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Finding the “Income” in “Income Tax”: A Look at Murphy v. I.R.S. and an Attempt to Pick up Pieces of Glenshaw Glass

MATTHEW J. O’CONNOR*

The income tax has made more liars out of the American people than golf has.¹

INTRODUCTION

In a 2006 opinion, Murphy v. I.R.S.,² the District of Columbia Circuit Court of Appeals (‘D.C. Circuit’) invoked a famous quote by Albert Einstein: “[t]he hardest thing in the world to understand is the income tax.”³ While the D.C. Circuit claimed its holding was simple to understand by comparison,⁴ nothing could be further from the truth, and its decision quickly made headlines among legal commentators.⁵ In Murphy, the D.C. Circuit held Section 104(a)(2) of the Internal Revenue Code (“I.R.C.”) unconstitutional as applied to Marrita Murphy’s injuries,⁶ which consisted of emotional damages with some physical symptoms.⁷ In doing so, the D.C. Circuit unnecessarily focused on the meaning of the word “income” under the Constitution, rather than limit its analysis to the tax statute. As a result, not only did the D.C. Circuit advance a definition of income at odds with current Supreme Court doctrine, but also potentially created incentives for tax resisters to pursue frivolous litigation.⁸ Although

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1. WILL ROGERS, ILLITERATE DIGEST 71–72 (1924).
2. Murphy v. I.R.S. (Murphy I), 460 F.3d 79 (D.C. Cir. 2006), rev’d, 493 F.3d 170 (D.C. Cir. 2007) (en banc). Although the D.C. Circuit has recently reheard and subsequently reversed its decision, it did so for reasons which do not affect the analysis of this Note. See infra note 9.
4. Id.
6. Murphy I, 460 F.3d at 81. Murphy sued her former employer for injuries allegedly occurring as a result of retaliatory employment actions taken against her after she alerted state authorities to environmental hazards at her jobsite. Id. See also infra Part I.A.
7. See infra notes 27–28 and accompanying text.
8. See infra note 167 and accompanying text (detailing how some fear that Murphy I may lead to increased frivolous lawsuits by tax resisters capitalizing on the distinctions that the D.C. Circuit read into the constitutional definition of income).
the D.C. Circuit reversed its decision in July 2007, it did so on different grounds from the original decision, and did not repudiate its initial reasoning in Murphy I.\footnote{9}

Section 104(a)(2) of the I.R.C. excludes damages awarded for physical injuries from taxation, but specifically does not exempt damages for non-physical injuries.\footnote{10} This distinction between physical and non-physical damages is a recent one, created by amendments to the I.R.C. in 1996.\footnote{11} The D.C. Circuit held that the drafters of the Sixteenth Amendment, which successfully created the national income tax in 1913,\footnote{12} would not have perceived awards for non-physical injuries as income, and therefore may not be reached under the income tax.\footnote{13} The D.C. Circuit further reasoned that an award for a non-physical injury, like an award for a physical injury, merely restores something that has been taken from an individual, and therefore is not a gain and hence cannot be defined as income.\footnote{14}

One of the hardest things to understand about the income tax is how to define “income,” and this may help explain why the Supreme Court has largely abandoned trying to define it with any degree of particularity. Professor Kornhauser has described the analysis of what counts as income under the Constitution as “incoherent.”\footnote{15} The Sixteenth Amendment fails to clarify this, stating only that Congress may lay taxes “on incomes, from whatever source derived.”\footnote{16} The I.R.C.’s definition of income is similarly expansive; Section 61 of the Code defines “gross income” as “all income from whatever source derived.”\footnote{17} The Supreme Court’s case law about this concept is sparse, first consisting of a narrow definition of “income” in 1920 in \textit{Eisner v. Macomber},\footnote{18} which imposed a requirement that income be completely severed from “capital” (“capital” meaning any sort of wealth which has been invested into property, thereby reducing its liquidity). The Court then seemingly abandoned this definition and

\footnote{9}{After its rehearing of this case \textit{en banc}, the D.C. Circuit held that Murphy’s damage awards were taxable, even if they are not “income” within the meaning of the Sixteenth Amendment, because of Congress’s general power to tax under Article I of the Constitution. Murphy v. I.R.S. (\textit{Murphy II}), 493 F.3d 170, 173 (D.C. Cir. 2007) (en banc). The court also relied upon an “implicit” congressional amendment of the statutory definition of income in the Internal Revenue Code. \textit{Id.} at 179–80. The court also concluded that the taxation of Murphy’s damage awards was an “indirect” tax rather than a “direct” tax and as such was constitutional. \textit{Id.} at 184–86. Because the D.C. Circuit did not reverse its initial reasoning about the true meaning of “income” under the Sixteenth Amendment, and upheld the taxation of Murphy’s damage awards while preserving a potentially narrow definition of income, \textit{id.} at 173, I argue that this Note remains relevant despite \textit{Murphy I}’s reversal.}

\footnote{10}{I.R.C. § 104(a)(2) (2000).}

\footnote{11}{The amendments were included as part of the Small Business Protection Act, Pub. L. No. 104-188, 110 Stat. 1755, 1838–39, § 1605(a) (1996).}

\footnote{12}{The Supreme Court, at the time of the amendment’s passage, had previously struck down an attempt to institute a national income tax on the grounds that it violated the Constitution’s prohibition on direct taxation without apportionment. \textit{See infra} Part II.A.}

\footnote{13}{\textit{Murphy I}, 460 F.3d 79, 89 (D.C. Cir. 2006).}

\footnote{14}{\textit{Id.} at 89–91.}


\footnote{16}{U.S. CONST. amend. XVI.}

\footnote{17}{I.R.C. § 61(a) (2000).}

\footnote{18}{252 U.S. 189 (1920).}
replaced it with a much broader conception of income in 1955 in *Commissioner of Internal Revenue v. Glenshaw Glass Co.*: "clearly realized accessions to wealth." This inclusive notion of income has survived to the present day, but the D.C. Circuit's decision threatens to undermine this settled definition and create unnecessary confusion by harking back to older and largely irrelevant precedent.

