LIVING CONSTITUTIONALISM, ORIGINALISM, AND THE SIXTEENTH AMENDMENT

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INTRODUCTION

The Supreme Court's embrace of living constitutionalism in tax jurisprudence may allow it to avoid building the tax base on constitutional quicksand.[1] In *Moore v. United States*, the Court eschewed creating a structural calamity in tax jurisprudence and applied a pragmatic type of living constitutionalism.[2] While the Court originally granted certiorari in *Moore* to address the question whether "the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states,"[3] in the opinion that followed, the majority explicitly declined to answer this question, finding instead that there was realization in this case.[4] This technical tax case could have dramatically altered the tax code, but instead uplifted living constitutionalism as a method for interpreting the Constitution. Whether the Court will expand on its use of living constitutionalism—let alone recognize *Moore* as containing living constitutionalist rationale—remains to be seen, but *Moore* provides a productive pathway forward for constitutional interpretation.

The Court's opinion in *Moore* uses a pragmatic approach combining history, textualism, and precedent with modern conditions, concerns, and consequences. This approach indicates that there is a type of living constitutionalism that can—even if rarely—garner support from the Supreme Court. We argue that *Moore* is another example that originalism's claim to objectivity has failed, and pragmatic living constitutionalism should be embraced by the Court as its paramount constitutional interpretive method. A move away from originalism and towards living constitutionalism is especially

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1. Moore v. United States, 602 U.S. 572, 651 (2024) (Thomas, J., dissenting) ("[I]f Congress invites calamity by building the tax base on constitutional quicksand," the Court does not have the power to "fashion an emergency escape."). We contend that over one hundred years of tax law was not built on quicksand, but instead that Justice Thomas's new constitutional interpretation would create a constitutional "emergency."

2. *See id.* at 597.

3. Petition for Writ of Certiorari at i, *Moore*, 602 U.S. 572 (No. 22-800) [hereinafter Moore Petition].

4. *Moore*, 602 U.S. at 598.

important in tax jurisprudence, where the statutory structure of the tax code is intricately intertwined to create a stable, coherent[5] ecosystem.

As wealth inequality increases in the United States and proposals to tax wealth gain support, opponents of wealth taxes and other taxes aimed at taxing accumulated wealth have sought a preemptive strike against these proposals.[6] In *Moore*, for example, individuals contested the constitutionality of the Mandatory Repatriation Tax (MRT), a complex international tax provision, passed as part of the Trump-era Tax Cuts and Jobs Act.[7] Their goal was to short-circuit the possibility of wealth or other taxes on capital.[8] The Moores argued that the term "incomes" in the Sixteenth Amendment only includes "realized" income, and that a tax on unrealized income is a direct tax subject to apportionment.[9] Generally, "realization" as a concept is understood as the moment when taxpayers have sufficient control over income to make taxation appropriate.[10] And because apportionment is thought to be politically impossible,[11] opponents of unrealized income taxes likely believe a determination that unrealized gains are not income under the Sixteenth Amendment would ensure that Congress could not enact such a tax.[12] While it may take some time before a wealth tax or tax on appreciated stock comes

5. We recognize that many do not see the current tax code as coherent. We use the term to mean "logically or aesthetically ordered or integrated" and not necessarily "having clarity or intelligibility." *Coherent*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/coherent [https://perma.cc/3B2L-CMVR] (last visited Jan. 17, 2025). As is natural when legislation is enacted through a democratic process, the tax code has loopholes, inconsistencies, and complexity. It is, however, a cohesive body of law that creates an ecosystem for raising revenue.

6. Such proposals include the Billionaire Minimum Income Tax Act, H.R. 6498, 118th Cong. (2023) (proposing a minimum tax on taxpayers with taxable income, including net unrealized gains, over $100 million); the Billionaires Income Tax Act, S. 3367, 118th Cong. (2023) (including tax on unrealized gains for people with net worth over $1 billion); the Ultra-Millionaire Tax Act of 2024, H.R. 7749, 118th Cong. (2024); and the Ultra-Millionaire Tax Act of 2024, S. 4017, 118th Cong. (2024) (proposing a 2% annual tax on households and trusts with net worth over $50 million).

7. *Moore*, 602 U.S. at 579–80; *see* 26 U.S.C. § 965.

8. *See* Moore Petition, *supra* note 3, at 2–3.

9. Brief for Petitioners at 1, 16, *Moore*, 602 U.S. 572 (No. 22-800).

10. *See* Helvering v. Horst, 311 U.S. 112, 116 (1940) ("[T]he rule that income is not taxable until realized has never been taken to mean that the taxpayer . . . who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor. The rule, founded on administrative convenience, is only one of postponement of the tax to the final event of enjoyment of the income . . . ."); Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991) ("[T]he concept of realization is 'founded on administrative convenience.'" (quoting *Horst*, 311 U.S. at 116)). *Eisner v. Macomber*, upon which the Moores rely, however, explained that a stock dividend was not income because it was not realized. 252 U.S. 189, 209–10 (1920). *See also* John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1, 42 (2024) (concluding that the realization requirement in *Macomber* is inconsistent with an originalist jurisprudential approach).

11. *But see* Donald B. Tobin, *Have Your Cake and Eat it Too, Using Apportionment to Preserve Congress' Tax Power*, 28 FLA. TAX REV. 438, 472–74 (2025) (outlining ways a tax could be apportioned and transfer payments or taxes could be used to offset any unfairness caused by apportionment); John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX. L. REV. 75, 81 (2022) (asserting that apportionment is possible); Brian Galle, David Gamage & Darien Shanske, *Money Moves: Taxing the Wealthy at the State Level*, 113 CAL. L. REV. 635, 654–55 (2025) (discussing alternate options including apportionment and state reforms).

12. *See Moore*, 602 U.S. at 582 (noting the "politically unpalatable" results of direct taxes).

before the Court, as Congress considers distributive justice and tax provisions that seek to tax wealth, a fight over whether realization is a constitutionally required prerequisite for taxation is coming.

In an opinion by Justice Kavanaugh, five justices avoided the constitutional question of whether "realization" was a constitutional prerequisite to taxation, holding instead that the international tax provision at issue was constitutional because there was realization present in the case.[13] The constitutional question in *Moore* was not only a disagreement about the particular tax provision at issue—or even the meaning of the Sixteenth Amendment—but also a deontological debate about interpretive theory and how to interpret constitutional text in the tax arena. The majority engaged in pragmatic analysis of the long history of similar provisions in the tax code, the concerns Congress was trying to address, and dire consequences of changing the long-standing rules of the tax code through constitutional jurisprudence.[14] Four justices signed on to opinions supporting an originalist approach.[15] Justice Thomas's dissent in *Moore* highlights the limitations of originalism as a method of constitutional interpretation, underscoring how questionable historical understandings can lead to problematic outcomes. The dissent was willing to overturn over one hundred years of tax jurisprudence that would have upended provisions in the existing tax code, and in doing so ignored significant historical evidence that calls into question the dissent's originalist analysis. The *Moore* dissent demonstrates that originalism, like living constitutionalism, can be weaponized to achieve certain ends or preferences.[16]

Part I of this article explains the tax issues at play in *Moore* and why a technical international tax provision almost led to a radical change in the tax

13. *Id.* at 583–84. There were seven justices in support of the judgment, but Justice Barrett—joined by Justice Alito—concurred only in the judgment. The concurrence indicated support for the dissent and, like the dissent, agreed that realization was a constitutional prerequisite for taxation. *Id.* at 605 (Barrett, J., concurring). Barrett and Alito concurred in the judgment only because they felt the Moores had failed to meet their burden of proof. *Id.* at 620. The decision thus highlights that there are at least four Justices who believe that realization is a constitutional prerequisite for taxation. *Id.* at 605; *id.* at 621 (Thomas, J., dissenting).

14. *Moore*, 602 U.S. at 590–97.

15. *Id.* at 605 (Barrett, J., concurring); *id.* at 622 (Thomas, J., dissenting).

16. Although not fully developed in *Moore*, the case highlights that originalism fails in its proclamation as a constraining force on judges. The record is far from clear that an originalist approach produces the result sought by Justice Thomas. In fact, a true originalist approach may have overturned *Pollock v. Farmers Home Loan & Trust Co.*, which found the income tax unconstitutional. *See* Brief of Amicus Curiae Calvin H. Johnson in Support of Respondent at 19–20, *Moore*, 602 U.S. 572 (No. 22-800); Brief of Amici Curiae Professors Akhil Reed Amar and Vikram David Amar in Support of Respondent at 1–3, *Moore*, 602 U.S. 572 (No. 22-800); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 11 (1999) (explaining the origins of the term "direct taxation" in the Constitution); *see also* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 1 (1998) (describing the Constitution's apportionment requirement for direct taxes as absurd and inequitable); Donald B. Tobin & Ellen P. Aprill, *The Taxing Question of Income: Historical Insights on the Meaning of "Income" May Preserve the Income Tax*, 84 MD. L. REV. ONLINE 1, 3 (2024), https://digitalcommons.law.umaryland.edu/endnotes/103/ [https://perma.cc/GWH5-7P8R]. *But see* Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2334 (2006).

law. Part II reviews the various forms of living constitutionalism and originalism to provide the interpretive tools necessary to understand *Moore*. Part III examines the majority opinion and explains why the majority approach contains important elements of living constitutionalism. Part IV examines the flaws of the originalist approach and explains why the Court should apply a type of pragmatic living constitutionalism when analyzing the constitutionality of tax provisions.

I. THE MEANING OF "INCOMES" IN THE SIXTEENTH AMENDMENT

The Constitution provides Congress with the "Power To lay and collect Taxes . . . for the common Defence and general Welfare of the United States . . . ."[17] This power is extremely broad and is only limited by the apportionment clause, which requires that direct taxes be apportioned among the states.[18] Prior to *Pollock v. Farmers Home Loan & Trust,* which found the income tax unconstitutional,[19] direct taxes were limited to taxes imposed directly on a person or property, like property taxes or head taxes.[20] Because apportioning a tax was extremely difficult, the determination that a tax was a direct tax was politically fatal.[21] Despite previous decisions limiting direct taxes to head taxes or property taxes, the Court in *Pollock* determined that a direct tax included not only taxes on property but also taxes on income derived from that property.[22] Thus, the Court in *Pollock* concluded that the income tax was a direct tax and unconstitutional unless apportioned among the states.[23]

The Sixteenth Amendment was ratified in response to the Court's decision in *Pollock*,[24] providing Congress with the power to "lay and collect taxes on

17. U.S. CONST. art. I, § 8, cl. 1.

18. U.S. CONST. art. I, § 2, cl. 3; *see also Moore*, 602 U.S. at 583 ("[T]axing power 'is exhaustive' . . . ." (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 12–13 (1916)). The Constitution also requires that "Duties, Imposts, and Excises . . . be uniform." U.S. CONST. art. I, § 8, cl. 1.

19. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), *superseded by* U.S. CONST. amend XVI, *as recognized in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

20. *See, e.g.*, Hylton v. United States, 3 U.S. 171, 172–73 (1796); Springer v. United States, 102 U.S. 586, 598 (1880) (suggesting that only taxes on the whole property of individuals or on their whole real or personal estates are direct taxes); *see also* Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 296 (2004) (reiterating the Constitution's requirement that direct taxes be allocated by population and discussing how enslaved populations were counted for this purpose); *see generally* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RIDE OF PROGRESSIVE TAXATION, 1877–1929 (2013) (explaining the progression from the old to modern fiscal order).

21. *Moore*, 602 U.S. at 582. *But see* Tobin, *supra* note 11, at 472–74; *see* Brooks & Gamage, *supra* note 11, at 81.

22. *Pollock*, 158 U.S. at 634–35.

23. *Id.* at 637.

24. *Moore*, 602 U.S. at 583 ("Congress and the States responded to *Pollock* by approving a new constitutional amendment. Ratified in 1913, the Sixteenth Amendment rejected *Pollock*'s conflation of (i) income from property and (ii) the property itself.").

incomes, *from whatever source derived*, without apportionment among the several States."[25]

Shortly after ratification of the Sixteenth Amendment, Congress passed the Tax Act of 1913, which included an income tax.[26] As part of the Tax Act, Congress provided that both dividends from stock and cash dividends were subject to the income tax.[27] Unlike cash dividends, where shareholders receive money, a stock dividend grants shareholders additional shares of stock instead of cash.[28] The distinction became central in *Macomber,* where the taxpayer argued that the stock dividend was not "income" under the Sixteenth Amendment.[29]

The Court in *Macomber* sought to limit Congress's taxing power by narrowing the definition of "incomes" in the Sixteenth Amendment.[30] The decision relied on several different theories, which scholars have been dissecting ever since.[31] First, the Court provided that for something to be income, it must be from capital, labor, or both.[32] This interpretation effectively confined income to categories like wages, business profits, rents, and royalties.

The Court revisited this definition in *Comm'r v. Glenshaw Glass Co.*,[33] clarifying that *Macomber* did not provide a comprehensive definition of income but merely explained why the amounts at issue did not qualify as income.[34] The Court indicated that income includes not only amounts derived from capital and labor but also other forms of gain,[35] holding that income was generally "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[36]

The second component of *Macomber* was the idea that the income had to be separated from the capital to be income.[37] In Macomber's case, the argument was that a stock dividend is just capital, and thus the distribution of a stock dividend did not separate the benefit from the underlying capital.[38] Opponents

25. U.S. CONST. amend. XVI (emphasis added).

26. *See* Underwood-Simmons Tariff Act, ch. 16, § 2, 38 Stat. 114 (1913) (re-establishing a federal income tax in the United States, eight months after the ratification of the Sixteenth Amendment).

27. *See id.*

28. *Topic no. 404, Dividends and Other Corporate Distributions*, IRS, https://www.irs.gov/taxtopics/tc404 [https://perma.cc/TPH9-JMRX] (last visited Jan. 10, 2026).

29. Eisner v. Macomber, 252 U.S. 189, 201 (1920).

30. *Id.* at 207.

31. *See, e.g.*, Alex Zhang, *Rethinking* Eisner v. Macomber*, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 183–87 (2024); Johnson, *supra* note 16, at 19–20; Ackerman, *supra* note 16, at 4–5. *But see* Jensen, *supra* note 16, at 2334.

32. *Macomber*, 252 U.S. at 207.

33. 348 U.S. 426, 430–31 (1955).

34. *Id.*

35. *Id.*

36. *Id.*

37. Zhang, *supra* note 31, at 200–01; *Macomber*, 252 U.S. at 207.

38. *Macomber*, 252 U.S. at 225.

of a wealth tax or taxation of stock appreciation invoke this principle and argue the gain in the value of stock would not be income because the increase in value has not yet been separated from the underlying capital.[39] Yet, this separation requirement discussed in *Macomber* was rejected in *Glenshaw Glass* and almost every Supreme Court case on this issue since *Macomber* was decided.[40] *Glenshaw Glass* clarifies that it is the accession to wealth, not the separation from capital, that drives whether there is income.[41]

The third component of *Macomber* was the idea that Macomber did not receive an accession to wealth when she received a stock dividend.[42] In other words, there was no income. Under this theory, because the additional shares of stock were issued to all stockholders, Macomber's underlying interest in the corporation did not change. Thus, she had no accession to wealth when the dividend was distributed. In a more common occurrence today, a stock split would not be a taxable event because the splitting of the stock and thus doubling each shareholder's shares would not change the holder's underlying interest in the company.[43]

Closely tied to the separation requirement and the lack of accession to wealth requirement was the idea that Macomber did not "realize" any gain on the transaction. The concept of "realization" was highly under-theorized at the time and still is, but it is generally thought to be the moment in time when something happens that makes taxation appropriate.[44] For instance, a clear example of a realization event is when there is a sale or exchange of stock. Accountants, however, often refer to realization when an item's value is sufficiently certain that it can be accounted for in a company's books and records.[45] Thus a specific date in time when something can be valued might be a realization event.[46]

The Moores' basic argument was that the gains obtained by the foreign-controlled corporation were not distributed to them, and therefore, they should

39. Brief for Petitioners at 23–24, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800).

40. *See, e.g.*, Helvering v. Horst, 311 U.S. 112, 116 (1940); *Glenshaw Glass Co.*, 348 U.S. at 431; Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991); *Moore*, 602 U.S. at 583–84.

41. *Glenshaw Glass Co.*, 348 U.S. at 431.

42. *Macomber*, 253 U.S. at 231.

43. *See Frequently Asked Questions Stocks (Options, Splits, Traders)*, IRS, https://www.irs.gov/faqs/capital-gains-losses-and-sale-of-home/stocks-options-splits-traders/stocks-options-splits-traders-7 [https://perma.cc/FGZ5-4GPW] (last visited Jan. 10, 2026) ("Stock splits don't create a taxable event; you merely receive more stock evidencing the same ownership interest in the corporation that issued the stock.").

44. For example, section 1001(a) defines taxable gain as the amount realized minus the adjusted basis. The mark to market rules in section 475 requires the market to market of traded securities for certain dealers and treats the last day of the year as a realization event. 26 U.S.C. § 475; *see also Horst*, 311 U.S. at 115 ("[D]ecisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him.").

45. *E.g.*, Floyd W. Windal, *The Accounting Concept of Realization*, 36 ACCT. REV. 249, 252–54 (1961).

46. *See Horst*, 311 U.S. at 115.

not be taxed on those gains.[47] They contended there was no realization event *as to them*, and that constitutionally, the word "incomes" in the Sixteenth Amendment includes only realized income.[48] In fact, in the Moores' brief, they assert that the term realized income is an oxymoron.[49]

Taking the Moores' argument to its logical conclusion, a wealth tax, or other taxes on appreciated stock, would be a direct tax because they would be a tax on property held by the taxpayer. These taxes would not be a tax on income within the meaning of the Sixteenth Amendment because there would not have been a realization event, and therefore would need to be apportioned among the states. Opponents of the wealth tax believe the apportionment requirements would doom the tax.[50]

The Court in *Moore* ignored this question, preferring to examine the specific international tax at issue and, having done so, found that income realized by the foreign-controlled corporation could be attributed to the taxpayer.[51]

The Court recognized that Congress has often not placed the onus of a tax at the entity level but instead has attributed the undistributed income to shareholders or individual owners.[52] In addition, since 1962, the tax code has provided—through what is commonly referred to as subpart F—for the taxation of shareholders of American-controlled foreign corporations on certain incomes earned by these foreign corporations.[53] The Court determined that the provision at issue in the *Moore* case was similar to subpart F and that it was constitutional to attribute the income at issue to the Moores, and the Moores could be taxed on that amount.[54] In other words, the Court concluded that there was realization in this case in that the foreign-controlled corporation realized the income.[55] The Court then concluded that Congress had the power to attribute that income of the corporation to the shareholders, in this case, the Moores.[56]

The concurrence in *Moore* found for the United States but was far more intellectually aligned with the dissent than with the majority. Under existing tax law, the taxpayer has the burden to show that the Commissioner's decision was

47. Brief for Petitioners at 14–15, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800).

48. *Id.*

49. *Id.* at 16.

