

News Flash: Pay Your Federal Income Taxes; The Sixteenth Amendment Was Properly Ratified

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The idea got around years ago—and it’s still around in tax-protester circles—that the Sixteenth Amendment wasn’t properly ratified and therefore that no legal obligation exists to pay federal income taxes. Wrong! The Amendment process was sloppy, but nothing happened that calls the legitimacy of the Amendment into question, particularly since the relevant officials considered the ratification issues in 1913, when the Amendment was formally adopted.

Introduction

I’m sure that all *Journal* readers who are subject to U.S. taxation properly filed their returns (or requests for extensions) by May 17. A week or two before that deadline I received a request from a media organization asking me to respond to the idea, advanced by a viewer, that the individual income tax is invalid—and can therefore be ignored—because the Sixteenth Amendment wasn’t properly ratified and therefore isn’t part of the Constitution.¹ There was a lot of sloppiness in the ratification process, to be sure, but that theory, which has been around for a long time, was ridiculous at its inception.² And it hasn’t gained legitimacy since then. (The theory is fun, however, for some of us—hence this essay.)

The Sixteenth Amendment provides that “[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” The Amendment was a reaction to the Supreme

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¹ I’m capitalizing “Sixteenth Amendment,” but I’m also leaving the lower-case version in quotations when appropriate.

² “Theory” is too nice a term to use, but I try to be a nice guy.

Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*,³ which struck down the 1894 income tax on the ground that, at least insofar as the tax reached income from property, it was a direct tax that hadn't been apportioned among the states on the basis of population, as required by the Constitution.⁴ An apportioned income tax would have been absurd—inconsistent with the reasons why many wanted an income tax in the first place.⁵ The Sixteenth Amendment made it clear that the apportionment rule doesn't apply to "taxes on incomes," thus making an *unapportioned* income tax—the modern income tax—possible.

The idea that the Sixteenth Amendment isn't part of the Constitution is inherently ridiculous, if only because the United States has been treating the Amendment as part of the law since 1913, when the thirty-sixth state ratified it—with state legislatures voting to ratify and the national Secretary of State accepting those ratifications as valid.⁶ (Six more states ratified the amendment shortly thereafter, bringing the total to 42 states.) Indeed, the Internal Revenue Service characterizes the idea that the Amendment was improperly ratified as frivolous. The Service considers people who don't file tax returns at all or file but don't pay their federal income taxes because they think the Amendment is invalid to be as whacko (and therefore as subject to penalties)

³ 157 U.S. 429 (1895) (determining that taxation, without apportionment, of income from real estate is unconstitutional); 158 U.S. 601 (1895) (extending same principle to income from personal property and concluding that the entire 1894 income tax statute was unconstitutional).

⁴ See U.S. Const. art. I, § 2, cl. 3 (providing that "Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers"); *id.*, art. I, § 9, cl. 4 (providing that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken").

⁵ In the late nineteenth century, the income tax was supported by those who thought the consumption taxes (excises, tariffs, etc.) that had largely funded the government to that time, except during the Civil War when an income tax was in place, unfairly hit poorer Americans. Among other things, the income tax was considered a way to reach the well-to-do. But apportionment would have made that goal impossible—or nearly impossible. For example, if apportionment is required, the aggregate income tax collected from two states with equal populations would have to be equal, regardless of the income levels in the two states. That would presumably mean that the rates for a *national* income tax would have to be higher in the poorer state than in the richer one—hardly a method to increase taxes on the wealthy in an efficient way. Congress does do some absurd things, but it wouldn't enact such a tax.

⁶ The Constitution requires that three-fourths of the states, either through their legislatures or by state conventions, depending on what Congress specifies—ratify a proposed amendment for it to become law. See U.S. Const. art. V. When Congress approved the resolution that ultimately became the Sixteenth Amendment, there were 46 states in the union (assuming Ohio was really a state). During the ratification process, Arizona and New Mexico became states so that the required threshold for approval of the Amendment was 36 states (i.e., three-fourths of 48).

as those who don't pay what is often characterized as a "voluntary" tax⁷ or those who argue that they had no income because they were paid in Federal Reserve notes, not backed by gold, that aren't real money.⁸

Tax Resisters' Arguments Made Against the Income Tax

Although arguments about the legitimacy of the Sixteenth Amendment pre-date 1985,⁹ the negative arguments were set out (sort of) systematically that year in a two-volume set, *The Law That Never Was*, by tax resisters Bill Benson and Red Beckman.¹⁰ (The volumes are out of print, but copies are available—at exorbitant prices—from used book dealers. Most academic libraries seem not to have acquired the set, for justifiable intellectual reasons.) The arguments are ultimately frivolous, but some of them may seem initially plausible.