Not only did the D.C. Circuit err by resurrecting an antiquated notion of "income," but its decision is also flawed because it incorrectly analyzed materials pertaining to Section 104. Enacted shortly after the creation of the federal income tax, Section 104, like the definition of income, has had incredibly broad and narrow scopes throughout the years. The Supreme Court has restricted the scope of Section 104's exclusion in recent years, releasing three opinions that broke with established case law about Section 104's application: *United States v. Burke*, *Commissioner of Internal Revenue v. Schleier*, and *O'Gilvie v. United States*. In the last of these decisions, *O'Gilvie*, the Supreme Court evaluated three historical documents—an opinion of the Attorney General, a House Report, and a Treasury ruling—in support of its contention that Section 104 should not cover punitive damages, only damages for personal injuries. While the Supreme Court did this in an attempt to explain the intentions of the creators of Section 104's statutory tax exemption, the D.C. Circuit mistakenly used the Supreme Court's reasoning to discern the intentions of those who enacted the Sixteenth Amendment. As a result the D.C. Circuit incorrectly conflated the definition of income with the interpretation of Section 104, further skewing its definition of income away from the Supreme Court's settled definition.

Although the D.C. Circuit recently vacated *Murphy I* in July 2007, the decision still evinces confusion about how courts should define income, confusion which remains important regardless of the subsequent decision in *Murphy II*. This Note argues that, irrespective of how the D.C. Circuit revisited its opinion, the flaws in its initial ruling have created confusion about how the Supreme Court defines income and how the Court views Section 104, confusion that muddies the Supreme Court's opinion on the nature of income and that potentially inspires those who would attempt to exploit an unsettled definition of income.

This Note does not address the wisdom or validity of Section 104(a)(2)'s exclusion of non-physical injuries from tax-exempt status; it addresses only the D.C. Circuit's argument that awards for non-physical injuries do not constitute "income" under the

23. See supra note 9.
24. See infra note 167 and accompanying text.
Sixteenth Amendment. Part I recounts *Murphy I* and explains its holding. Part II details the history of the creation of the income tax and how the Supreme Court has variously defined "income" under it. Part III details the history of Section 104's personal injury exemption in its various forms throughout the decades, including its interpretation by the Treasury Department ("Treasury"), the Internal Revenue Service ("I.R.S."), and the Supreme Court, and explains why Supreme Court decisions in this area are distinguishable from the D.C. Circuit's holding. Part IV explains how the D.C. Circuit's reasoning for holding Section 104(a)(2) unconstitutional is wrong. The Note concludes by explaining why the D.C. Circuit's holding is important: because it has awakened irrelevant and unworkable definitions of "income," because it has misread current Supreme Court case law pertaining to Section 104, and because the D.C. Circuit's holding potentially opens the door to unnecessary litigation.

I. MURPHY I

A. The Facts of the Case

Marrita Murphy filed a complaint in 1994 with the Department of Labor against her employer, the New York Air National Guard, claiming that they blacklisted her and gave unfavorable references after she reported environmental hazards on an airbase. She claimed both mental and physical injuries as a result of these actions, and a physician testified that she exhibited both emotional injuries and physical symptoms manifesting stress. These symptoms included teeth grinding, shortness of breath, dizziness, and anxiety attacks. An administrative law judge found Murphy's claim valid and recommended compensatory damages of $70,000. The Department of Labor Administrative Review Board subsequently affirmed the judge's findings. Murphy included the full amount on her tax return as part of her gross income.

Murphy later sought a refund of the tax paid on the award, however, citing to Section 104(a)(2), claiming that her physical symptoms sufficed to make her award received "on account" of physical injuries. The I.R.S. disagreed, arguing that Murphy failed to adequately demonstrate that the damages were linked to a physical injury or sickness.

In response, Murphy sued the I.R.S. and the United States in the D.C. District Court to obtain a refund. After losing on summary judgment, she appealed to the D.C. Circuit Court of Appeals. She had two arguments. First, she claimed that the I.R.S. was incorrect in deciding that her award did not to compensate her for physical injuries, as

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* The district court denied the government's motion to dismiss, but upheld its motion for summary judgment, rejecting all of Murphy's claims on the merits. *Id.* at 82.
several of her injuries had physical symptoms. Second, she claimed that Section 104(a)(2) was unconstitutional as applied to her injuries because by failing to exclude damages for non-physical personal injuries, it allowed taxation of funds that were not within the meaning of “income” under the Sixteenth Amendment.

B. The D.C. Circuit’s Holding

After determining that the I.R.S. could not be a party to the action because of sovereign immunity, the D.C. Circuit then considered Murphy’s arguments. First, the court dismissed Murphy’s first argument that her award was granted on account of physical injuries. The D.C. Circuit remarked that the Supreme Court in O’Gilvie v. United States had read Section 104(a)(2) to require damages to have a strong causal connection to a personal injury in order to qualify for a tax exemption. The D.C. Circuit construed this requirement to mandate that Murphy clearly demonstrate causality between her award and a physical injury. Since the administrative law judge had granted the award expressly on account of Murphy’s emotional injuries and damage to her professional reputation, the court held that Murphy had failed to show the requisite causal link between her damages and a physical injury. Murphy had little to fear, however, as the court proceeded to her alternative argument.

Murphy’s second argument was that Section 104(a)(2) could not constitutionally exclude non-physical injuries from the tax exemption. She argued that the Supreme Court had held that a return of capital is not income, as there is no “gain” from the exchange. Murphy next insisted that damages awarded because of personal injuries replace a form of “human” capital; they merely restore something that was taken away when the person sustained the injury. To support her argument, she cited a footnote from the Supreme Court case of Commissioner v. Glenshaw Glass Co. and claimed that it purported to read the concept of “human capital” into the tax code. Murphy supplanted this contention with three sources drafted some time after the ratification of the Sixteenth Amendment—a report from the House accompanying the passage of the precursor to Section 104(a)(2), an opinion from the Attorney General, and a revenue

35. *Id.* at 82.
36. *Id.* at 82.
37. *Id.* at 82–83. This meant that, despite the names of the parties in the case, the I.R.S. could not be sued *eo nomine*; all actions would have to proceed against the “United States,” as Congress had waived sovereign immunity for the United States for tax controversies involving tax refunds under 28 U.S.C. § 1346(a)(1). *Id.*
38. *Id.* at 84.
39. *Id.* (citing O’Gilvie v. United States, 519 U.S. 79, 83 (1996)).
40. *Id.*
41. *Id.* at 85 (citing O’Gilvie, 519 U.S. at 84; Doyle v. Mitchell Bros. Co., 247 U.S. 179, 187–88 (1918)).
42. *Id.*
43. *Id.* (citing Comm’r of Internal Revenue v. Glenshaw Glass Co., 348 U.S. 426, 432 n.8 (1955)). *But see infra* note 103 and accompanying text (arguing that the footnote should be read as only distinguishing compensatory damages from punitive damages, and not as an adoption of the “human capital” theory).
ruling from the Treasury—that she argued supported the idea of the exclusion of "human capital" from income.\textsuperscript{44}

