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## Taxation and the Constitution, Reconsidered

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# Taxation and the Constitution, Reconsidered

John R. Brooks & David Gamage\*

## INTRODUCTION

We have entered a new era of demand for progressive tax law reforms.<sup>1</sup> Public concern about income and wealth inequality has skyrocketed in recent years.<sup>2</sup> Meanwhile, scholarship, activism, and media exposés have together brought newfound attention to how billionaires and mega-millionaires can largely escape existing taxes.<sup>3</sup> The essence of the problem is that our primary progressive tax instrument—the federal income tax—is no longer up to the job of managing ever-increasing concentrations of financial wealth.<sup>4</sup> Yet reform efforts

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<sup>1</sup> Jonathan Curry, UC Berkeley Economists Chosen as Tax Notes Federal's Persons of the Year, *Tax Notes Fed.* 1707 (Dec. 16, 2019) (explaining the recent dramatic rise in both prominence and popularity of wealth tax and related progressive tax reform proposals).

<sup>2</sup> E.g., Jason Katz-Brown, *Taxing Billionaires Is Enormously Popular*, *Data for Progress* (Nov. 23, 2021), <https://www.dataforprogress.org/blog/2021/11/23/taxing-billionaires-is-enormously-popular>; Amina Dunn & Ted Van Green, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don't Pay Fair Share*, *Pew Res. Ctr.* (Apr. 30, 2021), <https://pewrsr.ch/3taOYtk>.

<sup>3</sup> E.g., Emmanuel Saez & Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (2019) (an example of an influential scholarly book that has contributed to bringing such attention); Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, *ProPublica* (June 8, 2021, 5:00 AM) (an example of an influential media exposé that has contributed to bringing such attention), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax>; see also Curry, note 1, for further discussion of the impact of such scholarship and activism.

<sup>4</sup> E.g., David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 *N.C. L. Rev.* 487, 489-504 (2022) (explaining how the income tax system is broken and leads to many harmful consequences); Ari Glogower, *Taxing Inequality*, 93 *N.Y.U. L. Rev.* 1421, 1424 (2018) (“With

are stymied by fears that any legislative effort capable of combatting such wealth concentration would face constitutional challenges before the current Supreme Court.<sup>5</sup>

This Article argues that such fears are misplaced. There is in fact a long history of federal taxes similar to wealth taxes, and a well-developed constitutional jurisprudence to go along with that history. This jurisprudence has laid mostly dormant during the past century-plus of the income tax era, but a reconsideration of taxation and the Constitution shows that we should now have multiple viable paths for taxing extreme concentrations of wealth.

To elaborate, wealth tax reform proposals gained new prominence during the 2020 Democratic Party presidential primary and thereafter,<sup>6</sup> with numerous related proposals having since been introduced at both the federal and state levels.<sup>7</sup> More recently, in October 2021, Senator Ron Wyden, chairman of the Senate Finance Committee, introduced a Billionaires Income Tax reform, to tax billionaires annually on their unrealized gains from publicly traded assets without waiting for those assets to be sold.<sup>8</sup> This proposal offers a fundamental transformation of the income tax that could end how billionaires currently

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these changes, Congress has taken a hammer to a progressive income tax system that was already broken.”); Edward J. McCaffery, *A New Understanding of Tax*, 103 *Mich. L. Rev.* 807, 920 (2005) (“Taxes on capital are easily avoided and virtually voluntary.”). See generally Thomas Piketty, *Capital in the Twenty-First Century* (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press 2014) (describing increasing levels of wealth inequality in the United States since World War II).

<sup>5</sup> See, e.g., Daniel Hemel, *Opinion, A Wealth Tax Is a Good Idea—If We Had a Different Supreme Court*, *Wash. Post* (Oct. 26, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/26/wealth-tax-constitution-supreme-court/>; Hearing on Funding Our Nation’s Priorities: Reforming the Tax Code’s Advantageous Treatment of the Wealthy Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means, 117th Cong. (2021) (Testimony of Jason S. Oh, Professor, UCLA School of Law) (“I am skeptical whether the current Supreme Court would uphold an annual wealth tax.”). But see Laurence Tribe (@tribelaw), *Twitter* (Dec. 2, 2019, 10:28 AM) (agreeing with analysis by tax law professors Rebecca Kysar and Daniel Hemel about the constitutional vulnerability of Senator Elizabeth Warren’s proposal for a federal wealth tax), <https://twitter.com/tribelaw/status/1201523551972548608>; Laurence Tribe (@tribelaw), *Twitter* (Jan. 8, 2019, 10:09 AM) (writing subsequently—after reading an earlier draft of the analysis that became this article—that “I’ve studied this issue further and am convinced Professors John Brooks and David Gamage have explained how a system of interstate transfer payments could solve the constitutional problems with a wealth tax like the one @SenWarren has advocated”), <https://twitter.com/tribelaw/status/1214927128803905538>.

<sup>6</sup> Curry, note 1.

<sup>7</sup> E.g., Gamage & Brooks, note 4, at 494 n.32-33 (listing some such proposals); see also note 11 and accompanying text for a discussion of such proposals.

<sup>8</sup> S. Comm. on Finance, *Wyden Unveils Billionaires Income Tax* (Oct. 27, 2021), <https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax>. See generally Letter, *Ams. for Tax Fairness*, 219 *Economists, Law Professors & Other Academics Urge Congress to Include the “Billionaires Income Tax” in Build Back Better Act* (Dec. 10, 2021), <https://americansfortaxfairness.org/wp-content/uploads/Academics-BIT-Sign-On-Letter-219-signers.pdf?atf>.

escape taxation.<sup>9</sup> This proposal was supported by congressional leadership and came close to being enacted in 2021.<sup>10</sup> Since then, there have been multiple similar reform proposals, including most notably, President Biden's proposed Billionaire Minimum Income Tax Reform.<sup>11</sup>

Whatever happens in the near term, it seems virtually certain that progressive wealth tax and transformative income tax reform proposals, like a tax on unrealized gains for the ultra-wealthy (such as the Billionaires Income Tax), will continue to play a central role in tax policy debates for years to come. However, few seem confident that the current Supreme Court would uphold a "uniform" federal wealth tax,<sup>12</sup> and key voices similarly predict that the current Court might also strike down a "uniform" transformative income tax reform like the Billionaires Income Tax.<sup>13</sup> The current era is thus characterized by transformative progressive tax reform proposals all struggling against fears that the current Supreme Court might strike down such reforms.

As brief background, the Constitution grants Congress the power to impose "Taxes, Duties, Imposts, and Excises," but imposes two requirements on that power: (1) "Duties, Imposts, and Excises" must be

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<sup>9</sup> S. Comm. on Finance, note 8.

<sup>10</sup> E.g., Tami Luhby, Billionaires' Wealth Has Soared 70% in the Pandemic. That's One Reason Why Democrats Wanted to Tax Them., CNN (Oct. 28, 2021, 5:12 PM) <https://www.cnn.com/2021/10/28/politics/billionaire-wealth-tax/index.html>; Lisa De Simone & Bridget Stomberg, On the Billionaire Income Tax, Taxes for the Masses (Nov. 28, 2021), <https://www.audible.com/pd/On-the-Billionaire-Income-Tax-Podcast/B09MPHV7TV>.

<sup>11</sup> See, e.g., David Gamage & Darien Shanske, Phased Mark-to-Market for Billionaire Income Tax Reforms, 176 Tax Notes Fed. 1875, 1875 (2022); Reuven S. Avi-Yonah & David Gamage, Billionaire Mark-to-Market Reforms: Response to Susswein and Brown, 176 Tax Notes Fed. 555, 555-56 (2022); Brian Galle, David Gamage & Darien Shanske, Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth, 72 Duke L.J. 1257 (2023). Note that one of us (Gamage) co-drafted the proposed legislation to enact President Biden's Billionaires Minimum Income Tax Reform.

<sup>12</sup> See, e.g., Hearing on Funding Our Nation's Priorities: Reforming the Tax Code's Advantageous Treatment of the Wealthy, note 5; Josh Barro, Constitutional Concerns Are a Major Risk for a Federal Wealth Tax, N.Y. Mag.: Intelligencer (Feb. 10, 2019) (quoting eminent law professors as to the constitutional uncertainties and the risks that a conservative Supreme Court majority would strike down a wealth tax), <https://nymag.com/intelligencer/2019/02/constitutional-concerns-are-a-major-risk-for-a-wealth-tax.html>; Noah Feldman, Opinion, Wealth Tax's Legality Depends on What "Direct" Means, Bloomberg (Jan. 30, 2019, 2:58 PM) ("But the court's conservative originalists would almost surely go the other way."), <https://www.bloomberg.com/opinion/articles/2019-01-30/elizabeth-warren-s-wealth-tax-is-probably-constitutional>.

<sup>13</sup> E.g., Hemel, note 5; Jeff Neal, Does the Constitution Allow a Billionaire Tax? Harvard Law Professor Thomas J. Brennan Explains the Many Hurdles, Legal and Practical, an Effort to Tax Billionaires Would Face, Harv. L. Today (Oct. 28, 2021) (quoting Thomas Brennan on constitutional vulnerabilities), <https://hls.harvard.edu/today/does-the-constitution-allow-a-billionaire-tax/>; Richard Rubin, Billionaire Tax Faces Likely Constitutional Challenge, Wall St. J. (Oct. 26, 2021, 11:06 AM), <https://www.wsj.com/articles/democrats-billionaire-tax-constitution-11635258358>.

levied in a “uniform” manner—meaning that the same rules and rates apply to all taxpayers regardless of location; and (2) “direct taxes” must be “apportioned” among the states proportionally based on population—meaning that each state’s share of the revenue collected be equal to its share of the population.<sup>14</sup> The challenge then is that—with the small exception of capitation taxes—no tax can be both uniform and apportioned. Uniformity is generally desirable for federal taxes, but if a wealth tax or similar reform is a “direct tax” (as many argue), it must instead be apportioned.

Most scholarship treats our current constitutional tax law as an obstacle to these sorts of transformative reforms and argues that some change in the law would be required, such as a constitutional amendment or overruling old constitutional cases. We characterize this scholarship as assigning the Constitution’s direct tax apportionment requirement with a substantive barrier function. In other words, this scholarship assumes that apportionment is a dead letter for a range of political and pragmatic reasons and that uniformity is thus the only practically viable path to the exercise of the federal taxing power. Some eminent scholars have argued that the Constitution’s provisions limiting the federal taxing power are relics that should be abandoned or at least interpreted very narrowly.<sup>15</sup> Other opposing scholars have argued for interpreting these provisions broadly in order to dispute the constitutionality of a variety of tax reform proposals.<sup>16</sup> Numerous other scholars have struck intermediate positions, arguing for curtailed scope of the direct tax apportionment requirement, though still squarely assuming that apportionment functions as a substantive barrier such that any tax constitutionally required to be apportioned must for that reason be rejected.<sup>17</sup>

However, this scholarship on taxation and the Constitution ultimately derives from eras prior to the recent rise in prominence of pro-

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<sup>14</sup> U.S. Const. art. I, § 2, cl. 3; *id.* art. I, § 8, cl. 1; *id.* art. I § 9, cl. 4; see Part I.A.

<sup>15</sup> E.g., Bruce Ackerman, *Taxation and the Constitution*, 99 *Colum. L. Rev.* 1 (1999); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Center of the Constitution*, 7 *Wm. & Mary Bill Rts. J.* 1 (1998). Note that the title of this Article is a purposeful reference to Ackerman’s seminal contribution to this vein of scholarship.

<sup>16</sup> E.g., Hank Adler, *The Mandatory Repatriation Tax Is Unconstitutional*, 171 *Tax Notes Fed.* 63 (Apr. 5, 2021); Gene Magidenko, *Is a Broadly Based Mark-to-Market Tax Unconstitutional?*, 143 *Tax Notes* 952 (May 26, 2014); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 *Colum. L. Rev.* 2334 (1997).

<sup>17</sup> E.g., Ari Glogower, *A Constitutional Wealth Tax*, 118 *Mich. L. Rev.* 717 (2020); Daniel Hemel, *Taxing Wealth in an Uncertain World*, 72 *Nat’l Tax J.* 755 (2019); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 *Ind. L.J.* 111 (2018); Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 *Nw. U. L. Rev.* 799 (2014); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 *J. Const. L.* 839 (2009).

gressive tax reform proposals and when the Court took a more expansive view toward congressional legislative power than the current Court has. Throughout the 1970's through the 2010's, tax reform debates mostly focused on rather less-progressive proposals, including flat-tax reforms and national sales tax and spending tax reforms.<sup>18</sup> Meanwhile, the Supreme Court majority was then much less oriented toward limiting the federal taxing power. It was thus reasonable at that time to think that the path of least constitutional resistance was to call for the Court to make some limited changes—though ones that would lie within a jurisprudence based on assuming that the direct tax apportionment requirement serves a substantive barrier function—to smooth the way for incremental tax reforms. But that time has passed.

This Article reconsiders the Constitution's tax provisions for the new era and resurrects a mostly forgotten, or ignored, constitutional approach to the federal taxing power. Specifically, we reject the idea that the apportionment requirement serves a substantive barrier function and argue for a return to what we call a "two paths approach" to federal taxation under the Constitution. This view, dominant for over a century and still clearly embodied in the case law, treats apportionment not as an insurmountable hurdle, but simply as one of the two paths—along with uniformity—set out in the Constitution for levying federal taxes. To be sure, apportioned federal taxes have historically been much less common than uniform ones, and apportionment is certainly the more arduous of the two paths for most or all modern federal taxes. But it is a viable path, nonetheless. Furthermore, the framers, early Congresses, and early Supreme Courts understood apportionment to be an entirely appropriate way to ensure interstate equity for certain taxes closely linked with population, not a way to handcuff Congress's plenary taxing power. As we will explain, a two-paths approach was widely followed prior to the Civil War. It fell into disuse during the post-Civil War rise in industrial capitalism but has since been strengthened by the passage of the Sixteenth Amendment and by subsequent Supreme Court cases, especially by the critical but often overlooked cases of *Brushaber v. Union Pacific Railroad Co.*<sup>19</sup> and *Stanton v. Baltic Mining Co.*<sup>20</sup>

A workable two-paths approach may well be essential for progressive federal tax reform. In particular, scholars who see the apportionment requirement as a substantive barrier to a federal wealth tax generally agree that overcoming this would require the Court to overturn a key holding in its two decisions in the case striking down the

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<sup>18</sup> See Curry, note 1.

<sup>19</sup> 240 U.S. 1 (1916).

<sup>20</sup> 240 U.S. 103 (1916).

1894 income tax, *Pollock v. Farmers' Loan & Trust Co.* (collectively, *Pollock*),<sup>21</sup> that taxes on both real and personal property solely because of ownership of such property are direct taxes that must be apportioned. There are no indications, however, that the current Court majority has any interest in overturning that holding.<sup>22</sup> Under a two-paths approach, this need not be the end of the story. The first reason is that apportioned direct taxes are blessed by the Constitution.<sup>23</sup> Indeed, Congress used the apportionment path five times between the late 1700's and mid-1800's in enacting the early Direct Tax Acts, providing us with some guidance for how to apportion.<sup>24</sup> The second reason is that the Supreme Court's subsequent jurisprudence has since continued to acknowledge the existence of two paths for the federal taxing power and in doing so has provided clear and workable standards for when each path should apply. However, much of this jurisprudence has been neglected during the past century, when it has been generally accepted that the apportionment path was no longer practically viable.

The challenge of the apportionment path is the requirement to allocate the burden of a tax act among the states by population, so that the percentage of the revenue collected from each state is in proportion to each state's share of the total population.<sup>25</sup> For anything other than flat taxes on persons (called "capitations" or "poll taxes"), this then effectively requires higher tax rates in poorer states and lower tax rates in richer states. Such differential tax rates across states would seem to pose an immediate political hurdle to any apportioned tax as representatives and senators from states that would face higher rates could be expected to reject any such proposals out of hand as unfair and unduly burdensome for their constituents.

Prior to the Civil War, however, it was understood that, aside from capitations, a tax on real property was the only other direct tax requiring apportionment, and also that there were not yet huge differences in per capita land value among the states.<sup>26</sup> In those circumstances,

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<sup>21</sup> *Pollock v. Farmers' Loan & Tr. Co.* (Pollock I), 157 U.S. 429 (1895). As we discuss in Part II.C, *Pollock I* was affirmed on rehearing and went further to declare the entire income tax unconstitutional. *Pollock v. Farmers' Loan & Tr. Co.* (Pollock II), 158 U.S. 601 (1895).

<sup>22</sup> E.g., Milan N. Ball, Cong. Res. Serv., RL46551, *The Federal Taxing Power: A Primer* 9, (2020) ("[I]t does not appear that the Supreme Court has overruled *Pollock's* central holding that a tax on real or personal property solely because of its ownership is a direct tax."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012) ("[The] result [in *Pollock*] was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.").

<sup>23</sup> Ball, note 22, at 2; *Brushaber*, 240 U.S. at 12, 18-19.

<sup>24</sup> See Part I.G.

<sup>25</sup> See Part IV.A.

<sup>26</sup> See Part I.G.

small differentiation of tax rates across states was not considered disqualifying. Moreover, because direct taxes were levied as lump sum levies, some method of apportionment among the states was administratively necessary, and at a time when all forms of federal taxation faced major administrative and implementation challenges, apportionment by population seemed a reasonable compromise for administrative simplification. However, during the Civil War, the representatives of poorer farming states argued that richer mercantile states should pay for more of the costs of the war, leading in part to the first income tax in 1861.<sup>27</sup> These arguments then solidified into a new conventional wisdom as industrial capitalism grew in the late 1800's and early 1900's.<sup>28</sup> Since then, there has been near-unanimous agreement among scholars, jurists, and policymakers that apportioned direct taxes were no longer practically viable because of fairness concerns about overtaxing poor states as compared to rich states.<sup>29</sup> Under this view, even if apportionment was once reasonable and practically viable, the world moved on while the constitutional text remained fixed, eventually making it practically infeasible to access the apportionment path.

Yet this Article explains how the nature of the modern fiscal world has since evolved further, so that apportionment is once again practically viable. The conventional wisdom against apportionment was quite likely correct in the late 1800's and early 1900's due to rising wealth disparities among the states, and especially when federal revenues were being raised to fund war efforts. The fiscal tools available at the time to manage distributional issues were relatively primitive. But the nature of the U.S. fiscal system evolved with the New Deal and with the subsequent expansion of the income tax and federal social welfare programs, plus similarly robust state fiscal systems. As a result, the U.S. fiscal system now regularly transfers large sums from rich states to poor states.<sup>30</sup>

In this new fiscal world, we argue that it is myopic to rule out apportioned taxes due to issues of interstate inequity. As we will explain, to the extent that apportioning a new federal tax reform might create issues related to interstate inequity, this can now easily be remedied by adjusting existing interstate transfer payments or through other

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<sup>27</sup> See, e.g., Monica Prasad, *The Land of Too Much: American Abundance and the Paradox of Poverty* 125-26 (2012); Simon Belokowsky, *Bezos v. Frankenstein: Historical Perspective of Wealth Taxes*, 173 *Tax Notes Fed.* 47, 47-48 (Oct. 4, 2021).

<sup>28</sup> Prasad, note 27, at 126-29.

<sup>29</sup> See, e.g., Ackerman, note 15, at 2; Johnsen & Dellinger, note 17, at 125; Dodge, note 17, at 841; Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 *Const. Comment.* 295, 296 (2004).

<sup>30</sup> See notes 345-348 and accompanying text.



forms of fiscal equalization.<sup>31</sup> We already rely on a basket of fiscal tools across multiple levels of government to manage distribution, and our solution is just an extension of that.

However, although we defend apportionment's practical viability, we recognize that for most or all modern federal taxes it is the more cumbersome of the two paths and that its added complications may make it less attractive politically. We thus still have a critical question of which forms of taxation must follow the apportionment path and which can follow the uniformity path. The valence of that question is greatly reduced as compared to a world in which apportionment is thought to serve a substantive barrier function, but it remains highly relevant and important. To address that question, we examine the history of Supreme Court case law and especially how that case law incorporated the passage of the Sixteenth Amendment. When viewed as a whole, we argue, the cases show a coherent and largely consistent jurisprudence explaining how to manage the two paths. In particular, the Court developed what we call the "Excise Tax Canon."<sup>32</sup>

As we use the term in this Article, the Excise Tax Canon is a quasi-canon of constitutional interpretation that starts by recognizing that there is considerable overlap between (1) the categories of taxes that might be considered direct taxes on property itself and (2) the categories of taxes that might be considered excises on uses of property or on activities engaged in with respect to property or on privileges exercised with respect to property. This is because almost any tax formally levied on uses of property (or on activities or privileges relating to property) could potentially be recharacterized as a tax burdening that property itself. Thus, were one to draw a Venn diagram of these overlapping categories, the overlapping portion might well be much larger than the nonoverlapping portions.

So, then, which requirement—uniformity or apportionment—should govern as to this overlap, wherein a tax could be characterized as either an excise or a direct tax? We argue that the cases have developed a jurisprudence holding that, as to this overlap, if Congress formally designs a tax as a uniform excise on uses of property or on activities or privileges relating to property, then the courts should not

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<sup>31</sup> Part IV.A.

<sup>32</sup> The relevant cases often use the term "excise" and the term "duty" interchangeably, and typically without any clear delineation between these categories. For simplicity of exposition, we thus define the term excise broadly—to include any tax levied on uses of property or on activities engaged in with respect to property or on privileges exercised with respect to property—and without worrying about whether any of these should instead be considered duties. Thus, although it might be somewhat more precise to call the "Excise Tax Canon" instead something like the "Excise or Duty Tax Canon," or perhaps even the "Excise, Duty, or Impost Tax Canon," we simplify with the pithier wording of just the "Excise Tax Canon."

seek to recharacterize this as a direct tax on the property itself to require apportionment. We call this jurisprudence the Excise Tax Canon.

For scholars assuming that the apportionment requirement for direct taxes was intended to serve a substantive barrier function, it might seem counterintuitive for courts to effectively grant Congress deference as to whether taxes in this overlap can be designed to follow the uniformity or the apportionment path. Embracing that logic, the *Pollock* Court essentially rejected the Excise Tax Canon to recharacterize the 1894 income tax (which, consistent with prior and subsequent Supreme Court rulings,<sup>33</sup> the *Pollock* Court agreed would otherwise qualify as an excise)<sup>34</sup> as equivalent to a direct tax on the property that was the source of the income being taxed. However, as we will explain, that holding of *Pollock* has already been overturned by the Sixteenth Amendment and by subsequent Supreme Court cases. In most of the relevant case law from the founding era through the early twentieth century, the Supreme Court has instead followed the Excise Tax Canon to uphold uniform taxes burdening property as excises on uses or activities or privileges relating to that property. We argue that this is appropriate, following the two paths' view that apportionment and uniformity were intended to operate just as two different meta-rules for ensuring interstate equity, and were not meant to substantively limit the congressional taxing power apart from requiring one of these two meta-rules. We explain that this view goes back to the beginning years of the Republic and is rooted in the earliest understandings of the respective domains for direct taxes and excises, our two main constitutional categories.

Why have important aspects of this history and Supreme Court case law composing the Excise Tax Canon been largely unappreciated in

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<sup>33</sup> E.g., *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18-19 (1916) (holding that taxes on income that are exempted from the apportionment requirement by the Sixteenth Amendment are excises and that any contentions to the contrary that would “destroy[] the two great classifications” are “wholly without foundation”).

<sup>34</sup> *Id.* at 16-17 (“[T]he conclusion reached in the *Pollock* Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such 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, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the *Pollock* Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from ‘professions, trades, employments, or vocations’ . . . its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past.” (quoting *Pollock II*, 158 U.S. 601, 637 (1895)).

modern debates? We place the blame for this primarily on the notorious 1920 Supreme Court case of *Eisner v. Macomber*.<sup>35</sup> Today, it is generally understood that *Macomber* has been largely overturned by subsequent Supreme Court decisions, if not completely overruled.<sup>36</sup> Nevertheless, the confusion created by *Macomber*'s shoddy reasoning has made a mess of the past century of writing on the Sixteenth Amendment and its relationship to the Constitution's tax provisions. With the law having largely moved on from *Macomber*, we argue that it is now time to rediscover the Excise Tax Canon as a guide for navigating which forms of taxation can follow the uniformity path and which must be apportioned.

Building on that history of constitutional tax jurisprudence, we offer strategies for how a congressional majority desiring transformative progressive tax reforms can overcome the obstacle of a Supreme Court presumed to be hostile. One set of strategies involves the use of legislated fallback clauses. While we believe that a properly constructed wealth tax or related reform should be considered an excise under current law, there is understandable concern that the Court could hold a wealth tax to be a direct tax subject to apportionment. Therefore, we recommend that Congress legislate fallback clauses to direct that a reform follow whichever path the Court might rule to be required. For instance, a new wealth tax might be designed to follow the uniformity path, but with fallback instructions included for apportioning the tax instead, in case the Court mandates apportionment.

We explain how Congress can design such fallback clauses by building on the history of the early Direct Tax Acts and of the Supreme Court precedents composing the Excise Tax Canon. We similarly explain how that history can guide Congress in enacting the other set of strategies that we propose for overcoming presumed hostility by the Supreme Court—the use of tax-reform trial balloons.