50. *Id.* at 1–4; Brief Of Amici Curiae Former Attorney General Edwin Meese III and Professors Steven G. Calabresi and Gary S. Lawson Supporting Petitioners at 1–3, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800); Mark E. Berg, *The Proposed Federal Wealth Tax Would Be Unconstitutional*, BLOOMBERG TAX DAILY TAX REP., Feb. 25, 2019, at 1–6 ; Hank Adler & Madison S. Spach Jr., *The National Wealth Tax: Unconstitutional and Unworkable*, TAX NOTES TODAY (Nov. 4, 2019), https://www.taxnotes.com/tax-notes-federal/ [https://perma.cc/TM3Z-926A]; Jensen, *supra* note 16, at 2334.

51. Moore v. United States, 602 U.S. 572, 584–85 (2024).

52. *Id.* at 577.

53. *Id.* at 577–78.

54. *Id.* at 579–80.

55. *Id.* at 598.

56. *Id.* at 599–600.

incorrect.[57] At trial, the Moores conceded that subpart F *was* constitutional.[58] Because the concurrence believed that the tax at issue was similar to subpart F, the concurrence concluded that the Moores failed to meet their burden of proof.[59] The concurrence, however, was skeptical that subpart F was constitutional and implied that had the Moores not conceded this point, the concurrence might have found for the Moores.[60] The concurrence, therefore, signaled that they would be sympathetic to future arguments along these lines.[61] In fact, the concurrence specifically indicated its agreement with the dissent's assertion that the Sixteenth Amendment includes a realization requirement and that only realized income may be taxed under the Sixteenth Amendment.[62]

In reaching its conclusion, the concurrence first equates the term "derived," which is in the Sixteenth Amendment, with the word "realized," finding they refer to "the same concept" and that decisions use them "more or less interchangeably."[63] It then asserts that the "'commonly understood meaning of the term' income when the Sixteenth Amendment was ratified requires that a gain be 'realized' or 'derived'—*e.g.*, through a sale or other transaction—to be taxed without apportionment."[64]

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57. *Id.* at 620 (Barrett, J., concurring).

58. *Id.* at 619.

59. *Id.* at 618–20.

60. *Id.*

61. *See id.*

62. *Id.* at 606 ("The Sixteenth Amendment's reference to income 'derived' from any source encompasses a requirement that income, to be taxed without apportionment, must be *realized*."); *id.* at 618.

63. *Id.* at 606. Interestingly, the concurrence used dictionaries from 1778 in defining realization, not from the time surrounding the Sixteenth Amendment when the word realization was actually used. *Id.* In addition, the concurrence argues the realization concept was understood at the time of the amendment; as such, and in applying a textualist argument, the use of an alternative word—which is far from a synonym—would indicate the word should be given its specific meaning. Realization is an act meaning to convert something into money or money's worth. *See Realization*, BRITANNICA DICTIONARY ONLINE, https://www.britannica.com/dictionary/realization [perma.cc/4DP8-9DDL] (last visited Jan. 25, 2026) (defining realization as "the act of selling property in order to get money"). Under the concurrence's definition, it is the act of separating or obtaining something of value. *Moore*, 602 U.S. at 606 (Barrett, J., concurring). But derived is *not* an act. Instead, something is derived from something else. Unlike realization, derived has nothing to do with the conversion of something of value from one form to another. Instead, derived means that something is "receive[d] . . . from a specified source." *Derive*, MERRIAM WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/derive [https://perma.cc/9SVT-K2FC] (last visited Jan. 17, 2025). These definitions viewed together further indicate that being *derived* from something is not the same as something being *realized.* If anything, realization is thus a subset of derived. Something might be derived from something else without yet being realized. If the realization concept was as commonly understood as the concurrence and dissent claim, one would expect the language to read "from whatever source realized." If Congress had wanted the Sixteenth Amendment to cover only realized income, Congress easily could have used the term "realized incomes" in the Sixteenth Amendment. If the concept was as clear as the concurrence and dissent argue, then "realized incomes" would have easily clarified the scope of the Amendment.

64. *See Moore*, 602 U.S. at 607 (Barrett, J., concurring) (noting that the Court has interpreted the word income to be the "'commonly understood meaning of the term' . . . when the Sixteenth Amendment was ratified" (quoting Merchants' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 519–20 (1921))). There is nothing in the notion of the word derived, however, that requires any kind of sale or exchange. The concurrence

Justice Thomas, in his dissenting opinion, joined by Justice Gorsuch, fully embraced the Moores' argument and argued that "incomes" in the Sixteenth Amendment refers only to income realized by the taxpayer.[65] Justice Thomas applied his version of originalism, concluding that the Sixteenth Amendment created a constitutional distinction between "income" and the "source" from which the income is "derived"; therefore, he uses the Sixteenth Amendment's language—"incomes, from whatever source derived"—as limiting language rather than an expansion of what constitutes income.[66] Put another way, instead of recognizing "from whatever source" as an indication of the intent to seek a broad view of what is taxed, he claims the Sixteenth Amendment creates a distinction between "income" and "source" that "necessitates" a realization requirement.[67] Thomas thus sees the Sixteenth Amendment as a transformative event but one that limits Congress's taxing power—not one designed to expand it.

II. LIVING CONSTITUTIONALISM AND ORIGINALISM AS CONSTITUTIONAL INTERPRETIVE METHODS

Central to the ultimate question regarding the constitutional breadth of Congress's taxation power is the meaning of the direct tax clause, the definition of a direct tax, and the meaning of the Sixteenth Amendment. In this article, we argue that living constitutionalism is a better interpretive method than originalism for answering constitutional questions and is a particularly appropriate method when interpreting tax provisions in the Constitution. This section explains the different schools of thought promoted by originalists and living constitutionalists. This review is not intended to be a comprehensive analysis of originalism or living constitutionalism but is instead designed to provide background to understand why *Moore* represents a type of living constitutionalism and why we believe this type of constitutional analysis can and should garner support of a majority of the Supreme Court.

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made that leap to tie income, realization, and derivation into one concept. *Id.* If Congress had wanted the Sixteenth Amendment to cover only realized income, Congress easily could have used the term "realized incomes" in the Sixteenth Amendment. If the concept was as clear as the concurrence and dissent argue, then "realized incomes" would have easily clarified the scope of the Amendment.

65. *Id.* at 621 (Thomas, J., dissenting).

66. *Id.*; *see* U.S. CONST. amend. XVI.

67. *Moore*, 602 U.S. at 622 (Thomas, J., dissenting). We contend that Thomas applied his stated version of originalism incorrectly and selectively applied the history behind the Sixteenth Amendment. As we will show in Part III, there is a very strong case that originalism properly applied would lead to a broad definition of income and no realization requirement. We contend that the fact that there was a strong case for an originalist application that would have sustained the tax—and a complete absence of any real analysis of those factors—is another indication that originalism is being applied in a result-oriented manner and fails its own objectivity test.

A. Originalism: A Brief Overview of its Origin and Transformation

Understood broadly, originalism is a theory of interpretation resting on the premise that the Constitution's meaning was "fixed" at the time of ratification, and that the original public meaning of the Constitution's text takes priority over other considerations (tradition, precedent, contemporary concerns, moral judgments, etc.).[68] It began as a reaction to the Warren Court's living constitutionalism,[69] although some scholars argue that it is better understood specifically as a response to *Brown v. Board of Education*.[70]

The first iteration of originalism—original-intent originalism—largely focused on the intent and understanding of the founders.[71] When interpreting the Constitution, an original-intent originalist would primarily look at what the drafters themselves thought they were enacting or, at least, what the founders themselves would have understood the words to mean.[72] Early supporters of

68. *See, e.g.*, Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1674 n.13 (2018) (writing that public meaning originalism is the dominant approach within originalist thought). Professor Lawrence Solum argues that what unites originalists is a shared belief in the Fixation Thesis and Constraint Principle. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6 (2015) ("Contemporary originalism is a family of constitutional theories, united by two core ideas, fixation and constraint.").

69. *See* Sunstein, *supra* note 68, at 1673–74 ("Whether right or wrong, originalism served as a foundation for an objection to the Warren Court . . . ."); James E. Fleming, *Are We All Originalist Now? I Hope Not!*, 71 TEX. L. REV. 1785, 1788 (2013) ("The old originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court (and early Burger Court.))"; *cf.* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 92 (2013) ("The Warren Court was often accused of ignoring the original meaning of the Constitution.").

70. *See* Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021) ("[T]he modern GOP's constitutional 'originalism' grew directly out of resistance to *Brown*."); *cf.* JACK BALKIN, MEMORY AND AUTHORITY: THE USE OF HISTORY IN CONSTITUTIONAL INTERPRETATION 114 (2024) ("Early originalists did not think that *Brown v. Board of Education* was consistent with originalism, and indeed, some racial conservatives turned to originalism because they believed that it showed that *Brown* was illegitimate."); MADIBA K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK 23 (2024) ("Prominent political conservatives spoke out against *Brown*'s methodology and outcome as illegitimate."). *But see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 76 (1990).

71. *See* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 8 (2011) ("The founders of the modern originalist movement characteristically maintained that constitutional interpretation should reflect *the intent of the Framers*."); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 711 (2011) ("The early originalists urged fidelity to the Framers' original intent."); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

72. What makes originalism distinct is that it prioritizes original intent or original meaning over other forms of interpretation. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (noting that originalists treat original intent as "authoritative" for purposes of constitutional interpretation). Many non-originalists, including living constitutionalists, have incorporated historical intent to supplement their interpretation as part of a larger interpretive balancing approach; as such, the debate over interpretation is not *always* about the relevancy of original meaning; it can also be about the weight or priority given to it. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1988) ("Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation."); STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOOSE PRAGMATISM, NOT TEXTUALISM 128 (2024) ("I do not say 'never' look to history. Often it is a useful tool.")

originalism argued that original-intent originalism would be constraining on judges.[73] Originalists similarly argued that originalism was normatively better aligned with democratic principles as it respected the "democratic moment" of the founding.[74]

Problems with original-intent originalism became immediately apparent.[75] To start, the founders often disagreed with each other.[76] In such cases, it is not clear which founder an originalist is supposed to prioritize for interpretation.[77] Further, many provisions were left intentionally broad so that the Constitution could garner support for ratification.[78] It is difficult to discern the intention of the framers to interpret the Constitution when their intention was to postpone major conflict on the issue until after ratification. Even if the founders' intent was apparent, some originalists might challenge the democratic legitimacy of original-intent originalism. They could argue that those who ratified the Constitution would have had no way of knowing what the founders' intent was because the ratifiers only had the text of the proposed document.[79] Many originalists understood the difficulty with original-intent originalism.[80] As such, the originalist movement has moved away from the founders' original intent, at

73. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2228 (2017) (describing how originalism can act as both an internal and external constraint on judges.).

74. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989); Thomas Bettge, *Marbury in the Vanishing Cabinet: Evaluating Originalism in the Light of Judicial Review's Uncertain Origins*, 55 WILLAMETTE L. REV. 1, 23 (2018); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1627 (2013) ("Originalists have traditionally based the normative case for originalism primarily on principles of popular sovereignty: the Constitution owes its legitimacy as higher law to the fact that it was ratified by the American people through a supermajoritarian process.").

75. *See* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation,* 103 NW. U. L. REV. 703, 703 (2009) ("A counterattack by the far more numerous academic proponents of an expansive method of judicial review challenged the practicability, even the coherence, of any attempt to recover those original intentions.").

76. *See generally* Alan Taylor, *Our Feuding Founding Fathers*, N.Y. TIMES (Oct. 17, 2016), https://www.nytimes.com/2016/10/17/opinion/our-feuding-founding-fathers.html [https://perma.cc/36RC-BXMQ] (describing how, because the founders clashed often on many issues, it is sometimes unclear to glean what their intentions were).

77. *See, e.g.*, CROSS, *supra* note 69, at 170.

78. *See* Ackerman, *supra* note 16, at 4 (explaining how constitutional provisions regarding taxes, for instance, were born out of "political expediency" rather than any principle).

79. *See* Kay, *supra* note 75, at 706.

80. *See* Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 759 (2021) ("These criticisms had teeth, and even Bork himself came to reject original intent originalism, saying no 'even moderately sophisticated originalist' holds that interpretative weight should be given the subjective intent of the Framers.") (citing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 218 (1990)); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 46 (1999).

least in theory.[81] Modern originalist discussions still reference original intent,[82] but it often plays a supplemental role to the now favored public meaning originalist theory.[83]

Public meaning originalism[84] is the dominant form of originalism embraced among sympathetic jurists today.[85] This originalism is defined by its belief that the original public understanding of the text is the best approach to assessing original meaning.[86] That is, interpreters should care less about what James Madison personally thought and instead prioritize what the public ratifiers, citizenry, or press would have "objectively" understood Madison's words to mean.[87] Originalists can look at founding-era dictionaries, literary debates, and early court decisions to try to decipher how the public understood the language of disputed constitutional provisions.[88] As contemporary originalists Randy Barnett and Evan Bernick frame it: "Most modern originalists now ask . . . what *publicly available* concepts a competent user of the English language would have associated" with a particular phrase.[89]

Constraint was still a major priority for public meaning originalists.[90] Justice Scalia argued that originalism was the "lesser evil" in that it constrained "judicial overreach."[91] Indeed, advocates of originalism continue to argue that its ability

81. *See* Kay, *supra* note 75, at 703; Eggert, *supra* note 80, at 759 ("Some originalists then shifted their focus to the meaning of the Constitution held by the ratifiers instead.").

82. *See* Kay, *supra* note 75, at 704; Smith, *supra* note 71, at 713 ("[T]here are still prominent originalists who closely identify with the old originalism . . . ."); Scott A. Boykin, *Original-Intent Originalism: A Reformulation and Defense*, 60 WASHBURN L.J. 245, 247 (2021).

83. *See* Kay, *supra* note 75, at 704. Many argue that, despite the flaws and related scholarly evolution, originalists often fall back to original-intent originalism to this day. *See* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1429 (2013); Eggert, *supra* note 80, at 762.

84. Some scholars combine the terms "original understanding originalism" and "public meaning originalism" interchangeably while others view these theories as distinct. To the extent they are distinct, original understanding originalism would look for the subjective intent of the ratifiers while public meaning originalism would look to an objective public meaning. *See* Eggert, *supra* note 80, at 761.

85. *See, e.g.*, Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 55 (2020).

86. *Id.*

87. *See* Eggert, *supra* note 80, at 761 ("Original public understanding originalism therefore tries to step away from the subjective meaning that those involved in the process may have intended and instead turns to a supposedly objective meaning to be gleaned from all sorts [of] documents from the time."); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 5 (2021).

88. *See* BORK, *supra* note 70, at 144–45.

89. *See* BARNETT & BERNICK, *supra* note 87.

90. *See* Quentin Fisher, *Articulating Our Law: Some Remarks on Baude and Sachs*, 25 U. PA. J. CONST. L. 688, 691 (2023) (explaining that early originalists were "principally concerned with curbing judicial subjectivity"); Smith, *supra* note 71, at 713 (explaining that there is still a debate about the role of judicial constraint among modern originalists).

91. *See* Scalia, *supra* note 74, at 862; Baude, *supra* note 73, at 2213 ("One important feature of Scalia's particular arguments for originalism was constraint—the idea that originalism was centrally a way, the best way, to constrain judicial decision-making, whereas nonoriginalist theories would essentially license judges to make up constitutional law as they went along.").

to impose meaningful constraints is one of its major virtues.[92] Consider Professor Peter Smith's argument that "[a]t bottom, originalists have advanced their claims about neutrality and objectivity, and their claim about constraint, to underscore that originalism is uniquely legitimate—and thus fundamentally different—from non-originalism."[93] However, the claim that originalism constrained judges has been subject to scholarly criticism for decades.[94]

Originalism continues to be articulated as a theory of constraint. Originalists argue constraint and predictability are the most important interpretive values, and thus we should adopt originalism.[95] Yet, the criticism that originalism fails to live up to its constraining values—and worse, hides subjectivity behind a wall of objectivity—has considerable teeth. Thus, hyper-modern originalists, mostly in the academy, began to adopt what Professor Bayer referred to as "deontological originalism."[96] Deontological originalists argue that originalism should be applied simply because it is the normatively correct way to understand that law. Professor William Baude, an originalist scholar, explains that: "[M]any modern originalists have tended to deemphasize the importance of constraining judges, relying instead on other arguments—that originalism is normatively desirable for other reasons, that it is an account of the true meaning of the constitutional text, or that it is required by our law."[97] Modern originalist Professor Keith Whittington agrees, arguing "[t]he primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."[98] For deontological

92. *See, e.g.*, Jason Altabet, Comment, TransUnion v. Ramirez*: Levels of Generality and Originalist Analogies*, 45 HARV. J.L. & PUB. POL'Y 1077, 1078 (2022) (noting that "[o]riginalism purports to be a formalist, discretion-limiting, method of constitutional interpretation" in the context of an analysis of the Court's 2021 *TransUnion v. Ramirez* opinion); Smith, *supra* note 71, at 730 ("Much of the force of the case for originalism has traditionally derived from its claims to neutrality and objectivity . . . .").

93. Smith, *supra* note 71, at 731.

94. *See* CROSS, *supra* note 69, at 190 (criticizing originalism as a doctrine "selective[ly]" invoked by Supreme Court justices to reach their preferred decisions); *see* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022) (arguing that originalism has problems in various areas, such as incoherency or its modern application); Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401; Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1420–21 (2009); Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 325–27 (2009).

95. *See* Altabet, *supra* note 92, at 1078.

96. *See* Peter Brandon Bayer, *Deontological Originalism: Moral Truth, Liberty, and, Constitutional Due Process: Part I - Originalism and Deontology*, 43 T. MARSHALL L. REV. 1, 1 (2017); Baude, *supra* note 73, at 2214 ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges."); Fleming, *supra* note 69, at 1785–86 ("Worse yet, [a broad view of originalism] may presuppose that we all have come around to Justice Antonin Scalia's and Robert Bork's ways of thinking, without conceding that many versions of originalism themselves have been moving targets that have moved considerably toward the positions of their critics.").

97. Baude, *supra* note 73, at 2215; *see* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 19–21 (2013); *see also* Whittington, *supra* note 72, at 602 (illustrating that modern originalists are promoting arguments other than judicial restraint).

