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The 16th Amendment, a National Wealth Tax, and More

by Jeffrey N. Schwartz

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In this report, Schwartz explores how the 16th Amendment may have incorporated a modified version of the *Pollock* direct tax categorization analysis into the Constitution itself, including its analysis that a national wealth tax is to be categorized as a direct tax.

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Under Article I of the Constitution, all federal "direct taxes" must be apportioned among the several states of the United States in proportion to each state's share of the national population, and all federal "indirect taxes" must be uniform throughout the United States.[1] The uniformity requirement mandates that the rates and subject (that is, the act or thing being subjected to tax) of a federal indirect tax be the same in, for example, New York as it is in Texas.[2]

What does or should constitute a direct tax within the original and current meaning of the Constitution has been the subject of significant academic debate, including debate over whether, if a national wealth tax were enacted, the Supreme Court would today follow some of its holdings in *Pollock*[3] and categorize a national wealth tax as a direct tax.[4]

If a national wealth tax were to be categorized as a direct tax, satisfying the related apportionment requirement would be politically difficult, if not technically impossible, because it would require higher rates in lower wealth-per-person states — or some other unusual mechanism would be needed to ensure the numbers worked out correctly. Thus, as part of their arguments in favor of a national wealth tax, proponents have argued that *Pollock* is so wrongly decided, and so reflects outdated notions that have been superseded by subsequent developments and judicial decisions, that the Supreme Court would today categorize a national

[1] *See* U.S. Const., Art. I, section 2, cl. 3.; U.S. Const., Art. I, section 8, cl. 1; and *Hylton v. United States*, 3 U.S. 171 (1796) (applying uniformity requirement to all federal taxes other than "direct taxes").

[2] *See United States v. Ptasynski*, 462 U.S. 74, 84-85 (1983).

[3] *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895) (*Pollock I*), and 158 U.S. 601 (1895) (*Pollock II*). The Supreme Court issued two separate decisions in *Pollock*; when relevant, this report cites the separate decisions (*Pollock I* and *Pollock II*) and generally refers to the decisions collectively as "*Pollock*."

[4] *See* Dawn Johnsen and Walter Dellinger, "The Constitutionality of a National Wealth Tax," 93 *Ind. L. J.* 111 (2018), and note 37 therein (briefly describing valuable commentary the authors found most helpful).

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wealth tax as an indirect tax that may be imposed free of the rule of apportionment (that is, that may be imposed as an "unapportioned tax"), subject only to the uniformity requirement mentioned above.

This report explores how the adoption of the 16th Amendment may be understood to have impliedly incorporated a modified version of the *Pollock* direct tax categorization analysis into the Constitution itself, including the parts of the *Pollock* analysis under which a national wealth tax is to be categorized as a direct tax. Moreover, as discussed below, aspects of this understanding appear to have been previously endorsed by the Supreme Court in its unanimous decision in *Brushaber*,[5] which validated the first post-16th Amendment federal income tax.

If a *Brushaber*-based analysis — incorporation of a modified *Pollock* direct tax categorization analysis into the Constitution via the 16th Amendment — were to prevail, the Supreme Court should today hold an unapportioned national wealth tax to be an unconstitutional, unapportioned direct tax. That is true even if the Court agreed with the proponents of an unapportioned national wealth tax that the reasoning of *Pollock* is flawed and that the Court is not otherwise bound to uphold the relevant holdings of *Pollock* under traditional notions of *stare decisis*.

For the reasons discussed below, this analysis could also (1) raise potential constitutional issues regarding the federal government's imposition of limitations on the deductibility of state and local income and property taxes for federal individual income tax purposes; and (2) have implications for the Supreme Court's most recent direct versus indirect tax categorization decision in *NFIB*,[6] in which the Supreme Court categorized a tax on forgoing health insurance, more commonly referred to as the Obamacare individual mandate, as a properly unapportioned indirect tax.

The analysis presented focuses primarily on the Supreme Court's decisions in *Pollock* and *Brushaber* as well as its most recent direct tax categorization decision in *NFIB*; the language of the 16th Amendment; and related legislative history.