The D.C. Circuit agreed with Murphy. First, it rejected the government’s assertion that Congress has nearly unlimited discretion in defining income, holding that the Supreme Court long ago remarked that "Congress cannot make a thing income which is not so in fact."\textsuperscript{45} It then held that the case did not ultimately involve the theory of human capital that Murphy advanced; instead, the case turned on whether her damages were "income."\textsuperscript{46}

To find whether or not Murphy's award was income, the court considered itself bound by the Supreme Court and by the other U.S. circuit courts to ask if the damages were awarded for something that is not normally taxed.\textsuperscript{47} It then reasoned that Murphy's emotional well-being and good reputation were not things normally seen as income, and thus would not be taxed. Because of this, any damages awarded to compensate her for the loss of such things were not taxable income.\textsuperscript{48}

In addition to this rationale, the D.C. Circuit followed the mandate of the Supreme Court that any definition of "income" under the Sixteenth Amendment must consider the meaning of the term to those who enacted and ratified the amendment,\textsuperscript{49} and that any contemporaneous legislation should be considered in this interpretation as well.\textsuperscript{50} Although the court recognized that the legislative history surrounding Section 104(a)(2) is ambiguous,\textsuperscript{51} it held that the opinion of the Attorney General and Treasury Report cited by Murphy\textsuperscript{52} "strongly suggested" that the word "incomes" in the Sixteenth Amendment did not include damages for personal injuries.\textsuperscript{53}

Next, in support of the notion that the adopters of the Sixteenth Amendment did not distinguish between physical and non-physical injuries when they viewed compensatory damages as non-income, the court cited a vast number of state cases dating around the time of the introduction and ratification of the Sixteenth Amendment allowing compensation for non-physical injuries, including defamation and reputational injuries such as the ones Murphy suffered.\textsuperscript{54} The court also cited decisions by the Internal Revenue Service and the U.S. Board of Tax Appeals\textsuperscript{55} concluding that

\begin{footnotes}

\item[45] Id. at 87 (quoting Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925)).

\item[46] Murphy I, 460 F.3d at 88. This was the first major misstep in the D.C. Circuit's opinion. \textit{See infra} Part IV.A.

\item[47] Id. at 88 (citing O'Gilvie v. United States, 519 U.S. 79, 86 (1996); Raytheon Prod. Corp. v. Comm'r, 144 F.2d 110, 113 (1st Cir. 1944)).

\item[48] Murphy I, 460 F.3d at 88.

\item[49] Id. at 88–89 (citing Merchants' Loan and Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921)).

\item[50] Murphy I, 460 F.3d at 89. (citing Myers v. United States, 272 U.S. 52, 175 (1926)).

\item[51] Murphy I, 460 F.3d at 89.

\item[52] \textit{See supra} note 44 and accompanying text.

\item[53] Murphy I, 460 F.3d at 89. This was the second major mistake in the D.C. Circuit's opinion. \textit{See infra} Part IV.B.

\item[54] Murphy I, 460 F.3d at 89–91 & 91 n* (citing cases from thirty-four states dealing with actions for non-physical injuries).

\item[55] The U.S. Board of Tax Appeals was the original name of the U.S. Tax Court.
\end{footnotes}
personal injuries include non-physical injuries and that any awards for those injuries were not income.\textsuperscript{56} By holding that compensatory damages for personal injuries were not “income” as recognized by those who implemented the Sixteenth Amendment, and by inferring that the framers of the amendment would not perceive a difference between compensation for physical and non-physical injuries, the D.C. Circuit then held that damages awarded as a result of non-physical injuries are not income as the adopters of the Sixteenth Amendment would have understood it.\textsuperscript{57} The court held Section 104(a)(2) accordingly unconstitutional as applied to these kinds of damages, as they could not be taxed in the first place, and ordered the government to refund the taxes Murphy paid on her award.\textsuperscript{58}

The D.C. Circuit’s conclusion about the definition of income and the constitutionality of Section 104(a)(2) was ultimately incorrect, but to see this requires explanations of both the necessity of defining “income” to create a constitutionally valid tax and the Supreme Court’s efforts to do so.

II. APPORTIONMENT, THE SIXTEENTH AMENDMENT, AND DEFINING “INCOME”

\textit{A. The Pollock Cases and the Passage of the Sixteenth Amendment}

Despite occasional statements that refer to the taxing power of Congress as “plenary,”\textsuperscript{59} the Constitution does place two restrictions on Congress’s taxing power: all direct taxes must be apportioned among the various states according to their populations,\textsuperscript{60} and duties, imposts, and excises must be uniform throughout the United States.\textsuperscript{61} Apportionment, which makes state liability for a percentage of collected revenue commensurate with its percentage of the national population,\textsuperscript{62} applies only to direct taxes, which place tax liability directly upon individuals with no opportunity for avoidance.\textsuperscript{63} Indirect taxes, such as sales tax and other taxes on consumable items, allow individuals to shift tax liability to others.\textsuperscript{64} Such taxes are subject only to the uniformity requirement.\textsuperscript{65}
The Supreme Court has historically interpreted the direct/indirect tax distinction both narrowly and broadly. In *Hylton v. United States*, the Court held that a federal tax on carriages used for "conveyance" was not a direct tax that required apportionment. The Court's reasoning on the matter is striking, as the justices seemed to feel that if a tax could not be reasonably apportioned, then it could not be considered a "direct tax" under the Constitution. This holding almost seemed to make the requirement of apportioning direct taxes a nullity; any tax imposed where apportionment would be unwieldy and unreasonable would automatically escape the label of a direct tax—in fact, several of the justices used dicta implying that the only kinds of direct taxes under the Constitution were poll or real estate taxes. Later Supreme Court cases, following this doctrine, repeatedly found no instances of direct taxes.