98. Whittington, *supra* note 72, at 609.

originalists, criticism of the Court's inconsistent application of originalism does not impugn the worth of originalism at all.[99]

B. Living Constitutionalism: A Brief Overview of its Origin and Transformation

Living constitutionalism is a broad descriptor that encompasses many constitutional approaches. Put simply, living constitutionalism is a school of interpretation[100] that argues that the Constitution's meaning should be construed in a manner that "evolves with the values and contexts of contemporary society."[101] Professor David Strauss, one of the preeminent scholars of living constitutionalism, defines a living constitution as "one that evolves, changes over time, and adapts to new circumstances, without being formally amended."[102] Professor Jack Balkin understands living constitutionalism as the "view that we must interpret the Constitution in accordance with changing times and circumstances. As the nation grows and changes, so too does the practical meaning of the Constitution."[103]

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99. *See, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 778, 778 (2022).

100. There is a current debate amongst scholars as to whether living constitutionalism is an interpretive theory of which, for instance, pragmatism is a tool or whether pragmatism is the interpretive theory that falls into a broad theme of living constitutionalism. We agree that living constitutionalism can be understood as a thematic understanding of construction, but we also argue that living constitutionalism is a useful interpretive tool for helping judges decide what to do. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 10 (1998) ("'Living constitutionalism,' . . . is the practice of interpreting the Constitution, usually in a nonhistorical way, to meet the needs of the present."); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 315 (2008) (calling originalism and living constitutionalism "general methods of constitutional interpretation"); *cf.* Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221, 224 (2022) ("[U]nderstanding . . . how the Warren Court utilized living constitutionalism will allow new judges and scholars to develop an alternative to originalism."). *But see* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009) ("[L]iving constitutionalism, properly understood, implies something different from what most advocates and critics of living constitutionalism have assumed . . . [I]t is not a theory of constitutional interpretation . . . but a theory of constitutional construction . . . ."). Indeed, *Moore* can be an example of how living constitutionalism can be used as an interpretive theory. After all, a judge should not massively undermine our tax structure—a structure that necessarily looks different than it would have at the founding. Our financial systems, and the government services our taxes need to support, have evolved. Enter living constitutionalism, which uses various tools—such as a common law constitutionalism—to ascertain how the Constitution has evolved, and what the text means in light of such evolution. But just because living constitutionalism has many tools in its toolbox does not mean it is not an interpretative theory; rather, the fact that the Constitution evolves is that driving force. This concept is similar to how originalism—also an interpretive theory—has various tools and approaches to ascertaining the meaning of text: original meaning, original intent, and reconstruction originalism, amongst others. For our purposes, however, the question of whether living constitutionalism is itself an interpretive theory is not particularly important to our conclusion. It is, at the very least, a broad descriptor of various tools used by the Supreme Court in *Moore*.

101. *See* Tobin, *supra* note 100, at 223; *see also* Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577, 631 (2015) ("Contextualism rejects strict construction of the Constitution in favor of a more nuanced and dynamic view of the Constitution as a 'living document' that interacts with and responds to the context in which any individual constitutional question arises.").

102. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010).

103. BALKIN, *supra* note 70, at 65–66.

The Warren Court is known for its use of living constitutionalism.[104] Indeed, living constitutionalism brought with it many important twentieth century opinions such as *Brown v. Board of Education* and *Griswold v. Connecticut*.[105] Like originalism, living constitutionalist theory has transformed and multiplied to the point that it encompasses a large spectrum of approaches. This review is not intended to be thorough; rather, it explains major themes of living constitutionalism that will be pertinent during our analysis of the Sixteenth Amendment. Furthermore, while we will focus on the evolutionary components of living constitutional theory, it is important to note that almost all living constitutionalists believe that the text and history of the Constitution matter.[106] Living constitutionalists differ from originalists in the *weight and priority* given to the original public meaning as compared with other interpretive considerations.[107]

1. Contemporary Ratification as a Means of Interpreting the Constitution

Contemporary ratification is a form of living constitutionalism championed by Justices William Brennan and Thurgood Marshall, and it stands for the idea that post-ratification events continue to influence, adapt, and ultimately ratify new understandings and applications into our Constitution.[108] While not directly relevant to the majority opinion in *Moore*, this approach provides context as to why pragmatic or common law constitutionalism is both necessary and legitimate. In Brennan's article on contemporary ratification, Brennan writes:

> [T]he ultimate question must be: What do the words of the text mean in our time? . . . Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.[109]

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104. *See generally* Tobin, *supra* note 100 (discussing the Warren Court's application of living constitutionalism at length). Of course, certain forms of living constitutionalism had been practiced long before, but they were not conceptualized in the same way as modern living constitutionalism. *See* Friedman & Smith, *supra* note 100, at 4.

105. 347 U.S. 483 (1954); 381 U.S. 479 (1965).

106. *See* Farber, *supra* note 72; BREYER, *supra* note 72; *cf.* BALKIN, *supra* note 70, at 3 (highlighting the different ways constitutionalists consider the history of the Constitution).

107. *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 706 (2024) (Sotomayor, J., concurring) ("History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.").

108. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4–5 (1987) (emphasizing the Constitution's original defects and the "momentous events" of Reconstruction, amendments, and later struggles that transformed its meaning and application over time); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

109. Brennan, *supra* note 108, at 438.

As Justice Brennan recognized, the United States has not always lived up to its grand aspirations.[110] Indeed, in many respects, including the Taxing Clause, slavery lurked behind the drafting of the notable passages. Justice Thurgood Marshall—a living constitutionalist and the first Black American on the Court—wrote plainly: "On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three–fifths each. Women did not gain the right to vote for over a hundred and thirty years."[111] Marshall found legitimacy in the evolution of constitutional meaning.[112]

As such, both Brennan and Marshall decried an originalist approach that "expresses antipathy to claims of the minority to rights against the majority."[113] Brennan noted that originalism ignores "social progress and eschew[s] adaptation of overarching principles to changes of social circumstance." Marshall takes perhaps an even more critical approach to the founding era, arguing that he did not "find the wisdom, foresight, and sense of justice

110. *See, e.g.*, Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 522 (2011) (explaining that originalism speaks in a "foreign tongue" to many Black and Brown Americans as it does not allow for legitimate dissent from history); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 630–31 (2016) ("[T]he Framers held certain values that are abhorrent to most Americans today. Most of them accepted that human beings could be held as property, and they believed that African Americans and Native Americans were inferior in various ways to Caucasians. None of them thought that women should enjoy full political or civil rights. Most of them doubted that poor people should be permitted to vote or hold political office."); Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 170 (2021) ("Most of them enslaved Black people and preferred rule by a 'natural aristocracy' of property-owning White men. The governments they established after independence reflected their aristocratic preferences."); Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 90 ("The Constitution was written from the perspective of white citizens with only their interests in mind."); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Race, Originalism, and Skepticism*, 25 U. PA. J. CONST. L. 1241, 1246 (2024) ("[T]o the extent that originalism defines original public meaning as the prevailing or dominant public meaning—as opposed to any understanding that anyone alive at the time had—there is no original public meaning of race consistent with our current understanding of racial equality."); Deepa Das Acevedo, *The Past as a Colonialist Resource*, 73 DUKE L.J. 1373, 1374 (2024) ("Today, originalist jurisprudence intentionally reinforces the political oppression of historically marginalized groups within the United States by magnifying the views of their historical oppressors."); Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 432 (2014) ("[The founders] did not simply forget about the ladies; they specifically and intentionally determined to exclude them and to confirm men's tyrannical power."); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 307 (2023) ("The drafters and ratifiers did not understand women or people of color to be full members of the polity—indeed, we were not understood to be fully human, at least in the sense that white men capable of exercising political, legal, and civil rights were deemed to be.").

111. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

112. *Id.* at 1341 ("We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making."). Recently, courts and judges have increased their recognition of the difficulties of applying history from eras rife with discrimination. *See, e.g.*, *Rahimi*, 602 U.S. at 705 (2024) (Sotomayor, J., concurring).

113. Brennan, *supra* note 109, at 436; Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 14 (Paul G. Cassell ed., 1986).

exhibited by the Framers particularly profound."[114] Indeed, Marshall argues that they created a slave document with repercussions even spanning well into modernity.[115] It logically follows that such a document requires evolution for it to have democratic legitimacy. [116]

2. Common Law Living Constitutionalism as an Interpretive Method

Common law living constitutionalism is a theory of interpretation championed by Professor David Strauss.[117] In his book, *The Living Constitution*, Strauss recognizes both the appeals and problems of living constitutionalism.[118] The Constitution must be able to evolve over time but is also a written Constitution that aims to establish common ground and narrow the area of societal disagreement. In interpreting the Constitution, judges should not implement their own preferences with little constraint. Strauss' solution is our common law tradition.[119] He argues we have been using common law to get out of this paradox for decades.[120] Strauss insists that the Constitution is a common law document, and thus, interpretation can go beyond the text to

114. Marshall, *supra* note 111, at 1338.

115. *See id.* at 1338–39.

116. *See* Greene, *Originalism's Race Problem*, *supra* note 110, at 518–19 ("It is not just that people of African descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure."); Milligan & Ross, *supra* note 110, at 307–08 ("Because the Constitution was not drafted or ratified in anything akin to a democratic, much less a super-majoritarian, process, its origins bear serious democratic deficits."); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 360 (2007) ("[L]iving constitutionalists insist that the legitimacy of the document cannot be fully defended if our first-order approach to it draws *exclusively* upon the historical." (emphasis added)). On rare occasions, originalists have recognized this problem. *See* MCGINNIS & RAPPAPORT, *supra* note 97, at 107; Akhil R. Amar, *American Constitutionalism — Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 198 (2013) ("[W]omen were excluded from the rooms that framed and ratified certain constitutional texts—including many of the rooms where woman suffrage itself was framed and ratified!"); AKHIL R. AMAR, AMERICA'S UNWRITTEN CONSTITUTION 279–83 (2012); G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. 739, 777 (2021) (explaining that recent originalist "efforts reveal both an increasing understanding of the seriousness of constitutional exclusion among originalists and the limitations of originalism to confront the problem fully"). Some scholars have responded to this flaw of originalism by emphasizing the role Reconstruction can play in originalist analysis. *See, e.g.*, AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215–30 (1998); *cf.* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *supra* note 110 (discussing the theory of "Reconstruction Originalism"). *But see* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012) (writing that originalists often ignore the Fourteenth Amendment in favor of focusing on the "writings and utterances of the eighteenth-century constitutional drafters"); *but cf.* Leib, *supra*, at 359 ("Originalists either bracket the problem of the document's legitimacy, evade the basic question of the document's legitimacy, or are content that they have come up with some account that takes this question off the table.").

117. *See generally* STRAUSS, *supra* note 102 (advocating for the "living constitution" theory of constitutional interpretation due to the evolution of society).

118. *See id.* at 1–2.

119. *See id.* at 36.

120. *See id.*

encompass both tradition and judgment.[121] Common law is not rigidly fixed in history; it is "built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past."[122] Strauss argues that this approach provides the best of both worlds; it allows the Constitution to change but only in a manner that is connected to history and past interpretations.[123] By applying common law constraints, a judge cannot stray too far from precedent nor can the judge easily succumb to public opinion. While judges may still impart their values, thus moving the common law trajectory, Strauss argues that some nudge is a benefit, not a harm.[124] Indeed, Strauss argues the job of the judge is to use judgment.[125] Strauss writes that: "There is a legitimate role for judgments about things like fairness and social policy."[126] But, as with all living constitutionalist approaches, that judgment is out in the open. It is subject to criticism and oversight, whereas originalism "hides the ball by concealing the real basis of the decision."[127]

Professor Strauss is not alone; renowned living constitutionalist Dean Erwin Chemerinsky has also highlighted precedent as an important tool for constitutional interpretation.[128] In *Worse than Nothing: The Dangerous Fallacy of Originalism*, Chemerinsky appreciates the balance that precedent strikes between history, tradition, and change.[129] Indeed, adherence to precedent allows for some level of predictability and stability—something that the consequentialist originalists have long claimed living constitutionalism has lacked.[130]

3. Pragmatism as a Component of Living Constitutionalism

Interpretive pragmatism is a form of living constitutionalism that possesses a distinctly consequentialist outlook. Judge Posner and Justice Breyer are two judges with very different judicial outlooks, but both employ pragmatism as a high priority when interpreting constitutional provisions.

Whether Judge Posner is a living constitutionalist is debatable. He decried interpretive labels, saying that: "Theories of statutory and constitutional

121. Jack M. Balkin, *Panelist Papers: The Roots of Living Constitutionalism*, 92 B.U. L. REV. 1129, 1129 (2012).

122. STRAUSS, *supra* note 102, at 3.

123. *See id.*

124. *See id.* at 38.

125. *See id.*

126. *See id.*

127. *Id.* at 4.

128. *See* CHEMERINSKY, *supra* note 94, at 173–78.

129. *See id.*

130. There has also been considerable scholarly discussion regarding the role precedent plays in originalism and how it is difficult to square originalism with adherence to precedent. *See, e.g.*, CHEMERINSKY, *supra* note 94, at 174–76; Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 961–62 (2008); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925 (2017).

interpretation are clutter and the last thing our courts need is more clutter."[131] He certainly never identified as a living constitutionalist.[132] But Judge Posner represents a very important strand of living constitutionalism whether he identifies with the field or not. Judge Posner recognizes that the law should reflect how the modern world works, and judges should review a wide range of sources to understand the consequences of legal decisions.[133] Judge Posner argued that judges need a "realistic approach to interpretation" that "grapple[s] with the complexity of today's world."[134] Like many living constitutionalists, Judge Posner argues that judges can and should look beyond that text and use a pragmatic approach which includes "political history, common sense and common knowledge, and ethical insight."[135] Like Strauss, Judge Posner believes that judges should judge, and these pragmatic concerns are well within the bounds of judicial review.[136] Further still, Judge Posner joins other living constitutionalists in arguing that interpretive flexibility for evolving times is a desirable feature of the Constitution.[137] Writing on *Heller*, Judge Posner argues a point that should now be familiar:

> [L]oose construction is especially appropriate for interpreting a constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry.[138]

Thus, in interpreting an old Constitution for modern times, Judge Posner is unafraid to examine empirical data, political ramifications for a particular decision, and economic consequences.[139] In doing so, the Constitution evolves, at least in a consequentialist sense. Whether Judge Posner is a living

131. RICHARD A. POSNER, REFLECTIONS ON JUDGING 234 (2013).

132. *See id.* at 8–10.

133. *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 737–39 (2002).

134. POSNER, *supra* note 131, at 149, 234.

135. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 309 (1990). Notice, however, that the terms "fairness," "justice," or "morality" do not appear on Posner's list. This absence has drawn criticism from other legal scholars such as professors Ronald Dworkin and Jon Hanson. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 97 (1978); Jon D. Hanson & Jacob Lipton, *Occupy Justice: Introducing the Injustice Framework*, 15 HARV. L. & POL'Y REV. 333, 336–37 (2022).

136. *See* Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633, 638–44 (2014) (discussing Posner's beliefs regarding pragmatism and its relationship with the bounds of judicial review).

137. John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1161 (2007) (establishing an instance when Judge Posner justified interpretive flexibility).

138. Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 26, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/3YPW-RK6U].

139. *See, e.g.*, Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633, 635, 667–68 (2014) ("Posner emphasizes the importance of economics, empirical inquiry, and reliance on social science in the context of an overarching project to 'overcome' law . . . .").

constitutionalist in name or theory makes little difference; he is a living constitutionalist in action.

Judge Posner praised Justice Breyer as a fellow pragmatist, although he criticized Justice Breyer's application.[140] Justice Breyer had no qualms with adopting the living constitutionalist mantel,[141] and he articulated a vision for a pragmatic living constitutionalism.[142] Justice Breyer routinely advocated for a form of pragmatic balancing that reviewed "history, tradition, precedent, purposes, and consequences."[143] Indeed, Breyer has advocated for a broader scope of interpretive inputs such as norms and practices of other countries.[144] And he has certainly shown a willingness to entertain consequentialist arguments, often ones including empirical data.[145] As Breyer explains, "'the Constitution is not a suicide pact."[146]

Justice Breyer expounded upon his pragmatic approach in his book, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism*.[147] Beyond restating two of the major premises of living constitutionalism—that there are no "right or wrong" answers and that judges should consult a plethora of sources depending on the question at issue—Justice Breyer stressed that the workability of living constitutionalism better honors the founders and their accomplishments.[148] He argued that by "considering purposes, consequences, and values" and by placing less reliance on "so-called" plain meaning, he arrives at an

140. *See* Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1703, 1707 (2006).

141. *See* Andrea Seabrook, *Justices Get Candid About the Constitution*, NPR (Oct. 9, 2011, at 00:58 ET), https://www.npr.org/2011/10/09/141188564/a-matter-of-interpretation-justices-open-up [https://perma.cc/DGJ5-ET57].

142. *See* BREYER, *supra* note 72, at 195; STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 163–64 (2010); *see also* Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 YALE L.J. 1719, 1720 (2006); John Greabe, *Commentary: The Pragmatic Consequentialism of Justice Breyer*, N.H. BULLETIN (Feb. 23, 2022, at 05:43 ET), https://newhampshirebulletin.com/2022/02/23/commentary-the-pragmatic-consequentialism-of-justice-breyer/ [https://perma.cc/PZ28-6UXT].

143. *See* BREYER, *supra* note 72, at 195–96; *see also* Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635, 651–52 (2012) (discussing how Breyer's methods are based in pragmatism); Posner, *supra* note 140, at 1705 (describing and critiquing Breyer's interest balancing of "impact" regarding campaign finance issues); LAURENCE H. TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 10 (2014) ("Breyer almost always prefers that the Court identify all relevant considerations and then balance them to reach the right, workable result under the circumstances.").

144. Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1695 (2006) (Justice Breyer is "a leading proponent of the idea that it is sometimes valuable for our courts to consider the experiences of other countries in the course of making decisions . . . .").

145. *See* Kende, *supra* note 143, at 661 (providing an example of Justice Breyer engaging with empirical data in assessing consequentialist harm).

146. STEPHEN BREYER, THE COURT AND THE WORLD 11 (2016); Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.").

147. *See generally* BREYER, *supra* note 72 (advocating for the usage of a pragmatic approach toward constitutional interpretation).

148. *Id.* at 195.

"interpretation that is more faithful to the desire of the Constitution's Framers to establish a workable framework for long-lasting government."[149] Indeed, Justice Breyer understood that most framers wanted a long-lasting document that continued to enjoy the support of the people.[150] The founders meant for the Constitution to be a practical document that would provide basic values to be transmitted through generations as principles that were workable over time.[151] If we are to realize the values underneath the Constitution, we must approach the Constitution so that it is "viable," "workable," "practical," and "feasible" in such a way that "reflect[s] the basic need to interpret the Constitution so that it works well, maintaining the basic democratic, human, and legal values that underlie it."[152] He juxtaposes this approach to both textualism and originalism. A reading of the Constitution without modern pragmatic considerations risks creating a Constitution "that no one would want."[153]

Thus, we see a balancing of constitutional history, text, and pragmatism. Justice Breyer does not ignore the text or history—far from it.[154] He would emphasize the purpose of the provision, and then examine the text to "see if it would *support* an interpretation that furthers (and does not undercut) the carrying out of that purpose."[155] If the text says you must be "thirty five" to be president, one may not be thirty-four. However, if the language is broad as in the Equal Protection Clause, a judge should look to the interpretation that best serves the purpose, consequences, and values of that provision while also being "linguistically permissible."[156] Thus, the job of a judge is to assure that the "change made" to the Constitution is consistent with the "values that underlie those provisions."[157] A literal reading of the provisions, without an understanding of this change, does a disservice to those values.[158]

149. *See id.* at xvii.