The Debate Over a National Wealth Tax

A national wealth tax is a federal tax that would be imposed on the owners of property merely because of their ownership of property, regardless of the owner's use or disposition of the property. Some of the Supreme Court's holdings in *Pollock*, as clarified by *Knowlton*[7] before the adoption of the 16th Amendment and by post-16th Amendment cases such as *Fernandez*,[8] include a federal tax on property — that is, a federal tax that falls upon the owners of property merely because of their ownership of property — in the category of "direct taxes" that must be apportioned among the several states of the United States in proportion to their respective shares of the national population.[9]

As noted, if a national wealth tax were categorized as a direct tax, satisfying the related apportionment requirement would be politically difficult if not technically impossible. Thus, as part of their arguments in favor of an unapportioned national wealth tax, proponents have maintained that *Pollock* is so wrongly decided, and so reflective of outdated notions that have been superseded by subsequent developments and judicial decisions, that the Supreme Court would today hold a national wealth tax to be an indirect tax.

It is important to note that, as discussed below, part of *Pollock*'s direct tax categorization analysis was overturned in 1913 with the

[5] *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1 (1916).

[6] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (*NFIB*).

[7] *Knowlton v. Moore*, 178 U.S. 41 (1900).

[8] *Fernandez v. Wiener*, 326 U.S. 340 (1945).

[9] *See Pollock II*, 158 U.S. 601, 637 ("taxes on real estate being indisputably direct taxes . . . we are of [the] opinion that taxes on personal property . . . are likewise direct taxes"); *Knowlton*, 178 U.S. 41, 47 (explaining in the context of categorizing an inheritance tax as an indirect tax that "the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will or as the result of intestacy"); and *Fernandez*, 326 U.S. 340, 362 ("A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property.").

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ratification of the 16th Amendment. A separate holding of *Pollock I* not directly related to *Pollock*'s analysis of rule of apportionment was also overturned by the Supreme Court in 1998.[10]

More recently, in reaching its 2012 decision in *NFIB*, the majority opinion stated:

> In 1895, we [the Supreme Court] expanded our interpretation [of direct taxes] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U.S. 189, 218-219 (1920).[11]

Some have interpreted this language, including the Supreme Court's citing *Pollock II* and *Macomber*, as confirmation that the Supreme Court would today continue to hold an unapportioned national wealth tax (that is, an unapportioned federal tax on the mere ownership of property, real or personal) to be an unconstitutional, unapportioned direct tax.[12] Others have argued to the contrary.[13]

This report explores more fully how the 16th Amendment functions to overturn the result of *Pollock II*. Based on the analysis in this report, it appears that the 16th Amendment accomplishes its intended result by modifying a specific element of the otherwise applicable *Pollock* analysis for when a tax on incomes is to be taken out of the category of indirect taxation and placed in the category of direct taxation. The modification appears to cause the particular form of a federal tax on incomes at issue in *Pollock* (the 1894 federal income tax) to be properly categorized as an indirect tax. The 16th Amendment, however, does not modify the balance of the *Pollock* direct tax and rule of apportionment analysis. That remaining analysis consists of *Pollock's* categorization of a tax on property, real or personal, as a direct tax, and the balance of its reasoning as to when a tax on incomes is to be taken out of the category of indirect taxation and placed in the category of direct taxation (the balance of the *Pollock* analysis).

Under those circumstances, the adoption of the 16th Amendment (because it did not negate all of *Pollock* or remove the concept of direct taxes and related rule of apportionment from the Constitution, and instead appears to function by modifying only one element of the *Pollock* analysis) may be understood to have impliedly incorporated the balance of the *Pollock* analysis into the Constitution itself, including *Pollock*'s categorization of a tax on property, real or personal (that is, a tax that falls on the owners of property, real or personal, because of their mere ownership of property) as a direct tax. Moreover, as discussed below, aspects of this understanding appear to have been previously endorsed by the Supreme Court in its unanimous decision in *Brushaber*.

The 16th Amendment, *Pollock*, and *Brushaber*

Congress's taxing authority under the Constitution includes the power to tax the import, use, disposition, or ownership of property as well as the income derived from the mere ownership of property or from other sources. Congress's taxing power, however, is not an unconstrained power. Instead, as mentioned above, that power is regulated by the rules of apportionment and uniformity under which, except to the extent modified by the 16th Amendment, all federal "direct taxes" must be apportioned among the several states by their shares of the national population and all federal "indirect taxes" must be uniform throughout the United States.

The 16th Amendment contains additional language intended to overturn the result of *Pollock II*, in which the 1894 federal income tax was struck down by the Supreme Court. The 1894 federal income tax (1) taxed "gains, profits and income" derived from multiple sources, including

[10] *See South Carolina v. Baker*, 485 U.S. 505 (1988) (overturning a holding in *Pollock I* in light of developments in the intergovernmental tax immunity doctrine since 1895).

[11] *NFIB*, 567 U.S. at 571.

