

THE ORIGINAL MEANING OF THE SIXTEENTH AMENDMENT

JOHN R. BROOKS & DAVID GAMAGE**

ABSTRACT

The Sixteenth Amendment to the United States Constitution enshrines Congress’s “power to lay and collect taxes on incomes, from whatever source derived.” Challenges to the exercise of that power have typically turned on whether the thing being taxed is “income” or not. In the most recent example, the 2024 Supreme Court case of Moore v. United States, taxpayers argued that the Sixteenth Amendment only authorizes taxation of realized income—that is, that gain from appreciated property can only be taxed as “income” when there has been a sale or conversion of that property.

In this Article we argue—based on the original meaning of the Sixteenth Amendment—that this approach to constitutional tax questions is wrong. The focus of the Sixteenth Amendment and of the congressional income tax power is not “income” per se, but rather “taxes on incomes, from whatever source derived.” Thus, the question should not be whether the thing being taxed satisfies some isolated definition of “income,” but rather whether that tax in question comports with the original meaning of “taxes on incomes.” This is because, as we show here, the explicit and well-understood original meaning of the Sixteenth Amendment was to overrule the Supreme Court case of Pollock v. Farmers’ Loan & Trust Co. and restore the “complete and plenary power of income taxation” as it was understood at the time. The Amendment did not create Congress’s power to tax income, a power which it had been exercising since the Civil War; rather, it merely removed the impediment Pollock had introduced. This original meaning of the

** Brooks: Professor of Law, Fordham University School of Law; Gamage: The Law School Foundation Distinguished Professor of Tax Law & Policy, University of Missouri School of Law. We are grateful for comments and suggestions from Ellen Aprill, Reuven Avi-Yonah, Laura Cadra, Conor Clarke, Michael Doran, Henry Franks, Brian Frazelle, Brian Galle, Brianne Gorod, Ari Glogower, Daniel Hemel, David Kamin, Rebecca Kysar, Shruti Rana, Alex Raskolnikov, Steven Rosenthal, David Schizer, Lawrence Solum, Joseph Thorndike, Donald Tobin, Victor Thuronyi, Brett Wells and participants at the Columbia Law School Tax Policy Colloquium, the National Tax Association Annual Meeting, Columbia Law School/Hebrew University Tax Conference, the University of Virginia Invitational Tax Conference, the LMU Loyola Law School Tax Colloquium, the Washington University School of Law Faculty Workshop, the University of San Diego School of Law Tax Speaker Series, the AMT/ETIC Conference at the University of San Diego School of Law, and the Tax Club of New York City. Michael Rotellini, Joseph Orlando, and Saeed Durojaiye provided valuable research assistance.

Amendment was communicated clearly at that time both in Congress and in the press.

Thus, to understand the power the Sixteenth Amendment authorized, we should look at the practice and experience of income taxation at that time. Our examination shows that federal (and state) income taxes explicitly included many items of “unrealized” income, such as shareholders’ shares of undistributed corporate earnings (the issue in Moore). We also show—for the first time in the modern literature—that the federal corporate income tax law at the time of the Sixteenth Amendment’s ratification incorporated elements of “mark-to-market” taxation—treating unrealized gain from the appreciation of assets as gross income for tax purposes. This historical review thus reveals that Congress’s power to tax income is broad and should not be limited by appeals to constrained definitions of “income” isolated from the historical context.

TABLE OF CONTENTS

INTRODUCTION3

I. BACKGROUND: THE CONSTITUTIONAL LAW OF TAXATION AND THE MOVEMENT TO REVIVE *EISNER V. MACOMBER*13

 A. *The Apportionment Clauses: Direct Taxes and Excises*13

 B. *Pollock v. Farmers’ Loan & Trust Co. and the Sixteenth Amendment*17

 C. *Eisner v. Macomber and the Question of Realization*18

 D. *Moore v. United States and the Movement to Revive Macomber* ..22

 1. *Case Background*23

 2. *Ninth Circuit Decision and Dissent*24

 3. *The Supreme Court Decision, Concurrences, and Dissent*26

II. THE ORIGINAL MEANING OF THE SIXTEENTH AMENDMENT: RESTORING CONGRESS’S PRE-EXISTING INCOME TAX POWER27

 A. *The Original Meaning of “Derived”*31

 B. *Congressional Debates*33

 C. *Newspapers and Other Public Communications*37

 D. *Post-Ratification Supreme Court Case Law*40

III. THE ORIGINAL MEANING OF “TAXES ON INCOMES” AND THE HISTORY OF TAXING UNREALIZED INCOME41

 A. *Undistributed Corporate Earnings*42

 B. *Unrealized Gain in Appreciated Property*44

 C. *Accrual vs. Realization*46

 D. *State Taxes on Incomes*49

 E. *Legal Treatises*50

IV. OTHER CONTEMPORARY SOURCES ON THE MEANING OF “INCOME” .53

 A. *Dictionaries*55

 1. *Income and Gain*55

 2. *Realization*58

 B. *Accounting Practices*60

 C. *Corpus Linguistics*63

CONCLUSION66

APPENDIX69

INTRODUCTION

The Internal Revenue Code of the United States taxes “income.”¹ But what is “income” for tax purposes? This is perhaps the most fundamental

1. I.R.C. § 1.

question of income tax law,² and is the starting point for the introductory course on tax law at most American law schools.³ It is largely a question of statutory interpretation and of legal and economic theory—but, crucially, it is also a question of constitutional law.

In U.S. federal law, the question “what is income?” goes back at least to the Civil War income taxes, but since the ratification of the Sixteenth Amendment in 1913, the question has taken on more constitutional significance. Throughout this time, scholars and courts have debated the meaning of the term “income,” without clearly settled answers. Moreover, since 1913, scholars and courts have also debated about the extent to which this is a question of constitutional interpretation (with the Supreme Court then having the ultimate authority) or of statutory law (with Congress then having the ultimate authority), also without clearly settled answers.⁴ These debates recently came to a head with the Supreme Court case of *Moore v. United States*.⁵

The taxpayers in *Moore* challenged whether the unrepatriated earnings of a foreign corporation can be taxed to a shareholder under the Sixteenth Amendment, arguing that this is outside of the constitutional definition of “income.” Although this specific issue is narrow, the broader implications of how the Court might interpret the Sixteenth Amendment are profound and far-reaching. “*Moore v. United States* is a tax case of generational significance,” wrote Thomas Lee, Lawrence Solum, James Phillips, and Jesse Egbert in a recent article.⁶ They explained: “Depending on the breadth of the Court’s holding, *Moore* has the potential to ‘affect broad swaths of

2. See, e.g., Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 736–37 (2020) (“Calculating a taxpayer’s federal income tax liability begins with determining her ‘gross income.’ . . . Scholars have noted, however, that there is no objective definition of the term ‘income.’”); John R. Brooks, *The Definitions of Income*, 71 TAX L. REV. 253, 253 (2018) (“Economists, tax scholars, policymakers, and others have struggled with the income concept for well over a hundred years, with no solution in sight.”).

3. See, e.g., MICHAEL A. LIVINGSTON & DAVID GAMAGE, *TAXATION: LAW, PLANNING, AND POLICY* (Carolina Acad. Press, 3d ed. 2019) (dedicating the first substantive chapter to this question); MICHAEL J. GRAETZ, DEBORAH H. SCHENK & ANNE L. ALSTOTT, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* (8th ed. 2018) (same).

4. E.g., Glogower, *supra* note 2, at 722 (“[T]his Article explains why the Court could only invalidate Wealth Integration methods by also invalidating integral features of the current income tax rules and fundamentally restricting Congress’s power to tax income under the Sixteenth Amendment.”); Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799, 802 (2014) (“[T]he validity of an unapportioned federal tax on property and, I shall argue, of an unapportioned tax on income from property, would depend entirely on the meaning of the Sixteenth Amendment.”); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 55 (1999) (“Professor Jensen’s treatment of the Sixteenth Amendment is no more satisfactory.”).

5. 144 S. Ct. 1680. The decision in *Moore* was issued just as this Article was going to press; the Article was almost entirely written—except for some minor last-minute revisions—prior to the decision being issued.

6. Thomas R. Lee, Lawrence B. Solum, James C. Phillips & Jesse A. Egbert, *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, 73 DUKE L.J. ONLINE 159, 160 (2024).

the U.S. tax code, corporate revenue and federal wealth tax proposals’ and to question ‘Congress’s authority to enact structural tax reform that substantiates the fiscal system’s commitment to distributive justice.’”⁷

Following the December 2023 oral arguments in *Moore*, many commentators began predicting that the Court might decide the case on relatively narrow grounds.⁸ And the five Justices signing onto the majority opinion did indeed decide the case on narrow grounds.⁹ However, this means that the deeper questions of interpreting the Sixteenth Amendment will almost certainly resurface in future cases.¹⁰ One such case—*Altria Group, Inc. v. United States*¹¹—has already been filed, but was stayed pending the decision in *Moore*.¹² Moreover, the uncertainty about how the Court might ultimately rule on these deeper questions of interpreting the Sixteenth Amendment will continue to plague both congressional and public debates over tax law reform.¹³ As Amandeep Grewal explains, “[f]ierce clashes between individual tax code sections and constitutional limitations now seem inevitable.”¹⁴

In this Article, we make two primary arguments. First, we argue that most of the caselaw and scholarship on interpreting the Sixteenth Amendment has been asking the wrong question. We explain that the original meaning of the Sixteenth Amendment does not rest on defining “income” as an isolated term. Instead, the generally understood meaning of the Sixteenth Amendment at the time of its ratification was to restore to Congress its pre-existing “power to lay and collect *taxes on incomes, from whatever source derived*.”¹⁵ Importantly, Congress was understood to have already had this power prior to *Pollock v. Farmers’ Loan & Trust Co.*,¹⁶ the notorious *Lochner* era case in 1895 that had declared the 1894 income tax

7. *Id.* at 160–61 (citations omitted).

8. *E.g.*, Reuven S. Avi-Yonah, *Effects from Moore: Does the Corporate Tax Require Realization?*, 182 TAX NOTES FED. 661, 661 (2024); Michael J. Graetz, *What I Learned at the Oral Argument in Moore*, 181 TAX NOTES FED. 2151, 2151–52 (2023).

9. *Moore*, 144 S. Ct. at 1696 (“[W]e emphasize that our holding today is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income. In other words, our holding applies when Congress treats the entity as a pass-through.”).

10. Reuven S. Avi-Yonah, *What Is the Best Candidate for a Post-Moore Constitutional Challenge?*, 182 TAX NOTES FED. 105, 105 (2024).

11. Complaint, *Altria Grp., Inc. v. United States*, No. 3:23-cv-00293 (E.D. Va. filed May 1, 2023).

12. Andrew Velarde, *Altria’s Case Stayed Pending Realization Decision in Moore*, 181 TAX NOTES FED. 1314 (2023); Order, *Altria Grp., Inc. v. United States*, No. 3:23-cv-00293 (E.D. Va. Nov. 9, 2023).

13. *See* Daniel J. Hemel, *Winning by Losing*, 181 TAX NOTES FED. 2153, 2154–55 (2023).

14. Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 GA. L. REV. 249, 310 (2023).

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

16. (*Pollock I*), 157 U.S. 429 (1895), *aff’d on reh’g*, 158 U.S. 601 (1895).

unconstitutional.¹⁷ The undisputed original meaning and purpose of the Sixteenth Amendment, as expressed repeatedly by members of Congress and as understood widely by the public, was to overrule *Pollock* and “restore”¹⁸ the “previous complete and plenary power of income taxation possessed by Congress from the beginning”¹⁹ as it existed prior to *Pollock*.²⁰

Second, we argue that this pre-existing power of income taxation included taxes on broad measures of income that encompassed, for example: accrued, but unrealized, income; shareholders’ shares of undistributed earnings of corporations; and appreciations in the value of property. To make this argument, we surface historical evidence—some of which appears here for the first time in the modern literature—of the practice of taxation by federal and state governments from the Civil War through the ratification of the Sixteenth Amendment. These historical examples of income taxation are consistent with the tax provisions called into question by *Moore*.

The Sixteenth Amendment to the U.S. Constitution states: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”²¹ We explain that “taxes on incomes” were not newly created by the Sixteenth Amendment, but rather had existed during the time periods leading up to and during the ratification of the Sixteenth Amendment. The voting public and relevant political actors were thus familiar with and often had direct experience with these “taxes on incomes”—both at the federal and state level. There is extensive historical evidence on the political and public debates leading up to the ratification of the Sixteenth Amendment, and this evidence does not document any contemporaneous claims or arguments that the Sixteenth Amendment might do anything less than fully restore Congress’s power to levy “taxes on incomes” of the sort that had existed during and prior to that time.²²

Why then has the past century of caselaw and scholarship mostly abandoned this original understanding to instead focus on interpreting the

17. See *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18 (1916) (“[T]he Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived . . .”).

18. 44 CONG. REC. 4409 (1909).

19. *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

20. It appears from *Moore* that all the Justices likely share this view. See *Moore v. United States*, 144 S. Ct. 1680, 1698 (Jackson, J., concurring); *id.* at 1699 (Barrett, J., concurring); *id.* at 1709 (Thomas, J., dissenting).

21. U.S. CONST. amend. XVI.

22. See *infra* Part II.

Sixteenth Amendment through the lens of defining “income” as a term isolated from historical practice? This framing was first adopted by the Supreme Court in 1920, in the seminal but infamous case of *Eisner v. Macomber*.²³ Specifically, the Court in *Macomber* examined the definition of “income” as an isolated term, looking to how, in the Court’s view, the term was “used in common speech” to determine the meaning of the Sixteenth Amendment.²⁴ The Court adopted a specific definition of income and ruled that the Sixteenth Amendment only authorized Congress to tax what was encompassed by that definition.²⁵ In particular, the Court said that gain from property became “income” only when that gain had been realized through a sale or conversion.²⁶

The Court subsequently at least partially overturned this definition in the 1940 case of *Helvering v. Bruun*²⁷ and in the 1955 case of *Commissioner v. Glenshaw Glass Co.*²⁸ Nevertheless, *Macomber*’s method of interpreting the Sixteenth Amendment by examining the meaning of the word “income” as an isolated term has remained the dominant paradigm in scholarship and caselaw to this day.

Of particular importance is the question of whether the Sixteenth Amendment authorizes Congress to tax only *realized* income and, relatedly, whether *realization* then requires some act of “sale or conversion” for property, as in *Macomber*’s definition, and as the petitioners in *Moore* argued.²⁹ The opinions in *Moore* suggest that at least four Justices may agree.³⁰

Tax scholars have long considered the realization requirement to be the “‘Achilles heel’ of the income tax system because it creates so much uncertainty and complexity in the tax law.”³¹ As we have shown in our prior scholarship, the realization requirement is also the source of the largest tax benefits for the wealthiest American households and other owners of

23. 252 U.S. 189 (1920).

24. *Id.* at 206–07.

25. *See id.*

26. *Id.* at 207.

27. 309 U.S. 461, 469 (1940).

28. 348 U.S. 426, 430–31 (1955). For discussion of the extent to which these and other related cases overturned *Macomber*, see, for example, Alex Zhang, *Rethinking Eisner v. Macomber, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179 (2024); and John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 130–34 (2022).

29. *See* Brief for Petitioners at 26–36, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

30. *Moore*, 144 S. Ct. at 1699–1709 (Barrett, J., concurring); *id.* at 1709–27 (Thomas, J., dissenting).

31. Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization*, in TAX STORIES 93, 132–33 (Paul L. Caron ed., 2d ed. 2009) (quoting William D. Andrews, *The Achilles’ Heel of the Comprehensive Income Tax*, in NEW DIRECTIONS IN FEDERAL TAX POLICY FOR THE 1980S, at 278 (Charles E. Walker & Mark A. Bloomfield eds., 1983)).

capital, because it allows for strategies whereby the fruits of wealth and economic income can be enjoyed without reporting much or any taxable income—that is, shielding most or all of the wealth and economic income from being subject to income taxation.³² Reforms targeted at wealthy taxpayers thus likely require changing or removing the realization requirement in at least some instances, such as by moving to a “mark-to-market” system for taxing gain on property or by adopting wealth tax reforms.³³ Indeed, the Tax Code already contains numerous targeted anti-abuse provisions that relax the realization requirement.³⁴ But both future reform possibilities and existing anti-abuse rules would be called into question if the Court were to revive *Macomber*’s approach of interpreting the Sixteenth Amendment by defining “income” to require realization.³⁵

As we show here, it is not necessary to read realization as inherent to the original meaning of the term “income,” and there is substantial evidence of broader uses of the term in law, accounting, and elsewhere at the time of the Sixteenth Amendment’s ratification. But more importantly, we reject the approach of interpreting the Sixteenth Amendment based on analyzing the definition of the word “income” as an isolated term. The constitutional

32. David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 501–02 (“We can thus estimate that most ultra-wealthy taxpayers only ever realize less than a quarter of their true investment income as taxable income.”); Brian Galle, David Gamage & Darien Shanske, *Solving the Valuation Challenge: The Ultra Method for Taxing Extreme Wealth*, 72 DUKE L.J. 1257, 1262 (2023) (“Briefly, under a realization regime taxpayers include gains or losses in taxable income only when the taxpayer sells or otherwise disposes of an asset. Individuals who make most of their money through investments thus get to choose when to pay tax. In combination with other unfortunate U.S. rules, one of these options is ‘never.’ The result is evident in recent news stories reporting that many of America’s wealthiest individuals, such as Jeff Bezos, have reported taxable incomes lower than those of the [IRS] agents who audit them.”).

33. See Gamage & Brooks, *supra* note 32, at 520–21. A “mark-to-market” system is one where gain or loss is calculated based on changes in the value of property during the tax year without regard for whether there is any act of “realization.” See Brooks & Gamage, *supra* note 28, at 131–32.

34. See, e.g., I.R.C. § 467 (requiring recognition of accrued but unpaid rent for certain types of property, even for a cash-method taxpayer); *id.* § 475 (requiring securities dealers to mark securities in their inventory to market, with corresponding recognition of gain or loss); *id.* § 817A (requiring life insurance companies to mark to market certain “modified guaranteed contracts”); *id.* § 877A (taxing expatriates as if they sold their property on the day before they expatriated); *id.* § 1256 (requiring certain types of financial derivatives to be marked to market and recognizing any resulting gain or loss); *id.* § 1296 (allowing a mark-to-market election for certain stock held by a passive foreign investment company).

35. See, e.g., Steven M. Rosenthal, Moore *Could Invalidate Decades of Tax Rules*, 181 TAX NOTES FED. 285, 292 (2023) (“Congress’s efforts to reflect income more accurately and prevent abuses are potentially in jeopardy if the Court, in *Moore*, breathes new life into *Macomber* and its realization rule. The Court could well upend a lot of long-accepted tax rules and reopen abuses.”); Michael J. Graetz, *To Avoid the Moore Morass, the Court Should DIG It — But It Probably Won’t*, 181 TAX NOTES FED. 1253, 1260 (2023) (“[T]he costs of a decision for Moore might cost the government \$100 billion or more of revenue annually. The Tax Foundation estimated that a particularly broad decision might cost trillions. The potential disruptions to current law demonstrate why I earlier described the Chamber of Commerce’s support of Moore as ironic on the ground that businesses need predictability and certainty in the tax law.”).

question is rather: what is the original meaning of the Sixteenth Amendment *as a whole*? Furthermore, the Amendment’s focus is not “income” but rather “taxes on incomes, from whatever source derived” and we argue that the “taxes on incomes” authorized by the Amendment encompassed the varieties of income taxation that were familiar at the time of the Amendment’s ratification.

What varieties of income taxation were familiar at the time of the ratification of the Sixteenth Amendment? We provide extensive historical evidence that there was then an established history of federal income taxation in which income was defined to encompass both undistributed corporate earnings (for shareholders) and unrealized appreciation in assets (for corporations).³⁶ The latter example is an especially important contribution of this Article—we believe that we are the first in the modern literature to show that the corporate income tax in operation at the time of the Sixteenth Amendment’s ratification incorporated elements of “mark-to-market” income taxation.

We further show that corporate accounting practice sometimes followed a similar methodology, calculating net profit (i.e., net income) as the change in the value of all assets and liabilities—that is, adopting a mark-to-market, rather than a realization-based, concept of income.³⁷ These corporate income tax and corporate accounting methods were in operation during the ratification, and the same mark-to-market method of including unrealized gain was also applied by Treasury in the first post-Amendment income tax. Moreover, we also explain that state income taxes in effect prior to and during ratification incorporated elements of “unrealized” income, including pass-through taxation of corporate shareholders and the taxation of imputed rent for homeowners. We argue that this political, legal, and accounting context is inseparable from the meaning of the phrase “taxes on incomes” in the Sixteenth Amendment, and from the original meaning of the Amendment as a whole.

The question of what is the proper unit of constitutional interpretation—the word “income,” the phrase “taxes on incomes,” or indeed the Amendment as a whole—partially implicates a broader debate in constitutional theory, and in originalist theory in particular: put simply, is the question of original public meaning one of “technical” meaning or of “common” or “lay” meaning?³⁸ For example, in an article responding to

36. See *infra* Part III.

37. See *infra* Part III.

38. See, e.g., John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2023–30 (2021).

earlier working paper drafts of our work that culminated in this Article,³⁹ Thomas Lee, Lawrence Solum, James Phillips, and Jesse Egbert take the position that common meaning dominates. (For ease of exposition, we will hereinafter refer to these professors collectively as the “Corpus Linguistics scholars.”) They write:

In two working papers, Professors John Brooks and David Gamage have argued that the original meaning of *income* did not include a realization requirement. [They] . . . draw on a number of sources . . .