Our two main arguments here—that a properly constructed wealth tax or similar reform should not have to be apportioned, but also that it is possible and practical to do so—may appear to be in some tension. But we think it is important to understand each argument in the context of the other. Together they show—contrary to most existing scholarship—that the direct tax question is not a strict binary about constitutionality, but rather a question of legislative design, sensitivity to interstate equity, and judicial deference to Congress's choice of tax instruments. Ultimately, we argue that fear of presumed hostility by the Supreme Court should not stand in the way of legislating transformative tax reforms desired by a congressional majority. We call for

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<sup>35</sup> 252 U.S. 189 (1920); see Part III.B-C.

<sup>36</sup> Part III.C.

moving on from the outdated substantive barrier conception of apportionment and for a return to the two-paths approach that was widely followed prior to the Civil War.

This Article proceeds as follows. Part I reviews the law and history from the founding through the Civil War, the period when apportioned federal taxes were used regularly, but also where the Court first started to delineate what taxes were “excises” that can follow the uniformity path and what taxes were “direct taxes” that had to be apportioned. Part II covers the period from the Civil War up until the Sixteenth Amendment, a period where, because of the rise of industrial and corporate capitalism, apportionment began to be seen as a barrier to progressive taxation rather than a viable path. During this period, the Court solidified the interpretive approach we call the Excise Tax Canon, while Congress began experimenting with new forms of progressive taxation, especially income taxation. The Court famously struck down an income tax in *Pollock*, but quickly backed away from its most problematic holding in that case even before being overruled on that point by the Sixteenth Amendment. Part III covers the Sixteenth Amendment and the rise of income taxation. Constitutional tax law and scholarship in this period were overwhelmingly about defining the shape and scope of uniform federal taxes. But during this period the Supreme Court also made some important moves to revitalize the Excise Tax Canon and the two-paths approach. Part IV operationalizes our two-paths approach for the new era, showing that apportionment is once again practically viable when combined with our current set of modern fiscal tools. We also discuss here why, under the Excise Tax Canon, a wealth tax or related reform should alternatively be authorized to follow the uniformity path. However, because of the uncertainty around which path the Court might require, this Part also presents strategies for navigating that uncertainty.

### I. THE FOUNDING THROUGH THE CIVIL WAR: NAVIGATING THE BOUNDARIES OF EXCISE TAXES AND APPORTIONED DIRECT TAXES

In this Part we review some of the political, economic, and fiscal context for taxation from just prior to the ratification of the Constitution up until the Civil War. Our goal is to illustrate the way taxation was thought about and practiced, both generally at that time but also in the specific context of the early Republic, in order to better understand the nature of direct taxes, excises, apportionment, and so on. While one purpose of this Article is to explore the constitutional meaning of the apportionment requirement for “direct taxes,” this dis-

cussion is not primarily an attempt to discover the original public meaning of the term “direct tax.” Indeed, as we explain in Section A, the historical record is conclusively *inconclusive* on what the framers specifically meant by the term “direct tax” or even that they intended anything specific at all. Instead, we describe the modes of thinking and fiscal practices that can help to make some sense of what might, from our modern standpoint, seem like nonsensical constitutional language. What we find is that the limitations on direct taxation were intended to address very particular political, economic, and fiscal concerns that were largely outdated by the end of the Civil War. Furthermore, we also find that the apportionment requirement for direct taxation was not seen as insurmountable, and indeed was somewhat reasonable for the types of taxes it applied to. Congress and the Court were actively working together in this period to clarify how the two-paths approach worked in practice. As we will see in Part II, it is only after the Civil War that the apportionment requirement starts to be seen as a substantive barrier to direct taxation rather than an alternative path.

#### A. *The Apportionment Clauses of the Constitution*

We begin with the constitutional text itself. The portions of the Constitution relevant to the question of wealth and related taxes are as follows. First, the Constitution grants a broad general taxing power to Congress, but requires that all “Duties, Imposts, and Excises” be “uniform”:

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; but all Duties, Imposts and Excises shall be uniform throughout the United States;<sup>37</sup>

Second, the Constitution requires that any “direct taxes” be “apportioned” in the Apportionment Clauses:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.<sup>38</sup>

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<sup>37</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>38</sup> U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.<sup>39</sup>

This basic structure of the Constitution thus provides two paths for Congress to enact taxes: Any “duty, impost, or excise” must be *uniform* and any “direct tax” must be *apportioned*—that is, must be divided among the states in proportion to their shares of the population.

Our task here is to dig further into the legal meaning of “direct tax” and how any apportionment of direct taxes is to be accomplished, but we first want to briefly address and put aside two prior interpretive questions that could be relevant to constitutional tax issues. First, it would be reasonable to wonder whether there are additional categories of tax beyond “duty, impost, and excise” and “direct” for which neither the uniformity nor apportionment requirements would apply.<sup>40</sup> But the Supreme Court has settled on the interpretation that these categories cover all taxes.<sup>41</sup> This is one reason why the Court often replaces “duties, imposts, and excises” with “indirect”—to emphasize that taxes are either direct or indirect, and that covers the whole spectrum of possible taxes. (The Constitution, though, never uses the word “indirect,” and some taxes can be described as both direct and indirect, issues we will return to below.)

Second, the settled interpretation of “uniform” is that these taxes must be applied in the same manner and with the same rate schedules across the country.<sup>42</sup> Residents cannot face different federal tax schemes based on their state or other place of residence. This was not always the obvious interpretation, however. Prior to the modern income tax, there was some real belief that taxes with progressive rates could fail the uniformity requirement because those rates would not be “uniform.”<sup>43</sup> In other words, some interpreted uniformity to mean

<sup>39</sup> U.S. Const. art. I, § 9, cl. 4.

<sup>40</sup> See, e.g., *Hylton v. United States*, 3 U.S. (3 Wall.) 171, 176 (1796) (opinion of Paterson, J.).

<sup>41</sup> See, e.g., *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18-19 (1916) (holding that taxes on income that are exempted from the apportionment requirement by the Sixteenth Amendment are excises and that any contentions to the contrary that would “destroy[ ] the two great classifications” are “wholly without foundation”); *Pollock I*, 157 U.S. 429, 557 (1895).

<sup>42</sup> See, e.g., *United States v. Ptasynski*, 462 U.S. 74, 80-82 (1983); *Knowlton v. Moore*, 178 U.S. 41, 106 (1900) (uniformity does not “signify an intrinsic but simply a geographical uniformity”); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 594 (1884) (“The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.”). Note that the uniformity requirement has not been extended to unincorporated territories such as Puerto Rico. See, e.g., IRC § 933.

<sup>43</sup> See, e.g., Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 20-26 (1992) (discussing legal arguments leading up to and in *Pollock*).

only flat-rate taxes would be allowed. This was, for example, one of the taxpayer arguments in *Pollock*—that if the income tax was not a direct tax, then in the alternative it would be a nonuniform indirect tax because it taxed higher-income individuals with higher tax rates.<sup>44</sup> The Supreme Court did not take the invitation to interpret “uniform” that way, however, and it is settled today that *uniformity* means only geographic uniformity.<sup>45</sup>

The central constitutional tax questions that remain then are: What taxes are “direct taxes” that must be apportioned? And how can any necessary apportionment be done? Apportioning a tax among the states in proportion to population is nontrivial for anything other than a “capitation” (the only stated example of a direct tax in the Constitution), because no other tax bases are proportionally distributed.<sup>46</sup> The per capita amounts of income, wealth, sales, estate size, number of carriages, etc., all differ state to state, and so would require *differentiated* tax rates state to state. (A capitation—also known as a “head tax” or a “poll tax,” a flat per-person tax—is the only tax that could be both uniform and apportioned by population.) Thus it is vital to know which taxes count as “direct” and how to apportion them.

As a question of textual interpretation, it is reasonable to begin with the text and its original meaning as understood by the framers and the broader public at the time. The challenge, however, is that it is not at all clear what the framers meant by “direct tax.”<sup>47</sup> Famously, according to James Madison, at the Constitutional Convention “Mr. King asked what was the precise meaning of *direct* taxation? No one answe[re]d.”<sup>48</sup>

Many scholars have tried to tackle the question of what the original meaning of “direct tax” is and have all landed in slightly different places. (See, for example, the impressive work of Calvin Johnson,<sup>49</sup> Bruce Ackerman,<sup>50</sup> Dawn Johnson and Walter Dellinger,<sup>51</sup> and Erik Jensen,<sup>52</sup> all of whom come to somewhat different conclusions.) In-

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<sup>44</sup> *Pollock I*, 157 U.S. at 555.

<sup>45</sup> See note 42.

<sup>46</sup> However, Hamilton and other framers may have believed it was relatively easy to apportion land taxes by population. See notes 98-99 and accompanying text.

<sup>47</sup> See Edward B. Whitney, *The Income Tax and the Constitution*, 20 *Harv. L. Rev.* 280, 280-83 (1907) (discussing the paltry debate around the issue, both at the Constitutional Convention and in state ratifying conventions); Dodge, note 17, at 860-64.

<sup>48</sup> 2 *The Records of the Federal Convention of 1787*, at 350 (Max Farrand ed., 1911).

<sup>49</sup> See Johnson, note 29; Calvin H. Johnson, *Purging Out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 *Tax Notes* 1723 (2002); Johnson, note 15.

<sup>50</sup> Ackerman, note 15.

<sup>51</sup> Johnson & Dellinger, note 17.

<sup>52</sup> Erik M. Jensen, *Interpreting the Sixteenth Amendment (by Way of the Direct-Tax Clauses)*, 21 *Const. Comment.* 355 (2004); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 *Ariz. St. L.J.* 1057 (2001); Jensen, note 16.

deed, we believe that the literature and the history point instead to the overwhelming conclusion that the text is ambiguous and was so at the time. Plausible evidence exists that the framers and other contemporaneous individuals may have thought that “direct tax” meant: a head tax;<sup>53</sup> a head tax and a land tax;<sup>54</sup> only taxes the incidence of which could not be shifted to others;<sup>55</sup> only requisition-style lump sum taxes;<sup>56</sup> the *opposite* of requisition-style taxes;<sup>57</sup> taxes on real property;<sup>58</sup> taxes on all property, including financial assets;<sup>59</sup> any tax on a person (as opposed to a transaction);<sup>60</sup> and any internal tax.<sup>61</sup> The history is also clear that the meaning of “direct tax” is inextricably bound up with slavery and the Three-Fifths Clause in a way that makes the term effectively meaningless today,<sup>62</sup> a point that was understood as early as the very first direct tax case in 1796<sup>63</sup> and by early scholars.<sup>64</sup>

Furthermore, deciding on a single constitutional definition of “direct tax” is not nearly the end of the task. Other questions are just as important: Can a tax that is economically equivalent to a direct tax be constructed in an “indirect” way? And if a tax is indeed direct, how do we follow the apportionment path? The remainder of this Part shows some of the early ways these questions were answered.

<sup>53</sup> Ackerman, note 15, at 12-13.

<sup>54</sup> See, e.g., The Federalist Nos. 21, 36 (Alexander Hamilton); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.); Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q.J. Econ. 436, 437-39 (1889) (discussing Hamilton and the French Physiocrats); Ackerman, note 15, at 17-20 (same).

<sup>55</sup> E.g., Oliver Wolcott, Jr., *Direct Taxes*, H.R. Doc. No. 100 (1796), in 1 *American State Papers: Finance* 414 (Walter Lowrie & Matthew St. Clair Clark eds., D.C., Gales & Seaton 1832); Edwin R.A. Seligman, *The Income Tax: A Study of the History, Theory, and Practice of Income Taxation at Home and Abroad* 537-38 (1911). The French Physiocrats also fit in this category because of their belief that all taxes were ultimately paid out of the produce of land—and thus taxes not on land were indirect because they would still fall on land. See Ackerman, note 15, at 18-19.

<sup>56</sup> See Robin Einhorn, *American Taxation, American Slavery* 168 (2006); Johnson, note 15, at 12-14.

<sup>57</sup> See The Federalist No. 30, at 138 (Alexander Hamilton) (Terence Ball ed. 2003) (arguing that a purpose of the Constitution was to overcome the failures of the requisition system); The Federalist No. 36, at 165 (Alexander Hamilton) (Terence Ball ed., 2003) (distinguishing between taxes and requisitions).

<sup>58</sup> Dodge, note 17, at 917-32.

<sup>59</sup> See Wolcott, note 55 (generally describing all such taxes as “direct taxes”).

<sup>60</sup> E.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796) (opinion of Chase, J.) (noting that distinction from Adam Smith); Jensen, note 16, at 2394-96.

<sup>61</sup> Johnson, note 15, at 46-51.

<sup>62</sup> See generally Ackerman, note 15.

<sup>63</sup> See *Hylton*, 3 U.S. (3 Dall.) at 178 (opinion of Paterson, J.).

<sup>64</sup> See Seligman, note 55, at 594 (“We have learned that the only reason of [direct tax language’s] original insertion was to effect a compromise on the slavery questions. Now that slavery had long been abolished, there was no further reason for retaining the clause in the constitution.”).



*B. Political Economy Versus Legal Definitions of “Direct”*

An issue that must be dispensed with first is the idea that the legal or constitutional meaning of “direct tax” must line up with other usages of the term outside of U.S. constitutional law, particularly as it was used in contemporary political economy discussions around the time of the Constitution’s drafting. There is a common intuition—even today—that “direct” taxes are those levied on a person while “indirect” taxes are those levied on a transaction or activity. For example, in European law today there is a legal distinction between “indirect taxation” (such as value-added taxes), over which the central European Union government has some authority, versus “direct taxation” (such as income taxes) for which more control is retained by the European Union member nations.<sup>65</sup> At the time of the Constitution’s ratification, political economy thinkers sometimes expressed the distinction through the idea of “tax incidence”—a direct tax was one where the person liable for the tax was also the one who paid it, whereas an indirect tax was one where the cost of the tax was passed on to another.<sup>66</sup> For example, a customs duty might be levied on a trader, but would ultimately be borne by an end consumer through higher prices. But as courts have acknowledged since the beginning of the Republic, there is no evidence that the framers intended to import these other nonlegal meanings, particularly when there were so many other potential meanings floating around.<sup>67</sup>

The distinction between legal and nonlegal meanings appears clearly in Treasury Secretary Oliver Wolcott, Jr.’s 1796 report to Congress on direct taxation, commissioned before the first federal direct tax. For example, Wolcott describes several state direct taxes, including taxes on personal property,<sup>68</sup> financial assets,<sup>69</sup> and even labor income.<sup>70</sup> Nonetheless, Wolcott distinguishes these direct taxes from the

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<sup>65</sup> See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union, art. 113, June 7, 2016, 2016 O.J. (C 202) 1.

<sup>66</sup> See note 55.

<sup>67</sup> This incidence-based analysis would also be nonsensical today given our more modern understandings of market equilibria and tax elasticity. Who bears the burden of a given tax does not depend on the form the tax takes but rather on a complex set of factors that reflects things like market power and labor bargaining, for example, as well as psychological factors. See Don Fullerton & Gilbert E. Metcalf, *Tax Incidence*, in 4 *Handbook of Public Economics 1787, 1788-89* (A.J. Auerbach & M. Feldstein, eds.) (2002).

<sup>68</sup> See Wolcott, note 55, at 418, 419.

<sup>69</sup> See *id.* at 418.

<sup>70</sup> See, e.g., *id.* (imposing a tax on “profits of lawyers, traders, and owners of mills” in Vermont). Seligman took issue with equating these sorts of “faculty” taxes to income taxes, since they were intended more as a way to measure what we might today call “human capital,” or alternatively as a tax on business profits. Edwin R.A. Seligman, *The Income Tax in the American Colonies and States*, 10 *Pol. Sci. Q.* 221, 222-23, 244 (1895). These taxes only tried to measure the value of a thing, rather than all of the income of a person.

“direct taxes” requiring apportionment under the Constitution. For instance, regarding state direct taxes on the income of professions and merchants, Wolcott says that “[i]t is presumed, that taxes of this nature cannot be considered as of that description which the constitution requires to be apportioned among the States.”<sup>71</sup> He adds that “[a] direct tax, *in the sense of the constitution*, must necessarily include a tax on lands,” again distinguishing between the state direct taxes he reports on and the type of tax required to be apportioned.<sup>72</sup>

Furthermore, *the Constitution never uses the word “indirect.”* The distinction drawn in the text of the Constitution is not between direct taxes and indirect taxes, as in the European Union, but rather between direct taxes and “duties, imposts, and excises.”<sup>73</sup> It is true that the discussions in the case law and elsewhere often reduce the latter category to “indirect” for simplicity, but as we will discuss below, the concept of an excise tax straddles the political-economic distinction, since one excises against a “thing” as much, or more, as a “transaction.”<sup>74</sup> The first such excise in the United States, for example—the famous Whiskey Tax of 1791—applied to all domestically distilled whiskey *regardless* of whether the whiskey was ever sold into the market, and the tax was levied as a per-gallon charge, independent of the selling price.<sup>75</sup> It was in effect a tax on a type of property. Of course, the intent was to tax a commercial product, but the effect was broader than that; one of the grievances in the Whiskey Rebellion was that whiskey was also used as a medium of exchange in cash-poor frontier regions, meaning that the excise operated in some circumstances like an income tax.<sup>76</sup> Needless to say, this complicates the incidence-based analysis preferred by eighteenth-century economists. As we will see, almost all the taxes challenged as “direct”—including the first income tax—were ultimately upheld as excises.

The takeaway then is that whatever preconceived ideas a reader today has about direct versus indirect taxes must give way to how the framers and early policymakers actually operationalized the distinc-

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Id. at 244; *see also* Ajay Mehrotra, *Making the Modern American Fiscal State* 133-35 (2013). The distinction is relevant, but as in other analyses, Seligman may be trying to give too much substance to formalistic distinctions. *See* John R. Brooks, *The Definitions of Income*, 71 *Tax L. Rev.* 253, 114-18 (2017).

<sup>71</sup> Wolcott, note 55, at 439.

<sup>72</sup> Id. (emphasis added).

<sup>73</sup> *See* text accompanying note 37.

<sup>74</sup> *See* *Thomas v. United States*, 192 U.S. 363, 370 (1904) (classifying “duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like” as excises).

<sup>75</sup> Act of March 3, 1791, ch. 15, § 15, 1 Stat. 199, 203.

<sup>76</sup> *See, e.g.,* William Hogeland, *The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America’s Newfound Sovereignty* 67 (2006).

tion for constitutional law purposes. From the earliest days of the Republic, the “excise” category was an expansive one that allowed for many types of taxes without regard to whether a political economist might consider them “direct” or “indirect,” whether based on tax incidence or any other purported distinction. As we will see the “directness” of a tax was more about the form of the tax than the thing being taxed.

### *C. Taxation in the Colonies and Early Republic*

To further understand this distinction between a “direct tax” and a “duty, impost, or excise,” and also the function and purpose of apportionment, we can look to how taxes were actually used during the era from the late colonial period up until the early years of the Republic. At that time, most taxes typically took just two forms: customs and excise taxes on goods and certain activities, and lump sum levies on individual “polls” (i.e., heads)<sup>77</sup> and property.<sup>78</sup> Key to both was an actual tax collector who assessed a specific dollar amount on the taxpayer.<sup>79</sup> These are quite different from today’s code-based, annual formulaic taxation of income that, comparatively speaking, operates almost automatically or by operation of law. Early tax authorities simply didn’t have the technology or administrative capacity to expect annual measurement of individual ability to pay, or to be able to enforce such a tax.

The taxes on individual property and polls were generally “lump sum,” that is, imposed as a single one-off tax of a specific amount of money, rather than as an ongoing periodic tax.<sup>80</sup> Thus the legislature

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<sup>77</sup> “Poll” being an archaic synonym for head or the top of a head. Poll, Merriam-Webster, <https://www.merriam-webster.com/dictionary/poll>.

<sup>78</sup> See, e.g., Edwin R.A. Seligman, *Essays in Taxation* 19-20 (1st ed. 1895); Thomas J. Cooley, *Treatise on the Law of Taxation, Including the Law of Local Assessments* 18-31 (1st ed. 1876).

<sup>79</sup> See Cooley, note 78, at 258-64; Wolcott, note 55, at 418-36.

<sup>80</sup> The term “lump sum” has been used to describe a number of different forms of taxation. Edwin Seligman used it to describe a tax imposed on an individual against all of their income, in contrast with what he called a “stoppage-at-source” withholding tax on different sources of income. Edwin R.A. Seligman, *The Income Tax*, 9 *Pol. Sci. Q.* 610, 636-37 (1894). A more modern use of the term is for any tax that does not depend on characteristics of the taxpayer. See, e.g., Harvey S. Rosen & Ted Gayer, *Public Finance* 299 (10th ed. 2014). Here we use it to mean a single tax bill imposed by a tax collector, as opposed to periodic collection based on tax-rate formulas (whether through withholding or direct payment). The economic definition distinguishes lump sum taxes by the fact that they do not depend on taxpayer behavior, and therefore are economically efficient. See *id.* Our usage of the term is consistent with that meaning, because onetime levies, even if imposed as a percentage of income or wealth, will not alter behavior in current periods, and are based on facts from prior periods that cannot be altered. (We acknowledge some gaming is possible—such as hiding items of property—but that does not change the general point.)

might set out to raise a certain amount of money and would do so by levying people based on the value of their property. Colonial and state statutes generally laid out the methodology for how to value land for this purpose,<sup>81</sup> but an actual tax often had to be “granted” by the legislature to be imposed, and years might pass between taxes (though typically they were imposed more often).<sup>82</sup> Because the goal was to raise a specific amount of money, the effective rates of tax on property might vary quite a bit from tax to tax. The rates might also change if there was a revaluation of property, though these were not frequent—some states might only revalue property every ten years.<sup>83</sup> These lump sum taxes that raised a fixed amount of revenue with variable tax rates should be contrasted with our modern taxes that instead fix the tax rates but raise a variable amount of revenue.

For these early direct taxes that raised a set amount of revenue, apportionment on some basis was a necessary component of the tax. Cities and towns (and, later, states) had to be told what fraction of the total tax bill for which they were responsible. Furthermore, such apportionment is relatively simple—it just means dividing the fixed amount of revenue to be raised among political subdivisions. The next Section will discuss why the framers chose to apportion by population, but there was no question that apportionment on some basis was required. Similar methods were also used for apportioning land taxes and capitations in both France and England.<sup>84</sup>

This general approach to taxation—customs and excises on goods and “direct taxes” on land and people—had been, essentially, the practice of most states since at least the Roman Empire<sup>85</sup> and likely encompassed the full range of taxes that were experienced or expected by the attendees at the Constitutional Convention. So it is not at all odd that this is how the Constitution speaks to taxation—duties, imposts, and excises on the one hand, and “direct taxes” on the other. And because of that mapping we can see why many contemporary observers argued in good faith that “direct tax” would refer only to land taxes and poll taxes.<sup>86</sup> To modern observers it may seem strange to say that a tax on a person’s land is “direct” while, say, a tax on a person’s income is not, but this was not a convenient *ex post* distinction invented by those who wanted an expansive taxing power, but

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<sup>81</sup> See Wolcott, note 55, at 418-36.

<sup>82</sup> See *id.*

<sup>83</sup> See, e.g., *id.* at 419 (revaluing property in New Hampshire every five years), 420 (revaluing property in Massachusetts every ten years).

<sup>84</sup> See Dunbar, note 54, at 439.

<sup>85</sup> See Clifford Ando, *The Administration of the Provinces, in A Companion to the Roman Empire 186-87* (David S. Potter ed., 2010).

<sup>86</sup> See, e.g., Ackerman, note 15, at 17-19 (discussing Hamilton, *inter alia*).

rather was an attempt to align the phrase “direct tax” with the extant examples at the time of the Constitution. The framers very likely had an intuition and experience of “direct taxation” as a lump sum levy of a specific dollar amount, apportioned out based on the value of land or number of polls or other criteria—as we will see, that is exactly how the early Congress levied the first federal direct tax in 1798.<sup>87</sup> After the Civil War that framing became somewhat obsolete, particularly after the rise of income taxation in the late nineteenth and early twentieth centuries, which helps to explain why apportionment began to be seen as a barrier rather than merely the way in which direct taxes were necessarily levied.

#### D. *The Purpose of Apportionment*

As we discuss below, the *Pollock* Court will later argue that the apportionment requirement for direct taxes was intended by the framers essentially to tie the hands of Congress, to make it more difficult to use direct taxes, in part to protect property owners from tyrannical government.<sup>88</sup> While it is of course true that the framers resolved that direct taxes should be raised in proportion to state population, the larger context suggests that this was just a practical administrative choice and may have even been a tool to promote, rather than restrict, redistribution of wealth.

To see this, it is helpful to begin with the Articles of Confederation, since it was in part the failure of the tax system under the Articles that led to creating a strong tax power in the Constitution.<sup>89</sup> The Articles gave no taxing power to Congress—any taxes that needed to be raised “shall be laid and levied by the authority and direction of the Legislatures of the several States.”<sup>90</sup> But the Articles did provide some guidelines for what those taxes could be, to wit:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, *in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated* according to such mode as the United States in

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<sup>87</sup> See Part I.G.

<sup>88</sup> See Part II.C.

<sup>89</sup> See, e.g., *The Federalist* No. 21 (Alexander Hamilton); Einhorn, note 56, at 157-58 (2006).

<sup>90</sup> Articles of Confederation of 1781, art. VIII.

