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CLASSIFYING FEDERAL TAXES FOR CONSTITUTIONAL PURPOSES

Evgeny Magidenko *

In 2012, ruling on a challenge to President Obama's landmark healthcare legislation, the Supreme Court upheld the legislation's individual mandate penalty as a tax.¹ The Court's decision relied in part on the finding that the penalty was not a direct tax and so its lack of apportionment was not fatal.² This was the first Supreme Court case in decades to address direct taxes, but regrettably it provided only a cursory examination of the subject. It did, however, serve as a useful reminder that the constitutional analysis of taxes is not a foregone conclusion and confirmed that there is a tenable distinction between direct and indirect taxes.³

As the national government's expenditures continue to outpace revenues, calls for new forms of federal taxation to right the balance will become more persistent.⁴ This pressure leads to the understandable desire to test the outer limits of the federal government's taxation power, with creative minds finding new methods of levying and collecting taxes never contemplated by the Founding Fathers. To adequately assess the validity of any proposed tax and fit it into the constitutional system, it is useful to have a roadmap from which to proceed. This Article seeks to develop such a model. As the examination that follows demonstrates, this is far from straightforward; however, having categorized the tax in question, it is often relatively simple to determine just what one can and cannot do with it. This Article focuses on taxes that may be

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1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–600 (2012).

2. *Id.* at 2599–600.

3. *Id.* at 2594–600.

4. See discussion *infra* Part IV.

imposed by the federal government, so constitutional limits on the powers of state taxation will not be addressed.⁵

The Article's first part examines the text of the Constitution's tax clauses and the history behind them.⁶ The second part surveys the Supreme Court cases interpreting these provisions.⁷ The third part outlines a five-category model for classifying taxes for constitutional purposes.⁸ The fourth and final part examines how this model applies to selected taxes proposed in recent years.⁹

I. THE CONSTITUTION'S TAX PROVISIONS

A. *The Text of the Direct (and "Indirect") Tax Provisions*

The best place to start any constitutional analysis is the text of the United States Constitution, in which several clauses address taxation, direct and otherwise.¹⁰ It is imperative to consider these provisions together, as their interplay informs any attempt to create a model to describe cogently the constitutional universe of taxation.

The basic constitutional provision authorizing the imposition of taxes states simply: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."¹¹ The term "taxes" covers all possible levies. It "is general, and was made use of to vest in Congress plenary authority in all cases of taxation."¹² In general, the taxing power has been understood broadly,¹³ though

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5. See, e.g., U.S. CONST. art. I, § 8, cl. 3 (the implied "Dormant Commerce Clause"); *id.* art. I, § 10, cls. 2–3.
 6. See discussion *infra* Part I. The review will be brief, as others have already conducted exhaustive historical analyses of these provisions. See, e.g., James R. Campbell, *Dispelling the Fog About Direct Taxation*, 1 BRIT. J. AM. LEGAL STUD. 109 (2012); Charles J. Bullock, *The Origin, Purpose, and Effect of the Direct-Tax Clause of the Federal Constitution. I.*, 15 POL. SCI. Q. 217 (1900).
 7. See discussion *infra* Part II.
 8. See discussion *infra* Part III.
 9. See discussion *infra* Part IV.
 10. See, e.g., U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cl. 4.
 11. U.S. CONST. art. I, § 8, cl. 1.
 12. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796) (opinion of Paterson, J.).
 13. Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 22 (1992). But see Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1059 (2001) (challenging "the notion that the taxing power is plenary . . . the specific limitations on the taxing power in the Constitution weren't intended to be trivial."). The clause granting the taxing power reads fully: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]" U.S.

modified by the structural restriction that an exaction must not be so punitive as to violate due process.¹⁴ To properly execute its functions, a government requires flexibility in raising revenue, and this grant of a general taxation power provides just that. Almost any revenue-raising measure can be called a tax.

Duties, imposts, and excises are a subset of taxes, commonly referred to as indirect (by negative implication from the explicitly mentioned direct taxes, discussed in the next paragraph), and are subject to the Constitution’s Uniformity Clause: “all Duties, Imposts and Excises shall be uniform throughout the United States.”¹⁵ This has generally been understood to require geographical uniformity only.¹⁶ That is, the federal government must ensure that a tax does not apply differently among the states; however, the incidence of the tax may vary.¹⁷ For example, if the federal government levies an excise on all hamburgers sold in the United States, the rate cannot differ based on geography, but if hamburger consumption (or production) varies in different parts of the country—as it surely does—then the collections from those parts need not be uniform. The Uniformity Clause extends only to the fifty states, the District of Columbia, and incorporated territories of the United States.¹⁸

Direct taxes, another subset of taxes, are subject to apportionment: “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”¹⁹ This requirement also appears in another clause: “[D]irect Taxes shall be apportioned among the several States which may be

CONST. art. I, § 8, cl. 1. The modifier means that the revenue collected must be used for public purposes. *South Carolina v. United States*, 199 U.S. 437, 450 (1905).

14. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24–25 (1916).

15. U.S. CONST. art. I, § 8, cl. 1.

16. Erik M. Jensen, *The Apportionment of “Direct Taxes:” Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2340 (1997).

17. *Id.*

18. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that it did not violate uniformity for Congress to impose duties on only Puerto Rican products after the United States acquired the territory from Spain, as Puerto Rico was not incorporated into the United States). An incorporated territory is one which Congress intends to incorporate into the United States and make an integral part of the country. The only incorporated territory held by the United States today is Palmyra Atoll, an archipelago in the Pacific Ocean with no permanent population. American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the United States Virgin Islands, and the various other small possessions (predominantly islands scattered throughout the Caribbean Sea and the Pacific Ocean) belonging to the United States are unincorporated and outside the Uniformity Clause’s reach.

19. U.S. CONST. art. I, § 9, cl. 4.

included within this Union, according to their respective Numbers. . . .²⁰ The considerable debate on the nature and extent of direct taxation notwithstanding,²¹ there is agreement on what apportionment actually entails.²² If a tax is to be apportioned, each state must pay proportionately to its number of residents as of the last census; thus, if California has twelve percent of the United States' population, then it is responsible for paying twelve percent of the total tax imposed across all the states.

The Sixteenth Amendment, ratified in 1913, removed the apportionment requirement for income taxes: “[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”²³ The curious corollary issue here is that if certain income taxes are still considered direct, then they are exempt from both the apportionment and uniformity requirements; the Supreme Court's approach to this question has been ambiguous.²⁴ In any case, the view of what constitutes income has expanded over the past century, such that

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20. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV. There is a question about the extent to which the Fourteenth Amendment has modified the apportionment requirement. *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 53 (1999) (“The question is . . . whether the repeal of slavery should lead courts to construe [the ‘direct tax’ clauses] meaning narrowly.”); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 26 (1998) (“When slavery ended, the historical rationale for the federal formula ended as well, but the formula remained as an allocation by population, counting every individual as one, but devoid of any remaining constitutional purpose.”). However, the apportionment requirement appears in two different constitutional clauses, and the Fourteenth Amendment modified only one of them. The best reading is that the apportionment requirement remains unchanged, although reasonable minds may disagree.
 21. Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999), *responding to* Ackerman, *supra* note 20, *responding to* Jensen, *supra* note 16. “The phrase ‘direct taxes’ is confessedly blind,” and “Alexander Hamilton warned . . . that we should search in vain for a settled legal meaning.” Dwight W. Morrow, *The Income Tax Amendment*, 10 COLUM. L. REV. 379, 414 (1910).
 22. Mark E. Berg, *Determining Which Taxes Are Prohibited Direct Taxes After NFIB*, 138 TAX NOTES 205, 205–06 (Jan. 14, 2013).
 23. U.S. CONST. amend. XVI. For an excellent summation of the back-and-forth surrounding the Amendment's ratification, as well as the history of the direct tax provisions generally, see Morrow, *supra* note 21, at 385–98.
 24. *See, e.g.*, *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 14, 18–19 (1916) (discussing whether a tax on income should be subject to the requirements of apportionment and uniformity).

today the Supreme Court generally defers to the views of Congress and the Treasury Department in analyzing what is income.²⁵

The constitutional prohibition against taxes on exports also bears brief mention: “[n]o Tax or Duty shall be laid on Articles exported from any State.”²⁶ This provision bans not only taxes falling squarely on exports, but also some that indirectly burden those exports.²⁷

B. A Brief History of the Constitution’s Tax Provisions

In examining constitutional provisions, in addition to the text of the Constitution itself, history too may be helpful to consider.²⁸ The men who wrote our organic law were informed by the events and passions of their time. To better appreciate the context in which the Constitution’s tax provisions arose, it is necessary to detour briefly and survey their origin.²⁹

Having declared independence from Great Britain in 1776, the American colonies had to devise a system to jointly raise revenue. Keeping with the decentralized nature of the Articles of Confederation, their primary revenue mechanism became that of requisitions, where the central government would total its expenses for a given fiscal cycle and then request the funds from the states.³⁰ After much haggling over the method of apportionment, it was decided that each state would contribute to the central treasury proportionately to the value of the land and improvements located within that state.³¹ The states were left to their own devices about

25. Kornhauser, *supra* note 13, at 21.

26. U.S. CONST. art. I, § 9, cl. 5. For a good summary of the Export Clause, see ERIKA K. LUNDER, CONG. RESEARCH SERV., R42780, EXPORT CLAUSE: LIMITATION ON CONGRESS’S TAXING POWER (2012), <https://www.fas.org/spp/crs/misc/R42780.pdf>.

27. *See* United States v. Int’l Bus. Machs. Corp., 517 U.S. 843, 846 (1996) (“We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process.”).

28. Professor Edwin Seligman’s magisterial work on the history of the income tax is an excellent resource. *See* EDWIN R. A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD (2d ed. 1914).

29. The Sixteenth Amendment’s history will be omitted, for it arose simply as a rejection of a turn-of-the-century Court decision. *See* Ackerman, *supra* note 20, at 5 (“*Pollock* . . . was finally repudiated by the Sixteenth Amendment in 1913.”); Jensen, *supra* note 16, at 2343 (“The invalidation of the late-nineteenth-century income tax led, more or less directly, to the Sixteenth Amendment, ratified in 1913[.]”).

30. Bullock, *supra* note 6, at 218.

31. Lior Jacob Strahilevitz, *The Uneasy Case for Devolution of the Individual Income Tax*, 85 IOWA L. REV. 907, 912 (2000).

how to raise the money, leading to considerable divergence in tax collection regimes.³² The requisitions method was theoretically sound, but its enforcement was an entirely different matter. The Confederation government “lacked both the political will to collect unpaid moneys from delinquent states and the coercive power to force states to comply.”³³ States took full advantage of this weakness, and the collections rate overall amounted to a paltry thirty-seven percent of the entire amount requisitioned during the Confederation government’s existence.³⁴

In light of the chronic failure of the central Confederation government to raise revenue, calls for a wholesale amendment to the Articles arose, culminating in what became the Constitutional Convention of 1787.³⁵ At the Convention, delegates spent much time debating the scope of the central government’s power.³⁶ It was ultimately agreed that the general power of taxation should be defined broadly and include the ability to levy “taxes, duties, imposts, and excises”—all the common names of taxes then known.³⁷

The prohibition on export taxes was auspicious. The natural benefits to a manufacturing economy aside, the South was concerned that any taxes on exports would more seriously injure the Southern states’ economies than those of the North—that the value of slaves “might be decreased by export duties on the peculiar products of slave labor.”³⁸ Massachusetts and Connecticut agreed, more because their economies relied on shipping than on any particular concerns over slavery.³⁹ A related provision is the uniformity requirement for duties, imposts, and excises, motivated by the concerns of several states that the central government might favor the ports of certain states over others.⁴⁰

The origin of the direct tax clauses was more complex than that of the rest and linked to the intractable question of slavery.⁴¹ One of the

32. *Id.* at 912–13.

33. *Id.* at 913.

34. *Id.* at 913–14.

35. *See id.* at 915–16.

36. *See id.* at 916–17 (discussing debates among the delegates regarding the proposed methods through which the central government would collect taxes from the states).

37. Bullock, *supra* note 6, at 222–23.

38. *Id.* at 225–26.

39. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 319 (1st ed. 2009); Bullock, *supra* note 6, at 226.

40. Bullock, *supra* note 6, at 227.

41. *Id.* at 230. Some commentators, however, dispute that the direct tax clauses had their genesis in the slavery question. *E.g.*, Arthur C. Graves, *Inherent Improprieties in the*

major obstacles facing the convention was how to proportion representation of states in the federal government. States with sizeable slave populations wanted all slaves counted for purposes of representation, whereas free states urged the opposite, contending that no slaves should be counted in determining representation.⁴² The delegates deadlocked as proposal after proposal was defeated.⁴³ The watershed moment came when Gouverneur Morris proposed that taxation be in proportion to representation, thereby reducing both the South's incentive to count all slaves and the North's opposition to admitting some form of additional representation on the basis of slave populations.⁴⁴ Addressing the criticism that this would represent a return to requisitions, Morris suggested that apportionment be limited to direct taxes, which he understood to be those taxes other than on exports, imports, and consumption.⁴⁵ The motion was passed unanimously and became the direct tax clause in Article I, section 2.⁴⁶

The history of the other direct tax clause, in Article I, section 9, referring explicitly to apportionment per the results of a census, is even more curious. The South was concerned that until the first census was conducted, the federal government might conduct an arbitrary population estimate and put an undue burden on slave states.⁴⁷ It was therefore proposed to limit capitation taxes until the census could be carried out.⁴⁸ This proposal was adopted, with a later amendment under which the restriction on capitation taxes was extended to all taxes, apparently to prevent readjustments of states' burdens under past requisitions of the Confederation government.⁴⁹

II. CASES INTERPRETING THE CONSTITUTION'S TAX PROVISIONS

The Supreme Court has provided a considerable body of jurisprudence interpreting the Constitution's tax clauses, with the

Income Tax Amendment to the Federal Constitution, 19 YALE L.J. 505, 510–11, 513–14 (1910).

42. See Bullock, *supra* note 6, at 232–34.

43. See *id.* at 232–33.

44. *Id.* at 233–34. It has been suggested that “[a]pportionment by population was treated in the debates as merely a measure of wealth when no other measure was feasible.” Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 303 (2004).

45. Bullock, *supra* note 6, at 234.

46. *Id.* at 234, 237.

47. *Id.* at 238–39.

48. *Id.* at 238.

49. *Id.* at 238–39.

bulk dating from the nineteenth and early twentieth centuries. As the judicial furor over the Sixteenth Amendment settled by the 1930s, tax clause challenges became less frequent. From the 1990s on, there has been a mild revival of interest in constitutional tax issues, though little attention is devoted to them outside of a small niche in academia.⁵⁰ This Article's conclusions rely on a close examination of the Supreme Court's case law—and its evolution through time—interpreting the Constitution's direct and indirect tax provisions and several corollary issues. The survey is split into four sections: the first addresses cases interpreting the direct tax provisions before the Sixteenth Amendment⁵¹; the second, as a continuation of the first, reviews those cases that follow the Amendment's ratification;⁵² the third and fourth look to cases examining the Uniformity and Export Clauses, respectively.⁵³

Hopefully, future scholars will benefit from this chronological overview of constitutional common law. The most important cases are discussed individually in the text, each beginning with a short summation of its holding. The curious reader can find many additional cases in the footnotes. The reader short on time may decide, at least initially, to skip the detailed survey of cases and go directly to the summary at the end of this Part II,⁵⁴ before continuing on to Part III, which proposes a constitutional model for classifying taxes,⁵⁵ and Part IV, which applies that model to several types of taxes that have been proposed—and might be considered in the future—to address the continuing national revenue gap.⁵⁶ The author hopes that such a reader will then return to this case survey in order to more fully understand the Supreme Court decisions that form the basis of the constitutional model proposed below.

A. Cases Interpreting the Direct Tax Clauses

The constitutional rule for direct taxes states that such levies must be apportioned based on population.⁵⁷ Notwithstanding the

50. See Erik M. Jensen, *Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?*, 136 TAX NOTES 1309, 1314 (Sept. 10, 2012) (“For the three of us in the world who care about the direct-tax apportionment rule . . .”).

51. See *infra* Part II.A.

52. See *infra* Part II.B.

53. See *infra* Parts II.C, II.D.

54. See *infra* Part II.E.

55. See *infra* Part III.

56. See *infra* Part IV.

57. 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.”).

conceptual simplicity of the apportionment requirement, the Court has long struggled to define what types of taxes are in fact subject to it.⁵⁸ The Founding Fathers did not have a monolithic definition of direct taxes in their minds when they were drafting the Constitution.⁵⁹ As history has shown, an ambiguous constitutional provision is often the fountainhead of endless court challenges, which has been the situation with direct taxes, as the following cases demonstrate.

Hylton v. United States – 1796

Holding: an annual tax on carriages is a duty.⁶⁰ Justice Chase concludes that direct taxes encompass capitations and taxes on land.⁶¹ Justice Paterson finds that direct taxes also include general personal property assessments.⁶²

The best place to start the survey is from the beginning. *Hylton* was the first case to interpret direct taxes and is notable for its time period and the men involved, such as Alexander Hamilton, who argued on behalf of the United States.⁶³ The case was decided in 1796, when George Washington was still president, and the Constitutional Convention a recent memory. Three of the four justices who heard the case had been delegates to the Philadelphia Constitutional Convention.⁶⁴ And although their decision is not beyond challenge,⁶⁵ it is an important Founding-era judicial interpretation on this question.

At issue in *Hylton* was whether an annual tax on carriages was direct, which would require that it be apportioned.⁶⁶ The Court delivered its opinion seriatim, as was the custom at the time, inherited from the British appellate courts. The justices held unanimously that the tax was indirect.⁶⁷

58. See Campbell, *supra* note 6, at 111.

59. See Ackerman, *supra* note 20, at 4 (“[T]he Founders didn’t have a very clear sense of what they were doing in carving out a distinct category of ‘direct’ taxes for special treatment.”).

60. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.).

61. *Id.*

62. *Id.* at 176–77 (opinion of Paterson, J.).

63. J.H. Riddle, *The Supreme Court’s Theory of a Direct Tax*, 15 MICH. L. REV. 566, 567 (1917).

64. Those were Justices Wilson, Paterson, and Chase. Ackerman, *supra* note 20, at 21.

65. See *id.* at 22 (“Chase and Iredell were strong nationalists, and so their opinions upholding a uniform national tax might not be too surprising.”).

66. *Hylton*, 3 U.S. (3 Dall.) at 172–73 (opinion of Chase, J.).

67. *Id.* at 172–84.

Justice Chase, first to deliver his opinion, identified several types of taxes for constitutional purposes: direct taxes subject to apportionment; duties, imposts, and excises subject to uniformity; and taxes that are neither direct, nor duties, imposts, or excises, and thus subject to neither restriction.⁶⁸ He posited that there might also be a tax simultaneously direct and indirect, although he could offer no examples of such a tax.⁶⁹ He considered rhetorically: “[W]ould Congress be prohibited from laying such a tax, because it is partly a direct tax?”⁷⁰ Answering in the negative, he observed that such a tax would be deemed entirely indirect: “The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census.”⁷¹ It would be inequitable for states of like population but different numbers of carriages to be apportioned an equal tax burden, such that the per-carriage incidence of the tax would vary among the states.