None of the sources cited by Professors Brooks and Gamage provide direct evidence of the original public meaning of “incomes, from whatever source derived” in 1913. Instead, their sources bear on the *technical* meaning of the word *income* in the late nineteenth and early twentieth centuries.⁴⁰

The Corpus Linguistics scholars further argue that “both originalist theory and the decisions of the Supreme Court point in the opposite direction” from our “technical meaning.”⁴¹ They conclude that:

[I]nvestigation of the corpus linguistics evidence reveals [that] the “definition of the term ‘income,’ as used in *common speech*,” and the “sense most obvious to the common understanding at the time” the Sixteenth Amendment was ratified does not include unrealized gains. It is substantially different from the technical meanings for lawyers, accountants, and economists that may be found in the sources canvassed in by Professors Brooks and Gamage.⁴²

39. We began work on the historical research that forms the foundation of this article before the Court granted certiorari in *Moore*, and immediately after the Court granted certiorari we posted an early draft of that analysis to SSRN as a research paper to make it publicly available. John R. Brooks & David Gamage, *Moore v. United States and the Original Meaning of Income* (Fordham L. Legal Stud., Working Paper No. 4491855, 2023), <https://ssrn.com/abstract=4491855> [<https://perma.cc/AY5G-SDD9>]. We subsequently expanded and revised that analysis and then posted a new research paper to SSRN to make our analysis publicly available prior to the oral arguments in *Moore*. John R. Brooks & David Gamage, “*From Whatever Source Derived*”: *The Sixteenth Amendment and Congress’s Income Tax Power* (Fordham L. Legal Stud., Working Paper No. 4595884, 2023), <https://ssrn.com/abstract=4595884> [<https://perma.cc/V4VM-E5PQ>]. We then also submitted and published an amicus brief based on this analysis, working with the Constitutional Accountability Center. Brief of John R. Brooks and David Gamage as *Amici Curiae* in Support of Respondent, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800); John R. Brooks, David Gamage, Elizabeth Wydra, Brianna J. Gorod & Brian R. Frazelle, *Amicus Brief of John R. Brooks and David Gamage in Moore v. United States, No. 22-800* (Fordham L. Legal Stud., Working Paper No. 4611767, 2023), <https://ssrn.com/abstract=4611767> [<https://perma.cc/QY3G-3HB5>]. This Article is the culmination of all of that work.

40. Lee et al., *supra* note 6, at 186–87 (second emphasis added).

41. *Id.* at 188.

42. *Id.*

The full scope of the debate between technical and common meaning in constitutional theory is beyond the scope of this Article, but the particulars of these two arguments are directly relevant to the questions raised by *Moore* and to the meaning of the Sixteenth Amendment more generally. Indeed, the taxpayers in *Moore* relied heavily on the work of the Corpus Linguistics scholars in their oral argument,⁴³ and our historical work presented here formed the basis of the government’s arguments for original meaning.⁴⁴ More generally, we agree with the Corpus Linguistics scholars that an originalist analysis is likely to prove “crucially important” to these questions.⁴⁵ Because *Macomber* has been largely (if not entirely) overturned by subsequent cases, there is no convincing *stare decisis* arguments for interpreting the Sixteenth Amendment to constrain Congress’s income tax power to less than the original understanding of the Amendment.⁴⁶

That said, we also believe that the debate between technical and common meaning is a false choice in this context, and in interpreting the Sixteenth Amendment more generally. While our arguments are certainly consistent with adopting a “technical” meaning of the word income, we are not arguing that technical meaning must always dominate over lay or common meaning. Rather, our argument is that even a common meaning of the Sixteenth Amendment as a whole—and “taxes on incomes” in particular—would incorporate past practice and experience of income taxation.

Income taxes were not created by the Sixteenth Amendment and thus readers of the Amendment would not have had to apply any *a priori* intuition of what “income” was in order to understand its content. They could instead simply look to the contemporaneous practice of federal and state income taxation. Furthermore, it was known that the Amendment did not exist in a vacuum and was instead an iterative step in a longer and deeper constitutional dialogue going back decades—this was clear in contemporaneous newspaper accounts and other public communication, as we show here. In other words, the context of the Amendment shows that lay readers would have understood that “taxes on incomes” incorporated technical legal and accounting concepts of “income” and “income tax.” Readers of the Amendment would have understood, so to speak, that they

43. See Oral Argument at 8:53–12:19, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800), https://www.supremecourt.gov/oral_arguments/audio/2023/22-800 [<https://perma.cc/CRX6-YMXX>].

44. See generally *id.* As full disclosure, the Office of the Solicitor General received copies of our research papers and early drafts of this article, and we discussed the case and our historical research with the Assistants to the Solicitor General working on *Moore*.

45. Lee et. al., *supra* note 6, at 188.

46. See Zhang, *supra* note 28, for the most comprehensive account. Zhang concludes that “combining careful analysis of *Macomber* in its doctrinal context and close reading of caselaw development in the 1920s to the 1940s” supports a broad view of Congress’s income tax power that is compatible with our arguments here about original meaning. *Id.* at 247.

should consult their tax lawyer or accountant or rely on their own prior experience with contemporaneous income taxes, rather than ask the person on the street how the isolated word “income” might have been used in everyday speech.

That said, the intuitions of a person on the street are not irrelevant. But our review of dictionary definitions and other sources from around the ratification period does not show any contradictions with the contemporaneous practice of federal and state income taxation. Indeed, we find that no major dictionary definition of the term “income” included the word “realize” or any similar terms, even though “realize” was a well-defined term at that time. And while it may be the case that many ordinary usages of the word “income” outside of tax and accounting referred to cash income,⁴⁷ those usages just referred to the most common instances of “income” and not to the full extent of what might be encompassed within the definition in all contexts.

This Article proceeds as follows: Because of the confusing doctrine in this area, Part I presents a brief background on the relevant constitutional law of taxation, and of income taxation in particular. Frequent errors flow from misunderstanding this history, and so we take that as a starting point. This Part also introduces the specifics of *Moore* and why it is a battle in the larger war to revive *Macomber* and a strong realization requirement. Part II makes the historical argument for a proper understanding of the Sixteenth Amendment and provides the fullest account in the literature to date of the original meaning of the Sixteenth Amendment and its purpose of overruling *Pollock* and restoring Congress’s “complete and plenary power of income taxation.”⁴⁸ Part III explains the varieties of “taxes on incomes” that were familiar at the time of ratification, introducing evidence not previously known to the modern literature about the nature and extent of the taxation of unrealized gain, and in particular that the Corporation Excise Tax of 1909 had elements of “mark-to-market” taxation of capital assets. Part IV then analyzes other sources relevant to the understanding of “income” at the time of ratification, including dictionary definitions and accounting practices, and also further discusses the implications of the Corpus Linguistics scholars’ arguments and their analysis of the word “income.”

47. See, e.g., Lee et al., *supra* note 6 (arguing that a corpus linguistics analysis of the word “income” shows its use only in the context of cash income).

48. *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

I. BACKGROUND: THE CONSTITUTIONAL LAW OF TAXATION AND THE
MOVEMENT TO REVIVE *EISNER V. MACOMBER*

We begin by briefly laying out some of the background constitutional law governing issues of taxation. This is law that is—even for constitutional law (and tax law)—quite arcane and non-intuitive. It also, until recently, has only rarely been relevant in the modern era.⁴⁹ As a result, there is substantial confusion about how to apply it, even at the circuit court level.⁵⁰ By necessity this is a relatively brief sketch, and we refer interested readers to our more in-depth treatment⁵¹ and the treatments of others.⁵²

A. *The Apportionment Clauses: Direct Taxes and Excises*

We begin with the Taxing and Apportionment Clauses of the Constitution, which state:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States⁵³

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.⁵⁴

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.⁵⁵

49. See Graetz, *supra* note 8, at 2152 (“For many years, when the constitutional holding of *Eisner v. Macomber* seemed moribund — before Chief Justice Roberts injected new life into it in his *Obamacare* opinion — I told my students the Constitution appeared to stop where the Internal Revenue Code begins. But no one should say that anymore.”).

50. See, e.g., *Murphy v. I.R.S.*, 460 F.3d 79 (D.C. Cir. 2006), *vacated*, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006); *Murphy v. I.R.S.*, 493 F.3d 170 (D.C. Cir. 2007).

51. See Brooks & Gamage, *supra* note 28.

52. See, e.g., Ackerman, *supra* note 4; Glogower, *supra* note 2; Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998).

53. U.S. CONST. art I, § 8, cl. 1.

54. *Id.* art I, § 2, cl. 3.

55. *Id.* art I, § 9, cl. 4.

The key constitutional requirement is thus that “direct taxes” must be “apportioned” among the states based on population. That is, for direct taxes, each state’s share of the overall revenue raised must be the same as each state’s share of overall population—a state with 20% of the nation’s population pays 20% of the overall direct tax revenue. The catch is that no tax base is distributed in proportion to population (except population, of course). If the direct tax is on, say, property value, the lower a state’s per-capita property values, the higher the *rate* of tax on those values must be in order for the tax to raise enough revenue to pay that state’s apportioned share of the tax. Because this is typically thought to be politically unfeasible, it is commonly believed today that declaring a tax to be a “direct tax” is tantamount to saying that it is unconstitutional.⁵⁶

We disagree, and we have explained in prior scholarship how the use of modern fiscal tools should make it both politically and administratively feasible to apportion a tax in an equitable fashion.⁵⁷ A full discussion is beyond the scope of this Article, but the short explanation is that Congress could design a modern apportioned tax in a similar fashion to how the pre-Civil War direct taxes were designed and levied (especially the 1798 Direct Tax)⁵⁸ and then use intergovernmental grants to resolve any interstate inequities in a similar fashion to how the Medicaid program currently operates.

That said, apportioning a modern tax involves unavoidable complexities. We argued in our prior scholarship that those complexities can be overcome, but there is little doubt that Congress would prefer to levy uniform, non-apportioned taxes to the extent possible, and so our arguments about apportionment are mostly an aside for present purposes. This is because we do not expect Congress to seriously contemplate apportioned taxes except either in response to a possible Supreme Court decision ruling that certain forms of taxes must be apportioned or as a precautionary move in anticipation of such a Supreme Court decision.