150. *See id.* at 207 (explaining that Chief Justice Marshall understood the need for the Constitution to last through "ever-changing circumstances over centuries") (citing NLRB v. Noel Canning, 573 U.S. 513, 533–34 (2014); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819)); *cf.* BALKIN, *supra* note 70, at 112 ("Thick accounts of original meaning or original understanding threaten to place many of the federal programs and protections that Americans rely on today beyond the Constitution.").

151. *See* BREYER, *supra* note 72, at 123. In a recent article, Justice Breyer advocated for a "purposive constitutional interpretation." Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 751 (2025). He did so in pragmatic terms, writing that "it is difficult to find subsidiary principles that help courts apply, say, the Establishment Clause. It is less difficult to apply the core purpose of the Religion Clauses, which is to reduce religious strife and promote harmony between people of different beliefs." *Id.* at 752.

152. *See* BREYER, *supra* note 72, at 122.

153. *See id.* at 140.

154. *See id.* at 207.

155. *Id.*

156. *See id.*

157. *Id.*

158. *Id.*

C. Revitalization of Living Constitutionalism as an Interpretive Method Employed by a Majority of the Court

The *Moore* case created an opportunity to apply originalism to the Sixteenth Amendment, which is a more contemporary constitutional provision than those often interpreted by the Court. In *Moore,* the Court rejected the Moores' argument the tax at issue was unconstitutional. The Court could have reached this conclusion by applying originalist principles and finding that "incomes, from whatever source derived" was clearly understood at the time of passage of the Sixteenth Amendment to provide Congress with broad authority to tax incomes, whether the income is realized or unrealized. The Court, however, did not reach this result, and it was the dissent that employed originalism.[159] The dissent, however, viewed the Sixteenth Amendment to restrict Congress's power and limit the taxation of incomes to only realized income.[160] Surprisingly, the majority employed a type of living constitutionalism that incorporated history, precedent, and pragmatism.[161] As such, *Moore* shows that a slim majority of the Court was willing to employ living constitutionalism to interpret tax provisions, at least for now.

Justice Kavanaugh's majority opinion in *Moore* contained two themes of living constitutionalism, one obvious and one subtle. First, Justice Kavanaugh used pragmatic living constitutionalism to consider the real-world implications and consequences of a judicial outcome. A second, more subtle brand of living constitutionalism used by Justice Kavanaugh is a Straussian common law precedent approach.

1. Justice Kavanaugh and Pragmatic Living Constitutionalism

As discussed in Part III.B.3, pragmatic living constitutionalism is concerned, among other things, with making the Constitution "work" in the modern day.[162] Pragmatists are often interested in doctrine that is manageable, flexible, and context dependent.[163] They look to the real-life implications of judicial decisions and assess a legal question within the larger intersectional system it rests in.[164]

Justice Kavanaugh's opinion contains passages that are undeniably pragmatic living constitutionalism. Indeed, it is certainly possible that *Moore* is the prime example of such an interpretation by the Roberts Court. A pertinent *Moore* passage reads in full:

159. Moore v. United States, 602 U.S. 572, 621 (2024) (Thomas, J., dissenting).
160. *Id.* at 652.
161. *Id.* at 595 (majority opinion).
162. *See* discussion *infra* Part III.B.3.
163. *See id.*
164. *See id.*

> In short, the Moores cannot meaningfully distinguish the MRT from similar taxes such as taxes on partnerships, on S corporations, and on subpart F income. The upshot is that the Moores' argument, taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional. See, *e.g.*, 26 U.S.C. § 305(c) (deemed stock distributions); §§ 446, 448 (accrual accounting); § 701 (partnership taxation); §§ 951–965 (subpart F); § 951A (pass-through tax on global intangible low-taxed income); § 1256(a) (certain futures contracts); § 1272(a) (original-issue discount instruments); §§ 1361–1379 (S corporations); §§ 2501–2524 (gift taxes).
>
> And those tax provisions, if suddenly eliminated, would deprive the U. S. Government and the American people of trillions in lost tax revenue. The logical implications of the Moores' theory would therefore require Congress to either drastically cut critical national programs or significantly increase taxes on the remaining sources available to it—including, of course, on ordinary Americans. The Constitution does not require that fiscal calamity.[165]

This first paragraph begins with an acknowledgment that the MRT exists within a larger tax ecosystem, and that ruling against the MRT would upend "vast swaths of the Internal Revenue Code."[166] On its own, the analytical practice of applying an interpretation to analogous situations is not living constitutionalism. But the opinion goes further, connecting the implications of the anti-MRT interpretation to the logical consequences: the United States Government would lose trillions of dollars in tax revenue.[167] An originalist approach would stop there even if it had even gotten that far. The fact that the Government stood to lose trillions of dollars in revenue is of no concern to the originalist. They are instructed to find the original understanding of the text. If the original understanding of the text results in trillions of dollars of revenue disappearing, then so be it. Indeed, we see this exact response from Justice Thomas in dissent.[168]

But the *Moore* opinion does not just recognize the loss of tax revenue, it also explains what the loss of revenue means materially.[169] Justice Kavanaugh

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165. *Moore*, 602 U.S. at 597.

166. *Id.*; *see, e.g.*, I.R.C. §§ 467 (taxing unpaid rent in certain situations); 475 (mark-to-market for certain securities dealers); 817A (requiring mark-to-market for certain life insurance contracts); 965 (mandatory repatriation tax); 1265 (mark-to-market for some financial derivatives); *see also* IRC §§ 475 (requiring securities dealers to mark securities in their inventory to market, with corresponding recognition of gain or loss); 817A (requiring life insurance companies to mark to market certain "modified guaranteed contract[s]"); 877A (taxing expatriates as if they sold their property on the day before they expatriated); 965(a)-(c) (taxing certain shareholders of foreign corporations with the so-called mandatory repatriation tax); 1256 (requiring certain types of financial derivatives to be marked to market and recognizing any resulting gain or loss); 1296 (allowing a mark-to-market election for certain stock held by a passive foreign investment company). For a discussion of the consequences of creating a constitutional realization requirement, see Brief of Amici Curiae Reuven Avi-Yonah, Clinton G. Wallace & Bret Wells in Support of Respondent, *Moore*, 602 U.S. 572 (No. 22-800).

167. *See Moore*, 602 U.S. at 597.

168. *Id.* at 651 (Thomas, J., dissenting).

169. *Id.* at 597 (majority opinion).

writes that the Government would either have to "drastically cut *critical* national programs" or increase taxes, including on "ordinary Americans."[170] This passage is striking. The Court in *Moore* is recognizing that the loss of revenue would mean the Government could not afford a large number of governmental programs—and not only that—the Court recognizes such programs as "critical." Also, the Court recognizes that the alternative would be to raise remaining taxes, which would impact "ordinary Americans," implying that doing so would be a consequentially undesirable outcome.[171] The passage ends by calling the above consequences a "fiscal calamity" and perhaps nodding to a generally accepted canon that the Constitution need not be interpreted in a way that undermines the document itself.[172]

Put plainly, the above analysis is not originalist. Indeed, the Court's originalist members—either in dissent or a dissent-sympathetic concurrence—approached the question much differently. Justice Thomas goes to the heart of the matter in his dissent, writing:

> The majority is not ashamed to lay bare the consequentialist heart of its opinion. Because it wrongly concludes that the Moores' constitutional argument would invalidate not only the MRT but also other longstanding taxes, the majority frets that the Moores would "deprive the U. S. Government and the American people of trillions in lost tax revenue" and "require Congress to either drastically cut critical national programs or significantly increase [other] taxes." . . . But, if Congress invites calamity by building the tax base on constitutional quicksand, "[t]he judicial Power" afforded to this Court does not include the power to fashion an emergency escape. Art. III, § 1, cl. 1.[173]

Justice Thomas is wrong about the application of originalism in this case, but he is not wrong that an originalist would not engage in the pragmatic analysis in *Moore*.

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170. *Id.* (emphasis added).

171. *See generally* Reuven Avi-Yonah, Elise Hocking & Muskan Sharma, *Containing the Blast Radius: Can Congress Save the Code from Realization?*, 28 FLA. TAX REV. 343 (2025) (discussing the consequentialist turn of majority and its inconsistency with text and history); *id.* at 345 n.3 ("It is striking how consequentialist this statement is. The majority does not show any trace of the originalism evidenced by the dissent or the textualism of the Barrett concurrence . . . . [A]s the majority explained, constitutionalizing realization would have led to a fiscal calamity in 2024. Every taxpayer whose return would possibly be impacted, like every partner in a partnership or S corporation, could have taken the position based on this case that she has substantial authority not to pay the tax.").

172. *Id.*; *see* BREYER, *supra* note 146. Justice Kavanaugh has employed similar pragmatic reasoning in other separation-of-powers contexts. In dissenting from the Court's recent tariff decision, he warned that the majority's statutory interpretation could require "refund[s of] billions of dollars" and generate substantial instability in ongoing trade arrangements, and he argued that excluding tariffs while permitting embargoes or quotas "does not make much sense" as a practical matter. *See* Learning Resources, Inc. v. Trump, No. 24–1287, slip op. at 4, 6 (U.S. Feb. 20, 2026) (Kavanaugh, J., dissenting). There, as in *Moore*, the interpretive analysis was informed by systemic and institutional consequences. *Id.*

173. *Moore*, 602 U.S. at 651 (Thomas, J., dissenting).

While the pragmatism in *Moore* is readily apparent, its use of common law precedent-based living constitutionalism is present but subtle. Professor Strauss argues that this approach protects practices that embody "a kind of rough common sense" and that manifests as "built out of precedents and traditions that accumulate over time."[174] As such, understanding the constitutional system as a common law precedent-based system allows "room for adaptation and change, but only within certain limits and only in ways that are rooted in the past."[175]

With this form of living constitutionalism in mind, we turn again to Justice Kavanaugh's majority opinion in *Moore*. The opinion reviews the history and background of the Supreme Court's tax jurisprudence, particularly around the passing of the Sixteenth Amendment.[176] Understanding the history of both the original taxing clause and the Sixteenth Amendment is certainly consistent with originalist analysis. Further, an originalist may be interested in legislative understandings during both these eras as such understandings may reflect how the text was generally understood at the time. Yet, the opinion does not cabin its text and history to the founding era or 1913, the year the Sixteenth Amendment was ratified.[177] Instead, the opinion declares that "Congress has long taxed the shareholders and partners of business entities on the entities' undistributed income."[178] The Court cites congressional or agency action from 1958 and 1962 as part of establishing a particular taxing tradition.[179] The opinion does not mince words, arguing that: "Such a '[l]ong settled and established practice' can carry 'great weight in' resolving constitutional questions—and here it reflects and reinforces this Court's precedents."[180] Crucially, the Court explicitly includes "established practice" from 1958 and 1962, many decades after the passing of the Sixteenth Amendment.[181] Further, the Court's precedents referenced in the opinion were often decided far after 1913 and contain non-originalist analysis.[182] By referring to post-ratification practices and precedent, Justice Kavanaugh's *Moore* opinion embraces a precedent-based living constitutionalism. Originalists are less interested in post-ratification history, are rarely persuaded by post-ratification congressional enactments, and have often ignored precedent when they believe precedent conflicts with originalism. Indeed, Justice Gorsuch penned an originalist concurrence in *Loper Bright Enterprises v. Raimondo*[183] criticizing the use of

174. STRAUSS, *supra* note 102, at 3, 41.
175. *Id.* at 3.
176. *Moore*, 602 U.S. at 583.
177. *Id.* at 590.
178. *Id.*
179. *Id.* at 591.
180. *Id.* at 592.
181. *Id.*
182. *Id.* at 590–91.
183. 603 U.S. 369, 416–48 (2024) (Gorsuch, J., concurring).

precedent as law and undermining the historic role of the "common law judge."[184]

2. *The Decision in* Moore *Sits Squarely Within the Supreme Court's Living Constitutionalist Tradition*

Justice Breyer wrote the majority opinion in *NLRB v. Noel Canning*,[185] a 2014 case about presidential appointments and the separation of powers. The decision was on its surface 9-0, but there were sharp disagreements on the merits with a 5-4 split between Justice Breyer's pragmatism and Justice Scalia's originalism.[186] Ultimately, the Court held that recess appointments cannot occur if the Senate is in session, and that "*pro forma* sessions count as sessions . . . ."[187] However, the opinion maintained a general recess appointment power.[188] Crucially, aspects of the decision reflect the same reasoning as *Moore*. Justice Breyer argued that "Justice [Scalia] would render illegitimate thousands of recess appointments reaching all the way back to the founding era," much the same way the *Moore* Court was concerned that finding against the MRT would disrupt a century of tax law and practice.[189] And just as Justice Kavanaugh paid close attention to the historical understandings of Congress, so too did Justice Breyer who made his pragmatic consequentialism plain: "The Court, in interpreting the Clause for the first time, must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."[190] Indeed, the *Moore* and *Noel Canning* Courts were in lockstep in their appreciation of tradition as an evolutionary tool not to be discarded by a dogmatic adherence to perceived original intent.[191]

Similar comparisons can be made between *Moore* and the Warren Court's jurisprudence. In *Mapp v. Ohio*, the Court found that all evidence obtained by improper searches and seizures in violation of the Fourth Amendment was

184. *See id.* at 426, 445 ("[I]t would be a mistake to read judicial opinions like statutes.").

185. 573 U.S. 513, 517 (2014).

186. *Id.* at 517; *id.* at 569 (Scalia, J., concurring).

187. *See id.* at 550 (majority opinion) ("We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.").

188. *See id.* at 552 ("When the Senate is without the *capacity* to act, under its own rules, it is not in session even if it so declares.").

189. *See id.* at 556.

190. *Id.* at 514.

191. *Compare id.* at 516 ("The Court is reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long."), *with* Moore v. United States, 602 U.S. 572, 592 (2024) ("Such a '[l]ong settled and established practice' can carry 'great weight in' resolving constitutional questions—and here it reflects and reinforces this Court's precedents.").

inadmissible in state court.[192] In a 6-3 opinion written by Justice Clark,[193] the Court took a consequentialist approach. It recognized that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[194] The Court noted that in practice, such a guarantee would be useless if it did not apply to state courts.[195] While a federal prosecutor could not use illegally seized evidence, "a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment."[196] Indeed, the Court was explicit in saying that "[t]here is no war between the Constitution and common sense."[197] The Federal Government had operated under an exclusionary rule for decades, and no "pragmatic evidence" had shown an impact on the FBI's ability to execute its duties.[198]

Mapp is not an originalist opinion. In fact, some originalists have held *Mapp* up as a prime example of a decision in direct contradiction to originalism.[199] Fundamentally, the Court chose to look at the promises of the Fourth Amendment and then balance the consequences of the exclusionary rule: state level workaround for illegal seizure versus the inability to use potentially critical evidence. The precise practices of the founding era were not the first order of priority in the Court's analysis.

The Court's approach in *Mapp* tracks onto *Moore* in two crucial and related ways. First, both *Mapp* and *Moore* consider the practical consequences of their decision within a larger context and legal framework.[200] The MRT and exclusionary rule do not exist in a vacuum. If the MRT is invalid, so are a plethora of other taxes resulting in a catastrophic loss of revenue. If the exclusionary rule does not apply to states, then the federal exclusionary rule is largely ineffective, rendering the Fourth Amendment "a form of words."[201] Second, but relatedly, both Courts refer to an accepted previous practice as a

192. 367 U.S. 643, 655 (1961).

193. The opinion was joined by Chief Justice Warren, Justice Brennan, and Justice Douglass—the three classic living constitutionalists on the Court. *See id.* at 643.

194. *See Mapp*, 367 U.S. at 656 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

195. *See id.* at 657.

196. *Id.*

197. *Id.*

198. *See id.* at 659–60.

199. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (focusing on *Mapp* when exploring the role of the states in developing constitutional law); Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457 (1997) (arguing that the *Mapp* opinion and the exclusionary doctrine did not derive from the text, history, or structure of the Constitution). *But see* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV 1 (2009) (explaining that the basis of the exclusionary doctrine originates from the regular practices of those in the Founding era).

200. *See* Moore v. United States, 602 U.S. 572, 592 (2024); *Mapp*, 367 U.S. at 643.

201. *See Mapp*, 367 U.S. at 648 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

rationale for constitutionality.[202] The *Moore* Court noted congressional history and the conceded constitutionality of subpart F, which was an international tax provision similar to the MRT.[203] Similarly, the *Mapp* Court reviewed the state exclusionary rule as part of a series of case law building upon a long-settled understanding of a federal exclusionary rule.[204]

Further, *Moore* follows in the footsteps of other pragmatic opinions in recognizing the importance of government services to the well-being of the United States. In *Plyler v. Doe*, the Court recognized that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[205] Justice Brennan wrote for a 5-4 Court, and while he included a considerable amount of history and analysis around the Fourteenth Amendment, he also tied the Amendment to the consequences of a lack of education: "[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[206] Here, pragmatism plays a "complementary"[207] role in a larger analysis of history and tradition, much like in *Moore*. The "social cost"[208] or "fiscal calamity"[209] is not the sole driver of interpretation, but it is significant context that may aid constitutional interpretation—a context originalists would leave at the door.

There are many more examples of *Moore*'s reasoning looking similar to famed living constitutionalist opinions—many decisions over the Court's history combined tradition, precedent, common sense, and the needs of contemporary society. Labeling tradition and precedent-based legal reasoning as living constitutionalism may surprise some. Indeed, such a practice seems like normal, run-of-the-mill constitutional analysis, and that is because for decades it has been. Until recently, slowly evolving living constitutionalism, built on incremental precedent, reflecting changing norms, problems, technology, and legislative solutions, was the de facto mode of constitutional interpretation.[210] Originalism often leads to extreme conclusions with

202. *See id.* at 655–57; Moore v. United States, 602 U.S. 572, 592 (2024).

203. *Moore*, 602 U.S. at 592.

204. *Mapp*, 367 U.S. at 655–57.

205. Plyler v. Doe, 457 U.S. 202, 221 (1982). There are, of course, other opinions that take a different approach to education. This opinion is an example of how a living constitutionalist jurist may appreciate the importance of government services.

206. *Id.*

207. *See* Claire Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1565 (2023).

208. *Plyler*, 457 U.S. at 221.

209. *See* Moore v. United States, 602 U.S. 572, 597 (2024).

