Florida Tax Review

Volume 4 Article 3

2023

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FLORIDA TAX REVIEW

VOLUME 4 *1999* *NUMBER 2*

The Constitutionality of Taxing Compensatory Damages for Mental Distress When There Was No Accompanying Physical Injury

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Since 1919, statutory tax law has excluded from gross income compensatory damages received on account of a personal injury or sickness.[1] The current version of that exclusion is set forth in section 104(a)(2) of the Internal Revenue Code of 1986.[2] The construction of that exclusion, both by the courts and by the Commissioner, underwent significant alterations over the 80-year period that the provision has existed.[3] The statute itself was amended several times, most recently in 1996.[4] It is the 1996 amendment

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1. The first statutory provision was adopted in 1919 as part of the Revenue Act of 1918. Pub. L. No. 65-254, § 213(b)(6), 40 Stat. 1057, 1066 (1919). There was an issue for some years as to whether the exclusion also applied to punitive damages received in connection with a personal injury. That issue was laid to rest by a 1996 statutory amendment so that IRC § 104(a)(2) explicitly states that it does not apply to punitive damages (with one minor exception for certain wrongful death damages). See IRC § 104(c). Also, even prior to the amendment's taking effect, the Supreme Court held that the IRC § 104(a)(2) exclusion does not apply to punitive damages. O'Gilvie v. United States, 519 U.S. 79 (1996).

2. The current reading of the relevant portions of IRC § 104(a) is as follows:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any taxable prior year, gross income does not include—
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> (2) the amount of any damages (other than punitive damages) received ... on account of personal physical injuries or physical sickness;
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> . . . (f)or purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care . . . attributable to emotional distress.

3. The history of the various interpretations of that provision are set forth in Douglas A. Kahn, Taxation of Damages After Schleier—Where Are We and Where Do We Go From Here?, 15 Quinnipiac L. Rev. 305-09 (1995); and Douglas A. Kahn, Compensatory and Punitive Damages For A Personal Injury: To Tax or Not To Tax?, 2 Fla. Tax Rev. 327, 330-39 (1995).

4. Section 1605(b) of The Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(b) (1996).

that has raised a constitutional issue concerning the validity of a portion of the statute.[5]

As a consequence of the 1996 amendment, damages received for a personal injury will not be excluded from gross income unless the victim suffered a physical injury.[6] For this purpose, the emotional distress that a victim suffers because of a tortious act does not constitute a physical injury.[7] The House Report to the 1996 amendment states that "emotional distress includes physical symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress."[8] Consequently, damages received for the emotional and mental distress suffered because of defamatory statements or because of discriminatory acts are excludible only to the extent that the victim incurred medical expenses thereby. Defamation and discriminatory acts do not cause physical injuries.

However, if a victim who suffers a physical injury from a tortious act, also suffers emotional distress, the House Report to the 1996 amendment states that damages received for the emotional distress will be excluded from gross income by section 104(a)(2).[9] Thus, even if a victim has physical repercussions from a tort causing emotional distress, the damages (other than an amount equal to medical expenses) are not excluded from gross income; but if the victim suffers emotional distress as a consequence of physical injuries received from a tort, the damages received for the emotional distress are excludible. The statutory distinction made between damages received for emotional distress that accompanies a physical injury and those that do not has raised a constitutional issue in the minds of some commentators.[10] Those persons who question the constitutionality of section 104(a)(2) are sometimes referred to herein as "the detractors." The thesis of this commentary is that, contrary to the contention of the detractors, the different treatment that Congress ordered in section 104(a)(2), depending upon whether the tortious act caused a physical injury, is constitutional and valid.

Before presenting the author's reasons, it is useful to describe the argument for the contrary view. The rationale for that view was ably set forth

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5. See, F. Patrick Hubbard, Making People Whole Again: The Constitutionality of Taxing Compensatory Tort Damages for Mental Distress, 49 Fla. L. Rev. 725 (1997).

6. IRC § 104(a)(2).

7. IRC § 104(a) (penultimate sentence). However, to the extent that the victim incurred medical expenses as a consequence of the emotional distress, the damages received up to the amount of those medical expenses will be excluded from gross income. IRC § 104(a) (last sentence).

8. H. Rep. No. 104-586, n.24 at 144 (1996).

9. Id.

10. See Hubbard, supra note 5.

by Professor Hubbard in his 1997 article on this topic,[11] and the following exposition of the arguments for unconstitutionality is drawn from that article.