Returning to the question of what constitutes a “direct tax,” for the first century or so of the Republic, constitutional tax questions primarily turned on the question of distinguishing what was a “direct tax” requiring apportionment from a “duty, impost, [or] excise” requiring uniformity.⁵⁹

56. See, e.g., Ackerman, *supra* note 4, at 2.

57. See generally Brooks & Gamage, *supra* note 28.

58. Act of July 14, 1798, 1 Stat. 597; see Brooks & Gamage, *supra* note 28, at 101–03 & 138–41.

59. It is settled that “uniformity” refers to geographic uniformity, i.e., that the same federal tax law must apply to everyone regardless of their state of residency. See, e.g., *United States v. Ptasynski*, 462 U.S. 74, 80–82 (1983); *Knowlton v. Moore*, 178 U.S. 41, 106 (1900) (uniformity does not “signify an intrinsic but simply a geographical uniformity”); *Head Money Cases*, 112 U.S. 580, 594 (1884) (“The

(We note that although this distinction is often framed as “direct” vs. “indirect” taxes, the Constitution never uses the word “indirect.”) Thus, the key distinction in constitutional law is between direct taxes and excises—the two “great classes” of tax.⁶⁰ Over the first century or so of the Republic, the Supreme Court developed a sophisticated jurisprudence on this question,⁶¹ which concluded with a holding in 1881 that direct taxes were limited to capitations and taxes on real property,⁶² and that everything else was an excise, including the first federal income tax during the Civil War.⁶³

As discussed below, the *Pollock* case shifted the definition of direct tax somewhat, but the category continues to be defined narrowly—direct taxes are those “upon property solely by reason of its ownership,”⁶⁴ while the excise category is expansive and could describe a tax on “business, privileges, employments, and vocations”⁶⁵ or on the “privilege, opportunity, or facility” of using property in a particular way.⁶⁶ Thus, under current law, examples of excises include financial transaction taxes, the corporate income tax, the estate tax, and—crucially—the income tax.⁶⁷ Prior to the *Pollock* case (discussed in the next Section), the Supreme Court had upheld every tax presented to it as an excise and had never struck down a tax as an unapportioned direct tax.⁶⁸

This general jurisprudential approach of narrowly interpreting the phrase “direct tax” and expansively interpreting “excise”—even to cover taxes that might not fall into those categories in ordinary usage—we have described elsewhere as the Excise Tax Canon.⁶⁹ But whether or not it rises to the level

tax is uniform when it operates with the same force and effect in every place where the subject of it is found.”).

60. *Pollock I*, 157 U.S. 429, 557 (1895). For ease of exposition, as in our prior Article, we typically use the term “excise” to refer to the combined category of duties, imposts, and excises. See Brooks & Gamage, *supra* note 28.

61. See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1868); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

62. *Springer v. United States*, 102 U.S. 586, 602 (1881) (“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 . . .”).

63. *Id.*

64. *Knowlton*, 178 U.S. at 81.

65. *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 637 (1895); see also *Thomas v. United States*, 192 U.S. 363, 370 (1904) (“There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like. Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the Constitution.”).

66. *Nicol v. Ames*, 173 U.S. 509, 519 (1899).

67. See *supra* notes 62–63 and accompanying text.

68. Congress passed five apportioned direct taxes between 1798 and 1861, using different methodologies, and none faced any constitutional challenge. See Brooks & Gamage, *supra* note 28, at 101–04.

69. See *id.* at 109–11.

of a canon of constitutional interpretation, this approach is consistent with upholding and preserving Congress's Taxing Power generally, and it is also consistent with how the Framers and others in the early Republic understood the role of taxation.⁷⁰

A full analysis of the original meaning of "direct tax" is beyond the scope of this article—and, as we explain below, not directly relevant to understanding the meaning of the Sixteenth Amendment—but until the *Pollock* decision in 1895, there is little sense in the caselaw or elsewhere that apportionment was understood as a substantive *barrier* to certain taxes. Rather, it was accepted that apportionment and uniformity were the two respective paths for the two "great classes" of tax—direct tax and excise. Indeed, Congress levied five apportioned direct taxes—taxes on the value of real property and enslaved people—between 1798 and 1861. In *Pollock*, and to this day,⁷¹ there are some who claim that the Framers required apportionment for direct taxes primarily as a way to protect property by making it difficult for Congress to tax it⁷²—this purported logic often stands in for the lack of direct evidence that this was the Framers' intent. But a moment's thought reveals how unlikely that is: First, if the Framers wanted barriers to federal property or income taxation, they could have just said that. Second, the apportionment mechanism "protects" property by essentially daring Congress to tax residents of poorer states at higher rates—a very odd mechanism, particularly when an overarching constitutional concern is protecting weaker states from being bullied by other states or the federal government.

A slightly more coherent claim is that the Framers intended taxation and representation to work together—that each state's share of the tax burden be commensurate with its relative political power. However, that logic only makes sense if we think of direct taxes in the same way that the Supreme Court did until 1895—as limited to capitations and taxes on land, that is, objects of taxation geographically associated with state population. There is ample evidence that the Convention delegates believed that land value roughly tracked population, because at that time land value was driven almost entirely by agricultural production, which in turn was driven by the population subsisting on that land.⁷³ They understood that apportioning a

70. See *id.* at 85–99.

71. See, e.g., Brief Amici Curiae of the Manhattan Institute for Policy Research and Professors Erik M. Jensen and James W. Ely in Support of Petitioners at 5–8, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800) (brief in support of petition for a writ of certiorari).

72. See, e.g., *Pollock I*, 157 U.S. 429, 607 (Field, J., concurring) (discussing the "present assault upon capital").

73. See, e.g., THE FEDERALIST NO. 21, at 98 (Alexander Hamilton) (Terence Ball ed., 2003) (Hamilton writing that that direct taxes "principally relate to lands and buildings," and that "[e]ither the

land tax on the basis of *land value*—as the Articles of Confederation did⁷⁴—would have made more sense.⁷⁵ But the experience of the Articles showed that they did not have the administrative capacity to accurately value land, and that states were too often gaming the system.⁷⁶ Apportionment by population was seen as a second-best proxy—not as fair a means of apportionment, but much simpler to administer and less prone to gaming by the states.⁷⁷

At any rate, there is much more to say on the meanings of direct tax and of excise (some of which we have said elsewhere⁷⁸). But we turn now to the question of income taxation and the Sixteenth Amendment.

B. *Pollock v. Farmers' Loan & Trust Co. and the Sixteenth Amendment*

As noted above, the direct tax jurisprudence was shaken somewhat in 1895 by *Pollock*, which struck down an 1894 income tax,⁷⁹ but *Pollock* did not disrupt the jurisprudence as much as some went on to assume.

For our purposes *Pollock* had two relevant holdings.⁸⁰ First, it held that direct taxes were taxes on all property “solely by reason of its ownership”⁸¹—an expansion from *Springer v. United States*’s explicit limitation to only real property.⁸² Second, *Pollock* held that a tax on the income *from property* was the “legal equivalent”⁸³ of a direct tax on property,⁸⁴ by applying a sort of source-based look-through analysis. Because a tax on income from property burdens the property itself, the

value of land, or the number of the people may serve as a standard [for apportionment]” because “[t]he state of agriculture, and the populousness of a country, have been considered as nearly connected with each other”); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585 (Max Farrand ed., 1911) (Madison arguing that though population and wealth did not necessarily track each other, “that in the U. States it was sufficiently so for the object in contemplation”); see also *Pollock II*, 158 U.S. 601, 702 (1895) (Jackson, J., dissenting) (“The framers of the Constitution proceeded upon the theory entertained by all political writers of that day, that there was some relation, more or less direct, between population and land.”).

74. See ARTICLES OF CONFEDERATION of 1781, art. VIII.

75. See *supra* note 73.

76. See, e.g., Johnson, *supra* note 52, at 84–88.

77. See *id.* at 88–92.

78. See generally Brooks & Gamage, *supra* note 28.

79. 157 U.S. 429, 586 (1895), *aff'd on reh'g*, 158 U.S. 601, 637 (1895).

80. *Pollock* also held that the federal government could not tax state or local bond interest, because it had the effect of taxing a state directly, something prohibited by sovereign immunity and federalism. *Id.* at 586. That holding was explicitly overruled. *South Carolina v. Baker*, 485 U.S. 505, 524 (1988) (“We thus confirm that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax.”).

81. *Knowlton v. Moore*, 178 U.S. 41, 81 (1900) (describing holding of *Pollock*).

82. 102 U.S. 586, 602 (1881).

83. *Knowlton*, 178 U.S. at 81.

84. *Pollock I*, 157 U.S. at 579.

Court held a tax on income from property is equivalent to taxing the property itself.

It is crucial to see, however, that income taxes *generally* were still in the excise category, not the direct tax category. *Pollock* explicitly declined to overrule *Springer*'s holding that an income tax on *labor or business income* was an excise.⁸⁵ The *Pollock* Court struck down the entire income tax only because it held that the taxes on labor and business income were inseverable from the taxes on income from property in the statute, *not* because those taxes were themselves unconstitutional.⁸⁶ The general distinction between direct taxes and excises described above thus remained largely intact; the only changes were that direct taxes now included taxes on all property, not just real property, and (for the moment) an excise could be recharacterized as a direct tax if the source of income being excised was property.

It was this second holding of *Pollock*—that an income tax could be the legal equivalent of a direct tax if the source of the income was property—that the Sixteenth Amendment overruled. The Amendment reads: “The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several States, and without regard to any census or enumeration.”⁸⁷

The Sixteenth Amendment thus instructed courts to ignore the question of source in evaluating whether an income tax was equivalent to a tax on property solely by reason of its ownership. In essence, this reverted the constitutional law of direct taxation to the status quo ante *Pollock*—including the Excise Tax Canon—now with the only change being that the direct tax category was expanded to include taxes on all property solely by reason of its ownership, not just real property. (Because this is crucial to an understanding of the Sixteenth Amendment and its relationship—if any—to a realization requirement, we will have much more to say on this below.)

C. *Eisner v. Macomber and the Question of Realization*

After the Sixteenth Amendment, constitutional tax jurisprudence largely shifted from whether a tax was a direct tax or an excise to whether the thing being taxed was “income” or not. If it was income, then the question of direct versus excise was irrelevant, because of the Sixteenth Amendment’s clear command that “taxes on incomes” need not be apportioned. That said, the background question still remains, and a proper analysis would follow two steps: First, is the thing being taxed “income.” Second, if not, could the

85. *Pollock II*, 158 U.S. 601, 637 (1895); see *Moore v. United States*, 144 S. Ct. 1680, 1688 (2024) (stating that “income taxes are indirect taxes”).

86. *Pollock II*, 158 U.S. at 637.

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

tax still be considered an excise, and thus apportionment would still not be required. The failure to even ask that second question is just one of the main flaws in the second-most notorious Supreme Court tax decision after *Pollock*, the case of *Eisner v. Macomber*. Because that case and its analysis is pivotal to any discussion of the constitutional role of realization, we briefly review the case and some of its flaws.

The issue in *Macomber* was whether stock dividends—a distribution of stock in the distributing corporation itself—could be considered “income” for purposes of the Sixteenth Amendment.⁸⁸ The question arose in part because an odd feature of a stock dividend is that no corporate assets are actually distributed to shareholders, and no shareholders’ proportionate share of the corporation changes, because the new stock is distributed pro rata.⁸⁹ The stock dividend is, in essence, just evidence of retained corporate earnings that are attributed to a particular shareholder, but with no distribution of those earnings.⁹⁰ It is thus almost identical to a mere “stock split.”⁹¹

In order to answer the question of whether stock dividends were “income,” the *Macomber* Court purported to inquire into the meaning of income “as used in common speech.”⁹² The Court examined four dictionaries “in common use,” but without quoting them determined that the best definition was actually supplied by two prior cases,⁹³ *Doyle v. Mitchell Bros. Co.*⁹⁴ and *Stratton’s Independence, Ltd., v. Howbert*.⁹⁵ “Income may be defined as the gain derived from capital, from labor, or from both combined.”⁹⁶ The Court then based its understanding of income on a sort of dubious conceptual analysis (and without citing any authority or evidence) of what it thought “derived” meant:

“Derived—from—capital”;—“the gain—derived—from—capital,” etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being “derived,” that is, *received* or *drawn* by the recipient

88. *Eisner v. Macomber*, 252 U.S. 189, 199 (1920).