One argument made in *The Law That Never Was* that doesn't satisfy the "initially plausible" standard but that has developed a life of its own in

⁷ When the IRS says that the U.S. income-tax system is "voluntary," it doesn't mean that persons can ignore tax obligations. The poorly chosen term is intended to convey the idea that, because the Service can't audit a high percentage of returns, the system can work only if taxpayers, in general, complete their returns honestly and in good faith.

⁸ See Internal Revenue Service, "The Truth About Frivolous Tax Arguments" (Mar. 2018), available at https://www.irs.gov/pub/taxpros/frivolous_truth_march_2018.pdf. Long ago I was a clerk for a federal judge in the Tenth Circuit; the Intermountain West has a lot of tax resisters hiding in the mountains. One federal district judge, obviously exasperated by what he saw as a waste of his time, reportedly asked a person who had not paid taxes due, "If the Federal Reserve notes are valueless, why don't you just pay the tax with those notes?"

⁹ See, e.g., *U.S. v. Scott*, 521 F2d 1188, 1192 (9th Cir. 1975) (non-taxpayer "claimed that the sixteenth amendment authorizing the income tax was not properly ratified"). A quibble with the Ninth Circuit's language: The Amendment didn't "authorize" an income tax; it made it possible to have an *unapportioned* income tax.

¹⁰ See William J. Benson & Martin J. "Red" Beckman, *The Law That Never Was* (1985). Benson and Beckman were well-known in the tax resistance "community." See, e.g., *U.S. v. Benson*, 561 F3d 718 (7th Cir. 2009) (affirming injunction against Benson's marketing his Reliance Defense Package (RDF), which advertised that non-taxpayers couldn't be convicted for failing to file tax returns if they really believed there was no such obligation, and the RDF was intended to create that belief); *U.S. v. Benson*, 941 F2d 598 (7th Cir. 1991) (reversing Benson's conviction for failure to file tax returns on technical grounds—that the district court had abused its discretion in admitting all of the testimony of the government's expert witness—but Benson was again convicted on retrial and spent several years in jail); *Benson v. Hunter*, 45 P3d 444 (Okla. Civ. App. Ct., Div. 2, 2002) (affirming dismissal of Benson's suit against Oklahoma Secretary of State claiming that Oklahoma had no authority to collect state income taxes because its ratification of the Sixteenth Amendment had been invalid). A proponent of anti-Semitic conspiracy theories, Beckman had his own problems with the tax authorities, no surprise given the titles of some of his "scholarly" works. See, if you must, M.J. "Red" Beckman, *Do Unto the IRS as They Would Do Unto You!* (1982); *The IRS and the Black Robed Cover-up* (1983); see also Red Beckman, "16th amendment—To Whom it May Concern" (hope for America, Aug. 11, 2014) (setting out Beckman's history of his tax-resistance collaboration with Benson), available at <http://www.redbeckman.com/>.

tax-resister circles is that Ohio wasn't validly admitted as a state in 1803.¹¹ As a result, the argument goes, Ohio's vote for ratification shouldn't count.¹² I've been in Ohio for 38 years, and I hadn't heard that one before. (I admit to not having perused *The Law That Never Was* until writing this piece.) Apparently Congress in 1803 was supposed to have explicitly approved the Ohio constitution as part of considering Ohio's admission as a state, and it neglected to do so. Yes, approval of the Ohio constitution was implicit in the process that did occur, but there was still an oversight. Oversights happen. When that glitch was discovered in 1953, in connection with Ohio's sesquicentennial celebration,¹³ Congress passed a resolution making Ohio's admission to the Union—if in fact there was otherwise a problem—retroactive to March 1, 1803.¹⁴ That effort elicited giggling on the House and Senate floors; it didn't seem as though members of Congress were taking the process seriously.¹⁵