Two of the premises on which the thesis that the statute is unconstitutional rests are very questionable. One premise is that Congress cannot tax as income an item that does not fall within the meaning of "income" as that term is used in the Sixteenth Amendment. Support for this premise can be found in the Supreme Court's 1920 decision of *Eisner v. Macomber*,[12] in which the Court held that a tax on a receipt that is not "income" within the meaning of the Sixteenth Amendment, is a tax on the taxpayer's capital, and thus constitutes a direct tax that is not apportioned among the states according to population and so is unconstitutional as violative of the requirement of Article I, Section 9, Clause 4 of the Constitution prohibiting Congress from imposing a direct tax unless in proportion to the population of the states.[13] The *Macomber* decision itself rests on two 1895 decisions of the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*,[14] holding, in a pre-Sixteenth Amendment case, that a direct tax on property is unconstitutional. *Macomber* holds that a tax that is not authorized by the Sixteenth Amendment will be invalid if it constitutes a direct tax.[15]

Another premise of the attack on the validity of section 104(a)(2) is that a receipt must constitute a "gain" to the taxpayer to qualify as income within the meaning of the Sixteenth Amendment. This contention also rests on the holding of the Supreme Court in the *Macomber* case.

From those two premises, the argument is made that compensatory damages for emotional distress do not represent a gain, but merely restore the injured party to some sort of equivalence to the condition that the party had before being injured. Accordingly, it is argued that the tax on such damages is on an item that does not constitute income within the scope of the Sixteenth Amendment; and so the tax is unconstitutional as a direct tax not apportioned among the states by population.

There are other issues to this topic that need to be addressed, but the validity of the two premises described above should be considered first. Even if the Sixteenth Amendment had not been adopted, there is reason to believe that a contemporary Supreme Court would sustain the validity of an income tax. By the time that the Sixteenth Amendment was adopted in 1913, there was reason to question whether the 5-4 divided opinion of the second *Pollock* decision would be sustained by the then current Court. For example, in 1909,

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11. Id.
12. 252 U.S. 189 (1920).
13. Id.
14. 157 U.S. 429 (1895), reh'g granted, 158 U.S. 601 (1895).
15. Eisner v. Macomber, 252 U.S. at 189.

Congress passed an income tax on corporate income.[16] In a 1911 case, which predated the adoption of the Sixteenth Amendment, the tax on corporate income was upheld as valid by the Supreme Court in *Flint v. Stone Tracy Co.*,[17] on the ground that it was a tax on the privilege of doing business and so was not a direct tax. The deference that a contemporary Court would give to the unapportioned direct tax issue is at least subject to considerable doubt.[18]

Moreover, the contemporary vitality of the constitutional holdings of the Court in *Macomber* is very much in doubt. *Macomber* held that a dividend of a corporation's common stock on shares of its outstanding common stock was not income within the Sixteenth Amendment, and that the statutory provision taxing that stock dividend was invalid as unconstitutional.[19] *Macomber* stands for the view that realization (i.e., severance of income from capital) is a constitutional requisite to having "income" for purposes of the Sixteenth Amendment.[20] While, as a matter of Congressional tax policy, realization is generally required as a condition to imposing an income tax, that requirement is not considered to be constitutionally mandated. To the contrary, in certain circumstances, the tax law imposes a tax on income that has not been "severed" from capital and thus has not been "realized" as that requirement was viewed by the Supreme Court in its *Macomber* decision. Let us simply note two income tax provisions that would be invalid if the limitations adopted in *Macomber* were respected.

A United States shareholder of a "controlled foreign corporation" must include in income for United States income tax purposes his pro rata share of the so-called Subpart F income of that corporation even though that income was accumulated and retained by the corporation (i.e., it was not realized by the shareholder).[21] Similarly, a creditor must include as interest income a portion of the original issue discount of a debt instrument that the creditor holds even though the creditor has not received payment of that interest.[22] These, and other such provisions, have not been challenged and are universally believed to be valid.[23]

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16. 36 Stat. 11, 112-17 (1709). The corporate tax statute was adopted as § 38 of the Payne-Aldrich Tarrif Act of August 5, 1909.

17. 220 U.S. 107 (1911).

18. See Calvin H. Johnson, Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution, 7 Wm. & Mary Bill of Rights Jour. 1 (1998).