Despite the Court's early dismissal of the direct tax clause, it revived it with a vengeance nearly a century later. In a pair of cases in 1895, the Court invalidated an initial attempt at creating a federal income tax, holding that the tax was direct. In *Pollock I*, the Court invalidated the tax as it applied to income derived from real estate, reasoning that taxing income derived from real estate is sufficiently analogous to taxing real estate itself to bring the tax within the narrow definition of a direct tax created by *Hylton*. In *Pollock II*, however, the Court, on rehearing, extended this holding, invalidating the tax as it applied to general income, "whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property . . . ." The Court held that the *Hylton* Court's decision merely concerned itself with determining whether the carriage tax was a direct tax or an

states in return for consideration of slaves as three-fifths of human beings for purposes of determining state populations, and as such should not be validated by modem American society); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) (arguing that the premise of apportionment of direct taxes, as it potentially places a greater tax burden on poorer populations, is inherently illogical).  

66. 3 U.S. (3 Dall.) 171 (1796).  
67.  Id. at 175, 179–80, 182.  
68.  See id. at 174, 181.  
69.  Poll taxes are taxes imposed directly upon each person with no other consideration.  

70.  See *Hylton*, 3 U.S. at 177. Several legal scholars have used *Hylton* as evidence of the direct tax clause's irrelevance. See Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of The Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 377–80 (2004) (responding to such claims by Professors Ackerman and Johnson).  
71.  See Jensen, *supra* note 62, at 1070 (citing Springer v. United States, 102 U.S. 586 (1880); Scholey v. Rew, 90 U.S. (8 Wall.)331 (1874); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869)).  
73.  The initial federal income tax struck down by the Court was introduced in 1894 by amendments to a tariff reform bill introduced by Congressman James Wilson, Revenue Act of 1894, ch. 349, 28 Stat. 509 (1894), and borrowed language from an earlier federal income tax instituted during the Civil War. See Richard J. Joseph, *The Origins of the American Income Tax* 51–57 (2004).  
75.  *Pollock II*, 158 U.S. at 618.
excise, and that any dicta purporting to restrict direct taxes to the categories of poll
taxes and real estate taxes should be disregarded.  The Court then ruled that a tax on income derived from personal property
is a direct tax that must be apportioned. With the tax law defeated, its proponents responded by introducing the Sixteenth Amendment.

The amendment specifically removed the apportionment requirement from taxing income, stating that Congress would have the power "to lay and collect taxes on incomes . . . without apportionment among the several States, and without regard to any census or enumeration." With the constitutional roadblock removed, Congress then passed the Revenue Act of 1913, instituting the national income tax which still exists today, albeit in modified form. Neither of these sources, however, provided any clear definition of what income was, and it was left to the Supreme Court to puzzle one out, with varying degrees of success.

B. The Supreme Court's Struggle With the Definition of Income: Eisner & Glenshaw Glass

The Supreme Court's struggle with the term "income" mirrors its experience in interpreting the direct tax clause, but in reverse; it initially defined income in a way that restricted taxation, but later revised its definition to a more general one that gave authorities greater leeway in what they could constitutionally tax. Many argue that this change is due to the inherent difficulty in determining what the framers of the Sixteenth Amendment thought "income" was.

1. Eisner v. Macomber

In Eisner v. Macomber, the Supreme Court confronted the question of whether stock dividends could be considered income and therefore subject to tax without apportionment. The Court concluded that dividends could not be considered income

76. Id. at 627.
77. Id. at 630–33. For an argument that the Pollock opinion implies that taxes on wages or profits are not direct, see Hubbard, supra note 25, at 731–32.
78. Public opposition to the Pollock decisions was widespread, with critics "characteriz[ing] the case as approaching Dred Scott in its horrible effects." Jensen, supra note 62, at 1073 (footnote omitted) (alteration added). See also JOSEPH, supra note 73, at 30–60 (outlining the historical and sociological factors creating the national desire for a federal income tax).
79. President Taft first suggested a constitutional amendment to Congress as a possibility of sidestepping the Pollock decisions. Kornhauser, supra note 15, at 11–12.
80. U.S. CONST. amend. XVI.
82. The modern Internal Revenue Code is codified within Title 26 of the United States Code.
83. 252 U.S. 189 (1920).
84. Id. at 199. Dividends had also been included in the tax code's definition of income. Revenue Act of 1916, ch. 463, 39 Stat. 756 (1916); see also Eisner, 252 U.S. at 199–200.
according to the Sixteenth Amendment and therefore any tax on them required apportionment.\textsuperscript{85}

The Court argued that, as an initial matter, Congress is not free to define income however it chooses to, since to do otherwise would essentially free it from any constitutional limitations it bore with regard to taxation.\textsuperscript{86} The Court then stated that only a definition of income "as used in common speech" is necessary.\textsuperscript{87} Justice Pitney elected to use a definition of income taken from several past Court cases evaluating the Corporation Tax Act of 1909: "the gain derived from capital, from labor, or both combined."\textsuperscript{88} Focusing on the phrase "derived from," the Court reasoned that this definition required gains to have been severed from capital in order to count as income; consequently, the Court held that dividends are merely a kind of capital that increases in value, and hence cannot be income under this definition.\textsuperscript{89}

Several justices dissented; Justice Holmes considered the purpose of the Sixteenth Amendment to have gotten "rid of nice questions as to what might be direct taxes";\textsuperscript{90} in other words, the kinds of fine distinctions advanced by the majority went against the spirit of the amendment. Justices Brandeis and Clarke stressed the equivalence of cash and stock dividends in the business world.\textsuperscript{91}

This definition of income, requiring a gain with no connection to capital, was a highly narrow one. It signaled the willingness of the Court to scrutinize the tax code to police Congress's intentions.\textsuperscript{92} It threatened to exclude huge areas of economic activity where individuals arguably received economic gains, yet would avoid income taxes because their gains still retained some connection to sources of capital.\textsuperscript{93} Also, the Court's contention that it used a "common" understanding of income is suspect—many common dictionary definitions of income at the time included economic concepts that the Court never addressed, such as the need for income to be gained on a regular basis, or for income to be rooted in economic activity.\textsuperscript{94} Regardless of the wisdom of the Court's definition, it remained in force, in theory, for several decades,\textsuperscript{95} until the Court opted for a revised and simpler definition when it decided a case in 1954.

