CONSTITUTIONAL TAX STRUCTURE

Though written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally & recall the people: they fix too for the people principles for their political creed

-- Thomas Jefferson

Brian D. Swanson
The purpose of the Constitution of the United States is to create effective government while preserving individual liberty. This is accomplished through division of authority and separation of powers. It delegates certain powers to the federal government and reserves those not delegated to the states. It also divides power between the executive, legislative and judicial branches of government. But seemingly lost to history is the division of the taxing power between the federal and state governments. The division of taxing authority exists to equitably allocate resources between federal and state governments and to prevent the concentration of financial power to discourage oppression and abuse. The power of the purse is the principle power in this world and preventing its concentration in one authority or another is essential to preserving liberty. Understanding and restoring this constitutional separation will restore that balance of power between federal and state governments that has been lost.

The Constitutional tax structure, like all our laws, begins with the Constitution:

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Article 1 Section 2:

Representatives and direct taxes shall be apportioned among the several states which may be included within this union.

Section 8:

Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises .... but all duties, imposts and excises shall be uniform throughout the United States

Section 9:

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

The Constitutional tax structure as defined includes: direct taxes subject to the rule of apportionment and indirect taxes (duties, imposts and excises) subject to the rule of uniformity. All taxes must be limited by either apportionment or uniformity, for there is no provision for a tax without limitation. These limits protect citizens from misapplication and abuse

*Brushaber v. Union Pacific R. Co. (1916)*

In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises.
Adding these rules to our structure looks like this:

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<td>Direct Taxes</td>
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<td>Indirect Taxes</td>
<td>Requirement: Uniformity</td>
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The Constitutional tax structure is dependent on the definition of direct tax because indirect taxes are so numerous and indefinite that they defy definition. Once direct tax is defined, the rest of the tax structure falls neatly into place. Justice Swayne noted in his opinion in *Springer v. United States* (1880):

> The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject

The federal government’s taxing power is dependent on the legal definition of this term. Since it appears in the Constitution a more definitive definition, beyond the fluctuating opinions of economists, is required to ensure consistent application. Because our government has need for a legal definition of direct tax, let’s remember what the text-writers have declared:

Hamilton, Alexander (1796):

> The following are presumed to be the only direct taxes: capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must of necessity be considered as indirect taxes

Mr. Justice Chase, *Hylton* (1796):

> 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

Mr. Justice Patterson *Hylton* (1796):

> I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land
Mr. Justice Iredell, *Hylton* (1796):

Perhaps a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description.

Chief Justice Chase, *Veazie Bank v. Fenno* (1869)

It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.

Mr. Justice Clifford, *Schley v. Rew* (1874):

Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income

Mr. Justice Wilson - dissenting, *Pollock v. Farmers Loan and Trust* (1894)

That, upon every occasion when it has considered the question whether a duty on incomes was a direct tax within the meaning of the Constitution, this court has, *without a dissenting voice*, determined it in the negative, always proceeding on the ground that capitation taxes and taxes on land were the only direct taxes contemplated by the framers of the Constitution.

Mr. Justice Brown – dissenting, *Pollock v. Farmers Loan and Trust* (1894)

So also, whenever this court has been called upon to give a construction to this Clause of the Constitution, it has universally held the words "direct taxes" applied only to capitation taxes and taxes upon land. In the five cases most directly in point, it was held that the following taxes were not direct, but rather in the nature of duty or excise, viz., a tax upon carriages, *Hylton v. United States*, 3 Dall. 171; a tax upon the business of insurance companies, *Pacific Insurance Co. v. Soule*, 7 Wall. 443, a tax of ten percent upon the notes of state banks held by national banks, *Veazie v. Fenno*, 8 Wall. 533; a tax upon the devolution of real estate, *Schley v. Rew*, 23 Wall. 331; and, finally, a general income tax was broadly upheld in *Springer v. United States*, 102 U. S. 86. These cases, consistent and undeviating as they are and extending over nearly a century of our national life, seem to me to
establish a canon of interpretation which it is now too late to overthrow, or even to question.