Chase concluded that an annual tax on carriages is properly classified as a duty, which he understood to include such items as stamp taxes, passage tolls, and numerous others.⁷² An annual carriage tax is a tax on a “consumable commodity,” a tax that is indirect and on the owner’s expense.⁷³ Chase then reasoned in dicta “that 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 circumstances; and a tax on LAND.”⁷⁴ He doubted whether “a general assessment of personal property, within the United States, is included within the term direct tax.”⁷⁵ With direct taxes including only capitations and taxes on realty, the carriage tax could be nothing but indirect.

Justice Paterson, next to deliver his opinion, observed that, although the case hinges on definitions, there is no clear

68. *Id.* at 172–74 (opinion of Chase, J.).

69. *Id.* at 174.

70. *Id.*

71. *Id.*

72. *Id.* at 175.

73. *Id.* What Justice Chase means here by a “consumeable commodity” is unclear. John Locke understood “consumable commodities” to be those capable of being consumed—what are today known as consumables. Carriages, however, are durable goods. Chase perhaps intended that carriages were goods that depreciated with time, such that they were eventually “consumed,” and indeed the passage from Adam Smith quoted by Justice Paterson later suggests that consumable commodities include both durable (i.e., capital) and consumable goods. *Id.* at 180–81 (opinion of Paterson, J.).

74. *Id.* at 175 (opinion of Chase, J.).

75. *Id.*

understanding of the meanings of “duty” and “excise.”⁷⁶ The Founding Fathers intended that Congress “should possess full power over every species of taxable property, except exports.”⁷⁷ The term “taxes” in the Constitution is generic, describing all levies that could conceivably be enacted, vesting in Congress a plenary taxation authority.⁷⁸ Taxes can be divided into direct (explicitly mentioned in the Constitution) and indirect (inferred from the Constitution by negative implication) varieties. Duties, imposts, and excises are indirect and subject to uniformity.⁷⁹ Paterson speculated that there might exist an indirect tax that is neither a duty nor an impost or excise.⁸⁰ He suggested that such a tax should still be uniform but did not elaborate further.⁸¹ As to direct taxes, the Constitution describes capitations as direct, and Paterson observed that taxes on land are also deemed to be direct, both theoretically and practically.⁸² It was unclear whether taxes on the product of land were to be deemed direct or indirect, but the question was not at issue in *Hylton*, so Paterson noted it but did not examine it further.⁸³ He did observe, disagreeing on this point with Chase, that if Congress were to enact an aggregate tax on “things that generally pervade all the states in the Union,” then that tax might be considered direct.⁸⁴

Paterson next stated that the rule of apportionment should not be extended by construction, as it was the product of compromise and otherwise “radically wrong,” not to “be supported by any solid reasoning,” because it treated slaves as a type of property represented more than other property.⁸⁵ Moreover, a system relying heavily on apportionment would effectively constitute a return to the old requisitions scheme of the Articles of Confederation.⁸⁶ Apportionment would also result in similarly situated individuals in different states potentially paying different sums, leading to

76. *Id.* at 176 (opinion of Paterson, J.) (“What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms.”).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 176–77.

84. *Id.* at 177.

85. *Id.* at 177–178.

86. *See id.* at 178; *supra* text accompanying notes 30–34.

uncertainty and undue administrative burdens for the states. The Uniformity Clause was a simpler and more equitable rule.⁸⁷ Paterson observed that apportionment is an operation on the states, involving arbitrary valuations and assessments, whereas uniformity is “an instant operation on individuals,” involving no intervening assessments.⁸⁸ He concluded by observing that taxes on expenses and consumption are indirect, as they are “circuitous modes of reaching the revenue of individuals, who generally live according to their income.”⁸⁹ Since a tax on carriages is a tax on expenses or consumption, it is indirect and not subject to apportionment.

Justice Iredell authored the third and final substantive opinion in *Hylton*, disagreeing with the reasoning of both Chase and Paterson. Iredell affirmed that Congress has the plenary power to tax all taxable objects, excepting exports, subject to apportionment for direct taxes and uniformity for duties, imposts, and excises.⁹⁰ He also noted that if an indirect tax is not a duty, impost, or excise, then it should still be subject to uniformity.⁹¹

On the main question, Iredell argued that, “[a]s all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.”⁹² If a tax cannot be apportioned, then it is not a direct tax for constitutional purposes. Apportioning something like the carriage tax would lead to absurd results, with identical articles taxed at different rates in different states.⁹³ If the incidence of a carriage tax were passed on to carriage owners, then between two states of comparable population, the one with the larger number of carriages would have a lower tax per capita.⁹⁴ Alternative proposals for apportioning such a tax were also unworkable.⁹⁵ In any case, a direct tax was one on “something inseparably annexed to the soil,” such as a land or poll tax.⁹⁶

87. *Hylton*, 3 U.S. (3 Dall.) at 180. See also *supra* text accompanying notes 15–18 (explaining the Constitution’s Uniformity Clause).

88. *Hylton*, 3 U.S. (3 Dall.) at 180 (opinion of Paterson, J.).

89. *Id.*

90. *Id.* at 181 (opinion of Iredell, J.).

91. *Id.* Justice Iredell’s reasoning on this point is not clear; he likely thought it contrary to the spirit of the Constitution to levy non-geographically uniform taxes on individuals. *Id.* at 181–83.

92. *Id.* at 181.

93. *Id.* at 181–82.

94. *Id.* at 182.

95. *Id.* at 182–83.

96. *Id.* at 183. See also Steven J. Willis & Nakku Chung, *Oy Yes, the Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725, 727–28 (Nov. 8, 2010) (examining critically whether Justice Iredell said what he meant in *Hylton*).

Loughborough v. Blake – 1820

Holding: Congress may impose a direct tax on the District of Columbia or a territory, although it is not obligated to do so when it imposes such a tax on the states.⁹⁷ If a direct tax is imposed on the District or territories, however, it must follow the rule of apportionment.⁹⁸

Although often ignored in discussions about direct taxation, *Loughborough* is nonetheless worthy of brief mention. At issue was whether Congress could impose a direct tax on the District of Columbia and by extension other American territories not incorporated as states.⁹⁹

Chief Justice Marshall, writing for a unanimous Court, observed that Congress has a general power to levy taxes without geographical restriction.¹⁰⁰ The Uniformity Clause requires uniformity “throughout the United States[,]” meaning that indirect taxes must be imposed in a like manner everywhere within the United States, including the District and territories.¹⁰¹ Since the power to lay direct taxes is coterminous with indirect taxes (though the mode of exercise is different), Congress has the power to impose direct taxes anywhere in the United States, including the District and other territories.¹⁰²

The exercise of the power of direct taxation is problematic as applied to the District and Territories, however, since the apportionment of direct taxes is governed by the results of a census, which is required to count only the population of the states and not the federal District.¹⁰³ But when the census was conducted, the population of the District and the Territories could just as easily be counted in the same manner.¹⁰⁴ And, although Congress cannot exempt any state from its apportioned direct tax burden, the terms of the Constitution addressing direct taxation confine this limitation to the states.¹⁰⁵ Therefore, if Congress lays a direct tax, that tax must apply to all states, but Congress may choose whether to apply it to the

97. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 325 (1820).

98. *Id.* at 322.

99. *Id.* at 318–19.

100. *Id.*

101. *Id.* at 318–19 (quoting U.S. CONST. art. I, § 8, cl. 1).

102. *Id.* at 325.

103. *Id.* at 319–22.

104. *Id.* at 321–22.

105. *Id.* at 323.

District and territories.¹⁰⁶ If Congress does elect to impose a direct tax in the District or Territories, it must be apportioned, for just as the uniformity requirement “secures the district from oppression in the imposition of indirect taxes,” the principle of apportionment secures “the district from any oppressive exercise of the power to lay and collect direct taxes.”¹⁰⁷

Pacific Insurance Company v. Soule – 1868

Holding: a tax on the gross income of insurance companies is a duty or excise.¹⁰⁸ Duties are things due and recoverable by law.¹⁰⁹ Imposts are duties on imports.¹¹⁰ And excises are domestic taxes on the consumption of commodities or retail sales.¹¹¹

Following *Loughborough*, the Supreme Court remained silent on direct taxation questions for nearly 50 years until *Pacific Insurance Company*, a challenge to a wide-ranging internal revenue act enacted during the Civil War, which levied, among other exactions, a tax on the gross receipts of certain insurance companies.¹¹²

Justice Swayne, writing for the Court, looked to *Hylton* for the proposition “that the [only] direct taxes contemplated by the

106. *Id.*

107. *Id.* at 325.

108. *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 434, 445 (1868).

109. *Id.* at 445 (citing 2 T.E. TOMLINS, *THE LAW DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW; DEFINING AND INTERPRETING THE TERMS OR WORDS OF ART; AND COMPRISING COPIOUS INFORMATION ON THE SUBJECTS OF LAW, TRADE, AND GOVERNMENT* 330 (Philadelphia & New York, P. Byrne & I. Riley 1811)).

110. *Id.*

111. *Id.* (citing 1 JOSEPH BATEMAN, *THE LAWS OF EXCISE; BEING A COLLECTION OF ALL THE EXISTING STATUTES RELATING TO THE REVENUE OF EXCISE; WITH PRACTICAL NOTES AND FORMS, AND AN APPENDIX OF SELECT CASES* 9 (London, A. Maxwell & Son 1843); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION* § 953 (The Lawbook Exch., Ltd., 2d ed. 2009); 1 SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 318 (Geo. T. Biesel Co. 1922); 1 ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAW, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* app. at 242 (Philadelphia, William Young Birch & Abraham Small 1803)).

112. *Id.* at 434.

Constitution” were capitations and taxes on land.¹¹³ However, dissatisfied with a cursory conclusion, he dissected the species of indirect taxes listed in the Uniformity Clause. Citing *Tomlin’s Law Dictionary*, he defined *duties* as “things due and recoverable by law[,]” a definition broad enough to cover most taxes.¹¹⁴ A narrower meaning was sometimes imparted to duties, defining them as customs, and therefore synonymous with imposts.¹¹⁵ Justice Swayne defined imposts as duties on imported goods and merchandise, looking to James Madison, who had considered duties and imposts synonymous for constitutional purposes.¹¹⁶ A possible alternative view was that imposts cover every type of tax not deemed a “tax” or “excise.”¹¹⁷ Finally, according to Justice Swayne and the majority, an excise is “an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.”¹¹⁸

With the exception of the apportionment and uniformity restrictions, as well as the ban on export taxes, “the exercise of the [taxing] power is, in all respects, unfettered.”¹¹⁹ If a tax on carriages held for private use was not direct, then a tax on the business of insurance companies could not be direct either.¹²⁰ Apportioning the insurance company tax would be inequitable, as the burden would fall lightly in those states with many and wealthy corporations, not at all in those with no insurance companies, and most heavily in those with few and poor corporations.¹²¹ Justice Swayne argued that “[i]t cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results.”¹²² The insurance company revenue tax therefore could be nothing but a duty or excise—indirect and not subject to apportionment.

113. *Id.* at 444–45 (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.)).

114. *Id.* at 445 (citing TOMLINS, *supra* note 109, at 330).

115. *Id.* (citing TOMLINS, *supra* note 109, at 330; STORY, *supra* note 111, at § 952; *Hylton*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Veazie Bank v. Fenno – 1869

Holding: a tax on state bank note circulation is a duty.¹²³
Affirming Justice Paterson’s view in *Hylton* that direct taxes are capitations, taxes on land, and general personal property assessments.¹²⁴

A year after deciding *Pacific Insurance Company*, the Supreme Court again took up the issue of direct taxation in *Veazie Bank v. Fenno*. At issue was the constitutionality of a federal tax on the circulation of notes and bills issued by entities other than national banking associations, imposed to discourage state-issued notes.¹²⁵

Chief Justice Chase (not the same Chase as in *Hylton*), writing for the Court, noted the difficulty of accurately defining the terms used in the Constitution to describe the congressional taxing power.¹²⁶ The general intent of the Constitutional Convention was to create a strong federal taxing power, encompassing the taxation of everything but exports, with “certain virtual limitations, arising from the principles of the Constitution itself[,]” primarily that the federal government cannot tax “to impair the separate existence and independent self-government of the States,” nor can it tax to achieve “ends inconsistent with the limited grants of power in the Constitution.”¹²⁷ To this end, the uniformity and apportionment requirements were not restrictions but directions on the mode of exercising the taxing power.¹²⁸

Chase dismissed political economists’ definitions of direct taxes as irrelevant to the constitutional understanding of the term and turned instead to the historical evidence of how Congress understood direct taxes when it legislated apportioned taxes.¹²⁹ Through 1869, there were five instances of Congress levying apportioned taxes, with each instance a one-time gross levy apportioned among the states based on population.¹³⁰ In these instances, Congress consistently limited direct

123. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 549 (1869).

124. *Id.* at 544–46.

125. *Id.* at 539–40.

126. *Id.* at 540.

127. *Id.* at 540–41.

128. *Id.* at 541.

129. *Id.* at 541–42.

130. Bullock, *supra* note 6, at 470–74 (1900). The 1815 and 1861 levies had been made annual but were later repealed and suspended, respectively, such that they were in effect for only one year. Either way, the levies appear to have been ineffective at raising revenue. *Id.*

taxes to those on land, appurtenances, and capitation.¹³¹ Contrariwise, “personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax.”¹³² Chief Justice Chase concluded that this practical construction by Congress was entitled to considerable deference, especially in the absence of any contrary evidence in the discussions of the Constitutional Convention and state ratifying conventions.¹³³

Chief Justice Chase thus affirmed *Hylton*, holding that direct taxes are: (1) capitation taxes, (2) taxes on land, and (3) possibly taxes on all personal property by general valuation.¹³⁴ All other taxes are indirect—duties, imposts, and excises—and subject to the rule of geographical uniformity.¹³⁵ The tax on bank note circulation most closely fits the category of duty, similarly to the tax on insurance company income analyzed by the Court the prior year in *Pacific Insurance Company*.¹³⁶

Scholey v. Rew – 1874

Holding: an inheritance tax is an excise or duty.¹³⁷ Occupational and license fees may be a form of indirect tax, separate from duties, imposts, and excises.¹³⁸

Several years after *Veazie Bank*, the Supreme Court again confronted the direct tax question in *Scholey*, where at issue was a tax applicable when a person became beneficially entitled to real estate or income from real estate upon the death of a decedent.¹³⁹

131. *Veazie Bank*, 75 U.S. (8 Wall.) at 542–43. In 1798 (\$2 million), 1813 (\$3 million), 1815 (\$6 million), and 1816 (\$3 million), the tax was levied upon lands, improvements, dwelling-houses, and slaves. *Id.* In 1861, a \$20 million tax was levied upon lands, improvements, and dwelling-houses only. *Id.* The 1798 tax treated the slave component as a capitation, while the remainder of the Antebellum taxes treated slaves as a part of realty. *Id.* at 543.

132. *Id.* at 543.

133. *Id.* at 544.

134. *Id.* at 546. The Court here evidently favored Justice Paterson’s view of a broadly based personal property tax as a direct tax, over that of Chase. *See supra* text accompanying notes 75, 84.

135. *Veazie Bank*, 75 U.S. (8 Wall.) at 546.

136. *Id.* at 546–47.

137. *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 346–47 (1874).

138. *Id.* at 348.

139. *Id.* at 346.

Justice Clifford, writing for the Court, determined that the tax was an excise or duty and thus indirect.¹⁴⁰ Although he affirmed the *Hylton* Court's land tax-or-capitation definition of a direct tax, he reasoned that the exaction was not a tax on land but a tax on the transfer of land.¹⁴¹ The tax only applied when the successor's interest in real estate vested upon the death of a predecessor.¹⁴² "[I]n other words," he opined, "it is the right to become the successor of real estate upon the death of the predecessor" that triggers the tax.¹⁴³

Justice Clifford observed that it was not necessary to determine whether a direct tax included exactions other than taxes on land or capitations.¹⁴⁴ However, "it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax. . . ."¹⁴⁵ In other words, an inheritance tax is in principle similar to an income tax, which had been found indirect in *Pacific Insurance Company*. Justice Clifford also noted that the government could draw revenue from:

[Exactions in] the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock or to the business done or profits earned by the individual or corporation.¹⁴⁶

140. *Id.*

141. *Id.* at 346-47.

142. *Id.*

143. *Id.* at 347.

144. *Id.*

145. *Id.* at 347-48.

146. *Id.* at 348. *Contra* *United States v. Vassar (License Tax Cases)* 72 U.S. (5 Wall.) 462, 471 (1886) (stating that a license grant "must be regarded as nothing more than a mere form of imposing a tax"). Under Justice Clifford's definition, none of the exactions listed would qualify as a direct tax, so he must be suggesting that license fees, capital stock levies, and income taxes are indirect. This of course raises the question of whether these exactions are to be understood as separate from duties, imposts, and excises, in which case they would be exempt from the uniformity requirement. *Pacific Insurance Co.* determined that corporate income taxes are duties or excises, and Justice Clifford here invoked the same reasoning. *See Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 445 (1868). Almost certainly he understood capital stock levies and income taxes to fall under the umbrella of duties, imposts, and excises. On the other hand, he seemed to indicate fairly explicitly (exactions "may also assume the form of license fees . . .") that occupational and franchise license fees would be a category in addition to duties, imposts, and excises. He does not offer any further

Springer v. United States – 1881

Holding: an income tax is an excise or duty.¹⁴⁷

Justice Swayne, delivering the Court’s unanimous opinion, examined in *Springer* whether a Civil War-era tax on income, gains, and profits was direct.¹⁴⁸ He began his analysis with the history of the direct tax provisions, relating the almost serendipitous way in which Gouverneur Morris’s suggestion for a direct tax limitation was incorporated as part of a compromise on representation in the Constitutional Convention.¹⁴⁹ Swayne also looked to Alexander Hamilton’s thoughts in Federalist Papers No. 21 and 36, in which Hamilton had written that direct taxes are principally those on real property and capitations.¹⁵⁰ Hamilton argued similarly in his briefs for *Hylton*, although he also added to direct taxes the category of general assessments (taxes levied on the whole property of individuals or upon their entire real or personal estate).¹⁵¹ Levied only on a part of a taxpayer’s personal estate, the income tax at issue could not be a general assessment and did not fall into any of the other direct tax categories.¹⁵²

Examining the taxes that Congress treated as direct, Justice Swayne found, as the Court did in *Veazie Bank*, that the only direct taxes imposed by Congress and identified as such had been on real estate and slaves.¹⁵³ He affirmed that such a “uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.”¹⁵⁴ Looking to Supreme Court jurisprudence on the issue of direct taxation, he found like interpretations, with contemporary treatises on constitutional law and taxation offering no dissent.¹⁵⁵

explanation, and this ambiguity is likely a case of careless drafting. *Scholey*, 90 U.S. at 348.

147. *Springer v. United States*, 102 U.S. 586, 602 (1880).

148. *Id.* at 592.

149. *Id.* at 596.

150. *Id.* at 596–97.

151. *Id.* at 597–98.

152. *Id.* at 598.

153. *Id.* at 598–99; see *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542–43 (1869).

154. *Springer*, 102 U.S. at 599.

155. *Id.* at 602. Justice Story, cited by Justice Swayne here, had posited that direct taxes include taxes on land or real property, and that indirect taxes include taxes on consumption. *Id.* (citing STORY, *supra* note 111, at § 950).