[12] *See* John T. Plecnic, "The New Flat Tax: A Modest Proposal for a Constitutionally Apportioned Wealth Tax," 41 *Hastings Const. L. Q.* 482 (2014) (proposing that the tax be apportioned based on an understanding that *NFIB* confirms that the Supreme Court would view it as a direct tax).

[13] *See* Johnsen and Dellinger, *supra* note 4, at 132-135 (explaining the authors' view that "the Court's brief citations to *Pollock* and *Macomber* in *Sebelius* . . . should not be read as support of those opinions' current force").

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"income" derived from labor and from the mere ownership of property;[14] (2) defined the subject of the tax[15] as the gains, profits, and income remaining after a full deduction for all national, state, county, school, and municipal taxes — not including those assessed against local benefits — paid in the relevant tax year;[16] (3) imposed a uniform rate of federal tax on that subject;[17] and (4) based on an analysis that included a consideration of the sources of the "income" (but not the gains or profits[18]) being subject to tax, was categorized in *Pollock II* as a properly unapportioned "indirect tax" as applied to income derived from labor, but as an unconstitutional, unapportioned "direct tax" as applied to income derived from property, real or personal. The 1894 federal income tax was then struck down entirely as applied to gains, profits, and income derived from all sources because it had been enacted as a whole.

As the Supreme Court explained in its unanimous decision in *Brushaber*, and further analyzed below, it appears that the 16th Amendment accomplishes its intended result by modifying the otherwise applicable *Pollock* analysis for when a tax on incomes is to be taken out of the category of indirect taxation and placed in the category of direct taxation. That analysis included a consideration of the sources of the income being subjected to tax. The 16th Amendment's focus on modifying only that one element of the *Pollock* analysis, and not its categorization (as clarified by *Knowlton*) of a tax on the mere ownership of real or personal property as a direct tax, led the Supreme Court to conclude in *Brushaber*:

> The Amendment . . . shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that, although from the date of the *Hylton* case, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiat[ing] or challenging the ruling in the *Pollock* case that the word "direct" had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, *and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution* — a condition which clearly demonstrates that the purpose [of the Amendment] was not to change the existing interpretation [of *Pollock* as clarified by *Knowlton*] except to the extent necessary to accomplish the result intended — that is, the prevention of the 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, and thereby [on the basis of the source of the income] to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes.[19] [Emphasis added.]

The unanimous opinion in *Brushaber* was written by Chief Justice Edward D. White who, as an associate justice, had dissented in both the Court's 6-2 decision in *Pollock I* and its 5-4 decision in *Pollock II*. Another associate justice joining in

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[14] *See* section 7 of the Wilson Tariff Act of August 28, 1894 ("from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two percentum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States").

[15] The subject of a tax in the act or thing being subjected to some relevant rate of tax.

[16] *See* section 28 of the Wilson Tariff Act of August 28, 1894 ("And all national, state, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor.").

[17] *See supra* note 14.

[18] "Gains" and "profits" might be understood to consist of accessions to wealth derived from the disposition of property and the conduct of a trade or business, respectively, while "income" could be understood to consist of one or more or all other categories of accessions to wealth.

[19] *Brushaber*, 240 U.S. at 19.

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the unanimous opinion in *Brushaber* was Charles Evans Hughes, who would later become chief justice and who, in his previous capacity as the governor of New York during the debates over the ratification of the 16th Amendment, had originally opposed ratification because he thought the 16th Amendment would adversely affect the finances of New York. Hughes was then persuaded during the ratification debates that, if properly interpreted, the 16th Amendment posed no such risks.[20]

Overturning the Result of *Pollock II*

The 16th Amendment to the Constitution provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived [(for example, from labor or the mere continued ownership of property)], without apportionment among the several States, and without regard to any census or enumeration.

As the Supreme Court, in its 1916 decision in *Baltic*,[21] summarized its more detailed analysis in *Brushaber*:

> [The 16th 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*.[22] [Emphasis added.]

It appears that the resulting modification to the otherwise applicable *Pollock* direct tax categorization analysis, one element of which was a consideration of the sources of the income being subjected to tax, occurs as a matter of logical inference. As explained in *Brushaber*:

> The command of the [16th] Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the *Pollock* case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class. This must be unless it can be said that, although the Constitution, as a result of the Amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution.[23]

Explained more directly, once the Constitution has been amended to make clear that Congress may exercise its preexisting taxing authority to tax "incomes, from whatever source derived, without apportionment" a consideration of the source from which income being subjected to tax is derived (for example, from the mere ownership of property) can no longer be a relevant consideration in categorizing a tax on incomes as a direct tax. That is because the only consequence of direct tax categorization is to subject the tax at issue to apportionment, and the amendment makes clear that a federal tax on incomes may be imposed without apportionment, regardless of the source of the income being subjected tax.