210. *See* BREYER, *supra* note 151, at 720–21 (calling the search for purpose, consequences, and values "traditional" in interpretation); *cf.* DENNIE, *supra* note 70, at 12 (describing the founders' originalist ideas). In his recent book, Professor Balkin goes into detail on the role of living constitution and evolution in our Nation's legal psyche. BALKIN, *supra* note 70, at 65. He explained that "[o]ne can find arguments that the

disastrous consequences. The Court is far better off avoiding quicksand and applying precedent-based living constitutionalism where history and text are relevant but not exclusive considerations.

III. ORIGINALISM IS AN INAPPROPRIATE METHOD FOR INTERPRETING THE CONSTITUTIONALITY OF TAX PROVISIONS

In general, originalists argue that originalism is a preferred method of constitutional interpretation because it gives faith to the founders—it produces stable results, and it constrains judges from engaging in results-based decision making.[211] The dissent's application of originalism in *Moore,* however, highlights how originalism fails to deliver on these main tenets and has the potential to cause drastic disruptions in existing legal expectations.[212] The dissent in *Moore* is both flawed as an originalist opinion and leads to results that are not consistent with constitutional norms in tax jurisprudence.

Despite the dissent's conclusion that an originalist analysis of the taxing clause and the Sixteenth Amendment requires the conclusion that the MRT is unconstitutional, a number of scholars have applied originalist principles to the *Moore* case and determined that originalism would lead to decisions supporting a broad taxing power.[213] We summarize some of that work here and then indicate why the dissent in *Moore* falls far short of engaging with the important history of the direct tax clause and the Sixteenth Amendment. People often disagree on the history surrounding a provision or what that history shows, but the dissent engages in an analysis of the history that is flawed and incomplete and that makes interpretive judgments that lead to results-based reasoning. It thus fails to deliver certainty, constrain judges, or hold true to the intentions of the founders or the intent of the taxing clause or the Sixteenth Amendment.

The *Moore* case involved whether Congress had the power to tax the income of a foreign controlled corporation without having to apportion the tax among the states.[214] For an originalist, this requires an originalist analysis of both the direct tax clause and the Sixteenth Amendment. Central to the interpretation of the direct tax clause is *Pollock*, which disregarded over one hundred years of precedent and determined that an income tax was a direct tax and therefore

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Constitution must be interpreted flexibly, or that it must adapt to changing times and circumstances, in politics, in popular culture, in judicial opinions, and in academic theories of interpretation." *Id.* at 66. We agree and, in our view, while overtures to history have been important since our founding, references to historical narratives *to the exclusion* of themes regarding evolution and adaptation is a new and troubling phenomenon.

211. *See supra* Part II.

212. We recognize that there are different theories of originalism, and we discuss those at length in Part II. Our argument here is that *Moore* is a prime example of where the core values of originalism are either not being followed or are failing to deliver on originalism's promise.

213. *See* Brief for Calvin H. Johnson, *supra* note 16, at 19–21; Brief of Professors Akhil Reed Amar & Vikram David Amar, *supra* note 16, at 1–3.

214. *Moore*, 602 U.S. at 577–78.

must be apportioned among the states.[215] If the holding in *Pollock* is incorrect when applying originalism, then the Sixteenth Amendment would be unnecessary in interpreting the question in *Moore*, and the tax at issue in *Moore* would clearly be an indirect tax and therefore not subject to apportionment.[216]

Thus, the first question an originalist confronts is whether *Pollock* can be justified based on an originalist interpretation. We contend that applying originalism should have led to the conclusion that *Pollock* was wrongly decided and that direct taxes were only head taxes and taxes on property. Prior to *Pollock*, the Court had never found a tax on anything besides head taxes and property taxes to be a direct tax.[217] It also explained, as early as 1796, that the drafters would not have intended the direct tax clause to apply to taxes that could not be easily apportioned.[218] In other words, the drafters would not have included a provision in the Constitution that could not be implemented.[219] By the time *Pollock* was decided, the overwhelming view was that direct taxes included only poll taxes and taxes on property.[220]

A. An Originalist Approach Interpreting the Direct Tax Clause Would Lead to Overruling Pollock *and a Determination that the Income Tax Was Not a Direct Tax*

The Constitution provides Congress with broad taxing power, which was an essential part of the new Constitution.[221] One of the primary failures of the Articles of Confederation was the Federal Government's inability to raise funds.[222] The drafters of the Constitution recognized that if the Union was going to survive, the Federal Government needed broad taxing authority.[223]

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215. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895), *superseded by*, U.S. CONST. amend XVI, *as recognized in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

216. The term "indirect taxes" is not used in the Constitution. Instead, Article I, Section 8 provides that "Duties, Imposts and Excises" must be "uniform." U.S. CONST. art. I, § 8. Duties, Imposts, and Excises are classified as indirect taxes. *See* Hylton v. United States, 3 U.S. 171, 176 (1796).

217. *See, e.g., Pollock*, 158 U.S. at 706–09 (White, J., dissenting) (discussing previous caselaw on the subject).

218. *Hylton*, 3 U.S. at 174.

219. See discussion *infra* Parts III.A.2.

220. *See, e.g.*, THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 495, 513 (6th ed. 1890) (direct taxes are capitations and land taxes only); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 955 (2d ed. 1851) (It is generally assumed that, as to the Constitution, direct taxes are poll taxes and taxes on land); SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 237 (1891) (direct taxes are capitation taxes and taxes on real estate); *see also* Mehrotra, *supra* note 20, at 130–38; Brooks & Gamage, *supra* note 10, at 15 (finding the same).

221. Ackerman, *supra* note 16, at 6–7; Johnson, *supra* note 16, at 3–4.

222. Johnson, *supra* note 16, at 3.

223. *See, e.g.*, AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840 340–41 (2021) (discussing how the founders recognized a need for federal taxation); Calvin H. Johnson, *Homage to CLIO: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 474 (2003–2004) (same); Moore v. United States, 602 U.S. 572, 581–

1. History Indicates the Direct Tax Clause was the Product of a Compromise Involving Slavery

The direct tax clause emerged during the drafting of the Constitution partially as a corollary to the three-fifths compromise involving representation in Congress.[224] It was an argument that if Southern states were going to obtain more representation in Congress by counting enslaved people as three-fifths a person, the Southern states should also have to include enslaved people when calculating a tax apportioned based on population.[225]

Professor Bruce Ackerman, in his article, *Taxing and the Constitution*, explores the connection between the direct tax clause and slavery.[226] Ackerman explains that as the drafters were seeking to form a new constitution, the Federal Government's taxing power was ensnared in the debates surrounding slavery.[227] His work carefully traces the history of the direct tax clause and explains that the direct tax clause is not about limiting Congress's taxing power.[228] Rather, it is a clause that is intertwined with the issue of slavery and the three-fifths compromise regarding representation in Congress.[229]

As Ackerman explains, the direct tax and apportionment clauses "do not represent an independent judgment about the proper system for direct taxation, but were part and parcel of a larger compromise over slavery at the Philadelphia Convention."[230] Representatives from Southern states were concerned that Congress might use the taxing power to place a tax on slaves, thus potentially ending slavery through taxation.[231] Northern representatives believed that if the Southern states were going to receive increased representation in Congress due to enslaved persons being counted as three-fifths of a person, they should also pay additional tax based on that same allocation.[232] There was also concern from the Southern states that taxation could be used as a method of placing

82 (2024) (same). Justice Thomas in dissent argues that the history indicates the drafters intended a limited taxing power, but that interpretation is not supported by the text of the Constitution or the history surrounding the new Constitution. The failure of the Articles of Confederation to include a Federal taxing power was a central reason that a new constitution was needed. Justice Thomas argues that amendments sought to limit the power argue in favor of a limited power. Those provisions, however, were rejected, showing an understanding that the power would be broad.

224. AMAR, *supra* note 223, at 345–46.

225. *Id.*

226. Ackerman, *supra* note 16, at 7–13.

227. *Id.*

228. *Id.* at 8–13.

229. *Id.* at 8–10.

230. *Id.* at 4.

231. Hylton v. United States, 3 U.S. 171, 177 (1796) (opinion of Paterson, J.); Ackerman, *supra* note 16, at 9.

232. Ackerman, *supra* note 16, at 4 ("Quite simply, the South would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College, if it was willing to pay an extra three-fifths [tax] . . . .").

significant burdens on the South and as a means of eliminating slavery.[233] Apportionment ensured that the burden on the Southern states was related to the state's population and not the number of enslaved people. [234] Nothing in this history supports the claim, as some opponents of a broad taxing power have argued, that the direct tax clause was purposefully designed to make the imposition of certain taxes impossible by making apportionment unworkable.[235]

The idea that the direct tax clause was a purposeful limitation on taxes like the income tax is unsupported not only by the historical record but also by common sense. If Congress wished to constrain the taxing power, it did not need to do so with a hidden method limiting the power through apportionment. It could have easily placed the restriction in Article I, Section 8 and provided that Congress only had the power to implement direct taxes that could be apportioned among the states.[236] Reading such a restriction on Congress's taxing power into the Constitution is exactly the type of "evil" that originalists claim their theory eliminates.

Calvin Johnson's work on the direct tax clause and Congress's taxing power similarly places the direct tax clause within the history surrounding the new Constitution and the failure of the Articles of Confederation.[237] Johnson explains that under the Articles of Confederation, the Federal Government raised funds through requisitions to the states, which Johnson explains are direct taxes on the states.[238] The Articles of Confederation determined a state's allocation based on the value of real estate and improvements.[239] States, however, cheated on these assessments to lower their tax liability and also failed to pay them.[240]

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233. *Id.* at 9.

234. The dissent in Moore fails to discuss any of this history. *See* Moore v. United States, 602 U.S. 572, 620–45 (2024) (Thomas, J., dissenting).

235. *See* Brief for Petitioners at 1–4, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800); Brief of Amici Curiae Former Attorney General Edwin Meese III and Professors Steven G. Calabresi and Gary S. Lawson Supporting Petitioners at 2, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800); Opinion, *Is a U.S. Wealth Tax Constitutional?*, WALL ST. J. (June 14, 2023), https://www.wsj.com/articles/wealth-tax-ninth-circuit-moore-v-u-s-charles-and-kathleen-moore-supreme-court-constitution-6cdfba92 [https://perma.cc/HFM3-3MKS]; Berg, *supra* note 50, at 1–6; Adler & Spach Jr., *supra* note 50; Jensen, *supra* note 16, at 2415; James W. Ely Jr., *"One of the Safeguards of the Constitution": The Direct Tax Clauses Revisited*, 12 BRIGHAM-KANNER PROP. RTS. J. 63, 63 (2023).

236. In fact, Congress knew how to express such a limitation and did so in Article I, Section 9 when it specifically referred to capitation taxes and other direct taxes. It did not place the restriction within the context of creating Congress's broad taxing power in Article I, Section 8. *See* Ackerman, *supra* note 16, at 6–7.

237. Brief of Johnson, *supra* note 16, at 7–9.

238. *Id.* at 3.

239. *Id.*

240. *Id.* at 3–4 (citing Letter from North Carolina Delegates to Alexander Martin (Mar. 24, 1783), *in* 20 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 90 (Paul H. Smith et al. eds., 1993)). The last requisition under the Articles mandated payments of $3,800,000, but the Government only collected $663. *See* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES 15 (2005).

Congress recognized that allocating a tax burden among the states according to the state's wealth was a fair distributional method, but that measuring a state's wealth was extremely difficult, especially if states were not reporting that value accurately.[241] Congress, therefore, sought to use population instead of valuation because population was harder to manipulate.[242] Johnson explains that population was a proxy for wealth in a state,[243] and "[n]either side in the direct tax debate understood apportionment to be a hobble or restriction."[244]

2. Public Understanding of the Direct Tax Clause at the Time of Ratification Indicates that Direct Taxes were only Head and Property Taxes

The common understanding at the time of the drafting of the Constitution was that the new Constitution was granting Congress broad taxing power. The direct tax clause was not a structural limitation on the taxing power, but instead clarification that when Congress sought to tax based on head taxes or property taxes those taxes should be implemented in a manner that distributed the tax burden fairly among the states.[245]

The term "direct tax" is not specifically defined in the Constitution, and there was limited debate about the direct tax clause at the Constitutional Convention.[246] According to Madison's Notes on the Convention: "Mr. King asked what was the precise meaning of direct taxation? No one answered."[247] Professor Ackerman argues that this lack of response is indicative of the deal that was struck between Northern and Southern factions regarding the three-fifths compromise and the direct tax clause, and it is therefore not a surprise that no one responded to Mr. King's question.[248] If the provision was designed to be a specific limitation on Congressional authority granted in Section I, Clause 8, we would expect at least some discussion of its limiting function.

Although no one answered what a "direct tax" was at the Constitutional Convention, the term was interpreted by the Supreme Court shortly after the

241. *See* JOHNSON, *supra* note 240, at 102–03.

242. *Id.*

243. *See* Brief of Johnson, *supra* note 16, at 4 ("James Wilson of Pennsylvania said similarly that the allocation of state taxes between Philadelphia and the rest of the state was the same whether population or property value was used. James Madison generalized, saying that as long as labor could move freely, labor would find its level in different places, so that labor would always be a measure of comparative wealth.") (citations omitted).

244. *Id.* at 9.

245. Tobin, *supra* note 11, at 440–41.

246. *See* U.S. CONST. art. I, § 9, cl. 4; JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 435 (G. Hunt & J. Scott eds., The Lawbook Exchange, Ltd. 1999) (1920).

247. *See* MADISON, *supra* note 246, at 435 (cleaned up).

248. Ackerman, *supra* note 16, at 11.

adoption of the constitution.[249] In *Hylton v. United States*,[250] the Court considered whether a tax placed on carriages was a direct tax and therefore subject to apportionment. The *Hylton* case is particularly instructive for several reasons. First, several of the justices who considered the case were at the Constitutional Convention and therefore had direct knowledge of the clause and its meaning.[251] In addition, George Washington proposed the carriage tax, and Alexander Hamilton was a proponent of the tax and litigated the case in the Supreme Court.[252] Thus, *Hylton* offers a unique opportunity to examine the original meaning of the term "direct tax" close in time to the ratification of the Constitution.

In *Hylton,* the question before the Court was whether a tax on carriages was a direct tax and thus subject to apportionment.[253] The Court rejected the argument that the carriage tax was a direct tax.[254] At that time, each Justice authored an opinion regarding his decision.[255] Justices Samuel Chase, William Paterson, and James Wilson, three of the four justices considering the case, were participants in the Constitutional Convention.[256] Justice Paterson specifically referenced the provision's bleak history, explaining that the Southern states were concerned that absent a direct tax clause, Congress might tax slaves, and thus disproportionately impact Southern states.[257]

Justice Chase reasoned that the drafters would not have created a provision that required apportionment of taxes that could not be fairly apportioned.[258] He explained "[t]he Constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply . . . ."[259] Chase recognized that the direct tax clause was not designed to limit Congress's power but to allocate direct taxes that could be apportioned fairly.[260] Justice James Iredell similarly noted "[a]s all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not

249. Hylton v. United States, 3 U.S. 171, 172 (1796).

250. *Id.*

251. *See* Ackerman, *supra* note 16, at 21.

252. AMAR, *supra* note 223, at 340–49.

253. *Hylton,* 3 U.S. at 172.

254. *Id.* at 184 (opinion of Wilson, J.).

255. Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, JUSTIA: VERDICT (Oct. 9, 2017) https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court [https://perma.cc/387R-5CTE].

256. Ackerman, *supra* note 16, at 21; *see* AMAR, *supra* note 223, at 340–49.

257. *Hylton*, 3 U.S. at 177 (opinion of Paterson, J.). We note that Justice Paterson was a participant at the Constitutional Convention, a signatory on the Constitution, and would have had first-hand knowledge regarding the direct tax clause and its connection to slavery. *See* Ackerman, *supra* note 16, at 21.

258. *Hylton*, 3 U.S. at 174 (opinion of Chase, J.).

259. *Id.* (cleaned up).

260. *Id.* (cleaned up).

a direct tax . . . ."[261] By definition, according to the Court, a tax that could not be apportioned fairly was not a direct tax.[262] As Professor Johnson explains, "[t]he *Hylton* rule that an equal per capita tax base was inherent in the definition of 'direct tax' was sound and stable constitutional doctrine for a hundred years."[263]

Professors Akhil Amar and Vikram Amar highlight the historical aspects of the direct tax clause and the *Hylton* case, similarly concluding that the direct tax clause only applies to head taxes and real estate taxes.[264] They reveal that Alexander Hamilton, who represented the Government in the *Hylton* case, explained during the argument that a "facile and overly broad definition of the direct-tax category could easily generate 'ruinous' tax rates in relatively carriage-free states, or, perhaps worse still, simply 'defeat the power of laying' the tax altogether."[265] After noting the nonsensical results that would occur if the direct tax clause was interpreted broadly, Hamilton argued that if there is a more practical explanation: "[N]o construction ought to prevail calculated to defeat the express and necessary authority of the government."[266] Hamilton then expressed the view that direct taxes included only head taxes and taxes on real estate.[267] As Professors Amar and Amar note, "[t]he key point for originalists is that, on the merits, all the participating Justices in fact agreed with Washington and Hamilton and the early Congress."[268]

3. Congress's Original Intent to Distribute Taxes in a Fair Manner Should Drive our Interpretation of the Drafter's Intent in Creating the Direct Tax/Indirect Tax Distinction

Central to the focus in interpreting the taxing clause is the notion that the drafters sought a method of distributing the tax burden fairly. They were writing the Constitution in the context of the failure of the Articles of Confederation and the recognition that a federal taxing power was necessary to create a sustainable government.[269] The drafters also worried about how future

261. *Id.* at 181 (opinion of Iredell, J.).

262. *Id.*

263. Brief of Johnson, *supra* note 16, at 17; *see* Scholey v. Rew, 90 U.S. 331, 342–43 (1874) (holding a succession tax on land was not a direct tax but was instead an excise tax). The Court in *Scholey* explained that the succession tax at issue was neither "a tax on land nor a capitation." *Id.* at 346; Springer v. United States, 102 U.S. 586, 602 (1880) ("Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . . .").

264. Brief of Amar & Amar, *supra* note 16, at 1.

265. *Id.* at 9.

266. Alexander Hamilton, *Carriage Tax*, *in* 8 THE WORKS OF ALEXANDER HAMILTON 380 (Henry Cabot Lodge ed., 1904); Brief of Amar & Amar, *supra* note 16, at 9–10.

267. Brief of Amar & Amar, *supra* note 16, at 13; *see also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1786 628 (Max Farrand ed., 1911) (defining direct taxes as "[t]axes on lands, houses and other real estate, and capitation taxes").