Accordingly, “*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.”¹⁵⁶

Pollock I – 1895

Holding: a tax on rents or other income from real estate is direct.¹⁵⁷

Following *Springer*, slightly more than a decade had passed before the Supreme Court again heard a case on direct taxation. That case, *Pollock*, represented such a watershed moment that it is typical to divide direct tax jurisprudence into pre- and post-*Pollock* eras.¹⁵⁸ In *Pollock*, a broadly based income tax was challenged on the grounds that, by taxing the income or rents of real estate, the law taxed the real estate itself.¹⁵⁹ Likewise, by taxing the interest or other income from bonds and other income-producing personal property, the law taxed directly the personal estate itself.¹⁶⁰

Chief Justice Fuller, delivering the Court’s opinion, observed that the Founding Fathers, in writing the Constitution, “had just emerged from the struggle for independence whose rallying cry had been that ‘taxation and representation go together.’”¹⁶¹ After an examination of the federal system of government and the constitutional system of taxation, Fuller noted in passing that if there were an indirect tax that was not a duty, impost, or excise, then it had remained undiscovered “for more than one hundred years of national existence,” expressing skepticism but not outright dismissal of the idea.¹⁶²

156. *Id.*

157. *Pollock v. Farmers’ Loan & Tr. Co. (Pollock I)*, 157 U.S. 429, 580–81, *vacated*, 158 U.S. 601 (1895). *See also* *Hyde v. Cont’l Tr. Co.*, 157 U.S. 654 (1895) (incorporating by reference the opinion, concurrence, and dissents from *Pollock I*). There are in fact two *Pollock* opinions, issued within months of each other. The first decision found the justices of the Supreme Court deadlocked at 4–4 on several key issues, which led the Court to rehear the case a month later. Although the two *Pollock* cases are often taken together, for the sake of chronology, they are treated separately here.

158. *E.g.*, Jensen, *supra* note 16, at 2350. The *Pollock I* case had overtones of what today would be called ‘class conflict,’ animated as the debate was in the late nineteenth and twentieth centuries by the rise of socialism and communism. *See* Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894-1913*, 66 *TAX LAW.* 295, 301–06 (2013).

159. *Pollock I*, 157 U.S. at 431–32.

160. *See id.* at 432–33.

161. *Id.* at 555–56.

162. *Id.* at 557.

On the direct tax question, Fuller stated that indirect taxes economically are those which can be shifted to another person or avoided, while direct taxes are taxes on one's real or personal estate or the income therefrom that cannot be avoided.¹⁶³ However, acknowledging that the constitutional definition may be different, he examined the Founding Fathers' understanding of direct taxes.¹⁶⁴ Fuller ultimately concurred with Albert Gallatin's assessment from 1796 that "[t]he most generally received opinion . . . is, that by direct taxes in the constitution, those are meant which are raised on the capital or revenue of the peop[le]; by indirect, such as are raised on their expense."¹⁶⁵ The justices in *Hylton* had expressed doubt about whether a direct tax included anything beyond a capitation or a land tax, but avoided expressly deciding the question.¹⁶⁶ Moreover, British law had always classified income taxes as direct, and the expectation was that direct taxation would be levied only in exigent circumstances, which had held true until the 1894 income tax.¹⁶⁷ All the direct taxation cases following *Hylton* had conceded that taxes on land are direct, and none had determined that rents or income derived from land are not taxes on land.¹⁶⁸ Citing the common law principle that land is nothing but the profits that may be derived therefrom, Fuller held that "[a]n annual tax upon the annual value or annual user of real estate[.]" which is without question a direct tax, "appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."¹⁶⁹ As substance controls and not form, the income tax law, insofar as it levied "a tax on the rents or income of real estate," violated the Constitution.¹⁷⁰ The Court was evenly split on the severability of constitutional provisions from those held unconstitutional,¹⁷¹ a deadlock that paved the way to a rehearing and second opinion in *Pollock II* a month later.

163. *Id.* at 558.

164. *See generally id.* at 558–70.

165. *Id.* at 569.

166. *See id.* at 571–72.

167. *Id.* at 572–74.

168. *Id.* at 579.

169. *Id.* at 581.

170. *Id.* at 583.

171. *Id.* at 586.

Pollock II – 1895

Holding: a tax on real or personal property, or a tax on the income from such, is direct.¹⁷² Duties are taxes on the import, export, or consumption of goods. Imposts are indirect taxes generally. Excises are taxes on goods or licenses.¹⁷³

After a rehearing and change of opinion by one of the justices, the Court issued a second opinion in *Pollock*, also written by Chief Justice Fuller, which again was met with vigorous dissents from four justices. The goal of the rehearing was to address the arguments on which the Court initially had been evenly split.¹⁷⁴ Pointing out that the Court's previous "conclusions remained unchanged," Fuller noted that, just like a person's income derived from rents or products of real property is direct, so too is income derived from personal property, including bonds, stocks, and other such forms, finding support in the natural meaning of the words used to delineate the constitutional taxation powers and the historical circumstances surrounding the Constitutional Convention.¹⁷⁵ Fuller asserted that the limitation on direct taxes was designed to constrain the taxation power, delegated as it was by the states to the federal government.¹⁷⁶ It could not be that direct taxation was "restricted in one breath, and the restriction blown to the winds in another."¹⁷⁷

Fuller relied on the commentary of several legal experts to derive definitions of the various types of indirect taxes. Looking to Michigan jurist Thomas Cooley's *Constitutional Treatise*, he observed that a "duty" is a tax imposed on the import, export, "or consumption of goods;" a "custom" is a duty on imports or exports only; an "impost" can be any tax, tribute, or duty, although it is generally applied to indirect taxes only;¹⁷⁸ and an "excise" is an inland impost on goods and "licenses to pursue certain trades or to

172. *Pollock v. Farmers' Loan & Tr. Co. (Pollock II)*, 158 U.S. 601, 637 (1895).

173. *Id.*

174. *Id.* at 617.

175. *Id.* at 617–19.

176. *Id.* at 621 (citing *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 428 (1819)).

177. *Id.* at 622.

178. *Id.* This definition of impost differs from that advanced in an earlier case, where the issue arose in the context of the constitutional prohibition on state taxation of imports and exports. There, "impost, or duty on imports," was defined as "a custom or a tax levied on articles brought into a country," which could be levied either before or after "the importer is allowed to exercise his rights of ownership over [the goods imported.]" *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827).

deal” in commodities.¹⁷⁹ Fuller also looked approvingly to Justice Story’s view that “duties” in the Constitution are used equivalently to “customs” and “imposts.”¹⁸⁰

Fuller stated that *Hylton* was “badly reported,” omitting certain key reasoning, such as that the case turned not on the issue of direct taxation specifically but whether the carriage tax was an excise.¹⁸¹ It had not been stated explicitly in *Hylton*, but Hamilton had argued in that case that a general assessment, be it upon an individual’s entire property or real or personal estate, is also a direct tax.¹⁸² Thus, “a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property,” must be direct.¹⁸³

Just as the income from real property cannot be regarded in isolation, neither can the income from personal property.¹⁸⁴ It was not dispositive on the issue that Congress had not included personal property in its prior apportioned taxes.¹⁸⁵ Income, once generated, may be severed from the property from whence it came, but it cannot be taxed where the source cannot be.¹⁸⁶ If there is no power to tax real and personal property without apportionment, the same restriction ought to apply to the income generated therefrom.¹⁸⁷ In England, the income tax had always been regarded as direct.¹⁸⁸ Even assuming that an income tax was not contemplated by the Founding Fathers, which is unlikely,¹⁸⁹ it cannot be taken out of the constitutional rule. Although an income tax levy may give rise to inconveniences, it can be apportioned, even if that apportionment may operate unequally.¹⁹⁰ In a challenge that would ultimately be met within twenty years, Fuller noted that the Constitution allows for

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

180. *Id.* (citing STORY, *supra* note 111, at § 952).

181. *Id.* at 626–27.

182. *Pollock I*, 157 U.S. 429, 572 (quoting 7 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 332 (Henry Cabot Lodge ed., 1886)), *vacated*, 158 U.S. 601 (1895).

183. *Pollock II*, 158 U.S. at 627.

184. *Id.* at 628.

185. *Id.* at 629.

186. *Id.*

187. *Id.* at 630.

188. *Id.*

189. The first general income tax was introduced in England in 1799, more than a decade after American independence, although some partial forms of income taxes were known to exist much earlier. Indeed, at the time of the Constitution’s adoption, taxes were levied in many states on incomes from professions, business, and employment. *Id.* at 630–32.

190. *Id.* at 633.

amendment, and if the desire is strong to tax income from real and personal property without apportionment, that route is available.¹⁹¹

Holding that a tax on income arising from both real and personal property (as with a tax on the real and personal property itself) is direct, Fuller turned to severability.¹⁹² Gains and profits from business, privileges, and employment had always been deemed to be excises, and there was no reason to doubt that interpretation.¹⁹³ However, with the income tax stricken out of the law as it applied to income from real and personal property, the largest portion of the anticipated revenue was eliminated.¹⁹⁴ This left “the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor.”¹⁹⁵ Since the law imposed the income tax in a single scheme of taxation, and because of the severe burdens that would be imposed if parts of the income tax were left to stand, Fuller determined that the entire income tax must be stricken.¹⁹⁶

Nicol v. Ames – 1899

Holding: a stamp tax on sales at exchanges is a duty or excise, and it is uniform, because it applies equally to all users of exchange facilities without regard to geography.¹⁹⁷ A general sales tax, however, would be a direct tax on property.¹⁹⁸

Several years after *Pollock*, the Court again confronted the definition of a direct tax in *Nicol*, where it addressed the constitutionality of a stamp tax levied on sales of merchandise at exchanges and boards of trade.¹⁹⁹ Justice Peckham, writing for the Court, observed that in analyzing a tax’s validity, it is the tax’s practical effect that is most important, rather than “the purely

191. *Id.* at 635.

192. *Id.*

193. *Id.*

194. *Id.* at 637.

195. *Id.* For an article by a contemporary reflecting on the injustices of apportionment and criticizing the expanded *Pollock* definition of direct taxes, see Bullock, *supra* note 6, at 465–81.

196. *Pollock II*, 158 U.S. at 637.

197. *Nicol v. Ames*, 173 U.S. 509, 519–21 (1899).

198. *Id.* at 518.

199. *Id.* at 514.

economic or theoretical nature of the tax.”²⁰⁰ The primary argument against the stamp tax in question was that it was a tax on the sale of property measured by the value of the thing sold, making it a direct tax upon the property itself.²⁰¹ Peckham held that the tax was not “upon the business itself which is so transacted,” but rather “a duty upon the facilities made use of, and actually employed, in the transaction of the business, and separate and apart from the business itself.”²⁰² The purpose was to exact a levy for the privilege of doing business at exchanges and boards of trade.²⁰³ The fact that it was not capable of being shifted was irrelevant, since the tax was an indirect duty or excise.²⁰⁴ However, “[a] tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.”²⁰⁵ Peckham dismissed allegations that the tax was not uniform, concluding that it was valid under any possible definition of uniformity, since it was geographically uniform and otherwise equally applied to all who used the facilities offered at exchanges.²⁰⁶

Knowlton v. Moore – 1900

Holding: a succession tax is a duty or excise.²⁰⁷

A year after *Nicol*, the Supreme Court considered in *Knowlton* the validity of a succession tax on legacies and distributive shares of personal property.²⁰⁸ Justice White, writing the Court’s opinion, observed that death duties relate not to the property itself but to the act of transferring that property by will or descent.²⁰⁹ Death duties had always been considered different from taxes on property, and succession taxes were always treated as duties—i.e. indirect.²¹⁰

200. *Id.* at 513, 515–16.

201. *Id.* at 514, 518.

202. *Id.* at 519.

203. *Id.*

204. *Id.* at 520.

205. *Id.* at 521.

206. *Id.* at 522.

207. *Knowlton v. Moore*, 178 U.S. 41, 78–79, 83 (1900). As the Court explained, a probate duty is one charged upon the entire estate, a legacy duty is one “charged upon each legacy or distributive share of [personal property], and a succession duty [is one] charged against each interest in real property.” *Id.* at 51.

208. *Id.* at 43, 46.

209. *Id.* at 43, 47.

210. *Id.* at 78.

Pointing to *Scholey*, and refuting the argument that *Pollock* overruled it, White concluded that the succession tax was an indirect duty or excise.²¹¹ He also refuted the argument that, since the succession tax was not capable of being shifted, it must be direct.²¹² The “shiftability theory” advocated by some economists had never been adopted by the court as the basis of direct tax classification, which relies on specific constitutional meanings.²¹³

Patton v. Brady – 1902

Holding: a tobacco tax is an excise.²¹⁴ An excise can be defined as a tax (1) levied on articles intended for consumption, and (2) imposed between the beginning of manufacture and final consumption.²¹⁵

In *Patton*, the Supreme Court addressed whether a tax on manufactured tobacco held by dealers was an excise.²¹⁶ Justice Brewer, writing for the Court, found that it was. Referring to the definition of excise by commentators and dictionaries, and considering governmental practice in levying excises, he deduced a two-part definition of such a tax. An excise is a tax (1) levied “upon goods intended for consumption,” and (2) imposed at some point “intermediate the beginning of manufacture or production and the act of consumption.”²¹⁷ A tobacco tax was an indirect excise under any definition, for “it is not a tax upon property as such, but upon certain kinds of property, having reference to their origin and their intended use.”²¹⁸ Further, the power to impose excise taxes is not exhausted once exercised, so that goods and property are generally not immune from double taxation.²¹⁹

211. *Id.* at 81. The Court affirmed the *Pollock* holding as prohibiting a tax “imposed upon property solely by reason of its ownership[.]” *Id.* As to the succession tax, the Court understood it to apply to the *privilege* of transmitting property at death, and not to a claimed *right* of transmission, which would have suggested a tax on property because of ownership. Some commentators critique the post-*Pollock* cases for errantly reading the “solely by reason of its ownership” language into *Pollock*. *E.g.*, Riddle, *supra* note 63, at 571.

212. *Knowlton*, 178 U.S. at 81–82.

213. *Id.*

214. *Patton v. Brady*, 184 U.S. 608, 615, 623 (1902).

215. *Id.* at 617.

216. *Id.* at 615.

217. *Id.* at 617.

218. *Id.* at 619.

219. *Id.* at 621–22.

Thomas v. United States – 1904

Holding: a tax on the sale of stock certificates is indirect.²²⁰
 Duties, imposts, and excises elude precise definition and likely cover all indirect taxes.²²¹

Thomas is a typical case for the period where, in the light of *Pollock*'s expansive definition of direct taxation, courts frequently faced the argument that since the right of transfer is an inherent attribute of property, a tax upon such a transfer was substantially a levy on the property itself and so a direct tax requiring apportionment.²²² In *Thomas*, at issue was a stamp tax imposed on agreements of sale of stock certificates.²²³ Chief Justice Fuller, writing for the Court, noted that there are two broad classes of levies—"taxes" and "duties, imposts, and excises"—which "apparently embrace all forms of taxation contemplated by the Constitution."²²⁴ Although duties, imposts, and excises escape precise definition, these terms "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like"—in other words, indirect taxes.²²⁵ The stamp duty in question was contingent upon a sale of stock, a business transaction "in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates[,]" where "the element of absolute and unavoidable demand is lacking."²²⁶ The tax, as with stamp taxes generally, was therefore indirect.²²⁷

Spreckels Sugar Refining Company v. McClain – 1904

Holding: a gross annual receipts tax on companies is an excise.²²⁸

220. *Thomas v. United States*, 192 U.S. 363, 370–71 (1904).

221. *Id.*

222. *Id.*

223. *Id.* at 370.

224. *Id.* (internal quotations omitted).

225. *Id.*

226. *Id.* at 371.

227. *Id.* at 370–71.

228. *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397, 412–13 (1904).

Spreckels Sugar Refining Company saw a challenge to a tax on the gross annual receipts above \$250,000 of petroleum and sugar refining companies.²²⁹ Justice Harlan, writing for the Court, observed that “the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar.”²³⁰ Moreover, Congress called the tax a “special excise,” which served at least partially to elucidate its intent.²³¹ The Court’s past decisions were in accord with holding the tax an excise, and there was no need to reexamine the grounds upon which those judgments rested.²³²

Flint v. Stone Tracy Company – 1911

Holding: a tax on a corporation’s business, measured as a percentage of its income, is an excise.²³³ “[D]uties, imposts, and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.”²³⁴

Flint examined the validity of a “special excise tax” on the business of corporations, levied at a rate of one percent upon the entire net income over \$5,000 from all sources.²³⁵ Justice Day, writing for the Court, noted that, while the statutory classification of a tax is not entirely dispositive, it “is entitled to much weight.”²³⁶ Justice Day distinguished *Pollock* on the grounds that there, the tax “was imposed upon property simply because of its ownership[,]” whereas in the instant case, the tax was occasioned upon the “carrying on or doing of business in the designated [corporate] capacity[.]”²³⁷ The difference between “mere ownership of property” and the “actual doing of business in a certain way” was substantive.²³⁸ Duties, imposts, and excises were generally considered to embrace all forms of indirect taxes.²³⁹ Thomas Cooley’s constitutional treatise distinguished duties and imposts as levies on import and export, whereas excises could be understood as (1) manufacture, sale, and

229. *Id.* at 410–11 (quoting Act of June 13, 1898, ch. 448, § 27, 30 Stat. 448, 464).

230. *Id.* at 405, 411.

231. *Id.* at 411 (quoting Act of June 13, 1898, ch. 448, § 27, 30 Stat. 448, 464).

232. *Id.* at 411–12.

233. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 145–46, 151–52 (1911).

234. *Id.* at 151.

235. *Id.* at 142, 145–46.

236. *Id.* at 142, 145.

237. *Id.* at 150.

238. *Id.*

239. *Id.*

consumption taxes, (2) occupational license taxes, and (3) taxes upon corporate privileges.²⁴⁰ The corporate tax could be described best as “an excise upon the particular privilege of doing business in a corporate capacity,” where the “element of absolute and unavoidable demand is lacking.”²⁴¹ It could be measured validly by the income of a corporation, even if part of it originated from property that itself would be considered non-taxable or property not actively used in the business.²⁴²

B. Cases Interpreting Direct Taxes in Consideration of the Sixteenth Amendment

The Sixteenth Amendment indelibly altered the nature of inquiries into the definition of direct taxes.²⁴³ The Supreme Court cases following the Amendment’s ratification in 1913 merit treatment in a separate section, for they inevitably rely on the changes it wrought to the constitutional structure of taxation. It is difficult to separate the legal analyses of the meaning of direct taxation from those of the Sixteenth Amendment, since both are necessarily intertwined.²⁴⁴ Whereas before 1913 the Constitution recognized direct and indirect taxes as the two primary analytical categories, the Amendment introduced a third—income taxes—which, to the extent they were direct, were now exempt from apportionment. This innovation meant

240. *Id.* at 151.

241. *Id.* at 151–52.

242. *Id.* at 165. For another case addressing the same corporate tax, see *Stratton’s Indep., Ltd. v. Howbert*, 231 U.S. 399, 420 (1913), where the Court held that a mining corporation was engaged in a business, notwithstanding that it was arguably converting capital assets from one form to another, similarly to a manufacturing company. The corporate tax was held to be not an income tax but a levy on the corporation’s business activity, the same distinction made two years earlier in *Flint v. Stone Tracey Co.* *Id.* at 415. The line of reasoning in these cases has been criticized as fundamentally unworkable. See, e.g., Riddle, *supra* note 63, at 572–73 (arguing that the distinction between income taxes and excise taxes on business measured by income is tenuous). The Supreme Court was confronted with taxes that had always been considered indirect, but applying *Pollock* to them would lead to a contrary result. The Court’s desire to reconcile two irreconcilable views led to the incoherent result that an income tax is not an income tax if called an excise.