\textsuperscript{85} Eisner, 252 U.S. at 211, 219.
\textsuperscript{86} Id. at 206.
\textsuperscript{87} Id. at 206–07.
\textsuperscript{88} Id. at 207 (citing Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918); Stratton's Independence v. Howbert, 231 U.S. 399, 415 (1913)).
\textsuperscript{89} Id. at 208–11.
\textsuperscript{90} Id. at 220 (Holmes, J., dissenting).
\textsuperscript{91} Id. at 223–24 (Brandeis & Clarke, JJ., dissenting).
\textsuperscript{92} See Kornhauser, supra note 15, at 7.
\textsuperscript{93} See, e.g., id at 8–9 (describing Justice Brandeis's view that since cash and stock dividends were functionally the same, their inclusion in the income tax was necessary to avoid subverting the spirit of the tax).
\textsuperscript{94} See id. at 9–10.
\textsuperscript{95} Not long after Eisner, the Court held in Merchant's Loan & Trust Company v. Smietanka, 255 U.S. 509, 519–20 (1921), that certain capital gains may be taxed, in seeming contradiction of Eisner's holding. See Kornhauser, supra note 15, at 15 ("The erosion of constitutional restraint began just one year after Macomber in Merchant's Loan & Trust Company v. Smietanka.") (footnote omitted).
2. Glenshaw Glass

In Commissioner of Internal Revenue v. Glenshaw Glass Co., the Court considered two cases dealing with taxation of punitive damages. Both cases involved punitive damages awarded as a result of commercial disputes. The recipients of the damages claimed that the punitive damages, as they were a "windfall" for the parties, could not constitute a "gain" derived from capital, labor, or both combined as defined by Eisner v. Macomber.

The Court disagreed, and in doing so tentatively limited Eisner's holding to its facts: "it was not meant to provide a touchstone to all future gross income questions." The Court's language indicated that Congress had a broad power to tax a wide variety of items under the banner of income: "undeniable accessions to wealth, clearly realized, and over which taxpayers have complete dominion." The Court also expressed reluctance to "restrict a clear legislative attempt to bring the taxing power to bear upon all receipts constitutionally taxable." While the Court did focus on the general meaning of the word "income," it also contrasted punitive damages with compensatory damages for personal injuries in a footnote. However, the Court did so only to clarify that punitive damages did not fall into clearly-recognized exemptions; it made reference only to a "long history of departmental rulings holding personal injury recoveries nontaxable." It did not refer to established case law holding compensatory injuries not to be income, or to any need to exclude personal injury damages because of the definition of "income" under the Sixteenth Amendment.

Far from the narrow and tax-hostile position of the Eisner Court, this opinion granted Congress broad latitude in its taxing power—there was no reiteration of Eisner's language that Congress was constrained by limits on what "income" was. Although the language of the Court allows Congress to bring its full taxing power on all receipts constitutionally taxable, such a caveat depends only on a determination that something is income. If something is income according to the Supreme Court, then it falls within the highly general definitions of income in both the Sixteenth Amendment and Section 61 of the Internal Revenue Code and is taxable without apportionment. And the Court's language relating to what it viewed as income, accessions to wealth, indicates that the Court had abandoned the type of neat economic divisions that occupied itself in Eisner.

Professor Dodge writes in his article The Story of Glenshaw Glass that two important points of the decision in Glenshaw Glass are: (1) that the tax statutes, not judicial decisions, are the ultimate source of tax law, and (2) that the definition of gross income in the tax code covers all accessions to wealth, regardless of their source, if

97. Id. at 427-29.
98. Id. at 430.
99. Id. at 431.
100. Id.
101. Id. at 432-33.
102. Id. at 432 n.8.
103. See id.
104. See supra notes 16-17 and accompanying text.
they are not specifically exempted by statute.\(^{105}\) He writes that the Court in \textit{Glenshaw Glass} implicitly rejected past doctrine that required determination of the meaning of income to consider a “common” meaning of the term in 1913, and instead viewed interpretation of the tax \textit{statutes} as the proper method of tax adjudication.\(^{106}\) Professor Kornhauser has written similarly, illustrating how the Supreme Court immediately began stepping back from its “common meaning” interpretation of income not long after \textit{Eisner}, and now largely defers to Congress and the Treasury in defining what is income.\(^{107}\)

In fact, discovering a common understanding of the word income in 1913 proves to be incredibly difficult, as there were several competing economic theories of how income should have been defined at the time.\(^{108}\) Some economists drew a sharp division between capital and income—a theory largely drawn from trust and business accounting and one which the Court in \textit{Eisner} seemed to embrace.\(^{109}\) Others saw income as a taxpayer’s net increase in wealth plus consumption.\(^{110}\) Another theory perceived income as only what a taxpayer consumes in the form of cash; investments should not be taxed until converted into cash form.\(^{111}\)

It makes sense that the Court rejected parsing through all these competing economic theories and arbitrarily picking one to serve as the Sixteenth Amendment’s drafters’ conception of income, and instead chose to abandon “the clutter and distractions inherited from the nineteenth century and the early twentieth century”\(^ {112}\) to provide a clear framework for evaluating what counts as income: accessions to wealth, clearly realized, over which the taxpayer has dominion. Gone is any lingering need to discern what was considered income at the time of the Sixteenth Amendment; the Supreme Court has backed away from such archaeological excavations.

The \textit{Murphy} court, in contradiction of this principle, held that the creators of the Sixteenth Amendment would not have seen compensatory damages as income. The \textit{Murphy} court held that several people at the time of Section 104’s creation perceived damages for non-physical injuries as a return of a sort of “human capital,”\(^ {113}\) where the plaintiff is simply put back into a pre-injury position, and that this view can also be reasonably attributed to the creators of the Sixteenth Amendment. The court’s reasoning was ultimately flawed,\(^ {114}\) both because it referenced irrelevant definitions of income and because it used Section 104 case law incorrectly. But, in order to properly perceive this latter point, we must first look at the history of Section 104, its


\(^{106}\) \textit{Id.} at 31. \textit{But see} Jensen, \textit{supra} note 62, at 1144–45 (arguing that the \textit{Glenshaw Glass} Court recognized the importance of \textit{Eisner} for distinguishing gain from capital, and hence may have recognized an implicit definition of income as: “not capital”).

\(^{107}\) Kornhauser, \textit{supra} note 15, at 14–21; \textit{see also supra} note 95.

\(^{108}\) \textit{See DODGE, supra} note 105, at 31.

\(^{109}\) \textit{See id.} at 32.

\(^{110}\) \textit{See id.} at 34.

\(^{111}\) \textit{See id.} at 35.

\(^{112}\) \textit{Id.} at 51.