And they shouldn't have been serious. It was absurd for any reasonable person to conclude that Ohio wasn't a state after having been treated as one for 150 years. Since 1803 everyone had been proceeding on the assumption that Ohio was part of the union, and at some point technical defects in a process just have to be ignored. (Besides, this defect was retroactively corrected.¹⁶) Think about what not treating Ohio as a state until 1953 would mean. For one thing, it wouldn't scuttle the Sixteenth Amendment because enough other states ratified the Amendment by 1913. But it could mean, I suppose, that any presidential election the results of which depended on Ohio's electors would be retroactively invalid—we would magically have had a President Tilden without the country's (or Tilden's) being aware

¹¹ See 1 Benson & Beckman, *supra* note 10, at 326.

¹² If Ohio weren't considered a state, that would have changed the ratification calculations as well, of course. However, three-fourths of 47 states would have been 35.25, so that 36 states would still have been required for ratification.

¹³ Apparently some Ohio schoolteachers went to Washington hoping to bring home copies of historical documents in connection with the state's sesquicentennial, and not all of the required documents were available in the Library of Congress. See Tim Pawlak, "Ohio: The 48th State?" (Ohio History Connection, Mar. 15, 2018), available at <https://www.ohiohistory.org/learn/education/resource-roundup/march-2018/ohio-the-48th-state#:~:text=On%20May%2019%2C%20the%20House,to%20ignore%20the%20whole%20business.%E2%80%99>. It's a good story anyway.

¹⁴ There was also some uncertainty about the precise day of statehood in 1803. If that mattered for some reason—what that reason would have been, I have no idea—the resolution cleared up any doubt about the date.

¹⁵ See U.S. House of Representatives, "The Admission of Ohio as a State" (Apr. 7, 1953), available at <https://history.house.gov/Historical-Highlights/1951-2000/The-admission-of-Ohio-as-a-state/>.

¹⁶ Benson and Beckman disagree even with that, however. See 1 Benson & Beckman, *supra* note 10, at 327 (stating that even the 1953 process "was never completed. Ohioans should probably consider naturalization, or maybe after reading the shameful history recorded in this book, they might want to consider staying the way they are, citizens of a territory."). Of course, natural-born citizens of U.S. territories are already U.S. citizens.

of it¹⁷—or that any piece of legislation that would not have been enacted without the votes of the Ohio delegation would be retroactively invalid, or No, we can't think that way. How do you undo history? What's done is done. Life must go on. Add your own cliché.¹⁸

With regard to Oklahoma, it was claimed that the state legislature manipulated the language of the congressional resolution and in fact reversed the meaning before approving the resolution. If that's so, tax protesters posit, Oklahoma's ratification vote should also be ignored.¹⁹ Although there were some changes, albeit minor ones, in language, it's hard to see any underlying conspiracy here.²⁰

In any event, it doesn't matter whether Ohio was a state and whether Oklahoma acted in good faith for these purposes so long as enough other states—unquestionably real states—ratified the amendment.

That brings us to the rest of the claims in *The Law That Never Was*, some of which are superficially plausible. I haven't examined each state (and don't intend to), but it is a fact that the resolutions being voted on in the various states included some differences in language (for example, "incomes" was sometimes "income"); punctuation (commas versus semicolons, for example); and capitalization (or lack thereof) of words like "States."²¹ Some of those things *could* change the meaning of a document.²² But in this case there was no reason to think the differences affected the core meaning of the document or that the various state legislatures were voting on fundamentally different documents.²³

¹⁷ Samuel Tilden, not Rutherford Hayes, would have been elected in 1876. (He perhaps should have been considered the winner anyway, but that's another story.) As it was, Ohioan Hayes won the electoral college by one vote, while receiving all 22 of Ohio's electoral votes.

¹⁸ You can't unscramble the eggs. Like Aaron Judge, I put my pants on one leg at a time.

¹⁹ See 1 Benson & Beckman, *supra* note 10, at 61–67 & 327.