268. Brief of Amar & Amar, *supra* note 16, at 23 (emphasis removed).

269. Tobin, *supra* note 11, at 446–47.

government officials would use the taxing power and distribute tax obligations.[270]

The structure of the taxing power shows how the drafters grappled with the two important goals of a federal taxing power and a fair distribution of the tax burden. When a tax was indirect and applied to all people equally, the drafters required uniformity.[271] When a tax was really an allocation to the states, either based on population or property, the drafters recognized that each state's tax base was not equal.[272] Some states simply had more wealth than others. Thus, in those instances, when one state might have more wealth than another, the drafters borrowed from the Articles of Confederation and sought to apportion the burden among the states.[273] Ideally, this apportionment would be based on wealth within the state, but that was not possible at the time of the drafting of the Constitution.[274] The drafters used a state's population as a proxy for its wealth.[275] Thus, at the time of drafting, the apportionment provision was designed to equitably distribute the tax burden among the states based on a state's ability to collect that money from its citizens. We should not transform a provision that was designed to promote equity into a provision that requires inequitable distributions.[276]

B. An Originalist Approach Interpreting the Sixteenth Amendment Should Lead to the Recognition that the Word Income is Broadly Defined

An originalist interpretation of the Sixteenth Amendment reinforces Congress's broad taxing authority and a comprehensive definition of income, thereby limiting what taxes are direct taxes and need to be apportioned. The Sixteenth Amendment was a direct response to the Supreme Court's decision in *Pollock* that the income tax was a direct tax that needed to be apportioned among the states.[277] The notion, as suggested by the Moores, that the word income in the Sixteenth Amendment is limited to realized income

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270. *See id.* at 446–48.

271. *Id.* at 446.

272. *Id.* at 446–47; s*ee also supra* Part III.A.1 (discussing how the history of slavery affected the states' tax bases).

273. Tobin, *supra* note 11, at 447.

274. *See* Nathaniel Gorham, Speech to the Philadelphia Convention (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1937) ("[T]he most exact proportion prevailed between numbers & property."); James Madison, Speech to the Philadelphia Convention (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585 (observing that since labor is mobile, labor is a good measure of comparative wealth); 1 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, at 321 (Julian P. Boyd ed., 1950) ("[T]he numbers of people were taken . . . as an index of the wealth of the state & not as subjects of taxation.").

275. *See* THE PAPERS OF THOMAS JEFFERSON, *supra* note 274, at 321.

276. *Id.*

277. *See* Pollock v. Farmers Home Loan & Trust Co., 158 U.S. 601, 637 (1895), *superseded by* U.S. CONST. amend XVI, *as recognized in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

fundamentally misconstrues the purpose and intent of the Amendment. The history surrounding the passage of the Sixteenth Amendment and the understanding of the word income at the time of its passage indicate that the word income was intended to cover more than just realized income.

1. The History Surrounding the Enactment of the Sixteenth Amendment Indicates the Drafters Intended a Broad Definition of Income

The United States implemented an income tax twice before the enactment of the modern income tax.[278] The 1862 act was re-enacted in 1864, and the 1864 income tax was upheld by the Supreme Court in *Springer v. United States*.[279] The 1864 income tax expired in 1873.[280] The Populist and Progressive Movements re-energized calls for a new income tax as a means of addressing the significant wealth disparity that occurred because of the industrial revolution.[281] In addition, Southern states objected to a tax system that relied heavily on tariffs, which Southern states felt burdened the South more than the North.[282] A coalition of southerners and progressives successfully included an income tax in the Wilson-Gorman Tariff Act of 1894.[283]

The Supreme Court struck down the income tax in *Pollock*, finding that the tax on many sources of income were taxes on the source itself.[284] Thus, a tax on rents, for example, was a tax on the underlying property. The Court therefore concluded that both taxes on property, including stocks and bonds, and the income that derived from that property, were direct taxes and therefore needed to be apportioned among the states.[285] The 1894 tax was not apportioned, so the Court held the tax unconstitutional.[286]

The Supreme Court's decision in *Pollock* was roundly criticized, with President Taft commenting, "Nothing has ever injured the prestige of the

278. Wilson-Gorman Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894) (the income tax overturned in *Pollock*). The first income tax was enacted as part of the Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309. This was never implemented and was revised by the Act of July 1, 1862, ch. 119, § 2, 12 Stat. 432. The tax was reenacted in the Act of June 30, 1864, ch. 173, § 7, 13 Stat. 223, 224.

279. 102 U.S. 586, 598, 602 (1881) (upholding the income tax and limiting direct taxes to capitulation taxes and taxes on real estate).

280. *See* H.R. 2144, 42nd Cong. (1872).

281. *See People's Party of 1892*, *in* A POPULIST READER: SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS 90–96 (George Brown Tindall ed., 1966); *see Democratic Party Platform of July 7, 1896, in* NATIONAL PARTY PLATFORMS, 1840-1972, at 98 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1975).

282. *See* RICHARD F. BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880-1980, at 22–23 (1984) (noting the disconnect between the Northern and Southern economic approaches).

283. Wilson-Gorman Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553.

284. Pollock v. Farmers Home Loan & Trust Co., 158 U.S. 601, 628–29 (1895), *superseded by statute*, U.S. CONST. amend XVI, *as recognized in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

285. *Id.* at 634.

286. *See id.* at 634–35.

Supreme Court more."[287] The breadth of the Court's decision simply could not be reconciled with existing jurisprudence or the Constitution. There was significant debate in Congress whether Congress should pass a new income tax and hope that the Court would reconsider its opinion, or whether Congress should attempt to pass a constitutional amendment.[288] Congress ultimately decided to pass a constitutional amendment providing Congress with the power to collect taxes on incomes.[289]

The context of the amendment and the debate surrounding it clearly indicate that the drafters intended to broaden Congress's taxing power. They were especially interested in taxing the wealthy in society so they would "pay their 'fair share.'"[290] Senator Borah explained that the income tax was necessary, "not for the purpose of putting all the burdens of government upon property or all the burdens of government upon [the wealthy], but that it may bear its just and fair proportion of the burdens of this Government."[291] According to Senator Borah, the income tax proposal was "not as an assault upon wealth, but as an assault upon the vicious principle of exemption of wealth."[292] Congressman Hull, in discussing the income tax in the House of Representatives, also expressed concern about concentration of wealth.[293] He noted, "I have no disposition to tax wealth unnecessarily or unjustly, but I do believe that the wealth of the country should bear its just share of the burden of taxation and that it should not be permitted to shirk that duty."[294]

2. The Phrase "From Whatever Source Derived" in the Sixteenth Amendment was Designed to Broaden the Scope of the Amendment, not Restrict It[295]

Professors Donald Tobin and Ellen Aprill analyzed the history surrounding the passage of the Sixteenth Amendment and concluded that the words "from

287. 1 ARCHIBALD BUTT, TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT 134 (Doubleday, Doran & Co., eds. 1930); STEVEN R. WEISMAN, THE GREAT TAX WARS; LINCOLN – TEDDY ROOSEVELT – WILSON HOW THE INCOME TAX TRANSFORMED AMERICA 227 (2004).

288. *See, e.g.*, 44 CONG. REC. 4394 (July 12, 1909) (statement by Cong. Pickett); 44 CONG. REC. 4396-4398 (July 12, 1909) (statement by Cong. James); 44 CONG. REC. 1566 (April 28, 1909) (statement by Sen. Bailey).

289. U.S. CONST. amend. XVI.

290. Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 TAX LAW. 311, 319 (2014); *see also* 44 CONG. REC. 1682 (May 3, 1909); 44 CONG. REC. 533 (Mar. 29, 1909); *Democratic Party Platform of 1908*, *in* NATIONAL PARTY PLATFORMS, 1840-1972, at 144, 147 (Donald Bruce Johnson & Kirk H. Potter eds., 5th ed. 1975) (noting that the platform endorsed a "constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government").

291. 44 CONG. REC. 1682 (May 3, 1909).

292. Tobin & Aprill, *supra* note 16, at 19 (quoting 44 CONG. REC. 4000 (July 1, 1909)).

293. 44 CONG. REC. 533 (Mar. 29, 1909).

294. *Id.*

295. This section benefits greatly from the work of Ellen P. Aprill. *See generally* Tobin & Aprill, *supra* note 16 (arguing for a broad interpretation of the word "incomes" in the Sixteenth Amendment).

whatever source derived" were designed to expand the scope of the taxing power and were not designed to create a realization requirement.[296] President Taft recommended that Congress pass a constitutional amendment "conferring the power" upon Congress to levy an income tax.[297] President Taft indicated that the Supreme Court's decision "deprived the National Government of a power which, by reason of previous decisions of the court, it was generally supposed that Government had. It is undoubtedly a power the National Government ought to have."[298] Thus, from the very initial step in the process, the Sixteenth Amendment was designed to recognize a broad taxing power, and to confer the power to tax income broadly defined on Congress. The original version of the amendment proposed that "Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population."[299] The version reported out by the Senate Finance Committee was slightly different; it removed the "direct tax" language and substituted in the "from whatever source derived" language.[300]

Nothing in the legislative history explains the language change, and nothing supports Justice Thomas's view that this language created a new framework where Congress separated income from its source, thus requiring a realization event.[301] The Amendment indicated that the source did not matter in determining whether income could be taxed, but that is far different from saying that income must be separated from the source before taxing it. That language indicates that income is taxed regardless of the source.

In common parlance, the clause "incomes, from whatever source derived" would seem like a clear statement indicating Congress has the power to tax income from whatever source. This was a direct attempt to overrule the holding in *Pollock* that Congress did not have the power to tax profits derived from

296. The concurrence's and dissent's arguments that the words derived and realized have the same meaning defies common sense. They are not interchangeable. *See supra* notes 63–64 and accompanying text. The "from whatever source derived" language was common in previous income tax statutes, and those statutes included the taxation of unrealized gains. *See* Act of June 30, 1864, § 117, 13 Stat. 223, 282; Collector v. Hubbard, 79 U.S. 1, 18 (1871) (upholding the 1864 Act), *overruled by* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895), *superseded by statute*, U.S. CONST. amend XVI, *as recognized in* Moore v. United States, 602 U.S. 572, 590 n.5 (2024). As one example analogous to the appreciation of stock, the Act taxed "the increased value of live stock, whether sold or on hand." Act of June 30, 1864, § 117, 13 Stat. 223, 282. The taxation of the appreciation of unsold livestock is extremely similar to the taxation of appreciated stock. *See id.*; Brooks & Gamage, *supra* note 10, at 42–46 (explaining ways 1864 Act taxes unrealized gains).

297. 44 CONG. REC. 3344 (June 16, 1909).

298. *Id.*

299. 44 CONG. REC. 3377 (June 17, 1909).

300. 44 CONG. REC. 3900 (June 28, 1909).

301. *See* EDWIN R.A. SELIGMAN, INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 595 (1911) (noting the lack of explanation for the language change in the legislative history).

capital, including non-realized capital like stock dividends.[302] When the Amendment was sent to the states for ratification, the language "from whatever source derived" was hotly debated. Governors were concerned that the language would allow Congress to tax the interest from municipal bonds.[303] Supporters of the Amendment, including Senators, Congressmen, and influential economists, responded that Congress already had this power prior to *Pollock* and chose not to exercise it.[304] Once again, opponents arguing against the amendment claimed it was overly broad, and supporters, acknowledging the breadth of the Amendment, explained that the political process, not the courts, should be the constraint on Congress's taxing power.

Moreover, the assertion that "from whatever source derived" was intended to expand, not restrict, the scope of Congress's taxing power is supported by the author of the language. While there is no record of the Senate Finance Committee's debate, there is a historical record of the drafters' intent. Harry Hubbard, the solicitor general who argued the *Macomber* case, wrote an article in the Harvard Law Review arguing that the text "from whatever source derived" was added to make the amendment as broad as possible.[305] After the article was published, Senator Knute wrote to Hubbard.[306] Hubbard reported his exchange in the American Bar Association Journal.[307] In letters from May 7, 1920, and September 10, 1920, Senator Nelson wrote:

> I am glad to see that you concur in my views. The words "from whatever source derived" were inserted in the amendment in the Senate at my instance and on my insistence . . . . The record may not show it but I introduced the amendment and the facts are that at that time Mr. Aldrich was Chairman of the Finance Committee and I discussed the matter with him and insisted on the amendment being inserted and he concurred with me and reported the bill with the phrase "from whatever source derived."[308]

Nelson thus confirmed that he added the language, and that it was intended to make the amendment as broad as possible. The language was not added to create a realization requirement.[309] As Edwin R.A. Seligman explained, "To say, 'from whatever source derived' is simply another way of saying 'irrespective of

302. The original income tax passed in 1864 taxed gains from corporations and partnerships whether "divided or otherwise." *See* Act of June 30, 1864, § 117, 13 Stat. 223, 282. Interestingly, the 1864 Act also taxed the increase in the value of "live stock, whether sold or on hand." *Id.* Taxing the increase in the value of live stock on hand is a classic example of taxing unrealized gains. The 1913 Tax Act taxed undistributed corporate earnings in some situations. *See* Tariff Act of 1913, ch. 16 § II(A)(2), 38 Stat. 114, 166.

303. John D. Buenker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 190 (1981).

304. *Id.* at 190–91.

305. Harry Hubbard, *The Sixteenth Amendment*, 33 HARV. L. REV. 794, 798 (1920).

306. Harry Hubbard, *From Whatever Source Derived*, 6 A.B.A. J. 202, 203 (1920).

307. *Id.*

308. *Id.*

309. *Id.*

the source,' or a shorter way of saying 'from all sources alike, whether the source be one that previously made apportionment necessary or not.'"[310]

Professors John R. Brooks and David Gamage argue that a better understanding of the meaning of "incomes" and "from whatever source derived" is accomplished by reading those terms together.[311] They argue that one of the errors by the Moores is that they read each word in isolation, but according to Brooks and Gamage, in order to understand the original meaning, one must examine the entire phrase "taxes on incomes, from whatever source derived."[312] They explain that an ordinary reader at the time would understand that this was "a 'term of art,' a technical legal concept that depends on the interpretations of lawyers, accountants, and economists, not just ordinary meaning."[313]

In this regard, Brooks and Gamage place the language within its historical setting. They argue that the Sixteenth Amendment was designed to return to pre-*Pollock* law, and that in that context that language "from whatever source derived" "had the effect of overruling the part of the *Pollock* decision that hinged on the source of the income."[314] Congress was clearly indicating that the source of the income did not matter.[315]

The phrase was also not used for the first time in the Sixteenth Amendment. It was part of previous income tax laws, which used different variations of the words "from whatever source derived."[316] The 1864 income tax included language referring to "income . . . derived . . . from any other source whatever,"[317] and the 1894 act referenced "income . . . derived . . . from any other source whatever."[318] Importantly, both of these acts included taxes on unrealized gains, thus indicating that Congress used the language "income derived from any source whatever" to include unrealized gains.[319] This clearly indicates that the source of income could be the capital, and the income from that source could be the gain accrued to that capital.

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310. Edwin R.A. Seligman, *The Income-Tax Amendment*, 25 POL. SCI. Q. 193, 198 (1910).

311. John R. Brooks and David Gamage, *"From Whatever Source Derived": The Sixteenth Amendment and Congress's Income Tax Power*, Fordham Law Legal Studies Research Paper No. 4595884, at 24–25 (October 8, 2023), available at SSRN: https://ssrn.com/abstract=4595884 or http://dx.doi.org/10.2139/ssrn.4595884.

312. *Id.*

313. *Id.* at 25.

314. *Id.* at 29.

315. *See id.*

316. *See, e.g.*, Act of June 30, 1864, § 116, 13 Stat. 223, 281.

317. *Id.*

318. Act of Aug. 27, 1894, § 27, 28 Stat. 509, 553.

319. *See* Act of June 30, 1864, § 116, 13 Stat. 223, 281; *see also* Collector v. Hubbard, 79 U.S. 1, 18 (1871) (upholding the 1864 Act); Brooks & Gamage, *supra* note 10, at 36 (explaining how this provision is a tax on unrealized gains).

3. Public Understanding and Original Meaning of the Sixteenth Amendment at the Time of Ratification Indicates the Amendment Reaffirmed Congress's Broad Taxing Power and Did Not Include a "Realization" Requirement

The public understanding and original meaning of the Amendment can be understood by examining the Sixteenth Amendment's passage in historical context. Rather than interpreting the Amendment word by word, it must be understood as a whole, with its language considered within the context of the time in which it was written. Brooks and Gamage provide a comprehensive analysis of the history surrounding the Amendment, the preceding legislative actions, and the text in question.[320] They conclude—based on originalist principles—that the Sixteenth Amendment should be interpreted broadly to encompass unrealized income.[321] As a starting point, Brooks and Gamage explain that the Sixteenth Amendment was designed to overturn *Pollock*.[322] Therefore, understanding the interpretation of Congress's power to tax that existed prior to the Court's decision in *Pollock* is crucial to interpreting the meaning of the Sixteenth Amendment.[323] This view, that the Sixteenth Amendment should be read as overturning the holding in *Pollock* and returning the law to the pre-*Pollock* jurisprudence, was affirmed by the Court in *Moore*.[324]

While recognizing that the word "incomes" is broad enough to cover unrealized gains, Brooks and Gamage argue that looking at the word "incomes" in a vacuum has the potential to lead to a misunderstanding regarding the original meaning of the Sixteenth Amendment.[325] They explain that the word "incomes" is not the correct starting point for analysis.[326] Instead, they focus on "taxes on incomes, from whatever source derived" and note that prior to *Pollock* there was a common understanding of what constituted "taxes on incomes."[327]

4. Congress Taxed Unrealized Gains Prior to and Immediately After Passage of the Sixteenth Amendment Indicating a Common Understanding that Congress Could Tax Unrealized Gains

Originalists often look to prior language in operation at the time of passage to determine ordinary meaning. Prior to passage of the Sixteenth Amendment

320. *See* Brooks & Gamage, *supra* note 10, at 27–40.

321. *Id.* at 41.

322. *Id.* at 17–18.

323. *See id.*

324. Moore v. United States, 602 U.S. 572, 583 (2024) ("Therefore, the Sixteenth Amendment expressly confirmed what had been the understanding of the Constitution before *Pollock*: . . .").

325. Brooks & Gamage, *supra* note 10, at 55.

326. *See id.* at 28.