Mr. Justice White - dissenting, Pollock v. Farmers Loan and Trust (1894) who would write the unanimous Brushaber v. Union Pacific R. Co.

The facts, then, are briefly these: at the very birth of the government, a contention arose as to the meaning of the word "direct." The controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion made use of language which clearly showed that he thought the word "direct" in the Constitution applied only to capitation taxes and taxes directly on land.

Chief Justice White – Brushaber (1916)

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.

In summarizing all these opinions, the pronouncement of the Supreme Court in Springer v. United States (1880), provides the legal precision:

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

“Direct tax” has a custom Constitutional definition fixed by the Supreme Court. The Constitutional definition of a “direct tax” is a capitation or a tax on real estate and nothing else. This is not an economic definition. Many economic theories abound regarding the meaning of a direct tax, but its Constitutional meaning has been fixed by the Supreme Court.

Justice White – dissenting Pollock v. Farmers Loan and Trust (1894)

(referencing Springer)
This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word "direct" in the Constitution, and renders unnecessary a resort to the conflicting opinions of the framers or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person.
The door is closed. A direct tax, as it means in the Constitution, is only a capitation and tax on real estate. A tax on real estate is a simple concept, but many readers may not be familiar with the term “capitation.” Black’s Law Dictionary defines ‘capitation’ as:

One which is levied upon the person simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow.

A capitation is a tax that is levied directly on the person like an ancient tribute. It might be levied upon the person, property, wealth or earnings. Pollock describes this type of tax as falling on the revenue of the person, meaning one’s earnings, vice the expense, or one’s spending:

The remarkable coincidence of the clause of the Constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from, and falling immediately on, the revenue, and, by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.

Since “direct tax” in the Constitution means only a capitation and a tax on real estate and has a legally fixed definition, indirect taxes are logically all not direct taxes, as Hamilton noted above; they include every tax that is not direct. This is why the answer to the question, “what is a direct tax,” is so important, and why it figures so prominently in American jurisprudence: it’s the basis for understanding the rest of the tax structure.

Adding this information almost completes the tax structure:

<table>
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<tr>
<td>Capitation</td>
</tr>
<tr>
<td>Taxes on Real Estate</td>
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<tr>
<td>All not Direct Taxes including:</td>
</tr>
<tr>
<td>Excises, Duties, Imposts</td>
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In *Pollock*, Chief Justice Fuller noted:

And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax, for more than one hundred years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

And Chief Justice White concurred in *Brushaber*:

That the authority conferred upon Congress by § 8 of Article I "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned.

Every conceivable tax is described in the chart above and must fall in the category of either a “direct tax” or an indirect tax and these taxes must be limited by either apportionment or uniformity. Since the chart above embraces every conceivable power of taxation, and there is no provision for an unlimited tax outside the chart’s defined space, each category of tax can be logically expressed in two ways:

<table>
<thead>
<tr>
<th>Direct Tax</th>
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<tr>
<td>A tax levied with apportionment</td>
<td>A tax levied with uniformity</td>
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<tr>
<td>A tax levied without uniformity</td>
<td>A tax levied without apportionment</td>
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The two expressions in each category are logically equivalent. All taxes levied without uniformity can also be described as “Direct taxes” and all taxes levied without apportionment can be described as indirect taxes.

It will be noticed that "income tax" is not explicitly on the chart, but as that tax is levied without apportionment, it is clear that the income tax is and must be in the category of indirect taxes, and can only be applied and enforced as an excise. In *Brushaber v. Union Pacific R. Co. (1916)*, Chief Justice White confirms this analysis:

Moreover, in addition, the 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.

Chief Justice White, “recognized the FACT that taxation on income was in its nature an excise…”

Why is taxation on income “in its nature an excise?” It’s not an excise in England.
Pollock v. Farmers Loan and Trust (1894)

In Dowell's History of Taxation and Taxes in England, admitted to be the leading authority, the evolution of taxation in that country is given, and an income tax is invariably classified as a direct tax.