Congress assembled, shall from time to time direct and appoint.<sup>91</sup>

In other words, the Articles implied that revenue for the national government would be based on apportioned land taxes, where the apportionment was done based on proportional value of land in each state, rather than on proportional population in each state as the Constitution requires of “direct taxes.” As early as the *Hylton* case (discussed below),<sup>92</sup> the Supreme Court puzzled over the apportionment requirement for things, such as carriages, that are not owned in proportion to the population, with Justice Iredell even suggesting that the apportionment requirement could only apply to those things “capable of apportionment.”<sup>93</sup> Reading the Articles suggests that the framers well understood that an apportionment requirement should be with respect to the base subject to the tax—for example, apportionment of land taxes based on value of land. So the question is, why then did they shift in the Constitution to apportioning land taxes by population?<sup>94</sup>

The most likely answer is simply administrative convenience—that they had found under the Articles that it was too difficult to determine the value of land across states with sufficient accuracy and comparability to apportion the taxes with any rationality.<sup>95</sup> Indeed, Hamilton says just that in Federalist No. 21.<sup>96</sup> Among other complaints, the inaccuracy of land valuation may also have created opportunities under the Articles for states to undervalue their land in order to shirk their tax duties.<sup>97</sup> Shifting to apportionment by population—a harder metric to fudge—could limit that sort of tax gaming.

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<sup>91</sup> *Id.*, art. VIII (emphasis added).

<sup>92</sup> See Part I.F.

<sup>93</sup> *Hylton v. United States*, 3 U.S. (3 Wall.) 171, 183 (1796) (opinion of Iredell, J.).

<sup>94</sup> There is a potential argument here that the framers might have intended for “direct tax” to refer only to poll taxes, not taxes on land, since the apportionment is based on polls not land. Ackerman points out, for example, that much of the negotiating was around the relationship between head taxes, congressional representation, the three-fifths compromise, and the concern among Southern states that their slaveholdings might be taxed into oblivion. See Ackerman, note 15, at 11-13; see also Part I.E. The insertion of “or other direct tax” in Article I, Section 9, of the Constitution was at the last minute. See Ackerman, note 15, at 13.

<sup>95</sup> Einhorn, note 56, at 127-28; see Calvin H. Johnson, *Binding Constitutional History: Reverse Pollock and End Fatal Apportionment*, 25 Fla. Tax Rev. 740, 746 (2022).

<sup>96</sup> The Federalist No. 21, at 98 (Alexander Hamilton) (Terence Ball ed., 2003) (“In every country it is an Herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability.”).

<sup>97</sup> This was a source of some grievance between states under the Articles. Calvin Johnson writes that Pennsylvania likely undervalued its land and realty in order to lower its tax

At the same time, it was believed that shifting to apportionment by population instead of land value would not have a dramatically different outcome, because land—improved land in particular—was distributed roughly proportional to population. In Federalist No. 21, for example, Alexander Hamilton says that direct taxes “principally relate to lands and buildings,” and that “[e]ither the value of land, or the number of people may serve as a standard [for apportionment]” because “[t]he state of agriculture, and the populousness of a country, have been considered as nearly connected with each other.”<sup>98</sup> Madison argued at the Convention that even though population and wealth did not necessarily track each other, “that in the U. States it was sufficiently so for the object in contemplation,” in part because free movement of labor among the states should reallocate population toward wealthier states until it leveled out.<sup>99</sup> The theory here is that land use roughly tracked agricultural need and therefore would generally be in proportion to population.

Furthermore, before the rise of industry and financial capitalism after the Civil War, there were less dramatic market price differences between lands located in different areas. So it at least seemed plausible that this sort of land tax could be apportioned based on population. But if this view is correct, share of improved land is essentially a proxy for share of population at the state level—the difference is just that taxing land *within* a state rather than people shifts a state’s fixed tax bill more toward wealthier state residents—landowners—compared to merely taxing polls. In other words, under those circumstances, apportioning a tax on improved land on the basis of population would have been a tool of progressivity in a time when there were relatively few fiscal instruments available to accomplish redistribution. As we will see, this is quite different from the framing the Court in the *Pollock* decisions will choose, that apportionment is a tool to protect wealth and to *limit* redistribution.<sup>100</sup>

Indeed, if the framers intended merely to protect property and wealth from federal taxation, there were much simpler ways to accomplish that goal (such as banning property taxation altogether). At most the framers meant to protect *states* vis-à-vis other states, to ensure that

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bill, and that this is one reason why the Constitution shifted to apportionment by population. See Johnson, note 95, at 746.

<sup>98</sup> The Federalist No. 21, at 98 (Alexander Hamilton) (Terence Ball ed., 2003); see also *Pollock II*, 158 U.S. 601, 702 (Harlan, J., dissenting) (“The framers of the Constitution proceeded upon the theory entertained by all political writers of that day, that there was some relation, more or less direct, between population and land.”); *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869) (including value of enslaved people necessary to ensure that comparative value of land in Northern and Southern states remained proportional).

<sup>99</sup> 1 Records of the Federal Convention of 1787, note 48, at 585.

<sup>100</sup> See Part II.C.

no state (and particularly no slave state) bore a disproportionate share of national taxes. This is a consistent animating concern in both the Articles and the Constitution—that is, that no state dominate another and that each pay its fair share. Recall the point in the prior Section, that direct taxes were generally levied in a dollar amount, not as a prespecified tax rate formula—where the revenue act spelled out in detail how much was apportioned to each state, or even to each region within a state. Such a system requires some prescribed method to make sure that those tax bills are apportioned out fairly between the states, and that is what both the Articles and the Constitution provide—a meta-rule that however taxes are apportioned between the states, the division must be pro rata. This is also consistent with the requirement of uniformity for customs and excises—that they not be imposed differently based on location. Because of this concern with interstate equity, it again seems highly unlikely that the framers would have intended to create a system that necessarily imposes *disproportionate* burdens across the states, as a land tax apportioned by population likely would today. The *Pollock* Court’s interpretation would have us believe that the framers intended for direct taxes to hit the poorest states the hardest. That is simply absurd.

Furthermore, the belief that land mostly tracked population helps to explain the framers’ delineation of the two paths for the two types of taxation, as two different meta-rules for ensuring interstate equity. For subjects of taxation that are mostly geographically based—capitations on people and direct taxes on land itself—apportioning by population ensures fair distribution of tax burdens (if the value of the land roughly tracks population). For subjects of taxation that are not likely to be distributed pro rata across the states—or that, as in the case of consumption taxes or taxes on measurements of ability to pay, may involve parties or properties in multiple states<sup>101</sup>—a uniformity rule ensures fair treatment. One should not pay a higher excise on their whiskey, for example, simply because of state residence. Of course, this logic does not provide clear guidance when extended to items of property—such as carriages—that physically reside in one state but which are not evenly distributed among the states, which is why the Court struggled almost immediately with that issue in the *Hylton* case, discussed below.<sup>102</sup> But the underlying concern—to provide an administrable meta-rule to ensure interstate equity for taxes that require some method of apportionment—can help to explain what the framers were trying to accomplish.

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<sup>101</sup> For elaboration, see Part IV.B.

<sup>102</sup> Part I.F.



### E. *Roots in Slavery*

That the framers may not have fully thought through issues relating to the distribution of land value, much less the value of other property, can also be explained by the fact that the Apportionment Clauses were more directly addressing slavery, not taxation. This is well-trod ground, so we do not recapitulate the arguments others, like Robin Einhorn and Bruce Ackerman, have made in greater detail.<sup>103</sup> What is important for us is that the Apportionment Clause in Article I, Section 2, of the Constitution addresses both direct taxation and representation in Congress—it's the famous Three-Fifths Clause, the twisted compromise that allowed for voters in Southern states to be somewhat overrepresented in Congress by virtue of the large population of enslaved people living in the South. Bruce Ackerman summarizes the compromise well: “[T]he South would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College, if it was willing to pay an extra three-fifths of taxes that could be reasonably linked to overall population.”<sup>104</sup>

With respect to taxation, the Southern states understood that enslaved people could likely be a focus of federal “direct” taxation in either its poll tax or land tax formulation. Enslaved people, as people, could obviously be a subject of a capitation or head tax. But slaves, as a class of property, were also sometimes considered a form of “reality,” since slavery was largely used to extract value from land.<sup>105</sup> So even in the limited formulation of direct taxation familiar to the founders—poll taxes and land taxes—slaves could be a target, and the paranoid slave states imagined that an antagonistic federal government could levy a tax on slaves as a way to attack their economy and way of life—particularly if they could be counted as three-fifths of a person for poll tax purposes.<sup>106</sup> From this standpoint, the apportionment requirement was a protection against this possibility, since any “direct tax” that included slaves also had to raise a proportional amount from a free state by levying a tax on a different base (e.g., land) as well.

There may also have been a concern from the Northern states that a land tax that *did not* also include enslaved people could disproportionately burden them, since in the Southern states with slavery-based economies, the value of agriculture may have been bifurcated between land and enslaved people such that land was relatively *undervalued* in Southern states, particularly if land value tracked overall

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<sup>103</sup> Einhorn, note 56, at 157-73; Ackerman, note 15.

<sup>104</sup> Ackerman, note 15, at 4.

<sup>105</sup> See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 543 (1869).

<sup>106</sup> See Einhorn, note 56, at 166-73.

population as Hamilton and others seemed to believe.<sup>107</sup> An apportionment requirement could also have been some protection against that concern.

Given the paucity of evidence from the Constitutional Convention on this point, and the somewhat slapdash way in which the “direct tax” language was negotiated, we need not dwell on the particular logic here overmuch. Our overriding point is just that any logic there might have been for the Apportionment Clauses is inextricably bound up in the slavery issue, which leads to a few conclusions: first, that at least part of the argument for apportionment is linked to a deeply discredited ideology; second, that the constraint it intended to introduce does not extend to taxes that do not include enslaved persons; and third, that the entire issue is mooted by the Thirteenth Amendment.<sup>108</sup> Finally, it shows again that the context of the provision is far removed from our modern systems of taxation.

#### F. *Hylton v. United States*

To further understand the context of the Constitution and early understandings of “direct” taxation, we turn to the Supreme Court case of *Hylton v. United States*,<sup>109</sup> a case brought just a few years after the ratification of the Constitution concerning a federal tax on carriages. We address it here because it is likely that the case was brought deliberately as a vehicle to clarify the meaning of “direct tax” in the ambiguous and poorly drafted Apportionment Clauses, since the stipulated facts were almost certainly fictitious.<sup>110</sup> Delegates to the Constitutional Convention argued both sides of the case and also made up a majority of the Justices—it is not hard to see the case as essentially a continuation of the unresolved debate at the Convention, an attempt to fix some meaning to a phrase that could mean almost anything. Indeed, less than two weeks after *Hylton* was decided, Congress got to work drafting its first apportioned direct tax. (We address that and the other direct taxes further in Section G below.)

One of the lawyers arguing in *Hylton* in favor of a narrow interpretation of the term “direct tax” was Alexander Hamilton.<sup>111</sup> Some

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<sup>107</sup> Veazie, 75 U.S. (8 Wall.) at 543.

<sup>108</sup> See Ackerman, note 15.

<sup>109</sup> 3 U.S. (3 Dall.) 171 (1796).

<sup>110</sup> See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 102 (1995); Whitney, note 47, at 283 n.1 (referring to *Hylton* as a “fictitious case”); Jensen, note 16, at 2351-52 (summarizing research). Jensen seems to imply that this is a reason to discount the *Hylton* decision. In our view, however, the fact that the parties manufactured the case shows the pressing need to resolve the real-time ambiguity and lack of consensus around how to interpret the constitutional language.

<sup>111</sup> 3 U.S. (3 Dall.) at 172.

scholars have suggested that Hamilton was disingenuous in taking a litigating position that could be read as contradicting language from some (though not all) of his essays in *The Federalist*.<sup>112</sup> But even if that were so, Congress appears to have been trying in good faith to understand the contours of its taxing power, given the ambiguous language in the Constitution. That individual parties may have wanted a particular result from the *Hylton* Court does not change the fact that Congress needed the Court to say *something* about how to interpret the ambiguous text.

The Justices in *Hylton* gave their opinions seriatim, and only three are fully reasoned decisions, which presents a challenge for drawing out a clear holding. But the general sense of the Justices was clear—the carriage tax was not a direct tax subject to apportionment, and apportionment was intended for taxes that were readily apportionable. Justice Chase wrote that “[t]he Constitution evidently contemplated no taxes as direct taxes, but only such as Congress *could* lay in proportion to the census.”<sup>113</sup> He went on to say, in dicta, that “I am inclined to think, but of this I do not give a judicial opinion, 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 circumstance; and a tax on LAND.”<sup>114</sup> Justice Paterson wrote, “[w]hether direct taxes, in the sense of the Constitution comprehend any other tax than a capitation tax, and a tax on land, is a questionable point.”<sup>115</sup> And Justice Iredell wrote that “it is evident that the Constitution contemplated [no tax] as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution.”<sup>116</sup> In the end, the Court held that the tax on carriages was more in the nature of an excise.

This understanding of direct taxation and apportionment is consistent with the story we tell above—that apportionment was not intended to hinder Congress’s taxing power but was rather understood as a reasonable protection of interstate equity for taxes on land or

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<sup>112</sup> See, e.g., Jensen, note 16, at 2357-58 (pointing out that in some of *The Federalist* essays, Hamilton implies that “indirect” taxes are imposts, duties, and excises on articles of consumption). But see *The Federalist* No. 21, at 98 (Alexander Hamilton) (Terence Ball ed., 2003) (writing that “direct taxes” are capitations and land taxes); *The Federalist* No. 36, at 164-67 (Alexander Hamilton) (Terence Ball ed., 2003) (discussing only taxes on land and poll taxes as direct taxes).

<sup>113</sup> 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.) (emphasis added).

<sup>114</sup> *Id.* at 175 (emphasis added). Justice Paterson also noted that slavery was the root of the Apportionment Clauses, and thus they should not be “extended by construction.” *Id.* at 178 (opinion of Paterson, J.). For more on the connection between the Apportionment Clauses and slavery, see Ackerman, note 15.

<sup>115</sup> *Hylton*, 3 U.S. (3 Dall.) at 177 (opinion of Paterson, J.).

<sup>116</sup> *Id.* at 181 (opinion of Iredell, J.) (emphasis added).

people—but one which would not be relevant to other kinds of taxes. Looking forward, we see in *Hylton* the beginnings of a jurisprudence that uses an expansive understanding of “excise” as a way to differentiate between the sorts of taxes intended to be apportioned and those there were not.

### G. *The Direct Tax Acts*

Underscoring the view that the framers understood direct taxation and apportionment in this limited way, Congress passed five apportioned taxes on real property (and enslaved persons) over the course of the eighteenth and nineteenth centuries, with the first enacted shortly after *Hylton*, in 1798. As with *Hylton*, we can look especially at the Direct Tax of 1798—less than ten years from the Constitutional Convention—as evidence of the framers’ understanding of what a direct tax was and how apportionment should operate. These taxes were never challenged as unconstitutional and so should be understood to be presumptively constitutional—indeed, the Court frequently looked to them as examples of what “direct taxes” were.

Before enacting that first direct tax in 1798, the Ways and Means Committee directed Secretary of the Treasury Wolcott to prepare “a plan for raising the sum of two millions of dollars, by apportionment among the several states, agreeably to the rule prescribed by the constitution; adapting the same to such objects of direct taxation, and such modes of collection, as may appear, the laws and practices of the States, respectively, to be most eligible in each.”<sup>117</sup> Wolcott presented his report to Congress in December of that year.<sup>118</sup> As noted above, Wolcott reviewed a number of state “direct tax” practices and noted that some of them included income-like taxes, but ultimately concluded “that taxes of this nature cannot be considered as of that description which the constitution requires to be apportioned among the States.”<sup>119</sup> Wolcott’s report ultimately recommended that Congress impose a direct tax on land, ad valorem; on house value above an exemption amount (perhaps with three classes of presumptive value, though the report is not clear on this); and on enslaved persons, at a single uniform rate.<sup>120</sup>

The first direct tax enacted by Congress in 1798 largely followed the model proposed by Wolcott, and it in turn provided the model for the four subsequent direct taxes: of 1813, 1815, 1816, and 1861. The acts

<sup>117</sup> William Smith, Increase of Revenue, H.R. Doc. No. 95 (1796), in 1 American State Papers: Finance, note 55, at 409.

<sup>118</sup> Wolcott, note 55.

<sup>119</sup> *Id.* at 439.

<sup>120</sup> *Id.* at 440.

are all structured similarly, so we review a few of their key elements. In addition to providing our only evidence of what Congress intended direct taxes to be, these taxes are also our only examples of how apportionment works in practice, an issue we will return to in Part IV.

The 1798 Direct Tax called for a tax of \$2 million, apportioned among the states based on population,<sup>121</sup> and then further into geographic divisions.<sup>122</sup> The commissioners for each division were then to assess their tax quotas against land, dwelling houses, and slaves.<sup>123</sup> But even though the overall quotas were apportioned among the states based on population, the assessment methods were not—the whole tax was actually a combination of a *uniform* tax on dwelling houses and enslaved persons, and a *residual* tax on land assessed at whatever rates were necessary to fill out each state's quota. The act instructed district tax commissioners to assess the value of all dwelling houses exceeding \$100 in a uniform way across all districts,<sup>124</sup> and to then assess tax against those houses at uniform, graduated rates of between 0.2% and 1%.<sup>125</sup> Similarly, the owners of enslaved persons between the ages of twelve and fifty were taxed at a uniform rate of fifty cents per person.<sup>126</sup> Land was then taxed as follows:

And the whole amount of the sums so to be assessed upon dwelling-houses and slaves within each state respectively, shall be deducted from the sum hereby apportioned to such state, and the remainder of the said sum shall be assessed upon the lands within such state according to the valuations to be made pursuant to the [Act of July 9], and at such rate per centum as will be sufficient to produce the said remainder.<sup>127</sup>

Thus, seen as three separate taxes—a tax on dwelling houses, a tax on enslaved persons, and a tax on land—*none* was apportioned based on population. For example, a flat fifty-cent tax on enslaved persons would collect little revenue outside of the Southern states with a substantial population of enslaved people. And a uniform set of tax rates on dwelling houses would collect tax in proportion to those values, not in proportion to population. And the residual tax on land was neither

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<sup>121</sup> Act of July 14, ch. 75, 1798, § 1, 1 Stat. 597, 597-98.

<sup>122</sup> Act of July 9, 1798, ch. 70, § 1, 1 Stat. 580, 581-84.

<sup>123</sup> Act of July 14, 1798, § 2, 1 Stat. at 598.

<sup>124</sup> Act of July 9, 1798, § 8, 1 Stat. at 585.

<sup>125</sup> Act of July 14, 1798, § 2, 1 Stat. at 598.

<sup>126</sup> Act of July 9, 1798, § 8, 1 Stat. at 585 (discussing the age range); Act of July 14, 1798, § 2, 1 Stat. at 598 (discussing the tax rate).

<sup>127</sup> Act of July 14, 1798, § 2, 1 Stat. at 598.

uniform nor apportioned.<sup>128</sup> It was only the combination of the three—the *total revenue collected*—that was proportional to population. This is an immensely important point that informs our construction of apportionment in Part IV. And, again, for lump sum taxes like these *some* form of apportionment is practically required—the legislation must set out how much each state or region owes.<sup>129</sup> The method of assessing that direct tax is a separate question, and one that is not bound by the same constitutional requirements. Indeed, in Wolcott’s report he considers several different types of land taxes, on several different types of land, and using several different types of valuation and assessment<sup>130</sup>—all that matters for apportionment is that the ultimate bills be in proportion to population.<sup>131</sup>

The 1813 Direct Tax was also assessed against land, dwelling houses, and enslaved persons, but in a somewhat more straightforwardly ad valorem way.<sup>132</sup> However, the act also allowed a reduction of up to 15% if a state paid its quota directly to Treasury before certain dates, since that relieved the federal government from doing the work of assessing individuals.<sup>133</sup> Only seven states took advantage of the discount, meaning that the final revenues actually collected were *not* exactly proportional to population (another noteworthy consideration in designing a practical apportioned tax).<sup>134</sup> The 1815 and 1816 Direct Taxes were substantially the same as the 1813 Direct Tax, though only

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<sup>128</sup> Furthermore, the Act of July 14 contemplated that there could be no tax on land in some states, if the tax on dwelling houses and slaves exceeded the state’s quota, in which case the commissioners could proportionally lower the tax rates on dwelling houses. *Id.* § 3, 1 Stat. at 599.

<sup>129</sup> We suppose it is theoretically possible for the legislation to detail what each individual owes, but that is obviously impracticable. Because tax assessors operated at the regional level, they needed to be told how much they were responsible for collecting. This is one reason why tax laws, including this one, are some of the first examples of congressional delegation to administrative actors. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288 (2021); Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 *Duke L.J.* 1673, 1685-87 (2014).

<sup>130</sup> Wolcott, note 55, at 439-41.

<sup>131</sup> It is also worth noting that the 1798 tax took some time to collect. It seems that revenue did not start coming in until 1800, and then only about \$735,000. See *Internal Revenues*, H.R. Doc. No. 166 (1801), in 1 *American State Papers: Finance*, note 55, at 727. By 1807, Treasury had collected around \$1.7 million. See *Annual Receipts for Seventeen Years*, H.R. Doc. No. 289 (1809), in 2 *American State Papers: Finance*, note 55, at 318, 319. The collection over many years is consistent with our point that direct taxes were understood at the time to be single “lump sum” assessments, rather than annual periodic taxes like our income tax. See Part I.C.

<sup>132</sup> See Dunbar, note 54, at 443.

<sup>133</sup> Act of Aug. 2, 1813, ch. 37, § 7, 3 Stat. 53, 71.

<sup>134</sup> Dunbar, note 54, at 443.

four states prepaid their taxes in those years.<sup>135</sup> These three taxes were paid “with a considerable degree of promptness and precision.”<sup>136</sup> We draw two key points from how Congress understood the concept of apportionment in enacting the first direct taxes: a precedent of cooperation with the states in collection, and the inclusion of an offsetting payment to a state without undermining the original apportionment calculation—that for apportionment purposes there may be a formal distinction between the tax itself and any credits against that tax.

The Act of 1861 was intended to be roughly the same as the 1813-1816 Acts, though without the tax on enslaved persons—retaining only the taxes on land and on dwelling houses.<sup>137</sup> The act also contained the same option as the 1813-1816 taxes for states to assume the debts of their citizens, with a discount, but this time nearly every state took that deal, in part because that tax debt could be offset by amounts owed to the state by the federal government, instead of being collected from individuals.<sup>138</sup> Because of the Civil War, states had advanced a large amount to the central government, in the form of military manpower, equipment, and straight cash.<sup>139</sup> Charles Dunbar suggested in 1889 that the Northern states probably would have made these advances anyway out of patriotic duty,<sup>140</sup> but one could read this act in part as a way for the federal government to tax away whatever debts it owed the states.<sup>141</sup> At any rate, the tax was controversial, in part because of the difficulty of collecting the full tax owed by the Southern states even after the war, as well as the perceived unfairness in how the tax was apportioned. As Dunbar says, “[o]nly the smallness of the sum to be raised made special assessment upon one species of property tolerable, in a country where personal property had multiplied so greatly.”<sup>142</sup> Here, we begin to see the economic and fiscal shift that led to seeing apportionment not as a viable method for a particular class of lump sum tax, but rather as a substantive barrier to Congress’s taxing power.

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<sup>135</sup> *Id.* at 444.

<sup>136</sup> Sidney Ratner, *American Taxation: Its History as a Social Force in Democracy* 34 (1942).

<sup>137</sup> Act of Aug. 5, 1861, ch. 45, § 13, 12 Stat. 292, 296.

<sup>138</sup> *Id.* § 53, 12 Stat. at 311-12.

<sup>139</sup> See Dunbar, note 54, at 447.

<sup>140</sup> *Id.*

<sup>141</sup> How much of the bills owed the states offset the state tax bills is not clear from the record and may have been lost due to recordkeeping issues and accounting discrepancies. See Letter of Acting Secretary of the Treasury C.S. Fairchild, H.R. Exec. Doc. No. 158 (1887), reprinted in H.R. Rep. No. 50-552, at 5 (1888).

<sup>142</sup> Dunbar, note 54, at 445.

## II. THE CIVIL WAR THROUGH *POLLOCK*: APPORTIONMENT AS BARRIER AND THE DEVELOPMENT OF THE EXCISE TAX CANON

The period from the Civil War and Reconstruction through the Gilded Age and the Progressive Era was one of rapid and far-reaching economic, political, and social change, in ways that of course extend far beyond what we can describe here.<sup>143</sup> What is important for our purposes is that industrialization, global trade, and the rise of financial capital led both to the need for new taxes and fiscal tools, especially income taxation, and also to a growing belief that apportionment by population was no longer a feasible option for such taxes. Using the tax system to combat economic inequality and concentrations of wealth and income required more progressive tax instruments, but also made it next to impossible—given the fiscal tools of the time—to apportion those taxes by population among states where wealth and income were ever-more unevenly distributed among the states.

This shift is captured by the fact that the same Act of August 5, 1861, that enacted the *last* direct tax also enacted the *first* income tax.<sup>144</sup> Up until then, the federal government had largely subsisted on import duties, with the direct taxes used to fund particular expenses like war or to pay down war debts.<sup>145</sup> But it was clear by 1861 that an apportioned land tax alone would no longer be sufficient to fund the war effort. With the growth of financial wealth, it was no longer reasonable only to tax real estate, and furthermore, wealth was concentrated in the Northeast while western states had seen big population growth, such that apportioning any direct tax by population was seen as unjust.<sup>146</sup> The income tax was Congress's answer, a way to get at the new concentrations of wealth without resorting to (apportioned) direct taxation.