19. Eisner v. Macomber, 252 U.S. at 189.

20. Id.

21. IRC § 951(a).

22. IRC § 1272(a).

23. See also, Regs. § 1.305-3(e), ex. 7 for an illustration of the extent to which current tax law contravenes the *Macomber* decision.

In addition to the questions concerning the necessity of realization, there is also reason to question whether the view of "gain" adopted in *Macomber* is applicable today. In that case, the Supreme Court defined income as "the gain derived from capital, from labor, or from both combined."[24] That definition limited the application of the income tax in certain circumstances where it appeared unwarranted to do so. The definition was finally laid to rest by the Supreme Court itself in *Commissioner v. Glenshaw Glass Co.*,[25] in which the Court stated that the "definition" adopted in *Macomber* "was not meant to provide a touchstone to all future gross income questions."[26] Moreover, the Court's reference to "gain" in *Macomber* had less to do with gain than with realization. The "gain" that the stock dividend represented in *Macomber* was the income earned by the corporation. Contrary to the Court's view, it does not matter whether the shareholder owned her stock at the time that the corporation earned that income. If that were true, it would be unconstitutional to tax a shareholder on the receipt of cash dividends derived from corporate earnings obtained before the shareholder acquired his stock.

While the two premises discussed above are open to serious doubt, they do not pose the most interesting issues concerning the validity of section 104(a)(2). In the interest of discussing those other issues, let us assume *arguendo* that the two premises mentioned above are valid.

Insofar as the realization of gain is concerned, compensation received for an involuntary conversion of property is treated the same as is a voluntary sale of the damaged property.[27] When a taxpayer receives damages for an injury to taxpayer's property (nonhuman capital), the amount received that replaces the capital that the taxpayer is deemed to have invested in the property (i.e., its basis) is merely a substitution for the investment that the taxpayer lost because of the injury, and so is not taxable. If the amount received is greater than the amount of the taxpayer's investment (that is, greater than his basis), the taxpayer will realize income to the extent of any such surplus.[28] Whether that income will be taxed to the taxpayer depends upon whether some nonrecognition provision, such as section 1033, prevents it. Nonrecognition provisions are provided by Congress when Congress deems there to be good policy reasons for not taking realized income or loss into account at that point in time—i.e., they are deferral provisions that postpone the tax consequence of a transaction to a later date when it is deemed more

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24. Eisner v. Macomber, 252 U.S. at 207 (citations omitted).

25. 348 U.S. 426 (1955).

26. Id. at 431.

27. See, e.g., Raytheon Production Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944).

28. Id.

appropriate to take it into account. The relevant nonrecognition provision in the instant circumstance is section 1033. Section 1033 provides nonrecognition of gain from an involuntary conversion to the extent that the taxpayer reinvests the proceeds of that conversion into property that is similar or related in service or use to the damaged or destroyed property.

One question is whether the same realization of income treatment should be accorded to compensation received for an injury to human capital. Since an individual has no basis in his personal attributes (such as his limbs, eyes, mental well-being, or personal reputation), should the compensation received for damage to those personal attributes be treated as gain because there is no basis (i.e. dollar investment) that is replaced by them? Those who question the validity of the current version of section 104(a)(2) maintain that basis should not be the device for measuring gain when the "property" damaged is human capital (i.e., some personal attribute of a human being).[29] Even if basis is an appropriate standard for determining the taxation of damages for certain types of human capital, those who question the constitutionality of the current provision maintain that basis has no place in measuring gain when the injury is to a person's mental and emotional well-being.[30] They maintain that an individual's right to the psychic security of being protected from invasions of his mental or emotional well-being is part of that person's birthright, part of his personhood, and is not something that can be traded in the market or exploited commercially.[31] In any event, regardless of whether basis is an inappropriate standard for measuring gain for statutory construction purposes, it is contended that it is constitutionality impermissible to use that standard to determine whether there is income within the meaning of the Sixteen Amendment.