243. “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

244. See Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 357 (2004) (“The process of interpreting the Amendment is inevitably also the process of interpreting the Clauses. You can’t hope to understand the Amendment without understanding what it was a reaction to.”).

that no analysis of the direct-indirect tax distinction could be complete without also examining what is “income.”

Brushaber v. Union Pacific Railroad Company – 1916

Holding: income taxes are indirect and subject to uniformity.²⁴⁵ The Sixteenth Amendment overturned *Pollock*, which had held that that a direct tax on income was in effect a direct tax on the property generating that income, looking past the income to its source.²⁴⁶ The Amendment prohibited such a source inquiry, thereby exempting from apportionment income taxes, which on their own had always been indirect.²⁴⁷ The progressive nature of an income tax does not violate the Due Process Clause, although a confiscatory tax might do so.²⁴⁸

Brushaber was the first Supreme Court case to analyze direct taxes after the Sixteenth Amendment’s ratification, challenging various income tax provisions of a law passed shortly after the Amendment’s ratification. Now-Chief Justice White, who had dissented from the *Pollock* decision, delivered the Court’s opinion. Examining the history of income taxation in the United States, he determined that the income taxes levied, although occasionally including income from real and personal property, were not treated as “taxes directly on property because of its ownership.”²⁴⁹ Chief Justice White then interpreted *Pollock* in a novel way, finding that it had never held that income taxes were direct taxes on property.²⁵⁰ Instead, the case “recognized the fact that taxation on income was in its nature an excise . . . unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent.”²⁵¹ In other words, income taxes of any sort are, and have always been, excises (and thus indirect), but because of their similarity to direct taxes when levied on income from property, the *Pollock* Court had held

245. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18–19 (1916).

246. *Id.* at 9–11.

247. *Id.* at 10–11.

248. *Id.* at 24.

249. *Id.* at 14–15.

250. *Id.* at 15–16.

251. *Id.* at 16–17. In *Stanton v. Baltic Mining Co.*, the Court affirmed this holding, that an income tax ought to be tested by what it is rather than by its origin, finding that a tax on a mining company’s income was an excise levied on the results of its business. 240 U.S. 103, 114 (1916).

them to be subject to apportionment to protect the constitutional structure of taxation.²⁵²

Under this new interpretation, the Sixteenth Amendment did not convey any new power of taxation, since Congress had always had the power to tax incomes; rather, it served “to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.”²⁵³ The Amendment was intended to overturn the principle upon which *Pollock* was decided, of holding an income tax direct based on “the burden which resulted on the property from which the income was derived,” rather than “a consideration of the burden placed on the taxed income upon which it directly operated.”²⁵⁴ It thus prevented an analysis of the sources from which income was derived “in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties and imposts, and place it in the class of direct taxes.”²⁵⁵ This idiosyncratic interpretation likely arose from the concern that if income taxes were direct, then not only would they be exempt from the uniformity requirement, but they would also be exempt from apportionment under the express terms of the Sixteenth Amendment.²⁵⁶ Classifying income taxes as indirect (though arguably contradicting *Pollock*) did the least violence to the constitutional structure of taxation by ensuring that all existing taxes were subject to either apportionment or uniformity.²⁵⁷

Chief Justice White concluded the decision with several further points. First, the Uniformity Clause requires only geographical uniformity.²⁵⁸ Second, the Fifth Amendment’s Due Process Clause is not a limitation on the taxation powers per se,²⁵⁹ except to the theoretical extent that a tax in name might violate due process if it amounts to “confiscation of property” (i.e., a taking) or leads to such gross and obvious inequality as to amount to a taking.²⁶⁰ Third, the

252. *Brushaber*, 240 U.S. at 16–17.

253. *Id.* at 18.

254. *Id.*

255. *Id.* at 19. Although the *Brushaber* analysis can readily be criticized for misinterpreting the *Pollock* decision, it did finally resolve the intractable conflict between income taxes *eo nomine* and excise taxes measured as a percentage of income. See *supra* note 242.

256. *Id.* at 17.

257. *Id.* at 18–19.

258. *Id.* at 24.

259. See, e.g., *McCray v. United States*, 195 U.S. 27 (1904) (noting that the Fifth Amendment does not hinder Congress’s constitutional taxing power).

260. *Brushaber*, 240 U.S. at 24–25.

progressive features of the tax on their own do not amount to an “arbitrary abuse of power” violating due process.²⁶¹

Eisner v. Macomber – 1920

Holding: taxation of income under the Sixteenth Amendment requires realization of some gain.²⁶² A tax on stock dividends paid in the stock of the company issuing them is not a tax on income but on property and is subject to apportionment.²⁶³

The seminal case of *Macomber* considered whether, under the Sixteenth Amendment, Congress had the power to tax as income a stock dividend made to a shareholder against profits accumulated by a corporation after the Amendment’s ratification.²⁶⁴ Justice Pitney, writing for the Court, relied primarily on several then-recent cases dealing with the statutory interpretation of income. He first cited *Towne v. Eisner*²⁶⁵ for the proposition that a stock dividend neither reduces the corporation’s property nor increases that of the shareholder, reasoning that the statute in question could not be construed more narrowly than the Sixteenth Amendment.²⁶⁶ Citing two additional cases from the same term,²⁶⁷ Justice Pitney observed

261. *Id.* at 25. It has been remarked that the Court’s decision to not apply substantive due process doctrine to taxation statutes, even while it was being applied to numerous regulatory acts, was significant. See Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 12 (1987) (“[T]he courts sensed that the federal income tax—even in an earlier day—was so full of debatable distinctions that any attempt to police the Code in the name of substantive due process would lead them from one provision to another in a never-ending process of judicial review.”).

262. *Eisner v. Macomber*, 252 U.S. 189, 207–08 (1920).

263. *Id.* at 212–13.

264. Although this case was limited to its facts—a stock dividend paid in common stock to common stockholders—first the Treasury Department and then Congress in the Revenue Act of 1921 exempted all stock dividends from tax. See *Helvering v. Gowran*, 302 U.S. 238, 241–42 (1937) (dealing with statutory interpretation issues arising from the 1921 Act); *Koshland v. Helvering*, 298 U.S. 441, 446–47 (1936) (holding that a distribution of a stock dividend in common stock to preferred stockholders was taxable at distribution). The Court has been urged repeatedly to overrule *Macomber* but so far has declined to do so. See, e.g., *Helvering v. Griffiths*, 318 U.S. 371, 403–04 (1943) (holding that Congress did not intend to tax the dividend in question and therefore not reaching a *Macomber* analysis).

265. 245 U.S. 418 (1918).

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

267. *Id.* at 202 (citing *Lynch v. Hornby*, 247 U.S. 339 (1918) and *Peabody v. Eisner*, 247 U.S. 347 (1918), both also dealing with questions of statutory interpretation).

that, on the other hand, extraordinary cash dividends and dividends paid in stock of another company were taxable as income.²⁶⁸ Citing yet another case of statutory interpretation,²⁶⁹ he found useful the definition of income as “gain derived from capital, . . . labor, or . . . both combined.”²⁷⁰ Pointing out that the text of the Sixteenth Amendment provides for taxes on “incomes, *from whatever source derived*,” and that “income” should be understood in its plain English definition, he concluded that income can be defined as “a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being ‘*derived*’—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal.”²⁷¹ A true stock dividend indicates that a company’s accumulated profits had been capitalized; thus, although a shareholder is indeed richer due to an increase in capital, there is no realization or receipt of any income in the transaction.²⁷² Congress has the power to tax

268. *Id.* at 204.

269. *Id.* at 207. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179 (1918).

270. *Id.* at 185 (citations omitted).

271. *Macomber*, 252 U.S. at 207. This line of reasoning—that income is gain from capital or labor—has been used in many subsequent cases. *See, e.g.*, *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 175 (1926) (holding that settling a pre-WWI mark-denominated debt to the German Deutsche Bank in devalued post-war marks was not income just because settling in dollars would have resulted in forgiveness of a large part of the loan); *Edwards v. Cuba R.R.*, 268 U.S. 628, 633 (1925) (concluding a railroad subsidy payment by a foreign government was held to be a reimbursement for capital expenditures, not profit or gain, and thus not income under the Sixteenth Amendment).

272. *Macomber*, 252 U.S. at 211–12. However, later cases restricted the situations in which capitalization is deemed to have occurred. In *United States v. Phellis*, 257 U.S. 156, 169–70 (1921), the Court held that a stock dividend in the form of a successor corporation’s stock is income, unless the old and new companies are substantially identical (formation of a new company in another state and a stock split were too much). The companion case to *Phellis*, *Rockefeller v. United States*, 257 U.S. 176, 183–84 (1921), where two oil companies spun off their pipeline business and distributed stock in the new corporations to their shareholders, concluded that the stock so distributed was income. A later case, *Cullinan v. Walker*, 262 U.S. 134, 138 (1923), used the same reasoning to come to a similar conclusion, holding that the stock of new corporations distributed upon the liquidation of an old corporation was a taxable gain. *See Marr v. United States*, 268 U.S. 536, 541–42 (1925), for another case of a reorganization where the new stock was held to be substantially different from the old. However, *see Weiss v. Stearn*, 265 U.S. 242, 254 (1924), for a case where a reorganization was deemed technical enough to avoid taxation on stock distributed. Offering stock subscription rights to existing shareholders was also similar enough to a stock dividend to not be taxable until those rights were sold. *Miles v. Safe Deposit & Tr. Co. of Balt.*, 259 U.S. 247, 252 (1922).

shareholders on their property interests in corporate stock, even if valued in reference to the company's accumulated and undivided profits, but this would be taxation of property because of ownership and subject to apportionment.²⁷³

New York Trust Company v. Eisner – 1921

Holding: an estate tax is indirect.²⁷⁴

This case saw a challenge to a federal estate tax on the grounds that it was a direct tax on a decedent's property.²⁷⁵ Justice Holmes, writing for the Court, relied on *Knowlton* to dispose of the objection. Although *Knowlton* dealt with an inheritance tax, and the present case—with an estate tax,²⁷⁶ Holmes thought the distinction immaterial. Death duties, broadly understood, “treated the ‘power to transmit or the transmission or receipt of property by death’ as all standing on the same footing.”²⁷⁷ Per *Knowlton*, historical understanding and practice treated as indirect both the avoidable inheritance tax and the inevitable estate tax.²⁷⁸ The inevitability of the estate tax is insufficient to render it direct in the face of contrary historical precedent, where on “this point a page of history is worth a volume of logic.”²⁷⁹

273. *Macomber*, 252 U.S. at 217.

274. *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349–50 (1921).

275. *Id.* at 349 (“It is argued . . . here the [estate] tax is inevitable and therefore direct.”).

276. *Id.* at 346. There is an oft-neglected distinction between an estate tax and an inheritance tax (also called a succession or legacy tax). Estate taxes are levied on, and with reference to, a decedent's entire net estate. *Estate Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014). Inheritance taxes are levied on the property received by a beneficiary from a decedent's estate. *Inheritance Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014). In short hand, estate taxes work before distribution to beneficiaries, and inheritance taxes after.

277. See *N.Y. Tr. Co.*, 256 U.S. at 348–49 (quoting *Knowlton v. Moore*, 178 U.S. 41, 57 (1900)).

278. *Knowlton*, 178 U.S. at 47. An estate tax is also indirect when applied to property held by a husband and wife in a tenancy by the entirety, as the surviving spouse gains substantial rights to that property, such as the sole right to dispose of it. *Tyler v. United States*, 281 U.S. 497, 504 (1930); see also *United States v. Jacobs*, 306 U.S. 363, 370 (1939) (applying the same reasoning and coming to the same result for property held in a joint tenancy).

279. *N.Y. Tr. Co.*, 256 U.S. at 349.

Bailey v. Drexel Furniture Co. – 1922

Holding: a tax on net business profits is an excise.²⁸⁰ A heavy burden alone does not make a tax a penalty, but a putative tax may have such penalizing features as to become a penalty.²⁸¹ The act must be “reasonably adapted to the collection of the tax” and not aimed to achieve an otherwise unconstitutional purpose.²⁸²

This case dealt with the constitutional validity of a ten percent tax on the net profits of any business that employed children younger than fourteen years of age.²⁸³ Chief Justice Taft, writing for the Court, found that the law in question was a regulation of child labor and not a tax, citing: (1) the law’s stated intent; (2) that it provided a detailed and specified course of business conduct; (3) that the penalty was not proportioned to the extent or frequency of violations; and (4) that its imposition required a knowing violation.²⁸⁴ If the law were a tax, it would be “clearly an excise[,]” and the Court would not “infer solely from its heavy burden that the act intends a prohibition instead of a tax.”²⁸⁵ However, an ostensible tax might have such penalizing features that “it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.”²⁸⁶ A motive other than taxation is insufficient to invalidate a tax, although “the taxing act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.”²⁸⁷

Bromley v. McCaughn – 1929

Holding: a gift tax is an excise.²⁸⁸ Taxes levied based on general ownership are direct, whereas taxes levied based on

280. *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 35–36, 42–43 (1922).

281. *Id.* at 36–37.

282. *Id.* at 43; *see also* *Hill v. Wallace*, 259 U.S. 44, 68–69 (1922) (striking down a per-bushel tax on grain futures contracts settled on certain boards of trade on the grounds that the tax’s purpose was to compel the boards to comply with regulations not related to the tax’s collection).

283. *Child Labor Tax Case*, 259 U.S. at 20.

284. *Id.* at 36–37, 41.

285. *Id.* at 36.

286. *Id.* at 38.

287. *Id.* at 43.

288. *Bromley v. McCaughn*, 280 U.S. 124, 138 (1929).

a particular use of property or exercise of power incidental to ownership are excises.²⁸⁹ A graduated rate schedule is constitutional.²⁹⁰

In *Bromley*, Justice Stone, writing for the Court, addressed, first, whether a gift tax was direct and, second, whether its graduated rate schedule violated the Uniformity Clause and the Fifth Amendment's Due Process Clause.²⁹¹ On the first issue, noting the opacity of "direct taxes[.]" he articulated a succinct distinguishing rule: while taxes levied upon persons "because of their general ownership of property may be taken to be direct . . . a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned."²⁹² With the gift tax, as with other levies like legacy taxes, but one of the many rights of property was being taxed.²⁹³ It was thus not a tax falling on an owner merely because of his passive ownership regardless of use or disposition of property. Justice Stone did not find convincing the objection that so many of the rights of property could be taxed as to have a net effect of taxing ownership itself.²⁹⁴ On the second issue, he observed that uniformity "is geographic not intrinsic," and that graduated taxes have long been upheld as constitutional and are not on their own "so arbitrary and unreasonable" as to violate the dictates of due process.²⁹⁵

Helvering v. Independent Life Insurance Co. – 1934

Holding: Congress may limit deductions from gross income to arrive at the net it chooses to tax.²⁹⁶

In this case at issue was a revenue provision allowing life insurance companies to deduct expenses for real estate owned and occupied wholly or partially by the company, provided that rental value of at least four percent of the real property's book value, in addition to

289. *Id.* at 136.

290. *Id.* at 138–39.

291. *Id.* at 135.

292. *Id.* at 136.

293. *Id.* at 137.

294. *See id.* at 137–38 (opining that the power to give is a power incidental to ownership, and a tax levied upon such a limited use is distinguishable from a direct tax on the property itself).

295. *Id.* at 138–39.

296. *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 381 (1934).

rental income from other tenants, was included in annual income.²⁹⁷ Justice Butler, writing for the Court, addressed whether this amounted to a tax on the rental value of space occupied by such a company.²⁹⁸ He conceded that a tax “on the part of a building occupied by the owner” would be a direct tax, as “[t]he rental value [of such property] does not constitute income within the meaning of the Sixteenth Amendment.”²⁹⁹ However, the statutory formula operated in lieu of an apportionment of expenses, resulting in “a diminution or apportionment of expenses to be deducted from gross income”—effectively, a condition or limit on deductions from gross income—a power that Congress may freely exercise “to arrive at the net that it chooses to tax.”³⁰⁰ Accordingly, the tax was not on real property owned and occupied by the owner and thus was indirect.³⁰¹

United States v. Safety Car Heating & Lighting Co. – 1936

Holding: income is treated as income when its amount becomes certain and definite.³⁰²

Here, a company on the accrual accounting method had brought a patent infringement suit against another company for actions occurring both before and after the effective date of the Sixteenth Amendment, eventually confining its claim to profits and settling the suit in 1925.³⁰³ Justice Cardozo, writing for the Court, considered whether the company owed tax only on the profits attributable to the period after the Amendment was ratified.³⁰⁴ He observed that the amount of liability was contested until the settlement in 1925, and that the claim was too contingent and indefinite to be considered accrued income at the time when the Sixteenth Amendment and the first revenue law adopted under it became effective in 1913.³⁰⁵ An “expectancy of income, or income, . . . in the process of becoming” is insufficient to be income proper; rather, it must be certain and definite to be considered income.³⁰⁶ Income under the Sixteenth

297. *Id.* at 376–77.

298. *Id.* at 378.

299. *Id.* at 378–79.

300. *Id.* at 381.

301. *See id.*

302. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936).

303. *Id.* at 90–91.

304. *Id.* at 90, 94.

305. *Id.* at 93–94.

306. *Id.* at 99.

Amendment “is the fruit that is born of capital, not the potency of fruition.”³⁰⁷ Further, the acceptance of a settlement lower than the value of the claim at a certain point in time involves a loss of neither income nor capital.³⁰⁸

Sonzinsky v. United States – 1937

Holding: a court will not speculate on congressional motives behind a tax or its restrictive effects, so long as it produces some revenue, is “not attended by offensive regulation, and . . . operates as a tax.”³⁰⁹

In *Sonzinsky*, the petitioner challenged an annual license tax on firearms dealers on the grounds that it was a penalty imposed to suppress traffic in certain firearms.³¹⁰ Justice Stone, writing for the Court, observed that the statute did not contain express regulatory provisions, nor was the subject of the tax treated as criminal.³¹¹ All taxes have regulatory components to establish “economic impediment[s]” on the things taxed, and a regulatory effect is insufficient to invalidate a tax.³¹² Indeed, “it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.”³¹³ So long as a tax operates as a tax, produces some revenue, and is not accompanied by “an offensive regulation,” the courts will not speculate on the congressional motives in imposing the tax—or its regulatory effects.³¹⁴

Steward Machine Co. v. Davis – 1937

Holding: a tax on certain employers, measured by wages paid, is a valid excise.³¹⁵ Direct taxes and duties, imposts, and excises (i.e. indirect taxes) include every form of possible taxation.³¹⁶ The actual classification of an indirect

307. *Id.*

308. *Id.* at 100.

309. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937).

310. *Id.* at 512.

311. *Id.* at 511, 513.

312. *Id.* at 513.

313. *Id.*

314. *Id.* at 514.

315. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578–83 (1937).

