The Constitutionality of Taxing Agricultural and Land Use Emissions

by Michelle Melton

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Summary

Economywide legislation to address climate change will be ineffective unless it addresses greenhouse gas emissions from agriculture and land use. Yet incorporating these sectors into the most popular policy proposal—a carbon tax—carries legal risk that policymakers and legal commentators have ignored. This Article explores whether a carbon tax, as applied to agriculture and land use, is a direct tax within the meaning of the Constitution; it concludes that text, history, and Supreme Court precedent up through *National Federation of Independent Business v. Sebelius* (2012) leaves such a tax open to challenge. Consequently, policymakers should avoid eliminating EPA's regulatory authority over greenhouse gas emissions in exchange for a carbon tax.

Agriculture and land use are a nontrivial source of U.S. greenhouse gas emissions (GHGs)[1] and an even larger contributor to short-term warming, as short-lived climate pollutants such as methane are estimated to account for about 40% of current warming.[2] As such, these sectors warrant inclusion in any national climate mitigation program. Curbing carbon dioxide emissions from fossil fuel combustion—the largest source of GHGs—will understandably be the primary target of any climate mitigation program, but a policy that excludes agricultural and land use emissions leaves a significant source of emissions uncovered. While there may be administrative and political reasons for exempting agricultural producers from a comprehensive GHG control scheme,[3] a national

1. A substantial minority of U.S. emissions is attributable to non-carbon dioxide gases, primarily methane and nitrous oxide (N_2O). Together, these gases constituted about 16% of U.S. GHGs on a carbon dioxide-equivalent basis, and are predominantly attributable to the agriculture and land use sectors. U.S. Environmental Protection Agency, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2016, at ES-6 to ES-8 (2018). Agricultural and land use activities contribute GHGs through various processes, including agricultural soil management, enteric fermentation, livestock manure management, rice cultivation, liming, urea fertilization, and field burning of agricultural residues. Overall, livestock—primarily cattle—is responsible for about one-third of U.S. methane emissions. *Id*. at ES-21. Methane is emitted from a wide variety of industrial and nonindustrial activities. The largest source of U.S. methane emissions—accounting for more than one-quarter of all anthropogenic methane emissions—is livestock, via enteric fermentation (a byproduct of livestock digestion). *Id*. at ES-15. N_2O emissions, which accounts for about 6% of total U.S. GHGs, *id*. at ES-16, are produced by biological processes in soil and water, although N_2O is also a byproduct of certain industrial activities. The primary source of U.S. N_2O emissions is agricultural soil management, such as the application of fertilizer and the growth of nitrogen-fixing plants (77%, comprising nearly 4.5% of *total* U.S. emissions in 2016), as well as manure management and other sources (e.g., stationary fuel combustion, nitric acid production).
2. California Air Resources Board, Short-Lived Climate Pollutant Reduction Strategy 1 (2017), *available at* https://perma.cc/6DVZ-GDQU.
3. No existing or proposed carbon-pricing schemes, in the United States or globally, regulate emissions from agricultural or land-based sources. British Columbia's carbon tax, for example, only covers emissions from fossil fuels; even so, the tax contains exemptions, including for fuel purchased by farmers for on-farm use (e.g., in mechanized equipment or for heating). *See* Government of British Columbia, *Motor Fuel Tax & Carbon Tax Exemptions*, https://perma.cc/2JN3-CB6X; British Columbia Ministry of Finance, Coloured Fuels and Other Substances (2018) (Tax Bulletin MFT-CT 003), *available at* https://perma.cc/Z789-7CX8. This is despite the fact that, in the words of one paper, "there is not compelling evidence for exemption of the agricultural sector from the tax." Nicholas Rivers & Brandon Schaufele, Pacific Institute for Climate Solutions, The Effect of British Columbia's Carbon Tax on Agricultural Trade 4 (2014), *available at* https://perma.cc/8LLX-DHSQ. Other jurisdictions have implemented even more limited carbon taxes, generally applying only to certain fuels. For example, Alberta assesses a carbon tax on transportation and heating fuels (marked farm fuels are exempt from the levy). *See* Government of Alberta, Budget 2016: The Alberta Jobs Plan—Fiscal Plan 94-96 (2016), *available at* https://open.alberta.ca/dataset/c341d72a-c424-4d6d-8c64-4ff250e50775/resource/4d67f16d-21b5-4bf6-b7d0-ec2ebfc66185/download/fiscal-plan-complete.pdf. Several other countries have some form of carbon levy—for example, Finland, Sweden, and the United Kingdom, among others—but none incorporate agriculture or waste; although they vary in the details, these carbon taxes are all limited to levies on fossil fuels. *See* World Bank Group, State and Trends of Carbon Pricing 2017, at 45-53 (2017), *available at* https://perma.cc/SAF2-4F3Y. No U.S. jurisdic-

GHG abatement program that does not address agricultural emissions—especially from large emitters—is, at best, incomplete. At worst, an agricultural exemption threatens to undermine the efficacy of the mitigation program.

Policymakers have several options for enacting an economywide carbon policy: a sector-by-sector regulatory approach, a cap-and-trade program, a carbon tax,[4] or some combination of these options. While experts have debated the relative political, economic, administrative, and policy trade offs of these options for decades, they have largely ignored emissions from agriculture and land use, despite the significant contribution from these sectors to U.S. GHG emissions.[5] Yet a mitigation policy that does not address agriculture is seriously—perhaps fatally—flawed.[6]

A more fulsome policy conversation about how to regulate emissions from agriculture and land use is warranted. One conceivable way to cover these sectors is through a carbon tax, which is currently the only comprehensive climate proposal to attract support from both sides of the political aisle. The policy design issues and relative merits of carbon taxes have been extensively discussed, but the legal issues have not been fully explored. Including agriculture within a carbon tax carries legal risk from a perhaps unexpected source: the U.S. Constitution's Direct Tax Clause.

This Article demonstrates that assessing a carbon tax on agriculture and land use would raise a difficult question about whether such a provision constitutes a "direct tax." A carbon tax scheme would either need to ignore agriculture or assume the legal risks set out below. Understanding the scope of this legal risk is especially important in light of conservative proposals to support a carbon tax in exchange for elimination of the U.S. Environmental Protection Agency's (EPA's) authority over GHGs.[7]

Whether the U.S. Congress can extend a carbon tax over emissions from agriculture and land use will depend on an interpretation of the Constitution's Direct Tax Clause.[8] The Direct Tax Clause is one of the Constitution's most inscrutable provisions; neither the text of the Constitution, nor the practice at the Founding, nor the U.S. Supreme Court's precedents provide much insight into its mean-

tion currently taxes GHGs, although there have been several proposals at both the state and federal levels to implement a carbon tax. None of these initiatives has proposed to tax non-fossil fuel emissions. For an overview of the mechanics of state proposals to tax carbon, see Janet A. Milne, *Carbon Tax Choice: The Tale of Four States*, *in* The Green Market Transition 3-7 (Stefan E. Weishaar et al. eds., Edward Elgar 2017) (discussing four of the six state carbon tax proposals). Other states have also recently contemplated a carbon tax, most notably Washington State, which would have covered electricity production, electricity imports, and fossil fuels. *See* S.B. 6203, 65th Leg. (Wash. 2018).

4. This Article uses the term "carbon tax" as shorthand for a tax on GHGs, regardless of whether the tax is assessed on carbon dioxide or another gas. The name "carbon tax" is therefore potentially a misnomer, as theoretically such a tax should (and could feasibly) apply to all GHGs, adjusted for their warming potential.

5. Despite the importance of non-fossil fuel emissions, most federal climate proposals, which vary in their level of specificity, are limited to fossil fuels. Several carbon tax proposals have been introduced in the U.S. Congress during the past few legislative sessions. All are limited to assessing a levy on fossil fuels and, in some cases, hydrofluorocarbons. *See*, *e.g.*, Climate Protection and Justice Act of 2015, S. 2399, 114th Cong. (2015); Tax Pollution, Not Profits Act, H.R. 2014, 115th Cong. (2017); American Opportunity Carbon Fee Act of 2017, H.R. 3420/S. 1639, 115th Cong. (2017); Healthy Climate and Family Security Act of 2018, H.R. 4889/S. 2352, 115th Cong. (2018); Modernizing America With Rebuilding to Kick-Start the Economy of the Twenty-First Century With a Historic Infrastructure-Centered Expansion Act (MARKET CHOICE Act), H.R. 6463, 115th Cong. (2018). The alternative GHG pricing mechanism is a cap-and-trade program, also known as an emissions trading scheme. Most existing and proposed carbon trading schemes also exempt the agricultural and waste sectors from requirements to cover their emissions. The European Union Emissions Trading Scheme, for example, does not currently cover agriculture or waste. California has statutorily exempted agriculture from its cap-and-trade program until at least 2024. Cal. Health & Safety Code §39730.7 (2018). The American Clean Energy and Security Act (Waxman-Markey), an economywide proposed cap-and-trade program that passed in the U.S. House of Representatives in 2010 before failing in the U.S. Senate, also did not cover these industries. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). Although none of these trading schemes *requires* agricultural or waste emitters to reduce their emissions, some allow voluntary emissions reductions in these sectors to generate offset credits for industries subject to the regulation. *See id.*; California Air Resources Board, *Compliance Offset Program*, https://perma.cc/AD4L-Q5ZL.

6. Despite compelling scientific reasons to address all gases and sectors, regulating the agriculture and land use sectors are difficult owing to the political and administrative difficulties of extending a pricing system beyond fossil fuel combustion. Although it is a significant source of pollution, agriculture has long been exempted from important environmental laws and regulations, including air and water quality laws, primarily for political reasons. *See generally* Megan Stubbs, Congressional Research Service, Environmental Regulation and Agriculture (2014), *available at* https://perma.cc/F2VR-VQQA. For example, §404 of the Clean Water Act exempts agriculture from the Clean Water Act's requirement to obtain a permit before discharging dredged or fill material into wetlands, streams, rivers, or other waters of the United States. 33 U.S.C. §1344(f)(1)(A). Similarly, runoff from agricultural lands, which is exempted from §402 of the Clean Water Act, 33 U.S.C. §1342(1)(1), contributes significantly to water pollution. *What Is Farm Runoff Doing to the Water? Scientists Wade In*, NPR, July 5, 2013, https://perma.cc/DU87-ELMG. Hazardous substance releases emitted from livestock operations were, until a recent U.S. Court of Appeals for the District of Columbia (D.C.) Circuit ruling, exempt from the Comprehensive Environmental Response, Compensation, and Liability Act's requirement to report releases to federal officials. *See* Waterkeeper Alliance v. Environmental Prot. Agency, 853 F.3d 527, 47 ELR 20062 (D.C. Cir. 2017). The U.S. Environmental Protection Agency (EPA) rules require emission controls on stationary engines, for example, but engines used by agricultural sources are largely exempted. 40 C.F.R. §63 (2018). Significantly, EPA's Greenhouse Gas Reporting Rule, which went into effect in 2010, requires large industrial and nonindustrial sources to report their annual GHGs. Annual appropriations riders have prohibited EPA from requiring reporting from large farms. The same rider has been included every fiscal year since EPA promulgated the rule in 2010. The fiscal year 2018 prohibition was included in Consolidated Appropriations Act, §417, 2018. EPA estimates that 107 livestock facilities nationwide would need to report under the rule. Stubbs, *supra* at 4. Aside from political resistance to including these sources in any potential carbon-pricing scheme, Congress may opt to exempt emissions from agriculture, forestry, land use, and waste because of the administrative difficulty of including such sources. The difficulty of incorporating these sectors is especially stark when compared with taxing GHGs associated with fossil fuel combustion. An upstream carbon tax on fossil fuels would cover about 80% of emissions while being assessed on fewer than 3,000 taxpayers. *See* Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 Harv. Envtl. L. Rev. 499, 504-05 (2009) (estimating a carbon tax covering fossil fuels would cover 80% of U.S. emissions). *See also* John Horowitz et al., U.S. Treasury Department, Methodology for Analyzing a Carbon Tax 6 (2017) (noting that non-fuel emissions require greater tax administration efforts and finding that 76% of emissions could be covered by an upstream or midstream carbon tax via "modest modifications to existing [tax forms]" and could be "readily . . . imposed on top of existing fuel and energy taxes"), *available at* https://perma.cc/9LDS-DVNA.

7. *See*, *e.g.*, James A. Baker III et al., Climate Leadership Council, The Conservative Case for Carbon Dividends (2017), *available at* https://www.clcouncil.org/media/TheConservativeCaseforCarbonDividends.pdf.