The constitutional attack on section 104(a)(2) proceeds along these lines. An individual who suffers mental distress from a wrongful act that also caused a physical injury is in the same position regarding the invasion of his psychic and mental well-being as is an individual who suffers mental distress from a wrongful act that did not also cause a physical injury. The taxation of compensatory payments received by the latter is therefore unequal treatment to the exclusion of compensatory damages received by the former for the very same type of injury. One ground for objecting to that inequality of treatment might invoke the Equal Protection Clause of the Constitution, but that is not a promising contention since the courts have generally refused to apply Equal Protection to income tax provisions unless there was

29. See Hubbard, supra note 5, at 761-66.
30. Id.
31. Id.

discrimination against some protected group.[32] Rather than rely on an the Equal Protection clause, the attack on the validity of the statute focuses on the interpretation of the word "income" in the Sixteenth Amendment. The contention is made that it would be unjust to construe the word "income" in that Amendment in such manner that it would permit the tax law to provide disparate treatment to persons receiving damages for injury to their personhood.[33] In both cases, where the victim suffered a physical injury and where he did not, the money that is received by a victim is merely an effort to restore that person to the status that he held before the injury took place.

The gist of the opposition to section 104(a)(2)'s requirement of a physical injury is not merely that basis has no role in measuring gain when money is received for an individual's psychic security; rather it is that such receipts lie totally outside the tax law because of their noncommercial nature. The reason for concluding that basis has no role is that the transaction is not subject to taxation since the receipt is not within the scope of the term "income" as used in the Sixteenth Amendment. While the tax law generally taxes money received for anything in which the taxpayer has no monetary investment, unless it is excluded by a Congressional Act, the detractors of section 104(a)(2) maintain that that principle is inapplicable to money received to compensate for a taxpayer's psychic security because of the noncommercial nature of human capital.

The detractors make a case for not taxing compensation received for damages to certain types of human capital. It is not a compelling case, but it is a respectable position. However, the case made is primarily one of values to be considered in adopting legislation. It goes to tax policy issues that are the subject of Congressional legislation and judicial interpretation of statutes. For the moment, at least, Congress has given greater weight to other considerations that led it to tax such compensatory payments. While the author concurs with the Congressional decision on that issue, there is no need in this piece to go into the competing considerations.

One difficulty with the detractors' thesis is that they would constitutionalize a value judgment that would better be left to the more flexible solutions that Congress and the Internal Revenue Service can provide. For many years, the Supreme Court has not sought to impose Constitutional constraints on Congress's selection among various values. The tax laws do not treat all people in seemingly similar circumstances equally. One problem with demanding equal treatment is that circumstances are not identical. The addition or deletion of certain factors can invoke competing values or can

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32. The reasons why Equal Protection arguments have generally not fared well in the income tax area is discussed later in the text.

33. See Hubbard, supra note 5.

create a more compelling case for raising one set of values over the competing ones that previously led to a different treatment. In other words, persons taxed differently may have dissimilarities of circumstance as well as similarity. By focusing on the similarities to the exclusion of the dissimilarities, there can appear to be unequal tax treatment. The weighing of those considerations is best left to Congress where changes can be made when it is deemed appropriate.

For example, the inequality on which the detractors focus is the disparity of tax treatment of mental stress damages when the victim suffered a physical injury and when he did not. But there are competing values in the physical injury case that are not present or entitled to the same weight when no physical injury occurs. The rationale for excluding any compensatory damages for personal injuries has been discussed in many articles, including several written by the author.[34] Without recapitulating all that has been said on that subject, consider the following three items that the author considers to be the most likely reasons for that exclusion. Two of the items are applicable in both physical and nonphysical injury cases. Those are: (1) that the victim's loss is of a personal attribute which is not customarily bought and sold commercially, and (2) that the victim's loss has forced the victim into a monetary replacement of the personal attribute that was lost or damaged, and that there is no substitute property in which the damages can be invested to prevent recognition of the victim's taxable gain. For many persons, neither of those considerations, taken alone, would be sufficient to provide a tax exclusion. But when a third item is added, the combination of all three of these items convinced Congress to provide an exclusion.

The third item is the distastefulness of taxing someone on compensation aimed at making him whole for a physical loss of a serious nature, and the resulting lessening of the extent to which a taxpayer is returned by the damage recovery to the status held before the injury was incurred. The third item applies especially strongly when a victim suffers a serious physical injury. It is not that there is a lack of sympathy for the plight of those who suffered only nonphysical injuries, but typically they will not be regarded with the same degree of pity as will the victim who lost a limb or was paralyzed. While individuals can disagree about the sympathy extended to victims of nonphysical injuries, the determination of the amount of weight to be given to the third item in those differing circumstances is the kind of policy judgment that Congress routinely makes and that Congress ought to make.