316. *Id.* at 581.

tax as an excise, impost, or duty is unimportant, as the result is the same.³¹⁷

In this case, a company challenged a tax measured as a percentage of total wages payable by employers with eight or more employees.³¹⁸ Justice Cardozo, writing for the Court, determined that the statute is “an excise upon the relation of employment.”³¹⁹ He disagreed with the claim that because “employment is a right, not a privilege,” it is exempt from excises, finding that history and conceptual analyses pointed to excises applying to both.³²⁰ Congress has broad discretion to choose the subject matter of taxation, circumscribed somewhat by different restrictions on the respective classes of taxes.³²¹ “Together, these classes include every form of tax appropriate to sovereignty. Whether the tax is to be classified as an ‘excise’ is in truth not of critical importance. If not that, it is an ‘impost,’ or a ‘duty.’ A capitation or other ‘direct’ tax it certainly is not.”³²² Further, the tax did not violate the Fifth Amendment, notwithstanding the various exemptions from the excise.³²³ Even states, which are subject to the Fourteenth Amendment’s Equal Protection Clause (to which the federal government is not, for the Fifth Amendment lacks such a clause), “are not confined to a formula of rigid uniformity in framing measures of taxation.”³²⁴

Helvering v. Bruun – 1940

Holding: severance of an improvement begetting gain from the original capital is unnecessary for realization to occur.³²⁵

317. *Id.* at 581–82.

318. *Id.* at 573–74. Similar issues were raised in the companion case of *Helvering v. Davis*, 301 U.S. 619, 645 (1937), where the Supreme Court, on the same grounds as in *Steward Machine Co.*, upheld a Social Security excise upon employers and a special income tax on employees to be deducted from their wages and paid by the employers—the analogue to modern withholding under the Federal Insurance Contributions Act (FICA). *See generally* I.R.C. §§ 3101–3128 (2012) (requiring that employers withhold a set percentage of their employees’ wages, to be matched by employers, as part of the Social Security Trust Fund).

319. *Steward Mach. Co.*, 301 U.S. at 578.

320. *Id.* at 578–79.

321. *Id.* at 581–82.

322. *Id.* (citations omitted).

323. *Id.* at 583.

324. *Id.* at 584.

325. *Helvering v. Bruun*, 309 U.S. 461, 469 (1940).

In *Bruun*, a tenant demolished a building on leased land and constructed a new one with a higher fair market value.³²⁶ Upon the lease's termination, the government determined that the owner realized a net gain on the transaction.³²⁷ Justice Roberts, writing for the Court, disagreed with the owner's contention that under the Sixteenth Amendment added value can be realized only on the owner's disposition of the asset.³²⁸ Although "economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset."³²⁹ Severance of "the improvement begetting the gain from the original capital" was unnecessary for recognition of taxable gain.³³⁰ "Gain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from a liability, or other profit realized from the completion of a transaction."³³¹ Nevertheless, realization of gain in some form is still a necessary condition for a taxable event to occur.³³²

326. *Id.* at 464–65.

327. *Id.* at 465.

328. *Id.* at 467.

329. *Id.* at 469.

330. *Id.*

331. *Id.* Justice Roberts cited a series of statutory interpretation cases dealing with the realization of gain under provisions of the Internal Revenue Code. *Id.* at 469 n.9. See *United States v. Hendler*, 303 U.S. 564, 566–67 (1938) (holding that a corporation realized gain on a merger involving both an exchange of stock or securities); *Helvering v. Am. Chicle Co.*, 291 U.S. 426, 430 (1934) (holding that a company realized income from debt forgiveness, when it assumed bonds which it later redeemed at less than face value); *United States v. Kirby Lumber Co.*, 284 U.S. 1, 3 (1931) (holding that a company realized income from debt forgiveness, when it redeemed its own bonds at less than face value); *Old Colony Tr. Co. v. Comm'r*, 279 U.S. 716, 731 (1929) (holding that an employer's payment of income taxes assessable against an employee was additional taxable income to that employee); *Marr v. United States*, 268 U.S. 536, 540 (1925) (holding that an exchange of securities of a New Jersey corporation for different securities of a Delaware corporation was income to the stockholder); *Cullinan v. Walker*, 262 U.S. 134, 137–38 (1923) (holding that the stock of new corporations distributed upon the liquidation of an old corporation was a taxable gain). A case that followed *Bruun* by only ten days was *Helvering v. Horst*, 311 U.S. 112, 119 (1940), in which the Court held that the gift of interest coupons detached from bonds and in the same year paid at maturity was akin to an assignment of income and taxable to the bondholder.

332. Accordingly, half a century later, in *Cottage Savings Ass'n v. Commissioner*, the Court held that a financial institution had realized a tax loss on exchanging its interests in a loan portfolio for another lender's interests in a different portfolio because the properties were different materially, and the owners enjoyed "legal entitlements . . . different in kind or extent." 499 U.S. 554, 565 (1991). Justice Blackmun, concurring in part and dissenting in part, elaborated on the realization concept:

Sunshine Anthracite Coal Co. v. Adkins – 1940

Holding: taxation may be used as a sanction to enforce regulatory provisions of laws.³³³

Here, at issue was an extraordinary 19.5% tax on sales of bituminous coal by producers who refused to participate in a coal regulatory scheme.³³⁴ Justice Douglas, writing for the Court, observed that while the tax was “not designed merely for revenue purposes” and was “a sanction to enforce the regulatory provisions of the Act,” this alone was insufficient to invalidate it, as the taxation power “may be utilized as a sanction for the exercise of another power which is granted it.”³³⁵ Furthermore, Douglas found that the application of the tax to some types of coal (i.e., that produced by non-compliant companies) but not to others was not discriminatory under the Fifth Amendment: “the Fifth Amendment, unlike the

It long has been established that gain or loss in the value of property is taken into account for income tax purposes only if and when the gain or loss is “realized,” that is, when it is tied to a realization event, such as the sale, exchange, or other disposition of the property. Mere variation in value—the routine ups and downs of the marketplace—do not in themselves have income tax consequences. This is fundamental in income tax laws.

Id. at 569–70.

Although the realization requirement has been circumscribed in some respects, *see* Kornhauser, *supra* note 13, at 20 (“Thus, while *Eisner v. Macomber* nominally stands as a constitutional barrier to taxing unrealized appreciation, the reality is that the Court, through its own action and its acquiescence in congressional action, has relegated the realization requirement to the lower realm of administrative convenience.”), with some commentators suggesting that it has been abandoned, *see* Testimony of David Rosenbloom at the Finance Hearing on Expatriate Taxation Before the Senate Committee on Finance Subcommittee on Taxation and Internal Revenue Service Oversight, 104th Cong. 51 (1995) (statement of H. David Rosenbloom), the Court has steadfastly refused to overrule *Macomber*’s realization holding, evidenced as recently as Chief Justice Roberts’s citing the case in his opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2598 (2012).

For good defenses of realization, *see* Erik M. Jensen, *The Constitutionality of a Mark-to-Market Taxing System*, 143 TAX NOTES 1299 (2014); Mark E. Berg, *Bar the Exit (Tax)! Section 877A, the Constitutional Prohibition Against Unapportioned Direct Taxes and the Realization Requirement*, 65 TAX LAW. 181, 192–205 (2012); Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 VA. TAX REV. 1, 58 (1993).

333. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 (1940).

334. *Id.* at 389, 391–92.

335. *Id.* at 393.

Fourteenth, has no equal protection clause,” and in any case, the tax was a constitutionally permissible sanction for non-compliance with the statutory regulatory scheme.³³⁶

Fernandez v. Wiener – 1945

Holding: an estate tax on the entire community property is an excise.³³⁷ A tax on real estate or chattels is direct.³³⁸ On the other hand, a tax on a “particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property” is indirect.³³⁹

Fernandez saw another challenge to the federal estate tax, this time as applied to the community property estate of a husband and wife upon one spouse’s death.³⁴⁰ Chief Justice Stone, writing for the Court, disagreed with the claim that a spouse’s death in a community property state results in a transfer of only the half share held by the decedent and that a tax upon the remainder is a direct tax subject to apportionment.³⁴¹ He noted that the taxing power “extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death.”³⁴²

336. *Id.* at 400–01. The Fifth Amendment’s interpretation would change with later Supreme Court jurisprudence to include equal protection components. This shift, however, did not see any change in the Court’s position on discriminatory taxation. That position was summarized by Justice Rehnquist in *Regan v. Taxation with Representation of Washington*, where, in the context of a challenge under the First and Fifth Amendments by a non-profit organization to the § 501(c)(3) restrictions on lobbying, he observed that Congress has “especially broad latitude in creating classifications and distinctions in tax statutes.” 461 U.S. 540, 547 (1983). Although “[b]oth tax exemptions and tax-deductibility are a form of subsidy,” *id.* at 544, such tax preferences are subject to heightened scrutiny only when “they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race.” *Id.* at 547. As for the First Amendment, discretionary subsidies through the Tax Code are generally subject to standard rational basis review, so long as the “governmental provision of subsidies is not ‘aimed at the suppression of dangerous ideas.’” *Id.* at 550 (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

337. *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

338. *Id.*

339. *Id.*

340. *Id.* at 343–44.

341. *Id.* at 346–47.

342. *Id.* at 352.

The Court had long held that “Congress may tax real estate or chattels if the tax is apportioned, and without apportionment it may tax an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.”³⁴³ As in previous cases dealing with estate taxes imposed on property held in a tenancy by the entirety and joint tenancy, the husband’s death changed the rights and powers of the wife to the community property, which was sufficient to justify imposing an excise upon the entire value of it.³⁴⁴ The tax did not violate constitutional due process guarantees, as it was not arbitrary or capricious, nor did it violate uniformity, for it applied to the entire United States geographically, notwithstanding that some states had marital community property laws and others did not.³⁴⁵

National Federation of Independent Business v. Sebelius – 2012

Holding: Congress may tax inactivity, as taxing inactivity is economically identical to giving a tax incentive for activity.³⁴⁶ Direct taxes include capitations, taxes on real and personal property, and income from property; the Sixteenth Amendment overturned the result as to the latter.³⁴⁷ A tax may be so punitive as to cease being a tax; however, the precise point at which this can occur is undecided.³⁴⁸

343. *Id.*

344. *Id.* at 354–55.

345. *Id.* at 358–60; *see supra* notes 207–13 (discussing the uniformity requirement as applied to variations in state law).

346. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

347. *Id.* at 2598.

348. *Id.* at 2600. The lead up to and aftermath of this case led to a flurry of activity among commentators, who with great relish overturned nearly every rock they could find in attempts to validate or condemn the Affordable Care Act. *See, e.g.,* Brian Galle, *The Taxing Power, The Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 409–12 (2011) (explaining that the individual responsibility requirement portion of the Affordable Care Act is a tax rather than a penalty); Mark A. Hall, *A Healthcare Case for the Ages*, 6 J. HEALTH & LIFE SCI. L. 1, 12 (2012) (explaining that the Affordable Care Act is a tax for constitutional purposes); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 92–93 (2012) (explaining that even though it was labeled as a penalty in the Act, it was “paid as part of most Americans’ most basic tax action” and even if it were not a tax, “Congress should be able to require individuals to purchase health insurance or pay a penalty . . .”).

This case addressed several substantive tax questions related to a “shared responsibility payment” on individuals without health insurance.³⁴⁹ The exaction, paid by taxpayers when they filed their income tax returns, applied only to individuals whose income exceeded the threshold for filing returns and was computed with reference to a taxpayer’s adjusted gross income.³⁵⁰ Chief Justice Roberts, writing for the Court, held that the payment was a tax, notwithstanding that it was called a “penalty” in the statute.³⁵¹ The label was not dispositive on the constitutional question—a substantive analysis was necessary. Chief Justice Roberts outlined four considerations to analyze whether a levy is a tax: (1) whether it produces “some revenue for the government”;³⁵² (2) whether it avoids “impos[ing] an exceedingly heavy burden”;³⁵³ (3) whether it lacks the elements of a punitive statute, such as a scienter requirement; and (4) whether it is enforced by the revenue service alone.³⁵⁴ Finding that the exaction in question answered each consideration affirmatively, he concluded that it reasonably may be deemed a tax.³⁵⁵ Moreover, it was not a punishment for an unlawful act or omission, and there were no “negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.”³⁵⁶

Roberts, having found the payment to be a tax, then considered whether it was a direct tax requiring apportionment. To that effect, he observed that by the early 20th century, direct taxes were understood to include capitations, taxes on property both real and personal, and income from property.³⁵⁷ After 1913, however, “[t]hat result was overturned by the Sixteenth Amendment, although we

349. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2595–99 (citing 26 U.S.C. § 5000A(b) (2012)).

350. *Id.* at 2594 (citing 26 U.S.C. § 5000A(e)(2)).

351. *Id.*

352. *Id.* (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953)).

353. *Id.* at 2595 (citing *Child Labor Tax Case*, 259 U.S. 20, 36–37 (1922)) (explaining that the ostensible “tax,” in that case was determined to be a penalty because it was ten percent of a company’s net income, without regard to the magnitude of the infraction).

354. *Id.* For a variation on this idea, see Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1198–99 (2012), which develops an “effects theory” of the distinction between taxes and penalties that follows the Chief Justice’s reasoning in this case. Practically speaking, the Court is unlikely to hold an exaction an unconstitutional penalty, for the bar has been set so high, although the theoretical possibility remains. *E.g.*, Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1175–87 (2012).

355. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2600.

356. *Id.* at 2597.

357. *Id.* at 2598.

continued to consider taxes on personal property to be direct taxes.”³⁵⁸ The tax at issue was not one on the ownership of land or personal property.³⁵⁹ It also was not a capitation, for capitations are taxes paid by every person without regard to any particular circumstance; here, the payment was triggered by two specific circumstances—earning income above a certain threshold and not obtaining health insurance.³⁶⁰ Further, “the Constitution does not guarantee that individuals may avoid taxation through inactivity,” as the document recognizes, for example, capitations—taxes “that everyone must pay simply for existing”—as a form of acceptable tax.³⁶¹ In any case, taxing an individual for not doing something has

358. *Id.* (citing *Eisner v. Macomber*, 252 U.S. 189, 218–19 (1920)). It is unclear what Chief Justice Roberts meant here by stating that “[t]hat result was overturned by the Sixteenth Amendment.” Did he refer to the result that a tax on income, regardless of whether it may be considered direct, is no longer subject to apportionment? Or that the Sixteenth Amendment took income out of the definition of a direct tax entirely? Some Supreme Court precedent, and *Eisner v. Macomber* in particular (which upheld *Pollock* generally, albeit without reference to this particular question), might suggest the former. *But see* *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 17–19 (1916) (holding that the Sixteenth Amendment, in overturning certain holdings in *Pollock*, prohibited inquiries to the source of income, thereby exempting from apportionment income taxes which are—on account of the lack of source inquiry—in fact indirect). Chief Justice Roberts’s language here is ambiguous. If he thought the Sixteenth Amendment to have reclassified income taxes as indirect, then why not say as much or at least cite to *Brushaber*? That the Chief Justice did not is highly telling. This question is more than theoretical. If the Sixteenth Amendment simply removed the apportionment requirement for direct income taxes, then they are constrained neither by apportionment nor uniformity. If the Amendment somehow converted income taxes from direct to indirect, then they are subject to uniformity. Granted, no income taxes to date have violated geographical uniformity, and the prospect of such a tax being enacted seems remote, not to say that a non-geographically uniform income tax would probably violate constitutional due process guarantees.

359. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599.

360. Chief Justice Roberts did not attempt to definitively classify the tax, which did not go unnoticed among commentators. *See* Matthew A. Melone, *The Pundits Doth Protest Too Much: National Federation of Independent Business v. Sebelius and the Future of the Taxing Power*, 2012 MICH. ST. L. REV. 1189, 1240 (2012) (“It is not clear whether the Court believed that the individual mandate is not a direct tax subject to apportionment because it is an income tax or because it is an excise tax irrespective of the method in which it is calculated.”).

361. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599. This analogy is troublesome, as capitations—taxes on “simply . . . existing”—are direct, yet Chief Justice Roberts contended that the payment was indirect. Professor Kleinbard anticipated and sidestepped this problem by arguing that the penalty is a tax on the provision of health care self-insurance and not a tax on inactivity at all. Edward D. Kleinbard, *Constitutional Kreplach*, 128 TAX NOTES 755, 756 (2010). The penalty has also been

the same economic effect as giving that individual a tax incentive to do that thing. Although taxes may theoretically be extended in such a manner as to become excessively punitive, and “Congress’s ability to use its taxing power to influence conduct is not without limits,” the present case did not require the Court to determine the “precise point” where the line would be drawn.³⁶²

C. Cases Interpreting the Uniformity Clause

While direct taxes are limited by the apportionment requirement, indirect taxes are constrained by uniformity.³⁶³ The doctrine here is simpler than that of direct taxes, and the cases examined will be few in number. After *Knowlton v. Moore*, the Supreme Court’s jurisprudence on this topic has more or less repeated that case’s holding: the Uniformity Clause requires only geographical uniformity.

United States v. Singer – 1872

Holding: the Uniformity Clause requires uniformity in a tax’s operation—that the tax must apply equally wherever the taxable object may be.³⁶⁴

In *Singer*, at issue was a tax on distillers assessed at a minimum of eighty percent of the distillery’s producing capacity, regardless of its actual operating capacity.³⁶⁵ Justice Field, writing for the Court, concluded that the tax was an excise and thus subject to uniformity throughout the United States.³⁶⁶ The tax was “uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.”³⁶⁷

called a tax on a particular use of wealth (for purposes other than purchasing health insurance) or a tax on a particular form of insurance (shifting the cost from one’s self to society). Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L.J. ONLINE 27, 31–32 (2010).

362. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599–600.

363. “[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1.

364. *United States v. Singer*, 82 U.S. (15 Wall.) 111, 121 (1872).

365. *Id.* at 118.

366. *Id.* at 121.

367. *Id.*

Edye v. Robertson – 1884

Holding: a tax is uniform when it operates with equal force and effect in every place where its subject is found; the Uniformity Clause does not contemplate perfect equality.³⁶⁸

In the *Head Money Cases*, a ship owner challenged a duty on non-U.S. citizen passengers arriving by vessel at any American port; the revenue from which went to a fund to defray the expense of regulating immigration.³⁶⁹ Justice Miller, writing for the Court, observed that the uniformity required by the Constitution was only geographical.³⁷⁰ “[A] tax is uniform when it operates with the same force and effect in every place where the subject of it is found.”³⁷¹ The challenged tax was an excise duty operating “precisely alike in every port of the United States where [foreign] passengers can be landed.”³⁷² It was not fatal that the tax only applied to marine ports and not inland borders. “Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream.”³⁷³ Chief Justice Miller concluded that the imposition in question, though “as far as it can be called a tax, [it] is an excise duty,”³⁷⁴ was in fact imposed not under the taxation power but as a regulation of commerce and immigration.³⁷⁵ Nonetheless, he likely would have upheld it under the taxing power if none other were available.³⁷⁶

Knowlton v. Moore – 1900

Holding: the Uniformity Clause requires only geographical uniformity.³⁷⁷

Knowlton, discussed above in the context of classifying direct taxes, is also relevant in its analysis of the Uniformity Clause.³⁷⁸ The

368. *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 594 (1884).

369. *Id.* at 586.

370. *Id.* at 594.

371. *Id.*

372. *Id.*

373. *Id.* at 595 (citing *Taylor v. Secor (State Railroad Tax Cases)*, 92 U.S. 575, 612 (1876) (examining the courts’ equity jurisdiction to restrain the collection of state taxes)).