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<sup>143</sup> See generally, e.g., Richard White, *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865-1896* (2017).

<sup>144</sup> Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309. To be clear, this 1861 income tax was superseded by a revised version in 1862 and thus was never enforced. Act of July 1, 1862, ch. 119, § 2, 12 Stat. 432; Joseph A. Hill, *The Civil War Income Tax*, 8 Q.J. Econ. 416, 420-23 (1894). The first income tax collections were under the 1862 bill. The 1862 tax was reenacted in 1864, Act of June 30, 1864, ch. 173, § 7, 13 Stat. 223, 224, and that 1864 version was the subject of the *Springer* case, see notes 154-159 and accompanying text.

<sup>145</sup> The 1798 tax was related in part to a military buildup during a confrontation with France. See Ratner, note 136, at 29. The 1812-1816 and 1861 taxes were connected to the War of 1812 and the Civil War, respectively.

<sup>146</sup> See, e.g., Cong. Globe, 37th Cong., 1st Sess., at 254-55 (statements of Sens. Fessenden & Simmons), 330 (statements of Rep. Morrill); Ratner, note 136, at 65-67; Hill, note 144, at 418-19 (noting, inter alia, that Illinois would have had a tax rate on real property of 6% to meet its apportioned quota, while Massachusetts would have had a tax rate of only 2.6%).



In addition to that first income tax, Congress enacted several other taxes that became the subject of Supreme Court litigation from 1869 to 1881. Two key legal developments came out of this jurisprudence. First, the claim that direct taxes were only taxes on land and people, as suggested by the Justices in *Hylton*, gradually hardened into black letter law by the eve of the *Pollock* decisions, to the extent that *Pollock* was considered a shocking result. Second, and more importantly, the Court built an interpretive methodology and jurisprudence that rooted the congressional taxing power in the excise tax clauses. Ackerman refers to this as a “tradition of restraint” in not unnecessarily finding taxes to be direct taxes, but we would go further and describe it, as Justice Brown did in his dissent in *Pollock II*, as a sort of quasi “canon of interpretation,”<sup>147</sup> or what we call the Excise Tax Canon.<sup>148</sup>

Both legal developments followed from the decline of direct taxation as a feasible way to generate sufficient revenue, due to its intense administrative requirements and the growing belief that apportionment could no longer be a fair methodology in a world of growing inequality and wealth disparities. In this period, the government had only the first hints of progressive fiscal tools to manage fairness concerns, so the only real option was to cabin off apportioned direct taxes and more fully develop the legal theories and jurisprudence for the other path—uniform excise taxation, and especially income taxation. As we will discuss in Part IV, however, apportionment no longer faces those same constraints—because of a fuller set of fiscal tools, apportioned direct taxation can now be implemented in a reasonably fair way.

#### A. *What Were Direct Taxes in 1881?*

We can dispense quickly with the black letter issue. In opinions issued between 1869 and 1881, the Court gradually homed in on a clear constitutional meaning of “direct tax.” The first cases begin with more exclusionary holdings, that certain taxes were *not* direct (rather than affirmatively declaring what *is* a direct tax). For example, in *Pacific Insurance Co. v. Soule*, the Court upheld a tax on the income of insurance companies, saying that the injustice of trying to apportion such a tax required a narrow reading of the term “direct tax.”<sup>149</sup> In *Veazie Bank v. Fenno*, the Court upheld a 10% tax on the value of banknotes—currency, essentially—as a tax on an object and therefore “under the head of duties.”<sup>150</sup> Noting the “difficulty of defining with

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<sup>147</sup> *Pollock II*, 158 U.S. 601, 689 (1895) (Brown, J., dissenting).

<sup>148</sup> See note 32 and accompanying text.

<sup>149</sup> 74 U.S. (7 Wall.) 433, 446 (1869).

<sup>150</sup> 75 U.S. (8 Wall.) 533, 546-47 (1869).

accuracy”<sup>151</sup> the term “direct tax,” the Court relied heavily on the fact that Congress had only ever levied direct taxes on real property and enslaved persons.<sup>152</sup> In light of that, the Court stated as follows:

It may be rightly affirmed, therefore, that in the practical construction of the Constitution, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes. And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the conventions which ratified, the Constitution.<sup>153</sup>

But in *Springer v. United States*,<sup>154</sup> the Court directly confronted the question that it would face again in *Pollock*—is an income tax a direct tax that must be apportioned? The case concerned the 1864 tax on “income, gain, and profits.”<sup>155</sup> As in past cases, the Court noted the ambiguity of the terms used in the Constitution<sup>156</sup> and looked to Congress’s practice in enacting explicit direct taxes to guide its interpretations.<sup>157</sup> As in *Veazie*, the Court found that the only direct taxes passed by Congress covered just real estate and enslaved people and that the determination made “by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.”<sup>158</sup> The Court then turned to the key question—what, exactly, are direct taxes? The holding is clear:

Our conclusions are, that 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.<sup>159</sup>

After *Springer*, the near-unanimous view of courts, constitutional scholars, and tax scholars was that direct taxes were only capitations and taxes on land, and that an income tax was not a direct tax.<sup>160</sup>

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<sup>151</sup> *Id.* at 540.

<sup>152</sup> *Id.* at 542-43.

<sup>153</sup> *Id.* at 544.

<sup>154</sup> 102 U.S. 586, 592 (1881).

<sup>155</sup> *Springer*, 102 U.S. at 592; see note 144.

<sup>156</sup> *Id.* at 596-98.

<sup>157</sup> *Id.* at 598-99.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 602.

<sup>160</sup> See, e.g., Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 589 (6th ed. 1890) (“The term ‘direct taxes,’ as employed in the Constitution, has a technical meaning, and embraces

Importantly, these jurists and commentators all fully understood—just as the *Hylton* Court and Wolcott did—that the *economic* meaning of “direct tax” can be different from the *constitutional* meaning, that these are just the same pair of words used to describe different concepts. Edwin Seligman, for example, wrote, “[T]he Supreme Court is undoubtedly correct in assuming that the only direct taxes contemplated by the constitution were the poll tax and the general property tax, chiefly the land tax,” and that there is “no reason to suppose that [Soule] will be reversed.”<sup>161</sup> Writing after *Pollock*, Seligman described the pre-*Pollock* state of affairs:

It was accepted as part of American constitutional law, and was taught without exception by all writers on the subject, that the words “direct tax” as used in the constitution, signified only land and poll taxes.<sup>162</sup>

The economist Richard Ely, after describing the income tax as within an economist’s definition of “direct tax,” notes (with exasperation) that “[t]he American federal classification is indeed a strange one. . . . It has been held that by direct taxes are meant only taxes on real estate and on slaves; consequently an income tax was imposed during the late Civil War and was regarded as an indirect tax!”<sup>163</sup>

And the preeminent tax law scholar of the time, Thomas Cooley—again, after first clearly putting an income tax under the general *eco-*

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capitations and land taxes only.”); 1 James Kent, *Commentaries on American Law* 256 (“[T]he better opinion seemed to be, that the direct taxes contemplated by the Constitution were only two, viz. a capitation, or poll tax, and a tax on land.”); 1 Joseph Story, *Commentaries on the Constitution of the United States* § 955 (2d ed. 1851) (“It has been seriously doubted, if, in the sense of the constitution, any taxes are direct taxes, except those on polls or on lands.”); Samuel Freeman Miller, *Lectures on the Constitution of the United States* 237 (1893) (“Direct taxes, within the meaning of the Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate.”); John Norton Pomeroy, *An Introduction to the Constitutional Law* § 277 (5th ed. 1880) (“Direct taxes include those assessed upon land, and those which pass under the denomination of capitation or poll, and probably no others. Indirect taxes would then embrace all the remaining species, and would be co-extensive with duties, imposts and excises.”); 1 J.I. Clark Hare, *American Constitutional Law* 149-50 (1889); W.H. Burroughs, *A Treatise on the Law of Taxation* 502 (“The construction given to the expression ‘direct taxes’ is that it includes only a tax on land and a poll tax, and this is in accord with the views of writers upon political economy.”) (1877); John Ordronaux, *Constitutional Legislation in the United States* 225-26 (1891) (“The two rules prescribed for the government of Congress in laying taxes, are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes, and taxes on land; in the second, duties, imposts, and excises . . . . Direct taxes are now well settled in their meaning. . . .”). See generally Mehrotra, note 70, at 130-38; *Pollock II*, 158 U.S. at 601, 657-58 (1955) (Harlan, J., dissenting).

<sup>161</sup> Seligman, note 80, at 634-35.

<sup>162</sup> Seligman, note 55, at 534.

<sup>163</sup> Richard T. Ely, *Taxation in American States and Cities* 77 (1888).

*nomic* heading of “direct tax”<sup>164</sup>—goes on to say that, for purposes of apportionment, it is a different question “as to the meaning of the term direct taxes as . . . employed [by the Constitution].” He notes that *Hylton* “strongly intimated . . . that only capitation taxes and taxes on land should be deemed to be within the provision,” and that “the intimation of the earliest case [*Hylton*] is very distinctly affirmed in one recently decided [*Springer*] where a tax on land was in question.”<sup>165</sup>

*B. The Excise Tax Canon: Interpreting “Excise” Broadly and “Direct” Narrowly*

Recall that the Constitution describes two categories of taxes—“direct taxes” that must be apportioned, and “duties, imposts, and excises” that must be uniform. In applying the law described above—that direct taxes are only taxes on capitations and taxes on real estate—the Court necessarily upheld various taxes by finding that they were instead “duties, imposts, and excises,” and excises in particular. In developing this jurisprudence, the Court applied the Excise Tax Canon; namely, the Court interpreted the word “excise” broadly and “direct” narrowly, in keeping with the general purpose of the framers to give a strong taxing power to Congress.<sup>166</sup>

Even as far back as the *Hylton* decision in 1796, the Court understood that some taxes can be plausibly described as either direct taxes or indirect excises, but if so, that it should defer to the excise interpretation. For example, Justice Chase asked, rhetorically, “I believe some taxes may be both direct and indirect at the same time. If so, would Congress be prohibited from laying such a tax, because it is partly a direct tax?”<sup>167</sup> The Court then applied a similar approach in *Pacific Insurance Co.*<sup>168</sup> and again in *Veazie*,<sup>169</sup> in both cases adopting a broad construction of “indirect” or “excise” and a narrow construction of “direct.” In *Veazie*, especially, the Court is explicit that reading direct tax narrowly and “duties, imposts, and excises” broadly com-

<sup>164</sup> Thomas M. Cooley, *A Treatise on the Law of Taxation, Including the Law of Local Assessments* 6 (2d ed. 1886). This was despite the fact that Cooley was a supporter of “constitutional barriers against the use of taxation for redistributive ends.” Horwitz, note 43, at 22.

<sup>165</sup> Cooley, note 164, at 8 (citing *Springer v. United States*, 102 U.S. 586 (1881)).

<sup>166</sup> *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869) (“And nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.”).

<sup>167</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.).

<sup>168</sup> *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1869).

<sup>169</sup> 75 U.S. (8 Wall.) 533.

ports with the intent of the framers and the general construction of the Constitution itself.<sup>170</sup>

This interpretive approach was perhaps most clear in *Scholey v. Rew*,<sup>171</sup> a case regarding a “succession tax”—an early form of inheritance or estate tax—imposed on the value of real estate transferred to another because of death.<sup>172</sup> The Court held that the succession tax is “an excise tax or duty,” because it was levied on the “devolution” of the property, not the property itself, and the fact that it was computed based on the value of land and became a lien on the land did not contradict that conclusion.<sup>173</sup> But recall that even the narrowest constructions of “direct tax” up to this point would include a tax on land. The succession tax in *Scholey* fell on the “devolution” of title to real property—and *only real property*. Of any of the taxes in question before *Pollock*, this would seem to be at the most risk of being declared a direct tax in the sense of the Constitution. (Indeed, Justice White said exactly this in his dissent in *Pollock*.)<sup>174</sup> Nonetheless, the Court held that the tax was affirmatively an excise, a tax on the *act* of devolution, rather than on the land itself. Even though it would have been straightforward to hold that a succession tax based on the value of real property was equivalent to a tax on land, and therefore a direct tax, the Court nonetheless upheld the formal construction of the tax as an excise tax on the act of devolution.

This question of *source* is worth pausing on, since it is a central part of the reasoning the Court will rely on in *Pollock* and also central to the repeal of that holding of *Pollock* by the Sixteenth Amendment and subsequent cases.<sup>175</sup> Any tax on the income, use of, or particular legal privilege of property can be said without much trouble to be a tax on the *source* of that income, use, or privilege—namely the property itself. And this was well understood even in the colonial period, where taxes on land were often determined by reference to the rental value of the property.<sup>176</sup> In that period, even proto-income taxes were justified not as taxes on income itself, but as a measurement of the value of the human capital that an artisan or professional had developed, analogous to the land or financial property that another taxpayer might own.<sup>177</sup>

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<sup>170</sup> *Id.* at 546-47.

<sup>171</sup> 90 U.S. (23 Wall.) 331 (1875).

<sup>172</sup> *Id.* at 346.

<sup>173</sup> *Id.* at 346-47. We note that the earlier cases relied more on a sort of rule of exclusion, that the taxes were indirect because they were not clearly direct. In *Scholey* the Court instead describes the succession tax as affirmatively an excise tax.

<sup>174</sup> *Pollock I*, 157 U.S. 429, 648 (1895) (White, J., dissenting).

<sup>175</sup> See Part III.A.

<sup>176</sup> See Wolcott, note 55, at 418-36 (describing various valuation methods).

<sup>177</sup> See Ratner, note 136, at 51-53; Seligman, note 70, at 244-45.

Thus a key corollary to the Excise Tax Canon is to generally ignore the question of source when determining if a tax is direct or an excise; it does not matter that the thing being excised against was real property, even though a tax on real property itself might be a “direct tax.” In *Scholey* an excise tax on the act of devolving real property by succession clearly is a tax burden on the real property itself, and so a Court could—if it wished—“look through” the form of the tax to the source and declare it a tax on real property. But that same approach could apply even to universally accepted examples of “duties, imposts, and excises.” The excise tax at issue in the Whiskey Rebellion, for example, could be described as a tax on the “mere ownership” of a kind of personal property, and an impost levied against imported goods could also be described as a tax on personal property.<sup>178</sup>

The Court in this period recognized that for the constitutional scheme to be workable at all, there had to be the ability to levy excise taxes—taxes on particular actions or privileges, or on particular uses of property—without consideration of the “source” of the thing being taxed. This is, to be clear, a somewhat formal distinction—but it is a formal distinction set out by the framers themselves and, as we will see, one further commanded by the Sixteenth Amendment.

In the end, heading into *Pollock*, we have a relatively clear and coherent doctrine and jurisprudence around direct taxation. First, the apportionment requirement only applies to capitations and land taxes, and perhaps for taxes on real property generally. Second, the Court has an interpretive methodology—the Excise Tax Canon—that, in addition to the above narrow definition of “direct tax,” also reads “excise” broadly to include taxes on any particular use or privilege of owning property, including producing income, transferring the property to another, or generally using that property in commerce, *even if* any of those taxes also burden real property.

### C. *Pollock v. Farmers’ Loan & Trust Co.*

We turn now to the pivotal case of *Pollock v. Farmers’ Loan & Trust Co.*<sup>179</sup> that struck down the 1894 income tax. *Pollock* was understood as a shocking result and an extraordinarily bad opinion even at the time it was decided.<sup>180</sup> It is correctly seen today as one of the first of the *Lochner*-era cases, wherein the Court purported to derive previously nonexistent laissez-faire natural law from vague passages in

<sup>178</sup> See notes 75-76 and accompanying text.

<sup>179</sup> *Pollock I*, 157 U.S. 429, *aff’d on reh’g*, *Pollock II*, 158 U.S. 601 (1895).

<sup>180</sup> Even Jensen, who says the result in *Pollock* was right, describes the opinion as “embarrassing.” Jensen, *Interpreting the Sixteenth Amendment*, note 52, at 391.

the Constitution.<sup>181</sup> The case actually consisted of three consolidated cases argued twice, and with two separate opinions.<sup>182</sup> But for our purposes we can focus on the core elements. The taxpayer made several arguments for the unconstitutionality of the income tax. *Pollock I* held for the taxpayer on the claims that a tax on rent from land was equivalent to a tax on land itself, and that a tax on the interest from municipal bonds was unconstitutional in its own right.<sup>183</sup> After rehearing, the Court in *Pollock II* held additionally that taxes on personal property were direct taxes, and thus taxes on the income from that property were also equivalent to direct taxes.<sup>184</sup> The Court further held that the entire act was unconstitutional because the unconstitutional taxes on rent, other income from property, and municipal bond interest were inseparable from the act as a whole.<sup>185</sup>

Because we aim our attention more at events before and after the case, and because analyzing the case has already been ably handled by others,<sup>186</sup> our review here is brief. We start by noting the two key holdings in *Pollock*. First, the Court held for the first time that a tax on personal property (not just real property) was a direct tax.<sup>187</sup> As we have previously shown, until *Pollock*, it was settled constitutional law that the scope of direct taxes was limited to capitations and taxes on real property. Second, and more important for the purposes of this Article, the Court held that a tax on rent or income from personal property had the effect of being a tax on the *source* of that income—the property itself—so that a tax on the income from property also had to be apportioned as a direct tax.<sup>188</sup> That source-based analysis amounts to a rejection of the Excise Tax Canon that the Court had developed up until that point, but that source-based analysis will itself be quickly discarded and overruled, as we discuss below.<sup>189</sup>

Contrary to our approach here, much of the debate in the literature about *Pollock*, and the Apportionment Clauses more generally, is over the first holding—that is, what is the “correct” meaning of the term “direct tax,” at least to the framers, and whether *Pollock*

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<sup>181</sup> See White, note 143, at 820; Marjorie E. Kornhauser, The Story of Macomber: The Continuing Legacy of Realization, in *Tax Stories: An In-Depth Look at Ten Leading Federal Income Tax Cases* 112 (Paul L. Caron ed., 2d ed. 2009).

<sup>182</sup> See Mehrotra, note 70, at 132.

<sup>183</sup> *Pollock I*, 157 U.S. at 583 (real estate); *id.* at 586 (municipal bonds).

<sup>184</sup> *Pollock II*, 158 U.S. at 628.

<sup>185</sup> *Id.* at 636-37.

<sup>186</sup> See, e.g., Ackerman, note 15, at 28-31. See generally Johnson, note 15.

<sup>187</sup> *Pollock II*, 158 U.S. at 628.

<sup>188</sup> See *Pollock I*, 157 U.S. at 580-83.

<sup>189</sup> See Parts II.D, III.

wrongly held that taxes on all property were direct taxes.<sup>190</sup> While this line of scholarship raises important questions relating to understanding the original meaning of the term “direct tax”—indeed, we suggested above some of the neglected historical context that could inform that debate<sup>191</sup>—this approach misses what we argue is the more consequential error of *Pollock*.

To be clear, we believe *Pollock* was deeply flawed in expanding the definition of “direct tax” to encompass personal property, contrary to what prior Supreme Court precedents had clearly stated. That said, we think it likely that the current Supreme Court would sustain that holding and view direct taxes broadly as encompassing all taxes on property, not just capitations and taxes on real property—especially in light of Chief Justice Roberts’s recent citation to *Macomber*, in dicta, to that effect.<sup>192</sup> As a recent report by the Congressional Research Service concludes, “it does not appear that the Supreme Court has overruled *Pollock*’s central holding that a tax on real or personal property solely because of its ownership is a direct tax.”<sup>193</sup>

By contrast, as we will elaborate below, the second holding—that a court should consider the source of the income (or of whatever other activity or privilege is being formally taxed) to determine whether a tax is substantively equivalent to a direct tax—has already been overruled both by the Sixteenth Amendment and by Supreme Court cases following *Pollock*.<sup>194</sup> Our approach here therefore does not depend on whether or not the first holding of *Pollock* remains good law—indeed, we describe a mostly consistent and coherent understanding of the full line of direct tax jurisprudence from the founding to the present day, including the parts of *Pollock* that still stand.

Before we move on, we also want to briefly touch on two other problems with the opinions in *Pollock*. First, the Court based its holding in part on a novel interpretation of the Apportionment Clauses as embodying how the states and the federal government shared their “concurrent power” over direct taxation. Under this view, the states were wary of sharing this power, particularly when they were also giv-

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<sup>190</sup> See, e.g., Ackerman, note 15; Erik M. Jensen, Taxation and the Constitution: How to Read the Direct Tax Clauses, 15 J. L. & Pol. 687 (1999); Johnson, note 49; Johnsen & Dellinger, note 17.

<sup>191</sup> Part I.

<sup>192</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) (“[The] result [in *Pollock*] was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.”).

<sup>193</sup> Ball, note 22.

<sup>194</sup> Id. (“[W]hile the Court in *Pollock* held that a tax on income derived from property was indistinguishable from a tax on the property itself, the Court later rejected that reasoning in *Stanton v. Baltic Mining Company*, upholding an unapportioned tax on a mine’s income as being [an excise].”).



ing up the power to “levy taxes on imports and to regulate commerce,”<sup>195</sup> and thus they deliberately tied the hands of Congress.<sup>196</sup> The Court also implied that the Constitution was intentionally protecting property owners from the “unfair and discriminat[ory]” will of a “mere majority vote.”<sup>197</sup> This is an interpretation of the Constitution that is wholly absent from any of the prior direct tax cases, not to mention from the Constitutional Convention itself—though it was of course ascendent in the *Lochner* era.<sup>198</sup> Indeed, it is in conflict with the Court’s reasoning in *Hylton*, *Pacific Insurance Co.*, and elsewhere, that a narrow construction of “direct tax” was necessary precisely because apportionment was so difficult. As we noted above, it is also inconsistent with the actual concerns about interstate inequity that animated the Constitutional Convention, that some states not be disproportionately burdened relative to others. If the states wanted to limit the federal government’s use of direct taxes, there were more straightforward ways than daring the federal government to tax poor states disproportionately.<sup>199</sup> As we explained above, it is more coherent to see an apportioned land tax as a progressive alternative to a poll tax in a world where the distribution and value of improved land mostly tracked population.<sup>200</sup>

Second, the Court selectively cites historical evidence purporting to show what the framers intended by “direct tax,” while dismissing or ignoring any contrary evidence. But, as discussed above and as the Court itself held on numerous occasions prior to *Pollock*, there is good evidence to support many different interpretations of what constitutes a “direct tax”—which is exactly why the Court had been called on so often to answer this precise question.<sup>201</sup> Indeed, the *Pollock* Court likely misinterpreted some of the historical evidence when it said that the income tax in England had always been treated as a “direct tax,”<sup>202</sup> since those taxes were in effect land taxes, and to the degree there were taxes on incomes, they were called “duties.”<sup>203</sup> The

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<sup>195</sup> *Pollock I*, 157 U.S. 429, 556-57 (1895).

<sup>196</sup> It is worth noting that Joseph Story refers to this argument as “wholly without any solid foundation.” Joseph Story, *Commentaries on the Constitution of the United States* § 939 (2d ed. 1851). As he notes, the mere fact of concurrent power is sufficient protection, since states are not in any way prohibited from direct taxation. *Id.* §§ 940-43.

<sup>197</sup> *Pollock II*, 158 U.S. 601, 621(1895).

<sup>198</sup> See, e.g., Horwitz, note 43, at 19-31 (on the linkage between *Pollock*, *Lochner*, and the push to invalidate any redistributive government action); White, note 143, at 810-22.

<sup>199</sup> Moreover, we should also recall that a purpose of the Constitution was to *increase* federal taxing power and make it easier to collect taxes from the states, relative to the Articles of Confederation.

<sup>200</sup> Part I.D.

<sup>201</sup> See notes 47-62 and accompanying text.

<sup>202</sup> See *Pollock II*, 158 U.S. at 630-31.

<sup>203</sup> See Whitney, note 47, at 293-95.

general income tax in England did not even appear until 1799, well after the ratification of the U.S. Constitution.<sup>204</sup>

In addition to these points, the dissenters also give voice to our Excise Tax Canon—indeed, Justice Brown refers to the collected holdings of the major pre-*Pollock* cases as a “canon of interpretation.”<sup>205</sup> Justice White notes that the source-based analysis in *Pollock*—that a tax on income is the same as a tax on the income’s source—was even stronger in some of the earlier cases, such as *Scholey*, in which the tax was “laid directly on the right to take real estate by inheritance.”<sup>206</sup> Nonetheless, Justice Brown believed the *Scholey* Court deferred to Congress’s characterization of it as a tax on the act of devolution.<sup>207</sup> Justice Brown writes that “if [a tax] can be done directly in one manner, i.e. by the rule of apportionment, *it does not follow that it may not be done indirectly in another manner.*”<sup>208</sup> These Justices understood that *Pollock* was wrong not only in its redefinition of “direct tax,” but also in the flawed methodology it appeared to prescribe. As we will see next, that methodology was quickly set aside and ultimately overruled.

#### D. *The Aftermath of Pollock: Refining the Excise Tax Canon*

The negative response to *Pollock* was swift and intense.<sup>209</sup> Faced with massive pushback, the Court quickly pivoted, returning to its pre-*Pollock* practice of finding taxes to be excises whenever possible—in other words, of applying the Excise Tax Canon.