²⁰ I suppose it's not hard to see an underlying conspiracy, in that many do so. I mean that's it hard to see a carefully planned effort to subvert the ratification process.

²¹ See *infra* text accompanying note 38 (quoting from Easterbrook opinion). I'm not going to provide citations for each of the mistakes. It may be worth noting that capitalization practices in amendments haven't followed the style of the original Constitution for centuries.

²² Commas matter. As the signs and sweatshirts say,

LET'S EAT GRANDMA

LET'S EAT, GRANDMA

COMMAS SAVE LIVES

²³ In Illinois, the last phrase of the draft amendment voted on referred to "without regard to any census or *renumeration*," rather than "census or *enumeration*." See 1 Benson & Beckman, *supra* note 10, at 53; *infra* text accompanying note 37. That's a pretty egregious mistake. If the word means anything at all, "renumeration" obviously isn't the same as "enumeration," but this was a hiccup. In any event, it was so obvious a mistake that ignoring it was easier than would have been the case if a word with a slightly different meaning than "enumeration" had been substituted. As it was, no one's conception of the draft could possibly have been misled by what was clearly a scrivener's error.

Secretary of State Philander Knox,²⁴ who certified the ratification of the Amendment, was aware of these difficulties. The Office of the Solicitor in the State Department carefully catalogued the differences in the documents approved in the various states and noted some procedural problems as well (for example, the Kentucky legislature passed a resolution ratifying the Amendment before it received a certified copy of the congressional resolution). The Solicitor nevertheless found none of the discrepancies to be fatal, noted similar problems in the ratification documents of the Fourteenth and Fifteenth Amendments—problems that hadn't compromised the ratifications of those amendments—and recommended to Secretary Knox that he certify the Sixteenth Amendment's ratification.²⁵ Guided by the Solicitor, the Secretary did so, on February 25, 1913.

The same sort of silly argument could presumably be made, in spades, about the ratification of the Constitution itself. The draft Constitution considered in the various colonial ratification conventions wasn't emailed around the country, after all, nor was a single, unquestionably correct version electronically copied to distribute to the various colonies. How could it have been? What was passed around for consideration in each convention was the product of handwritten transcription or, if printed, handset type. Inevitably differences were going to arise. Are we therefore to conclude that the Constitution itself wasn't validly ratified? Nah-h. Again, the world has to move on. Scriveners' errors happen, and they generally don't invalidate otherwise valid enactments.

Courts' Rejections of Tax Protesters' Claims

Courts have not been friendly to the argument that the Sixteenth Amendment wasn't properly ratified. Although the Supreme Court hasn't directly addressed this issue, it has taken the validity of the Amendment for granted in several cases.²⁶ Lower federal courts and state courts addressing *The Law That Never Was* have generally either ridiculed the tax protesters' claims, noting the large body of contrary case law, or the courts have said that they

²⁴ Can we create a movement to bring that wonderful first name back? The kid would be called Phil—nothing the matter with that. (But I suppose schoolyard taunts of “Philanderer” would be inevitable, so maybe this isn't a good idea.)

²⁵ See Office of the Solicitor, Dep't of State, Memorandum re Ratification of the 16th Amendment to the Constitution of the United States (Feb. 15, 1913), available at https://constitution.org/1-Activism/tax/us-ic/ratif/memo_130215.htm; Office of the Solicitor, Dep't of State, Memorandum (Feb. 20, 1913) (containing draft certification for Secretary), available at https://constitution.org/1-Activism/tax/us-ic/ratif/memo_130220.htm.

²⁶ See, e.g., *Eisner v. Macomber*, 252 U.S. 189 (1920) (holding that the receipt of a totally proportionate stock dividend didn't give rise to income within the meaning of the Amendment).

had no authority to entertain the claims (or both).²⁷ In particular, arguments that states didn't follow their own procedures have been rejected as beyond judicial consideration. If State A officials say that the legislature has ratified a particular proposed amendment, that's likely to end any controversy—except, perhaps, in extraordinary circumstances. (Or if there is a continuing controversy, it continues among state officials, without review of the state's practices by federal courts. A federal court is likely to view a challenge to a state's meeting its own procedural requirements as a political question, not to be resolved by the judiciary.)