374. *Id.* at 594.

375. *Id.* at 595.

376. *See id.*

377. *Knowlton v. Moore*, 178 U.S. 41, 105–06 (1900).

issue in this case was whether duties, imposts, and excises need be imposed on an intrinsically equal and uniform basis in their operation on individuals (i.e., whether a progressive tax was prohibited), or whether they were constrained solely by geographical uniformity.³⁷⁹

Justice White, writing for the Court, concluded that interpreting the Uniformity Clause to require equal treatment of all individuals would deprive the words “throughout the United States” of meaning.³⁸⁰ The provision’s intent was to forbid geographical discrimination by the national government.³⁸¹ Indirect taxes were never understood to be subject to inherent equality and uniformity, and congressional practice in the United States had always adhered to geographical uniformity but not to other forms of equal application.³⁸² White observed that the reasoning of the *Head Money Cases* on the constitutional prohibition of port preferences also applied to the Uniformity Clause, as both provisions were treated in their operation as identical by the Constitutional Convention.³⁸³ White also rejected the argument that a progressive tax was fundamentally unjust and should be held void.³⁸⁴ The question of progressivity was a legislative, not judicial, one, and no constitutional limitation supported striking down the law on that basis.³⁸⁵ He declined to

378. The holdings in this case as to the Uniformity Clause have been reaffirmed exactly by numerous subsequent cases. *See, e.g.*, *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916); *Billings v. United States*, 232 U.S. 261, 282 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158 (1911).

379. *Knowlton*, 178 U.S. at 84–85.

380. *Id.* at 87.

381. *Id.* at 89. Differences in state laws affecting federal tax liability do not cause a federal tax to violate the uniformity requirement. *See Phillips v. Comm’r*, 283 U.S. 589, 602 (1931) (“The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity.”); *see also Riggs v. Del Drago*, 317 U.S. 95, 102 (1942) (“Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity.”); *Poe v. Seaborn*, 282 U.S. 101, 117–18 (1930) (“[D]ifferences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read . . . to spell out a lack of uniformity.”).

382. *Knowlton*, 178 U.S. at 92. A broader reading of the Uniformity Clause would have made impossible the current system of taxation in the United States. *See Bittker, supra* note 261, at 10 (“A broad reading of the uniformity clause . . . would not only have rendered exemptions and differential tax rates unconstitutional, but it might well have invalidated the distinction between capital gains and ordinary income and a host of other provisions that make up the warp and woof of the Internal Revenue Code.”).

383. *Knowlton*, 178 U.S. at 106.

384. *Id.* at 109.

385. *Id.* at 109–10.

consider whether the judicial branch had the power to overturn “an arbitrary and confiscatory exaction . . . imposed bearing the guise of a progressive or any other form of tax,” as the present case did not fall into that category.³⁸⁶

United States v. Ptasynski – 1983

Holding: it does not violate uniformity to define the subject of a tax in geographical terms where a unique class merits special treatment.³⁸⁷

For over eighty years after *Knowlton*, the Court did not address any novel Uniformity Clause challenges until *Ptasynski*, where at issue was an excise had been levied on crude oil extracted in the United States.³⁸⁸ Exempted from the tax were certain classes of oil defined in geographical terms, including “exempt Alaskan oil.”³⁸⁹ Justice Powell, writing for the Court, observed that “cases have confirmed that the Framers did not intend to restrict Congress’ ability to define the class of objects to be taxed.³⁹⁰ They intended only that the tax apply wherever the classification is found.”³⁹¹ The Uniformity Clause is satisfied where the subject of a tax is defined in non-geographic terms, but it is not necessarily fatal to a tax’s validity for the subject to be defined in geographical terms.³⁹² In the latter instance, a court ought to “examine the classification closely to see if there is actual geographic discrimination.”³⁹³ With “exempt Alaskan oil,” Powell concluded that it was a unique class meriting favorable treatment due to the “disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region,” and that there was no “indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the Clause.”³⁹⁴ Accordingly, the Court

386. *Id.*

387. *See* United States v. Ptasynski, 462 U.S. 74, 84 (1983).

388. *See id.* at 75, 81.

389. *Id.* at 77.

390. *Id.* at 82.

391. *Id.*

392. *Id.* at 84.

393. *Id.* at 85. This broad reading of the Uniformity Clause has caused some to question whether the restriction has been read out of the Constitution entirely. *See* Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1200–05 (1984).

394. *Ptasynski*, 462 U.S. at 85–86.

would not disturb congressional judgment on such “an enormously complex problem[.]”³⁹⁵

D. Cases Interpreting the Export Clause

Although the Export Clause³⁹⁶ seems to speak for itself,³⁹⁷ the Supreme Court has nonetheless addressed it on several occasions. In the cases that follow, certain subtleties in the Clause become apparent, with the unusual trend being to interpret its restrictions expansively.

Pace v. Burgess – 1875

Holding: a fixed administrative fee imposed on export-bound goods without regard to quantity or value is not a tax and does not violate the Export Clause.³⁹⁸

At issue in *Pace* was a law requiring that stamps be affixed to packages of manufactured tobacco intended for exportation, per a law imposing an excise tax on all such tobacco except that intended for export; the stamp’s cost was fixed and did not vary depending on the container’s size or weight.³⁹⁹ Justice Bradley, writing for the Court, observed that “[t]he stamp was intended [only] to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected.”⁴⁰⁰ The stamp was compensation for

395. *Id.* at 86.

396. “No Tax or Duty shall be laid on Articles exported from any State.” U.S. CONST. art. I, § 9, cl. 5.

397. Though perhaps not—the Clause has on occasion been pressed into service to argue that it should limit non-tax export controls. *See, e.g.,* Note, *Constitutionality of Export Controls*, 76 YALE L.J. 200, 201 (1966) (contending that export quotas on certain key goods—iron, steel, aluminum, nickel, and sugar—the justification for which was domestic scarcity, violated the Export Clause).

398. *Pace v. Burgess*, 92 U.S. 372, 373 (1875).

399. *Id.* A similar case to *Pace* arose again a decade later in *Turpin v. Burgess*, 117 U.S. 504 (1886). The Court there observed that although it would be unconstitutional to impose a duty “on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. . . . a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition.” *Id.* at 507. For support, the Court cited to *Coe v. Errol*, 116 U.S. 517 (1886), where it had upheld, notwithstanding the constitutional prohibition on state taxes on imports and exports, a general state property tax that included some property ultimately exported. *Turpin*, 117 U.S. at 506.

400. *Pace*, 92 U.S. at 375.

administrative expenses, akin to a fee for clearing a vessel or certifying a cargo manifest, evidenced by the stamp's cost being fixed at a single price bearing "no proportion whatever to the quantity or value of the package on which it was affixed."⁴⁰¹ Since the charge imposed was not excessive, and the stamp was not used for the purpose of levying a duty or tax (rather, its intent was to secure exemption from a tax), it did not run afoul of the constitutional prohibition on export taxes.⁴⁰²

Fairbank v. United States – 1901

Holding: no tax may be levied which directly burdens exportation.⁴⁰³

In *Fairbank*, at issue was a fixed stamp duty on bills of lading (i.e., shipping manifests) for export-bound goods, with internal bills charged one cent and export bills charged ten.⁴⁰⁴ Justice Brewer, writing for the Court, noted that the Constitution requires "that exports should be free from any governmental burden. The language is 'no tax or duty.'"⁴⁰⁵ Congress, in imposing the duty on bills of lading, "as effectually place[d] a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict . . . free exportation."⁴⁰⁶ The restriction's purpose was not solely to prevent discrimination among states that would occur if export taxes were imposed on certain articles produced in only several states.⁴⁰⁷ Rather, the restriction serves to free all exports from federal burden. This "requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation."⁴⁰⁸

Justice Brewer found support in the Court's prior cases. *Nicol v. Ames*⁴⁰⁹ held that a stamp tax imposed upon every instrument

401. *Id.*

402. *Id.* at 376.

403. *Fairbank v. United States*, 181 U.S. 283, 295, 312 (1901).

404. *Id.* at 283–84.

405. *Id.* at 290.

406. *Id.* at 290–91.

407. *Id.* at 292.

408. *Id.* at 293.

409. 173 U.S. 509 (1899).

evidencing a sale was effectively a tax upon the property sold.⁴¹⁰ Likewise, *Brown v. Maryland*⁴¹¹ held that a tax in the form of a license required of importers was in fact a tax on imports, “and that the mode of imposing it by giving it the form of a tax on the occupation of importer merely varied the form without changing the substance.”⁴¹² Several additional cases supported the proposition that Congress cannot evade a restriction on taxation by imposing a tax on people or items or actions incident to the subject on which a tax is restricted.⁴¹³ Brewer distinguished *Pace*, as there the stamp covered the administrative costs of exempting tobacco, while in *Fairbank* “the stamp [was] distinctly for the purpose of revenue and not by way of compensation for services rendered.”⁴¹⁴ Therefore, “a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition.”⁴¹⁵

Cornell v. Coyne – 1904

Holding: export-bound articles may be taxed by a generally applicable law applying to all property similarly situated.⁴¹⁶

Cornell saw a challenge to a general tax on filled cheese that did not exempt product manufactured for export.⁴¹⁷ Justice Brewer, writing for the Court, observed that “[s]ubjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export.”⁴¹⁸ The Export Clause requires only “that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly

410. *Id.* at 293 (citing *Nicol v. Ames*, 173 U.S. 509 (1899)).

411. 25 U.S. (12 Wheat.) 419 (1827).

412. *Id.* at 295 (discussing *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827)).

413. *Id.* at 296–98.

414. *Id.* at 305.

415. *Id.* at 312. This reasoning was affirmed in *United States v. Hvoslef*, 237 U.S. 1 (1915), where the Court struck down a stamp tax on charter parties carrying cargo exclusively from American to foreign ports, finding that a tax on the charter parties was substantially a tax on exportation.

416. *Cornell v. Coyne*, 192 U.S. 418, 426 (1904).

417. *Id.* at 418–19.

418. *Id.* at 427.

situated.”⁴¹⁹ Thus, the Clause applies to export but not to articles before their exportation—so a generally applicable tax could be constitutionally applied to export-bound filled cheese.⁴²⁰

Thames & Mersey Marine Insurance Company v. United States – 1915

Holding: a tax on a necessary incident to exportation unconstitutionally burdens exports.⁴²¹

At issue here were stamp taxes on marine insurance policies insuring certain exports against marine risks in transit to foreign ports.⁴²² Justice Hughes, writing for the Court, concluded that “the tax upon such policies so directly and closely related to the ‘process of exporting’ that the tax is in substance a tax upon the exportation.”⁴²³ On reference to standard shipping practice and the government’s policy of insuring exports against war risks, he observed that “the business of exporting requires not only the contract of carriage, but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as one of the ordinary ‘shipping documents.’”⁴²⁴ Since a tax on insurance policies burdens exports as much as taxes on bills of lading and the goods themselves, the tax was one on exports and unconstitutional.⁴²⁵

A.G. Spalding & Bros. v. Edwards – 1923

Holding: although a tax that attaches to goods in the manufacturing stage does not violate the Export Clause, a tax that attaches on the passing of title to export-bound goods does.⁴²⁶

419. *Id.* Likewise, a generally applicable income tax can be levied on income from exportation, since the net income that is taxed is at least “as far removed from exportation as are articles intended for export before the exportation begins.” *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 175 (1918).

420. *Cornell*, 192 U.S. at 427–28.

421. *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27 (1915).

422. *Id.* at 22.

423. *Id.* at 25.

424. *Id.* at 26.

425. *Id.* at 27.

426. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 66–70 (1923).

At issue in *A.G. Spalding & Bros.* was whether a tax on certain items sold by a manufacturer or importer could properly apply to those items when commissioned by an agent for export.⁴²⁷ Justice Holmes, writing for the Court, noted that the transaction was intended from the beginning to be one for exporting the goods.⁴²⁸ The fact that the law was a general one “touching all sales of the class, and not aimed specially at exports” would not be enough to sustain the tax as applied to exports.⁴²⁹ Likewise, articles in the course of transportation are also exempt from tax.⁴³⁰ The key question was in fixing the point at which the export began.⁴³¹ Per *Cornell*, goods still in the process of manufacture, even if intended for export and made with reference to a foreign order, are subject to taxation, whereas those loaded on a foreign-bound vessel with bills of lading issued are exempt.⁴³² In the present case, the act of sale upon which the tax would attach—the passing of the title—had already “committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods.”⁴³³ At that point, the goods could not be taxed, since exportation had begun.⁴³⁴ The theoretical possibility that the agent could change its mind and retain the goods was too improbable to justify a different approach.⁴³⁵

United States v. International Business Machines Corp. – 1996

Holding: the Export Clause strictly prohibits taxes, discriminatory or not, falling on exports during the course of exportation, including on services and activities closely related to the export process.⁴³⁶ Pre-export goods and services, however, are excluded.⁴³⁷

For over seventy years the Supreme Court remained silent on the Export Clause, until it took it up in this case, where a company challenged the imposition of a tax on insurance premiums it had paid

427. *Id.* at 68.

428. *Id.*

429. *Id.* at 69.

430. *Id.* (citing *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 173 (1918)).

431. *Id.* at 69.

432. *Id.* (citing *Cornell v. Coyne*, 192 U.S. 418 (1904)).

433. *Id.*

434. *Id.* at 69–70.

435. *Id.* at 70.

436. *United States v. Int’l Bus. Machs. Corp.*, 517 U.S. 843, 843 (1996).

437. *Id.*

to foreign insurers to cover shipments of goods to its foreign subsidiaries.⁴³⁸ Justice Thomas, writing for the Court, pointed out that the Court “broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process[.]” while “limit[ing] the term ‘Articles exported’ to permit federal taxation of pre-export goods and services.”⁴³⁹ In its cases from the early 20th century, the Court made clear that “the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation.”⁴⁴⁰ However, the Export Clause does not extend to pre-export goods and services, nor does it cover “various services and activities only tangentially related to the export process.”⁴⁴¹ That said, the Clause’s text suggests a broad intent to strictly limit the imposition of export taxes. Since the question had not been raised of whether an assessment on a particular activity or service is so closely connected to the exported goods as to be a tax on the goods themselves, the Court declined to reexamine the holding of *Thames & Mersey*.⁴⁴² Thus, “the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit[.]” and per *Thames & Mersey*, this extended to insurance on export shipments.⁴⁴³

United States v. United States Shoe Corp. – 1998

Holding: a user fee affecting instrumentalities of export is permissible if it is (1) proportionate to the quantity or value of the goods exported, and (2) not excessive.⁴⁴⁴

In *United States Shoe Corp.*, the Court addressed whether a tax charged at 0.125% of the value of commercial cargo shipped through American ports was an impermissible export tax.⁴⁴⁵ Justice Ginsburg,

438. *Id.*

439. *Id.* at 846.

440. *Id.* at 848. One of those cases, *Dooley v. United States*, 183 U.S. 151 (1901), had found that a duty on merchandise imported into Puerto Rico from New York was not an export tax. Rather sensibly, the Court there held that the word “export” connotes “something carried out of the United States,” that is “to goods exported to a foreign country[.]” and since Puerto Rico is not a foreign country, goods carried from New York to Puerto Rico are not being exported and thus are not subject to the Export Clause. *Id.* at 154–55.

441. *Int’l Bus. Machs. Corp.*, 517 U.S. at 849–50.

442. *Id.* at 854–56.

443. *Id.* at 863.

444. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 369 (1998).

445. *Id.* at 363.

writing for the Court, held that the tax, “imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.”⁴⁴⁶ The Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit.⁴⁴⁷ An exaction is permissible if it is “a bona fide user fee,” i.e. not proportionate to the quantity or value of the goods exported and not excessive.⁴⁴⁸ The challenged tax failed the user fee criteria since the tax was “determined entirely on an ad valorem basis,” and “the value of the export cargo [did] not correlate reliably with the federal harbor services used or usable by the exporter.”⁴⁴⁹ A proper user fee would consider that “the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging.”⁴⁵⁰ In this case the tax did not “fairly match the exporters’ use of port services and facilities[.]” and so it was an unconstitutional export tax.⁴⁵¹

E. In Summary

The threshold question in analyzing any exaction is whether it is a tax for constitutional purposes or a penalty. To determine whether a levy is a tax and subject to the restrictions of the tax clauses, the Court will examine whether it (1) produces some revenue, (2) avoids imposing an exceedingly heavy burden, (3) lacks elements of a punitive statute, and (4) is enforced by the revenue service alone.⁴⁵² A tax may be so punitive as to cease being a tax, and possibly violate due process; even so, the precise point remains undecided and ought to be addressed case by case.⁴⁵³ Congress, however, can tax inactivity, which is economically identical to giving a tax preference for an activity.⁴⁵⁴

446. *Id.*

447. *Id.* at 367.

448. *Id.* at 369.

449. *Id.*

450. *Id.*

451. *Id.* at 370.

452. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594–95 (2012).

453. *Id.* at 2599–600; *see* *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24–25 (1916) (holding that the Fifth Amendment’s Due Process Clause limits the taxation powers only to the extent that a putative tax might violate due process if it amounts to a confiscation of property or leads to such gross inequality as to amount to a taking); *see also* *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584 (1937) (holding that exemptions from a tax do not violate due process or equal protection guarantees).

454. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599.

If an exaction is a tax, it must be either direct or indirect. Direct taxes consist of the following categories: capitations, taxes on real and personal property, and income from property.⁴⁵⁵ In view of the Sixteenth Amendment, only capitations and property taxes are subject to apportionment by population, while income from property is not.⁴⁵⁶ An income tax may be direct or indirect, depending on the source of the income; income itself evades precise definition, although it seems to presuppose some gain and realization of that gain.⁴⁵⁷ However, income is treated as income at the point when its amount becomes certain and definite.⁴⁵⁸ All taxes other than those identified as direct are deemed indirect and include: business gross receipts taxes,⁴⁵⁹ business profits taxes,⁴⁶⁰ gift taxes,⁴⁶¹ social security taxes,⁴⁶² estate taxes,⁴⁶³ inheritance taxes,⁴⁶⁴ and generally any excises on “particular us[es] or enjoyment[s] of property or shifting . . . of any power or privilege incidental to the ownership or enjoyment of property.”⁴⁶⁵

Duties, imposts, and excises, per the Uniformity Clause, must be uniform throughout the United States. Generally, the Clause is satisfied when a tax is levied in a geographically uniform way.⁴⁶⁶ Otherwise, the Clause is satisfied where the subject of the tax is defined in non-geographic terms. However, it is not fatal to the tax’s validity if the subject *is* defined in geographical terms, in which case a court ought to scrutinize the classification to determine if there is actual geographic discrimination.⁴⁶⁷

The Export Clause generally prohibits taxes on exports. The following have been held to be impermissible export taxes: ad

455. *Id.* at 2598.

456. *Id.*

457. *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 569–70 (1991) (Blackmun, J., concurring in part and dissenting in part); *Eisner v. Macomber*, 252 U.S. 189, 211–12 (1920); *see also Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 381 (1934) (holding that a tax on the rental value of the part of a building occupied by the owner is a direct tax not on income).

458. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936).

459. *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397, 411 (1904).

460. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911).

461. *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929).

462. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578–79 (1937).

463. *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 348–49 (1921).