For example, in *Nicol v. Ames*, decided in 1899, taxpayers raised a challenge to a stamp tax on certain commodity sales through the Chicago Board of Trade, arguing that it was a direct tax because it was assessed based on the value of property being sold.<sup>210</sup> Even though *Pollock* had held that taxes on personal property were direct taxes, the Court nonetheless held unanimously that the tax in question was “a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges.”<sup>211</sup> In its opinion—written by Justice Peckham, who joined the Court after *Pollock*, but was later the

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<sup>204</sup> See, e.g., S.J. Thompson, *The First Income Tax, Political Arithmetic, and the Measurement of Economic Growth*, 66 *Econ. Hist. Rev.* 873, 876 (2012); Whitney, note 47, at 295.

<sup>205</sup> *Pollock II*, 158 U.S. at 689 (Brown, J., dissenting).

<sup>206</sup> *Id.* at 648 (White, J., dissenting).

<sup>207</sup> *Id.* at 689 (Brown, J., dissenting).

<sup>208</sup> *Id.* at 692-93 (emphasis added).

<sup>209</sup> See Mehrotra, note 70, at 143-48; Ackerman, note 15, at 31.

<sup>210</sup> 173 U.S. 509, 514 (1899).

<sup>211</sup> *Id.* at 519.

author of the *Lochner* decision<sup>212</sup>—the Court used language that would seem to reject the approach taken in *Pollock*. For example, the Court wrote, in language that mirrors our Excise Tax Canon:

In deciding upon the validity of a tax . . . no micro-scopic examination as to the purely economic or theoretical nature of the tax should be indulged in, for the purpose of placing it in a category which would invalidate the tax. *As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect.*<sup>213</sup>

In *Knowlton v. Moore*,<sup>214</sup> decided a year after *Nicol*, the Court unanimously upheld a “death duty”—an estate tax, essentially—as a “duty or excise.”<sup>215</sup> In the course of its discussion, the Court seemed to challenge and narrow some of the claims made in *Pollock*. While the Court noted that *Pollock* had stated that “if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment,” the Court also said that this statement was specific to “the subject-matter under consideration” in *Pollock*, and was inapplicable to the question of whether a tax that had always been held to be a duty or excise could nonetheless be held to be a direct tax (even though that was precisely what *Pollock* did).<sup>216</sup> The Court also rejected the source-based analysis of what is direct or indirect as a “fallacy,” despite its playing a key role in *Pollock*.<sup>217</sup> To be clear, “a succession tax is direct in a much more positive sense than is a general income tax,” as Edward Whitney (the former assistant attorney general who argued and lost in *Pollock*)<sup>218</sup> pointed out in the *Harvard Law Review* in 1907,<sup>219</sup> yet the Court nonetheless still departed here from the source-based analytic approach of *Pollock*.

In *Patton v. Brady*, the Court was asked to rule whether a tax levied on the value of tobacco was a direct tax.<sup>220</sup> In holding that it was not, the Court noted the clear overlap between an excise and a tax on

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<sup>212</sup> See *Lochner v. New York*, 198 U.S. 45, 52 (1905).

<sup>213</sup> *Nicol*, 173 U.S. at 515-16 (emphasis added).

<sup>214</sup> 178 U.S. 41, 83 (1900) (citing *Pollock II*, 158 U.S. 601 (1895)).

<sup>215</sup> *Id.* at 83.

<sup>216</sup> *Id.* at 81. Recall that the income tax had already been clearly held to be an indirect tax in *Springer*. See notes 154-159 and accompanying text.

<sup>217</sup> *Knowlton*, 178 U.S. at 82; see *Pollock I*, 157 U.S. 429, 558 (1895).

<sup>218</sup> *Pollock II*, 158 U.S. at 613; see Mehrotra, note 70, at 263.

<sup>219</sup> Whitney, note 47, at 287.

<sup>220</sup> 184 U.S. 608 (1902).

property: “They are each methods by which the individual is made to contribute out of his property to the support of the government.”<sup>221</sup> That overlap was not sufficient for the Court to require apportionment; when a tax could plausibly be seen as either an excise or a direct tax, the Court deferred to the excise interpretation with little trouble.

Finally, in the most famous example of this interpretive method, the Court upheld a corporate income tax in *Flint v. Stone Tracy Co.*<sup>222</sup> The Court again reverted to the pre-*Pollock* practice of holding a tax to be an excise if there was a plausible reading as such—even if there were also a plausible reading of it as a direct tax. The Court underscored that *Pollock*’s definition of a direct tax was a tax on a person “solely because of their general ownership of property,”<sup>223</sup> and that *Pollock* endorsed looking through an income tax to the source of the income to determine if that was so. However, the *Flint* Court held, even looking through a corporate income tax to the same extent as in *Pollock*, that a corporate income tax was not a tax on property solely because of its ownership, but was instead “a tax upon business done in a corporate capacity,”<sup>224</sup> and therefore could be called an excise.<sup>225</sup> Furthermore, the opinion affirmatively cited *Springer*, the case that upheld the 1864 income tax as an excise.<sup>226</sup>

In each of these cases, the Court relied on a combination of earlier precedent as to what fell in the category of excise taxes and an avoidance of calling something a direct tax if an excise description seemed reasonable. But to be clear that same approach would certainly have applied in *Pollock* as well, since the Court had already clearly held in *Springer* that an income tax was an indirect excise, even if it taxed a person in part based on their ownership of land, and furthermore a tax on income could be framed without much difficulty as a tax on the choice to generate income from property, rather than just to hold it passively.<sup>227</sup> In this view, *Pollock* is the anomaly, the first time in an otherwise unbroken line of jurisprudence when the Court stepped outside of our Excise Tax Canon and attempted a source-based analysis of the “true” nature of a tax.

Finally, we see in these cases not only a return to the Excise Tax Canon interpretive approach, but also a more refined and clearly

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<sup>221</sup> *Id.* at 622.

<sup>222</sup> 220 U.S. 107 (1911).

<sup>223</sup> *Id.* at 149 (quoting *Knowlton v. Moore*, 178 U.S. 41, 82 (1900)).

<sup>224</sup> *Id.* at 150.

<sup>225</sup> To be clear, by this point corporations were deemed to be legal “persons.” *City of Santa Clara v. S. Pac. R.R.*, 118 U.S. 394 (1886). So it’s not immediately obvious why a choice to do business in a corporate capacity is different from a choice to do business (i.e., generate income) at all. See Mehrotra, note 70, at 257-61.

<sup>226</sup> *Flint*, 220 U.S. at 152, 158-59 (citing *Springer v. United States*, 102 U.S. 586 (1881)).

<sup>227</sup> See Ackerman, note 15, at 32-33.

specified application of it and of the line between direct taxes and excises. In the post-Civil War cases prior to *Pollock*, the Court relied relatively heavily on that era's affirmative holding that direct taxes were limited to capitations and land taxes, with the Excise Tax Canon gradually taking shape almost in the background. Following *Pollock's* expansion of "direct tax" to include taxes on all property, not just real property, the Court had to more explicitly hold that a tax was an excise, rather than just *not* a direct tax. So, we see a description of an excise as a tax on any particular uses or activities or "privilege" related to property,<sup>228</sup> as distinct from a direct tax on property itself "solely because of . . . ownership."<sup>229</sup> In these cases, we see the Court implicitly rejecting—but not explicitly overruling—the source-based analysis of *Pollock*, of refusing to see a tax on the use or privilege of property as a tax on the property itself. The actual overruling would come next.

### III. THE SIXTEENTH AMENDMENT—AND THE CHALLENGE OF *EISNER v. MACOMBER*

The prior Part explained that the cases following *Pollock* backed away from its source-based analysis to determine whether any tax or excise had the same effect as a direct tax and returned to applying the Excise Tax Canon. But those cases did not fully overrule *Pollock* on that point. That overruling comes from the Sixteenth Amendment and subsequent Supreme Court cases. The amendment reads:

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.<sup>230</sup>

In this Part, we look more closely at the Sixteenth Amendment and argue for why it should be read as overruling *Pollock's* source-based analysis and explain how subsequent Supreme Court cases confirmed that it did indeed overrule *Pollock* on that point. We then analyze the line of cases following the Sixteenth Amendment, up to the modern era. In particular, we take a close look at *Eisner v. Macomber*, the case that began a new era of constitutional tax jurisprudence centering on the definition of income and, in doing so, we argue, made a mess of the last century of writing on the Sixteenth Amendment and its relationship to the Constitution's tax provisions. As with *Pollock*, we

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<sup>228</sup> *Nicol v. Ames*, 173 U.S. 509, 519 (1899).

<sup>229</sup> *Knowlton v. Moore*, 178 U.S. 41, 82 (1900).

<sup>230</sup> U.S. Const. amend. XVI.

show that *Macomber* has since been effectively overruled in key respects.

As this discussion shows, in this period it came to be fully accepted that apportionment was no longer a practically viable path for direct taxes and so was instead a substantive barrier. For the next century of tax jurisprudence, the Court and other legal actors shifted their focus away from a determination of the proper paths for a particular tax and instead toward describing the boundaries of the uniform income tax path, the only path now thought to be practically feasible. This jurisprudence certainly bears on the question of designing a constitutional wealth tax or related reform, but as we discuss in Part IV, it is ultimately not dispositive in a world where the two-paths approach is once again practically viable.

#### A. “From Whatever Source Derived”

Scholars have long debated whether to read the Sixteenth Amendment as a full repudiation of *Pollock*—including its extension of the legal definition of “direct tax” to cover any tax on property solely because of its ownership—or only as a narrow allowance for an income tax while keeping intact the apportionment requirement for any other taxes on property. As with the drafting of the Constitution itself, there is evidence for both views. For example, Bruce Ackerman has argued that, because of post-*Pollock* cases such as *Knowlton*, there was no need to draft a full repeal for the Apportionment Clauses, since it appeared that the only problem was the income tax—every other potential direct tax had already been upheld as a valid exercise of Congress’s taxing power.<sup>231</sup> And some income tax supporters at the time argued that a constitutional amendment of any kind wasn’t even necessary, since *Pollock* was clearly an erroneous aberration that the Court was not likely to uphold.<sup>232</sup> On the other hand, there is the clear language of the amendment itself, which only addresses income, when Congress well understood that a broader repeal of apportionment was available.<sup>233</sup>

For our purposes, we focus on the importance of the language “from whatever source derived.” This is sometimes understood today to mean an endorsement of a broad definition of income. In *Commissioner v. Glenshaw Glass Co.*, for example, the Court used that lan-

<sup>231</sup> Ackerman, note 15, at 33-34.

<sup>232</sup> See Roy G. Blakey & Gladys C. Blakey, *The Federal Income Tax 27-36, 60-64* (1940); Mehrotra, note 70, at 263-69.

<sup>233</sup> See Daniel Hemel & Rebecca Kysar, *Opinion, The Big Problem with Wealth Taxes*, N.Y. Times (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html>.

guage to reject earlier language from *Eisner v. Macomber* that implied that income was derived only from labor or capital sources, holding instead that it could come from any source.<sup>234</sup> But read in light of *Pollock*, the phrase takes on a different and more important meaning—namely a repudiation of *Pollock*'s source-based analysis and a full reinstatement of the Excise Tax Canon interpretive methodology.

First, we should briefly review some of the congressional debate and the process by which this language was included, since it adds important context for interpreting the language of the amendment. A first draft of the amendment was proposed by Senator Norris Brown in April 1909 that read: "The Congress shall have the power to lay and collect taxes on income and inheritances."<sup>235</sup> But as Senator Isidor Rayner immediately pointed out, Congress *already had* the power to tax income and inheritances—but the Constitution demanded the apportionment path if those taxes were considered "direct taxes."<sup>236</sup> Ackerman describes this, not unreasonably, as an attempt to gut the amendment, since it said nothing about relieving the apportionment requirement.<sup>237</sup> The second attempt by Brown, in June, read, "The Congress shall have the power to lay and collect *direct* taxes on incomes without apportionment among the several States according to population."<sup>238</sup>

The danger with this language was that it could have reified a disputed reading of the holding of *Pollock*—that income taxes were themselves direct taxes, and by implication that there were other kinds of direct taxes as well, perhaps including those, like the estate tax, that had also previously been upheld as excises.<sup>239</sup> Recall that

<sup>234</sup> *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430-31 (1955) (declining to characterize income as solely "the gain from capital, from labor, or from both combined," and instead holding that "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" constitutes income (quoting *Eisner v. Macomber*, 252 U.S. 189, 207 (1920)).

<sup>235</sup> S.J. Res 25, 61st Cong., 44 Cong. Rec. 1568 (1909).

<sup>236</sup> *Id.* at 1568-69.

<sup>237</sup> See Ackerman, note 15, at 36-37. Jensen takes issue with Ackerman characterizing Brown as a "conservative" opponent of income taxation not acting in "good faith." Jensen, *The Taxing Power*, note 52, at 1111-12 n.271. Jensen implies instead that Brown was acting in good faith, even though income tax opponents were also supporting the amendment as a way to punt the issue from Congress and have it hopefully die in the states. *Id.* at 1113. The truth is probably somewhere in the middle.

<sup>238</sup> S.J. Res. 39, 61st Cong., 44 Cong. Rec. 3377 (1909) (emphasis added); see Ackerman, note 15, at 37.

<sup>239</sup> Ackerman, note 15, at 36-37. Moreover, this phrasing did not reject the source-based analysis of *Pollock*, so that even if an income tax was allowed to be unapportioned, the door could still be open for a constitutional challenge that a tax on other items of income was in effect another sort of direct tax for which apportionment was still required. See John D. Bunker, *The Income Tax and the Progressive Era* 126 (1985) ("The belief that income is taxable regardless of its source . . . would not have been supported by Brown's word-

*Pollock* was subtler, holding that an income tax that taxed income from property *had the same effect* as a tax on property. *Pollock* never questioned, for example, that an income tax on labor or business income was indirect.<sup>240</sup> It was only the supposed inseparability of the tax on income from property that led the Court to strike down the whole act. Senator Anselm McLaurin, an income tax supporter, objected to Brown's language and called instead for an amendment to remove the phrase "direct tax" from the relevant portions of the Constitution entirely—a change that would in effect have removed the apportionment requirement for *any* tax, direct or otherwise.<sup>241</sup> Brown objected to the removal of that phrase, saying candidly that his "purpose [was] to confine it to income taxes alone."<sup>242</sup> Thus, some argue, we should understand the Sixteenth Amendment drafters as only intending to allow unapportioned income taxes, while keeping the apportionment requirement for any other kind of "direct tax"—the implication being that they still wanted Congress's hands tied for other direct taxes, perhaps including wealth taxes.<sup>243</sup>

That argument is flawed for two main reasons, however. First, it is not clear why we should give Senator Brown's intent any particular weight. Even though he formally proposed the amendment, his role in the strategy and negotiations around the amendment was minimal.<sup>244</sup> Ackerman suggests that he may even have been an opponent of the income tax not acting in good faith<sup>245</sup>—which was true for most of the amendment proponents, since the strongest income tax supporters

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ing."); Ratner, note 136, at 299 (1942) ("The justification for the income tax given in 1895, that income is taxable irrespective of the source from which it is derived, would not have been written into the Constitution by Brown's amendment.").

<sup>240</sup> See, e.g., *Pollock I*, 157 U.S. 429, 578-79 (1895) (distinguishing *Springer* on this basis).

<sup>241</sup> The change would have meant that only capitations were required to be apportioned—but they are apportioned by definition anyway.

<sup>242</sup> 44 Cong. Rec. 3377 (1909); see Ackerman, note 15, at 37.

<sup>243</sup> See Hemel & Kysar, note 233.

<sup>244</sup> For example, in their "classic study of the legislative history of the income tax," Mehrotra, note 70, at 28 n.59, Roy and Gladys Blakey describe Brown as striving to be recognized during the Senate debates and being quickly usurped by the Senate Finance Committee, Blakey & Blakey, note 232, at 61. They describe him as "zealous[ly]" trying to maintain a connection to the amendment by formally proposing the Senate Finance Committee version in July, likely not when it was originally planned to be brought up. *Id.* Historian Sidney Ratner says the Senate Finance Committee "buried [his] suggestion[.]" Ratner, note 136, at 298. Historian John Buenker describes Brown largely as a tool of President Taft. See Buenker, note 239, at 120. In Ajay Mehrotra's masterful history of the intellectual and legal movement behind the income tax, Brown isn't even mentioned. See Mehrotra, note 70.

<sup>245</sup> Ackerman, note 15, at 36-37. But see discussion at note 237. In the congressional debates in July, McLaurin called out Brown:

Mr. McLaurin: . . . If I understood the vote yesterday, the proponent of this proposed constitutional amendment voted against the income tax.

Mr. Brown: I voted for an income tax.



wanted instead to pass a new income tax bill, predicting that the Supreme Court would be forced to overrule *Pollock*.<sup>246</sup> Contemporaneous and historical accounts understood Senator Nelson Aldrich as the real force behind the amendment,<sup>247</sup> with Senator Knute Nelson authoring the key language.<sup>248</sup> This leads to the second flaw in the argument that we should accept Brown's characterization of the amendment—the language in the final amendment ended up significantly different from Brown's version. The Senate Finance Committee's version—the final version—as written by Nelson, removed the phrase “direct tax” and added the phrase “from whatever source derived.”<sup>249</sup> Ackerman describes this as a “major retreat from Brown's conservative ambitions.”<sup>250</sup> Whether or not Brown's ambitions were conservative, the final draft is clearly broader than the Brown version

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Mr. McLaurin: I did not catch the vote of the Senator aright if he voted for an income tax. The Senator from Nebraska [Brown], as I heard it, voted to substitute the corporation tax for the income tax.

Mr. Brown: I did. A corporation tax is a tax on incomes, which the court has sustained. I voted for that which the court sustained and rejected that which the court rejected.

44 Cong. Rec. 4067 (1909). In its practical effect, this is not easily distinguished from the strategy of Aldrich, who famously declared, “I shall vote for a corporation tax as a means to defeat the income tax.” *Id.* at 3929.

<sup>246</sup> See Blakey & Blakey, note 232, at 27-36 (on the Bailey-Cummins income tax proposal), 60-64 (on the Sixteenth Amendment as a compromise position); Buenker, note 239, at 100-37; Mehrotra, note 70, at 263-69; Ratner, note 136, at 298. The issue is more complex than can be treated fully here, but it appears that President Taft and some “Insurgent” Republicans were attempting a middle ground between completely abandoning an income tax, as Senator Aldrich and the more conservative Northeastern Republicans wanted, and passing an income tax in Congress in order to force the Supreme Court to overturn *Pollock*, as Democrats and some more progressive Republicans wanted. See Ratner, note 136 at 298; Mehrotra, note 70, at 268-69; Seligman, note 55, at 592-93. It seems that Taft, though hardly an income tax supporter, had come around to the view that *Pollock* was wrongly decided, but feared the optics of Congress forcing the Supreme Court to back-track. See Buenker, note 239, at 88, 93-94; Mehrotra, note 70, at 268. His compromise solution was to instead pass a corporation excise tax in Congress and a constitutional amendment. The amendment would either die in the states or would allow the Supreme Court to save face. According to Buenker, Taft “won over” Brown to this view, splitting him from the more progressive Insurgent Republications like Senators Borah, Bristow, Cummins, and La Follette. Buenker, note 239, at 120. Buenker describes Brown as a “marginal Insurgent,” *id.*, and Sidney Ratner describes him as a “halfway Insurgent,” Ratner, note 136, at 298. The other Insurgent Republicans continued to support passing an income tax bill instead, though they ultimately voted for the constitutional amendment as better than nothing. See Blakey & Blakey, note 232, at 60; Buenker, note 239, at 130-37; Ratner, note 136, at 301.

<sup>247</sup> See, e.g., Ratner, note 136, at 300 (“Aldrich's Proposal for a Constitutional Amendment”); Seligman, note 55, at 595 (on Aldrich controlling the Senate debate); Harry Hubbard, “From Whatever Source Derived,” 6 A.B.A. J. 202, 203 (1920) (on Aldrich controlling the committee process).

<sup>248</sup> See Hubbard, note 247, at 203.

<sup>249</sup> S.J. Res. 40, 61st Cong., 44 Cong. Rec. 3900 (1909); see Ackerman, note 15, at 38.

<sup>250</sup> Ackerman, note 15, at 38; see Johnson, Purging, note 49, at 1733.

and could more easily be read as rejecting the source-based analysis of *Pollock*—and at any rate Brown’s understanding of the language becomes far less relevant when Aldrich and Nelson were the key drafters.<sup>251</sup>

The comparison between the two drafts reveals something else, though, which is that the “from whatever source derived” language was not strictly necessary to make an unapportioned income tax possible. Brown’s second version—the one containing the “direct tax” language and the apportionment language—would have done the job. So, we have to ask, what does the phrase “from whatever source derived” add in addition to allowing an income tax?<sup>252</sup>

The Supreme Court addressed this question early on, in *Brushaber v. Union Pacific Railroad Co.*, in which the taxpayer challenged application of the new income tax as unconstitutional, even given the new Sixteenth Amendment.<sup>253</sup> The *Brushaber* Court explained that *Pollock* “did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise” unless it had the *effect* of being a direct tax on property, “in which case the duty would arise to *disregard form and consider substance alone* and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.”<sup>254</sup> The Court is here articulating what we argue is the key error of *Pollock*, of disregarding the form of taxation chosen by Congress and also disregarding the fact that an income tax could be—and, indeed, had been on many occasions—described as an excise, and instead purporting to look at the source to determine the true substance of the tax. That is, of disregarding the Excise Tax Canon.

<sup>251</sup> Because he proposed the original resolution, “[a]s a formal matter of parliamentary procedure, Brown’s amendment served as the basis for the entire debate on the Senate floor,” but his particular language was quickly put aside, with the Senate Finance Committee’s amendment being the subject of full debate. Ackerman, note 15, at 37-38.

<sup>252</sup> There was an active debate before and after the Sixteenth Amendment’s ratification on whether these words were specifically intended to allow the taxation of income derived from state governments, such as municipal bond interest (at issue in *Pollock I*) or judicial salaries, see *Evans v. Gore*, 253 U.S. 245 (1920), overruled in part by *United States v. Hatter*, 532 U.S. 557 (2001). See, e.g., Blakey & Blakey, note 232, at 454-67; Mehrotra, note 70, at 270-76; Seligman, note 55, at 596-604; Hubbard, note 247, at 202. The particulars of that debate are not important here, since the drafters who supported that view, especially Nelson, intended by it to make “the power to tax incomes *as broad as ‘incomes’ themselves could possibly be*,” *id.* at 203, which is consistent with our interpretation of the phrase and with later Supreme Court interpretations, as discussed below. See *South Carolina v. Baker*, 485 U.S. 505 (1988); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

<sup>253</sup> *Brushaber*, 240 U.S. at 9.

<sup>254</sup> *Id.* at 16-17 (emphasis added).

As the Court subsequently elaborated in *Stanton v. Baltic Mining Co.*:

[By *Brushaber*,] it was settled that the provisions of the Sixteenth Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.<sup>255</sup>

In light of this reading of *Pollock*, the purpose of the Sixteenth Amendment, the *Brushaber* Court said, “was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived”<sup>256</sup>—that is, to no longer attempt to determine if the income tax is in “substance” a tax on the source of the income solely because of its ownership:

[T]here is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* Case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived. . . .<sup>257</sup>

To be clear, the *Brushaber* Court understood the Sixteenth Amendment as enshrining *Pollock II*'s view that direct taxes include not just taxes on *real* property solely because of its ownership, but taxes on *all* property solely because of its ownership.<sup>258</sup> More importantly, however, the *Brushaber* Court held that the purpose of the Sixteenth Amendment was to “prevent[ ] . . . resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself.”<sup>259</sup>

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<sup>255</sup> 240 U.S. 103, 112-13 (1916).

<sup>256</sup> *Brushaber*, 240 U.S. at 18.

<sup>257</sup> *Id.*; see also Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 1.2.3 (2022).

<sup>258</sup> *Brushaber*, 240 U.S. at 19; see Ackerman, note 15, at 41.

<sup>259</sup> *Brushaber*, 240 U.S. at 19.

Thus, as interpreted by both *Brushaber* and *Stanton*,<sup>260</sup> the Sixteenth Amendment overruled the second critical error of *Pollock* and reaffirmed the Excise Tax Canon. Courts should not inquire into the underlying source of the thing being taxed for purposes of characterizing a tax as direct when an excise interpretation is reasonable. However, this raises the question of whether the Sixteenth Amendment's overruling of *Pollock*'s source-based analysis and the further holdings of *Brushaber* and *Stanton* apply to all taxes or only to taxes that comply with some constitutional definition of "income." In other words, it could perhaps be argued that the Sixteenth Amendment reinstated the Excise Tax Canon only with respect to *income* taxes so that *Pollock*'s source-based analysis could still be applied for other taxes. We think there is little to support that view, however. First, *Pollock* applied the source-based analysis only to *income*—it said nothing about applying that method to other taxes.<sup>261</sup> To the contrary, the Court continued to apply and refine the Excise Tax Canon to a variety of other taxes in the cases following *Pollock*.<sup>262</sup> Second, the settled status of both the corporate income tax and the estate tax as excises is firm and long-standing for well over a century—as far as we know, it has never been plausibly argued that *Pollock* should be read as overturning *Flint* or *Knowlton*.

Furthermore, the third main holding of *Pollock*—that an income tax could not constitutionally tax municipal bond interest—followed a similar source-based analysis as for rent, and that holding has since been unambiguously overruled. The Court in *Pollock I* asked whether a tax on municipal bond interest was in effect a tax on the bond itself.<sup>263</sup> The result of that source-based analysis was not to make a tax on municipal bond interest an unapportioned direct tax, however, but rather to view it as violating intergovernmental immunity, because the federal government would in essence be taxing a state, by placing a burden on its contracts.<sup>264</sup> The intergovernmental immunity point is not directly relevant to us here,<sup>265</sup> but in that line of cases following the Sixteenth Amendment, the repudiation of the source-based analysis is even more strongly held, up to an explicit overruling of *Pollock I* on that account in *South Carolina v. Baker*.<sup>266</sup> As early as 1939 the Court—citing a long string of cases—wrote in *Graves v. New York ex*

<sup>260</sup> See note 255 and accompanying text.