327. *Id.*

and *Pollock,* Congress subjected some unrealized gains to taxation under its power to tax incomes from whatever source derived.[328]

First, both the 1864 and 1894 income tax used language similar to that in the Sixteenth Amendment referring to "income derived from" any source "whatever."[329] Both of those acts taxed some unrealized gains. For example, the 1864 Act taxed some undistributed corporate profits as income.[330] If the Act taxed undistributed corporate profits to shareholders, the Act was taxing the types of unrealized gains that the Moores argue could not be taxed. Furthermore, the 1864 Act specifically taxed the increase in the value of "live stock, whether sold or on hand."[331] The increased value of livestock "on hand" is exactly the type of unrealized income that the Moores claim cannot be taxed.[332] The 1864 Act was upheld by the Court in *Collector v. Hubbard.*[333] In *Hubbard*, the Court explicitly recognized that the language "income derived" could include unrealized gains, and the drafters would have understood that to be the ordinary meaning of the phrase.[334] Similarly, the statutory version of the income tax proposed in 1909 included similar language and taxed unrealized gains.[335] Congress ultimately decided to propose a constitutional amendment instead of enacting legislation, but these acts are clearly contemporary indications of ordinary meaning at the time the Sixteenth Amendment was drafted.

Moreover, this understanding of the breadth of the Sixteenth Amendment was confirmed when, shortly after passage of the Amendment, Congress passed an income tax statute that included the taxation of stock dividends, which were unrealized gains. The original Treasury Regulations implementing the 1913 Act explained that gross income "embraces not only the operating revenues, but also . . . *appreciation in values of assets, if taken up on the books of account as gain.*"[336] In

328. *Id.* at 33.

329. The 1864 Income Tax Act referred to income "derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere, or from *any other source whatever* . . . ." Act of June 30, 1864, § 116, 13 Stat. 223, 281 (emphasis added). The 1894 Act provided, "whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from *any other source whatever* . . . ." Act of Aug. 27, 1894, § 27, 28 Stat. 509, 553 (emphasis added).

330. *See* Brooks & Gamage, *supra* note 10, at 44; *see also* Act of June 30, 1864, § 116, 13 Stat. 223, 281.

331. Act of June 30, 1864, § 117, 13 Stat. 223, 282.

332. *See* Act of June 30, 1864, § 117, 13 Stat. 223, 282.

333. *See* Collector v. Hubbard, 79 U.S. 1, 18 (1871).

334. *Id.* at 17 ("Other references to the same effect might be made, but it is believed that these are sufficient to show that the policy of Congress in that act was to tax all gains and profits, whether divided or undivided, and that the construction that the undivided gains and profits of manufacturing companies are properly included in that rule is just and reasonable.").

335. Brooks & Gamage, *supra* note 10, at 36.

336. OFF. OF COMM'R, LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES 65 (1914) (emphasis added).

addition, at the time of the Sixteenth Amendment, many corporations were keeping their accounts based on accrual accounting.[337] As a basic principle, accrual accounting does not rely on realization as a mechanism for determining when something should be taxed as income.[338]

5. Discussions Regarding the Amendment that Appeared in the Popular Press and Through its Ratification Also Indicate a Common Understanding that Congress Could Tax Unrealized Gains

Discussions surrounding the Amendment in the press also indicated that the Amendment was intended to provide broad power to Congress to tax both realized and unrealized income. Here, Brooks and Gamage help reframe the originalist argument away from a word-by-word analysis to an analysis of the phrase at issue. Because the Amendment was being debated in a particular context, the public meaning of the Amendment itself, not each word, must be analyzed.[339] According to Brooks and Gamage, the question is not what the average person on the street would think the word "incomes" meant, but what the person on the street would think the words of the Sixteenth Amendment meant.[340] In other words, what was the meaning of Congress having the "power to lay and collect taxes on incomes, from whatever source derived?"[341] In this regard, it is clear that in discussing the Amendment, both proponents and opponents believed the Amendment had broad reach.

The *Atlanta Constitution* noted that the Amendment would "remove the [S]upreme [C]ourt of the United States on this subject from the arena of political contention and strife."[342] An article in the *Christian Science Monitor* explained, "[t]here are reasons for believing that Congress, in the enactment of the income tax law, will confine itself within rational limitations, although there is nothing compelling it to do so."[343] The newspaper continued that the greatest constitutional scholars had been forced to admit that "[t]he new amendment . . . is so sweeping in the authority that it confers upon Congress . . . [the ability to] go anywhere it likes for the funds to be derived from the new law . . . ."[344] The *Los Angeles Times* thought the power was extremely broad and was concerned that if there should be a "sweep" that

337. *See* Brooks & Gamage, *supra* note 10, at 60; *see also* Tobin & Aprill, *supra* note 16, at 7 (noting that "the Supreme Court has long accepted accrual accounting").

338. *See* Spring City Foundry Co. v. Comm'r, 292 U.S. 183, 184 (1934) (approving accrual accounting).

339. *See* Brooks & Gamage, *supra* note 10, at 9–12.

340. *See id.*

341. U.S. CONST. amend. XVI.

342. *Asks for Approval Income Tax Amendment: Gov. Swanson Sends Special Message to Virginia Legislature on the Subject*, THE ATLANTA CONST., Jan. 18, 1910, at 11.

343. *New Amendment to Constitution First Adopted Since 1869*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 1913, at 7.

344. *Id.*

turned "government control to the Populists," the states' reliance on Congressional restraint "is no stronger than a straw."[345] Similarly, a description of the Amendment in the *Wall Street Journal* argued the Amendment would "abrogate" the direct tax clause.[346]

In testimony before the Committee on Federal Relations in Massachusetts as part of the ratification process, Nathan Matthews testified that "[t]here is no limit to the power of Congress to say what things can be taxed under this bill."[347] He further noted, "[t]he intended effect . . . is to have ordinary forms of property taxed first, to tax real estate, buildings, cattle."[348] Matthews then asserts, "*[t]he Government would naturally go to property easily reached and tax land first. What land could rent for and not what it does rent for would be taxed* . . . ."[349] In tax terms, Nathan Matthews is referring to imputed income—in this instance, the imputed value of rent. Imputed income is classic unrealized income, suggesting that a common understanding of the Amendment included the potential to reach unrealized gains.[350] Nathan Matthews's comments were later quoted in a story in the *Boston Evening Transcript*, reflecting both contemporary understanding and the perspective of many considering the ratification of the Amendment.[351] Regardless of one's view of the benefits of the Amendment, both proponents and opponents recognized that it would broadly expand Congress's taxing power.

6. Cases Decided Close in Time to the Passage of the Amendment Indicate the Original Meaning of the Amendment

Originalists often examine Supreme Court cases decided close in time to the passage of a constitutional provision to determine the original meaning of the Amendment.[352] *Brushaber v. Union Pacific Railroad*[353] and *Stanton v. Baltic Mining Co.*[354] both indicate that the drafters intended that the Sixteenth Amendment restore Congress's taxing power to what existed pre-*Pollock*.[355]

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345. *The Sixteenth Amendment*, L.A. TIMES, Jan. 20, 1910, at 114.

346. *How an Income Tax Would Work*, WALL ST. J., July 24, 1909, at 6.

347. *Matthews on Income Tax*, BOS. EVENING TRANSCRIPT, Feb. 14, 1910, at 2 (quoting Nathan Matthews).

348. *Id.*

349. *Id.* (emphasis added).

350. *See id.*; Brooks & Gamage, *supra* note 10, at 33.

351. *Matthews on Income Tax*, *supra* note 347, at 2.

352. See *supra* Part III for the argument that *Pollock* was wrongly decided based on originalist methodology and that *Hylton*, as a Supreme Court case close in time to the drafting of the Constitution, was a good indication of the original meaning of what was a direct tax.

353. 240 U.S. 1, 10–12 (1916).

354. 240 U.S. 103, 112–114 (1916).

355. As discussed *infra*, these cases also contradict the dissent's argument that by applying originalism, the Sixteenth Amendment created a new distinction between source and income, and that this separation mandated a realization requirement.

In *Brushaber,* a stockholder of the Union Pacific Railroad Company sought to prevent the railroad from complying with the Income Tax Act, whereby the corporation paid the tax on behalf of the stockholder.[356] In upholding the constitutionality of the income tax, the Court explained "*the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.*"[357] Similarly, in *Stanton v. Baltic Mining Co.,* just as in *Brushaber*, a stockholder brought suit to prevent a corporation from making a "voluntary payment" of income tax on behalf of the stockholder.[358] The Court concluded that "it was settled that the . . . Sixteenth Amendment conferred no new power of taxation but simply [restored] the previous complete and plenary power of income taxation possessed by Congress *from the beginning"* and confirmed the previous understanding that an income tax was *an indirect tax*.[359] The Court further explained that a tax must be tested on "what it was" and not "by a mistaken theory deduced from the origin or source of the income taxed."[360]

These two cases were decided in 1916, just three years after the passage of the Sixteenth Amendment.[361] They show a clear public understanding that the Sixteenth Amendment was designed to return tax law to the pre-*Pollock* jurisprudence. The original meaning of the Sixteenth Amendment was to make clear that an income tax was an indirect tax, and that the source of the income was not relevant to determining whether a tax was indirect. This directly contradicts that notion that the Sixteenth Amendment created a realization requirement by requiring that the gain be separated from the capital.[362] That is precisely the opposite of what these cases indicate the drafters were trying to accomplish by passage of the Sixteenth Amendment. The Sixteenth Amendment highlighted that the source of the gain was not relevant.

IV. ORIGINALISM'S FAILURE IS PARTICULARLY DAMAGING IN THE TAX CONTEXT WHERE DRASTIC CHANGES CAN FUNDAMENTALLY UNSETTLE THE EXISTING ECONOMIC FRAMEWORK

Justice Scalia and other originalists argue in favor of applying originalism because they claim it provides certainty, minimizes bias, and limits judges' ability

356. *Brushaber*, 240 U.S. at 9.

357. *Id.* at 18. (emphasis added).

358. *Baltic Mining Co.*, 240 U.S. at 107.

359. *Id.* at 112 (emphasis added).

360. *Id.* at 113.

361. *See generally Baltic Mining Co.*, 240 U.S. 103 (decided in 1916); *Brushaber*, 240 U.S. 1 (same); U.S. CONST. amend XVI (ratified in 1913).

362. For a discussion of allowing for the taxation of unrealized gains, see generally Collector v. Hubbard, 79 U.S. 1 (1871), *overruled by* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895), *superseded by statute*, U.S. CONST. amend XVI, *as recognized in* Moore v. United States, 602 U.S. 572, 590 n.5 (2024).

to engage in results-oriented decision-making.[363] Stability and reliability are particularly important in interpreting tax law because taxation is an essential component of the U.S. financial system, and the tax code is an intricate system that has been built upon itself since its creation. The system might have developed differently had early conceptions of income or the Constitution been different, but small changes in fundamental questions could topple the entire system. Originalists' willingness to reinterpret existing settled law based on their particular view of what they believe is the original meaning of a provision is extremely dangerous for the health of the financial system and the economic foundations of our market structure. This is especially true if the theoretical underpinning of originalism fails to deliver on its promise of limiting bias and results-oriented decision-making.

The dissent in *Moore* would have unsettled existing tax jurisprudence and required a complete restructuring of the tax code. Since the passage of the Sixteenth Amendment, stable tax jurisprudence and Congress's responsible exercise of the taxation power have provided for a constitutional and stable tax system. In contrast, the Moores and others advocate for a fundamental shift in the jurisprudence surrounding Congress's taxing power. The dissent claims that drastic results are not the Court's fault, and that the Court need not fashion a remedy for these calamities.[364] It argues that the Court need not assist if the Congress writes legislation that rests on constitutional quicksand.[365] In *Moore*, however, it was as if the dissent dug the hole, poured in the sand, added water, and then complained that there was quicksand.

While there are originalist arguments on both sides, the weight of historical evidence favors a broad interpretation of the Sixteenth Amendment. The dissent ignores most of the tools in an originalist's toolkit and appears to view history through a lens designed to produce an ideological result.[366] The dissent also fails to even discuss many of the factors relied upon by originalists that indicate a contrary result. If originalism fails in its goal of creating stable, identifiable, and clear results based on a clear understanding of the original meaning of a provision, then its validity and its willingness to completely unravel existing jurisprudence must be questioned.

363. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii (2012).

364. Moore v. United States, 602 U.S. 572, 651 (2024) (Thomas, J., dissenting).

365. *Id.*

366. JEFFREY A. SEGAL & HAROLD SPAETH THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86, 92 (2002); *see* RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 12 (2018).

A. The Dissent Fails to Apply Originalist Principles in Interpreting the Direct Tax Clause

As we discussed in Part III, the direct tax clause was originally interpreted, shortly after the ratification of the Constitution, as only applying to head taxes and property.[367] The interpretation limiting direct taxes to head taxes and taxes on property was settled for over a century until the Court, expanding the definition of direct tax, struck down the income tax in *Pollock*.[368] *Pollock* was a radical departure from the historical understanding of the direct tax clause, and *Pollock* was ultimately overruled by the Sixteenth Amendment.[369] A standard originalist argument would have looked at *Hylton*, the case decided almost immediately after the ratification of the Constitution, as having a better understanding of the original meaning of direct tax than *Pollock*. In addition, if the Sixteenth Amendment overruled *Pollock*'s interpretation of direct tax, the originalist would look to the original interpretation in *Hylton* and its progeny, not to *Pollock*, as the background for the original meaning. In fact, though it would have been a more dramatic decision, one would have expected an originalist to look at *Pollock* and determine it was wrongly decided on originalist grounds, overrule *Pollock*, and conclude that direct taxes only included head and property taxes.

The dissent, however, does not take this path. Instead, it sees the original federal taxing power in the Constitution as a "radical proposal" and the direct tax clause as an important limitation on that power.[370] The Court does not cite any authority for either proposition, and the conclusion does not comport with the history of the clause. The dissent ignores any of the history indicating that the direct tax clause and the apportionment requirement had a direct connection to the three-fifths clause and slavery.[371] It also ignores the concern in Congress that direct taxes be allocated among the states fairly based on a state's population.[372]

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367. Hylton v. United States, 3 U.S. 171, 175 (1796) (opinion of Chase, J.) ("I am inclined to think . . . direct taxes . . . are . . . a capitation, or . . . a tax on land." (cleaned up)); *id.* at 181 (opinion of Iredell, J.) ("If [a tax] cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution." (cleaned up)).

368. *See Moore*, 602 U.S. at 601 (Jackson, J., concurring).

369. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 18 (1916); *see* Brooks & Gamage, *supra* note 10, at 6.

370. *Moore*, 602 U.S. at 626 (Thomas, J., dissenting).

371. *See Hylton*, 3 U.S. at 177 (opinion of Paterson, J.); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 92–96 (2006) (explaining that the Constitution balanced sectional power to provide the North and South "a practical veto on national policy"); Ackerman, *supra* note 16, at 6–13 (arguing that the direct tax clause was designed to protect slavery).

372. The three-fifths clause hampers any discussion of "fair distribution." Since the Constitution included enslaved people at three-fifths of a person for purposes of representation, it also included them as three-fifths of a person for purposes of distribution of direct taxes. *See* Ackerman, *supra* note 16, at 9. Therefore, prior to the Civil War Amendments, the distribution of direct taxes was not "equal." The argument

The dissent recites a history of distrust of taxation and distrust of providing for a federal tax power to bolster its conclusion that the direct tax clause was designed to limit the Federal taxing power.[373] It notes that after ratification of the Constitution, both the Federal Government and state governments had a power of taxation, and that granting the federal tax power was a concern to many.[374] The dissent then concludes that the "Federal Government's ability to exercise that concurrent power [was] thus an essential component of the constitutional compromise."[375] The dissent uses the fact that there was significant opposition to the federal taxing power to argue that the granted power was therefore a limited power.[376] But the more logical reading of the history is to conclude that those who opposed a federal taxing power simply did not carry the day. In other words, the effort to limit the federal taxing power failed.

Moreover, the dissent ignores the historical understanding and debate at the time of drafting of the clause. It fails to even consider the debate surrounding slavery and the concern that the North might have used taxation of enslaved people as a means of eliminating or discouraging slavery. The direct tax clause ensured that, if there was a tax on enslaved people, that tax would be distributed by state population (counting enslaved people as three fifths of a person) and would ensure that the burden was distributed not based on the number of enslaved people in each state, but based on the population in a particular state.

Despite the fact that originalists use cases decided close in time to a provision as an indication of original meaning, the dissent declines to rely on *Hylton* as a good indication of the meaning of the clause. In examining *Hylton*, the dissent acknowledges that three of the four justices who heard the case suggested that direct taxes were limited to capitation and land taxes.[377] The dissent then explained that this limitation was done "with some caution."[378] What was, however, clear from *Hylton* was that the definition of a direct tax was *very* limited and was not intended to reduce Congress's power to tax. In fact, in *Hylton*, Justice Iredell determined that direct taxes could only be taxes that could be fairly apportioned.[379] And Justice Chase noted that "[t]he rule of *apportionment*

from the North was that if the South received a benefit with regard to representation, it was "fair" for it to similarly pay a higher portion of the burden of a direct tax. *See Hylton*, 3 U.S. at 177 (opinion of Paterson, J.); Ackerman, *supra* note 16, at 9.

373. *Moore*, 602 U.S. at 626–30 (Thomas, J., dissenting).

374. *Id.* at 631.

375. *Id.*

376. *See id.* at 634.

377. *Id.* at 632.

378. *Id.*

379. Hylton v. United States, 3 U.S. 171, 181 (1796) (opinion of Iredell, J.) ("If [a tax] cannot be *apportioned*, it is, therefore, not a *direct* tax in the sense of the Constitution.").

is only to be adopted in *such* cases where it can *reasonably* apply."[380] The notion was that Congress would not have thought the apportionment provision applied to taxes that could not fairly be apportioned.[381]

Moreover, from 1796 to the Court's decision in *Pollock*, the Court had never extended the direct tax clause beyond that set out in *Hylton*.[382] In a series of cases decided after *Hylton*, the Court continued to classify most taxes as indirect taxes.[383] In 1869, the Court held that a tax on an insurance company was not a direct tax, [384] and a tax on banks for "notes issued for circulation"[385] was an indirect tax.

In 1875, the Court in *Scholey v. Rew* determined that a "succession tax" was not a direct tax within the meaning of the Constitution.[386] The Court acknowledged that "it never [had] been decided" whether "any other tax than a capitation tax and a tax on land" were direct taxes, implying that the definition was in doubt.[387] The full quote does recognize some doubt about the scope of the term "direct taxes" in some situations, but the quote was referencing the fact that some types of taxes on land or property might be direct taxes. It clearly understood that income taxes were not direct taxes. The full quote provides:

> Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not *absolutely* decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the *tax on income*.[388]

The Court in *Scholey* in 1875 thus recognized that it had not absolutely decided that direct taxes were only taxes on land and capitation taxes, meaning that there might be some classification of taxes that it had not considered that might be direct taxes.[389] It was clear to the Court, however, that in general, direct taxes were land and capitation taxes and that income taxes were not direct taxes.