464. *Knowlton v. Moore*, 178 U.S. 41, 81 (1900).

465. *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

466. *Knowlton*, 178 U.S. at 89. As discussed, *supra* note 18, the Uniformity Clause does not extend to unincorporated territories of the United States.

467. *United States v. Ptasynski*, 462 U.S. 74, 85 (1983).

valorem taxes on the value of exported cargo;⁴⁶⁸ and taxes (discriminatory or otherwise) falling on exports during the course of exportation, including on services and activities closely related to the export process⁴⁶⁹ or necessary incidents to it.⁴⁷⁰ On the other hand, user fees affecting instrumentalities of exportation are permissible if they are (1) not proportionate to the quantity or value of the good exported, and (2) not excessive,⁴⁷¹ for example, if they are fixed administrative fees imposed on goods bound for export without regard to quantity or value.⁴⁷² Likewise, levies on pre-export goods and services, along with those on various services and activities tangentially related to the export process, are acceptable,⁴⁷³ as are generally applicable taxes on income from exportation.⁴⁷⁴ Taxes on goods carried from the incorporated United States to a territory are not considered export taxes.⁴⁷⁵

III. DEVELOPING A CONSTITUTIONAL MODEL FOR CLASSIFYING TAXES

Having reviewed the Supreme Court's case law on constitutional taxation provisions, certain articulable patterns emerge. The power of Congress to levy taxes (Taxes, Duties, Imposts and Excises) is exceptionally broad.⁴⁷⁶ The definition of "taxes" in the Constitution is similar to the vernacular understanding of the term—impositions by the government to raise revenue.⁴⁷⁷ As the Court in *National Federation of Independent Business* concluded, the threshold for deeming an exaction a tax is quite easy to meet: it must raise some

468. *Id.*

469. *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 863 (1996).

470. *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 26–27 (1915).

471. *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 369 (1998).

472. *Pace v. Burgess*, 92 U.S. 372, 375–76 (1875).

473. *Int'l Bus. Mach. Corp.*, 517 U.S. at 850.

474. *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 174–75 (1918).

475. *Dooley v. United States*, 183 U.S. 151, 156–57 (1901).

476. *See, e.g., Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 581–82 (1937) (observing that Congress has broad discretion to choose the subject matter of taxation); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176–77 (1796) (opinion of Paterson, J.) (noting that the term "taxes" is generic, covering all levies that could conceivably be enacted, and vesting in Congress a plenary taxation authority).

477. BLACK'S LAW DICTIONARY defines "tax" as "a charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, impost, and excises." (10th ed. 2014).

revenue and not be entirely punitive.⁴⁷⁸ The courts will not speculate on congressional motives in imposing a tax, nor will they question the tax's restrictive effects, so long as the exaction produces some revenue, is not attended by "offensive regulation," and operates as a tax.⁴⁷⁹ In any case, taxes in the Constitution are divided into two categories: direct and indirect.⁴⁸⁰ Direct taxes are expressly named, and the existence of indirect taxes is implied from that reference by negative implication.⁴⁸¹ Notwithstanding Justice Chase's assertion in *Hylton*,⁴⁸² it is quite unlikely that there can be a tax simultaneously direct and indirect.⁴⁸³ By definition, the categories are mutually exclusive and cover all types of taxes—there can be no tax that is neither direct nor indirect.

A. Direct Taxes

Direct taxes fall into two broad categories: those that are subject to apportionment and those that are exempt. From *Hylton*, the Court has unequivocally considered capitations and real property taxes to be direct.⁴⁸⁴ From *Pollock*, the Court has considered personal property taxes and taxes on income from real and personal property to be direct as well.⁴⁸⁵ Thus, for constitutional purposes, direct taxes are: capitations, property taxes, and taxes on the income derived from

478. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–97 (2012).

479. Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

480. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796).

481. *Id.*

482. *Id.* at 174 ("I believe some taxes may be both direct and indirect at the same time.").

483. One might contend that an income tax that extends equally to wages and passive income could be a tax that is both direct and indirect. Indeed, the Court in *Pollock II* struck down the entire taxation statute, including the parts that were not held to be a direct tax, as the law constituted "one entire scheme of taxation." *Pollock II*, 158 U.S. 601, 637 (1895). However, such a law is best understood not as a single tax both direct and indirect, but rather as several discrete taxes, some direct, others indirect, that together constitute the regime. The question addressed in *Pollock II* was one of severability, whether "the parts are wholly independent of each other," and the Court determined that if passive income was removed from taxation, then the tax burden would fall too severely on wage and other active income. *Id.* at 635. The Court also observed that a statute could lay a direct and an indirect tax, treating the two components separately. *Id.* at 637 ("We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations.").

484. *Hylton*, 3 U.S. (3 Dall.) at 176.

485. *Pollock II*, 158 U.S. at 637. See *supra* note 358 for a discussion of whether the Sixteenth Amendment removed income taxes from the definition of direct tax.

property. The Sixteenth Amendment exempts income taxes from apportionment, but the other direct taxes are still subject to the rule.⁴⁸⁶ The only income taxes that would have been subject to apportionment but for the Amendment are those on income from property, today called passive income, including capital gains, royalties, interest, dividends, rents, and the like.⁴⁸⁷ Only those taxes levied on property purely because of ownership are deemed direct.⁴⁸⁸ Thus, levies that attach on sale, gift, death, or other action or event are considered indirect. From here emerge the first two categories of a constitutional model of taxation:

1. Direct taxes subject to apportionment: capitations and property taxes.
2. Direct taxes exempt from apportionment: taxes on income derived from property (i.e., passive income).

There is ambiguity about whether direct taxes exempt from apportionment are also exempt from the uniformity requirement. It is clear that direct taxes subject to apportionment need not be uniform, as the apportionment process would necessarily entail non-uniform application of taxes, with the possible exception of pure capitations levied equally on each person. As to direct taxes exempt from apportionment, the plain language of the Sixteenth Amendment, in providing that taxes on income, regardless of source, need not be apportioned, makes no reference to reclassifying direct income taxes as indirect or to applying to them the requirements of the Uniformity

486. U.S. CONST. amend. XVI.

487. It is curious that taxes on income from property are considered direct, whereas taxes imposed on individuals directly for income from their occupations are deemed indirect. See *Pollock II*, 158 U.S. 601, 635 (1895) (“We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, [finding such taxes to be direct,] and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.”). The Sixteenth Amendment made this idiosyncrasy moot for practical purposes, and today active income has greater constitutional protection (it must be uniform) than does passive income (exempt from apportionment and not subject to uniformity).

488. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911) (holding that property taxes are direct when “imposed upon property simply because of its ownership”). The Court’s expression of the idea of a direct tax is not the most accurate semantically. A tax is not direct because the government imposes it because of ownership, but rather because it attaches for no other reason than the taxpayer’s ownership of the property.

Clause.⁴⁸⁹ On the other hand, one might argue that the drafters of the Sixteenth Amendment would not have wished for Congress to impose taxes on passive income that varied solely based on geographical location, and in any case, the Court’s decision in *Brushaber* to reclassify income taxes as indirect resolved the question.⁴⁹⁰ The counter-argument is that, at least as to real property, income from some property might merit different treatment because of its location, although classifying property based on its location, if applied uniformly throughout the United States (e.g., a tax on all seaside real property), would likely comply with the Uniformity Clause anyway. Moreover, the Court’s ambiguous approach in the recently decided *National Federation of Independent Business* can be interpreted as overruling *Brushaber*. On balance, the most likely answer is that passive income is indeed exempt from both apportionment and uniformity.⁴⁹¹ Regardless, it would be extraordinarily difficult, politically, to levy a truly non-uniform tax on passive income, and such a tax might still be found unconstitutional under some non-tax provision, such as the Fifth Amendment’s due process protections.

B. Indirect Taxes

The counterpart to direct taxes is indirect taxes. Their existence is implied negatively by the explicit references to direct taxes, and they are best understood as being that which direct taxes are not.⁴⁹² Thus, only by having identified which taxes are direct can one define the indirect variety. The Constitution expressly references four types of

489. See Morrow, *supra* note 21, at 412 (“If the Sixteenth Amendment is passed such a tax [subject to neither the rule of uniformity nor apportionment] will have been discovered.”).

490. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18–19 (1916).

491. *But see* Jensen, *supra* note 16, at 2341–42 n.37 (arguing that, per *Brushaber*, “income taxes must satisfy the uniformity rule”). It is unclear to what extent the holding in *Brushaber*, that income taxes are indirect taxes given that a source inquiry is prohibited, is still good law in the light of the ambiguity introduced by Chief Justice Roberts’s opinion in *National Federation of Independent Business*, as discussed in greater depth above. See *supra* note 332. In divining the Court’s mystical coans on this topic, there is no clear answer—only speculation.

492. *But see* Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 292 (1907) (“Indirect taxation is not . . . mentioned in the Constitution itself, and nothing in the Constitution requires us to give it a legal definition. . . . The distinction between direct and indirect taxation belongs, or belonged (if it is obsolete), to political economy, not to law.”).

indirect taxes: duties, imposts, excises, and export taxes.⁴⁹³ One can dispose quickly of the latter, as the Constitution prohibits taxes on exports.⁴⁹⁴ The other three types of enumerated indirect taxes, however, have been sources of definitional consternation for some time. Since *Pacific Insurance Co.*, the Court repeatedly attempted to define the terms, citing different definitions over the years. It hardly helped that the Court appeared to use “duties” and “excises” interchangeably, and, in upholding various indirect taxes, called them “duties or excises.”⁴⁹⁵ Thus, in *Pacific Insurance Co.*, *duties* were “things due and recoverable by law” or by an alternative definition—synonymous with customs; *imposts* were import taxes; and *excises* were domestic taxes on the consumption of commodities or retail sales.⁴⁹⁶ In *Pollock II*, *duties* were taxes on import, export, and consumption; *imposts* were any indirect tax; and *excises* were taxes on goods or licenses.⁴⁹⁷ In *Patton v. Brady*, *excises* were taxes levied on articles intended for consumption and imposed between the beginning of manufacture and final consumption.⁴⁹⁸ In *Thomas v. United States*, the Court, in evident frustration, noted that *duties*, *imposts*, and *excises* elude precise definition but are “used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.”⁴⁹⁹ In *Flint v. Stone Tracy Co.*, the Court defined *duties* and *imposts* as import and export levies, and *excises* as taxes on manufacture, sale, and consumption, as well as occupational license taxes and taxes on corporate privileges.⁵⁰⁰ The Court last addressed the question in *Steward Machine Co. v. Davis*, where it observed that direct taxes, duties, imposts, and excises “include every form of tax appropriate to sovereignty,” and that whether an indirect tax is classified as a duty, impost, or excise is of minimal

493. See U.S. CONST. art. I, § 9, cl. 5; *id.* art. I, § 10, cl. 2.

494. *Id.* art I, § 9, cl. 5.

495. See, e.g., *Knowlton v. Moore*, 178 U.S. 41, 83 (1900) (holding that an inheritance tax was “a duty or excise”).

496. *Pac. Ins. Co. v. Soule*, 74 U.S. 433, 445 (1868).

497. *Pollock II*, 158 U.S. 601, 622 (1895). There was some ambiguity introduced in *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 348 (1875), about whether occupational and license fees were duties or excises or some other form of indirect tax, as Justice Clifford there appeared to suggest in dicta that license fees might be separate from duties, imposts, and excises, but later cases such as *Pollock II* referred to license fees as excises. 158 U.S. at 656.

498. 184 U.S. 608, 617 (1902).

499. 192 U.S. 363, 370 (1904).

500. 220 U.S. 107, 151 (1911).

importance.⁵⁰¹ The Court did note that although there might be indirect taxes that are not duties, imposts, or excises, their existence remained undiscovered.⁵⁰²

Even though the Court apparently gave up on the task of precisely defining duties, imposts, and excises, the definitions are nonetheless important for developing a coherent view of federal taxation's boundaries. *Black's Law Dictionary* crystallizes the definitions of each of these three types of taxes well. A *duty* is defined as a "tax imposed on a commodity or transaction, esp. on imports A duty in this sense is imposed on things, not persons."⁵⁰³ An *impost* is a "tax or duty, esp. a customs duty."⁵⁰⁴ An *excise* is a "tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)."⁵⁰⁵ These definitions generally comport with the

501. 301 U.S. 548, 581–82 (1937).

502. *Id.* at 582.

503. *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014). Some taxes that bear the name "duty" listed in the same category include accounts duties, ad valorem duties, customs duties, death duties, and succession duties, among others. By comparison, the Oxford English Dictionary defines "duty" as:

A payment to the public revenue levied upon the import, export, manufacture, or sale of certain commodities, the transfer of or succession to property, licence to use certain things or practise certain trades or pursuits, or the legal recognition of deeds and documents, as contracts, receipts, certificates, protests, affidavits, etc. Applied to the payments included under the several heads of customs, excise, licences, stamp-duties, probate and succession duties (death duties), inhabited house duty. In general, 'duties' differ from other taxes in that they are levied upon specific articles or transactions, and not upon persons whether by capitation or in proportion to their income or possessions. But the distinction is not strictly observed in language; a 'window-tax' and 'dog-tax' are duties, as much as the inhabited house duty, or the duty on men-servants.

Duty, OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

504. *Impost*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Oxford English Dictionary defines "impost" as:

A tax, duty, imposition, tribute; *spec.* a customs-duty levied on merchandise. Now chiefly *Hist.* The distinction suggested by Cowell, that *impost* properly denotes a duty on imported goods, and *custom* one on goods exported, is repeated by later dict.; but there is no evidence that it was ever in accepted use.

Impost, OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

505. *Excise*, BLACK'S LAW DICTIONARY (10th ed. 2014). The Oxford English Dictionary defines "excise" as, generally, "[a]ny toll or tax," and specifically:

Court's attempts to define these tax types.⁵⁰⁶ In sum, indirect taxes can be defined as taxes on transactions, activities, or changes in position. Thus, two more categories emerge for a taxation model:

3. Indirect taxes subject to uniformity: duties, imposts, and excises.
4. Indirect taxes prohibited: export taxes.

Were one to conclude here, however, the model would remain incomplete. As mentioned, there are direct taxes and indirect taxes, and these two mutually exclusive categories cover all conceivable taxes. The Constitution provides that all direct taxes (except those on

A duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers" (*Encycl. Brit.*). In England this kind of taxation was first adopted in 1643, in acknowledged imitation of the example of Holland. . . . The taxes levied under the name of Excise by the Ordinance of 1643 included certain duties imposed, in addition to the customs, on various foreign products; it was not until the 19th century that the actual use of the word became strictly conformed to the preceding definition.

Excise, OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

506. The Court's definitions may have deviated significantly from what an original understanding of the terms implied. *See* Whitney, *supra* note 490, at 293: In Great Britain the words 'tax' and 'duty' had had legal definitions for a century, exclusive of each other, settled and unvarying in their statutory use. A tax was laid upon all property, or upon all real property, at a valuation, and always by a rule of apportionment. The only 'tax' in actual use was the general land tax. Everything that was not a tax in this restricted sense was a duty. No duties were laid by any system of apportionment. All were laid by a rule of uniformity. This unvarying distinction in terms in the statute book cannot have been accidental, and must have been familiar to lawyers.

The same commentator also proposed treating capitations as a separate category apart from direct taxes, *id.* at 280, and that direct taxes "would be the general property taxes laid according to a general valuation, while [duties, imposts, and excises] would include those on specific property, together with stamp duties, license duties, business duties, and duties on salaries and pensions," and "[t]axes invented in the future (and the general income tax is one of these) would be left to be classified in the future[.]" *id.* at 296.

For another view, *see* Johnson, *supra* note 44, at 300: "'Impost' was a reference to a tax on imports, now more commonly called 'tariffs' or 'custom duties.' 'Duty' was apparently a reference to a stamp tax on legal documents. 'Excise tax' referred, originally but not exclusively, to tax on whiskey."

income) must be apportioned.⁵⁰⁷ However, in setting the uniformity rule, the Constitution does not apply it to all indirect taxes; rather, the rule applies only to duties, imposts, and excises. The interpretational doctrine of *expressio unius est exclusio alterius* (meaning “the expression of one thing implies the exclusion of others”) suggests that a non-exhaustive list of things enumerated presupposes something not enumerated.⁵⁰⁸ Indeed, Justice Chase, in his *Hylton* opinion, observed that “[i]f the framers of the Constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary.”⁵⁰⁹ This leaves us with a fifth and final category in the model:

5. Indirect taxes exempt from uniformity.

The one example of such a tax is one that predates the Constitution itself and has not been levied since America’s current governing document took effect: requisitions.⁵¹⁰ Requisitions were the primary

507. U.S. CONST. art. 1, § 2, cl. 3.

508. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107–11 (Thomson/West ed. 2012) (calling the doctrine the “negative-implication canon”).

509. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1793) (opinion of Chase, J.); see also Jensen, *supra* note 21, at 712 (“It is not a new idea that some taxes might be immune from both the apportionment requirement and the uniformity rule.”); but see *Pollock I*, 157 U.S. 429, 557 (1895) (“Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words ‘duties, imposts and excises,’ such a tax for more than 100 years of national existence has as yet remained undiscovered . . .”).

510. One might question whether requisitions could be levied constitutionally. If Congress were careful in crafting a requisition law to avoid Tenth Amendment commandeering concerns and intergovernmental tax immunity issues (which might not be easy, since the anti-commandeering rule prevents Congress from forcing a state to use its political process to follow federal dictate, while intergovernmental tax immunity prevents Congress from levying a tax directly on the sovereign operations of a state (and vice versa)), *cf.*, *e.g.*, Rob Gunning, *Into and Out of the Bog: The Intergovernmental Tax Immunity Doctrine*, 41 WILLAMETTE L. REV. 151, 151 (2005); William D. Marsh, Note, *Intergovernmental Tax Immunity Beyond South Carolina v. Baker*, 13 BYU L. REV. 249, 259–60 (1989), it would appear that on balance requisitions would be allowable, especially given the Court’s reticence over the past century to strike down taxes. Compare Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1988–89 (1993) (“[The Constitution] was not conditioned on the continued futility of requisitions Today, under an originalist analysis . . . the federal government may not reclaim that discarded instrument now that it might prove more efficacious.”), with Strahilevitz, *supra* note 31, at 918 (“[I]t seems highly likely

way by which the Articles of Confederation contemplated the federal government would raise revenue.⁵¹¹ Under that system, the Congress of the Confederation determined the amount of revenue needed for national purposes and required each state to supply the fraction of the total sum relative to the value of real property (land and buildings and improvements) within that state, by such valuation method as the Congress determined.⁵¹²

A requisition scheme would almost certainly be deemed a tax, as it would raise revenue and not be punitive in its intent or operation.⁵¹³ Moreover, since it would be imposed neither on individual taxpayers, nor on property directly (it need not be measured based on property at all), it would not be a direct tax.⁵¹⁴ And referring to the definitions of the specifically enumerated indirect taxes discussed above, it is clear that a requisition is not a duty, impost, or excise.

that requisitions were considered the paradigmatic examples of ‘indirect taxes’ specifically authorized by the Constitution.”); Jonathan L. Entin & Erik M. Jensen, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 353, 379 (1998) (“[T]here is substantial evidence that the Constitution left intact the federal government’s power to impose requisitions on the states.”); *see also* Jensen, *supra* note 16, at 2400–01 (“But whether or not requisitions are permitted under the existing constitutional scheme, they have not been attempted.”).