89. *See id.* at 211–13.

90. *See id.*

91. The difference between a stock dividend and a stock split is that with a stock dividend, some amount of retained earnings are transferred to paid-in capital—as if the earnings had been distributed and reinvested—whereas stock splits have no effect on the corporate balance sheet.

92. *Macomber*, 252 U.S. at 206–07.

93. *Id.* at 207.

94. 247 U.S. 179 (1918).

95. 231 U.S. 399 (1913).

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

(the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description.⁹⁷

Because it will come up later, we should underscore that although the *Macomber* Court appears to be engaging in a sort of originalist analysis—by asking about the meaning of income in “common speech”—that description only applies to its chosen phrasing of the income definition, quoted above.⁹⁸ The *application* of that definition to the question of realization, however, was novel—realization was not at issue in *Doyle* or *Stratton’s Independence*. Furthermore, that application is based only on the Court’s chosen meaning for “derive,” for which it provides no evidence and which furthermore does not rule out the idea that gain could be “received” from the original capital while still being invested in the enterprise. And the Court ignored or dismissed prior precedents that held differently on undistributed earnings.⁹⁹ Thus, from an originalism standpoint, *Macomber* stands at most only for what five judges thought about income and realization. Because the case was decided somewhat close in time to the Amendment, that is not irrelevant evidence, but must be put up against the other evidence we discuss below.

In any event, based on this particular phrasing of the income concept, the Court said that the distribution of a stock dividend does not cause the shareholder to “realize[] or receive[] any income in the transaction”¹⁰⁰ because nothing had actually left the corporation—the gain (the corporate earnings) had not been “separated”¹⁰¹ from the capital (the corporation).

The government argued in the alternative, that even if a stock dividend itself did not by its distribution generate income, its value represents a shareholder’s share of retained corporate earnings, and Congress had the power to attribute those earnings as income to the shareholders.¹⁰² The Court disagreed, on the same basis—even if there was potential shareholder gain held by the corporation, it still had not been “separated” from the corporation.¹⁰³

Finally, the government argued that, even if such a tax could not be an *income* tax it might still be an excise,¹⁰⁴ in the same way that other taxes on

97. *Id.*

98. *See supra* text accompanying note 96.

99. *See Macomber*, 252 U.S. at 217–18 (distinguishing *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1, 17–18 (1871), which held that undistributed corporate earnings were “income” to a shareholder).

100. *Id.* at 212.

101. *Id.* at 210.

102. Supplemental Brief for the Plaintiff in Error at 15–21, *Macomber*, 252 U.S. 189 (No. 318).

103. *Macomber*, 252 U.S. at 218–19. Note the Court in *Moore* describes this part of *Macomber* as “dicta.” *Moore v. United States*, 144 S. Ct. 1680, 1691 (2024).

104. Supplemental Brief for the Plaintiff in Error, *supra* note 102, at 41.

income or other uses of privileges of property could be excises. The Court did not address that question at all, concluding without analysis that a tax on retained corporate earnings was a direct tax:

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be *taxation of property because of ownership*, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.¹⁰⁵

What those “previous decisions of this court” might be is unclear—there is no citation, and in fact that Court had on a number of occasions approved both the taxation of stock dividends¹⁰⁶ and the attribution of corporate earnings to shareholders.¹⁰⁷

Indeed, one of the more egregious errors of *Macomber* is the Court’s casual dismissal of one of those precedents, *Collector v. Hubbard*, based on specious circular reasoning. First, it said that, even if *Hubbard* had held that undistributed corporate earnings were “income,” that law had been overruled by *Pollock*, which held that taxing income from property was equivalent to taxing property.¹⁰⁸ The government’s response was to say yes, that is true, but the Sixteenth Amendment overruled *Pollock* on that equivalence, so *Hubbard* should still stand.¹⁰⁹ The Court then said, no, because the Sixteenth Amendment only applied to income, and “what is called the stockholder’s share in the accumulated profits of the company is capital, not income.”¹¹⁰ This is textbook question-begging—the government was arguing precisely for why undistributed earnings *are* income and thus covered by the Sixteenth Amendment.

In any event, the *Macomber* Court struck down the tax on stock dividends as an unconstitutional unapportioned direct tax, based largely on the fact that, in its view, the shareholder had not “realized or received” any income from the corporation as long as the corporation still held and controlled the earnings in question.¹¹¹ This is (to date) the only case in which

105. *Macomber*, 252 U.S. at 217 (emphasis added).

106. See, e.g., *Bailey v. R.R. Co.*, 89 U.S. (22 Wall.) 604 (1875). Arguably this is dicta because the tax appears to be on the corporation, but the Court’s discussion makes clear that it sees the tax as de facto on shareholders and analyzes the issue on that basis. *Id.*

107. See *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1 (1871).

108. *Macomber*, 252 U.S. at 218–19; see *Pollock I*, 157 U.S. 429, 580–83 (1895).

109. *Macomber*, 252 U.S. at 219.

110. *Id.*

111. *Id.* at 212.

the Court has struck down a tax because the thing taxed (in this case, stock dividends) was not “income” under the Sixteenth Amendment.¹¹² As tax scholars have long pointed out, there is a good reason to think that this key holding of *Macomber* has been dramatically carved back if not fully overruled,¹¹³ and we agree. However, that doctrinal point is somewhat distinct from the central argument of this Article. Here, we emphasize why *Macomber* was wrongly decided in the first place, in large part because of its interpretation of the Sixteenth Amendment based on an erroneous definition of the term “income” taken in isolation. We turn to that question in subsequent Parts. But first, we briefly explain why the question of *Macomber* and the role of realization has become newly urgent.

D. Moore v. United States and the Movement to Revive Macomber

A realization requirement—a constitutional rule that there must be some sale, exchange, disposition, or other kind of conversion of property before there can be any “income” from that property for tax purposes—would be a strong barrier against the effective taxation of income from property. To be clear, realization is a general statutory requirement under the current Tax Code for most gains from property,¹¹⁴ and, sure enough, this provides well-documented tax advantages for the owners of property.¹¹⁵ At the simplest level, it allows owners of property to avoid taxation of any gain by simply not realizing that gain, and instead accessing the wealth by other means, such as borrowing against it.¹¹⁶ More sophisticated tax planning also generally grows out of the realization requirement.¹¹⁷

But under the current tax code, realization is not an absolute requirement, and there are a number of exceptions for the sake of proper administration and the prevention of abuse. These include numerous anti-abuse provisions,¹¹⁸ but could also include core features of the tax law, such as accrual-basis accounting, depreciation, and the treatment of pass-through income from partnerships and LLCs. Moreover, a number of prominent tax reform proposals would depart much further from realization, such as the recent proposals for federal wealth tax reforms and proposals like President Biden’s Billionaire Minimum Income Tax reform.¹¹⁹

112. See JASPER L. CUMMINGS, JR., *THE SUPREME COURT, FEDERAL AND STATE TAXATION, AND THE CONSTITUTION* 25–41 (2d ed. 2022); Graetz, *supra* note 35, at 1253.

113. See, e.g., Zhang, *supra* note 28, at 185–86.

114. I.R.C. § 1001(a).

115. See Gamage & Brooks, *supra* note 32, at 497–506.

116. *Id.*

117. *Id.*

118. See *supra* note 34.

119. Brooks & Gamage, *supra* note 28, at 76–77.

A possible legal strategy to stop these reforms would be to constitutionalize a strong realization requirement. Thus, opponents of taxing wealth or unrealized gains would like very much to revive *Macomber* and its strong language on realization from near- (if not actual) death, in part by arguing that the case is consistent with the original meaning of income at the time of the Sixteenth Amendment.¹²⁰ The recent case of *Moore v. United States*, appeared to offer that opportunity. The case was litigated by the Competitive Enterprise Institute (on behalf of the taxpayers),¹²¹ and amici in support of the taxpayers included libertarian and anti-tax organizations, such as the Cato Institute, Americans for Tax Reform, the U.S. Chamber of Commerce, and the Manhattan Institute.¹²²

In this Section we review the case details, the lower court opinions, and (very briefly) the Supreme Court’s decision (which was issued just as this Article was about to go to press). As we explain, the Court ultimately decided on very narrow grounds, making it virtually certain that these issues will rise again in future cases. The case thus signals a new relevance of this area of constitutional tax jurisprudence as a strategy to counter potential future tax reforms.

1. Case Background

The plaintiffs in *Moore* were investors in a small controlled foreign corporation (CFC).¹²³ The CFC was profitable but retained all its earnings and had never distributed dividends to the plaintiffs.¹²⁴ Under prior law, none of those earnings were presently taxable to the taxpayers.¹²⁵ They would only have been taxed when “repatriated” to the U.S. parent as a dividend distribution. But the 2017 tax reform bill enacted Internal Revenue Code § 965, a one-time shareholder-level tax on a CFC’s profit since 1986, essentially deeming all those retained earnings as repatriated to U.S. shareholders.¹²⁶ This was enacted as part of the general shift from worldwide to territorial¹²⁷ tax treatment of foreign income—the one-time

120. *Id.* at 133–34.

121. See Brief for Petitioners, *supra* note 29, at cover page.

122. See, e.g., Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

123. *Moore v. United States*, 36 F.4th 930, 932–33 (9th Cir. 2022), *aff’d*, 144 S. Ct. 1680 (2024).

124. *Id.*

125. *Id.* at 933.

126. *Id.*; see Pub. L. No. 115-97 § 14103, 131 Stat. 2054, 2195 (2017) (codified as amended at I.R.C. § 965).

127. Roughly speaking, a “worldwide” system is one in which a taxpayer is taxed in their residence country on all income earned anywhere in the world, including income of foreign subsidiaries. A “territorial” system is one in which income earned in other jurisdictions is taxed only in those

tax would substitute for the deferred tax on prior earnings earned under the worldwide system, so that the territorial system would apply only to earnings from that point forward.¹²⁸ Section 965 also provided a significant chunk of revenue that was used to offset the revenue losses from other portions of the bill, and ensured that the overall bill could satisfy that Senate’s budget reconciliation instructions.¹²⁹

The taxpayers brought suit challenging § 965, arguing that it was an unapportioned direct tax and therefore in violation of the Constitution.¹³⁰ (They also argued that its seeming retroactivity was in violation of the Due Process clause of the Fifth Amendment,¹³¹ though this was not the main focus of the case, nor did the dissenters address it, nor did the petitioners raise the issue in the cert. petition, so we put that claim aside.¹³²) The district court dismissed the claim, and a three-judge panel of the Ninth Circuit unanimously affirmed the dismissal.¹³³ The taxpayers’ subsequent petition for rehearing and rehearing en banc was denied.¹³⁴

2. Ninth Circuit Decision and Dissent

The Ninth Circuit held that the § 965 did not violate the Apportionment Clauses because it was a tax on income within the meaning of the Sixteenth Amendment, and that “[w]hether the taxpayer has realized income does not determine whether a tax is constitutional.”¹³⁵ The Ninth Circuit distinguished *Macomber* (and also *Glenshaw Glass*) in part by saying that their definitions of income were offered only as possible, not universal, definitions, and that the subsequent cases had made that clear.¹³⁶ In *Helvering v. Griffiths*,¹³⁷ for example, the Court said that *Helvering v.*

jurisdictions. This is a gross simplification, but prior to 2018, the baseline rule was that U.S. parents were taxed on the income of their CFCs (though with deferral of taxation until the CFC distributed its earnings to the parent). See generally, e.g., J. Clifton Fleming Jr., Robert J. Peroni & Stephen E. Shay, *Expanded Worldwide Versus Territorial Taxation After the TCJA*, 161 TAX NOTES 1173 (2018). After 2018, the baseline rule is that U.S. parents are not taxed on those distributions. See I.R.C. § 245A. There were and are many exceptions to both regimes.