In the United States, “direct tax” within the meaning of the Constitution, is a capitation and a tax on real estate. Taxation on income is not a direct tax by definition and therefore must be an indirect tax — in this case, an excise. Justice Swayne declared this fact explicitly in Pacific Insurance Company v. Soule (1868), where he noted that a tax levied, “upon dividends, undistributed sums, and income is not a ‘direct tax,’ but a duty or excise.”

A direct tax on individual earnings is a capitation, which by definition requires apportionment.

An income tax is something different than a tax on individual earnings; a real, Constitutional income tax is an indirect tax on privilege-distinguished events, which usually takes the form of an excise tax on licenses and privileges as explained in these examples:


Excises are taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of the privilege, and if business is not done in the manner described, no tax is payable.

And

..and it is this privilege which is the subject of the tax, and not the mere buying, selling or handling of goods.

A valid excise tax on income is not a direct tax on every worker or gainful receipt. To be liable for the tax one must exercise the requisite privilege. Despite its misleading name, the "income" subject to the income tax is not all that comes in, but only a special, qualified subclass of what comes in.

Brushaber v. Union Pacific R. Co. (1916)

Nothing could serve to make this clearer than to recall that, in the Pollock case, insofar 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" (158 U.S. 158 U. S. 637) -- 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. \textit{Id.}, p. 158 U. S. 635.

But as the Court said in \textit{Flint}, “if business is not done in the manner described, no tax is payable.” If the federal government does not tell a worker how to do the job, the worker does not owe the government any tax on individual earnings.

Thirty years after the ratification of the Sixteenth Amendment, debates in Congress clearly prove that members understood taxation on income to be an excise as shown in the 1943 Congressional Record, 78\textsuperscript{th} Congress, Volume 89 Part 2, pg 2580:

Treasury Department legislative draftsman F. Morse Hubbard’s statement:

The Sixteenth Amendment authorizes the taxation of income “from whatever source derived” – thus taking in investment income – “without apportionment among the several States.” The Supreme Court has held that the Sixteenth Amendment did not extend the taxing power of the United States to new or excepted subjects but merely removed the necessity which might otherwise exist for an apportionment among the States of taxes laid on income whether it be derived from one source or another. So the amendment made it possible to bring investment income within the scope of a general income-tax law. It is still fundamentally an excise or duty with respect to the privilege of carrying on any activity or owning any property which produces income.

The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax: it is the basis for determining the amount of tax.

Taxation on income is not a “direct tax” by definition and must be logically, inherently and “by nature” included in the category of indirect taxation and according to the Supreme Court, it’s specifically an excise. Until 1894 no form of income tax had ever been ruled a direct tax by the Supreme Court.

The Supreme Court’s ruling in \textit{Pollock v. Farmers' Loan & Trust Co.}, 157 U. S. 429; 158 U. S. 158 (1894), slightly altered the tax structure when it ruled that income in connection with national railroad investments in the form of rent and dividends has to be considered a direct tax because the gains proceeded from property (stock and real estate). The court reasoned that if the source of the income was an object of a direct tax, then the income derived from it must also be a direct tax. Personal property and real estate were certainly the objects of a direct tax and thus income derived from these sources, said the Court, is a “direct tax” also. Taxation of this investment income now required apportionment as well.
Pollock v. Farmers Loan and Trust (1894)

The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and therefore unconstitutional and void became not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

Note, only taxes on income from real estate and personal property were declared direct taxes under the Pollock court’s reasoning, but gains and profits from business, privileges, or employments was taxed as an excise and sustained as such. Excise-taxation of business and employment income was upheld as valid:

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Taxation on business, privileges or employment has never been ruled a direct tax by the Supreme Court. Many writers and government organizations try to confuse the public by repeating that “income tax” was declared a direct tax by Pollock, but this is a deceptive use of half-truths and twisted reasoning. Only a tax on “income of real estate and personal property” was declared a direct tax, and that only because the court considered those particular kinds of gains inseparable from their real estate and personal property sources.