511. ARTICLES OF CONFEDERATION of 1781, art. VIII.

512. *Id.*

513. *See* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 845–46 (2009) (“It is probable that ‘requisitions’ on states are included within ‘Taxes,’ although the issue has never squarely arisen (as no requisition has been enacted by Congress under the Constitution).”).

514. Some commentators have argued that a requisition would be a direct tax. *See id.* at 841 (“[T]he category of ‘direct tax’ (subject to the apportionment requirement) is limited to requisitions, capitation taxes, and taxes on tangible property.”). However, this position erroneously conflates “direct taxes” with “taxes that are capable of being apportioned,” an apparent misreading of Justice Iredell’s argument in *Hylton*. *Cf.* *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181 (1796) (opinion of Iredell, J.) (“As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.”). While it may be true that all direct taxes must be taxes capable of being apportioned, it does not follow that all taxes that are capable of being apportioned are direct. Although a requisition can indeed be apportioned based on population, it is not a direct tax, at least so far as the Supreme Court has interpreted the term. *See also* Jensen, *supra* note 16, at 2338 (“[M]any founders distinguished a direct-tax regime from the ineffective requisitions process used under the Articles of Confederation: Congress issued requisitions for revenue to the states, and each state could determine how . . . its obligation would be satisfied. Direct taxes are instead imposed by the national government directly on individual taxpayers.”).

In *Hylton*, Justices Paterson and Iredell suggested in dicta that if there were to be a tax which was indirect but not a duty, impost, or excise, then it would nonetheless be subject to uniformity.⁵¹⁵ Justice Chase disagreed—and was correct in doing so.⁵¹⁶ It is hard to conceive how a requisition could be applied geographically uniformly, as the Uniformity Clause requires geographical uniformity not just among the states but within them as well.⁵¹⁷ Whether a requisition were allocated today based on property value or some other metric, except perhaps on a per-head basis, it cannot be uniform throughout the United States. While it might be applied geographically uniformly as between the states themselves, the operation of the requisition *within* the states would not be uniform; which is what is required to satisfy the Uniformity Clause. For example, if a requisition scheme were imposed, taking as the basis of allocation the value of non-federally-owned real property in the states, and if the states passed the cost of the tax down to the property owners, due to inherent differences in population densities and property values among the states, the burden would not be borne on a geographically uniform basis. In other words, two otherwise equally situated property owners might well bear different tax burdens, solely because of their residence (i.e., geographical location). All of this is not to say that a requisition could be arbitrarily imposed in varying amounts on different states. Even if the apportionment and uniformity rules do not present an obstacle, the law must still conform to constitutional due process constraints.

515. *Hylton*, 3 U.S. (3 Dall.) at 176 (opinion of Paterson, J.) (“There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts, or excises; in such case it will be comprised under the general denomination of taxes. . . . The question occurs, how is such tax to be laid, uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned.”); *Id.* at 181 (opinion of Iredell, J.) (“If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost or excise; there is no provision in the Constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present Constitution was particularly intended to affect individuals, and not states, except in particular cases specified . . .”).

516. *Id.* at 173 (opinion of Chase, J.) (“If there are any other species of taxes that are not direct, and not included within the words duties, imposts, or excises, they may be laid by the rule of uniformity, or not; as Congress shall think proper and reasonable.”).

517. *Contra* Strahilevitz, *supra* note 31, at 918 (“As long as Congress applied the same formula to all states, a requisition would be a constitutional [uniform] indirect tax.”).

In brief summary, to present in one place the five-part model that emerges from the Supreme Court's jurisprudence on taxation, there are:

1. Direct taxes subject to apportionment: capitations and property taxes.
2. Direct taxes exempt from apportionment: taxes on income derived from property (i.e., passive income).
3. Indirect taxes subject to uniformity: duties, imposts, and excises.
4. Indirect taxes prohibited: export taxes.
5. Indirect taxes exempt from uniformity.

IV. LOOKING TO THE FUTURE

“O brave new world, / That has such taxes in't!”⁵¹⁸

As government expenditures continue to outpace revenues, many have pushed to expand the intake. To that effect, a variety of additional taxes have been proposed or discussed in academic literature on the subject, the most prominent of which are addressed here and classified by the five-part model distilled in the previous section, as examples of the model's practical application. The proposed taxes were selected based on their novelty, and at least in the case of the last two, their singular creativity. The analyses that follow are brief and represent the author's thoughts on the appropriate categorization of these taxes, in the light of the lengthier reflections above.

A. Federal Consumption Tax

Sales taxes are ubiquitous in the United States, levied by the overwhelming majority of American state governments.⁵¹⁹ The federal government, however, has never imposed a broadly based

518. As Shakespeare's Miranda might say were she a tax lawyer. *Cf.* WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 1 (Rev. ed., Yale Univ. Press 1955); *but see* WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2 (Tucker Brooke ed., Yale Univ. Press 1923) (“The first thing we do, let's kill all the lawyers.”).

519. Scott Drenkard, *State and Local Sales Tax Rates in 2014*, TAX FOUND. (Mar. 18, 2014), <http://taxfoundation.org/article/state-and-local-sales-tax-rates-2014>.

consumption tax. With revenues projected to become a major problem for the United States, various consumption tax ideas have been floated. These include instituting a value-added tax (VAT),⁵²⁰ a type of tax already imposed by many countries, as well as more arcane proposals, such as the flat⁵²¹ and the unlimited savings allowance taxes.⁵²² A federal sales or VAT-type tax would clearly fall into the category of duties, imposts, and excises, as it would be imposed on transactions and would be levied indirectly.⁵²³ It would therefore be a third-category tax, an indirect tax subject to uniformity.

Some other proposed taxes, such as the flat and the unlimited savings allowance taxes are somewhat more complicated.⁵²⁴ The basic idea of both is that an individual must pay taxes on his annual income, with the income reduced by the amount saved that year (it is thus the inverse of a wealth tax). For businesses, the calculation is similar, except that they offset their income by investments made. The end result is that the taxpayer is taxed on his consumption. The classification of these taxes is not readily apparent. Since they appear to have qualities of both direct and indirect taxes, they have been called “direct-consumption taxes.”⁵²⁵ So far as these taxes are levied on passive income, they are indeed direct,⁵²⁶ but fall into the category

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520. See generally *The VAT Reader: What a Federal Consumption Tax Would Mean for America*, TAX ANALYSTS (2011), [http://www.taxanalysts.com/www/freefiles.nsf/Files/VATReader.pdf/\\$file/VATReader.pdf](http://www.taxanalysts.com/www/freefiles.nsf/Files/VATReader.pdf/$file/VATReader.pdf) (a collection of articles arguing for the imposition of a VAT in addition to the income tax); Americans for Fair Taxation, *How FAIRtax Works: Your Money, Your Decision*, FAIRTAX.ORG (2014), <https://fairtax.org/about/how-fairtax-works> (arguing for the wholesale replacement of the income tax by a consumption tax).
521. ROBERT E. HALL & ALVIN RABUSHKA, *THE FLAT TAX* 84 (2d ed. 1995). This proposal is not to be confused with the flat *income* tax that has been mooted in recent years. E.g., Jeanne Sahadi, *Rand Paul’s Hopes for a Flat Tax*, CNN MONEY (Mar. 31, 2014), <http://money.cnn.com/2014/03/31/pf/taxes/rand-paul-flat-tax/>.
522. Proposed by legislators and described in brief by Professors Zelenak and Jensen in their respective articles. Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833, 833–36 (1999); Jensen, *supra* note 16, at 2402–05.
523. *But see Nicol v. Ames*, 173 U.S. 509, 521 (1899) (observing in dicta that “a tax upon every sale made in any place” would be a tax on property and so direct).
524. See Jensen, *supra* note 16, at 2403–04 (concluding that other proposed taxes, such as the flat and the unlimited savings allowance taxes, are somewhat more complicated).
525. *Id.* at 2407.
526. Cf. Zelenak, *supra* note 522, at 842 (“[T]he Supreme Court’s understanding, expressed in the *Pollock* opinion of 1895, [is] that a tax imposed solely on earned income is not a direct tax. . . . the tax on earned income was invalidated only because the Court viewed it as not severable from the unapportioned direct tax on income from property.”).

of income taxes. These direct-consumption taxes effectively tax only the portion of income spent on consumption; nonetheless, it cannot be denied that they do tax income.⁵²⁷ The starting point for calculating the amount of tax due is income earned for the year. Even when reduced by the amount of savings or investments, the remainder is still properly characterized as income.⁵²⁸ It has become axiomatic in tax law that “every deduction from gross income is allowed as a matter of legislative grace.”⁵²⁹ That Congress decided to allow a deduction for savings, as opposed to any one of the panoply of current deductions and offsets, does not change the character of the thing taxed.⁵³⁰ These unusual income taxes, to the extent they fall on passive income, would land in the second category—direct taxes exempt from apportionment; the remainder would be placed in the third—indirect taxes subject to uniformity.

B. Federal Property Tax

Today, all states tax real estate and many tax some personal property on an ad valorem basis.⁵³¹ These taxes are, in addition to capitations, the quintessential direct taxes. Unlike the federal government, the states do not have any federal constitutional restrictions on their ability to levy direct taxes. Should the federal government attempt to tax real or personal property based on its value, such as by instituting a national real property tax, it would have to apportion it as required by the Constitution.⁵³² Arguments that a federal ad valorem property tax is an income tax on the yield from property are unpersuasive, especially as an income tax is substantially “a tax on economic outcomes,” requiring some form of realization, a feature lacking in a property tax.⁵³³ A federal property tax would fall into the first category of the model—direct taxes subject to apportionment.

527. *But see* Jensen, *supra* note 16, at 2408–09.

528. *See* Zelenak, *supra* note 522, at 846 (arguing that “excluding saved income from the tax base” is not “inconsistent with an income tax”).

529. *White v. United States*, 305 U.S. 281, 292 (1938).

530. Even if the tax were to be considered a non-income tax, it would only invalidate any portion of the tax that was on passive income and not apportioned (unless the direct-tax component was not severable from the indirect-tax part). The remainder, including that on wages, would be characterized as an indirect tax, subject to uniformity.

531. *See* Dodge, *supra* note 513, at 929–31.

532. *See* Berg, *supra* note 22, at 211.

533. *See* Dodge, *supra* note 513, at 932.

C. Wealth Tax

In recent years, the idea of a national wealth tax has found traction.⁵³⁴ In its several variants, ultimately such a tax would fall upon the wealth owned by individuals, including real property, tangible and intangible personal property, and cash. So far as the wealth tax included in its base real and personal property, it would be direct for the same reason that a federal property tax would be direct.⁵³⁵ Such a tax is not an excise on the privilege of holding property,⁵³⁶ as an excise on a privilege implies “discrete positive-law benefits conferred by government,” or at least some action or change in position to which the excise would attach.⁵³⁷ Here, the tax would be levied on property simply because of its ownership.⁵³⁸ Again, this would be a quintessential example of a first-category tax—a direct tax subject to apportionment.

D. Mark-to-Market Tax

A mark-to-market tax on publicly traded securities, like its more broadly based cousin, the wealth tax, has also found its advocates.⁵³⁹ This proposal involves taxing the increases in the value of publicly

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534. See, e.g., BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 95 (Yale Univ. Press 1999); Calvin H. Johnson, *Purging out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723, 1724 (2002); Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 424 (2000); Ackerman, *supra* note 20, at 56–58 (arguing for a federal wealth tax); *but see* Erik M. Jensen, *The Constitution Matters in Taxation*, 100 TAX NOTES 821, 822 (2003); Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and The Meaning of ‘Incomes’*, 97 TAX NOTES 99, 99–100 (2002).
535. See Berg, *supra* note 22, at 211–12.
536. *Contra* Richard W. Lindholm, *The Constitutionality of a Federal Net Wealth Tax: A Socioeconomic Analysis of a Strategy Aimed at Ending the Under-Taxation of Land*, 43 AM. J. ECON. & SOC. 451, 454 (1984) (arguing that an unapportioned wealth tax would be constitutional because the Court could separate the measure of the tax from its base, but that to be safe, it would be best to exclude land from the wealth tax base).
537. Dodge, *supra* note 513, at 933–34.
538. See *Springer v. United States*, 102 U.S. 586, 597–98 (1881) (noting Alexander Hamilton’s observation that taxes levied on the whole property of individuals or upon their entire real or personal estate are direct).
539. See, e.g., Martin A. Sullivan, *Economic Analysis: Can Marking Stock to Market Replace the Corporate Tax?*, 143 TAX NOTES 139 (2014) (describing a proposal to replace the corporate income tax with a mark-to-market tax on publicly traded stocks); David S. Miller, *A Progressive System of Mark-to-Market Taxation*, 109 TAX NOTES 1047 (2005) (proposing a progressive mark-to-market tax on publicly traded property and derivatives).

traded stock at regular intervals without regard to realization.⁵⁴⁰ In its typical form, this proposal extends only to publicly traded property, presumably because of easier monitoring and valuation.⁵⁴¹ Since a broadly based mark-to-market tax on unrealized capital gains would attach to personal property held by an individual simply because of his ownership of that property, it would be direct. Moreover, because there is no realization involved, it cannot be an income tax exempt from apportionment. Granted, there are already limited mark-to-market regimes for dealers in securities,⁵⁴² for futures contracts and options,⁵⁴³ and an exit tax on the property of certain expatriates,⁵⁴⁴ none of which have run into fatal challenges in the courts. However, these particular cases can be differentiated, as they involve either something more than the passive holding of securities or some change in position justifying what can effectively be deemed excise tax regimes.⁵⁴⁵ Accordingly, a mark-to-market tax would be, like the wealth tax, a first-category direct tax subject to apportionment.

E. Requisition Tax

Conceived as a possible replacement for the federal income tax, a requisition tax would resurrect the taxation regime in place before the Constitution went into effect.⁵⁴⁶ Under this proposal, the federal government would create a formula determining each state's fiscal obligations to the national treasury.⁵⁴⁷ The formula might be based on the relative share of total national income earned in the aggregate by a state's residents,⁵⁴⁸ or any other rationally based rule. Each state would then collect the assigned sum from its residents in whatever way it deems most appropriate.⁵⁴⁹ As discussed in the previous part,

540. See Miller, *supra* note 539, at 1067.

541. *Id.* at 1053.

542. I.R.C. § 475 (2012).

543. I.R.C. § 1256 (2012).

544. I.R.C. § 877A (2012). The exit tax has not gone unchallenged in commentary, however. See, e.g., Berg, *supra* note 322, at 214.

545. The author has addressed this question, as well as the constitutionality of a broadly based mark-to-market tax generally, in an earlier article. See Gene Magidenko, *Is a Broadly Based Mark-to-Market Tax Unconstitutional?*, 143 TAX NOTES 952 (2014).

546. See Strahilevitz, *supra* note 321, at 923–25.

547. *Id.* at 923–24.

548. *Id.* at 924.

549. Different states would presumably have different ideas about how best to assign the burden and collection of the tax, thereby functioning as “laboratories of democracy.” See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single

since a requisition is not imposed directly on individuals or property—and it is not a duty, an impost, or an excise—it would be the prime example of a fifth-category indirect tax exempt from uniformity.

F. Imputed Income Tax

The idea of a tax on imputed income has arisen in at least some quarters. “[I]mputed income” is “the rental value of an asset owned by the taxpayer that is held for personal use.”⁵⁵⁰ Such a tax could be measured, for example, by a levy on the amount of rent that a homeowner would expect to receive by renting out his home instead of living in it. Although such a tax might appear to have the characteristics of both an excise (as a tax on the ostensible “use” of a home) and a property tax (a tax on property because of its ownership),⁵⁵¹ in substance it cannot be anything but a property tax. The rental value of property is often intimately linked to the property’s actual value. In a case where the income is only hypothetical and where the value of a tax is determined with reference to the property’s value, this tax falls again into the first category—a direct tax subject to apportionment.⁵⁵²

G. Personal Endowment Tax

In the world of zany tax ideas, a personal endowment tax probably takes the prize. It is “a tax on a person’s human capital, or wage-earning capacity. . . . a tax on income-producing potential, as

courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

The difficulty with a requisition tax today recalls the country’s experience under the old Articles of Confederation—how is it to be enforced? If a state refuses to comply, the federal government could try, for example, to levy payroll or income taxes directly on the citizens of the recalcitrant state, a power not available when requisitions were last attempted. Strahilevitz, *supra* note 321, at 925. Since the federal government’s ability to coerce the states is limited, *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”), taxing individuals directly may be less constitutionally objectionable than most alternative enforcement mechanisms, though it is by no means free from doubt. *See supra* note 358.

550. Dodge, *supra* note 513, at 934.

551. *Id.* at 935–36.

552. *See Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371, 378–381 (1934) (holding that a tax on the rental value of the part of a building occupied by the owner is direct and not on income).

opposed to economic uses or outcomes.”⁵⁵³ It would presumably be measured by factors such as innate ability (genetics), education, and family status. At first glance, this tax seems akin to a capitation, as in some respects it is a levy on simply existing, measured by one’s “human capital.” It is not unlike a property tax imposed on unrealized value, which as noted above is direct. Yet human capital is not capital in the tax sense. Any wages that might be paid in compensation for one’s labor, or income derived from labor, at least for constitutional purposes, are indirect.⁵⁵⁴ If such a tax were to be found otherwise constitutionally acceptable, surely a very doubtful assumption,⁵⁵⁵ it would probably fall into the fifth category of indirect taxes exempt from uniformity. It is an indirect tax because it is derived from potential human labor, but since it does not attach due to a transaction, activity, or change in position, it cannot be deemed a duty, impost, or excise.

V. CONCLUDING THOUGHTS

At the risk of stating the obvious, tax reform is a very thorny matter. As time passes and the national government’s fiscal deficits continue, tax reform will loom ever more urgently. Although there are systemic obstacles to substantively changing the tax code, given the status quo, it is hard to suppose that new taxes will not be imposed in the future—the question seems one of timing more than anything else. America’s system of governance allows for great latitude in federal taxation, and this discretion makes wise decision-making at the helm vital.⁵⁵⁶ To that end, this Article has presented a model to facilitate lucid thought about taxes as integrated facets of the constitutional regime. As lawmakers and commentators contemplate taxation, they will find it helpful to consider not just the particulars but also how those particulars fit into the larger picture.

553. Dodge, *supra* note 513, at 938.

554. See *supra* note 488 and accompanying text.

555. For one, such a tax would effectively force someone to work against his will, quite possibly in a job he dislikes, raising serious equity concerns. See Dodge, *supra* note 513, at 939 n.433. In addition, since this tax could not be readily avoided (as can a property tax by disposing of property, for example), it would almost certainly run afoul of the Thirteenth Amendment. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

556. As John Adams wrote the day after (what has become) tax day: “[P]ublic Virtue is the only Foundation of Republics. There must be a positive Passion for the public good . . .” Letter of John Adams to Mercy Warren (Apr. 16, 1776), in 1 THE FOUNDERS’ CONSTITUTION 670 (Philip B. Kurland & Ralph Lerner eds., 1987).

Analysis that extends to only the specific or only the abstract is narrow and unlikely to lead to precise thought and well-reasoned decisions. Balancing particularity with abstraction, the model of taxation outlined here, derived from Supreme Court jurisprudence and informed by historical practice and experience, provides a conceptual framework for scrutinizing taxes and understanding how they fit into the constitutional design.