128. *Moore*, 36 F.4th at 933.

129. See Reuven S. Avi-Yonah, *Back to the Future? What to Do About the TCJA in 2025*, 113 TAX NOTES INT’L 1015, 1015–16 (2024).

130. *Moore*, 36 F.4th at 934.

131. *Id.*

132. A due process claim based on retroactivity is difficult, given that there would be no question that the earnings back to 1986 would be taxable to the shareholders had there been an actual dividend—in other words, the oldness of the earnings alone could not be a factor. For further discussion of some related issues, see Reuven S. Avi-Yonah, David Gamage, Darien Shanske & Kirk Stark, *Is New York’s Mark-to-Market Act Unconstitutionally Retroactive?*, 99 TAX NOTES STATE 541 (2021).

133. *Moore*, 36 F.4th at 932, 939.

134. *Moore v. United States*, 53 F.4th 507 (9th Cir. 2022).

135. *Moore*, 36 F.4th at 935.

136. *Id.* at 937–38.

137. 318 U.S. 371 (1943).

*Horst*¹³⁸ “undermined . . . the original theoretical bases of the decision in *Eisner v. Macomber*.”¹³⁹

The taxpayers petitioned for rehearing and rehearing en banc, both of which petitions were denied. However, four judges dissented from the denial of rehearing en banc, and a forceful dissenting opinion by Judge Bumatay said that they would have held that the § 965 was unconstitutional, as contrary to the original meaning of “income.”¹⁴⁰ “Simply put,” wrote the dissenters, “as a matter of ordinary meaning, history, and precedent, an income tax must be a tax on realized income.”¹⁴¹ On original meaning and history, the dissenters said: “[B]ecause this ‘commonly understood meaning [of income]’ was ‘in the minds of the people when they adopted the Sixteenth Amendment,’ neither Congress nor our court may redefine income to include unrealized gains.”¹⁴²

The dissenters misread much of the history and sources on income taxation and the Sixteenth Amendment, many of which we discuss below.¹⁴³ But the dissent makes several other errors as well. First, the dissent implicitly accepts a realization theory that goes far beyond what *Macomber* would have allowed, even as they claim to be upholding *Macomber*. In particular, they think it enough for income to have been “realizable”—not realized—by controlling shareholders, even in a situation where there has been no accrual of any economic benefit to those shareholders nor change in corporate assets—much like the *Macomber* case.¹⁴⁴ Second, they distort and completely misread the Ninth Circuit case of *Commissioner v. Fender Sales, Inc.*, reading it to allow for income to be attributed to shareholders because of their control, when the issue in that case was whether they could avoid income treatment because of their control.¹⁴⁵

138. 311 U.S. 112 (1940).

139. *Moore*, 36 F.4th at 937 (quoting *Helvering v. Griffiths*, 318 U.S. 371, 394 (1943)).

140. *Moore v. United States*, 53 F.4th 507, 508 (Bumatay, J., dissenting).

141. *Id.*

142. *Id.* at 512 (quoting *Merchant’s Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519 (1921)).

143. The dissent in particular focuses on legal treatises and dictionary definitions which we discuss in *infra* Sections III.E and IV.A, respectively.

144. *Moore*, 53 F.4th at 514 (Bumatay, J., dissenting). In the case of *Commissioner v. Fender Sales, Inc.*, 338 F.2d 924 (9th Cir. 1964), the taxpayers were each 50% owners and managers of a corporation. *Id.* at 925. They had equal deferred salary obligations that they converted into shares, and they argued that this should not be “income” under *Macomber*, because—just like the stock dividend in *Macomber*—no assets had left the corporation and they had no net accrual to their wealth (because the shares simply replaced the debt the company already owed them). *Id.* at 928. The District Court agreed that it was the same as *Macomber*, *id.* at 926, but the Ninth Circuit overruled and said that the taxpayers did have income from the share distribution. *Id.* at 929–30.

145. *Moore*, 53 F.4th at 514 (Bumatay, J., dissenting). Briefly, the taxpayers in *Fender Sales* cited their controlling ownership as a defense against income treatment. Had they been ordinary employees, there would have been no question that share distributions were income. *Fender Sales*, 338 F.2d at 924. But because they were co-owners, those share distributions did not affect their ownership of the

The taxpayers in *Moore* then petitioned for certiorari to the Supreme Court, arguing, inter alia, that contemporaneous dictionaries and legal authorities “understood ‘income’ to turn on realization”¹⁴⁶ and that the Ninth Circuit’s decision “contradicts that original understanding.”¹⁴⁷ Amici urging the Supreme Court to take certiorari made similar arguments, for example, that “[t]he Ninth Circuit’s holding that realization was not part of the constitutional definition of income contradicts the original understanding of the Sixteenth Amendment.”¹⁴⁸ And the Supreme Court granted certiorari, on the question: “Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.”¹⁴⁹

3. *The Supreme Court Decision, Concurrences, and Dissent*

The Court decided for the government, upholding § 965, but without deciding on the question of realization. The decision was formally 7-2, with Justices Barrett and Alito concurring in the opinion. But it is effectively a 5-4 decision on the most important questions, because Justices Barrett and Alito along with Thomas and Gorsuch, in dissent, would have held that the Sixteenth Amendment does require realization.

The majority opinion emphasized that its holding “is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income.”¹⁵⁰ Specifically, the majority held that Congress has the power to tax income realized at the business entity level, to either the entity or to its shareholders or partners (but not necessarily to both), and regardless of whether the entity is a corporation or a partnership: “The Court’s longstanding precedents plainly establish that, when dealing with an entity’s undistributed income, Congress may tax either (i) the entity or (ii) its shareholders or partners.”¹⁵¹

However, the majority emphasized that its analysis “does not address the distinct issues that would be raised by (i) an attempt by Congress to tax both the entity and the shareholders or partners on the entity’s undistributed

corporation, nor the assets of the corporation, so they (correctly) argued that *Macomber* was on point. *Id.* Thus, it is getting the case completely backwards to read it as supporting a rule for income inclusion because of ownership—it is a case about income inclusion *in spite of* ownership.

146. Petition for Writ of Certiorari at 19, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

147. *Id.* at 20.

148. Brief of *Amicus Curiae* Americans for Tax Reform in Support of Petition for Certiorari at 7, *Moore*, 144 S. Ct. 1680 (No. 22-800).

149. Brief for Petitioners, *supra* note 29, at i.

150. *Moore*, 144 S. Ct. at 1697.

151. *Id.* at 1691.

income; (ii) taxes on holdings, wealth, or net worth; or (iii) taxes on appreciation.”¹⁵² The majority repeatedly clarified that it was not deciding on the realization question: “For their part, the dissent and the opinion concurring in the judgement focus primarily on the realization issue—namely, whether realization is required for an income tax. We do not decide that question today.”¹⁵³ “To decide this case, we need not resolve that disagreement over realization. Those are potential issues for another day, and we do not address or resolve any of those issues here.”¹⁵⁴

II. THE ORIGINAL MEANING OF THE SIXTEENTH AMENDMENT: RESTORING CONGRESS’S PRE-EXISTING INCOME TAX POWER

The questions raised by *Moore* are broad and important, especially the undecided question of: does Congress have the power under the Sixteenth Amendment to tax unrealized gain (or other “unrealized sums”)? This is a question that has lingered in some way ever since *Macomber*. As Marjorie Kornhauser has explained, the shadow of this potential constitutional threat was sometimes a factor in the design of many tax provisions and helps to explain some otherwise odd choices in the Tax Code.¹⁵⁵ Answering the question about the constitutional status of “realization” thus goes beyond the specific details of *Moore*.

As phrased by the petitioners in *Moore* and the Ninth Circuit dissenters, the question focuses exclusively and myopically on the original meaning of the word “income.” While this is an important aspect of the question, and we address it below, the proper interpretive question is: what is the original meaning of the *Sixteenth Amendment as a whole*, which refers not to “income” but rather to “taxes on incomes, from whatever source derived”? This question, in turn, implicates interpretive questions, such as the differences between “common” and “technical” meaning and the differences between constitutional and statutory meaning. We first briefly address some of these meta-questions, before turning to our direct argument.

As we show below, the Sixteenth Amendment was intended and generally understood, by both Congress and the public, to overrule *Pollock* and restore Congress’s pre-existing power of income taxation. The power to tax income was not new nor was it invented by the Sixteenth Amendment; there was a history and a practice dating back at least to the Civil War. The Sixteenth Amendment stands for restoring Congress’s power to tax income as it was already broadly understood.

152. *Id.* at 1689 n.2.

153. *Id.* at 1696.

154. *Id.* at 1697.

155. Kornhauser, *supra* note 31, at 115–22.

Thus, the core of the question is not the meaning of “income” per se, but rather the meaning of *income tax*—or “taxes on incomes” as the Sixteenth Amendment phrases it. Because income taxes had existed since the Civil War, a body of statutory, regulatory, and case law had developed around them. Furthermore, there was an income tax (on corporations) in effect at the time of the Sixteenth Amendment’s ratification, and some states—most notably Wisconsin and Virginia—had already instituted income taxes on individuals. In other words, the original public meaning of “income tax” is not purely linguistic¹⁵⁶ but is inextricably bound up with the public’s understanding of what income taxes actually were in practice.

Moreover, even if a given reader did not have a pre-existing “common” understanding of “taxes on incomes,” a reasonable reader of the Sixteenth Amendment would see the whole phrase “taxes on incomes, from whatever source derived” and understand that phrase as a “term of art,” a technical legal concept that depends on the interpretations of lawyers, accountants, and economists, not just ordinary meaning.¹⁵⁷ Indeed, the key here is not so much the word “incomes” but the word “taxes”—a famously technical and complicated legal and financial subject, even in 1913. And this was not the only technical term in the Amendment, which continues, “without apportionment among the several States, and without regard to any census or enumeration.”¹⁵⁸ That phrase would make little sense to a reader unless they consulted the rest of the Constitution—at which point they would also stumble across the famously ambiguous term “direct tax.” These words and phrases do not even have a common meaning that can be relied on to aid in interpretation. Furthermore, it was widely understood that the Amendment was specifically overturning a Supreme Court decision, and so the public understood it to be a move within a larger legal and jurisprudential context.¹⁵⁹ The Amendment did not exist on its own in a vacuum, needing to be newly interpreted; it was instead the latest development in a line of tax law that extended back to 1861, if not earlier. In the end, any reader would have known that they needed to (in modern terms) “consult their tax advisor” to understand the full implications of the Amendment.