8. The Direct Tax Clause is actually two separate clauses, *see infra* Section I.A., but I refer to them throughout this Article in the singular, because the clauses impose one requirement.

ing. Persistent legal disputes about the constitutionality of wealth taxes have spurred sporadic, highly specialized academic debates about the boundaries of the Sixteenth Amendment and the ongoing vitality of the Direct Tax Clause, but renewed scholarly attention has not led to consensus on the scope or meaning of the provision or shed light on its potential application to a carbon tax.

With the notable exception of 2012's blockbuster case, *National Federation of Independent Business v. Sebelius* (*NFIB*),[9] the Supreme Court for the past century has avoided expounding on the meaning of the Direct Tax Clause, implicitly endorsing a view of Congress' power to tax as virtually plenary. But as Bruce Ackerman has observed, there is no reason that the Court will inevitably continue to accept the doctrinal status quo:

> [The] New Deal consensus has been especially emphatic when it comes to [taxation]. . . . And yet, as the Rehnquist Court's recent Commerce Clause jurisprudence suggests, we may be in for a period of anxious reappraisal of New Deal certainties. If new-found limits are being discovered in the Commerce Clause, why not in the "direct tax" clause?[10]

The concerns Ackerman highlighted have only grown in the intervening years, as the Court has shifted further to the right. The Court's only ruling on the Direct Tax Clause in the past 100 years, a cryptic paragraph in a voluminous and politically explosive 2012 opinion, leaves open the possibility of unsettling the doctrinal status quo. In short, the Direct Tax Clause, long since a constitutional backwater, is ripe for rediscovery by lawyers with broader constitutional objectives. Carbon taxes, as applied to GHG emissions from agriculture and land use, may provide an enticing opportunity to assert limits on federal power to a Court imbued with a more muscular vision of federalism.

In order to fully appreciate the long-term impacts of their policy choices and craft effective policy solutions to climate change, it is necessary for environmentalists and federal policymakers to understand the bounds on Congress' taxing authority set by the Constitution. While there are available and persuasive arguments that a carbon tax, as applied to agriculture and land use, is not a direct tax within the meaning of the Constitution, there is nonetheless at least one doctrinally available pathway to finding such a tax to be a direct tax that would require apportionment. Agricultural and other interests opposed to a carbon tax are likely to assert that a tax on GHG emissions from agriculture is a tax "on land," and therefore must be apportioned, a requirement that would be impossible to implement. Expanding a carbon tax to cover agriculture is therefore legally risky, and trading away EPA authority over GHGs for a carbon tax is environmentally risky.

The Article proceeds as follows. Part I explains the Direct Tax Clause, provides a brief overview of its genesis, and lays out the Supreme Court's case law on the subject. Part II applies this history and precedent to demonstrate that a tax on GHGs from agriculture and land use can be found to be either an indirect tax or a direct tax within the meaning of the Constitution, although it would be an indirect tax under most constructions. The conclusion argues that this risk should not translate into exempting agricultural and land use emissions from a comprehensive climate regulatory scheme.

I. History of the Direct Tax Clause

The Constitution confers broad authority on Congress to lay and collect taxes, subject to the requirements set forth in Article I.[11] The only absolute limitation on Congress' taxing power is the Constitution's clear and explicit prohibition on taxing exports ("No tax or duty shall be laid on Articles exported from any state").[12] Article I lays out three other requirements, none of which limit Congress' ability to enact taxes, but instead prescribe *how* Congress must levy taxes.[13] First, all "bills for raising revenue" must originate in the U.S. House of Representatives.[14] Second, all duties, imposts, and excises must be uniform.[15] The final requirement is that any direct tax be apportioned on the basis of population.[16] Unlike the export tax prohibition,

9. 567 U.S. 519 (2012).
10. Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 3 (1999) (internal citations omitted).
11. Aside from the constraints laid out in Article I, Congress is also bound by other constitutional prohibitions; for example, a tax cannot violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment. *See*, *e.g.*, Armour v. City of Indianapolis, 566 U.S. 673 (2012).
12. U.S. Const. art. I, §9, cl. 5. Although the prohibition seems relatively straightforward, the Court's most recent cases on the export ban involve the question of what constitutes an "export." The Court's most recent considerations of the export prohibition affirmed the clause's independent force and ongoing vitality by striking down two levies as prohibited taxes on exports. United States v. International Bus. Machs. Corp., 517 U.S. 843 (1996); United States v. U.S. Shoe Corp., 523 U.S. 360 (1998).
13. In an 1869 opinion, the Court held:
    > [The uniformity and apportionment requirements] are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. [The tax power] still extends to every object of taxation, except exports, and may be applied to every object of taxation, to which it extends, in such measure as Congress may determine.

    Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 541 (1869).
14. U.S. Const. art. I, §7, cl. 1.
15. *Id.* §8, cl. 1. The Uniformity Clause has been interpreted to prohibit Congress from charging different rates on the basis of geography, although a tax does not have to fall proportionately on each state. In other words, if Congress assesses a duty, impost, or excise, it must be the same *rate* in different states. However, Congress has "wide latitude" to define the scope of the levy, and geographically defined classifications are not prohibited, so long as there is no actual geographic discrimination. United States v. Ptasynski, 462 U.S. 74, 84-85 (1983). If a carbon tax is not a direct tax, the uniformity requirement would apply. Carbon taxes by definition would meet this requirement, as the theory behind carbon taxes is that they assess a uniform levy per pound of GHG emitted.
16. Although the meaning of direct tax is unclear, the concept of apportionment is well understood. Apportionment simply means that each state must bear the portion of a tax that is equivalent to its population. In a simplified example, assume there are three states, A, B, and C. State A has a population of six million, state B has a population of two million, and state C has a population of two million; the total U.S. population would therefore be 10 million. State A would have to bear 60% of any apportioned tax, and states B and C would each bear 20% of the tax. If Congress assessed a tax of $10 million, State A would pay $6 million, and states B and C would contribute $2 million each. If the per capita wealth of the residents of States A, B, and C were the same, each state would pay the same effective tax rate of 10%. If,

these requirements do not limit the permissible subjects of taxation, only the way Congress implements them. Direct and indirect taxes are mutually exclusive categories; therefore, if a tax is an excise, duty, or impost, it cannot be a direct tax.

The apportionment requirement first appears in Article I, §2, Clause 3, which specifies that, "Representatives *and direct Taxes* shall be apportioned among the several States" (emphasis added). The requirement is reaffirmed and elaborated in Article I, §9, the section that enumerates prohibitions on congressional action (such as the prohibition on suspending the writ of habeas corpus and the prohibition on foreign emoluments). The proscription reads, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[17] A capitation—that is, a head tax levied on every individual regardless of other circumstances—is clearly a direct tax. But the use of the phrase "or other direct [taxes]" suggests that the Framers imagined additional types of direct taxes, though what those other taxes might be is not obvious from the text.

Beyond capitations, the Constitution offers strikingly little guidance about what actually constitutes a direct tax. It does not define direct tax, nor does it define the other, presumably indirect, taxes it names—excises, imposts, and duties. Direct tax was not a term of art in the late 18th century, and was not defined in any contemporary legal treatises. The origins, expansiveness, and ongoing vitality of the Direct Tax Clause have been subject to debate since the Founding. Consequently, scholars and the Court have struggled to give the term precise legal meaning.[18]

The primary constitutional question about a carbon tax, as applied to agriculture and land use, is how to classify it. If it is an excise, duty, impost, or other indirect tax, it must be levied uniformly. If it is a direct tax, however, the tax must be apportioned. It is far from clear whether a carbon tax, applied to agriculture and land use, is a direct tax or an indirect one, as the meaning of direct tax is far from evident based on the constitutional text or structure.

In interpreting indeterminate constitutional provisions, courts often look to history, and in particular the Founding experience, to shed light on the meaning of constitutional text. Because a modern court might look to history—and, in particular, original public meaning, original intent, and historical experience—to decide whether a carbon tax is "direct" within the meaning of the Constitution, this history is particularly relevant. The next section briefly addresses the history of colonial tax systems, the Constitutional Convention, and the ratification debates.

The surviving record suggests that there is no "discoverable" definition of direct taxes because there was no shared contemporary meaning at the time the Constitution was adopted. But the historical experience suggests that the Convention intended to give Congress broad authority over taxation, and that the Direct Tax Clause was a reaction to representation concerns, not fear of giving the federal government a potentially centralizing, oppressive power of taxation. While this latter concern was raised during the state ratification conventions, efforts to impede the federal government's ability to raise direct taxes failed in the 1st Congress.

Moreover, the different definitions of direct taxes offered by the state conventions also indicates that there was no common meaning of direct taxes at the time of the Founding. As further evidence of this fact, the debates in the 1st Congress about direct taxes also suggest that there was sharp disagreement about the meaning of the Direct Tax Clause. Ultimately, the history of the provision reveals only that direct taxes had no precise economic definition at the time of the Founding.

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however, the residents of State A were wealthier than the residents of States B and C, they would pay a lower effective rate. Apportionment is strictly by population, without regard to wealth.

17. U.S. Const. art. I, §9, cl. 4.

18. Because of the Sixteenth Amendment and the fact that it is rarely litigated, the Direct Tax Clause has attracted relatively little scholarly attention. Modern scholars parsing the same limited—and largely inconclusive—historical and jurisprudential evidence have come to profoundly different interpretations of the Constitution's Direct Tax Clause, offering a range of definitions of direct tax. Broadly, these scholars fall into two camps: those arguing for a narrow interpretation of the clause and those arguing for a more encompassing definition.

    Ackerman has defined direct taxes as limited to land taxes and capitations, if that. *See* Ackerman, *supra* note 10. Calvin Johnson has defined direct taxes as those that can be apportioned (head taxes and requisitions). *See* Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 Wm. & Mary Bill Rts. J. 1, 3 (1998). Joseph Dodge argues that direct taxes are limited to requisitions, head taxes, and taxes on tangible property. *See* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 J. Const. L. 839, 842-43 (2009). Erik Jensen has argued that direct taxes are defined by incidence, and therefore direct taxes encompass capitation, land taxes, and any other tax that cannot be shifted. *See*, *e.g.*, Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2337 (1997). *See also* Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & Pol. 687 (1999); Erik M. Jensen, The Taxing Power: A Reference Guide to the United States Constitution (2005); Erik M. Jensen, *The Constitution Matters in Taxation*, 100 Tax Notes 821 (2003). Robert Natelson has offered the broadest definition of all, that direct taxes include a range of levies whose common characteristic is that they are exactions on existing and producing, as opposed to taxes on consuming, boundary crossing, or certain special transactions. Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 Case W. Res. L. Rev. 297, 329-31 (2015).

    These scholars have come to these widely divergent conclusions because they interpret the events at the Convention, and therefore the purpose of the Direct Tax Clause, quite differently. While there are some broad points of agreement among each of these scholars—namely, that the Constitution gives Congress broad authority over taxes and that the Direct Tax Clause was the result of a political compromise about representation—the list of their disagreements is much longer. These include the purpose and modern applicability of the apportionment requirement, the historical, contemporary, and constitutional meaning of the term direct tax, and the meaning and utility of subsequent case law on the subject. Those advocating a narrow understanding of the Direct Tax Clause (Johnson, Ackerman, and Dodge) place heavy emphasis on *Hylton* and disparage *Pollock*, while Jensen does the opposite. For a more extended discussion of the modern scholarship on the Direct Tax Clause, see Michelle N. Melton, The History of the Direct Tax Clause (on file with the author). None of these scholars have addressed the question of what it means to be a tax "on land."

A. Colonial and Early American Experience

The Framers' ideas about how to organize and empower a functional national government were heavily influenced by their experiences as both imperial subjects and participants in colonial government. The colonial experience was fundamentally one of divergent local practices; to generalize about a single "colonial" financial, governmental, or tax infrastructure anachronistically effaces these distinctions. Each colony had different governmental structures, revenue needs, and political constituencies, resulting in wildly variant tax and revenue laws, which reflected each colony's political and social power structures.[19] A particular colony's tax structure varied not only by its general structure and the composition of its colonial legislatures, but also across time over the course of the roughly 150 years between colonization and independence.[20] There was very little stability in tax policy—or the theory behind it—either across space or time in the colonial era.[21] As one historian has noted, "[i]n the final decades before independence, each colony relied on a different mixture of poll, property, and commerce taxes . . . [Colonies' revenue laws] differed so much one from another in the ways they raised money that it makes little sense to speak of 'American' taxation before 1776."[22]

The Founders brought these disparate colonial experiences to the Philadelphia Convention, but they were also heavily influenced by the evident failures of the Confederation period (1781-1789). This experience, in particular, led them to conclude that a new federal government would need broad, independent taxing authority. Under the Articles of Confederation, the federal government had no independent authority to raise revenue. When the Continental Congress needed money, it would determine the precise amount required, and then apportion this amount in quotas among the states according to the value of land within each state (a process called requisitioning), the rule laid out in the Articles of Confederation.[23] The states were free to raise requisitioned funds however they saw fit, and were supposed to send the requested amount to the federal treasury. However, requisitioning was widely considered by the Founders to be inadequate, as apportionment was difficult; few states had surveyed their land to assess its value, making apportionment of requisitions across states challenging.