<sup>261</sup> See, e.g., Ackerman, note 15, at 33-34 (arguing that the Sixteenth Amendment's language was narrow because of the Court's "strategic retreat" in *Knowlton* and elsewhere).

<sup>262</sup> See Part II.D.

<sup>263</sup> See 157 U.S. 429, 583-86 (1895).

<sup>264</sup> *Id.*

<sup>265</sup> See note 252.

<sup>266</sup> 485 U.S. 505, 524 (1988).

rel. *O'Keefe* that “[t]he theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable.”<sup>267</sup>

Therefore, in our view—and in the Supreme Court’s view—the phrase “from whatever source derived” in the Sixteenth Amendment is a command to accept the form of an income tax as declared by Congress and not to inquire into the source of the income to determine whether it is in substance a tax on property because of its ownership.<sup>268</sup> This returns income taxation to the same category as the other upheld excise taxes, like those on corporate income and estates—they are all taxes on uses or activities or privileges relating to property and thus are excises that need only be uniform, not apportioned—even though the “source” of those uses or activities or privileges is property.

### B. *Eisner v. Macomber and the Problem of Realization*

Although the Sixteenth Amendment overruled the key error of *Pollock* and reinstated the Excise Tax Canon, it also introduced a new issue—whether in order to be spared the rigors of apportionment a tax had to comply with some constitutional definition of “income” under the Sixteenth Amendment. To be clear, this framing of the question is problematic because Article I, Section 8, of the Constitution still clearly allows *any* duty, impost, and excise to follow the uniformity path and avoid apportionment—thus, whether something is or is not “income” should not be dispositive. Nevertheless, the Court in *Eisner v. Macomber*<sup>269</sup> evaluated the constitutionality of a uniform income tax provision as turning solely on the question of whether the thing taxed was “income” in a constitutional sense.

The case arose in 1917—just four years after the Sixteenth Amendment, and still solidly in the *Lochner* era.<sup>270</sup> It involved the inclusion of the value of stock dividends in a taxpayer’s income for tax purposes. For tax purposes, a dividend is a distribution of “earnings and profits” by a corporation to its shareholders.<sup>271</sup> While corporate distributions are typically cash, they can be any property, such as business assets of the corporation, stock of another corporation, or even stock of the corporation itself. In the case of a corporation making a distri-

<sup>267</sup> 306 U.S. 466, 480-81 (1939) (citations omitted).

<sup>268</sup> See Ackerman, note 15, at 40-41 (noting that *Brushaber* overruled this “second prong” of *Pollock*).

<sup>269</sup> 252 U.S. 189 (1920).

<sup>270</sup> See Kornhauser, note 181, at 112 (“*Macomber* is best understood as part of the struggle during the *Lochner* era to define the nature and scope of government.”).

<sup>271</sup> IRC § 316(a).

bution of its own stock, the shareholder receives additional shares of the corporation. But when every shareholder receives those shares on a pro rata basis, neither the relative ownership of the corporation is changed, nor has there been any change in the assets held by the corporation itself. For this reason, the plaintiff in *Macomber* argued that a stock dividend could not be considered “income” for purposes of the Sixteenth Amendment.<sup>272</sup> All that had happened was a change to some entries on the corporate balance sheet—nothing had “come in” to the taxpayer. The Court agreed and declared that it was unconstitutional for the income tax to include stock dividends.<sup>273</sup>

The history of *Macomber* and its continuing relevance to modern tax law has been well covered elsewhere, particularly by Marjorie Kornhauser.<sup>274</sup> We focus here on two questions the case raises that are relevant to our analysis of direct tax jurisprudence—whether it implies a rejection of the Excise Tax Canon, and whether it requires realization for any tax labeled as an “income tax.” This second issue is directly relevant for income tax reforms to include unrealized gain but may also be relevant for certain forms of wealth taxes framed as income taxes (such as a tax on the presumptive income from wealth). We address these two questions before turning to the question of whether *Macomber* even remains good law.

First, the Court appeared again to deviate from the Excise Tax Canon. Importantly, it should not have been dispositive to hold that stock dividends are not “income.” At most, all that should have done is move stock dividends out from under the particular protections of the Sixteenth Amendment. In order for the tax to be unconstitutional, however, it must be an unapportioned direct tax. The Court does an extensive analysis of the question of whether a stock dividend can be considered “income,”<sup>275</sup> but after holding that it cannot be, it simply asserts without analysis that the tax is therefore a direct tax—that is, a tax on property imposed “because of ownership.”<sup>276</sup>

With so little reasoning we cannot say for sure what the Court’s rationale is for this necessary second step in the argument, but it seems that the Court equates the taxation of a stock dividend with the taxation of a corporation’s accumulated earnings, which would be, in the Court’s view, the same as taxing part of the overall value of the

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<sup>272</sup> See *Macomber*, 252 U.S. at 201; Kornhauser, note 181, at 101.

<sup>273</sup> *Macomber*, 252 U.S. at 219.

<sup>274</sup> Kornhauser, note 181.

<sup>275</sup> See *Macomber*, 252 U.S. at 205-17.

<sup>276</sup> *Id.* at 217; see Bittker & Lokken, note 257, ¶ 1.2.4. (“[The Court] failed, despite the length of the opinion, to explain why a tax on the receipt of a stock dividend is a ‘direct’ tax requiring apportionment rather than an excise or indirect tax that is not subject to apportionment.”).

corporate stock solely because of its ownership.<sup>277</sup> This lack of reasoning is especially problematic because the *Macomber* Court cites both *Brushaber* and *Stanton* favorably for their key holdings,<sup>278</sup> but then proceeds to disregard the implications of those holdings in failing to even discuss the question of whether stock dividends, if not income, might still qualify as an appropriate base for an excise.

Had the *Macomber* Court considered this in light of prior cases, this question should have been easy to answer. Absent a resulting shift in economic ownership, a tax on stock dividends is quite clearly a tax only upon a particular corporate act. The Court should thus have found that the tax was an excise, that is, a tax on the *act* of declaring a stock dividend—in the same way that the succession tax in *Scholey* was an excise on the *act* of devolving real property,<sup>279</sup> and the corporate tax itself in *Flint* was an excise on the *act* of operating a business in corporate form.<sup>280</sup>

Thus, although the Court does not say this explicitly in *Macomber*, the decision only makes jurisprudential sense if the Court is treating a tax on a stock dividend as a tax on its source, corporate stock, solely because of its ownership. In other words, the Court effectively rejected the Excise Tax Canon's restrained approach and instead broadly inquired into whether property is burdened in any way, just as the Court in *Pollock* did. This worry is partially captured by Justice Holmes in dissent, who writes, "The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest."<sup>281</sup> In our view, the opinion's limited and flawed discussion of the issue means that *Macomber* should not be read as rejecting the Excise Tax Canon and resurrecting the source-based analysis of *Pollock*, but Holmes's dissent underscores the uncertainties and potential risks.

The second challenge raised by *Macomber* for our purposes is whether *realization* is constitutionally required for income taxes. The *Macomber* Court concluded that a stock dividend cannot be considered income because it has not been "*severed*" or separated from the underlying capital itself, and that was sufficient to require apportionment—"enrichment through increase in value of capital investment is not income in any proper meaning of the term."<sup>282</sup> If that is so—if realization is constitutionally required for any income tax—that poses

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<sup>277</sup> *Macomber*, 252 U.S. at 217.

<sup>278</sup> *Id.* at 206.

<sup>279</sup> *Scholey v. Rew*, 90 U.S. (23 Wall.) 331, 346-47 (1875).

<sup>280</sup> *Flint v. Stone Tracy Co.*, 220 U.S. 107, 152 (1911).

<sup>281</sup> *Macomber*, 252 U.S. at 220 (Holmes, J., dissenting).

<sup>282</sup> *Id.* at 207, 214-15 (majority opinion).

a challenge for taxes on unrealized gains and potentially also for wealth taxes that might try to be constructed as income taxes in order to fall under the Sixteenth Amendment. We discuss in the next Section why, even if this is what *Macomber* stands for, it has been essentially overruled on this point. But whether or not something is “income,” under *Macomber* or otherwise, does not resolve the issue—the ultimate question is still whether a tax can, following the Excise Tax Canon, be reasonably described as an excise. Only if the Excise Tax Canon has been rejected should the constitutional definition of “income” be dispositive. But rather than being rejected, courts continue to apply it today.

For example, consider the D.C. Circuit’s recent decision in *Murphy v. Internal Revenue Service*. In its first decision in the case (*Murphy I*), the court held that compensatory damages for emotional distress were not “income,” and therefore taxing them was unconstitutional.<sup>283</sup> The rationale was that the damages were not a gain, but rather a payment intended “to make [the plaintiff] emotionally and reputationally ‘whole,’” or what the court analogizes to being, in effect, a return of capital—the taxpayer’s “human capital.”<sup>284</sup> In its opinion, the court made much of the necessity to define the outer bounds of “income” based on some general understanding of the term, writing that “[t]he Sixteenth Amendment simply does not authorize the Congress to tax as ‘incomes’ every sort of revenue a taxpayer may receive. As the Supreme Court noted long ago, the ‘Congress cannot make a thing income which is not so in fact.’”<sup>285</sup>

However, the near-universal condemnation of the *Murphy I* case from the tax bar, scholars, and many others prompted the court to sua sponte vacate that holding and rehear the case.<sup>286</sup> In its decision following rehearing (*Murphy II*), the court then held the opposite—that Congress *did* have the power under the Constitution to tax compensatory damages from emotional distress.<sup>287</sup> Along the way, the court made several conclusions relevant to direct tax jurisprudence. First, it stated that an item need not strictly be an “accession to wealth” in order for Congress to include it under the definition of “income” for tax purposes: Congress can “*label* a thing income and tax it, so long as it acts within its constitutional authority, which includes not only the Sixteenth Amendment but also Article I, Sections 8 and 9.”<sup>288</sup> After

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<sup>283</sup> 460 F.3d 79, 88 (D.C. Cir.), vacated, 2007-1 USTC ¶ 50,228 (D.C. Cir. 2006).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 87 (quoting *Burk-Waggoner Oil Ass’n v. Hopkins*, 269 U.S. 110, 114 (1925)).

<sup>286</sup> *Murphy v. Internal Revenue Serv.*, 2007-1 USTC ¶ 50,228 (D.C. Cir. 2006) (order for vacation and rehearing).

<sup>287</sup> *Murphy v. Internal Revenue Serv.*, 493 F.3d 170 (D.C. Cir. 2007).

<sup>288</sup> *Id.* at 179.



concluding that Congress did, in fact, intend such damages to be treated as gross income under § 61(a), the court turned again to the constitutional question.<sup>289</sup> Ultimately, the court decided that it did not need to resolve the question of whether compensatory damages were truly “income,” because that was ultimately irrelevant to the question of whether Congress had the power to tax compensatory damages without apportionment. Instead, the court said, the issue turned on whether such a tax was a “direct tax” or more akin to a duty, impost, or excise.<sup>290</sup> Looking at the cases on this issue (many of which we discussed herein), the court held that taxing compensatory damages was an excise, and thus apportionment was not required.<sup>291</sup>

The court in *Murphy II* shows that whether something is “income” is not the end of the analysis when the Excise Tax Canon is properly applied. But *Macomber* has nonetheless muddied the last century of writing on the Sixteenth Amendment and its relationship to the Constitution’s tax provisions, by turning the focus to realization. As we discuss in the next Section, however, *Macomber* was slowly overturned over decades, so that even this flawed reading of the case should not carry weight today.

### C. *To What Extent Has Macomber Been Overturned?*

As we explained above, *Macomber* can be read to hold that the Sixteenth Amendment only authorizes a *realization-based* income tax without apportionment, such that both wealth tax reforms and taxes on unrealized gains could be found to be direct taxes that must be apportioned—if the Excise Tax Canon is also ignored. But that risk is only to the extent that *Macomber* remains good law. As we now explain, the decision has been largely overturned by subsequent cases like *Helvering v. Bruun*<sup>292</sup> and *Commissioner v. Glenshaw Glass Co.*,<sup>293</sup> but perhaps not completely overturned.

The *Bruun* Court held as follows:

Here, as a result of a business transaction, the respondent received back his land with a new building on it, which added an ascertainable amount to its value. It is not necessary to recognition of taxable gain that he should be able to sever

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<sup>289</sup> Id. at 180.

<sup>290</sup> Id. at 184. Here, we note, the court is doing what the Supreme Court failed to do in *Macomber*, in which it just assumed that the tax was a direct tax.

<sup>291</sup> Id. at 186.

<sup>292</sup> 309 U.S. 461 (1940).

<sup>293</sup> 348 U.S. 426 (1955).

the improvement begetting the gain from his original capital.<sup>294</sup>

This holding thus at least partially overturned *Macomber*'s rule that "income" requires severance from the underlying capital.<sup>295</sup> But the *Bruun* holding might still be interpreted as just narrowing the realization rule to requiring only that there be some "business transaction"; for instance, Jensen has argued that the *Bruun* Court did not repudiate *Macomber*'s realization requirement but rather just "interpreted its scope narrowly."<sup>296</sup>

The *Glenshaw Glass* Court then subsequently overruled *Macomber*'s holding that "income" must derive "from capital, from labor, or from both combined."<sup>297</sup> But, in doing so, the *Glenshaw Glass* Court said that there was income in that case because there were "undeniable accessions to wealth, *clearly realized*, and over which the taxpayers have complete dominion."<sup>298</sup> This could be read as maintaining the realization requirement from *Macomber*.

When Congress previously considered substantial income tax reforms to reach unrealized gains—such as taxing shareholders on certain undistributed profits in 1962, or taxing unrealized gains at death in 1963—there was controversy over whether the Supreme Court would uphold those reforms without apportionment, and that controversy played a role in those reforms being defeated.<sup>299</sup> Notably, this was during the era of the "progressive" Warren Court—there is good reason to suspect that today's Roberts Court would be even more inclined to limit Congress's taxing powers.<sup>300</sup>

That said, Congress has since successfully enacted several limited departures from the realization doctrine, each of which could be viewed as partial taxes on unrealized gains.<sup>301</sup> Courts have demon-

<sup>294</sup> *Bruun*, 309 U.S. at 469.

<sup>295</sup> *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

<sup>296</sup> Jensen, *The Taxing Power*, note 52, at 1143.

<sup>297</sup> *Glenshaw Glass Co.*, 348 U.S. at 430.

<sup>298</sup> *Id.* at 431 (emphasis added).

<sup>299</sup> Kornhauser, note 181, at 129-30.

<sup>300</sup> See note 22.

<sup>301</sup> See, e.g., IRC §§ 467 (requiring recognition of accrued but unpaid rent for certain types of property, even for a cash-method taxpayer), 475 (requiring securities dealers to mark securities in their inventory to market, with corresponding recognition of gain or loss), 817A (requiring life insurance companies to mark to market certain "modified guaranteed contracts"), 877A (taxing expatriates as if they sold their property on the day before they expatriated), 965(a)-(c) (taxing certain shareholders of foreign corporations with the so-called "mandatory repatriation tax"), 1256 (requiring certain types of financial derivatives to be marked to market and recognizing any resulting gain or loss), 1296 (allowing a mark-to-market election for certain stock held by a passive foreign investment company); see also Adler, note 16, at 63 (arguing that the so-called mandatory repatriation tax in § 965(a)-(c) is unconstitutional).

strated a reluctance to apply *Macomber* to rule these legislative departures from the realization doctrine as outside the scope of the Sixteenth Amendment. For example, § 1256, which requires taxpayers holding certain types of financial derivatives to be marked to market and recognize any gain or loss therefrom, was challenged and then upheld by the Ninth Circuit's decision in another case titled *Murphy*.<sup>302</sup> But *Murphy* upheld § 1256 based on a constructive receipt theory, because the taxpayer in that case "receive[d] profits as a matter of right daily."<sup>303</sup> The decision explicitly cautioned that "[w]e need not, and do not, decide the broader issue of whether Congress *could* tax the gains inherent in capital assets prior to realization or constructive receipt."<sup>304</sup> Similar theories could potentially be used to uphold the other existing legislated departures from the realization doctrine.<sup>305</sup>

The best recent discussion of these issues is in the Ninth Circuit's opinion in *Moore v. United States*, dismissing a challenge to the "mandatory repatriation tax" in § 965(a), which was enacted by the 2017 Act.<sup>306</sup> In upholding the district court's opinion, the *Moore* decision reviewed a series of cases following *Macomber* along with some of the existing legislated departures from the realization doctrine to hold that "[w]hether the taxpayer has realized income does not determine whether a tax is constitutional. . . . [T]he Supreme Court has made clear that realization of income is not a constitutional requirement."<sup>307</sup> Furthermore, the court read *Macomber* itself as "only providing a definition of what '[i]ncome may be defined as,' not a universal definition."<sup>308</sup>

If the Supreme Court were to affirm the Ninth Circuit's holding and adopt its reasoning, the *Moore* decision might thus mark the final death of *Macomber*. Regardless, the reasoning in *Moore* corresponds with a near scholarly consensus that *Macomber*'s holding is no longer valid.<sup>309</sup> It is also noteworthy that the Supreme Court has twice writ-

<sup>302</sup> *Murphy v. United States*, 992 F.2d 929 (9th Cir. 1993).

<sup>303</sup> *Id.* at 931.

<sup>304</sup> *Id.* at 931-32.

<sup>305</sup> For arguments to that effect, see Magidenko, note 16, at 955-56.

<sup>306</sup> 36 F.4th 930 (9th Cir.), reh'g denied, 53 F.4th 507 (9th Cir. 2022).

<sup>307</sup> *Id.* at 935-36.

<sup>308</sup> *Id.* at 937 (alteration in original) (emphasis added) (citation omitted). Further helpful discussion elaborating along these lines can be found in the district court opinion in the case. *Moore v. United States*, 126 A.F.T.R.2d 2020-6944 (W.D. Wash. 2020).

<sup>309</sup> For support that there is a near scholarly consensus on this question, see, e.g., Lily Batchelder & David Kamin, Policy Options for Taxing the Rich, in *Maintaining the Strength of American Capitalism* 200, 223 (Melissa S. Kearney & Amy Ganz eds., Aspen Inst. 2019) ("*Macomber* has been dramatically scaled back and essentially limited . . . to its facts. Virtually all commentators now agree the realization requirement is a mere administrative convenience and not constitutionally required." (citation omitted)); Bittker & Lokken, note 257, ¶ 5.1.1 (describing the Court's undermining of *Macomber*'s holding in

ten in dicta that “the concept of realization is ‘founded on administrative convenience.’”<sup>310</sup> This is often read as implying that *Macomber*’s holding that the realization rule is a constitutional requirement has been overturned.<sup>311</sup>

Nevertheless, the Supreme Court has never explicitly overturned *Macomber* on this question, and it is not clear whether today’s Supreme Court would follow the direction suggested by scholars and by some lower courts and by dicta written by Justices who have since retired. Specifically, some commentators predict that a majority of the Justices on the current Supreme Court might be inclined to revive *Macomber* so as to strike down taxes on unrealized gain and similar reforms.<sup>312</sup> Moreover, our recent experience working on the federal Billionaires Income Tax and Billionaires Minimum Income Tax reform proposals,<sup>313</sup> and also on state-level reform proposals for taxing the unrealized gains of the ultra-wealthy (for both New York<sup>314</sup> and Illinois<sup>315</sup>), suggests to us that opponents of transformative progres-

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subsequent decisions). But see, e.g., Erik M. Jensen, *The Constitutionality of a Mark-to-Market Taxing System*, 143 *Tax Notes* 1299 (June 16, 2014); Adler, note 16, 64-69; Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 36 *Yale J. on Reg. Bull.* 69, 76-82 (2018); Magidenko, note 16.

<sup>310</sup> *Cottage Sav. Ass’n. v. Commissioner*, 499 U.S. 554, 559 (1991) (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)).

<sup>311</sup> See, e.g., Bittker & Lokken, note 257, ¶ 5.2.

<sup>312</sup> See, e.g., Jensen, note 16, at 818 (“So *Pollock* and *Macomber* both live as statements of constitutional law? It is hard to read the Chief Justice’s opinion in any other way.”); Magidenko, note 16, at 956 (“[T]he Supreme Court’s consideration of direct taxation in *NFITB* suggests that it does not view the question as a dead letter. One cannot justly evaluate the merits and deficiencies of a mark-to-market tax without acknowledging the formidable, and quite possibly impassable, attendant constitutional barriers.”); Joe Bishop-Henchman & Grant Gourley, *Justice Thomas, a Medical Marijuana Dispensary, and the Limits of the Sixteenth Amendment*, Nat’l Taxpayers Union Found. Blog (July 6, 2021), <https://www.ntu.org/foundation/detail/justice-thomas-a-medical-marijuana-dispensary-and-the-limits-of-the-sixteenth-amendment>; see also *Moore v. United States*, 53 F.4th 507, 508 (9th Cir. 2022) (Bumatay, J., dissenting) (“While the Supreme Court has allowed flexibility in identifying ‘incomes,’ it has never abandoned the core requirement that income must be realized to be taxable without apportionment under the Sixteenth Amendment. Simply put, as a matter of ordinary meaning, history, and precedent, an income tax must be a tax on realized income. And our court is wrong to violate such a common-sense tautology.”), denying reh’g to 36 F.4th 930 (9th Cir.).

<sup>313</sup> See notes 8-13 and accompanying text.

<sup>314</sup> S.B. S8277B, 2019–2020 Legis. Sess. (N.Y. 2020). Note that one of us (Gamage) co-drafted this bill along with Emmanuel Saez, Darien Shanske, and other co-collaborators, and the other of us (Brooks) signed a letter in support of this bill. See David Gamage, Emmanuel Saez & Darien Shanske, *The NY Billionaire Mark-to-Market Tax Act: Revenue, Economic, and Constitutional Analysis*, Ind. Legal Stud. Res. Paper (forthcoming).

<sup>315</sup> H.B. 3475, 102d Gen. Assembly (Ill. 2021). Note that this bill—the Illinois “Extremely High Wealth Mark-to-Market Tax Act”—was modeled after the New York act, S.B. S8277B, note 314, and was co-drafted by one of us (Gamage) along with Darien Shanske.

sive tax reforms are eager to argue that courts should revitalize *Macomber*'s realization requirement so as to strike down such reforms.<sup>316</sup>

This small area of constitutional uncertainty—the possibility of a broad reading of *Macomber*'s realization requirement combined with a rejection of the Excise Tax Canon—could empower a court to require apportionment for both wealth taxes and transformative income tax reforms focusing on unrealized gain, even though doing so would be a major departure from constitutional tax jurisprudence from the founding until the present day. But because that risk is real, we turn next to the question of how apportionment of such taxes can be accomplished without major inequity.

#### IV. REVITALIZING THE TWO-PATHS APPROACH FOR THE MODERN ERA

In the prior Parts, we have shown that, read properly, the constitutional jurisprudence on taxation from the founding until today is reasonably consistent and coherent. Of course, *Pollock* departed dramatically from that jurisprudence with its holding recharacterizing the 1894 income tax as equivalent to a direct tax on the property being burdened, but that holding was then overturned by the Sixteenth Amendment and by subsequent Supreme Court cases. Beyond that, it is essentially only *Eisner v. Macomber* and some subsequent jurisprudence deriving from *Macomber*'s shoddy reasoning that departs from this otherwise reasonably consistent and coherent line of constitutional tax jurisprudence.

Specifically, the framers and early Congresses and Courts all generally understood uniformity and apportionment as just two different meta-rules for ensuring interstate equity that were not meant to substantively limit the congressional taxing power apart from requiring one of these two meta-rules. Subsequently, with the rise of industrial capitalism and the end of slavery after the Civil War, apportionment became increasingly problematic. Yet the Court then adjusted by developing a jurisprudence holding that—as to the overlap between

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<sup>316</sup> See, e.g., Jared Walczak, Taxes and New York's Fiscal Crisis: Evaluating Revenue Proposals to Close the State's Budget Gap, Tax Found. 24 (Dec. 8, 2020) ("Proponents contend that accumulated but unrealized gains, which would be subject to taxation under the Billionaire Mark to Market Tax Act, are income, not wealth, and can be taxed as such without violating the state constitution. But while we might conceptualize them as economic income, this is a concept, not a taxable flow."), <https://files.taxfoundation.org/20201208100040/Taxes-and-New-York%E2%80%99s-Fiscal-Crisis-Evaluating-Revenue-Proposals-to-Close-the-State%E2%80%99s-Budget-Gap.pdf>; Bill Mahoney, Would a New Billionaires' Tax Be Constitutional?, Politico (July 30, 2020, 5:00 AM) (quoting an opponent of the NY Billionaire Mark-to-Market Tax Act as saying, "The arguments for it being federally unconstitutional are overwhelming . . . . The arguments for it being unconstitutional in New York are absolutely slam dunk."), <https://www.politico.com/states/new-york/city-hall/story/2020/07/30/would-a-new-billionaires-tax-be-constitutional-1304177>.

taxes that might be considered either as (1) direct taxes burdening property or as (2) excises on uses or activities or privileges related to property—if a tax can be reasonably construed as a uniform excise (and especially if Congress formally designs a tax as a uniform excise), the courts should not seek to recharacterize it as a direct tax to require apportionment. This, again, is the jurisprudence we label the Excise Tax Canon.