\(^{113}\) \textit{See supra} notes 49–56 and accompanying text.

\(^{114}\) \textit{See infra} Part IV.
interpretation over the years, and how the Supreme Court has interpreted it. Ultimately, the D.C. Circuit placed improper weight on the sources it used to find that damages for personal injuries could not be income under an original understanding of the Sixteenth Amendment.

III. SECTION 104: TAKING SOME OF THE STING OUT OF PERSONAL INJURIES

Section 104(a)(2) of the I.R.C. states:

(a) In general.—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 prior taxable year, gross income does not include— . . .

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal physical injuries or physical sickness.

Section 104 has existed in various forms nearly as long as the federal income tax itself. Over the years since its enactment, the scope of Section 104's exemption has changed dramatically, growing from personal physical injuries, to including non-physical injuries, and eventually encompassing damages awarded from any tortious claim, including ones arising from federal anti-discrimination statutes. The Supreme Court, in a series of cases starting in 1992, radically curtailed the parameters of this last category of exemptions, and Congress responded by amending Section 104 in 1996 to exclude damages for non-physical injuries from the exemption. Although the Court held in one of these cases, O'Gilvie v. United States, that personal injuries were foremost in the minds of those who drafted Section 104, its holding had nothing to do with the constitutional definition of income, and thus the D.C. Circuit's reliance on its decision is misplaced and further complicates and deepens the flaws in the Murphy holding.

A. The Rise of Section 104: “On Account of Personal Injuries”

The Treasury Department initially considered damages received as a result of personal injuries to be taxable. However, upon request by the Secretary of the Treasury in 1918, the Attorney General advised that proceeds of an accident insurance policy should not be taxed, as they "merely take the place of capital in human ability

115. I.R.C. § 104(a)(2) (2000). The original version of this statute did not have language requiring a personal physical injury, nor did it expressly exclude punitive damages. See supra note 10 and accompanying text; infra note 129 and accompanying text.
116. See infra notes 125–29 and accompanying text;
117. See infra notes 134–39 and accompanying text;
118. See supra note 11; infra note 133 and accompanying text.
which was destroyed by the accident." 121 By this theory, a recipient of a damage award for a personal injury is simply being made whole by the award, and is not "gaining" anything. Hence, there is no real income. 122

The Treasury subsequently asked Congress to amend the tax code, and Congress responded by enacting the first version of Section 104 in 1918. 123 Congress did not indicate why it excluded personal injury damages from income. The accompanying House Report merely stated that it was doubtful under the law at the time that damages for personal injuries needed to be included in gross income. 124 Congress also failed to explain what it meant by "personal injuries" or "damages." Would damages include lost wages and punitive damages, or would it only include medical expenses and damages for pain and suffering? Would personal injuries include non-physical injuries?

The Treasury, in several early decisions, considered awards for non-physical injuries such as defamation and alienation of affection to be taxable, 125 but later reversed this stance, holding that such awards were non-taxable. 126 Subsequent rulings by the I.R.S. and other courts affirmed this thinking. 127

The range of excludable damages increased dramatically in 1960, when the Treasury issued a ruling stating that Section 104 should be construed to exclude not just damages for personal injuries, but damages based on "tort or tort type rights." 128 This expansion of the exemption not only included damages for physical injury, slander, libel, and other common torts, but some courts held that damages awarded under federal anti-discrimination statutes should be exempted as well. 129

With a wide variety of causes of action potentially covered by the exemption, courts struggled with the issues relating to which damages, either compensatory, punitive, or both, were covered by the exemption. 130 The I.R.S. understood the exemption to cover punitive as well as compensatory damages because punitive damages do arise "on account of" personal injuries, 131 but the Service later reversed its interpretation, stating

123. Cohen & Sager, supra note 120, at 452 (citing Revenue Act of 1918, Pub. L. No. 65-254, § 213(b)(6), 40 Stat 1057, 1066 (1919)).
124. Id. at 453 n.44 (citing H.R. Rep. No. 65-767, at 9–10 (1918)).
125. Id. at 453 n.45 (citing 1920-2 C.B. 71, 72; 1919-1 C.B. 65)
126. Id. at 453 (citing 1922-1 C.B. 92). For an argument that these rulings were a direct response to Eisner's formulation of a narrow definition of income, see Joseph W. Blackburn, Taxation of Personal Injury Damages: Recommendations for Reform, 56 Tenn. L. Rev. 661, 665–68 (1989).
127. Cohen & Sager, supra note 120, at 454 n.48.
128. Id. (citing Treas. Reg. § 1.104-1(c) (1960)).
129. Id. at 457.
130. Punitive damages outside the scope of Section 104's exemption had been held by the Supreme Court in Glenshaw Glass to be taxable income. See supra Part II.B.2.
that punitive damages do not compensate a plaintiff for a loss, but instead punish a defendant.\footnote{132}

### B. Restricting Section 104

Responding to the explosion of damages falling under the Section 104 exemption, both Congress and the Supreme Court began to limit Section 104's boundaries. In 1989, Congress amended Section 104 to exclude punitive damages obtained in actions not involving a personal injury.\footnote{133}

The Supreme Court continued this restriction, dramatically reducing the scope of damages qualifying for the exemption. In \textit{Burke v. United States},\footnote{134} the Court held that awards of back pay for a claim under Title VII\footnote{135} did not meet the requirements for the exemption, stating that claims under Title VII were not sufficiently "tort-like" in nature to qualify.\footnote{136} The Court then held in \textit{Commissioner of Internal Revenue v. Schleier}\footnote{137} that damages awarded for a claim under the ADEA\footnote{138} were likewise unreachable by the Section 104 exemption, and created a new test for determining tax liability of awards: the underlying cause of action must be based on tort or tort-like rights, and the damages must be awarded because of a personal injury.\footnote{139}