The Pollock decision slightly altered the Constitutional tax structure:

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<td>Capitation &amp; &quot;income&quot; from personal property</td>
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<tr>
<td>Real Estate &amp; &quot;income&quot; from real estate</td>
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Income from real estate and personal property was pulled from the class of indirect taxes and placed in “direct taxes” because the source of the income was a direct tax. Income from business and employment is still a valid excise, but now “income” is found in both classes of tax and causes angst and confusion.
Taxes on "income" (as meant in the income tax laws) from real estate and personal property had never been considered the proper object of a direct tax before this ruling and it angered many Justices and politicians because it injected confusion: income from real estate required apportionment (direct tax), but income from employment did not require apportionment (indirect tax)? Taxation of "income", in any form, had never been considered a “direct tax;” and now with income occupying space in both categories of tax – some direct and others indirect - it made drafting fair and equitable legislation more complicated. Chief Justice White said in Brushaber, that it was only because of Pollock that some income taxes, “were removed from the great class of excises, duties and imposts subject to uniformity, and were placed in the other or direct class.” Therefore, except for a small corporate income tax enacted in 1909, no general income tax legislation was attempted until after the Sixteenth Amendment.

The Sixteenth Amendment was ratified to clarify this confusion, overturn the despised Pollock decision’s “source” reasoning, and restore all income taxes, regardless of the source, to the class of indirect taxes, which do not require apportionment.

The text:

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

The Amendment makes no attempt to amend the Constitutional rules for “direct” and indirect taxes found in Articles 1 section 2 and 9: all taxes enacted by Congress must be either apportioned or uniform - or they’re unconstitutional. So, if income tax is collected without apportionment, then it must be collected with uniformity or it’s unconstitutional. An income tax collected without apportionment is logically equivalent to an income tax collected with uniformity – they both describe an indirect tax. Chief Justice White Stanton v. Baltic Mining Co. (1916):

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

The Sixteenth Amendment prohibited income taxation from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation. Pollock pulled income from real estate and personal property out of the category of indirect taxation and declared them direct taxes, an act which is now prohibited by the Amendment. The Amendment requires that all future income taxes will be collected as indirect taxes and they can never again be characterized as a direct tax.
In *Brushaber v. Union Pacific R. Co.* (1916):

but 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.

Taxes on "income" from business, privileges, and employments did not require apportionment before the 16th Amendment and after it, all income taxes are relieved from apportionment because they are all indirect taxes. The Amendment gives Congress the power to override the Supreme Court’s *Pollock* ruling so it can tax income from real estate and personal property without apportionment and reunite them with the all the other income taxes that do not require apportionment. The purpose of the Sixteenth Amendment is to ensure that income taxes are recognized by Congress and the courts as indirect excise taxes.

The 16th Amendment restored the Constitutional tax structure:

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The idea that the Sixteenth Amendment gives the power to enact a tax on unprivileged gains without apportionment is a myth to conceal the true purpose of the Amendment; this myth is found in history books, online resources and even the IRS website (https://www.irs.gov/uac/brief-history-of-irs):

16th Amendment

In 1913, Wyoming ratified the 16th Amendment, providing the three-quarter majority of states necessary to amend the Constitution. The 16th Amendment gave Congress the authority to enact an income tax.
The Amendment did not give Congress the authority to enact an income tax. Congress has always had the power to tax incomes from its authority in Article 1 Section 8, and it had taxed incomes as excises numerous times, as *Brushaber* confirms:

The Sixteenth Amendment does not purport to confer power to levy income taxes in a generic sense, as that authority was already possessed.

The purpose of the myth is to confuse and distract the public so it does not learn that a Constitutionally collected income tax is an indirect tax that does not apply to most American’s earnings. Additionally, government agencies that describe an income tax as a direct tax that has been exempted from the Constitution’s apportionment requirement promote an insidious myth that threatens the Constitution’s carefully designed tax structure. A non-apportioned direct tax is a contradiction that cannot exist within that structure.

A few lower court rulings such as, United States v. Collins 920 F.2d 619, 629 (10th Cir. 1990), In re Becraft, 885 F.2d 547, 548-49 (9th Cir. 1989) and Lovell v. United States, 755 F.2d 517, 518-20 (7th Cir. 1984), have supported this contradiction. To the extent that these lower court rulings describe income tax as a non-apportioned direct tax they do so in defiance of *Brushaber v. Union Pacific R. Co. (1916)* and a unanimous Supreme Court.