In 1783, the Continental Congress attempted to address this problem by adopting an amendment assigning population as a proxy for value (after some debate, slaves were to be counted as three-fifths of a free person for the purpose of counting population),[24] but the amendment failed to achieve the required unanimity.[25] As a result, the original assessment method was retained, which prevented fair apportionment. More problematic, from the perspective of the federal government, was the fact that states often ignored their requisitions and the federal government lacked the ability to force states to contribute. For various reasons, states often did not pay some or all of their requisitions.[26] Immediately preceding the Philadelphia Convention, the federal government was virtually insolvent—unable to repay its debts and unable to raise further revenue via either requisitions or loans[27]—and the federal government's inability to raise revenue independently of the states was one of the driving forces in calling the Convention.[28]

The Philadelphia Convention, which convened between late May and mid-September 1787, does not shed light on the meaning of the Direct Tax Clause; in fact, delegates explicitly declined to define direct taxes. Instead, the records of the Convention demonstrate that the purpose of the Direct Tax Clause was not to restrict the federal government's taxing authority, but to effectuate a delicate political compromise over a related, but separate issue: representation in a national government.

The first weeks of the Convention were consumed by a fierce debate about whether the federal government should affix representation in the national legislature on the basis of population or on the basis of state equality. Delegates eventually agreed to representation on the basis of proportionality, but they were divided about whether

19. For example, Robin Einhorn argues that the existence of a large landed gentry shaped Virginia's tax structure, which relied heavily on poll taxes and taxed land lightly. Similarly, Massachusetts' pattern of small freeholders led to a system of elected officials that taxed fairly equitably. Einhorn's broader argument is that the reliance on relatively simple tax structures impeded the development of democracy and competent government in the South. Robin L. Einhorn, American Taxation, American Slavery pt. I (2006). There are very few comprehensive studies of colonial tax, but others similarly identify the influence of disparate conditions on colonial tax systems. *See generally* Robert A. Becker, Revolution, Reform, and the Politics of American Taxation, 1763-1783 (1980); Alvin Rabushka, Taxation in Colonial America (2010).
20. Although the content of each category varied, colonial taxes generally fell into three categories: poll taxes, property taxes, and commercial taxes. Poll taxes, also known as capitation taxes, were an assessment on a per capita basis; such taxes were a common source of revenue in most colonies. Some colonies also brought in revenue in other ways. For example, Pennsylvania's loan office brought in interest revenue. *See* Rabushka, *supra* note 19, at 810-13. New York required itinerant traders to have a license, *id.* at 805, while during times of war, Massachusetts ran lotteries, which virtually ceased in the 20 years before the Revolution. *Id.* at 779.
21. Becker argues that despite the diversity in form and scope, the one consistency was that the poor and politically weak paid relatively more in taxes than their wealthy peers. *See* Becker, *supra* note 19, at 6.
22. *Id.* This remained true even after the Revolution and the foundation of the national government. Treasury Secretary Oliver Wolcott, tasked in 1796 with studying state tax systems to help design a national property tax, noted that state tax systems were "utterly discordant and irreconcilable, in their original principles." *Quoted in* Einhorn, *supra* note 19, at 79.
23. Articles of Confederation art. VIII. During the debates over the Articles of Confederation, there were proposals to apportion based on population. This engendered much debate, and apportionment was eventually decided on the basis of land value. *See* Charles J. Bullock, *The Origin, Purpose, and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217-19 (1900).
24. *Id.* at 219 (citing additional authority).
25. Delaware and New Jersey were the holdouts. *See* Johnson, *Fixing the Constitutional Absurdity of Apportionment*, *supra* note 18, at 304.
26. One scholar has estimated an average compliance rate with requisitions of about 37% between 1781 and 1786; the range was North Carolina's payment of 3% to New York's payment of 67%. Roger H. Brown, Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution 14 (1993). However, requisitions "had almost completely ceased" by 1787. *Id.* at 12. *See also* James E. Ferguson, The Power of the Purse: A History of American Public Finance 140 (1968).
27. Brown, *supra* note 26, at 17-19.
28. *See id.* at 20-21.

the proportion should be determined on the basis of population or wealth. On July 12, with the Convention at an impasse and on the verge of dissolution over how to apportion future representation, Gouverneur Morris proposed to use population as a basis for representation, so long as that population was also used to assess taxes.[29] In that way, each state would be represented solely by population, but the population of each state would have to carry an equal burden of paying for the new nation. Slaves would count as three-fifths for both representation and taxation purposes.

The immediate aim of the Direct Tax Clause was thus to settle the question of future representation, accounting for both wealth and population, while neither incentivizing nor disincentivizing slavery and avoiding the difficulty of actually measuring wealth that had bedeviled the Confederation. Although the compromise was necessary to appease southern interests—without representation based on some form of wealth, they would be significantly disadvantaged relative to their more populous northern counterparts—the compromise also addressed delegates' concerns about the balance of power between Atlantic and the soon-to-be-admitted western states.

The debate over representation was the only significant discussion of the Direct Tax Clause during the Convention. The subject of the federal government's taxing power was not revisited again until July 24, when Morris suggested that the drafters remove the direct tax compromise he had proposed a few weeks earlier. He claimed his compromise had been offered as "a bridge to assist us over the gulph: having passed the gulph, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections."[30] There is no record of a response to his comment, and the clause remained.

The Constitution was drafted in late July and early August, and the delegates subsequently went through each line of the draft Constitution, clause by clause. Delegates extensively debated several of the tax provisions, including the prohibition on exports.[31] The subject of direct taxes was raised several more times—on August 8, Morris again pleaded to remove the Direct Tax Clause. He suggested that direct taxes would never actually be imposed, and would therefore not be a restraint on the growth of slavery.[32] The motion was defeated after minimal debate.[33]

Although the question of duties, imposts, and exports was discussed on August 16,[34] direct taxes did not come up again until August 20, when, in taking up the clause about the census, Rufus King of Massachusetts asked the Convention for "the precise meaning of *direct* taxation." But, James Madison noted, "No one answered."[35] The next day, Luther Martin of Maryland noted that "[t]he power of taxation is most likely to be criticized by the public"; he therefore suggested making direct taxation a last resort, available only if requisitions on the states should fail. After Martin's proposal was rejected,[36] the Convention did not again discuss taxes.[37]

Martin's observation that the federal government's taxation authority would be contentious was prescient. The new federal government's power to lay direct taxes became one of the most controversial issues during both the public debate about the Constitution and at the state ratification conventions.[38] Delegates in nine state conventions proposed and debated a recommendation for an amendment prohibiting the federal government from levying direct taxes unless state requisitions failed. Ultimately, seven state conventions passed the resolution urging Congress to adopt an amendment giving the federal government the power to lay direct taxes only in the event that requisitions had failed. The House considered this constitutional amendment. It failed, 9-39, and was not offered to the states.[39]

29. 5 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 302 (Philadelphia, J.B. Lippincott & Co. 1836).
30. *Id.*
31. *Id.* at 432.
32. *Id.* at 393. Morris made an impassioned speech, where he vigorously protested the clause:

> Let it not be said that direct taxation is to be proportioned to representation. It is idle to suppose that the general government can stretch its hand directly into the pockets of the people, scattered over so vast a country. They can only do it through the medium of exports, imports, and excises. For what then, are all the sacrifices to be made?

Id. This plea could be interpreted to mean that the Direct Tax Clause was solely about slavery, as suggested by Ackerman. However, there are clearly other references during the debate to concerns about western states. The somewhat contradictory evidence—on the one hand, clear objections about western states on the part of some northern interests, and on the other, James Madison's note and Morris' plea about removing the Direct Tax Clause. One possible way to reconcile the evidence is that the northern states were couching their concerns about slavery in terms of western states. But given the willingness to directly address the wrongs of slavery during the same debates, it seems somewhat odd that this would be a place where the delegates couched their concerns as being about western states.
33. *Id.* at 394.
34. *Id.* at 431-32.
35. *Id.* at 451. There are two possible reasons for the delegates' refusal to answer King's question: either everyone agreed on what constituted direct taxes, or the subject was disputed, and delegates were not interested in risking further contentious debate on a controversial issue when success was both precarious and so close within reach. While it is not possible to know which was the case, the latter seems far more likely, given the circumstances.
36. *Id.* at 453.
37. The Convention tweaked the language of the Direct Tax Clause on September 14; it was a non-substantive change. *Id.* at 545.
38. Ultimately, seven state conventions passed the resolution urging Congress to adopt an amendment giving the federal government the power to lay direct taxes only in the event that requisitions had failed. *See* Johnson, *Fixing the Constitutional Absurdity of the Apportionment*, *supra* note 18, at 311. The House considered this constitutional amendment; it failed, 9-39, and was not offered to the states. 1 Annals of Cong. 773-77 (1789).
39. 1 Annals of Cong. 773-77 (1789).

Although the amendment ultimately failed, the ratification debates are revealing for two reasons. First, the debates reveal that neither side considered apportionment to be a limitation on the federal government's taxing power. Second, while delegates to the state conventions agreed that there was some category of direct taxes, they had different ideas about what kinds of taxes qualified as direct, implying that there was not a single, unifying definition of direct taxes. All participants clearly believed that direct taxes encompassed capitations and land taxes, but whether other items could be direct taxes, and the basis of the distinction between direct and indirect taxes, remained unsettled.

For example, Martin, in his long disquisition to the Maryland Legislature explaining why he voted against the Constitution, elaborated on the meaning of the tax-related terms in the Constitution. In an offhanded manner, he suggested that the direct taxes consisted of only capitation taxes or assessments on property.[40] Similarly, in *Federalist* No. 36, Alexander Hamilton implied direct taxes were only *ad valorem* taxes on real property, houses, and lands, as well as poll taxes, contrasting these taxes with taxes on consumption.

Yet, the records of the state ratification conventions are littered with references to direct taxation, many of which, contrary to Martin's and Hamilton's intimations, clearly comprehend property beyond land and capitations to be included in the category of direct taxes. Other Federalists at the New York Convention implied that direct taxation also encompassed taxation on other objects. Robert Livingston, while explaining the need for the federal government's power to levy direct taxes, stated, "Why, [the federal government] must have recourse to direct taxes; that is, taxes on land, and specific duties."[41] John Jay noted that he thought there were two kinds of direct taxes, "general and specific." General taxes were those "upon all property."[42] He implied that specific direct taxes would "usually embrace those objects which were uniform throughout the states; such as all specific articles of luxury. . . . For example . . . a tax of twenty shillings on all coaches[.]"[43] Future Supreme Court Chief Justice John Marshall, speaking at the Virginia Convention, stated, "The objects of direct taxes are well understood: they are but few: what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property."[44]

The lessons from this brief overview of colonial and Founding-era history are twofold. First, the Framers were convinced by their experience during the Confederation that the new federal government required independent taxing authority. At the Convention, the Framers intended to convey the full power to lay taxes, subject to the prohibition on exports and the constraints of uniformity and apportionment. The ratification debates confirm that contemporaries understood the Constitution to do just that, which is why some Anti-Federalists attempted to restrict the government's taxing power via a proposed constitutional amendment.

The Direct Tax Clause was therefore not born of a concern to limit the scope of the federal government's power, but to achieve a compromise about the principles of representation. The Convention's linkage of direct taxes and representation through apportionment was critical for achieving political consensus on the most controversial issue of the Convention. This compromise is important because it suggests that the Direct Tax Clause was not added out of a concern about government power, but as an expedient solution offered to resolve the bitter, unrelated debate about representation. In other words, the Direct Tax Clause was inserted in the Constitution as part of a political compromise about representation, rather than as an element of a broader plan of limited government or in discussions about the dangers of national power. This suggests that a court looking to define the term by reference to the intention of the Founders should not presume the clause was borne of a fear of oppressive federal power.

Second, despite Marshall's assertion that direct taxes are "well understood," the Constitutional Convention and subsequent ratification debates in the 13 states do not definitively establish the meaning of the Direct Tax Clause, but instead suggest that local circumstances varied considerably. The ratification debates, far from clarifying, offer little insight into where, precisely, the dividing line was between direct taxes and other taxes; if anything, they illustrate that, while there was a general sense of what kinds of taxes encompassed direct taxes, people evidently had different ideas of what was included in the category.