In 1996, the Court excluded all punitive damages, whether obtained as a result of a personal injury or not, in \textit{O'Gilvie v. United States}.\footnote{140} Looking at a case involving punitive damages awarded in a tortious wrongful death suit,\footnote{141} the Court held that the phrase "on account of personal injuries" in Section 104 required a stronger causal connection than a mere "but-for" link; simply because any punitive damages awarded in a lawsuit would not have been awarded except for an injury was not enough.\footnote{142} Looking at the history of Section 104, the Court concluded that its drafters had been motivated by the belief that restoration of personal injuries was not income, as it restored something which had been taken away and did not really "give" the recipient anything.\footnote{143} Recognizing that the language of the exemption did not limit its coverage only to compensatory injuries, the Court nevertheless held that this lack of limiting language did not support "cutting the statute totally free from its original moorings in

\begin{itemize}
  \item \footnote{132} \textit{Id.} at 121–22 (citing Rev. Rul. 84-108, 1984-2 C.B. 32).
  \item \footnote{133} The amendment was part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641, 103 Stat. 2106,2379 (1989), and added the words "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." \textit{Id.}
  \item \footnote{134} 504 U.S. 229 (1992).
  \item \footnote{135} Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (2000).
  \item \footnote{136} \textit{Burke}, 504 U.S. at 241.
  \item \footnote{137} 515 U.S. 323 (1995).
  \item \footnote{139} \textit{Schleier}, 515 U.S. at 336–37.
  \item \footnote{140} 519 U.S. 79 (1996).
  \item \footnote{141} \textit{Id.} at 81.
  \item \footnote{142} \textit{Id.} at 83.
  \item \footnote{143} \textit{Id.} at 84–85. Justice Breyer referenced three sources already cited in this Note: the original opinion of the Attorney General espousing the "human capital" theory, the response of the Treasury Department, and the House Report accompanying the precursor to Section 104. \textit{See supra} notes 120–23 and accompanying text.
\end{itemize}
victim loss." In response to these rulings, Congress amended Section 104 to exclude all punitive damages and damages from non-physical injuries in passing the Small Business Protection Act.

What is important about these Supreme Court cases is what they do not discuss: the definition of income. What these cases are engaged in is statutory construction—teasing out the proper meaning of statutes which provide exemptions from the income tax. None of these cases ever brought up the implication that any of these exemptions were constitutionally required. And while the Court in *O'Gilvie* did reference past materials discussing the "human capital" theory of excluding damages for personal injuries, it did so only in the context of discerning what the drafters of the statute may have intended the statute to mean. The Court in *O'Gilvie* made no attempt to determine whether or not punitive damages would have been thought of as "income" by the adopters of the Sixteenth Amendment when it made its decision; the *O'Gilvie* Court restricted its analysis to the materials immediately preceding the passage of Section 104. And the Court never explicitly adopted the "human capital" theory as something that should control the meaning of income in the case; in fact, it did not consider whether or not punitive damages are income as something that had any importance to the resolution of the case at all.

The decision in *Murphy v. I.R.S.* makes this kind of resolution necessary with respect to damages for personal injuries. Because the D.C. Circuit focused on the wrong question at the outset of its decision—whether damages for personal injuries are income, rather than asking if excluding non-physical injuries makes sense when looking at the original purpose of the statute—it opened up an issue largely considered closed by the legal community: the definition of income as determined by the Supreme Court.

**IV: WHERE MURPHY V. I.R.S. WENT WRONG**

There are several problems with the D.C. Circuit's ruling in *Murphy v. I.R.S.* First, at the outset, the court considered the wrong question: it framed the issue of Marrita Murphy's injuries as dealing with the definition of income under the Sixteenth Amendment, instead of how Section 104 should be interpreted. Not only does this approach differ from how the Supreme Court has dealt with this sort of issue for the past fifty years, its approach in resolving this question conflicts with the Court's decision in *Glenshaw Glass* about how all future questions relating to the definition of income should be handled, potentially creating confusion in future tax jurisprudence. Instead of asking if Murphy's damages were a "clearly realized accession to wealth," the D.C. Circuit attempted to discover if the drafters of the Sixteenth Amendment would have seen damages for non-physical injuries as "income." This approach does not square with current Court doctrine and will create confusion about a settled area of law and potentially create unnecessary litigation.

144. *O'Gilvie*, 519 U.S. at 86.
145. See supra note 11 and accompanying text.
146. In his dissent, Justice Scalia doubted that the legislators that created Section 104 would have been aware of either the Attorney General's opinion or the response of the Treasury. *O'Gilvie*, 519 U.S. at 97–99 (Scalia, J., dissenting).
147. See supra notes 105–12 and accompanying text.
Second, the D.C. Circuit gave too much weight to the materials it cited from the early twentieth century in support of its contention that the creators of the Sixteenth Amendment did not consider damages for non-physical injuries to be income. The D.C. Circuit also failed to take into account conflicting materials that call the court’s conclusion into question about the intent of the Sixteenth Amendment’s creators.

A. The Wrong Question

In its opinion, the D.C. Circuit rejected resolving the case solely based on a “human capital” theory, and instead premised its holding on one question: Would those who passed the Sixteenth Amendment have seen an award for a non-physical injury as income? Not only did framing the debate in terms of the intentions of the Congress of 1913 create problems when the circuit court attempted to discern Congress’s intent with secondary materials, it created a potentially huge conflict with Supreme Court case law, one which will continue to be important regardless of how the D.C. Circuit handles the case the second time around.

The circuit court held that finding the meaning of the word income involves relying on the common meaning of the word in the minds of those who adopted the Sixteenth Amendment. This doctrine was discarded by the Supreme Court in Glenshaw Glass, and it is telling that the circuit court cited a case from 1921 in support of its assertion. The case the D.C. Circuit cited—Merchant’s Loan & Trust Co. v. Smietanka—has been cited as evidence that the Court had begun to slowly abandon the “common” meaning of income that it advanced in Eisner. The Supreme Court has attempted to bypass the potentially confusing and conflicting definitions of income that it first wrestled with in Eisner, and the D.C. Circuit’s decision to reawaken that sort of analysis threatens to undo all post-Glenshaw Glass tax jurisprudence.

The Supreme Court itself, in O’Gilvie v. United States, when considering a question arising under Section 104, did not evaluate it by asking if those who drafted the Sixteenth Amendment would have thought of punitive damages as income or not. Instead, it restricted its analysis to interpretation of Section 104 itself—the reason for its creation and the probable motivations of the legislators that introduced it. The Court understood that it was tasked with interpreting an exemption to the income tax; those who created an exemption to the income tax must have understood that something must qualify as income and be subject to tax in order for an exemption from the tax to have any meaning.