Thus, the 1894 federal income tax, which included an unlimited deduction for many types of other national, state, and local taxes and had been categorized in *Pollock* as a form of taxation that was an "indirect tax" as applied to income derived from labor, cannot be taken out of the category of indirect taxation by reason of a consideration of the sources of income being subjected to tax and therefore continues to be categorized under the balance of the *Pollock*

[20] *See* Erik M. Jensen, "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes,'" 33 *Ariz. St. L. J.* 1057, 1122 (Winter 2001).

[21] *Stanton v. Baltic Mining Co.*, 240 U.S. 103 (1916).

[22] *Baltic*, 240 U.S. at 112-113.

[23] *Brushaber*, 240 U.S. at 18-19.

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analysis as an indirect tax on income derived from all other sources, including the mere ownership of property.

At the same time, the language of the 16th Amendment does not eliminate the constitutional requirement that all direct taxes be apportioned or contain an express authorization to "lay and collect *all* taxes on incomes [that is, both direct and indirect taxes on incomes] . . . without apportionment." It also does not include an express authorization to "lay and collect taxes on incomes, from whatever source derived *and irrespective of any other considerations*, without apportionment." Thus, the 16th Amendment leaves open the possibility that some modified form of the 1894 federal income tax might continue to be a tax required to be taken out of the category of indirect taxation and placed in the category of direct taxation, based on factors other than the source of the income being subjected to tax (for example, the deductions provided in the modified tax compared with the 1894 federal income tax and associated implications under the balance of the *Pollock* analysis). As explained in *Brushaber* and noted above, the 16th Amendment:

> shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. . . . The Amendment contains nothing repudiat[ing] or challenging the ruling in the *Pollock* case that the word direct had broader significance . . . and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution.[24]

Thus, consistent with the *Brushaber* analysis, the 16th Amendment can be understood to have impliedly adopted the analysis of the Court in *Pollock* (as clarified by *Knowlton*) that all federal direct taxes (including direct taxes on real property, direct taxes on personal property, and direct taxes on incomes) must be apportioned, while overturning the result of *Pollock II* by modifying the otherwise applicable *Pollock* analysis for when a tax on incomes should be taken out of the category of indirect taxation and placed in the category of direct taxation. The modification to the otherwise applicable *Pollock* categorization rules eliminates consideration of the sources of the income being subjected to tax as a relevant criterion in applying the otherwise applicable *Pollock* direct tax categorization analysis.

That modification, in turn, causes the 1894 federal income tax — which had already been held to be a properly unapportioned indirect tax as applied to gains, profits, and a taxpayer's income derived from labor — to continue to be properly categorized as an indirect tax under the balance of the *Pollock* analysis as applied to income from whatever other source derived, including the mere ownership of property. As discussed below, however, it does not automatically follow that all future, modified forms of the 1894 federal income tax should remain in the category of indirect taxation under the balance of the *Pollock* analysis.

In this context it is important to note how several decisions of various U.S. courts of appeal appear to have misunderstood *Brushaber* and to have thereby incorrectly concluded that the 16th Amendment expanded Congress's preexisting authority to impose unapportioned "indirect taxes on income" by further authorizing Congress to impose "direct taxes on incomes without apportionment," or that it otherwise functions to prevent any federal tax on incomes from ever being subject to the rule of apportionment.[25]

The faulty nature of those statements can be demonstrated by, for example, considering the specific holdings of *Pollock II* whereby the Supreme Court categorized the provisions of the 1894 federal income tax as a "direct tax" as applied to income derived from property, but as

[24] *Id*. at 19.

[25] *See, e.g., United States v. Francisco*, 614 F.2d 617, 619 (8th Cir. 1980) (citing *Brushaber* for the proposition that "the purpose of the Sixteenth Amendment was to take the income tax out of the class of 'excises, duties and imposts' and place it in the class of 'direct taxes'"); *United States v. Lawson*, 670 F.2d 923, 927 (10th Cir. 1982) (citing *Brushaber* and then explaining that "the Sixteenth Amendment removed any need to apportion income taxes among the states that otherwise would have been required by Article I, Section 9, clause 4"); *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir. 1984) ("The Supreme Court promptly determined in *Brushaber* . . . that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax."); and *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986) ("the Sixteenth Amendment . . . did no more than remove the apportionment requirement of Art. I, sec. 2, cl. 3 from taxes on 'incomes, from whatever source derived'").