B. Direct Taxes at the Court

Over the past 250 years, the Supreme Court has interpreted the Direct Tax Clause on only a handful of occasions. Of these approximately dozen cases, two are considered the lodestars of the direct tax debate. These two cases, *Hylton v. United States*[45] and *Pollock v. Farmers' Loan & Trust*,[46] can arguably be reconciled, but their reasoning and interpretation of the Direct Tax Clause are better understood as radically opposed. The modern scholarly debate about the meaning of the Direct Tax Clause echoes the reasoning of the Justices in these cases, and any court considering whether a levy is a direct tax must grapple with their holdings.

40. 1 Elliot, *supra* note 29, at 368 ("By the power to lay and collect taxes, they may proceed to direct taxation on every individual, either by a capitation tax on their heads, or an assessment on their property.").
41. 2 Elliot, *supra* note 29, at 342.
42. *Id.* at 381.
43. *Id.*
44. 3 Elliot, *supra* note 29, at 229. Similar quotes are found in newspapers, including Anti-Federalist tracts. The *Federal Farmer*, a prominent Anti-Federalist paper, suggested that direct taxes include "polls, lands, houses, labor, &c." *Quoted in* Natelson, *supra* note 18, at 310.
45. 3 U.S. 171 (1794).
46. 157 U.S. 429 (1895); 158 U.S. 601 (1895).

1. *Hylton* and Its Progeny[47]

Even though the proposed constitutional amendment limiting the federal government's power to assess direct taxes failed, the matter remained live, both politically and legally. In 1796, a legal fight about the scope and meaning of the Direct Tax Clause erupted. The case sheds light on contemporary meaning, and is a touchstone for all future decisions because the participants are a who's who of the Founding generation.[48]

In June 1794, Congress proposed a slew of revenue bills, including a direct tax of $750,000 to be apportioned among the states and a tax on carriages kept by persons for personal use (carriages kept for commercial purposes and agricultural wagons, carts, and drays were exempted).[49] Because one of these proposed taxes was explicitly an apportioned, direct tax, the implication was that, in the view of the congressional Committee considering the levies, the other proposed taxes, including the carriage tax, were indirect levies.

The carriage tax engendered controversy in Congress, exposing the lack of contemporary consensus on the definition of direct taxes.[50] Reps. Theodore Sedgwick of Massachusetts and John Nicholas of Virginia debated the meaning of the term direct tax on the House floor, with the former taking the position that a carriage tax was an excise, while the latter maintained it was a direct tax.[51] Although the congressional record only captures the outlines of debate, it is nonetheless clear that the two men held different notions about what constituted a direct tax.

Representative Nicholas apparently argued that the carriage tax was a direct tax, as direct taxes were those "which are paid by the citizen without being recompensed by the consumer [i.e., a tax whose incidence could not be shifted]."[52] Representative Sedgwick replied that the Convention had given Congress the authority to tax every subject, and therefore any interpretation that deprived Congress of this power was incorrect.[53] He further suggested that if Congress had the power to assess a tax, and the tax was not capable of apportionment (as with carriages), it was not a direct tax.[54] He offered his own definition of direct taxes, arguing that they were limited to capitations, taxes on land, and on property and income generally; by contrast, "luxury [tax] . . . [was] never supposed [to have been] considered a direct tax."[55] Representative Sedgwick concluded by appealing to morality and justice, asserting that the Constitution ought not to be read to "compel the Legislature to impose grievous burdens on the poorest and most laborious part of the community" while exempting the rich.[56]

Congressman William Murray, speaking in favor of the carriage tax, "confessed that the terms in the Constitution, direct and indirect taxes, had never conveyed very distinct or definite ideas to his mind." According to Representative Murray, only a tax on all property could be a direct tax, otherwise the apportionment rule would result in inequity and unfairness.[57] Representative Murray's comments were followed by a "long debate" on the nature of these taxes.[58] Despite the controversy, the bill ultimately passed, much to the chagrin of Madison and other Virginians, who publicly opposed the tax as unconstitutional.[59]

Several prominent Virginia carriage owners objected to the tax's constitutionality and refused to pay. In order to bring the legal controversy before the Supreme Court, the federal government agreed to bring an enforcement action against Daniel Hylton, a Virginia carriage holder.[60] Hylton conceded that he had not paid the tax, and defended by challenging the tax as an unapportioned, and therefore unconstitutional, direct tax.[61]

The case was argued in the circuit court in Virginia in 1795 before Supreme Court Justice James Wilson (riding circuit) and District Judge Cyrus Griffin. John Taylor, arguing for Hylton, offered a dense, convoluted argument that was partly about the tax itself, and partly an exposi-

47. This section—in particular, the text about the case before it reached the Supreme Court—relies heavily on Julius Goebel's definitive account of the controversy and litigation. 4 The Law Practice of Alexander Hamilton: Documents and Commentary (Julius Goebel Jr. & Joseph H. Smith eds., Columbia Univ. Press 1980) [hereinafter 4 Law Practice of Alexander Hamilton]. I have also consulted the available primary documents, including the congressional debate and the Taylor and Wickham pamphlets, in addition to other primary and secondary sources.
48. Hamilton, Madison, Edmund Pendleton, Marshall, William Paterson, James Iredell, and Samuel Chase, as well as many others, were either directly involved or offered opinions on the tax at issue. The fact that so many illustrious members of the Founding generation could be on different sides of the issue also suggests that there was likely no consensus definition of the category of direct taxes.
49. 4 Law Practice of Alexander Hamilton, *supra* note 47, at 299.
50. *Id.* at 308. The debate was likely informed by state experiences with carriage taxes, which pointed in several different directions. Some states characterized them as direct and others as indirect taxes, and varied in their assessments. In some states (including Connecticut, Massachusetts, and New York), carriages had been ratable under general revenue measures taxing real and personal property; other states (including South Carolina and Virginia) had made specific levies on carriages. *Id.* at 300-02. However, three New England states had previously taxed carriages via excise statutes targeting luxuries. *Id.* at 302.
51. 4 Annals of Cong. 643 (1794).
52. *Id.* at 646.
53. *Id.* at 644.
54. *Id.*
55. *Id.*
56. *Id.* at 645.
57. *Id.* at 652.
58. *Id.* at 653.
59. *See id.* at 656. As Goebel notes, "the southerners had made it clear that in their opinion such a tax would be inequitable, for it was in the southern states that carriages were esteemed a necessity and far exceeded in number those used in the northern states." 4 Law Practice of Alexander Hamilton, *supra* note 47, at 308.
60. *See* 4 Law Practice of Alexander Hamilton, *supra* note 47, at 311-15. The case was heard in the federal circuit court in order to be able to appeal to the Supreme Court. Because of the importance of the case, the United States and Hylton allegedly conspired to fix the sum of penalty above the level needed for appellate jurisdiction of the Supreme Court—then $2,000—despite the fact that the penalty for the tax would not be nearly that much. In short, the *Hylton* Court arguably lacked jurisdiction, as the alleged amount in controversy was "a patent artifice devised to get the suit to the Supreme Court by way of writ of error from the Circuit Court." *Id.* at 311-12. In fact, the writ of error allowing the case to proceed to the Supreme Court was issued before the trial below (which was not uncommon at the time). *Id.* at 313. The case included an agreement that, if Hylton was found guilty, judgment would be entered for $2,000, but all but $16 was to be discharged—the amount of the tax and penalty for one carriage. *Id.* at 314.
61. *See id.*

tion reflecting "the [broader, anti-Hamilton] political animosities current in Virginia" at the time.[62] His argument before the circuit court, which he immediately published as a pamphlet to elicit interest in the case and influence public opinion prior to the Supreme Court argument, was dense and difficult to follow.[63]

Taylor's argument, as far as it can be discerned, boils down to two main points: first, the apportionment requirement was intended to be a constraint on Congress to prevent states from unfairly taxing one another; second, direct taxes are those assessed on everyday "local" necessities that are impossible to avoid. Relying more on rhetoric than substance, Taylor warned that, if this tax was constitutional, Congress could effectively tax anything, with no limits on its oppressive power. According to Taylor, the carriage tax was a dangerous precedent,

> enabling Congress to intercept such a portion of a man's victuals, drink, and cloathing, the fruits of his own manual labour, as they may think proper—and under that of the carriage tax, every other species of property, is exposed. Of what avail is the principle of proportion, or in what manner is Congress controuled, if a majority can select a state and tax them exclusively, even up to famine or nakedness?[64]

The Framers' real intention in distinguishing between direct and indirect taxes, Taylor asserted, was to prevent the danger that some states would unfairly tax others—a danger "the principle of proportion" corrected.[65] Taylor contended that the nature of the union among states could not allow any tax that was, in effect, sectional.[66] Without enforcing the direct/indirect distinction, the apportionment requirement would be meaningless: "if so many channels for transmitting such drafts, can elude the restriction [of direct taxes], as to subject labour to . . . compleat bankruptcy . . . then the rule of proportion, which was intended to save something, can save nothing, and is itself a political nothing."[67]

Taylor offered his own distinction between a direct and indirect tax: an indirect tax was one assessed on articles of traffic circulating from state to state, while a direct tax was "a local tax." A direct tax was one "annexed to articles of necessity or convenience, exclusively produced and needed by particular soils and climates, cannot circulate, and subjects a state to be devoted."[68] Taylor continued:

> An indirect tax applies to the actual payer in the soothing language of solicitation—"will you buy sir, and thus contribute to the revenue." A direct tax, by contrast, cannot be avoided . . . it is the "voluntary quality" that distinguishes direct from indirect taxes; a direct tax is not shiftable, but taxes those items which are necessary for living.[69]

Defending the tax for the United States, John Wickham's argument was simple: the carriage tax was an excise, and it was uniform; therefore, it was constitutional.[70] Wickham suggested that Taylor's definition of a direct tax—one whose incidence could not be shifted—was unworkable.[71] Wickham urged the court to see the difficulty of adopting this definition by providing an example demonstrating that, under this definition, a tax could be both direct and indirect (in the case of a duty imposed on a distiller who consumed his own spirits). Wickham argued that this abstract definition delineating whether a tax was direct in reference to its incidence should be eschewed in favor of one defined by custom. Custom, according to Wickham, had long defined a direct tax as "a tax upon the revenue or income of individuals. . . . A tax upon their expences, or consumption [is] an indirect tax."[72]

Although Wickham admitted that there was some disagreement among various political economists on the exact boundaries of direct and indirect taxes, he asserted that these differences were not material to the dispute about the carriage tax.[73] The carriage tax, Wickham argued, was a classic consumption tax.[74] While Taylor had claimed that construing this tax as indirect would be oppressive, Wickham alleged that precisely the opposite was true: a carriage tax deemed to be direct would be to allow the Constitution to sanction the assessment of oppressive and unjust taxes, because an apportioned carriage tax would lead to absurd and unfair results (with the sole carriage owner in Kentucky, for example, bearing the state's entire burden).

The circuit court in Virginia divided on the issue, in an opinion that has been lost to history. Regardless, the case was, by design, destined for appeal. The Supreme Court heard the case over three days in February 1796. Hamilton, as associate counsel, argued the case on behalf of the

62. *Id.* at 317.
63. *See id.* As one contemporary observed, Taylor should "get some worthy person to do the second edition into English." *Id.*
64. John Taylor, An argument Respecting the Constitutionality of the Carriage Tax; Which Subject Was Discussed at Richmond, in Virginia, in May, 1795, at 8 (Richmond, Augustine Davis 1795).
65. *Id.* at 7.
66. *See id.*:
    > A northern or southern combination might partially burden particular states, by inflicting taxes on local products, necessaries, or conveniences. Americans, who had but just emerged from a seven year's war, could not have overlooked an evil of such magnitude, admitting that this war had commemorated the principles which produced it, to the meeting of the Convention. A general and irrefutable impulse must have been then felt, thoroughly and substantially to secure the principle of proportion, between representation and taxation. From this source, and such considerations, the constitutional distinction between direct and indirect taxes partly originated, and if so, we are guided to an unavoidable construction. If this carriage tax . . . kept and made simply and extensively for a man's *own use*, are to stand as expositors of the Constitution, this fundamental principle is gone forever.
67. *Id.* at 10.
68. *Id.*
69. *Id.* at 11.
70. John Wickham, The Substance of an Argument in the Case of the Carriage Duties, Delivered Before the Circuit Court of the United States, in Virginia, May Term, 1795, at 4 (Richmond, Augustine Davis 1795).
71. *Id.* at 5.
72. *Id.* at 6.
73. *Id.* at 9.
74. *Id.* at 11.

government.[75] Four members of the Court heard the case, two of whom had been delegates at the Philadelphia Convention.[76] The decision was unanimous that the carriage tax was not a direct tax, but three Justices writing *seriatim* (as was then customary) offered different reasoning.