The Court in O’Gilvie did look at some of the same material that the court in Murphy did when it ruled that punitive damages did not qualify for the Section 104 exemption. However, this does not correct the flaws in the D.C. Circuit’s opinion. First, as explained above, the Supreme Court used these materials in an analysis of the

148. See supra note 46 and accompanying text.
149. See infra Part IV.B.
150. See supra note 49 and accompanying text.
151. See supra notes 105–12 and accompanying text.
152. See supra note 95.
153. See supra notes 108–12 and accompanying text.
meaning of Section 104 itself, not as a way of understanding the intent of those who introduced the Sixteenth Amendment. Second, the conclusion arrived at by the Supreme Court in *O'Gilvie* was not nearly as speculative as the one advanced by the D.C. Circuit. The Supreme Court used these materials to show that Section 104, from its beginnings, had its roots in personal injury. The Court reasoned that to excessively broaden the scope of Section 104 to areas such as punitive damages was improper, because those who introduced Section 104 were largely concerned with personal injury. Because of the proximity of the use of historical materials to analysis of the actual statute and not the Sixteenth Amendment, and because of the relatively conservative result reached by the Supreme Court, the Court’s use of the texts is highly distinguishable from the D.C. Circuit’s use of them, and highlights further problems in the circuit’s decision.

**B. Tenuous Inferences**

The D.C. Circuit attempted to glean the definition of income as the drafters of the Sixteenth Amendment would have understood it by looking at “contemporaneous implementing legislation.” The court conceded that the House Report for the implementing legislation of Section 104 was “ambiguous and therefore unhelpful,” but then looked at the initial Attorney General’s report that recommended exemption of compensation for personal injuries and the subsequent Treasury ruling stating the same. The court held that these materials “strongly suggest[ed]” that the term “income” in the Sixteenth Amendment does not include funds received in compensation for a personal injury.

This inference is problematic when one remembers that the Treasury Department initially thought that damages for personal injuries were taxable, and changed its stance only after requesting the Attorney General to report on the matter. The problems are further compounded by the fact that the D.C. Circuit used these materials not to puzzle out the intentions of those who created Section 104, but tried to use them to discover something less “contemporaneous”—the intentions of those who drafted the Sixteenth Amendment. Given that the Treasury Department even felt the need to request the Attorney General’s assistance about the matter, and given that Congress did not take it upon itself to enact Section 104 until requested to do so by the Treasury, there seemed to be some confusion over whether personal injury damages should be considered income even at the time of Section 104’s creation in 1918. For the D.C. Circuit to use these materials to assume a universally-held opinion five years earlier—in 1913 at the Sixteenth Amendment’s adoption—about the nature of compensatory damages is too tenuous for comfort.

155. *See supra* note 146 and accompanying text.
156. *See supra* notes 140–43 and accompanying text.
157. In Justice Scalia’s view, the Court’s ruling was quite a stretch. *See supra* note 146.
158. Murphy I, 460 F.3d 79, 89 (D.C. Cir. 2006).
159. *Id*.
160. *Id*.
161. *Id* (alteration added).
162. *See supra* notes 120–23 and accompanying text.
This is doubly true for the court's conclusion about non-physical personal injury damages, when one remembers that the Treasury did not exempt such injuries until 1922. The court did not address this, instead stating only that the I.R.S. held such injuries to be exempt when it first considered the issue.

The court's admirable collection of tort cases attempting to show that those at the time of the Sixteenth Amendment saw both physical and non-physical injuries as actionable in tort does nothing to reconcile this conceptual separation between income and personal injury damages. If the D.C. Circuit could not persuasively show that those at the time of the Sixteenth Amendment felt that compensatory damages were not income, as the evidence indicates, then the fact that both kinds of injuries were actionable in tort is irrelevant. What matters is what the drafters of the Sixteenth Amendment thought "income" was, not what courts at the time thought about defamation and slander cases.

CONCLUSION

Although the D.C. Circuit has vacated its decision in Murphy I, its holding raises several issues that potentially remain very salient. First, any idea that finding the meaning of income involves discovering what the "common meaning" of the term was in 1913 is highly problematic. Although Glenshaw Glass seemingly put this notion to rest, the D.C. Circuit's revival of older Supreme Court definitions of the word threatens this consensus. Several commentators expressed trepidation that Murphy I could give ammunition to tax protestors, as it gives credibility to specious arguments about what is "income." Although the D.C. Circuit has reversed Murphy I, it has not explicitly reversed its reasoning about what constitutes "income" under the Sixteenth Amendment, and consequently has left this argument lying around, waiting for someone to pick it up.

Second, the Supreme Court has not stated whether the physical/non-physical injury distinction in Section 104 has anything to do with what or what is not income. Although the Court has analyzed Section 104 once before, it did not touch on the question of whether or not such damages are "income;" it only looked at the original intent of the statute. The D.C. Circuit held in Murphy II that the 1996 amendments to Section 104 may have implicitly changed the meaning of "income" under section 61 of the Internal Revenue Code, but did not explicitly reverse its conclusions about the applicability of Section 104 to the intent of the drafters of the Sixteenth Amendment,

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163. See supra notes 124–25 and accompanying text.
164. Murphy, 460 F.3d at 91.
165. See supra note 54 and accompanying text.
166. See supra note 9.
167. See, e.g., Christopher Bergin, Memo To The New Congress: You Have A Tax Problem, ROLL CALL, Dec. 5, 2006. (arguing that the Murphy I decision could embolden theories of tax protestors that since work replaces leisure, which is not taxable, wages from work should not be considered income); Marjorie Griffing, Will The Murphy Decision Embolden Tax Protestors?, PAYROLL MANAGER'S REP., Dec. 2006; Kathleen Pender, Snipes Hit by No-Tax Scammers, S.F. CHRON, Oct. 22, 2006, at F1. (discussing Murphy I and its implications for tax protestors in the context of actor Wesley Snipes being charged with tax evasion).
and its failure to do so leaves a gap between the Supreme Court's interpretation of Section 104 and the D.C. Circuit's interpretation.

In wrestling with the particulars of Section 104, the D.C. Circuit Court of Appeals made several missteps. It may have erred out of compassion—of wanting to prevent a plaintiff who had already suffered to bear the scrutiny of the taxman. Regardless of its motivations, the D.C. Circuit unnecessarily awakened a debate about the proper meaning of income under the Sixteenth Amendment, and the debate threatens to have ramifications that the D.C. Circuit may not have foreseen. This debate may have lost some degree of immediacy, given Murphy’s reversal, but the basic missteps made by the D.C. Circuit remain. Exemptions are exemptions, income is income, and the twain shall never meet.