Why then did Congress exclude from income damages received for nonphysical injuries when a physical injury is also present? The author's

34. See, e.g., Kahn, supra note 3.

reading of the statute, especially in light of the principle established by the Supreme Court in *Commissioner v. Schleier,*[35] is that only those compensatory damages that arise as a consequence of the physical injury (as contrasted to arising from the act that caused the physical injury) are excluded. All such damages are excluded except for medical expense reimbursement where the medical expenses had previously been deducted by the victim. The latter exception is an example of a competing value leading to a different result. The principle that a double allowance should not be given for the same item[36] overrode the other considerations and led Congress to tax such recoveries.

The decision to exclude all such compensatory damages for a physical injury is far-reaching. For example, the portion of the compensatory award that represents lost wages (past and potential future wages) is excluded from income even though the wages would have been taxed if actually received. Thus, the substitute for a taxable item is nevertheless excluded from tax. Why is that so? Two reasons seem the most likely candidates.

First, the award is not actually a substitute for the lost wages. There is great difficulty at arriving at the correct amount of monetary award that approximates the personal loss that a victim has suffered. Understandably, triers of fact latch on to any demonstrable monetary loss as clear indicators of part of the victim's personal loss, since dollar figures are readily available for those items. Thus, the breakdown of the award into several items is merely an indication of the items that influenced the determination of the overall monetary figure awarded to the victim. The victim receives an award for a specified amount to represent his loss of a limb etc., and lost wages are merely an identifiable number that can be used in placing a dollar figure on the personal loss that the victim suffered.

Second, in jury cases, the damage awards are typically given as a lump sum and are not subdivided into separate parts for each element of the award (other than the separation of items of a noncompensatory nature, such as distinguishing punitive and compensatory damages). Congress may have wished to avoid the administrative difficulty of having to determine how much of each such awards was attributable to lost wages. Reducing the administrative difficulties of tax determinations is a value of importance to the tax system.

Considerations of the two types mentioned above and of other factors that have been raised would not necessarily convince everyone that damages traceable to lost profits should be excluded from income; but that decision rests on a weighing of competing values, which also requires the decision

35. 515 U.S. 323 (1995).

36. See, e.g., Regs. § 1.161-1.

maker to decide the nature of the underlying circumstances; and the resolution of those issues is properly left to the political body. Note that none of those considerations was deemed strong enough to prevent Congress from distinguishing that part of an award that provides reimbursement of previously deducted medical expenses and subjecting that part of the award to taxation. The apparent explanation is that the competing principle of not permitting double allowances overrode the other considerations. The author would not like to defend the wisdom of that distinction, which in part is inconsistent with one of the rationales suggested for the treatment of compensation for lost wages—namely, that the amount of lost wages is merely an indicator of the proper monetary figure to represent the taxpayer's personal loss. But Congress's judgments, in tax as well as in many other matters, are not always wise. Nonetheless, wisdom lies in leaving those judgments to Congress where there is flexibility for change. The administrative complexity of determining whether taxpayers who are taxed differently do or do not occupy the same status is especially difficult in the tax area where so many differences of treatment exist.

The line that Congress drew rests on the existence of a physical injury. Not all physical injuries arouse a high level of sympathy. The taxation of an award to a victim of a mildly sprained ankle or a bruise would not appear especially rapacious. On the other hand, some nonphysical injuries can arouse great sympathy. The line was drawn at physical injuries, even though it is not a perfect indicator of when high levels of sympathy exist, because it provides a bright line test that generally separates the two groups accurately. It is not a perfect line, but administrative feasibility is an important value that is the source of many such differences of treatment in the tax laws. The proper resort to bright line distinctions is another reason that the courts should not seek to impose equality of treatment on the tax law.

If the detractors' thesis were adopted by the Supreme Court it could lead to undesirable tax consequences in a variety of other circumstances. The case for unconstitutionality of taxing compensatory damages for nonphysical injuries rests on the proposition that human capital is of such a personal, noncommercial nature that a monetary substitution for it should lie outside the scope of the income tax law, and so the absence of basis is not relevant to the determination of whether it is income for constitutional purposes. The case does not rest on considerations of involuntariness of conversion or of relative degrees of sympathy since those have nothing to do with the question of whether the receipt of such damages is not income under the Sixteenth Amendment. Even the issue of inequality of treatment is not the basis of the detractors' case since its assigned role is to influence the Court to make a determination that money received for a personal attribute is not subject to the tax law. Consider some of the likely consequences of accepting that proposition.