The Justices rehearsed the same reasoning offered in the congressional debate. Justice Samuel Chase authored the leading opinion. Justice Chase's main premise was that the Constitution gave Congress general power to lay taxes "of every kind or nature, without any restraint," so long as they are uniform (if indirect) or apportioned (if direct).[77] Justice Chase then explained why he did not believe the carriage tax was a direct tax, employing an argument similar to that of Congressman Murray: the constitutional definition of direct taxes is restricted to taxes where "[t]he rule of apportionment . . . can reasonably apply . . . the subject taxed, must ever determine the application of the rule."[78] Attentive to the potentially disruptive consequences of apportioning a carriage tax, he reasoned that if a tax would "create great inequality and injustice" by virtue of its apportionment, "it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."[79] Instead, he concluded that a carriage tax is a duty because it is a tax on consumption.

In dictum, Justice Chase opined on the meaning of direct taxes:

> 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 but two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by general assessment of personal property . . . is included within the term direct tax.[80]

Justice William Paterson's opinion began by noting the difficulty of defining the Constitution's tax terms: "[the] meaning of the words, duty and excise, . . . is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms."[81] Turning specifically to the question of direct taxes, Justice Paterson agreed that, in addition to a capitation, "a tax on land is deemed to be a direct tax."[82] Unlike Justice Chase, however, he was more equivocal about whether something other than a capitation or tax on land could be direct, claiming it "[was] a questionable point."[83]

Like Justice Chase, however, Justice Paterson could not resist reaching the issue. Despite going so far as to explicitly withhold judgment on the question,[84] Justice Paterson continued to muse on the subject, suggesting that, "[p]erhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself. . . . Land, independently of its produce, is of no value."[85] He reiterated this point of disagreement with Justice Chase, writing, "I will not say [ ] the only [ ] objects [ ] that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation and a tax on land."[86]

Justice Paterson made two other noteworthy observations. First, he commented that the apportionment requirement was the product of a political compromise about slavery, and was "radically wrong."[87] Therefore, Justice Paterson thought, the rule of apportionment ought not be extended by construction. Second, Justice Paterson dispelled the notion that the purpose of apportionment was to distribute the tax burden equally throughout the nation (an explicit rebuke of one of Taylor's arguments). Taylor's argument only works, he suggested, in a system where states, and not individuals, are the principal objects of taxation—a system rejected by the Framers (Justice Paterson had been at the Convention).[88] Justice Paterson concluded that an apportioned tax on carriages would be "absurd, and inequitable."[89]

Justice James Iredell, in a short opinion, reiterated Justice Chase's view that apportioned taxes were, essentially, those that could be apportioned.[90] Also like Justice Chase, he suggested that requiring apportionment of a carriage tax was "arbitrary" and would lead to "dangerous consequences" because it would result in different states bearing different tax burdens for the same item.[91] Although Justice Iredell explicitly disavowed the notion that he was provided a general opinion on what was meant by direct tax, like his colleagues, he could not resist:

> 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 consid-

75. It is not clear whether the arguments in the Supreme Court were the same as those offered in the circuit court, as the arguments were not reported. *See* 4 Law Practice of Alexander Hamilton, *supra* note 47, at 333. However, Hamilton did write an outline of a brief that survives. The brief made several points, the most forceful of which was that the Constitution clearly gave the federal government the power to tax, and construing the Constitution in a way that would require absurd results would "defeat the exercise of the power." *Id*. at 355.
76. Justices Paterson and Wilson had been delegates to the Philadelphia Convention, and Justice Iredell was a delegate to the North Carolina ratification convention. *See* National Archives and Records Administration, *Meet the Framers of the Constitution*, https://www.archives.gov/founding-docs/founding-fathers (last reviewed Dec. 14, 2018).
77. Hylton v. United States, 3 U.S. 171, 174 (1794) (opinion of Chase, J.).
78. *Id*.
79. *Id*.
80. *Id*. at 175.
81. *Id*. at 176 (opinion of Paterson, J.).
82. *Id*.
83. *Id*. at 177.
84. *Id*. at 176-77.
85. *Id*. at 177.
86. *Id*.
87. *Id*. at 178.
88. Later, he noted:
    > The truth is, that the articles taxed in one state should be taxed in another; in this way the spirit of jealousy is appeased, and tranquility preserved . . . Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity.

    Id. at 180.
89. *Id*. at 179.
90. *Id*. at 181 (opinion of Iredell, J.).
91. *Id*. at 183.

> ered of this description. . . . In regard to other articles, there may possibly be considerable doubt.[92]

In sum, each of the three Justices who wrote an opinion thought that it would be absurd to apportion a carriage tax, and determined that such absurdities were not contemplated by the Constitution. They also all agreed that a tax on land would be a direct tax; however, whether anything else might be a direct tax, the Justices reserved judgment. But both Justices Iredell and Paterson suggested that a tax on something closely related to the soil might constitute a direct tax.

After *Hylton*, the direct tax issue lay dormant at the Court for the next several decades; the Court did not issue another opinion on direct taxes until 1868. The Court subsequently heard several challenges to direct taxes in quick succession, mostly related to taxes on various forms of income. Despite the distinction that Wickham had made in his *Hylton* argument, the Court was unperturbed by any distinction between a carriage tax and an income tax; in a series of rulings, the Court reaffirmed what it understood as *Hylton*'s holdings: first, that a tax that cannot be apportioned is not a direct tax, and second, that only taxes on land or capitations are direct taxes.

The first case on direct taxes the Court heard following *Hylton* was *Pacific Insurance Co. v. Soule*.[93] The Court held that, because the consequences of apportioning of an income tax levied on the profits of any business would be absurd, the Founders could not have intended such a tax to be apportioned, and it was therefore not a direct tax.

The following year, in *Veazie Bank v. Fenno*,[94] the Court elaborated on the meaning of direct taxes. Taxpayers asserted a tax on state and nationally chartered banks' issuance of circulating bank notes was a direct tax, marshaling the arguments of prominent political economists. The Court rejected these arguments, noting that, while the definition of the tax terms used in the Constitution were notoriously difficult to pin down, the Framers wanted to give full power over taxation, excepting exports, to Congress.[95] The Court recognized the "diversity of opinion" on the subject of the meaning of direct taxes, but explicitly disavowed the definitions of political economists, including Adam Smith.[96] The Court reasoned that the definition of direct taxes offered by political economists was not useful in interpreting the phrase's constitutional meaning.

Rather than examining the writings of political economists, the Court thought congressional practice illuminated the meaning of direct taxes.[97] In the years since *Hylton*, Congress had levied direct, apportioned taxes several times and each time fixed a gross sum and then apportioned it among the states (and even, in some instances, by county).[98] This practice, the Court reasoned, demonstrated that Congress understood how to levy direct taxes when it wanted, and that Congress understood direct taxes to be capitations and taxes on land and improvements. The Court noted that *Hylton* confirmed this view, and upheld the tax.[99]

In *Scholey v. Rew*, the Court refused to entertain a taxpayer's argument that a succession tax on the disposition of real estate was a direct tax.[100] It was not, the Court explained, among those things "that have always been deemed to be direct taxes" (that is, "[t]axes on land, houses, and other permanent real estate").[101] The Court reasoned that the succession tax was not a tax on real estate itself, but a tax on the right to become the successor of real estate.[102] As such, it was indistinguishable from a tax on income, which the Court had affirmed as an indirect tax in *Pacific Insurance*.[103]

In 1880, for the fourth time in about two decades, the Court in *Springer v. United States*[104] again rejected a challenge to the Civil War income tax on the grounds that it was an unapportioned direct tax (although the tax had already lapsed[105]). In addressing whether the tax was direct, the Court, for the first time, exhaustively examined all available evidence on its meaning of direct taxes: the Constitutional Convention and ratification debates, congressional practice, and prior Supreme Court precedent. The Court first observed that neither the text of the Constitution nor the notes of the Convention were of help in illuminating the definition of direct taxes. Examining the history of the clause's incorporation into the Constitution during the debate about representation, the Court noted that "[i]t does not appear that an attempt was made by anyone to define the exact meaning of the language employed."[106]

The Court then turned to *Federalist* Nos. 21 and 36, observing that those essays provided no explicit definition of direct tax. Next, the Court dismissed the "elaborate researches" of the plaintiff on the debates at the state ratification conventions as unavailing, concluding that there

92. *Id.*
93. 74 U.S. 433 (1868).
94. 75 U.S. (8 Wall.) 533 (1869).
95. *See id.* at 541.
96. *Id.* at 541-42.
97. *Id.* at 542.
98. *Id.* at 542-43. *See also* Act of July 9, 1798, 1 Stat. 597; Act of July 22, 1813, 3 Stat. 53; Act of March 3, 1815, 3 Stat. 166; Act of March 5, 1816, 3 Stat. 255; Act of August 5, 1861, 12 Stat. 294. In all these statutes, Congress determined an amount that it wished to collect, and apportioned the amount among the states. Generally, Congress taxed land and appurtenances, as well as polls.
99. *Veazie Bank*, 75 U.S. at 545-47.
100. *See* 90 U.S. 331 (1874).
101. *Id.* at 347.
102. *See id.* at 348-49:
> Successor is employed in the act as the correlative to predecessor, and the succession or devolution of the real estate is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed, or laws of descent . . . nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

103. *Scholey*, 90 U.S. 331.
104. 102 U.S. 586 (1880).
105. Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894-1913*, 66 Tax Law. 295, 297 (2013).
106. *Springer*, 102 U.S. at 596.

was no dispositive evidence that would settle the meaning of the Direct Tax Clause.[107] The Court also surveyed the writings of Madison and Hamilton on the carriage tax. Quoting Hamilton's brief, prepared for *Hylton*, the Court endorsed his view: "It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none."[108]

The Court approvingly noted Hamilton's suggestion that direct taxes encompass only capitations, taxes on land and buildings, and general assessments on the whole property of individuals (e.g., their entire wealth). Not satisfied to end there, the Court also looked to congressional practice to illuminate meaning. Referencing all the direct taxes assessed, the Court observed that every direct tax levied thus far was an assessment on real estate and slaves, and that the direct taxes imposed were of a fundamentally different kind than the income tax in the instant case.[109]

Subsequently, the Court examined four of its own precedents—*Hylton*, *Pacific Insurance*, *Veazie*, and *Scholey*—and concluded that they were "undistinguishable [sic] in principle" from the current case.[110] Finally, the Court cited several prominent constitutional commentaries for the proposition that direct taxes only encompass capitations and a tax on land.[111] Concluding that the income tax was an excise or duty, the Court reiterated that direct taxes only include capitations and taxes on real estate.[112] In 1880, the Direct Tax Clause seemed to be all but dead.

2. *Pollock* and Its Aftermath

In 1894, Congress levied a flat 2% tax on gains, profits, and income of individuals and on the net profits from business activities; with the first $4,000 exempted, the tax effectively fell on the wealthy.[113] The first income tax since the Civil War income tax had lapsed in 1872,[114] the Act was part of broader tariff reform—a hot-button political issue—and was hard fought in Congress.[115] Notwithstanding the Court's 100-year history consistently extending *Hylton* from carriage taxes to income taxes and the strong and recent disquisition of the unanimous Court in *Springer*, the Court reversed direction in 1895 in a pair of opinions in *Pollock v. Farmers' Loan & Trust Co.*[116]

Similar to *Hylton* a century prior, the *Pollock* case was contrived to reach the constitutional issue as quickly as possible.[117] The Court held that the income tax on rents, real or personal property, bonds, stocks, or other forms of personal property was an unconstitutional unapportioned direct tax.[118]

In *Pollock*, the Court revived Taylor's earlier position and asserted that apportionment was a form of structural protection for states against abusive taxation.[119] The Court in *Pollock I* went on to hold that indirect taxes are those that can be shifted upon others, but that direct taxes include taxes on property holders on that basis, reviving another of Taylor's positions in *Hylton*.[120] *Pollock I* reached the issue of income derived from real estate, which the Court held was "in substance" a tax on the real estate itself.[121] *Pollock II* extended this holding to taxes on tangible personal property or the income on such estates.[122]

As the *Springer* Court had done, *Pollock I* exhaustively examined the history of the framing and ratification debates, the text and structure of the Constitution, and the consequences of each construction of direct taxes (*Pollock II* also exhumed the early history of the Direct Tax Clause, albeit in less detail).[123] The Court next found that there was a "commonly accepted distinction" between direct and