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an "indirect tax" as applied to income derived from labor. If the 16th Amendment authorized the imposition of all forms of income taxation (that is, both direct and indirect forms of income taxation) without apportionment, such an interpretation would necessarily lead to the conclusion that the amendment authorizes Congress to impose a tax on income derived from the mere ownership of property (which the Court in *Pollock* held to be a "direct tax") both without apportionment *and* without being subject to the rule of uniformity (because only indirect taxes, and not direct taxes, are subject to the rule of uniformity). That result could not have been intended, and it was specifically rejected by the Supreme Court in *Brushaber*:

> The confusion is not inherent, but rather arises from the [erroneous] conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation — that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. . . .
>
> But it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states. This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.[26]

Instead, *Brushaber* supports the proposition that, after the ratification of the 16th Amendment, all direct taxes (including "direct taxes on real property," "direct taxes on personal property," and "direct taxes on incomes") continue to be subject to the rule of apportionment under Article I, with the 16th Amendment functioning to modify, and thereby incorporate into the Constitution a modified version of, the otherwise applicable *Pollock* (as clarified by *Knowlton*) analysis for when a federal tax is to be categorized as a direct tax on property or income.

It appears that much of the confusion regarding *Brushaber* can be traced to several Supreme Court decisions that cite *Brushaber* or *Baltic* while oversimplifying, or perhaps misstating, the actual language of those earlier decisions, including in the context of attempting to understand the meaning of "income" for purposes of the 16th Amendment.[27] When approached from this perspective, the relevant

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[26] *Brushaber*, 240 U.S. at 11-12.

[27] *See William E. Peck & Co. v. Lowe*, 247 U.S. 165, 173 (1918) (citing *Brushaber* and *Baltic* for the proposition that the 16th Amendment "removed all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another"); *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (citing *Brushaber*, *Baltic*, and *Peck* for the general proposition that the adoption of the 16th Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income"); *Evans v. Gore*, 253 U.S. 245, 262-263 (1920) (properly citing *Brushaber*, 240 U.S. 17-18, to explain that "the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived" but then further stating that "what was there said was reaffirmed and applied in *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 240 U.S. 112-113, and *Peck & Co. v. Lowe*, 247 U.S. 165, 247 U.S. 172, and in *Eisner v. Macomber*, 252 U.S. 189, decided at the present term, we again held, citing the prior cases, that the amendment 'did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income'"); and *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926) ("Taxes on incomes from some sources had been held to be 'direct taxes' within the meaning of the constitutional requirement as to apportionment. Art. 1, section 2, cl. 3, section 9, cl. 4; *Pollock*, 158 U.S. 601. The Amendment relieved from that requirement, and obliterated the distinction in that respect between taxes on income that are direct taxes and those that are not, and so put on the same basis all incomes 'from whatever source derived.' *Brushaber v. Union P. R. Co.*, 240 U.S. 1, 240 U.S. 17.").

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constitutional inquiries regarding the 16th Amendment become focused on the nature of "income," including in the modern context whether unrealized appreciation is "income"[28] or whether one or more deductions must be provided to properly calculate "income" within the meaning of the 16th Amendment. These types of inquiries may, in turn, be understood as attempts to articulate a test for categorizing a tax on incomes, from whatever source derived, as a direct tax based on a consideration of factors other than the sources of the income being subjected to tax.

For example, in *Winkler*[29] the First Circuit held that it would be unconstitutional for Congress to subject a bookmaker's earnings on bets on horse racing to an unapportioned tax on income without providing a deduction against the winnings from a single horse race for at least all the losses incurred by the bookmaker from losing bets on the same race and possibly unconstitutional not to allow the bookmaker to calculate his income for the entire tax period by netting his aggregate winnings against aggregate losses for the period covered. This holding, to the effect that an unapportioned income tax cannot be imposed when the subject of the tax, that is, "income," has been improperly calculated, is the functional equivalent of removing the tax from the category of indirect taxation and placing it in the category of direct taxation, based on a consideration other than the source of the income being subjected to tax (that is, based on a consideration of the failure to provide a sufficient deduction in defining the subject of the tax and how that tax on improperly calculated income could therefore be deemed to function in the same manner as an unconstitutional, unapportioned direct tax on the taxpayer's property).