If the tax law does not apply to money received for a victim's personal attributes because of the highly personal and noncommercial nature of those attributes, it would seem to have no application when an individual voluntarily accepts payment for the future invasion of those attributes. Consider the following hypothetical example. An author and publishing firm inform A that the author has written a book in which an experience of A's is recounted that will humiliate A and subject him to scorn. A is not a public figure, and so the publisher fears that this work may make it vulnerable to an action for invasion of A's privacy. The publisher pays A $100,000 for A's release of all claims A may have because of the publication of the book. The detractors' proposed principle would seem to apply here to prevent taxation of the $100,000, since A has effectively sold part of his right to be secure in his privacy, and (under the detractors' view) basis plays no role in determining whether the receipt was a gain for Sixteenth Amendment purposes. For statutory purposes, the voluntary commercialization of personal attributes has always been taxed even though compensation received for damage to such attributes would have been excluded,[37] and that seems the proper treatment. The taxpayer has chosen to place part of his personhood in the commercial market, and payments received thereby should be taxed.

It is possible to distinguish A's situation from that of the compensatory damage award, but that distinction is more difficult to make in a constitutional setting than in a statutory one. The great difficulty in weighing and evaluating additional factors that exist in the huge number of circumstances in which the tax law provides differential treatment may be one of the constraints on subjecting differences in tax law treatment to equal protection claims. The same considerations would likely induce the courts to refrain from giving great weight to the alleged inequality of treatment in determining whether the Sixteenth Amendment is applicable. In short, the Court should refrain from resorting to equality concepts in construing the word "income" in the Sixteenth Amendment.

In regard to the weight to be accorded inequality in constitutional interpretation, Professor Hubbard (in his article on this topic) relies heavily on the framework for constitutional construction that he attributes to Ronald Dworkin.[38] While the views of Dworkin are worthy of respect and consideration, they are not part of the Constitution. Reframing a statement of Justice Holmes in his dissent in *Lochner v. New York*, the Constitution does not enact Dworkin's theory of construction any more than it does Herbert Spencer's Social Statics.[39] In any event, whether or not, as a general rule of

37. See, e.g., Green v. Commissioner, 74 T.C. 1229, 1233 (1980).

38. See Hubbard, supra note 5.

39. 198 U.S. 45, 74-5 (1905) (Holmes J., dissenting).

construction, the obtaining of equal treatment should be taken into account as a factor influencing the construction of the Constitution, that approach, for reasons discussed above, should not apply to a construction of the Sixteenth Amendment. As Justice Holmes said in his dissent in the *Macomber*[40] case, "The known purpose of this [Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes."[41] It would be unwise to reverse more than 70 years of subsequent judicial refrain from applying the direct tax limitation issue.

Not all of the judgments that Congress made with respect to compensatory damages for physical injuries can be justified on any sensible ground. It its difficult to fathom what reason might exist for the exclusion of the interest element in awards paid out in installments over a number of years.[42] The tax law has many such distinctions. Some may be the product of political considerations or of compromises with legislators who are seeking an even more undesirable treatment. Those consequences should be acceptable in the tax law, at least constitutionally acceptable, as part of the price paid for having taxes determined by the political process.

The same considerations that led Congress to incorporate compensation for lost wages in its exclusion of all compensatory damages for physical injuries applies equally to its decision to exclude the part of the award that is attributable to nonphysical injuries that arose from a physical injury. The victim who suffered no physical injury is denied an exclusion because his plight is not deemed to be as sympathetic as that of a physically injured victim. As stated above, the taxation of damage awards for persons without physical injuries does not raise the same level of sympathy (and therefore the taxation of such victims does not raise the same level of distaste) as applies to victims of serious physical injuries. In this respect, the status of nonphysically injured victims is not the same as that of physically injured victims. So the question of the inequality of differences in tax treatment rests on a rejection of the Congressional assumption of differences in levels of sympathy and on a determination that such differences do not warrant disparate tax treatment. These are the kinds of judgments that Congress should make, and they should not be made permanent by constitutionalizing them.

40. See Eisner v. Macomber, 252 U.S. 189 (1920).
41. Id. at 220.
42. IRC § 104(a)(2).