A non-apportioned direct tax would be an unlimited tax subject to neither the rule of apportionment nor uniformity and would make the American public vulnerable to unlimited abuse and financial ruin. A direct tax is not Constitutionally limited by uniformity and if a direct tax is exempted from apportionment, then its limited by nothing. An unlimited income tax might expose taxpayers earning the same income to be taxed at varied rates or citizens of the various states to be taxed differently. Chief Justice White, writing for the unanimous court, passes his disapproving judgement on the idea that the Sixteenth Amendment authorizes such a thing as a direct tax without apportionment:

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.

The unanimous Court warns that the existence of a non-apportioned direct tax results in “irreconcilable conflict” and would, “create a radical and destructive changes” to our tax structure and constitutional system because the Constitution requires that all direct taxes be apportioned and the Amendment does not alter that requirement. A non-apportioned direct tax is outside the boundaries of the Constitutional tax structure.

The chart below shows why a non-apportioned direct tax would, “create radical and destructive changes” and represents “irreconcilable conflict:”

| US Constitution |
|------------------|------------------|
|                  | Direct Taxes     | Indirect Taxes  |
| Requirement: Apportionment | Requirement: Uniformity |
| Capitation Taxes on Real Estate | All not Direct Taxes including: Excises, Duties, Imposts |
| Income tax with apportionment | Income tax without apportionment |

Income tax with apportionment could be a direct tax, as Pollock ruled, but it is now prohibited by the Sixteenth Amendment. An income tax without apportionment is simply an indirect tax.

Every conceivable tax exists within the boundaries of the chart, but a non-apportioned direct tax is out here in undefined space and is outside the Constitutional tax structure. It is subject to neither apportionment nor uniformity. Such a tax does not and cannot exist.

Had the Amendment proposed to authorize a tax requiring neither apportionment nor uniformity, it would have created something new that the Constitution does not recognize or allow: a tax without limitation, hence the “irreconcilable conflict”. White continues:

The Sixteenth Amendment was obviously intended to simplify the situation and make clear the limitations on the taxing power of Congress and not to create radical and destructive changes in our constitutional system.

The Amendment is written to harmonize and make clear the limitations on the taxing power – not to create a new tax or amend the existing tax structure. Specifically, it clarifies that Congress can only tax as "income" that which is suitable to an excise, and tortuous reasoning
like appealing to the source will not be used to make such an indirect tax subject to apportionment. White is so emphatic that he revisits this erroneous idea a second time:

We are of opinion, however, that the confusion is not inherent, but rather arises from the 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. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it.

And he explains for a third time his unequivocal contempt for the non-apportioned direct tax:

Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity, as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation ...

The contention that The Sixteenth Amendment treats the income tax as a direct tax not subject to apportionment is “wholly without foundation” and “erroneous.” In addition, treating income tax as a direct tax without apportionment would result in, “destroying the two great classifications [of tax] which have been recognized and enforced from the beginning.” The Constitution’s carefully designed tax structure would be destroyed if the Amendment attempted to permit an income tax to be levied without limitation as a direct tax without apportionment. In Brushaber, the Chief Justice has declared not once, not twice but three times that a non-apportioned direct tax is Constitutionally impossible.

It’s time to expose this destructive myth and demand that lower court rulings that contradict the unanimous Brushaber opinion be discarded and overruled. The 16th Amendment does not authorize an income tax or a non-apportioned direct tax, it simply restores the Constitutional tax structure by declaring that income taxes are not “direct taxes” and do not require apportionment.

Now that it is understood that the 16th Amendment clarifies that all income taxes are collected without apportionment because they are restored to the class of indirect taxes, a “direct tax,” as the Supreme Court defined, is still only a capitation and taxes on real estate, because Springer v. United States has not been altered or overruled.