Consistent with *Brushaber*'s original, technical analysis, the 16th Amendment appears to have impliedly incorporated into the Constitution a modified *Pollock* analysis under which: (1) all direct taxes continue to be subject to apportionment; (2) a tax on the mere ownership of property, real or personal (for example, a national wealth tax), continues to be properly categorized as a direct tax; (3) a tax on incomes in the form of the 1894 federal income tax is to be categorized as an indirect tax; and (4) a modified form of the 1894 federal income tax continues to be subject to being taken out of the category of indirect taxation and being placed in the category of direct taxation (and thereby being made subject to apportionment) if the modified tax triggers the modified *Pollock* direct tax categorization test, the possible outlines of which are described below.

Relevant legislative history also reflects the drafters of the 16th Amendment as having specifically rejected a draft amendment with language that would have authorized Congress to lay and collect "direct taxes on incomes without apportionment" in favor of the above language that instead authorizes Congress to lay and collect "taxes on incomes, from whatever source derived, without apportionment."[30] One likely reason the Senate Finance Committee rejected the earlier draft language authorizing the imposition of "direct taxes on incomes without apportionment" is that, as noted, an express authorization to impose "direct taxes on incomes without apportionment" would have authorized Congress to impose such taxes free of the rule of uniformity (because only indirect taxes, and not direct taxes, are subject to the rule of uniformity).[31] The rejected formulation also would have eliminated any possibility of any future, modified form of a federal tax on incomes being subjected to apportionment by reason of being categorized as a "direct tax on incomes."

The practical reasons for drafters with differing agendas to have agreed on an approach that appears to have impliedly incorporated a modified version of the *Pollock* direct tax categorization analysis into the Constitution itself

[28] *See, e.g.*, Henry Ordover, "Revisiting Realization: Accretion Taxation, the Constitution, Macomber and Mark to Market," 13 *Va. Tax Rev.* 1 (1993).

[29] *Winkler v. United States*, 230 F.2d 766 (1st Cir. 1956).

[30] *See* Jensen, *supra* note 20, at 1114-1117.

[31] *Cf.* Jensen, *supra* note 20, at 1117-1120 (criticizing traditional and other justifications, including that the drafters were trying to avoid any express endorsement of *Pollock*, for why a reference to "direct taxes" in an earlier draft of the 16th Amendment was removed in favor of adding the phrase "from whatever source derived" but not including in that discussion a justification based on the application of the rule of uniformity only to indirect taxes and the preservation of the possibility that a modified form of the 1894 federal income tax might be categorized as a direct tax, and thereby be made subject to apportionment, under the balance of the *Pollock* analysis).

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may have included: (1) a desire to maximize the chances of the passage and subsequent ratification of the 16th Amendment and the reenactment of a tax on incomes in the form of the 1894 federal income tax (for example, because a narrowly drafted amendment focused on permitting a tax on incomes in the form of the 1894 federal income tax, which, with its deductions, was presumably already supported by the general public, is more difficult to attack as being overly broad or as having unintended consequences); and (2) a desire to maintain to the fullest extent possible the holdings and related principles set forth in *Pollock* and thereby limit any expansion of Congress's taxing authority (especially for those who may have secretly hoped the amendment would be rejected[32]).

Categorizing a Tax on Incomes as a Direct Tax

The Supreme Court's unanimous opinion in *Brushaber* explains that it reached its income tax holdings in *Pollock* on the basis that a federal tax on the incomes of individuals was to be categorized as an indirect tax unless:

> it was concluded that to enforce it [as an unapportioned tax] 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 [categorize that tax on incomes as a direct tax and thereby] subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.[33]

Thus, if the balance of the *Pollock* analysis were impliedly incorporated into the Constitution via the adoption of the 16th Amendment, it appears that any modified form of the 1894 federal income tax should continue to be categorized as an indirect tax unless it is concluded that to enforce the modified tax as an unapportioned tax would — taking into account the relevant modifications and based on a consideration other than the source of the income being subjected to tax — amount to accomplishing the result that, according to *Pollock*, the requirement for apportionment of direct taxation was adopted to prevent.

As explained in *Brushaber*, *Pollock* includes a finding by the Supreme Court that:

> the classification of direct [and related rule of apportionment] was adopted for the purpose of *rendering it impossible* to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment.[34] [Emphasis added.]