107. *Id.* at 597.
108. *Id.*
109. *See id.* at 599 ("This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.").
110. *Id.* at 602.
111. *See id.*
112. *See id.*
113. *See* Pollack, *supra* note 105, at 306. The bill also taxed income from state and municipal bonds. The portion of the opinion on New York City bonds is not discussed here.
114. John F. Witte, The Politics and Development of the Federal Income Tax 70 (1985).
115. *See generally id.* at 70-73; Pollack, *supra* note 105, at 297-306; *see generally* Richard J. Joseph, The Origins of the American Income Tax 1-104 (2004).
116. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (*Pollock I*); modified on rehearing, 158 U.S. 601 (1895) (*Pollock II*). I refer to these opinions collectively as "*Pollock*," as their direct tax holding and reasoning is similar (formally, *Pollock II* goes further but *Pollock I* is more sweeping). The precedential impact of *Pollock II* on *Pollock I* is not entirely clear. The *Pollock I* Court ruled 6-2 on some issues, but deadlocked 4-4 on others (the ninth Justice was sick for the first hearing but was present at the rehearing). All the questions, not just the ones that had been undecided, were reargued. *See* Gerald G. Eggert, "Richard Olney and the Income Tax Cases," 48 The Mississippi Historical Review 24-41 (1961).
Although the *Pollock II* court "vacated" the prior "decrees," the decision also indicated that it approved of and was building upon the reasoning in *Pollock I,* and the decisions in no way conflict. Moreover, in 1988, the Supreme Court formally overruled a separate holding of *Pollock I*, which would not have been necessary if *Pollock II* had actually vacated *Pollock I*. The D.C. Circuit also recently cited both *Pollock I* and *Pollock II* as apparently good law. *See* Murphy v. Internal Revenue Serv., 460 F.3d 79 (D.C. Cir. 2006). Given the apparent uncertainty about the vitality of *Pollock I* in light of *Pollock II*, a future court would likely be free to cite the reasoning of either.
117. *See* Joseph, *supra* note 115, at 106-08. Different explanations have been offered for why the Court struck down the bill, with some historians arguing that the Court was considered a bulwark of conservatism, and others that the judiciary was attempting to balance against a perceived enlargement of congressional power at the expense of the other branches. For a brief historiographical overview of these positions, see *id.* at 111-13.
118. The Court's opinion in *Pollock I* as regards the income tax, as applied to real estate, was 6-2 (one Justice was absent due to illness); however, the Court split 4-4 on whether the tax on income derived from personal property was a direct tax and on other issues (the Court did not reach the issue of taxing earned income). The Court heard the case a second time (*Pollock II*) a few months later with a full Court, presumably to resolve the split.
119. *Pollock II*, 158 U.S. 601, 621 (1895).
120. *See id.* at 558 ("[A]ll taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.").
121. *Id.* at 581.
122. *See Pollock II*, 158 U.S. 601.
123. *See Pollock I*, 157 U.S. at 581; *Pollock II*, 158 U.S. at 620-27.

indirect taxation[124]: indirect taxes are raised on consumption, and direct taxes are raised on revenue and capital.[125] The Court noted that, at the time of the Founding, a tax on income was widely considered a direct tax.

The Court acknowledged the *Hylton* opinion, but argued that the *Hylton* Court had "avoided . . . laying down a comprehensive definition [of direct taxes], but confined [its] opinion to the case before the court."[126] Further distinguishing *Hylton*, the Court argued that a tax on carriages was unlike a tax on incomes, as the former was debatable as a direct tax, but the latter was not. Asserting that it must construe prior precedents narrowly to avoid overruling them, the Court found exceedingly narrow grounds to distinguish its other precedents, up to and including *Springer*.[127]

Having dispatched with any historical or precedential problems, the Court then turned to the question of whether a tax on income derived from real property was a direct tax. The Court, elevating substance over form, held that it was:

> Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of the real estate appears to use the same in substance as an annual tax upon the real estate.[128]

In *Pollock II*, the Court, over the vociferous dissents of four Justices, reaffirmed *Pollock I* and extended it to income derived from personal property. Notably, the Court endorsed *Pollock I*'s form-over-substance reasoning.[129]

Pollock garnered blistering criticism.[130] The Court's composition quickly changed, and the Court subsequently refused to extend *Pollock*'s reasoning, instead narrowing it to its facts.[131] The matter was effectively mooted by the passage of the Sixteenth Amendment, which overruled *Pollock*'s outcome by allowing Congress to assess taxes on incomes "from whatever source derived" without apportionment. But the amendment did not actually dispense with the direct tax requirement itself.[132]

Despite its notoriety and diminished doctrinal significance, *Pollock*'s direct tax holding has never been explicitly overruled. Moreover, it is doctrinally significant because the opinion represents several "firsts" for the Court. It was the first time that the Court embraced Taylor's unsupported argument that direct taxes were intended as a limitation on the federal government's taxing authority. It was also the first case in which the Court opined on the meaning of a tax on land. And it was the first time the Court elevated substance over form in interpreting the Direct Tax Clause. More generally, *Pollock* illustrates the hermeneutic free-styling that the direct tax issue invites because of the indeterminacy of the meaning of direct tax.

3. *National Federation of Independent Business v. Sebelius*

Since the passage of the Sixteenth Amendment, the Court has had limited opportunity to examine the Direct Tax Clause.[133] In its first opinion on the Direct Tax Clause since 1920,[134] the Court opined—albeit briefly—on the

124. *Id.* at 568.
125. *Id.* at 569-70.
126. *Id.* at 571-72. The Court concluded:
> (1) that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it; (2) that, under the state system of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes; (3) that the rules of apportionment and of uniformity were adopted in view of that distinction and those systems; (4) that whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise; (5) that the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies; and down to August 15, 1894, this expectation has been realized.

Id. at 573-74.
127. *Id.* at 578-80.
128. *Id.* at 580-81.
129. 158 U.S. at 627-28 ("[C]an it be properly held that the constitution . . . authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds? There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile . . . We find it impossible to hold that [the Direct Tax Clause] can be refined away by forced distinctions between that which gives value to property and the property itself.").
130. *See* Joseph, *supra* note 115, at 116-17. There was one group among whom the decision was celebrated: moneyed interests. *Id.* One scholar has called *Pollock* "the most contentious and emotion-laden [case] of the era." John Steele Gordon, Hamilton's Blessing 87 (1997), *cited in* Jensen page 45. The decision was also excoriated in William Jennings Bryan's famous "Cross of Gold" speech at the 1896 Democratic Convention. Pollack, *supra* note 105, at 308-09.
131. *See*, *e.g.*, Flint v. Stone Tracy Co., 220 U.S. 107 (1911) (holding the corporate income tax was indirect because it was a tax on the corporate form); Spreckels Sugar Ref. Co. v. McClain, 192 U.S. 397 (1904) (upholding an excise tax on the gross receipts of companies refining sugar); Knowlton v. Moore, 178 U.S. 41 (1900) (holding a levy on the property of a decedent was an indirect tax on the event of death rather than the underlying property).
132. U.S. Const. amend. XVI.
133. In modern times, there has been only one significant circuit court opinion on direct taxes. After holding that a tax on punitive damages was a direct tax, the uproar was so furious that the D.C. Circuit reversed on rehearing. *Compare* Murphy v. Internal Revenue Serv., 460 F.3d 79 (D.C. Cir. 2006), *with* Murphy v. Internal Revenue Serv., 493 F.3d 170 (D.C. Cir. 2007). However, the second *Murphy* opinion points to the discomfort that modern courts may have accepting the circular logic of *Hylton* that apportionable taxes are direct taxes. *See* 493 F.3d at 184:
> In the abstract, such a constraint [apportionment] is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states. If the Government's position is instead that by "capable of apportionment" it means "capable of apportionment in a manner that does not unfairly tax some individuals more than others," then it is difficult to see how a land tax, which is widely understood to be a direct tax, could be apportioned by population without similarly imposing significantly non-uniform rates.

(citing *Pollock II* and *Hylton*) (citation omitted).
134. *See* Eisner v. Macomber, 252 U.S. 189 (1920).

Direct Tax Clause as part of its blockbuster opinion on the Affordable Care Act.[135] The opinion is illuminating because it provides what little insight we have on how many current members of the Court understand the Direct Tax Clause. The Court's opinion is oblique, but at the very least, all nine members of the Court appeared to support the proposition that the Direct Tax Clause has ongoing vitality.

In Chief Justice John Roberts' opinion in *NFIB*, the Court held that the government did not have the authority under the Commerce Clause to assess a levy on individuals who refused to purchase health insurance. The Court (consisting of a different majority than the Commerce Clause holding) then held that the mandate was still constitutional, however, because it was a valid exercise of Congress' taxing power.[136] After concluding that the Affordable Care Act's mandate was a tax, rather than a penalty, the Court briefly examined whether the tax was an unapportioned direct tax. The Court held that the tax is not a direct tax, because it was neither a capitation nor a tax on land.[137]

Several parts of the Court's opinion touch on the interpretation of the Direct Tax Clause. First is a strange example the Court deployed. In explaining that what Congress calls a particular levy (e.g., a fine or a tax) is not dispositive in determining whether an assessment is a penalty (subject to Congress' Commerce Clause power) or a tax (subject to the Constitution's taxing power), the Court used an interesting example to illustrate its point:

> Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the [Internal Revenue Service]. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. . . . No one would doubt that this law imposed a tax, and was within Congress's power to tax.[138]

The Court provided this example to contrast penalties with taxes in the section of the opinion before its discussion of direct taxes. But it is not clear whether the Court's example of a tax on energy-inefficient windows is a direct or indirect tax. It could be an excise tax on windows, but there is no necessary transaction, sale, privilege, or event on which to hook the old, energy-inefficient windows, since they could have been left by the prior owner or could have been installed years ago by the current owner or tenant. Instead, the window tax looks like a static attribute of real property. This window tax could plausibly be characterized as a direct tax on real property. But the Court does not clarify, using the hypothetical only to demonstrate that this assessment is a tax, not a penalty. The hypothetical tax looks a lot like a carbon tax in that it is assessed based on (indirect) energy use. But there is no reasoning behind the example, making it of questionable precedential value.

The more relevant part is a few curt paragraphs in an otherwise lengthy opinion, which provide the Court's only explicit consideration of direct taxes and require close scrutiny. The Court first cited *Springer* approvingly for the proposition that the meaning of direct taxes was unclear at the Founding, and then quickly rehearsed the history of the Court's interpretation of the Direct Tax Clause:

> The Court upheld [the carriage tax in *Hylton*], 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 [citing *Hylton*]. The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. The narrow view of what a direct tax might be persisted for over a century. . . . 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. . . . That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.[139]

This language is purely descriptive; it does not explicitly embrace the narrow reasoning of *Hylton* or reject the broad reading of *Pollock*, and the opinion could be read either way. The most enigmatic part of the direct tax section of the Court's opinion is the three-sentence holding: "A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. . . . The payment is also plainly not a tax on the ownership of land or personal property."[140] These sentences can be read as reaffirming both *Hylton* and *Pollock*. The Court may plausibly be said to endorse the narrow reasoning that only a capitation or a tax on land or personal property is a direct tax. But in noting that it is not a tax on the ownership of land, Chief Justice Roberts also includes personal property—embracing an arguably broader definition of direct taxes than the *Hylton* Court.[141]

Moreover, the Court does not disavow *Pollock*—and arguably goes out of its way to reaffirm its reasoning by approvingly citing *Eisner* (a 1920 case that struck down a tax on unrealized gain as a direct tax), noting, of that deci-

135. *NFIB*, 567 U.S. 519, 570-72 (2012).

136. The *NFIB* opinion is complex, containing seven opinions on five issues. The precedential effect of the Commerce Clause part of the *NFIB* opinion is unsettled and controversial. Arguably, the tax holding is only necessary because of the Commerce Clause holding, and its precedential status is also uncertain, despite commanding a majority of the Court. *See generally* Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 Wash. U. L. Rev. 1 (2013).

137. *NFIB*, 567 U.S. at 571 ("[T]he payment is also plainly not a tax on the ownership of land or personal property."). The Court distinguished the health penalty from a capitation on the basis that capitations "are taxes paid by every person," irrespective of circumstance, and the health penalty was assessed on the basis of income. But whether the health mandate is a capitation is a closer question than the Court let on from its cursory analysis.

138. *Id.* at 569.

139. *Id.* at 570-71.

140. *Id.* at 571.

141. The dissent did not offer its own theory of direct taxes, but its criticism of Chief Justice Roberts' reasoning suggests that the conservatives on the Court may not embrace *Hylton*—or even *Pollock*, for that matter.

sion, "we continued to consider taxes on personal property to be direct taxes."[142] This may purely be descriptive, but it can also be read to grant *Pollock*'s reasoning ongoing vitality. The conclusion that *NFIB* reaffirms *Pollock* is bolstered by the carefully chosen language the Court uses to describe the opinion's status: the Court notes only that *Pollock*'s "result" was overturned by the Sixteenth Amendment. Not only does the opinion not rebuke *Pollock*, but the Court also does not cite any of the numerous opinions limiting *Pollock*'s holdings. This omission could indicate the Court has a particular view of *Pollock*, although it could also be a result of the fact that the Court was not briefed on direct taxes. In short, the Court's *NFIB* opinion appears to walk a narrow line in order to avoid choosing between *Hylton* and *Pollock*. As a consequence, *NFIB* leaves a future Court the possibility of embracing both or either.