The best example to illustrate all of this is probably *United States v. Thomas*.²⁸ In a 1985 district court decision, the judge wrote:

Defendant's second motion is for arrest of judgment on the grounds that the Sixteenth Amendment to the Constitution was never validly ratified. This argument is based upon an alleged "fraudulent scheme" between then Secretary of State Knox and his Solicitor of the Department of State causing the Secretary to declare that the Sixteenth Amendment was ratified on February 25, 1913. This fraud allegedly occurred because the Solicitor recognized that some of the ratifying legislatures did not use exactly the same wording or punctuation as had been enacted by Congress. The Solicitor nevertheless recommended in a letter to the Secretary of State that he issue his Proclamation of Ratification despite these "errors," and he did so.^[29]

The issuance of the proclamation was an exercise of the executive powers of the Secretary of State, and the Solicitor's letter disclosing the facts can in no way be considered collusion, a fraud, or a conspiracy. . . . [T]he time for examining the surrounding circumstances and state of mind of the parties has long gone by. The Secretary exercised his authority in good faith, on advice of counsel, and the legislatures' errors were of no substance. Therefore, if we were to rule on this question, it would be adverse to the defendant.³⁰

The district court, that is, didn't think it should have to rule on the merits of the claims, but it did so anyway, just in case the appellate court (and,

²⁷ See, e.g., *Miller v. U.S.*, 868 F.2d 236, 241 (7th Cir. 1989) ("We find it hard to understand why the long and unbroken line of cases upholding the constitutionality of the sixteenth amendment generally, . . . and those specifically rejecting the argument advanced in *The Law That Never Was*, have not persuaded Miller and his compatriots to seek a more effective forum for airing their attack on the federal income tax structure."); *Mitchell v. Wisconsin Dep't of Revenue*, 392 NW2d 469, 470 (Wis. Ct. App. 1986) (concluding that the validity of the Amendment is "nonjusticiable").

²⁸ 611 F. Supp. 881 (N.D. Ill. 1985).

²⁹ See *supra* note 25 and accompanying text.

³⁰ *Thomas*, 611 F. Supp. at 883–84.

ultimately, the Supreme Court) wanted to do so. More important, it shouldn't have been necessary to get to the merits:

[I]t has long been the law of the land that the courts will not intrude into a political question such as the validity of amendments to the Constitution. In *Leser v. Garnet*,³¹ . . . Justice Brandeis, writing for a unanimous court, held that the validity of the ratification of the Nineteenth Amendment was not a justiciable issue because the certification by the various States followed by the proclamation of the Secretary of State under 5 U.S.C. § 160 was “conclusive upon the courts.”³² . . .

All of the courts which have recently considered the argument raised by defendant in his motion in arrest have ruled that the validity of the Sixteenth Amendment cannot be contested under the facts alleged by defendant. . . . Nevertheless, we have ruled on it, alternatively, because of the tendency of the Supreme Court to become involved in “political” questions since 1939.³³

That last sentence is a nice dig at the Supreme Court.

The district court's determination on the justiciability issue was affirmed by the Seventh Circuit in a lengthy opinion written by Judge Easterbrook.³⁴ Near the beginning of his opinion, the judge referred to the Sixteenth Amendment argument as “underbrush” that needed to be “clear[ed] out,”³⁵ and he provided a lot more detail about the events in 1913. I'm probably overdoing the quotations, but the following passage is worth it:

[O]ne of [Thomas's] arguments is that he did not need to file tax returns because the sixteenth amendment is not part of the constitution. It was not properly ratified, Thomas insists, repeating the argument of . . . *The Law That Never Was* (1985).³⁶ Benson and Beckman review the documents concerning the states' ratification of the sixteenth amendment and conclude that only four states ratified the sixteenth amendment; they insist that the official promulgation of that amendment by Secretary of State Knox in 1913 is therefore void.

Benson and Beckman did not discover anything; they rediscovered something that Secretary Knox considered in 1913. Thirty-eight states ratified the sixteenth amendment, and thirty-seven sent formal

³¹ 258 U.S. 130 (1922).

³² *Id.* at 137.

³³ *Thomas*, 611 F. Supp. at 884.

³⁴ *U.S. v. Thomas*, 788 F2d 1250 (7th Cir. 1986).