156. This is not to imply that the ordinary linguistic meaning conflicts with the technical meaning. As we discuss below, it is likely that a common usage of the term refers to cash income, but that is not the only meaning, nor is it one necessitated by any of the many dictionary definitions we review.

157. See, e.g., Lawrence B. Solum, *Cooley’s Constitutional Limitations and Constitutional Originalism*, 18 *GEO. J.L. & PUB. POL’Y* 49, 59–60 (2020) (“The view of contemporary public meaning originalists is that at least some constitutional provisions are expressed in technical terms.”); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *NW. U. L. REV.* 923, 968 (2009).

158. U.S. CONST. amend. XVI.

159. See McGinnis & Rappaport, *supra* note 38, at 1343–44 (2018) (discussing use of context in resolving ambiguity between technical and ordinary meaning).

For either reason—whether “taxes on incomes” had an ordinary meaning that encompassed the existing experience of income taxes or a technical meaning that relied on interpretations of lawyers and accountants—Congress and the public understood that the Sixteenth Amendment was allowing “taxes on incomes” in all the ways that the law had already developed and incorporated. The Amendment was not conferring a new power, nor was it defining “income” differently than existing law already did. All historical evidence that we have found supports the view that the Sixteenth Amendment incorporated this contemporaneous understanding of income taxation, and as far as we know no historical evidence—including in the voluminous briefing in *Moore*—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*.¹⁶⁰

Indeed, the historical literature suggests the opposite; some were concerned at the time that the language of the Sixteenth Amendment might *expand* the concept of “taxes on incomes” to encompass items that were previously understood to be exempt from income taxation, such as judicial salaries and the interest on state and local bonds.¹⁶¹ By contrast, to our knowledge, the historical literature on the ratification debates does not document any significant discussions about the meaning of the word “income[s]” in the text of the Sixteenth Amendment as an isolated term. We argue that this is because the relevant historical actors all understood the Sixteenth Amendment’s phrase “taxes on incomes” to refer to the forms of income taxation that were familiar at that time.

However, two early Supreme Court cases—*Lynch v. Hornby* and *Doyle v. Mitchell Bros. Co.*—do state that “income” should be understood in its “ordinary sense”¹⁶² or its “natural and obvious sense.”¹⁶³ Relatedly, the Corpus Linguistics scholars argue that the constitutional inquiry should be only into the common, or lay, meaning of “income,” not its technical meaning.¹⁶⁴ We have several responses to this. First, to the extent that these

160. On the history of the passage and ratification of the Sixteenth Amendment, in addition to sources cited below, see ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* (1940); JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* (1985); AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE* (2013); SIDNEY RATNER, *AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY* (1942); Earle Hoyt Ketcham, *The Sixteenth Amendment* (1924) (Ph.D. dissertation, University of Illinois) (on file with authors); Seth Rachlin, *From Whatever Source Derived: Wealth, National Citizenship, and the Ratification of the Income Tax Amendment* (2014) (Ph.D. dissertation, Columbia University) (on file with authors).

161. *E.g.*, Rachlin, *supra* note 160, at 53–54, 84–85, 138–40; Harry Hubbard, “*From Whatever Source Derived*”, 6 A.B.A. J. 202, 203 (1920).

162. *Lynch v. Hornby*, 247 U.S. 339, 344 (1918).

163. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918).

164. Lee et al., *supra* note 6, at 188–89. The authors also argue that the original public meaning of “income” included a realization rule, a claim we address further below. *Id.* at 188.

cases depart from what we show to be the original meaning of the Sixteenth Amendment as a whole, they should not be read as dispositive. Indeed, the two cases quoted above and cited by the Corpus Linguistics scholars both post-date the cases we cite below¹⁶⁵ for a proper understanding of the meaning of the Sixteenth Amendment.

More importantly, we do not read either *Hornby* or *Doyle* as being in conflict with our argument, because both cases were ones of *statutory*, not *constitutional*, interpretation¹⁶⁶ and neither case involved the question of realization. Statutory and constitutional interpretation can of course differ. There is some evidence, for example, that courts, in the words of a contemporaneous treatise:

uniformly construed [the word “income”] to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid, *unless a contrary purpose is manifest from the language of the statute*. . . . [C]ourts have not departed, *unless it expressly appears otherwise*, from a construction of the law in accord with an intention to reach the actual and not the potential income.¹⁶⁷

The petitioners in *Moore* made a similar erroneous conflation of statutory and constitutional constructions, arguing that the case of *Maryland Casualty Co. v. United States*,¹⁶⁸ embodied the “settled legal meaning” that income included “only the receipt of actual cash as opposed to contemplated revenue due but unpaid.”¹⁶⁹ But they conveniently cut the rest of the sentence: “*unless a contrary purpose is manifest from the language of the statute*.”¹⁷⁰

165. See *infra* Section II.D.

166. *Hornby* states, “[W]e deem it equally clear that Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment” *Hornby*, 247 U.S. at 343–44. But this is dicta, because the taxpayer was not raising a constitutional claim. See *Lynch v. Hornby*, 236 F. 661 (8th Cir. 1916). Furthermore, the Court was making the “ordinary” meaning argument in the course of ruling against the taxpayer and in favor of an *expanded* concept of income that included distributions of earnings accrued prior to the passage of the 1913 Act and the Sixteenth Amendment. *Hornby*, 247 U.S. at 344–45. In that sense, the case is somewhat in tension with the cases we discuss distinguishing accrual from realization, see *infra* Sections II.B, III.C, though in a taxpayer-unfriendly way and also in a way consistent with later rulings on dividend taxation, see *United States v. Phellis*, 257 U.S. 156, 158, 175 (1921) (citing *Peabody v. Eisner*, 247 U.S. 347 (1918), decided on the same day and on the same basis as *Hornby*, 247 U.S. at 350).

167. GEORGE E. HOLMES, FEDERAL INCOME TAX: INCLUDING TAX ON UNDISTRIBUTED NET INCOME, CAPITAL STOCK TAX, AND WAR EXCESS PROFITS TAX 205–06 (1917) (emphasis added).

168. 52 Ct. Cl. 201 (Ct. Cl. 1917).

169. Brief for Petitioners, *supra* note 29, at 27 (quoting *Md. Cas. Co.*, 52 Ct. Cl. at 209).

170. *Md. Cas. Co.*, 52 Ct. Cl. at 209 (emphasis added). The case in fact addresses cash vs. accrual basis accounting of insurance company premiums and stands only (if at all) for the idea that Congress was presumed (at that time, in the context on insurance companies) to mean cash income, not accrued

This confusion between statutory and constitutional interpretation is why it is vital to understand the full context of the Amendment. It is perfectly plausible that Congress might be understood to be using “income” in a specific sense in a statute—particularly when the tax statutes after 1913 largely defaulted to taxing only realized gain unless otherwise stated—while also understanding that the Amendment itself was intended to return to Congress “the previous complete and plenary power of income taxation possessed by Congress from the beginning.”¹⁷¹

We turn to analyzing the content of that “complete and plenary power of income taxation” in Part III. But first, in this Part, we show that the Sixteenth Amendment was intended as a tool to overrule the Supreme Court in *Pollock* and reinstate Congress’s power to levy “taxes on incomes” as they were understood at the time. This exercise dovetails with a closely related interpretive question: what is the meaning of the phrase “taxes on incomes, from whatever source derived” in the Sixteenth Amendment? As we show here, the purpose of the phrase “from whatever source derived” was *not* to introduce a new realization requirement, but instead to overrule one of the holdings in *Pollock* and restore Congress’s pre-existing power of income taxation.

A. *The Original Meaning of “Derived”*

To begin, we make explicit a point that has been implicit up to this point—that many of the arguments about realization hinge on an understanding of the word “derive.” This word appears over and over—it is in several of the dictionary definitions we review in Part IV and that the *Moore* petitioners, amici, and Ninth Circuit dissenters highlighted. It is also the basis of the definitional phrase from *Doyle and Stratton’s Independence* that is applied in *Macomber*—“the gain *derived* from capital, from labor, or from both combined.”¹⁷² The decision in *Macomber* rests largely on the Court’s dubious conceptual analysis of the word “derive,” as we explained in Section I.C. The word has particular constitutional importance because it appears in the Sixteenth Amendment itself—“from whatever source

income, unless it said otherwise. *Id.* It has no bearing at all on the constitutional question, unless the petitioners were arguing that accrual basis accounting is also unconstitutional (which, to be clear, would not only be preposterous, but would require a dramatic and unprecedented restructuring of much of income tax law as it applies to businesses).

171. *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916). To be clear, this narrower construction of “income” for statutory purposes largely disappeared within a decade or so, and the Court later understood Congress’s use of “income” to be “exert[ing] . . . ‘the full measure of its taxing power.’” *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955) (quoting *Helvering v. Clifford*, 309 U.S. 331, 334 (1940)).

172. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (emphasis added) (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918)).

derived.” And the dissenting Justices in *Moore* also hang much of their argument on the notion that “derived” should be read as a “near-synonym” for “realized.”¹⁷³

As shown in Section I.B, the jurisprudential methodology of the *Pollock* decision was not to define an income tax as categorically a direct tax, but rather to ask whether a tax on the income derived from property had the same effect in substance as a tax on the property itself. Taxes on property were understood to be direct taxes.¹⁷⁴ So was a tax on the *income* of property essentially equivalent to a tax on the *source* of that income?¹⁷⁵ Though *Pollock* answered that question in the affirmative, the Court also made clear that it was not disrupting its prior holding in *Springer v. United States*¹⁷⁶ that a tax on the income from “business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.”¹⁷⁷ The *Pollock* Court declared the whole income tax unconstitutional because it could not sever the business and labor income taxes from the income tax on property, not because those taxes were unconstitutional in their own right.¹⁷⁸

In other words, the theory for the unconstitutionality of the 1894 income tax at issue in *Pollock* rested entirely on the issue of *source*¹⁷⁹—according to *Pollock*, even though income taxes generally were indirect excises, a court should look at the source of that income, because if the source were property, then the income tax would also in effect be a direct tax.

With that in mind, we can see why Congress added the phrase “from whatever *source* derived” (emphasis added) to the Sixteenth Amendment—it had the effect of overruling that part of the *Pollock* decision that hinged on the source of the income. It should be read, in effect, as “regardless of the source from which the income was derived.” As we discuss in the review of dictionary definitions below, some argue that we should read “derive” as requiring some sort of action (such as realization), but a full understanding of the historical context shows that “derive” is actually just a word to connect the more important words “incomes” and “source,” and nothing more.

173. *Moore v. United States*, 144 S. Ct. 1680, 1722 (2024) (Thomas, J., dissenting).

174. This is simplifying a more complex story of course, but the question of whether a direct tax is tax on all property or only real property is not at issue here. See Brooks & Gamage, *supra* note 28.

175. *Pollock I*, 157 U.S. 429, 578–83 (1895); *Pollock II*, 158 U.S. 601, 618 (1895).