The Court in *Scholey* made this interpretation clear at the beginning of the quotation where it noted, "[t]he construction *always* given to Article I, indicates that the only taxes which the Constitution regards as direct taxes, are capitation taxes and taxes imposed immediately on land, and which are capable of apportionment without producing any inequality or injustice."[390] In 1880, the

380. *Id.* at 174 (opinion of Chase, J.).
381. *Id.*
382. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570–71 (2012).
383. *See id.*
384. Pac. Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433, 446 (1869).
385. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 546–47 (1869).
386. Scholey v. Rew, 90 U.S. (23 Wall.) 331, 346–48 (1875).
387. *Id.* at 347.
388. *Id.* (emphasis added).
389. *See id.*
390. *Id.* at 343 (emphasis added).

Court considered whether the civil war income tax was a direct tax.[391] The Court concluded that the income tax was not a direct tax and that direct taxes were "only capitation taxes, . . . and taxes on real estate."[392]

In other words, every case decided from 1796 to 1881 included a very limited interpretation of "direct tax," and up until 1881 the Court viewed the definition as clear. These cases show a clear indication from an originalist perspective that the original meaning of the direct tax clause only applied to capitation taxes and taxes on land, and maybe on something very similar to capitation taxes and taxes on land, but the scope of the direct tax clause was extremely limited.

The Court recognized that it had limited direct taxes to poll taxes and taxes on land but describes this historically consistent understanding of the direct tax clause as "long-running skirmishes," which, it concludes, came to a "dramatic climax" in *Pollock*.[393] For an originalist, the consistent interpretation of the direct tax clause over a century is not a series of skirmishes but is instead a historical record regarding the interpretation of the direct tax clause.

B. The Dissent Fails to Apply Originalist Principles in Interpreting the Sixteenth Amendment

Possibly, in an attempt to avoid the longstanding definition of direct tax, the dissent relies on its original understanding of the Sixteenth Amendment to limit Congress's power to tax incomes.[394] Instead of examining the history surrounding the passage of the Sixteenth Amendment, the dissent relies on *Pollock* as the basis for its original understanding of the direct tax clause and the Sixteenth Amendment.[395] The dissent explains that the holding in *Pollock* determined that the direct tax clause could not be "refined away" by a forced distinction between "income and source," implying that the Court's decision in *Pollock* was correct.[396] To the dissent, *Pollock* stood for the proposition that, in determining what was a direct tax, *Pollock* concluded that there was no distinction between the income from property and the property itself.[397] According to the dissent, under *Pollock*, if a tax on property was a direct tax, so was the income derived from that property.[398] The dissent then concludes that the Sixteenth Amendment was designed to overturn this source/income distinction and that a source/income distinction must therefore be part of the

391. Springer v. United States, 102 U.S. 586, 592 (1881).
392. *Id.* at 602.
393. Moore v. United States, 602 U.S. 572, 634 (2024) (Thomas, J., dissenting).
394. *See id.* at 651–52.
395. *Id.* at 635.
396. *Id.* at 638.
397. *Id.* at 636–37.
398. *Id.*

Sixteenth Amendment.[399] It then concludes that a source/income distinction can only exist if there is a realization requirement implicit in the Sixteenth Amendment.[400]

1. The Dissent Fails to Grapple with the History Surrounding the Passage of the Sixteenth Amendment

In its originalist approach to the question presented in *Moore*, the dissent fails to deal with most of the history surrounding the Sixteenth Amendment. The Amendment was not considered in a vacuum but was debated and ratified at a time in the country's history when taxation of the large concentration of wealth dominated debate and where Congress was seeking a method to move away from regressive tariffs and towards a more progressive income tax. The history surrounding the Sixteenth Amendment was all about allowing Congress to tax wealthy members of society to ensure they paid "[their] just share."[401]

Because the Sixteenth Amendment was designed to overrule *"Pollock*'s obstacle to an income tax[] and it was understood by the public in those terms," the dissent claims that the Sixteenth Amendment stands for the proposition that one must distinguish between the source of the property and the income from that property.[402] If there must be a separation, the dissent proclaims that something must occur to determine whether something is the source or the income.[403] But the public clearly would not have understood the Sixteenth Amendment to create this income and source distinction relied upon by the dissent. The source and income distinction was not present in the debate surrounding the amendment, nor was it central to any distinction made in the discussion of the Amendment. The discussion surrounding the Amendment, both in Congress during ratification, and in public discourse, was about overturning what was viewed as an incorrect decision and returning the law to the pre-*Pollock* jurisprudence.[404]

The original proposed wording of the Sixteenth Amendment referred explicitly to "direct taxes."[405] The dissent noted that "[i]t is not clear how the original proposal's reference to 'direct taxes' was removed, or how the phrase 'from whatever source derived' was added."[406] But as discussed in Part III, there is reasonable evidence contemporary in time to discussion of the Amendment on both how and why "from whatever source derived" was added to the

399. *Id.* at 638.
400. *Id.* at 640.
401. 44 CONG. REC. 1682 (May 3, 1909).
402. *Moore*, 602 U.S. at 638–40 (Thomas, J., dissenting).
403. *See id.* at 642.
404. *See* Brooks & Gamage, *supra* note 10, at 29; *Moore*, 602 U.S. at 583.
405. *Moore*, 602 U.S. at 639 (Thomas, J., dissenting).
406. *Id.*

amendment.[407] Senator Nelson explained that the words were added at his request, and that the language was added to make the power to tax incomes as broad as possible.[408] The language was not designed to limit the breadth of the income tax.

2. *The Dissent Creates a New Constitutional Distinction Not Supported by an Originalist Analysis that a Distinction Between Source and Income Necessitates a Realization Requirement*

The dissent incorrectly finds a new constitutional distinction between income and source in the Sixteenth Amendment that is not supported by an originalist approach. Instead of recognizing that the Sixteenth Amendment was designed to overturn *Pollock* and return to the pre-*Pollock* jurisprudence, the dissent claims that the Sixteenth Amendment created a new constitutional distinction between income and source, and that such a distinction includes a realization requirement.[409]

The dissent, however, did not employ originalism to reach this result. Instead, the dissent used the much maligned and overturned opinion in *Pollock*.[410] Instead of looking to the original intent of the Sixteenth Amendment, the dissent creates a paradigm, connected to *Pollock*, that the Sixteenth Amendment is about distinguishing between income and source.[411] It looks to *Pollock* for the meaning of the Sixteenth Amendment[412] when the Sixteenth Amendment was an *explicit rejection* of *Pollock*. The *Pollock* Court conflated income and source to broaden the definition of direct taxes. The Sixteenth Amendment rejected this approach. Instead, the Sixteenth Amendment explicitly indicates that the source does not matter.[413] Congress has the power to tax income regardless of the source.[414] Thus, the income in question might be the appreciation of an asset, even if the source is capital. It turns originalism on its head to then argue that the Sixteenth Amendment broadens the definition of direct taxes when the entire point of the Amendment was to clarify that income could be taxed.

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407. Hubbard, *supra* note 306, at 203 (quoting a letter from Senator Nelson explaining that the words "whatever source derived" were designed to make the power to tax incomes as broad as possible).

408. *Id.*

409. *Moore,* 602 U.S. at 639–40 (Thomas, J., dissenting).

410. *See id.* at 638–39 (tethering the meaning of the Sixteenth Amendment to *Pollock* by stating that the amendment "was designed to overrule *Pollock*'s obstacle to an income tax" and nothing more).

411. *See id.* at 640 ("Against the background of *Pollock*, . . . the Sixteenth Amendment has an obvious and narrow meaning.")

412. *See id.*

413. U.S. CONST. amend. XVI (granting power "to lay and collect taxes on incomes, *from whatever source derived*" (emphasis added)); *see also*, Hubbard, *supra* note 306, at 203 (stating that the words "were inserted, in order to make the power to tax incomes *as broad as 'incomes' themselves could possibly be*.").

414. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 11–13 (1916).

After creating a source/income distinction that is nowhere in the text of the Amendment, the dissent then imports into the Amendment additional requirements that fit its narrative.[415] This is exactly the type of move that originalists claim to abhor. The dissent concludes that the income/source distinction incorporated within the Amendment is a realization requirement.[416] As the dissent explains, realization was understood as a concept at the time of the Sixteenth Amendment.[417] If realization was so well understood, then we would have expected the drafters to have used that word in the Amendment if it were important. Additionally, we can find no record of the word realization being used in either the debate surrounding the Amendment or in public discourse surrounding the Amendment.[418] The dissent explicitly adds the word "realized" into the Sixteenth Amendment.[419] It thus rewrites the Amendment to read "the Congress shall have power to lay and collect taxes on *realized* incomes."

The dissent rejects the notion that the word income could be broader than "realized income" not based on originalist analysis but based on a view that a broad definition of income would not distinguish between income and source.[420] The dissent acknowledges that income in a purely economic sense includes unrealized gains, but contends increases in the value of property would not distinguish between the source and the income.[421] The dissent argues that the tax on the increase in the value of assets would be a tax on the value of the real estate and therefore must be apportioned.[422] This statement again is an assertion not based on any of the tools originalists claim validate their interpretive method.

The increase in the value of the asset, even if the asset is not sold, is a gain to the person holding the asset. When stock increases from $100 to $200, the holder has an economic gain of $100. To the extent the dissent is worried about a distinction between source and income, the source is what, in tax terms, we refer to as basis. That is generally the cost of the asset. Section 1001 of the Internal Revenue Code then calculates the gain of the asset upon sale as the

415. *Moore*, 602 U.S. at 639–40 (Thomas, J., dissenting).

416. *Id.* at 641.

417. *See id.* "Well understood" is a bit of a stretch. Realization as a concept is still debated and not well understood.

418. *See* Brooks & Gamage, *supra* note 10, at 29 ("[A]s far as we know no historical evidence . . . has emerged of a public understanding that the Sixteenth Amendment intended to authorize a narrower version of the income tax power than that which existed prior to *Pollock*.").

419. *Moore*, 602 U.S. at 644 (Thomas, J., dissenting).

420. The dissent argues that the majority agrees with the distinction between income and source. *See id.* at 651–52. But the majority does not rely on this distinction. Instead, the majority recognizes that taxes on income are indirect and "property taxes" remain direct taxes. *Id.* at 583–84 (majority opinion). This is much different than relying on a source/income distinction suggested by the dissent.

421. *Id.* at 641–42 (Thomas, J., dissenting).

422. *Id.* at 642.

difference between the amount received on the sale and the basis.[423] The drafters of the tax code chose to defer tax on this gain until it is sold, but the incremental increase in value is still income to the holder of the asset.[424] Under the dissent's logic, the source is the value of the property and therefore not income. Economics and the current tax code, however, treat the increase in the value of the asset as being derived from that asset—the original asset is represented by its basis.

Thus, even if the dissent's interpretation is correct and the Sixteenth Amendment created a distinction between source and income, when considering an asset that has increased in value, the source is the basis in the asset and the income is the return to the owner, either through appreciation of the asset, or through cash flows obtained by the owner. The broad meaning of derived in the Amendment also supports that conclusion. The original capital investment is the basis, or the source, and increases in value of the capital investment are *derived* from the original investment. When investors think about their return on investment, it is the return from the original capital investment, whether that return is through appreciation of a capital investment or through dividends or other cash receipts.

3. The Dissent's Approach Highlights That Originalism's Claim to Objectivity Fails

The dissent in *Moore* exemplifies how originalism's claim to objectivity and stability fail, and how originalism is subject to the same type of results-oriented decision making that it claims to unseat. The willingness to ignore over a century of precedent to establish a new restriction on congressional power is particularly damaging in the field of taxation, which forms the basis of our current economic system. The tax code is extremely complex, and broad assertions from the Court could have devastating consequences to the economy and our democratic system.[425] Other interpretive methods that rely more on precedent, past practice, and pragmatism are less likely to create dramatic changes in common legal understandings. These types of dramatic changes are particularly problematic when there is an intertwined, complex area of law that forms the foundation upon which the United States survives. The dissent argues that if Congress steps in quicksand, it cannot then ask the Court to pull it out.[426] But here, the dissent uses a results-oriented approach to originalism that actually creates the quicksand. The Court should be very careful about drastically changing the jurisprudential landscape, especially when those drastic changes are built on very weak foundations.

423. 26 U.S.C. § 1001(a).
424. 26 C.F.R § 1.61-6(a).
425. *Moore*, 602 U.S. at 597.
426. *Id.* at 651 (Thomas, J., dissenting).

The dissent finds a realization requirement to exist even though previous jurisprudence did not include such a requirement. The text of the Amendment does not include the word realization though it was in common use at the time, and the debate around the Amendment does not include concerns regarding realization. Moreover, the dissent relies on originalism to conclude that when the drafters used the language "incomes, from whatever source derived"[427] they meant "incomes, from whatever source *realized*."[428] As discussed above, these conclusions are questionable when applying existing originalist methodology and lead to a concern that originalism is producing results-oriented decisions and is failing in its essential premise.[429]

C. The Court's Approach in Moore*, Applying a Type of Living Constitutionalism, is the Soundest Method of Constitutional Interpretation*

Originalism's willingness to forego long-term settled interpretations of law in favor of a new "original" understanding of the ordinary meaning of a provision is problematic but particularly dangerous when interpreting tax provisions. Tax law has generally avoided drastic disruptions due to changing constitutional interpretations, and constitutional law in the tax arena has been fairly well settled. The Court recognizes that the Constitution provides Congress with the power to tax and generally leaves tax policy to the political process.[430] The one occasion when the Court decided to overturn established precedent and find that the income tax was a direct tax resulted in the Sixteenth Amendment overturning the Court's action.[431]

The United States is the largest economy in the world, and the country's economic stability is intertwined with its financial system and its tax code.[432] Interpretive shocks to the system can have wide-ranging ramifications, especially when these shocks are based on decisions by the Court. In addition, the tax code is tremendously complex and intertwined, and broad-based changes to system wide understandings can be particularly harmful.

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427. U.S. CONST. amend. XVI.

428. *See Moore*, 602 U.S. at 620 (Thomas, J., dissenting) (arguing that a realization requirement is inherent to the Sixteenth Amendment).

429. We recognize that for what we refer to as Originalism 3.0, the promise of lack of bias is less important. They recognize that bias may exist in the application of originalism but argue that it is still the correct interpretive method. They argue that originalism may be done inappropriately but that is true of other methods as well. Their argument is that originalism should be used because it is the most appropriate interpretive method.

430. *See, e.g.*, *id.* at 590–92 (majority opinion) (examining how longstanding congressional taxing practices reinforce the Court's precedents).

431. *See id.* at 600 (Jackson, J., concurring).

432. *See, e.g.*, LIDA R. WEINSTOCK, CONG. RSCH. SERV., R45723, FISCAL POLICY: ECONOMIC EFFECTS 2 (2021) (detailing how increases and decreases in tax revenue effect consumer spending and, therefore, the economy as a whole).

The tax code is a statutory scheme built upon the taxing power contained in Article 1, Section 8.[433] Originalism, which looks back to the public meaning at the time of the founders, is particularly unsuited to dealing with this statutory structure. If the Court decides to pull the bottom out of the code, it will all come tumbling down, impacting the economy and the health of the United States. The willingness of originalists to create this type of destruction is evidenced by Justice Thomas's comment that he is unconcerned with the "calamity" that might be caused by a reinterpretation of constitutional norms.[434]

As the majority decision in *Moore* indicates, there is a type of living constitutionalism, that relies on history, precedent, original meaning, past practice, and pragmatism, that can stay true to the constitution without causing dramatic and seismic shifts in the law. The *Moore* opinion foreshadows that there might be a majority on the Court willing to use traditional living constitutionalist principles that will not disrupt the tax ecosystem and will provide stability for both taxpayers and the fisc.

For example, in *Moore*, in interpreting whether the MRT was constitutional, the Court examined the history of practice regarding provisions like the MRT. It evoked pragmatism and analyzed the consequences of its actions. It analyzed current code provisions, some that have been in force for decades, and recognized that those provisions might be influenced by a broad holding. And importantly, it recognized that common practice, over a long period of time, was relevant for determining the constitutionality of a provision. It allowed the MRT to be examined as part of a holistic tax system.

Originalism is now being used as a results-oriented interpretive method that almost always produces conservative interpretations. The Sixteenth Amendment was passed to deal with the Court's attempt to limit Congress's taxing power, and the dissent, using originalist methodology, still found the Amendment to limit and not expand congressional power. If the Sixteenth Amendment, with its history of seeking a broad-based income tax, does not convince originalists on the Court, it is hard to imagine what would.

Living constitutionalism would not always lead to a particular ideological result, and a conservative Court could still apply living constitutionalism to achieve conservative ends. But those conservative ends would be based on history, tradition, precedent, and pragmatism. Importantly, these changes would be incremental and provide for a measured and stable tax system. In addition, when the Court applies living constitutionalism as an interpretive theory, its biases and assumptions are better laid bare for all to see. If the Court relies on history, tradition, or pragmatism, those assumptions are clear and allow readers to understand both the intellectual reasoning and the judgments made by the various justices. The *Moore* opinion provides an excellent roadmap

433. U.S. CONST. art. I § 8.

434. *Moore*, 602 U.S. at 651 (Thomas, J., dissenting).

for a pragmatic and reasonable incremental approach to constitutional interpretation. It indicates that there may be five justices who are willing to forego classic originalism and employ a type of living constitutionalism, which is informed by historical tools but not governed by them. Living constitutionalism will provide flexibility and pragmatism in an area of law that requires it, enabling our financial ecosystems to thrive while allowing the Constitution to set the path.

CONCLUSION

Because of the Court's use of living constitutionalism, the *Moore* opinion does not upend the tax code and, instead, preserves existing norms and expectations without making drastic changes to the legal landscape. Four justices, however, indicated a willingness to dramatically transform the existing structure. The *Moore* opinion provides a pathway for considering future constitutional questions employing a type of living constitutionalism that relies on history, contemporary understanding, consequences, and pragmatism, to answer complex constitutional questions. This approach allows greater certainty for the legal structure as it places significant weight on precedent and practice.

The *Moore* opinion, however, does not resolve the original question posed by the Moores: whether realization is constitutionally required. Prior to *Moore*, most tax scholars would have argued no such realization requirement exists within the Constitution, but the *Moore* case indicates that there is potential support for such a requirement. Thus, new provisions, like a wealth tax or a tax on appreciated stock that has not yet been sold, may be in for rough treatment in the Court. *Moore*, however, shows that those issues can be interpreted through a living constitutionalism approach that would provide more measured answers to these questions. The wealth tax may be a direct tax, and the Court can reach that conclusion without applying the type of devastating originalist application suggested by the dissent in *Moore*. Alternatively, the wealth tax may be drafted in a way that makes it an excise tax similar to the estate tax, and the Court may determine that it is therefore constitutional. Those are questions for another day. But *Moore* provides a constitutionally sound set of principles and methods to answer those questions while avoiding constitutional and financial quicksand. The income tax is a fundamental part of our constitutional system and the Court should hesitate before undermining the Nation's ability to collect revenue. The last time the Court failed to heed that advice, a constitutional crisis ensued.