As clarified by *Knowlton* before the adoption of the 16th Amendment, and by later cases such as *Fernandez*, a tax that burdens an individual's property within the meaning of *Pollock* is a tax that falls upon the owner of the property merely because of the owner's ownership of the property, regardless of its use or disposition.[35]

Factoring in a further understanding that the ownership of property, regardless of its use or disposition during the tax year, may generate some form of actual or imputed economic return to the owner, one can understand how it may have been difficult for the Supreme Court in *Pollock* to conceptualize as "indirect" a federal tax that fell on the owners of property because of their receipt during the tax year of income derived from the mere ownership of property, regardless of whether the owner disposed of or used the property in a specific way, such as by importing the property; using the property in an active trade or business; or transferring the property by gift or bequest, all of which are examples of uses or dispositions that may be the subject of an unapportioned indirect tax as long as that indirect tax complies with the separate rule of uniformity.

Also, although not mentioned in *Brushaber*, *Pollock II* includes a further finding by the Supreme Court that the rule of apportionment was included in the Constitution to accomplish the result of leaving the several states at liberty (that is, to protect the ability of the several states)

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[32] *See* Jensen, *supra* note 20, at 1113.

[33] *Brushaber*, 240 U.S. 17.

[34] *Brushaber*, 240 U.S. at 16.

[35] *See supra* note 9.

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to discharge their respective obligations by "direct taxation on accumulated property." As explained in *Pollock II*:

> The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. . . .
>
> The founders [also] anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be, for the most part, met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity, and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made.[36]

It is important to note in this context how the 1894 federal income tax taxed a taxpayer's federal adjusted gross income consisting of gains, profits, and other income remaining after several deductions, including a full deduction for state and local income taxes paid during the tax year.[37] Under these circumstances, for example, if a state were to exercise its own constitutionally protected right[38] to tax 100 percent of some types or all a taxpayer's income without granting any deduction for any corresponding federal tax: (1) the state would take all the taxpayer's income being subjected to the state-level tax; (2) the federal government would collect none of the income being subjected to the state-level tax (because the taxpayer's corresponding federal adjusted gross income would be zero); and (3) the taxpayer would retain 100 percent of the taxpayer's accumulated property.

On the other hand, if (1) a state were to exercise its own constitutionally protected right to tax income without granting any deduction for any corresponding federal tax, (2) a federal tax is imposed on that same income that does not provide a full deduction for the corresponding state-level tax, (3) the taxpayer does not have any other sources of income, and (4) the combined federal and state-level tax exceeds 100 percent of the income being subjected to tax, there is no source for the payment of the excess other than the taxpayer's accumulated property. Thus, that modified form of the 1894 federal income tax might be argued (as compared with the 1894 federal income tax, in the absence of other savings language and for a reason other than the source of the particular income being subjected to tax (that is, because of the failure to provide a sufficient deduction)) to contain a modification that renders it possible for the federal tax to burden the taxpayer's accumulated property.[39]

It is also important to note how a federal tax on incomes in the form of the 1894 federal income tax (because it also provided a full deduction for state-level taxes on the mere ownership of accumulated property[40]) has the effect of protecting a state's ability to meet its obligations by "direct taxation on accumulated property." The protection derives from a federal income tax deduction for state-level taxes "on the mere ownership of accumulated property," making those taxes, when viewed in isolation after taking into account the federal deduction, less burdensome to income-earning taxpayers per

[36] *Pollock II*, 158 U.S. at 620-622.

[37] *See supra* notes 14 and 16.

[38] Under the 10th Amendment, powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[39] A full discussion of the meaning of "incomes" for purposes of the 16th Amendment and related computational matters is beyond the scope of this analysis. Nevertheless, it is worth noting how a federal tax on annual accessions to wealth that incorrectly calculates the amount of the "gains, profits, and other accessions to wealth" over which a taxpayer has complete dominion (for example, by failing to provide a deduction for that portion of an accession to wealth taken by a state, local, or foreign government in the form of taxes on the relevant gain, profit, or other income) might be further conceptualized as a tax that falls on the taxpayer's property (wealth) without regard to the taxpayer's use or disposition of the property or receipt of "properly calculated gains, profits, or other incomes" and might therefore be subject to categorization as a direct tax. *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 432 (1955) (implying that a federal, unapportioned income tax may be levied on all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

[40] *See supra* note 16.

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dollar raised at the state level than if there were no federal tax on incomes. Thus, with a federal tax on incomes in the form of the 1894 federal income tax in place (compared with a hypothetical situation of no federal income tax), income-earning property owners resident in a state that imposes a property tax have less of an incentive, and are therefore less likely, to relocate to a state with a lower or no corresponding state-level property tax.