One might think that defining direct taxes as only capitations and taxes on real estate and then encumbering its collection with so difficult a mechanism as apportionment, so to make it practically prohibited, is too restrictive on the Federal Government’s revenue and is a hindrance to public finance. However, Chief Justice Fuller, in Pollock v. Farmer’s Loan & Trust Co. 158 US
601 (rehearing), offers the reader an education on federalism that is not found in modern civics books, history books or any know online resource. Tucked away in this 113-year-old opinion, it is discovered that the Constitution distributes the taxing power to the federal and state governments the same as it distributes all political power. He explains that “direct taxes” are the state government’s Constitutionally protected source of revenue and apportionment exists to restrain the federal government from encroaching upon that revenue except in an emergency. Apportionment is not a hindrance to public finance, its purpose is to preserve the Constitution’s division of the taxing power. Chief Justice Fuller explains:

In distributing the power of taxation, the Constitution retained to the State the absolute power of direct taxation, but granted to the Federal government the power of the same taxation upon condition that, in its exercise, such taxes should be apportioned among the several State according to number, and this was done in order to protect to the States, who were surrendering to the Federal government so many sources of income, the power of direct taxation, which was their principal remaining resource.

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power or levying excises, and duties if covering anything other than excises; but, in respect of them, the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but, even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government.

The founders 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 ... the qualified grant was made
This information requires a final adjustment to the Constitutional tax structure:

<table>
<thead>
<tr>
<th>US Constitution</th>
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<tr>
<td><strong>Direct Taxes</strong></td>
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<tr>
<td>State Revenue</td>
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<tr>
<td>Requirement: Uniformity</td>
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<tr>
<td>All not Direct Taxes Including: Excises, Duties, Imposts</td>
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The States have unrestricted and unconditional power of direct taxation. Of course they may collect indirect taxes within their own jurisdictions, the US Constitution simply takes no notice of it.

Indirect taxes are the Federal Government’s primary source of revenue, but, in times of necessity, it can levy “direct taxes” through the rule of apportionment by which the states, “pay the amount apportioned and recoup from their own citizens.”

Those who understand American government may admire how beautifully the Framers incorporated federalism in the tax structure.

The Constitution distributes the taxing power to the federal and state governments, as it distributes all political power, to maintain a balance between the constituent parts of the government. “Direct taxes” are the primary funding source for the states, and indirect taxes are the primary funding source for the federal government and the purpose of apportionment is to enforce this separation. Those who peddle the myth that the 16th Amendment authorized a non-apportioned direct tax betray their ignorance of apportionment’s function, “to protect to the State governments ... the power of direct taxation, which was their principle remaining resource.” The chart shows that if the federal government has need of revenue derived from “direct taxes,” it must go through the rule of apportionment to get it. Apportionment is meant to restrain the federal government from encroaching on the state government’s primary source of revenue, except in an emergency and its difficulty and political accountability ensure it won’t be used often. Judges, politicians and public officials understood this distinction as shown by Richard Olney US Attorney General, quoted in Pollock:

That such inequalities must result is practically admitted, the only suggestion in reply being that the power to directly tax realty and personality was not meant for use as an ordinary, everyday power; that the United States was expected to rely for its customary revenues upon duties, impost, and excises, and that it was
meant it should impose direct taxes only in extraordinary emergencies and as a sort of dernier resort.

The federal government is meant to rely primarily on indirect taxes, a reliance which naturally regulates the volume of federal taxes and therefore the size of the federal government as well. This should explain why the federal government and federal courts are interested in limiting the definition of “direct tax” to as few items as possible: only the objects of a “direct tax” are in practice out of their reach except in extreme necessity. Indirect taxes include every tax that is not “direct” therefore, the vast majority of taxes falls under the category of indirect taxes and gives to the federal government a sufficient resource from which to fund its Constitutional responsibilities. When enacted judiciously, indirect taxation will provide natural barriers that defend against abuse and oppression as Alexander Hamilton explains it in Federalist 21:

Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for such impositions. If inequalities should arise in some States from duties on particular objects, these will, in all probability, be counterbalanced by proportional inequalities in other States, from the duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere. Or, if inequalities should still exist, they would neither be so great in their degree, so uniform in their operation, nor so odious in their appearance, as those which would necessarily spring from quotas, upon any scale that can possibly be devised.