The dissent was even less willing to rule on the meaning of the Direct Tax Clause. In a joint dissent, the four dissenters made several observations that have bearing on the Direct Tax Clause. First, they noted:

> [T]here are structural limits upon federal power. . . . Whatever may be the conceptual limits upon the Commerce Clause *and upon the power to tax and spend*, they cannot be such as will enable the federal government to regulate all private conduct and to compel the States to function as administrators of federal programs.[143]

This seems to assert, without elaborating, that there *are* structural limitations on Congress' power to lay taxes. Whether the joint dissent only meant to imply that the structural limits are those previously embraced by the Court (e.g., that the federal government cannot tax the states out of existence) or that there are structural limits implicit in the concept of direct taxes—a controversial proposition first advocated by Taylor—is not explained.[144]

More important than the vague reference to structural principles are the dissent's explicit observations about the Direct Tax Clause:

> [W]e must observe that rewriting [the healthcare mandate] 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. Perhaps it is not (we have no need to address this 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. . . . One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.[145]

The dissent may simply be expressing exasperation that the Court reached the tax issue at all. Another available reading, however, is that the dissent was substantively unconvinced by the majority's discussion of direct taxation—a discussion that was nothing if not faithful to the Court's precedents.

Ultimately, *NFIB* offers few clues about how the current Court might determine what constitutes a direct tax. But the Court's opinion does elucidate important points about the Direct Tax Clause. At the very least, it appears that nine members of the Court unquestionably reaffirmed the continued vitality of the Direct Tax Clause. The Court also confirmed that capitations and taxes on real and personal property are direct taxes (implicitly repudiating the views of some modern scholars[146]).

But the Court's reasoning is both terse and inscrutable, and the reach of the Court's holding is uncertain, as the opinion admits multiple readings. After *NFIB*, both *Pollock* and *Hylton* appear to be good law. But how far those precedents extend—and how to reconcile their conflicting holdings—is murky. The majority opinion leaves the door open to *Pollock*-type arguments, but at the same time, the Court did not discuss the incidence of the individual mandate, as *Pollock* might suggest. Similarly, the Court seemed to embrace at least some of *Hylton*, while seemingly disapproving, in its reasoning, of *Hylton*'s holding that only apportionable taxes are direct taxes. The dissent's reasoning is also opaque; it may suggest that the dissenters are willing to reconsider the doctrinal definition of direct taxes, but it may also simply reflect the dissenters' unhappiness with the Commerce Clause ruling.

II. Taxing Agriculture and Land Use

Unhappy taxpayers are likely to challenge any federal carbon tax on a variety of statutory and constitutional grounds. Facial constitutional challenges to carbon taxes are likely to be deemed by courts to be frivolous, as taxes on fossil fuels have long been considered to be a tax on sales, and therefore a constitutionally permissible excise. Fossil fuel excises are so ubiquitous that the U.S. Treasury has estimated that a carbon tax assessed solely on fossil fuels could easily be collected through only minor modifications to the federal tax form on which existing federal excise taxes are reported.[147]

A tax assessed on the production or sale of fossil fuels (and, arguably, any good that moves in interstate commerce) is likely to be constitutional on the same grounds that these other taxes are constitutional: they are permissible as uniform excise taxes. The gasoline tax, in place

142. *Id.*
143. *Id.* at 647 (Scalia, J., dissenting) (emphasis added).
144. The dissent probably does not intend to implicate Congress' authority to lay taxes within the scope of the second reading, because it later admits that the case is about "not whether Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so." *Id.* at 662.
145. *Id.* at 669.
146. *See* Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, and Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, *supra* note 18; Ackerman, *supra* note 10.
147. Horowitz et al., *supra* note 6, at 6.

since the 1930s, is only the most prominent of a host of excise taxes levied on fossil fuels[148]; excise taxes are also assessed on aviation gasoline and gasoline blendstocks, diesel fuel, diesel-water fuel emulsion, kerosene (including kerosene used in aviation), alternative fuels (such as ethanol), compressed natural gas (when used as a transportation fuel), fuels used in commercial transportation on inland waterways, and any liquid used in a fractional ownership program aircraft used as fuel.[149] There is also an excise tax assessed on coal produced in the United States (I.R.C. §4121), excepting lignite.

A GHG tax that includes an assessment on carbon emissions from a range of non-fuel sources, such as wastewater treatment, landfills, agriculture, and livestock, among others, would be subject to an as-applied challenge. A court adjudicating the constitutionality of a carbon tax, as applied to agriculture and land use, would likely interpret the Direct Tax Clause using Supreme Court precedent, assessing the purpose of the clause, and the meaning of the term direct tax at the time of the Founding.[150] Unfortunately, the evidence—including the purpose of the clause and the original meaning of the term direct tax—is disputed, and Supreme Court precedents (in particular, *Hylton* and *Pollock*) may point in different directions. A narrow interpretation of the clause—limiting it to taxes on land and capitation taxes—has long been doctrinal orthodoxy. But this narrow interpretation does not shed meaning on what constitutes a tax on land.

Taxpayers could assert two alternative theories in support of a constitutional challenge to carbon taxes applied to agriculture and land use. First, they could assert that carbon taxes assessed on agriculture and cattle are taxes "on land," and as such constitute direct taxes that must be apportioned. Alternatively, such taxes could be considered direct taxes if the Court accepts a broader definition of direct taxes that embraces more than taxes on land and capitation—for example, following *Pollock*, that direct taxes are taxes that cannot be shifted, or, embracing some modern scholarship, that direct taxes are any tax on production or sheer existence.[151] Regardless of which legal theory taxpayers assert, a carbon tax might survive constitutional scrutiny; but that conclusion is hardly compelled by the Court's precedents.[152]

This part outlines several potential ways the Court could rule on the question. First, it considers the ways in which the Court could uphold a tax assessed on agriculture or land.[153] There are several strong arguments that a carbon tax on agriculture is an excise[154]; alternatively, the Court could construe an economywide carbon tax covering all GHGs as an undefined indirect tax.[155] Next, it considers how the Court, relying on *Hylton* and *Pollock*, could find that a carbon tax, as applied to agriculture and land use, is a direct tax.

A. *Carbon Taxes as Excises or Other Indirect Taxes*

A carbon tax assessed on agriculture or land could be considered an excise because it is assessed on a sale/transfer (if assessed at sale rather than upstream),[156] an activity (as with the excise on produced coal), or event (the release of GHGs).

Alternatively, a carbon tax may be considered an excise assessed on a privilege. In *Pollock II*, the Court remarked that a constitutional tax could be laid on "business, *privileges*, employments, and vocations."[157] In *Flint v. Stone Tracy Co.*, the Court upheld an income tax assessed on corporations, characterizing it as a tax on the "privilege" of doing business in the corporate form, despite the lack of transaction or sale. [158] The *Flint* Court reasoned that the tax was an excise because it was "imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof."[159] In the case of a carbon tax, the government is arguably taxing the privilege of being allowed to release pollutants into the atmosphere.

148. *See* James M. Bickley, Congressional Research Service, The Federal Excise Tax on Gasoline and the Highway Trust Fund: A Short History 1 (2012).
149. *See* Internal Revenue Service, Excise Taxes (Including Fuel Tax Credits and Refunds) (2018) (Publication No. 510), *available at* https://www.irs.gov/pub/irs-pdf/p510.pdf.
150. The following analysis assumes that the tax is in fact a tax, and not a penalty or fee. The test for whether it is a penalty was arguably decided in *NFIB*. The question of whether it is a fee likely depends on how the revenue is used. This Article assumes that the revenue will be general government revenue, or returned to taxpayers. If, however, as some would like, the revenue is used entirely to pay for climate-related activities, it is possible that the tax would, for constitutional purposes, be a fee, and subject to Congress' Commerce Clause power. Similarly, a cap-and-trade program could potentially be deemed a tax, rather than a fee, depending on the structure of the program.
151. *See* Natelson, *supra* note 18.
152. Depending on the facts related to the incidence of the tax and how the revenues are spent, the government could defend on the theory that the assessment is not a tax at all, but a fee. Fees are charges designed as compensation for government-supplied services, facilities, or benefits. *See* United States v. U.S. Shoe Corp., 523 U.S. 360, 363 (1998). If the assessment were a fee, it would likely be constitutional under Congress' Commerce Clause authority. Defending on that theory, however, might have unwanted implications for the public trust doctrine as it relates to the atmosphere.
153. This Article assumes that the tax is assessed upstream, at the point of production. It is less clear whether a midstream or downstream tax would suffer from the same constitutional concerns.
154. "Excise," like direct tax, is a term notoriously difficult to define. The Court has stated that duties, imposes, and excises together "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like." Thomas v. United States, 192 U.S. 363, 370 (1904). *See generally* Joel Alicea & Donald Drakeman, *The Limits of New Originalism*, 15 U. Pa. J. Const. L. 1161 (2012).
155. Direct taxes and indirect taxes are mutually exclusive categories; therefore, if a tax is an excise, duty, or impost, it cannot be a direct tax.
156. At high GHG thresholds (that is, the trigger for paying the tax is releasing a certain amount of the gas), the sales theory is relatively unproblematic. But the theory may run into conceptual problems, as not all emissions are actually directly linked to a sale. For example, what sales should emissions related to manure be attributed to? In the case of beef cattle, the answer is, presumably, the beef. But in the case of dairy cows, the calculation is more complicated, though not impossible. The issue is more complicated with respect to waste; methane emissions from landfills are presumably not tied to a sale.
157. *Pollock II*, 158 U.S. 601 (1895) (emphasis added).
158. 220 U.S. 107 (1911).
159. *Id.* at 145-46 (overruled on other grounds).

Even if the Court does not hold that a carbon tax is an excise, it may still be an indirect tax by virtue of the fact that it is not a direct tax. The Court could hold that a carbon tax is not a direct tax based on various rationales. The Court could rely exclusively on either of *Hylton*'s two holdings to find that the tax is indirect. First, *Hylton* held that only taxes that can be equitably apportioned without absurd results are direct taxes. If the Court adopts the traditional, first holding set forth in *Hylton* and followed in subsequent decisions (but pointedly not embraced by *NFIB*), it should have no trouble holding that a carbon tax is an indirect tax. Because GHG emissions are not evenly distributed among the states, apportioning a carbon tax, much like apportioning a carriage tax, would have absurd and unjust results.

But *Hylton* also held—in dictum that has been elevated to the status of a holding—that only capitations or taxes on land are direct taxes. This holding may be—but is not necessarily—in tension with the holding that only taxes that can be apportioned are direct taxes.[160] Therefore, the second holding of *Hylton* suggests that a carbon tax might be a direct tax if it is a tax on land. *NFIB* qualifies *Hylton* further: only taxes on the *ownership* of land or personal property count.[161] Only the most literal-minded reading of the history and case law suggests that a carbon tax assessed on agriculture and land use is a tax on land within the meaning of the Constitution.

Historical practice and common sense suggest that the meaning of the tax on land is that *land* is what is being taxed. In practice, regardless of whether a land tax was assessed *ad valorem* or on a per acre basis, land was taxed *as land*—because of its physical existence and its ability to create value. A carbon tax explicitly aims *not* to tax land, but an activity—GHG emissions—that takes place on land. This distinction is made more evident by virtue of the fact that it is not *any* land that is being taxed, but only (and in proportion to) emissions. The same can be said of a carbon tax on personal property such as livestock. The tax is not assessed on the owner on account of *ownership*, but because of the property's emissions.[162]

The Court's "energy-inefficient window" example in *NFIB* may support the notion that ownership can be distinguished from an emissions-producing activity, but only if a tax on energy-inefficient windows is not a direct tax. Of course, the distinction between GHG emissions from soil—like the distinction between windows and a house—elevates form over substance. But, especially in the realm of taxation, the Court often draws or upholds form over substance.[163] In fact, the Court's opinion in *Scholey* made precisely this distinction between land and an activity related to land. In that case, the Court held that a tax assessed on inherited real property was deemed to be a tax on the right to succession, rather than on the underlying real property. Therefore, under one plausible reading of *Hylton*'s dictum-turned-holding, a carbon tax should not be construed as a direct tax.

The preceding analysis, however, only goes so far, as the *Hylton* case was about a carriage tax, not a tax on land. While *Scholey* is one of the cases where the Court grappled with the meaning of the phrase "on land," the only other case squarely on point is *Pollock*, which is more factually analogous to a carbon tax than *Scholey*. As noted above, *Pollock* has been read by subsequent courts to be limited to the facts. But its direct tax holding has never been explicitly overruled, and the Court's *NFIB* opinion arguably rehabilitates the opinion(s).