³⁵ *Id.* at 1253. Judge Easterbrook is a Reagan appointee, but clearing out underbrush was a specialty of President George W. Bush when he was at home on his Texas ranch.

³⁶ The books had come out shortly before the *Thomas* litigation.

instruments of ratification to the Secretary of State. (Minnesota notified the Secretary orally, and additional states ratified later; we consider only those Secretary Knox considered.) Only four instruments repeat the language of the sixteenth amendment exactly as Congress approved it. The others contain errors of diction, capitalization, punctuation, and spelling. The text Congress transmitted to the states was: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Many of the instruments neglected to capitalize “States,” and some capitalized other words instead. The instrument from Illinois had “remuneration” in place of “enumeration”;³⁷ the instrument from Missouri substituted “levy” for “lay”; the instrument from Washington had “income” not “incomes”; others made similar blunders.

Thomas insists that because the states did not approve *exactly* the same text, the amendment did not go into effect. Secretary Knox considered this argument. The Solicitor of the Department of State drew up a list of the errors in the instruments and—taking into account both the triviality of the deviations and the treatment of earlier amendments that had experienced more substantial problems—advised the Secretary that he was authorized to declare the amendment adopted. The Secretary did so.

. . . [T]he Supreme Court follows the “enrolled bill rule.” If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. . . . The principle is equally applicable to constitutional amendments. . . . Secretary Knox declared that enough states had ratified the sixteenth amendment. The Secretary’s decision is not transparently defective. We need not decide when, if ever, such a decision may be reviewed in order to know that Secretary Knox’s decision is now beyond review.³⁸

The conclusion: *The Law That Never Was* described a controversy that never was, or that at least was not subject to reconsideration by the judiciary in 1985 (or later). The issues had been validly addressed—and resolved—by the relevant officials in 1913.

That should put *The Law That Never Was* to rest (although it won’t, of course, for those inclined to tilt at windmills³⁹). I should note another

³⁷ Actually, the word used was “renumeration,” not “remuneration.” See *supra* note 23; S.J.R. No. 7, *Laws of the State of Illinois Enacted by the Forty-Sixth General Assembly* 94 (1910). Judge Easterbrook’s mistaken transcription of one word presumably doesn’t invalidate his opinion.

³⁸ *Thomas*, 788 F2d at 1253–54.

³⁹ Maybe that’s not the right phrase. The danger in relying on *The Law That Never Was* to guide one’s behavior is much greater than the danger in tilting at windmills.

reason why the arguments in *The Law That Never Was* might not matter. Most commentators think that the Sixteenth Amendment was legally unnecessary to have an unapportioned tax on the income of individuals. The Supreme Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*,⁴⁰ was, the argument goes, so clearly wrong that it shouldn't have been necessary to amend the Constitution to make an unapportioned income tax possible.⁴¹ If that's so—I disagree, but I'm in the minority on this issue—the Amendment was effectively surplusage, and it wouldn't matter whether it was validly ratified or not. The law that arguably never was would become the law that didn't need to be ratified to begin with.

Conclusion

No one should assume that he or she doesn't have to pay federal income taxes just because some folks with suspect backgrounds⁴² have claimed that the Sixteenth Amendment was improperly ratified. The Amendment is part of the Constitution and has been since 1913. What follows from that conclusion may not be clear in certain special circumstances, but there is no doubt that Congress has the power to enact an unapportioned income tax. And it has done so since 1913. Do everything legal you can to minimize your tax bill, but pay your federal income taxes due.

⁴⁰ *Supra* note 3.

⁴¹ It may have been politically necessary to amend the Constitution at the time, if there was going to be an unapportioned income tax, because Congress was unlikely to try again to enact such a tax unless it was clear that the Constitution permitted doing so. Challenging a recent Supreme Court decision with a new taxing statute, and then asking the Court to validate that new enactment, didn't seem to make political sense. See Erik M. Jensen, "Did the Sixteenth Amendment Ever Matter? Does It Matter Today?," 108 *Nw. U. L. Rev.* 799, 814 (2014). But that's not to say the Amendment was legally necessary (although I think it was).

⁴² See *supra* note 10.



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