On the other hand, a modified form of the 1894 federal income tax that limits the deductibility of state-level property taxes hinders the ability of the several states (and thereby does not leave them at liberty) to meet their obligations through direct taxes on accumulated property. This occurs by, for example, the modified tax making the related state-level taxes on the mere ownership of property more expensive to income-earning taxpayers per dollar raised as compared with a tax in the form of the 1894 federal income tax, thereby creating an increased incentive for income-earning property owners residing in higher tax states to relocate to lower or no-property-tax states together with their accumulated personal property, thereby also decreasing the demand for, and thereby the value of, real property located in their former states of residence and thereby making it more difficult for a state to satisfy its obligations by direct taxation on accumulated property, real or personal.

Thus, if the Supreme Court were to follow the reasoning of *Brushaber* and hold the balance of the *Pollock* analysis to have been impliedly incorporated into the Constitution via the adoption of the 16th Amendment, it is also possible that the Supreme Court might today categorize a modified form of the 1894 federal income tax with the characteristics described above as a direct tax on incomes that, like all other federal direct taxes, may be imposed only in accordance with the rule of apportionment.

If the Supreme Court were to categorize some modified form of the 1894 federal income tax as an unconstitutional, unapportioned direct tax, it is most likely that the Court would strike down only the offending modifications that caused the tax to be so categorized, and not the tax in its entirety.

The Supreme Court's Decision in *NFIB*

The Supreme Court's most recent decision addressing the technical issues associated with categorizing a tax as either "direct" or "indirect" for purposes of Article I of the Constitution is its 2012 decision in *NFIB*. As part of the portions of his opinion in *NFIB* representing the majority opinion of five of the nine Justices, Chief Justice John G. Roberts Jr. explained that:

> Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, section 9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.
>
> Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. See *Springer v. United States*, 102 U.S. 586, 596-598 (1881). Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. Id., at 597. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.). The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were

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> direct: capitations and land taxes. See id., at 175; id., at 177 (opinion of Paterson, J.); id., at 183 (opinion of Iredell, J.).
>
> That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." Springer, supra, at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U.S. 189, 218-219 (1920).
>
> A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or any other circumstance." *Hylton*, supra, at 175 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances — earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States [and instead falls within the Constitutional category of "indirect taxes"].[41]

In their joint dissent, Associate Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito responded, in part:

> Finally, we must observe that rewriting section 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, section 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question — perhaps because, until today, no federal court has accepted the implausible argument that section 5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. Petitioners' Minimum Coverage Reply Brief 25. At oral argument, the most prolonged statement about the issue was just over 50 words. Tr. of Oral Arg. 79 (Mar. 27, 2012).[42]

Based on the analysis above, it appears that the four dissenting justices in *NFIB* were correct to the extent that Roberts's opinion focused only on the "result" of *Pollock* being overturned by the 16th Amendment and did not mention *Brushaber* or its implications for the continued relevance of the interpretative rules adopted in *Pollock* in the income tax context. Whether the analysis included above regarding the proper categorization of federal taxes on property and incomes as "direct" or "indirect" might today lead a majority of the Court to reverse its prior holding in *NFIB* regarding a tax on the failure to obtain health insurance is less clear.

If a majority of the Supreme Court desired to overturn its holding in *NFIB*, it appears that they would need to focus on the fact that the tax in *NFIB* was not a tax on income and that, instead of being a tax on the use or disposition of property, the tax could be imposed on an owner of property for not making use or otherwise disposing of property (that is, for not purchasing health insurance). In addressing the relevant issues, the

[41] *NFIB*, 567 U.S. at 571.

[42] *Id*. at 669.

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Court might also be influenced, at least in part, by the repeal of the individual mandate by the Tax Cuts and Jobs Act. In that context, categorizing the individual mandate as an unconstitutional, unapportioned "direct tax" might be of less current institutional concern to the Court than when it first heard the case because it would be considering whether to prohibit the reimposition of the individual mandate rather than whether to invalidate that same provision as a current provision of federal law. Based on the work of some academics, the Court might also separately conclude that it would be difficult to characterize the individual mandate as an "excise."[43]

Nevertheless, other non-income taxes that have already been or might be characterized as excises, duties, or imposts for constitutional purposes — such as a tax on the act of employment calculated on an amount of wages without reduction for state and local taxes — should continue to be categorized as indirect taxes because they are "excises" within the meaning of the Constitution.[44] ■

[43] *See* Robert G. Natelson, "What the Constitution Means by 'Duties, Imposts, and Excises' — and 'Taxes' (Direct or Otherwise)," 66 *Case W. Res. L. Rev.* 2, 297 (2015).

[44] *See Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) and *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding Social Security taxes on employers as a valid excise or duty on the employment relationship).

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