Furthermore, as we discussed in Parts I and II, apportionment was for nearly a century considered to be a practically viable path for federal taxes on real estate and on at least certain other forms of wealth (including, at a minimum, enslaved persons, prior to the abolition of slavery). It was only the economic shift toward concentration of industrial and financial capital after the Civil War that led to the understanding that apportionment was no longer feasible. With very few tools available to manage wealth redistribution, an unapportioned income tax was then understood to be the only practically viable option. As we explain below, however, these limiting conditions no longer hold. The broad array of tax and fiscal instruments available to manage distribution today make apportionment once again practically viable.

So where does this all leave us? Returning to where we began, we appear to be entering a new era of demand for progressive tax law reforms, including wealth taxes and taxes on the unrealized gains of the very wealthy.<sup>317</sup> The popularity and prominence of such reforms has skyrocketed in recent years, as the public has increasingly gained awareness of how billionaires and mega-millionaires can largely escape existing taxes. However, at the same time, the Supreme Court has increasingly taken a more skeptical posture toward the congressional taxing power, leading reformers to fear that the current Court might strike down a newly legislated uniform federal wealth tax or tax on unrealized capital gains.

This Article argues that fears of presumed hostility by the Supreme Court should not stand in the way of transformative tax reforms desired by a congressional majority. To that end, building on our exposition of the history of constitutional tax jurisprudence, we now, in this Part, argue for revitalizing the two-paths approach for the modern era. We first explain more fully why the apportionment path is today once again practically viable. Congress could thus feasibly design a wealth tax or related tax reform to follow the apportionment path. However, we acknowledge that the apportionment path remains something of an awkward fit for most or all modern federal taxes and that its added complications may make it less attractive politically. We

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<sup>317</sup> See notes 1-11 and accompanying text.

thus also argue for why, following the Excise Tax Canon, the uniformity path should also be constitutionally available today for either a federal wealth tax or a federal tax on unrealized capital gains.

Of course, we fully acknowledge that the current Supreme Court might disagree with this latter argument. Although we argue that the best interpretation of existing doctrines supports upholding a uniform federal wealth tax or tax on unrealized gains, we recognize that there are other possible alternative interpretations of the ambiguities in current doctrines. We thus end this Article by suggesting some practical strategies for how a congressional majority desiring to enact a transformative tax reform can overcome fears of presumed hostility by the Supreme Court. The essence of these strategies is based on revitalizing the two-paths approach.

Neither the Constitution nor any prior cases suggest any justifications for excluding wealth taxes or taxes on unrealized gains from Congress's "very extensive" taxing powers—the Constitution and prior cases only require that such reforms must follow one of the two paths.<sup>318</sup> We thus explain how strategies like fallback clauses or tax reform trial balloons can be used to navigate the uncertainty as to which of these two paths the Supreme Court might require.

#### A. *Why the Apportionment Path Is Once Again Practically Viable*

Perhaps this Article's most important contribution is to explain why the apportionment path is today once again practically viable.<sup>319</sup> As

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<sup>318</sup> See, e.g., Ball, note 22, at 2 ("Supreme Court Chief Justice Salmon P. Chase famously described the taxing power in the License Tax Cases: 'It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.'" (quoting License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867)); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 13 (1916) ("[T]he requirement of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted.").

<sup>319</sup> To our knowledge, we are the first to explain why the apportionment path is now again generally practically viable in the modern era. To clarify, one prior scholar has previously written a specific proposal for an apportionment scheme whereby the federal government would levy a uniform wealth tax and then immediately refund to the taxpayers in each state the amounts needed to satisfy the apportionment formula after those rebates. See John T. Plecnik, *The New Flat Tax: A Modest Proposal for a Constitutionally Apportioned Wealth Tax*, 41 *Hastings Const. L.Q.* 483 (2014). Plecnik argues that this scheme is feasible because state governments could then be encouraged to enact "pick-up" taxes to claim those refunded funds for state expenditure. Although we applaud Plecnik's creativity, we are skeptical of his proposed scheme on several grounds. First, because most of the revenues raised by the new tax would end up either in the hands of state legislatures (to the extent pick-up taxes are enacted) or taxpayers (to the extent not), and not the federal government, we doubt that Congress would find this scheme attractive, as Congress is typi-

we have already elaborated, the nature of the fiscal world evolved in the periods during and following the Civil War. A consensus then developed that, because apportionment requires higher tax rates in poorer states and lower tax rates in richer states, interstate inequities made apportionment nonviable in the eras following the Civil War.

Yet the modern fiscal world has since further evolved. In the 1800's and early 1900's, the federal government had few fiscal tools for addressing concerns about overtaxing poorer states. By contrast, the federal government today has a plethora of such tools. During and following World War II, the federal income tax evolved from a narrow "class tax" into a broad "mass tax," dramatically increasing the revenues available for federal expenditures.<sup>320</sup> As the Tax Foundation reports, "Between 1900 and 2012, federal government receipts increased from 3.0 percent of the economy's output to 16.5 percent, and federal expenditures rose from 2.7 percent of economic output to 24.0 percent."<sup>321</sup> Large portions of these massively increased federal expenditures are now spent within or for the benefit of poorer states. According to another Tax Foundation report, in 2017, "22.9 percent of state revenues came from federal grants-in-aid," and "[s]tates that rely heavily on federal grants-in-aid tend to have sizable low-income populations and relatively lower tax revenues."<sup>322</sup>

Indeed, today, to the extent that politicians still raise concerns about some states being overtaxed or undertaxed as compared to other states, these complaints are more likely to be about wealthier

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cally highly motivated by the concern of raising federal revenues when legislating tax reforms. Second, we question whether the Supreme Court would agree that this scheme satisfies the apportionment requirement, as the new tax would not be apportioned in the first instance, and there are no historical precedents backing this scheme as a valid form of apportionment. Finally, we are skeptical that enough states would actually enact pick-up taxes to satisfactorily address the distributional concerns related to interstate inequities that have been at the heart of the conventional wisdom that apportionment is not viable. We further elaborate all of these concerns in an unpublished prior essay that we subsequently revised and developed into this Article. John R. Brooks & David Gamage, *Why a Wealth Tax Is Definitely Constitutional* (Jan. 9, 2020) (unpublished manuscript on file with the *Tax Law Review*). In any case, Plecnik's prior article is only tangentially related to the much broader argument we make here about why the apportionment path is today once again generally practically viable because of how the modern fiscal world has evolved to offer the federal government a plethora of tools to address concerns about overtaxing poorer states.

<sup>320</sup> Joseph J. Thorndike, Summary to Carl Shoup & Roy Blough, A Report on the Federal Revenue System Submitted to Undersecretary of the Treasury Roswell Magill, reprinted in *Tax Notes: Tax Hist. Proj.* (Mar. 1, 1996), <https://www.taxnotes.com/tax-history-project/birth-pangs-modern-income-tax-early-treasury-study-part-1/1996/03/01/12hfb>.

<sup>321</sup> Michael Schuyler, A Short History of Government Taxing and Spending in the United States, *Tax Found. Fiscal Fact No. 415*, at 1 (2014), <https://files.taxfoundation.org/legacy/docs/FF415.pdf>.

<sup>322</sup> Janelle Fritts, Which States Rely the Most on Federal Aid?, *Tax Found.* (Feb. 12, 2020), <https://taxfoundation.org/state-federal-aid-reliance-2020/>.



states being overtaxed as compared to poorer “moocher states.”<sup>323</sup> For instance, in 2018 it was estimated that “Kentucky received \$2.41 in federal spending for every \$1 the state’s population paid in federal taxes. New York, on the other hand, received 91 cents for every \$1 that state’s population paid in federal taxes.”<sup>324</sup> For sure, some commentators argue that even greater redistributive transfers should be made from richer states to poorer states,<sup>325</sup> and we do not mean to imply that we disagree. Nevertheless, there can be no doubt that we live in a very different fiscal world today as compared to the early 1900’s.

To show that apportionment is today once again practically viable, we illustrate below how a wealth tax or other modern tax reform could be apportioned. We then turn to methods for addressing interstate inequities. Combining these approaches generates an *apportioned* wealth tax or other reform that is also fairly distributed across the states.

### 1. *The Mechanics of Apportioning a Modern Wealth Tax or Other Tax Reform*

The revenues raised by any form of taxation depend on both the tax rates and the tax base. Because the early Direct Tax Acts were all designed as one-time lump sum levies, Congress legislated these acts by specifying the revenues to be raised and the elements of the tax base, and then apportioning the revenues to be raised among the states by population. The Direct Tax Acts then used two different methods for accomplishing the mechanics of apportionment.

The first method, which we will call the *residual tax* method, was used by the 1798 Direct Tax. This method involves combining uniform taxes on some components of the overall tax base with a residual tax on another component or components, with the rates of the residual tax then varying by state based on how much additional revenue is necessary to satisfy each state’s apportioned revenue quota. The 1798 Act accomplished this by combining *uniform* taxes on dwelling houses and enslaved persons with a *residual* tax on land.<sup>326</sup>

To use the residual tax method for apportioning a modern wealth tax or related tax reform, Congress would first need to specify the

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<sup>323</sup> Sid Salter, ‘Moocher’ States? Cuomo, McConnell Standoff Underscores Key Impasse in Partisan Divide, Clarion Ledger (Apr. 29, 2020, 5:00 AM), <https://www.clarionledger.com/story/opinion/2020/04/29/moocher-states-federal-funding-argument-reemerge-amid-coronavirus/3026132001/>.

<sup>324</sup> *Id.*

<sup>325</sup> E.g., Reuven Avi-Yonah et al., Federalizing Tax Justice, 53 Ind. L. Rev. 461 (2020).

<sup>326</sup> See Part I.G.

revenues to be raised by the reform act and then divide those revenues among the states by population to calculate apportioned revenue quotas. For a onetime wealth tax, Congress could start by legislating a national revenue target, as was done in 1798. However, for an ongoing annual wealth tax or other ongoing tax reform, Congress would need to legislate a formula for adjusting the national revenue target annually, similar to how portions of the tax code are currently adjusted annually for inflation.<sup>327</sup> Such formulas could either directly specify the national revenues to be raised or else could specify the tax rates for the uniform components of the tax.<sup>328</sup> Regardless, the state-specific tax rates for the residual component of the tax would then need to be calculated at an administrative level, just as the 1798 Direct Tax Act delegated this task to district tax commissioners.<sup>329</sup>

To be more concrete, to apportion an ongoing annual wealth tax, Congress might specify *uniform* tax rates for all components of the tax base except for land and other specified forms of real estate. That real estate would then compose the base for the residual tax. Similarly, to apportion an ongoing annual tax on unrealized capital gains, Congress might exempt land and other specified forms of real estate from that tax reform and then combine that reform with a residual ad valorem tax on the exempted asset categories. Then, an administrative agency could be delegated the task of calculating state-specific tax rates for the residual tax on real estate to meet each state's apportioned revenue quota—again similar to how the 1798 Direct Tax Act delegated this task to district tax commissioners.<sup>330</sup> Taxpayers with wealth or income below a specified threshold could be made exempt from the residual tax, to maintain progressivity, just as most proposals for a uniform national wealth tax or tax on unrealized gains only apply above an exemption threshold so as to limit these taxes to the very wealthy.

The second method, which we will call the *comprehensive rate adjustment* method, was used by the 1813 and later Direct Tax Acts.<sup>331</sup> This method involves varying the rates of all components of the tax base by state to satisfy each state's apportionment quota. In essence,

<sup>327</sup> David Gamage, Preventing State Budget Crises: Managing the Fiscal Volatility Problem, 98 Calif. L. Rev. 749, 806 (2010).

<sup>328</sup> See *id.* at 806-08 (discussing this in the context of local government property tax baselines).

<sup>329</sup> See notes 121-127 and accompanying text. For example, for a wealth tax, for the state with the highest wealth (subject to the tax) per capita, there would be no residual tax; then the state with the next highest wealth per capita would need to have a small residual tax so that it pays the same per capita as the wealthier state; and so on, with the state with the lowest wealth per capita having the highest relative residual tax.

<sup>330</sup> See notes 121-127 and accompanying text.

<sup>331</sup> See notes 133-139 and accompanying text.

then, this second method just treats the entire tax base as the residual tax, and then operates in the same manner as the residual tax method, as we explained above.

At least since *Hylton*, commentators have complained about the difficulties of apportionment and with many then citing such difficulties as arguments in favor of narrowly interpreting the scope of what counts as “direct taxes” that must be apportioned. For instance, Justice Paterson’s opinion in *Hylton* reasons, “A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.”<sup>332</sup>

This critique is valid insofar as it contemplates a tax on just carriages and nothing else. When contemplating taxes on a narrow class of property that may not exist or only scarcely exist in some states, it might well be impossible to vary the tax rates enough by state to raise the same revenues per capita. But this critique would not hold for an apportioned tax levied on carriages (or another narrow class of property) as only one component of a broader tax base. It would not have been especially difficult, for instance, to add a uniform tax on carriages to the 1798 Direct Tax along with the uniform taxes on dwelling units and enslaved people, while continuing to satisfy each state’s apportionment quota with the residual tax on land (the residual tax method). Nor would it have been especially difficult to add a tax on carriages to the 1813 Direct Tax and then vary the tax rates on all components of the overall base by state so as compensate for the different distributions of the overall tax base amongst the states and thereby satisfy each state’s apportionment quota (the *comprehensive rate adjustment* method).

Indeed, recall that the apportionment requirement for direct taxes was added to the Constitution in part for this very reason—to ensure interstate equity by preventing Congress from levying direct taxes solely on narrow classes of property that were nonexistent or scarcely existent in some states, and prevalent in other states, without those taxes being accompanied by taxes on other property in a manner designed to raise equal per capita revenues from every state.<sup>333</sup> Specifically, the representatives of Southern states wanted to prevent Congress from levying direct taxes just on enslaved people.<sup>334</sup> But the Constitution clearly authorized taxes on enslaved people as a compo-

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<sup>332</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 179 (1796) (opinion of Paterson, J.).

<sup>333</sup> See Dodge, note 17, at 853-55.

<sup>334</sup> See *id.* at 853.

ment of a broader tax base, and indeed each of the first four Direct Tax Acts included taxes on enslaved people as a component of the overall tax base.<sup>335</sup>

Some commentators have suggested that a tax on extreme wealth holdings with a high enough exemption threshold is akin to a tax on just a narrow form of property, like carriages or enslaved people. For instance, consider the Billionaires Income Tax we discussed earlier.<sup>336</sup> Because not every state has resident billionaires,<sup>337</sup> it would currently be impossible to apportion this tax in a straightforward fashion, without adjusting the base. However, this objection could be resolved by combining an apportioned version of the Billionaires Income Tax with a supplementary tax reform on a somewhat broader base. For instance, a supplementary tax on land and real property owned by taxpayers with (say) over \$50 million of wealth could accompany the Billionaires Income Tax, in the same way that taxes on land and buildings accompanied the taxes on enslaved persons in the early Direct Tax Acts. So long as the overall tax act collected sufficient revenues from every state to satisfy the apportionment requirements, it should not matter that some components of the overall tax base exist primarily in certain states,<sup>338</sup> just as the existence of enslaved persons in only Southern states did not prevent the early Congresses from levying apportioned Direct Tax Acts on enslaved persons along with buildings and land—as the framers clearly intended.

## 2. *Resolving Interstate Inequities*

The Justices in *Hylton* famously questioned whether any taxes other than capitations and taxes on land “could be apportioned.”<sup>339</sup> Citing to that language, numerous commentators have since suggested that it might be impossible or impractical to apportion a wealth tax or income tax.<sup>340</sup> However, despite their somewhat exaggerated language, the Justices in *Hylton* clarified that they were not actually questioning whether it was *literally* possible to apportion broad-based taxes on property or persons, but rather whether such apportionment could be

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<sup>335</sup> See *id.* at 854-55; Part I.E, I.G.

<sup>336</sup> See notes 8-11 and accompanying text.

<sup>337</sup> Lisette Voytko, *Here's the Richest Billionaire in Every U.S. State 2021*, *Forbes* (Apr. 7, 2021, 6:30 AM) (“Only seven states—Alabama, Alaska, Delaware, New Hampshire, North Dakota, Vermont and West Virginia—have no known billionaire residents.”), <https://www.forbes.com/sites/lisettevoytko/2021/04/07/heres-the-richest-billionaire-in-every-us-state-2021/?sh=6c9880324625>.

<sup>338</sup> Recall that the uniformity requirement does not apply to direct taxes.

<sup>339</sup> See notes 113-116 and accompanying text.

<sup>340</sup> See note 29 and accompanying text.

done without “great inequality and injustice.”<sup>341</sup> Similarly, as Joseph Dodge has explained, no one has seriously argued that it would be literally impossible to apportion a broad-based wealth tax or income tax, or any other broad-based tax “on the economic attributes of a person.”<sup>342</sup> The only real question is whether such taxes can be apportioned *equitably*.

Viewed in isolation, an apportioned wealth tax or income tax must take as taxes a greater percentage of the wealth or income from the residents of states with less wealth or income, and a lesser percentage from the residents of states with relatively more wealth or income. That is, a given taxpayer in a poorer state would end up paying a greater proportion of their wealth or income in tax as compared with a taxpayer with the same wealth or income in a richer state. This has generally been viewed as so inequitable as to be a fatal obstacle to apportioning a wealth tax or income tax, as Congress realized as far back as 1861 when it abandoned the apportionment path.<sup>343</sup>

However, consider that, for the existing U.S. income tax, combined federal- and state-level tax rates *already* differ dramatically among the states. For instance, the highest combined capital gains tax rate is currently 13.3 percentage points higher in California than in Florida.<sup>344</sup> Because all existing federal taxes are uniform, federal-level tax rates are currently set the same in every state; but combining federal taxes with state-level “piggyback” taxes then makes the combined tax rates unequal.

Tax rates varying by state is a natural result of a federal system wherein both state governments and the federal government have discretion over their own tax rates. But this is not generally considered to be inequitable because each state government then receives the revenues raised by its own tax rates to fund its own spending, which in turn largely benefits its own taxpayers. An apportioned federal-level tax differs from this because the federal government would receive the revenues raised by the tax rates that vary by state instead of the state governments receiving those revenues. For an apportioned federal-level wealth tax or income tax, this then means that the federal government would take a greater percentage of the wealth or income of poorer states as compared to richer states. This, rather than the mere fact of tax rates varying by state, is the heart of the inequity.

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<sup>341</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.).

<sup>342</sup> Dodge, note 17, at 916-17.

<sup>343</sup> See notes 27-29 and accompanying text.

<sup>344</sup> See Garrett Watson & Erica York, *Top Combined Capital Gains Tax Rates Would Average 48 Percent Under Biden’s Tax Plan*, Tax Found. (Apr. 23, 2021), <https://taxfoundation.org/biden-capital-gains-tax-rates/>.

Understanding that this is the heart of the inequity shows how the inequity can be resolved. All that is needed is for the federal government to spend the extra revenues raised from the tax rates varying by state for the benefit of the poorer states, just as higher-tax states already do. This could be accomplished in a number of ways, including by just funding a federal spending program that would primarily benefit poorer states. Indeed, for those who think that existing federal tax and spending programs already redistribute too much from richer states to poorer states, this “problem” has already been solved by existing federal tax and transfer programs.

Accordingly, to the extent that the sponsors of a new apportioned tax reform think that more should be done to resolve potential interstate inequities, the federal government today has many fiscal tools for accomplishing this. The most comprehensive solution might be to establish a new fiscal equalization system. As Kirk Stark has explained, “Australia, Canada, Germany, India, South Africa, and numerous other federations throughout the world have in place a complex system of ‘equalization grants’ whereby the central government makes fiscal transfers to ensure that resources available to state or provincial governments do not exhibit significant variation.”<sup>345</sup> Such fiscal equalization systems typically involve the federal government measuring the fiscal capacities of state governments and then providing block grants to the state governments with lower fiscal capacities.

Although the United States has never implemented a comprehensive fiscal equalization system like those in other federal nations, the U.S. federal government has implemented many programs that are in essence partial fiscal equalization systems. For instance, existing federal grants to state governments, such as through Medicaid and Title I of the Elementary and Secondary Education Act, already operate as a form of partial fiscal equalization, and “General Revenue Sharing” under the State and Local Fiscal Assistance Act of 1972 made unrestricted grants directly to states and municipalities based in part on income and need, prior to its repeal under President Reagan.<sup>346</sup> Moreover, between the early 1960’s and 1995 (when it was terminated by Congress), the Advisory Commission on Intergovernmental Relations periodically published a fiscal capacity study of the U.S. states.<sup>347</sup>

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<sup>345</sup> Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime*, 63 *Tax L. Rev.* 957, 957 (2010).

<sup>346</sup> See Joint Comm. on Internal Revenue Tax’n, 92nd Cong., *General Explanation of the State and Local Fiscal Assistance Act and the Federal-State Tax Collection Act of 1972*, at 1-4 (1973), <https://www.jct.gov/publications/1973/jcs-1-73/>.

<sup>347</sup> See Stark, note 345, at 985.

Since then, private researchers have continued to publish similar studies using the same methodology.<sup>348</sup>

It would thus not be especially difficult for a new apportioned tax reform to be accompanied by a more limited form of fiscal equalization, like these existing programs. For instance, if the new tax reform was apportioned using the residual tax method, the revenues raised by the residual tax could be channeled into block grants given to states with lesser fiscal capacities, perhaps measured by reviving the Advisory Commission on Intergovernmental Relations and its studies of state fiscal capacities.<sup>349</sup>

State legislatures could then be granted the discretion for how to use these block grant funds. For instance, state governments might opt to use these funds to rebate some or all of the apportioned taxes that state residents pay to the federal government. This would be similar to how state governments piggyback on existing federal taxes by levying supplemental state taxes on what is essentially the same base,<sup>350</sup> but in reverse, as the state legislatures would be rebating some or all of the federal-level apportioned tax liabilities of state residents rather than levying additional state-level taxes. For example, under the residual tax method, the federal government could rebate to each state its share of the residual tax on land or real estate value, and the state could further rebate that payment to the individual taxpayers who paid the residual tax, thus completely offsetting the inequities caused by apportionment. Alternatively, state legislatures might opt to reduce other state-level taxes or fund state-level spending programs.

The goal here should not necessarily be to put individual taxpayers back to the position that they might have been in had the tax not been apportioned. Rather, the key point is that the federal government today has sufficient fiscal tools to remedy any interstate inequities caused by apportioning a new tax reform. Questions of how best to use these tools will continue to be debated. But there is no question as to whether these tools exist, and so the federal government could readily resolve any interstate inequities related to apportioning a new tax reform.

It might perhaps be objected that using federal grants to states to counteract the interstate inequities of apportionment might somehow be against the spirit of the apportionment requirement. But the Court has never insisted that either the apportionment or the uniformity requirements for ensuring interstate equity in taxation be tied to how

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<sup>348</sup> See *id.*

<sup>349</sup> See David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 *Nw. U. L. Rev.* 295, 370-71 (2017) (arguing for this on the merits, unrelated to apportioning taxes).

<sup>350</sup> *Id.* at 337-38.

the tax revenues are spent—and for good reason, as it is hard to imagine how such a ruling could possibly be enforced. After all, the combined net effects of any federal tax and spending program are essentially guaranteed to be neither uniform nor apportioned. Instead, the Constitution leaves the task of ensuring the geographic fairness of federal spending to the political process, and grants from the federal government to state governments are a commonly used tool of existing fiscal federalism.

All of that said, we recognize that the apportionment path is somewhat awkward and cumbersome for all or most modern federal taxes. The apportionment path was arguably reasonably well suited for the onetime levies on real estate (and enslaved persons) that Congress enacted through the early Direct Tax Acts, and especially so considering the primitive state of tax administration at that time.<sup>351</sup> By contrast, for a modern federal wealth tax or tax on unrealized capital gains, satisfying the apportionment requirement would require Congress to jump through some extra hoops (as opposed to designing such a tax to follow the uniformity path) and for no clear policy rationale. We think that jumping through such extra hoops should be relatively manageable, both administratively and politically. On this point, we note again that many existing federal programs involve similar hoops and complications, designed to satisfy various other constraints of fiscal federalism, such as Medicaid's shared state and federal government financing system.<sup>352</sup> Nevertheless, it is certainly possible to imagine scenarios wherein some swing-vote representative or senator might object to the extra steps needed to make a proposed federal tax reform satisfy the apportionment requirement.

All considered, we thus expect that a congressional majority desiring to pass a new transformative progressive tax reform would likely prefer the uniformity path over the apportionment path, so long as the uniformity path is constitutionally available. The case for pursuing the apportionment path instead is strongest if done as a response to a possible future adverse Supreme Court decision or if done in the form of a fallback clause that would only take effect in the event of a future adverse Supreme Court decision (as we will explain further below). We thus next turn to explaining why, following the Excise Tax Canon, Congress should be constitutionally permitted to construct a new federal wealth tax or tax on unrealized capital gains to follow the uniformity path.

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<sup>351</sup> See Part I.

<sup>352</sup> See Robin Rudowitz et al., *Medicaid Financing: The Basics*, Kaiser Fam. Found. (May 7, 2021), <https://www.kff.org/c291735/>.