It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit; which cannot be exceeded without defeating the end proposed, that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that, “in political arithmetic, two and two do not always make four”.

If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.

Though indirect taxes are perfectly suited to satisfy the federal government’s revenue needs, in an effort to reach beyond indirect taxes, federal agencies have conjured a hoax, which is described as a non-apportioned direct tax (an idea the Supreme Court has already rejected), designed to specifically subvert and evade the apportion requirement for collecting “direct taxes” to illicitly appropriate revenue the Constitution has reserved to the states. The tax masquerading as a Constitutional income tax is actually administered as a capitation and results
in the breakdown of the Constitution’s distribution of the taxing power. The federal
government is meant to impose “direct taxes” only in time of distress and necessity as a *dernier
ressort*, but due to this hoax it collects “direct taxes” annually as part of its general revenues.
This action depletes state’s primary resource and forces them into economic dependency
requiring “federal funds” to augment their budgets. The income tax racket strips the nation of
over $1.5T in protected state government revenue and sends it to Washington where the states
have to come begging, hat in hand, for “federal funds,” which represents money taken from
their own pockets and returned with federal restrictions. Maybe this is the real reason Chief
Justice White described the idea of a non-apportioned direct tax as a, “radical and destructive
change to our constitutional system.” Restoring the integrity of this system will solve many of
our financial and political ills as it will force the federal government to act strictly within its
defined Constitutional limits – for it won’t have the money to do anything else.

We are living in a time of error and delusion. Those who possess even a rudimentary
knowledge of American government understand the concept of separation of powers and why
it’s a fundamental element in the attempt to preserve liberty and control the abuses of
government. However, we have erred by not recognizing the Constitution’s division of the
taxing power and its importance to maintaining a fiscal balance and limit government. Also, we
have been deluded into believing that the 16th Amendment authorizes a tax outside the
Constitutional tax structure that permits the federal government to swindle the state
governments out of their Constitutionally protected source of revenue. This tax structure
begins with separating taxes into two categories called direct and indirect taxes. “Direct taxes”
have a custom Constitutional definition established by the Supreme Court that is separate and
distinct from economic theory and the opinions of economists and indirect taxes include every
tax that is not direct. The Constitution then divides these between the federal and state
governments: indirect taxes are the primary source of revenue for the federal government and
“direct taxes” are the primary source of revenue for the state governments. Apportionment
exists to enforce this separation. These facts may have been common knowledge to every 8th
grade civics student when Chief Justice Fuller penned his explanation in *Pollock* back in 1894,
but these facts have been lost to history. This collective amnesia has provided the pretext for
government agencies to assert a myth that 16th Amendment creates a new tax, outside the
Constitutional tax structure, called a non-apportioned direct income tax that permits the
federal government to directly tax the earnings of every worker in the country without
apportionment. The effect of this myth is to subject individual citizens to federal harassment
for a tax they don’t owe and reduce the state governments to a condition of financial
dependency. This myth has three fatal flaws: first, a direct tax on an individual’s earnings is a
capitation and explicitly requires apportionment. Second, taxation on income is not a “direct
tax” and inherently belongs in the category of indirect taxation. And finally, the Supreme Court
has rejected the idea of a non-apportioned direct tax as “erroneous” and a “radical and
destructive change to our Constitutional system.” Yet the myth continues. It’s time to be
watchful and rally around the text of the Constitution and recall the people to repair this vital
separation of power, which will have the immediate effect of restoring fiscal responsibility,
limited government and the balance of power between federal and state governments.
Happily, restoring the Constitutional tax structure does not require an act of Congress, support of the President or any more rulings by the Supreme Court. All that is required is for citizens to read Peter Hendrickson’s book, *Cracking the Code- The Fascinating Truth About Taxation In America* and complete their taxes correctly using the information contained therein. The people have the power to restore this Constitutional principle on their own and the more people who act, the sooner the Constitutional balance will be restored.

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