Like *Hylton*, *Pollock* arguably has two holdings. The first of these is that a direct tax is a tax that cannot be shifted onto another taxpayer or escaped entirely through the taxpayer's behavior. Under this reasoning, a carbon tax on agriculture and land use is likely not a direct tax. At relatively high GHG thresholds, it is possible to escape payment either by reducing emissions or passing the cost on to customers.[164] In fact, carbon taxes are *premised*, at least partly, on a theory of shiftability: that emitters (and consumers), faced with a higher price, will change their behavior. In other words, under one of *Pollock*'s holdings, a carbon tax is an indirect tax, even as applied to emissions from agriculture and waste, because it is a tax that can be escaped by modifying behavior or shifting the incidence on to others.

B. Carbon Taxes as Direct Taxes

The Court has ample room within its precedents to reject a constitutional challenge to a tax assessed on emissions from agriculture, land, and waste. But *Hylton*'s second holding and *Pollock*'s second holding jointly provide the Court an available route for coming to the opposite conclusion. *Pollock*'s second holding, in tension with *Scholey*, construed the meaning of "on land" to be anything that *looks like* it targets the land itself; for example, a tax targeting the pro-

160. This tension was implicitly noted by the *Murphy* court, which attempted to avoid the conflict between the two holdings. *See* Murphy v. Internal Revenue Serv., 493 F.3d 170 (D.C. Cir. 2007) (rehearing); *see supra* note 136.

161. *NFIB*, 567 U.S. 519, 571 (2012).

162. Justice Harlan, in his lengthy *Pollock II* dissent, distinguished the tax at issue in that case in a similar manner:

> In determining whether a tax on income from rents is a direct tax, within the meaning of the Constitution, the inquiry is not whether it may in some way indirectly affect the land or the land owner, but whether it is a *direct tax on the thing taxed, the land*. The circumstance that such a tax may possibly have the effect to diminish the value of the use of the land is neither decisive of the question nor important. While a tax on the land itself, whether at a fixed rate applicable to all lands without regard to their value or by the acre or according to their market value, might be deemed a direct tax, within the meaning of the Constitution, as interpreted in the *Hylton* case, a duty on rents is a duty on something distinct and entirely separate from, although issuing out of, the land.

Pollock II, 158 U.S. at 666-67 (Harlan, J., dissenting).

163. *See infra* note 171 and accompanying text.

164. Of course, the Court also disparaged the form-over-substance reasoning employed above. *See Pollock II*, 158 U.S. at 629. Given the Court's unwillingness to find such distinctions relevant, it is not clear that the *Pollock* Court would be convinced about an emissions tax, especially because the Court was clear that "[a] direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed." *Id*. at 632.

ceeds of rent derived from land is a direct tax because it is equivalent to a tax on the land itself.

Pollock can therefore be read to stand for the proposition that the Court elevates substance over form when examining taxes "on land." The *Pollock* Court disparaged the kind of form-over-substance reasoning employed by *Scholey*:

> The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real-estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power, as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and, although once not taxable, have become transmuted, in their new form, into taxable subject-matter . . . Admitting that this act taxes the income of property, irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax, in the meaning of the Constitution.[165]

Given the Court's unwillingness to find technical distinctions relevant, it is not clear that the *Pollock* Court would be convinced tax on emissions from agriculture and land use are not direct taxes, especially because the Court was clear that "[a] direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed."[166] Therefore, *Hylton*'s direct taxes are "taxes on land" holding, if combined with *Pollock*'s substance-over-form holding, suggests that a carbon tax assessed on land and livestock may be a direct tax. The logic runs thus: *Hylton* held a tax on land is a direct tax; *Pollock* held that a tax on land is any tax traceable to and inseparable from the land—therefore, a tax on land traceable to and inseparable from the land (e.g., a carbon tax on agriculture) is a direct tax.

This holding is not necessarily inconsistent with *Hylton*. *Hylton* is distinguishable; the carriage tax was not a tax on land, or on real property or personal property related to land such as livestock. Moreover, two Justices in *Hylton* can be read as supporting a tax on an indeterminate number of things tied closely to land. Justice Paterson was at pains to elaborate that, "[p]erhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself,"[167] while Justice Iredell noted that a tax on land may mean "a tax on something inseparably annexed to the soil."[168] GHG emissions from land and livestock are undeniably tied to biological processes seemingly inherent in the existence of particular property. This is not the most natural reading of *Hylton*; it ignores the holding that three Justices agreed upon, that a direct tax is only a tax that can be equitably apportioned. But it is an available reading.

Despite the Court's subsequent precedents circumscribing *Pollock*, how the Court might respond to a modern case testing *Pollock*'s reasoning remains unknown. Because the direct tax holding of *Pollock* has not been explicitly overruled, the constitutionality of a carbon tax applied to agriculture and land use might come down to whether the Court wants to elevate substance over form; either GHG emissions can be theoretically separated from land itself or they cannot. *Pollock*'s reasoning suggests substance over form is the preferred method when analyzing direct taxes on land (although *Scholey* suggests the opposite). The *NFIB* Court's refusal to explicitly disavow *Pollock* makes it easier for a future Court to find a carbon tax (as applied) to be a direct tax on land.

There are certainly reasons why the Court might balk at embracing *Pollock*'s substance-over-form reasoning. The Court has consistently had difficulty applying substance-over-form doctrines in tax law, and has generally (though not entirely) abandoned such practices. In the area of intergovernmental tax immunity, for example, the Court tried for more than 100 years to implement a coherent substance-over-form doctrine, before explicitly abandoning that effort as unworkable in *South Carolina v. Baker*.[169] Whether a future Court would follow *Baker* in holding substance-over-form to be unworkable with respect to direct taxes is the key question.

Finally, the Court could forge an entirely new interpretation of the category of direct taxes, for example, adopting one modern scholar's view that the 18th century meaning of direct taxes was a tax on production or existence.[170] While the Court could turn to an alternative theory to invalidate or uphold a carbon tax, this seems unlikely given that a new interpretation of the Direct Tax Clause is not necessary to either uphold or strike down a carbon tax, and departing from precedent poses potential collateral doctrinal risks. Therefore, it seems more likely that a tax on carbon would be construed as direct or indirect based on existing precedent.

Nonetheless, a Court that embraced a more sweeping definition of direct taxes could (but need not) find a carbon tax to be a direct tax. A carbon tax could be characterized as a tax on existing or producing goods, but a better characterization is that it is a tax on GHGs, a specific byproduct of production. It is the byproduct, not the production itself, that is taxable. Taxpayers may nevertheless argue that it is no more possible to remove the byproduct from some of these activities than it is to remove carbon dioxide from human breathing. Whether the Court would find this argument persuasive again depends, at base, on the threshold level at which emissions are regulated and whether the Court elevates substance over form.

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165. *Id.* at 629.
166. *Id.* at 632.
167. Hylton v. United States, 3 U.S. 171, 177 (1794) (opinion of Paterson, J.).
168. *Id.* at 183 (opinion of Iredell, J.). Of course, Justice Iredell immediately went on to say that the thing annexed to the soil would be "something capable of apportionment under all such circumstances." *Id.*
169. *See* 485 U.S. 505, 524 (1985). That opinion also repudiated a holding of *Pollock I* related to intergovernmental tax immunity not discussed in this Article. *See also* Jasper L. Cummings Jr., *Cost of Goods Sold and the Constitution*, Tax Notes Fed., July 3, 2017, at 84.
170. *See* Natelson, *supra* note 18.

III. Conclusion

Throughout the history of the Republic, and especially since the ratification of the Sixteenth Amendment in 1913, there have been few occasions for the Supreme Court to address the meaning and scope of the Direct Tax Clause. As a result, the debate over direct taxes has been confined to a small academic group of (mostly) tax scholars concerned with the boundaries of the Sixteenth Amendment and the implications for wealth taxes. Should Congress enact an economywide carbon tax encompassing emissions from agriculture and lands, the stakes of the direct tax debate could suddenly become much higher.

As conversations and advocacy regarding a carbon tax increase in Washington, D.C.,[171] policymakers should be aware of the legal issues associated with taxing agriculture. But even if it remains unlikely that Congress enacts a carbon tax covering emissions from agriculture and land use, the interpretation of the Direct Tax Clause also has implications in the immediate term, in the context of political bargaining over a (presumably more limited) carbon tax. While most Republicans in Congress continue to reject climate action,[172] a small but growing group of conservatives has been pushing for climate legislation.[173] Some prominent voices on the right, as well as some corporations (including fossil fuel companies) have publicly embraced carbon taxes.[174]

Conservative proponents of a carbon tax argue that government intervention is necessary to address the particular market failure of the externalities associated with burning carbon. A well-designed carbon tax, they argue, can further the conservative objective of small government and fiscal discipline if the revenue is used to offset other taxes and is paired with the reduction of regulations they view as costly, burdensome, ineffective, and unnecessary. Although often vague on the specifics, many of these conservatives advocate that, as part of any deal to implement a carbon tax, Congress revoke EPA's authority to regulate GHGs.[175]

This Article suggests that, regardless of the political merits of such a trade, those concerned with climate change should be wary of trading away EPA's authority in order to regulate GHGs under such a scheme. Because of the legal risk—however small—associated with the Direct Tax Clause, the argument that agriculture can be incorporated into a carbon tax at a later date should be met with skepticism. Stripping EPA of its regulatory authority over *all* GHGs—as at least some conservative proposals appear to advocate—risks a future in which the federal government effectively has no authority over emissions from agriculture, land use, and possibly even waste.

Finally, the Article also suggests that policymakers and environmental advocates should start considering how they will address GHG emissions from non-fossil fuel sources. Taxing these sources may be administratively and politically challenging, even if it is legally permissible. Yet relying solely on financial incentives to address emissions from these sources is likely to be costly, and unfairly subsidizes some polluters in cleaning up their act. The solution is not to ignore emissions from non-fossil fuel sources on the justification that they are relatively small; they are still sizeable, and will likely grow as a share of overall emissions as emissions from fossil fuel combustion decrease. As experience in other areas of environmental regulation suggests, it will be challenging, if not impossible, to effectively mitigate climate change without addressing the contribution from agriculture and land use.

171. Oil companies have been active on this issue for the past several years; six major oil companies have stated their theoretical support for a carbon tax, with caveats. *See* Benjamin Hulac & Kelsey Brugger, *How Much Is Big Oil Working to Pass a Carbon Tax? We Checked*, Climatewire, Sept. 26, 2018, https://perma.cc/LLP4-K57X. According to *E&E News*, Shell Oil Co. has been meeting regularly with environmental groups since 2016 to build support for a national carbon tax. *See* Kelsey Brugger & Benjamin Hulac, *Oil Giant Met With Greens for Years on Climate Policy*, Climatewire, Sept. 6, 2018, https://perma.cc/BM7Y-Z4SQ.

172. *See*, *e.g.*, H. Con. Res. 119, 115th Cong. (2018) (expressing the sense of Congress that a carbon tax bill would be detrimental to the U.S. economy).

173. *See*, *e.g.*, MARKET CHOICE Act, H.R. 6463, 115th Cong. (2018). The Niskanen Center and the R Street Institute, both pro-market, conservative/libertarian think-tanks, are also pushing a carbon tax. *See*, *e.g.*, Jerry Taylor, Niskanen Center, The Conservative Case for a Carbon Tax (2015), *available at* http://niskanencenter.org/wp-content/uploads/2015/03/The-Conservative-Case-for-a-Carbon-Tax1.pdf; Catrina Rorke, R Street Institute, A Carbon Bargain for Conservatives (2016), *available at* https://www.rstreet.org/wp-content/uploads/2016/09/68.pdf; Josiah Neeley & Caroline Kitchens, R Street Institute, R Sheet on Conservative Climate Solutions (2018), *available at* https://perma.cc/933U-VZWH.

174. A third group, the Climate Leadership Council, headed by prominent conservatives and including large U.S. oil companies as members, has also formed specifically to push a carbon tax. *See* Baker et al., *supra* note 7; Climate Leadership Council, Exceeding Paris: How the Baker-Shultz Carbon Dividends Plan Will Significantly Exceed the U.S. Paris Commitment & Achieve 50% U.S. CO_2 Reduction by 2035 (2019), *available at* https://www.clcouncil.org/media/Exceeding-Paris.pdf.

175. *See* Taylor, *supra* note 173; Rorke, *supra* note 173; Baker et al., *supra* note 7. *But cf.* MARKET CHOICE Act, H.R. 6463, 115th Cong. (2018) (providing a moratorium on EPA's GHG authority, with the exception of some authority over methane, if the bill's targets are met; EPA's authority would not be permanently revoked).