*B. Why the Uniformity Path Should Also Be Constitutionally Available for Taxes Constructed as Excises*

For the purposes of this Article, we take as a given that *Pollock's* first holding—that a tax on property solely because of its ownership is a direct tax for which apportionment is required—remains good law.<sup>353</sup> In this, we depart from prior scholars—like Bruce Ackerman—who have argued for overturning that holding.<sup>354</sup> As a normative matter, we generally find the arguments made by Bruce Ackerman and other like-minded scholars persuasive, and our analysis in this Part is similar to theirs in many respects. However, we take as our task in this Part the question of how best to interpret the ambiguities in existing doctrines—and, as the Congressional Research Service concludes, “it does not appear that the Supreme Court has overruled *Pollock's* [first] holding that a tax on real or personal property solely because of its ownership is a direct tax.”<sup>355</sup> We thus add to the prior literature by showing how *Pollock's* first holding is compatible with the jurisprudence we label as the Excise Tax Canon, and how this jurisprudence supports upholding a properly constructed uniform federal wealth tax or tax on unrealized capital gains—without the need for overturning *Pollock's* first holding.

Recall our argument that *Pollock's* key error was rather in its second holding—the analytic step of recharacterizing what was otherwise an excise on the activity or privilege of earning income (that is, an income tax) as a direct tax because the property that was the source of that income was being burdened. Recall further that this second holding was then overruled by the Sixteenth Amendment and by the subsequent cases of *Brushaber* and *Stanton*.<sup>356</sup> We now argue that this should make the uniformity path constitutionally available, under current law, for wealth tax reforms or taxes on unrealized capital gains, so long as these reforms are properly constructed as excises.

To reconcile *Pollock's* first holding with the Excise Tax Canon we must inquire further into the meaning of “tax on property generally, real or personal, solely because of its ownership.”<sup>357</sup> Interpreted through the lens of the subsequent cases of *Brushaber* and *Stanton* and the other cases composing the Excise Tax Canon, we argue that key to this inquiry is whether a tax is being levied on the property itself (and so is based primarily on characteristics of the property itself) or whether the tax is instead being levied on activities or privi-

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<sup>353</sup> See note 258 and accompanying text.

<sup>354</sup> Ackerman, note 15, at 51-52.

<sup>355</sup> Ball, note 22, at 9.

<sup>356</sup> See Part III.A.

<sup>357</sup> *Knowlton v. Moore*, 178 U.S. 41, 82 (1900).

leges engaged in by the owner (and so is based primarily on activities or characteristics of the owner). To understand why, remember that the Excise Tax Canon starts by recognizing that there is considerable overlap between taxes that (1) burden property and (2) are formally levied on uses or activities or privileges related to that property.<sup>358</sup> Remember further our arguments that *Brushaber* and *Stanton* and the other jurisprudence composing the Excise Tax Canon have appropriately held that, as to this overlap, if Congress formally levies a tax on uses or activities or privileges related to property, the courts should not seek to recharacterize this as a direct tax on the property itself to require apportionment.<sup>359</sup>

Looking back to our discussion in Part I of how direct taxes were understood to operate in the nation's early history, we think it is helpful to imagine a tax assessor riding to localities within a state to look for actual physical property (and, in the case of capitations, also people) to be counted, valued, and taxed—all based on looking at the characteristics of the property itself, not the owner. As we explained in Part I, this was essential to the process of how apportionment was then understood to work for direct taxes. In a sense, this is also how local government property taxes continue to work to this day. For sure, formulas and technology have largely replaced the actual direct observation of property by tax assessors. Nevertheless, in essence, the assessment of local property taxes today similarly starts with a valuation of the property itself based on the characteristics of the property, not the owner. The owner primarily only enters the equation when it comes time for the tax bill to be sent out and paid.<sup>360</sup>

Notably, the early Direct Tax Acts were all levied on the base of real property (and enslaved persons) *within each state*, and not on the base of real property (or enslaved persons) *owned by the taxpayers residing within each state*.<sup>361</sup> Excises work quite differently, typically being levied on values derived from transactions or on measurements of taxpayers' aggregate ability to pay (again remember that the Su-

<sup>358</sup> See Part II.B.

<sup>359</sup> See notes 253-260 and accompanying text.

<sup>360</sup> Slightly complicating the matter, many states allow "circuit breakers" whereby certain low-income taxpayers can apply for exemption from their property tax bills—thus breaking the ownership circuit connecting them to the property being taxed, so to speak. But the general point remains that local government property taxes today mostly resemble the original understanding of how direct taxes on property were understood to operate—the taxes are assessed on the property itself based primarily on the characteristics of that property, with the owner mostly only entering the equation when it comes time for the tax bill to be sent out and paid. See Aidan Davis, Property Tax Circuit Breakers in 2018, Inst. on Tax'n & Econ. Pol'y: Pol'y Brief (Sept. 2018), <https://itep.sfo2.digitaloceanspaces.com/091318-Property-Tax-Circuit-Breakers.pdf>.

<sup>361</sup> See Part I.G.

preme Court has consistently held that income taxes are excises).<sup>362</sup> Whereas, at any given point in time, real or personal property typically exists in only a single state, measurements of aggregate ability to pay or of values derived from transactions can easily span multiple states' boundaries. This is easy to see when considering a sale or bequest from a resident of *State X* to a resident of *State Y*, where the very nature of the transaction crosses state borders.

Similarly, consider if a person living in *State X* owns property in *State Y*. Only *State Y* would then have a claim to tax that property under today's local government property taxes, and the property would have only been part of *State Y*'s apportioned tax base for purposes of the early Direct Tax Acts. This is because both today's local government property taxes and the early Direct Tax Acts were levied directly on the base of the property itself. Furthermore, any graduated tax rates—such as those on dwelling houses in 1798—were determined based on the value of the specific piece of property levied against, not the total value of property owned by the taxpayer. By contrast, under an excise tax levied on some measurement of taxpayers' aggregate ability to pay, like an income tax, *State X* would have a claim to tax the income deriving from that property in *State Y* because it would be part of the measurement of the income of the person residing in *State X*, and an income tax is levied on the income of residents rather than directly on the property that is the source of that income.

Because real estate and other physical property must exist within a specific state at any given point in time, apportionment is arguably at least somewhat sensible as a meta-rule for ensuring interstate equity with respect to taxes levied directly on physical property itself. By contrast, taxes on transactions or on measurements of aggregate ability to pay can readily span multiple state boundaries and so lack an equivalent connection to any specific state—making apportionment far less sensible for such taxes.

Let us now turn to consider the status of modern wealth tax reform proposals. The term “wealth tax” can potentially be applied to many different forms of taxation. For instance, the real property taxes levied by local governments in the United States are sometimes called a form of wealth tax.<sup>363</sup> But, again, these local government real property taxes are levied on the real property itself, primarily based on characteristics of the property itself, and the gross value thereof. Thus, were

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<sup>362</sup> See notes 33-34 and accompanying text.

<sup>363</sup> Kyle Pomerleau, A Property Tax Is a Wealth Tax, but . . ., *Tax Found.* (Apr. 30, 2019), <https://taxfoundation.org/property-tax-wealth-tax/> (“[R]esidential property taxes are a type of wealth tax.”).

Congress to enact a new federal tax on real property constructed in the same manner as existing local government real property taxes—as a tax on the gross value of a piece of property, regardless of other relevant taxpayer characteristics—we would view this as a direct tax that must be apportioned under *Pollock*'s first holding.

By contrast, recent federal wealth tax reform proposals have been fashioned quite differently. For instance, both Senator Elizabeth Warren's and Senator Bernie Sanders's wealth tax reform proposals have been fashioned as only reaching a taxpayer's total net worth above some high exemption threshold (above \$32 million of net worth for married couples for Senator Sanders's proposal, and above \$50 million of household net worth for Senator Warren's proposal) and with graduated rates then applying to net worth above even higher threshold levels.<sup>364</sup> In other words, these taxes are levied on a measurement of the taxpayers' aggregate ability to pay (net worth) and not on the property itself. For sure, ownership of property is a component source of that measurement of the taxpayers' aggregate ability to pay, but the taxes are still being levied on activities or privileges of the taxpayers and not directly on the property itself.

As with an income tax, if a person living in *State X* owns property in *State Y*, this would enter the aggregate net-worth measurement of the person living in *State X*, despite the fact that the property itself is located in *State Y*. If a tax on net worth had to be apportioned, then, should the property be attributed to *State X* or to *State Y*? Either answer is possible, as are hybrid answers that would divide the property value among the two states for purposes of calculating apportionment, but the point remains that measurements of aggregate ability to pay (like personal net worth) can readily span multiple state boundaries, making uniformity a far more sensible meta-rule for ensuring interstate equity than apportionment.

Moreover, although a tax on net worth above high thresholds certainly burdens the property that is a component source of that net worth, we argue that such taxes are more appropriately thought of as being levied on the activity or privilege of holding extreme levels of net worth. To see why, consider that a person with a net worth of, say, \$51 million, would be subject to these recently proposed taxes, but these taxes would very clearly *not* be levied on all of the property owned by that person. In other words, these taxes are not levied on the property itself. Indeed, any property subject to these taxes could

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<sup>364</sup> Huaqun Li & Karl Smith, Analysis of Sen. Warren and Sen. Sanders' Wealth Tax Plans, Tax Found. Fiscal Fact No. 691, at 2 (2020), <https://files.taxfoundation.org/20200127123048/Analysis-of-Sen.-Warren-and-Sen.-Sanders%E2%80%99-Wealth-Tax-Plans.pdf>.

easily be made exempt simply by transferring the property to another person with less total net worth. Ultimately, only a small portion of the property owned by the nation's taxpayers would be taxed under these reform proposals, and the primary trigger for making property taxed would be based on the overall economic activities or privileges engaged in by the owners, rather than being based on any characteristics of the property itself. We thus view both Senator Warren's and Senator Sanders's recent proposals for uniform federal taxes on net worth above extremely high thresholds as falling squarely within the overlap of taxes that both (1) burden property and (2) are formally levied on uses or activities or privileges related to that property.

However, note that we are not arguing that adding any sort of exemption to a direct tax on property itself would necessarily suffice to transform that tax into an excise. For instance, consider an exemption excluding any parcel of property valued at less than a \$100,000 from tax. Because such an exemption is based on characteristics of the property itself, and not on any characteristics or activities of the owner, this should clearly not transform a direct tax on property into an excise. There is also potentially a borderline category of taxes that are primarily based on characteristics of the property itself, but that are also based on characteristics or activities of the owners in some relatively minimal ways. For instance, consider the circuit breakers that some states offer whereby specified low-income residents can apply for exemption from local government property taxes on account of having low income.<sup>365</sup> On the one hand, having low income is clearly a characteristic or activity of the owner, and so a property tax with circuit breakers is not literally a tax on property itself *solely* because of its ownership. However, on the other hand, we think it fair to say that a property tax with circuit breakers is *primarily* still a direct tax on the property itself, at least so long as the circuit breakers are limited to relatively small numbers of low-income taxpayers (as they generally are).<sup>366</sup>

Regardless, Senator Warren's and Senator Sanders's recent proposals for taxes on net worth above extremely high thresholds are very far from this borderline category. Again, only a small portion of the nation's property would be taxed in any way by these proposals, and the primary trigger for property value to become a component of the tax base would be based on the owner's engaging in the activity or

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<sup>365</sup> Davis, note 360.

<sup>366</sup> See *id.* at 2 ("In 2018, income limits on state circuit breakers ranged from \$5,500 in Arizona to \$147,000 in Vermont. Because higher income eligibility means a costlier credit, many states extend eligibility only to the very poorest homeowners, despite the fact that fast-growing property taxes can be burdensome for middle-income taxpayers too. States also limit eligibility based on assets or the assessed value of the home.").

privilege of holding extreme levels of net worth. Thus, although ownership of property is a component source of the activity or privilege of holding extreme levels of net worth, it is the taxpayer's activity of accumulating and holding extreme levels of net worth that primarily triggers the tax. This is a far cry from the tax being assessed primarily based on observing the property itself with the owners only entering the equation when it comes time for the tax bill to be sent out and paid.

Moreover, personal net worth is not synonymous with the aggregate gross value of all property owned, because liabilities are deducted when calculating net worth.<sup>367</sup> This is again in contrast with both the early Direct Tax Acts and today's local government real property taxes. For taxes levied directly on property itself, liabilities are not deductible, because liabilities are not a characteristic of the property itself. A taxpayer could own, say, a \$100 million property (i.e., a value well above either Warren's or Sanders's thresholds) but not be subject to the tax at all if the taxpayer also has an offsetting \$90 million liability.

We thus distinguish between (1) direct taxes on property itself, wherein the role of ownership is primarily just to cause the owner to become liable for paying a tax that is otherwise levied and assessed based on characteristics of the property itself, as with today's local government property taxes and the early Direct Tax Acts, and (2) excises on measurements of aggregate ability to pay, like personal net worth above a high threshold, wherein the role of ownership of property is as a component of a set of economic activities or privileges engaged in by the taxpayer that along with other such activities (like borrowing) aggregate into a tax base that is primarily based on the characteristics or activities of the taxpayer. We argue that, following the Excise Tax Canon, only the former should be considered taxes "on real or personal property solely because of its ownership."

That Senator Warren's and Senator Sanders's recent reform proposals are called wealth taxes should not change this analysis, just as in *Flint v. Stone Tracy Co.* it was not dispositive that Congress did not explicitly label the corporate income tax as an excise.<sup>368</sup> As in *Flint*, that these reform proposals "may be described as an excise" should suffice to permit the uniformity path,<sup>369</sup> with the excise in this case being on the activities or privileges of holding extreme levels of net

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<sup>367</sup> Bruce Ackerman has previously made a similar argument that a tax on net worth differs from a tax on property because of the deductibility of liabilities, although Ackerman's version of this argument is premised on convincing the Court to completely overturn *Pollock*. Ackerman, note 15, at 56-57.

<sup>368</sup> 220 U.S. 107 (1911).

<sup>369</sup> *Id.* at 151.

worth. In other words, following the language of *Patton v. Brady*, these reform proposals are not “a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use.”<sup>370</sup> For these reasons, we argue that the best interpretation of existing constitutional tax precedents would be to uphold a tax on net worth above a high threshold as a uniform excise.

Similar reasoning applies for taxes on the unrealized capital gains of the very wealthy, like the proposed Billionaires Income Tax discussed earlier.<sup>371</sup> Arguably, such reforms should be upheld as taxes on income, authorized by the Sixteenth Amendment.<sup>372</sup> But even were the Court to attempt to revitalize the realization requirement of *Eisner v. Macomber*, these reforms should still be upheld as excises on other activities or privileges.

For instance, the proposed Billionaires Income Tax would only reach unrealized gains from publicly traded securities or as triggered by specified transfers (including bequests).<sup>373</sup> Just as in *Nicol v. Ames*, wherein the Court held that a tax on trades at the Chicago Board of Trade commodities exchange was an excise on the “privilege, opportunity or facility” offered by the exchange, and not on the underlying property being traded, a tax on unrealized gains from publicly traded securities should be upheld as an excise on the “privilege, opportunity or facility” of using public trading markets.<sup>374</sup> Similarly, a tax on unrealized gains as triggered by bequests and other specified transfers should be upheld as an excise on the acts of making those bequests and transfers, just as in prior cases like *Scholey v. Rew*<sup>375</sup> and *Murphy v. Internal Revenue Service*.<sup>376</sup>

Even if a tax on unrealized gains were extended to encompass all of the unrealized gains accrued by the very wealthy, this should still be upheld as an excise on the activity or privilege of investing extreme levels of net worth, just as we argue above with respect to wealth tax reforms like those proposed by Senators Warren and Sanders. Again, a tax on the activities of holding or investing extreme levels of net worth differs from a tax on property itself, because of: (1) the different jurisdictional claims on the tax base, (2) the fact that the primary trigger for property to become subject to tax is based on the economic

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<sup>370</sup> 184 U.S. 608, 619 (1902).

<sup>371</sup> See Letter, note 8, at 3-4.

<sup>372</sup> *Id.* at 3.

<sup>373</sup> *Id.* at 3-4.

<sup>374</sup> *Nicol v. Ames*, 173 U.S. 509, 519 (1899); see notes 210-213 and accompanying text.

<sup>375</sup> 90 U.S. (23 Wall.) 331 (1875); see notes 171-173 and accompanying text.

<sup>376</sup> *Murphy v. Internal Revenue Serv.*, 493 F.3d 170 (D.C. Cir. 2007); see notes 286-291 and accompanying text.

activities or characteristics of the taxpayer rather than on the characteristics of the property itself, and (3) the deductibility of liabilities.

All of that said, we recognize that the activities of holding or investing extreme levels of net worth are somewhat different from the other activities, uses, and privileges ruled to be excises in the prior excise tax cases. We fully acknowledge the constitutional uncertainties in these questions. Accordingly, we next proceed to suggest strategies for how Congress can draft tax reforms to navigate those uncertainties and overcome fears of presumed hostility by the Supreme Court.

### *C. Strategies for Navigating the Constitutional Uncertainties*

So how should a congressional majority desiring to legislate transformative tax reforms respond to the constitutional uncertainties and the fears of presumed hostility by the Supreme Court? We now explain how revitalizing the two-paths approach offers strategies for navigating the constitutional uncertainties.

To begin with, similar uncertainties existed in the late 1700's and early 1800's when the two-paths approach previously reigned. Congress then navigated those uncertainties primarily with a set of strategies that we will call "tax-reform trial balloons." Indeed, the *Hylton* case was likely an example of such strategies in action, as historians think the case was deliberately engineered as an effort to seek clarity about how to navigate the constitutional uncertainties about which forms of taxation should follow the apportionment path and which the uniformity path.<sup>377</sup>

This is part of what we mean by tax-reform trial balloons—deliberately legislating relatively low-stakes tax reforms with the goal of inducing Supreme Court decisions to clarify the nature of the two paths. Yet we would also include within this set of strategies the broader attitude of just legislating without overly worrying about the possibility of a hostile Supreme Court decision, because almost any decision blocking access to one of the two paths should provide at least some guidance for how to design subsequent tax reforms to follow the other path. We would thus potentially advise Congress to consider legislating any or all of: uniform wealth taxes, apportioned wealth taxes, uniform taxes on unrealized gains, or apportioned taxes on unrealized gains. Almost regardless of how the Court might respond, passing such legislation should provide at least some clarity for how to better navigate the two paths when designing future tax reforms.

Of course, the use of tax-reform trial balloons is not the only set of strategies that Congress might use for navigating the constitutional

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<sup>377</sup> See note 110 and accompanying text.



uncertainties of the two paths. Another set of strategies involves the use of legislated fallback clauses. As Michael Dorf explains, “[t]o address the risk that a court will declare all or part of a law unconstitutional, legislatures sometimes include ‘fallback’ provisions that take effect on condition of such total or partial invalidation.”<sup>378</sup> Dorf cautions that substitutive fallback provisions (like those we propose here) should be drafted with “great care”<sup>379</sup> and that courts should not enforce fallback provisions “aimed at coercing judicial acceptance of an unconstitutional original provision, unless the fallback is clearly germane to the law as a whole.”<sup>380</sup> Nevertheless, it is clear that Congress has the power to legislate fallback provisions and that the courts must enforce such provisions so long as they are drafted carefully to avoid constitutional defects.<sup>381</sup>

For our purposes here, the goal in drafting fallback provisions should be to navigate the uncertainty as to which path the Court might rule that a tax reform must follow. For instance, a uniform wealth tax reform proposal might include fallback instructions for apportioning the wealth tax if the Court decides that apportionment is required. There are numerous ways in which such fallback clauses might be drafted, and we cannot discuss all options or relevant considerations here. Instead, we will just note that the residual tax method for apportionment has some advantages that support using that method in fallback provisions for apportioning a tax designed to be uniform in the first instance.

For example, in the event that the Court rules that the original uniform tax reform must instead be apportioned, the residual tax could then be assessed on the base of all real estate value within each state, but with substantial circuit breakers provided to exempt all tax households with adjusted gross income of below some specified threshold from the residual tax.<sup>382</sup> In other words, the original uniform tax would remain in place and with the uniform rates as specified by the original legislation, and the residual tax would then be added on top

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<sup>378</sup> Michael C. Dorf, *Fallback Law*, 107 *Colum. L. Rev.* 303, 304 (2007).

<sup>379</sup> *Id.* at 373.

<sup>380</sup> *Id.*

<sup>381</sup> See *id.* at 371-73; see also *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020) (“When Congress includes an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause.”).

<sup>382</sup> Circuit breakers of this sort are a common mechanism in existing real property taxes. See *Davis*, note 360. Also note that, because every U.S. state has a real property tax system whereby the state government authorizes local governments to levy taxes subject to restrictions set by the state government, administration and compliance should be relatively simple because taxpayers could just be required to report the valuations that are already being conducted by property tax assessors.

of that to raise any additional revenues required to meet each state's apportionment revenue quota.<sup>383</sup> All revenues raised by the residual tax could then be directed into block grants provided to states with lesser fiscal capacities, as would be determined perhaps either by delegating this to Treasury or by reviving the Advisory Commission on Intergovernmental Relations.<sup>384</sup>

Returning to the bigger picture, the key takeaway is that Congress can use either tax-reform trial balloons or legislated fallback clauses as strategies for navigating the uncertainties about which sorts of taxes the Court might rule must follow either of the two paths. Entire articles could easily be written about how best to use these strategies or about other alternative strategies that Congress might use instead, and we have only aimed to scratch the surface of these topics here. For this Article's purposes, the key point is primarily just that such strategies exist. Therefore, by returning to the two-paths approach that reigned prior to the Civil War, Congress can utilize these strategies to navigate the constitutional uncertainties and overcome fears of presumed hostility by the Supreme Court.

## V. CONCLUSION

Economic inequality may well be among the central problems of our time.<sup>385</sup> In prior scholarship, we have argued that the existing U.S. income tax is broken, and that something like a wealth tax or a tax on unrealized capital gains is required to fix it.<sup>386</sup> Yet these reform pro-

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<sup>383</sup> To elaborate just a bit more, apportionment necessarily requires substantial roles for administrative actors. For instance, as we have explained, the 1798 Direct Tax Act charged district tax commissioners with calculating the state-specific rates for the residual tax needed to satisfy each state's apportioned revenue quota. Similarly, for fallback instructions to apportion a new federal tax via the residual tax method, administrative actors would need to be charged both with calculating each state's apportionment revenue quota and with calculating the state-specific rates for the residual tax needed to satisfy each state's apportioned revenue quota. See notes 327-330 and accompanying text. This could initially be done based on projections for how much revenues would be raised from every state from both the uniform and residual components of the tax, and then with a subsequent reconciliation process to adjust subsequent years' residual tax rates to account for under or over collecting with respect to a state's apportioned revenue quota. As we explained in Part I.G, it took a few years for the revenues from the 1798 Direct Tax Act to be collected, reflective of the one-time lump sum nature of those taxes. Applying the residual tax method to apportion a periodic federal tax with uniform rates on the non-residual components of the base might similarly require the residual tax component to be collected over multiple years (along with a reconciliation process to ensure the state-specific apportionment requirements are met).

<sup>384</sup> See note 349 and accompanying text.

<sup>385</sup> Emmanuel Saez, *Income and Wealth Inequality: Evidence and Policy Implications*, 35 *Contemp. Econ. Pol'y* 7 (2017).

<sup>386</sup> Gamage & Brooks, note 4; Galle et al., note 11.

posals are being stymied by fears of constitutional challenges before the current Supreme Court.

In this Article, we have argued that such fears are based on an outdated conception of the Constitution's tax provisions. We have thus called for returning to the two-paths approach that previously reigned during the era prior to the Civil War. To that end, we have explained why the apportionment path is once again practically viable due to the availability of modern fiscal instruments. We have also explained how the jurisprudence we label as the Excise Tax Canon should make a properly constructed uniform wealth tax or tax on unrealized capital gains constitutionally available.

We view these arguments as synergistic, in part because we hope that convincing relevant actors that the apportionment path is once again practically viable may ultimately make the use of that path unnecessary. We acknowledge that the apportionment path is an awkward fit for most or all modern forms of federal taxation, and that practically accessing that path requires some cumbersome extra steps that serve no apparent policy rationale. Yet we also acknowledge the uncertainties surrounding the constitutional availability of the uniformity path and that the current Supreme Court might well reject our arguments as to the best interpretations of existing doctrines. In a world where the uniformity path is thought to be the only practically viable option for enacting a transformative progressive tax reform, we expect the opponents of such reforms to have strong motivation for arguing that the constitutional uncertainties should be interpreted in a manner that would block such reforms from accessing the uniformity path.<sup>387</sup> By contrast, in a world where blocking access to the uniformity path would not thwart such reforms, but would instead just result in them being enacted in a somewhat more awkward and cumbersome fashion (to follow the apportionment path), we hope that there would be less motivation for opponents of such reforms to resist the Excise Tax Canon and our associated arguments for why existing doctrines should be interpreted to permit such reforms to follow the uniformity path.

Most importantly, we argue that the constitutional uncertainties should not stand in the way of legislating transformative tax reforms desired by a congressional majority. Despite the awkwardness of the uniformity path for most or all modern federal taxes, we think that jumping through the extra hoops it requires should be relatively manageable, both administratively and politically, if doing so ultimately becomes necessary for enacting a transformative progressive tax reform. Consequently, as we have explained, revitalizing the two-paths

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<sup>387</sup> See notes 312-316 and accompanying text.

approach for the modern era offers strategies for how a congressional majority desiring to enact transformative progressive tax reforms can overcome the constitutional uncertainties and associated fears of presumed hostility by the Supreme Court.