176. 102 U.S. 596, 635 (1881).

177. *Pollock II*, 158 U.S. at 635.

178. *Id.* at 635–37 (noting, *inter alia*, that “[i]t is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected”).

179. *Id.* This is also true for another holding of *Pollock* not at issue here, namely whether the federal government could constitutionally tax state or municipal bond interest. See *id.* at 630. The issue there was whether that would violate intergovernmental immunity doctrine, not whether such a tax would be a direct tax. *Id.* But looking through to the source of the income—a state government—was still central to that holding. *Id.*

Importantly, the phrase was also not new to income tax law in 1913. Prior law used variations of the phrase “from whatever source derived” to indicate the broad sweep of the concept. For example, the 1864 income tax referred to “income . . . derived . . . from any other source whatever”¹⁸⁰ and the 1894 income tax (struck down by *Pollock*) referred to “income derived from any source whatever.”¹⁸¹ These phrases were used, as the Department of Justice noted in a 1938 report, “to include income from all sources.”¹⁸² As shown below, both of these taxes reached unrealized income, again linking the pre-*Pollock* understanding of income taxes to the post-Amendment era.

Thus, the Amendment instructs courts to no longer inquire into the source of the income because it did not matter any longer—no matter what, a tax on income did not have to be apportioned, regardless of source. And because it had only been that source-based inquiry that potentially moved some types of income taxes into the direct tax category, the Amendment had the effect of restoring Congress’s power of income taxation as it existed before *Pollock*—all income taxes continued to be excises rather than direct taxes.

This interpretation of the text is not ours alone, however. In the next subsections we present affirmative evidence of this exact view among Congress, the public, and the Court.

B. Congressional Debates

The congressional debates and related evidence reinforce the understanding of the Sixteenth Amendment as intended to overrule *Pollock* and restore Congress’s broad power to tax income, and furthermore that the phrase “from whatever source derived” was in no way intended to *limit* Congress’s power to tax only “realized” gains. Indeed, much of the debate around that phrase was whether it *expanded* Congress’s power relative to what was understood before *Pollock*.

First, some in Congress said that the phrase “from whatever source derived” was added, in the words of a contemporaneous law journal article, “in order to make the power to tax incomes *as broad as ‘incomes’ themselves could possibly be.*”¹⁸³ Early drafts of the Amendment proposed by Senator Norris Brown would potentially have had a more limited effect, but then control of the process was taken over by Senators Aldrich and Nelson, with the “from whatever source derived” phrase added by

180. Act of June 30, 1864, ch. 173 § 116, 13 Stat. 223, 281.

181. Act of Aug. 27, 1894, ch. 349 § 28, 28 Stat. 509, 553.

182. JAMES W. MORRIS, SEWALL KEY, LUCIUS A. BUCK & WARNER W. GARDNER, DEP’T OF JUST., TAXATION OF GOVERNMENT BONDHOLDERS AND EMPLOYEES: THE IMMUNITY RULE AND THE SIXTEENTH AMENDMENT 152 (1938).

183. Hubbard, *supra* note 161, at 203.

Nelson.¹⁸⁴ In later correspondence, Nelson complained that the Supreme Court had disregarded this phrase in the case of *Evans v. Gore*.¹⁸⁵ That case had held that taxation of federal judges' salaries was unconstitutional, because it violated the Article III, Section 1 rule that judges' salaries "shall not be diminished during their Continuance in Office."¹⁸⁶ In Nelson's view, the Court thereby "utterly ignored the phrase; in fact, treated the amendment as though this phrase were not a part of it."¹⁸⁷ In other words, according to Nelson, the phrase was intended as an instruction to courts to ignore the question of source (in this case, a judge's salary) in asking whether a tax on income was constitutional.

Second, the congressional debates showed a consensus that the purpose of the Amendment was to overrule *Pollock* and return the tax law to how it had been in 1894. In proposing the Amendment, President Taft said:

The decision of the Supreme Court in the income-tax cases 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. . . . I therefore recommend to the Congress that both Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population.¹⁸⁸

Taft called for an Amendment that would restore to Congress the "full extent"¹⁸⁹ of its income tax power, which was a departure from earlier suggestions of his that Congress could enact "certain phases of this power"¹⁹⁰ without challenging the *Pollock* holding. According to a 1938 Department of Justice study, Congress lined up with Taft's recommendation and drafted an Amendment that would restore the full extent of the power, and "[t]his was accomplished by the use of the phrase 'from whatever source derived.'"¹⁹¹

184. Brooks & Gamage, *supra* note 28, at 120–23.

185. 253 U.S. 245 (1920), *overruled by* O'Malley v. Woodrough, 307 U.S. 277 (1939), and *United States v. Hatter*, 532 U.S. 557 (2001).

186. U.S. CONST. art. III, § 1; *see Evans*, 253 U.S. at 263–64.

187. Hubbard, *supra* note 161, at 203.

188. 44 CONG. REC. 3344 (1909).

189. *Id.*

190. *Id.*

191. MORRIS ET AL., *supra* note 182, at 148.

Representative James argued on the floor that “the most unfortunate decision ever written was the one holding the income-tax law unconstitutional.”¹⁹² He added:

For a century, this law had been held constitutional by an unbroken chain of decisions reaching from the first link forged by the Revolutionary judges down for more than a hundred years; a chain of decisions so strong that Abraham Lincoln girded it about the Republic in its darkest hour in the war between the States.¹⁹³

Like many income tax supporters, James more strongly favored passing another income tax law so that the Court could directly overrule *Pollock*, but said that others were “afraid to give the Supreme Court another chance to pass upon it . . . to see whether the court was right for a hundred years and wrong for fifteen, or wrong for a hundred years and right for fifteen.”¹⁹⁴

Many speeches referred to this same point—how *Pollock* had overruled what had been settled law for a hundred years, and that the amendment was needed to correct this error. For example, Representative Bartlett:

Therefore, if it requires a constitutional amendment to restore to Congress this power of levying a tax upon the wealth of the country, in order that it may bear its just proportion of the burdens of government, and to *restore* to the people and to Congress their right to levy and collect taxes for the support of the Government in the way it had been done for a hundred years prior to this decision, I must vote for the amendment.¹⁹⁵

Representative Henry argued that the Court in *Pollock* “turn[ed] backward, and uproot[ed] the established laws of more than three generations. Is it any wonder that the populace stood aghast and the bar was amazed?”¹⁹⁶ Even President Taft said of *Pollock* that “[n]othing has ever injured the prestige of the Supreme Court more.”¹⁹⁷

Later, after the ratification debates in New York raised the question of whether the phrase “from whatever source derived” might authorize

192. 44 CONG. REC. 4398 (1909). We are grateful to Victor Thuronyi for pointing us to some of these passages.

193. *Id.* James is referring to the key line of direct tax cases: *Hylton*, *Pacific Insurance Co.*, *Veazie Bank*, *Scholey*, and *Springer*, as well as the Civil War–era income taxes mentioned above.

194. *Id.*

195. *Id.* at 4409 (emphasis added); see also *id.* at 4403 (Rep. Hull: “It now ill becomes the opponents of an income tax to invoke this doctrine [stare decisis] in support of the decision in the Pollock case, which was wrong from the Supreme Court in spite of the great force of this doctrine.”).

196. *Id.* at 4413.

197. 1 ARCHIBALD WILLINGHAM BUTT, TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT MILITARY AIDE 134 (1930).

taxation of interest on municipal bonds,¹⁹⁸ which some understood to expand the income tax power,¹⁹⁹ the U.S. Senate debated that question, with senators addressing the meaning of that phrase directly. For example, Senator Borah said:

[T]he words “from whatever source derived” add nothing to the force or strength of the amendment itself. . . . If we should have said in this amendment that Congress shall have power to lay and collect taxes upon incomes without apportionment, it would necessarily, in constitutional parlance, include all incomes of whatever nature or from whatever source derived. . . . Therefore the adding of the words “from whatever source derived” does not amplify the power conferred or make it mean any other than it would mean if the words had been entirely omitted from the amendment.²⁰⁰

Senator Brown—the Senator who first officially introduced the Amendment, but who may not have been a strong supporter of an income tax²⁰¹—said, “My own judgment is that the words against which complaint is lodged, ‘from whatever source derived,’ neither add to *nor take away from* the power of the Government to reach the incomes of the country, provided the proposed amendment is adopted.”²⁰²

Third, as evidence that Congress did not intend to define income in a way that would have benefited the wealthiest households, congressional speakers stated repeatedly that the purpose of the income tax was to tax “wealth,” or, more precisely, to shift tax burdens onto wealthier people. For example:

For long years . . . [the Democratic Party] cherished the view that swollen fortunes and incomes of the rich should bear their just tribute and pay a part of the tax burdens of the country under a properly framed income-tax law. . . . It is undeniable that an income tax will

198. See, e.g., MEHROTRA, *supra* note 160, at 270–76.

199. The *Pollock* case had also held that taxation of this interest was unconstitutional, based on sovereign immunity doctrine (rather than the direct tax clauses). See *Pollock I*, 157 U.S. 429, 583–86 (1895). Unlike the income-tax holding, which was 5-4, the decision was unanimous on state bond interest. (Though it got there using a similar, and now overruled, source-based logic to treat the taxation of interest paid by a state as equivalent to taxing the state itself. See *supra* note 80.) Thus, there was some concern that the phrase might have been intended to *expand* the federal government’s tax power beyond what it was generally understood to be. As noted above, see *supra* notes 180–83 and accompanying text, it could be that some kind of expansion might have been Sen. Nelson’s intention, and the 1938 Department of Justice study concludes that Congress did, indeed, intend for it to reach such income. See MORRIS ET AL., *supra* note 182, at 146–62. At any rate, no one argued that the phrase *narrowed* Congress’s power.

200. 45 CONG. REC. 1695 (1910).

201. See Brooks & Gamage, *supra* note 28, at 120–23.

202. 45 CONG. REC. 1699 (1910) (emphasis added).

reach millions of wealth—bonds and stock—that would never be touched by a corporation or inheritance tax. . . . As I see it, the fairest of all taxes is of this nature, laid according to wealth, and its universal adoption would be a benign blessing to mankind.²⁰³

And yet such is the injustice which arises under a system which taxes consumption instead of wealth. To say that a man should pay taxes in proportion to the shoes, hats, and clothes he is compelled to buy instead of in proportion to the wealth which he calls upon the Government to protect for him is an economic absurdity²⁰⁴

While this does not change the fact that the subject of the debate, and of the Amendment, was an *income* tax, not a *wealth* tax, it does lend support to the idea that Congress understood itself to be amending the Constitution in order to allow for taxes that could effectively reach the ways in which wealth was earned. Indeed, the 1913 income tax probably reached less than five percent of households,²⁰⁵ presumably the wealthiest Americans, who thus disproportionately earned income from their wealth holdings, rather than labor income.

C. Newspapers and Other Public Communications

The purpose of the Sixteenth Amendment as overruling *Pollock* and restoring the pre-*Pollock* power of income taxation was also clearly communicated in the popular press and in broader public discussions. To begin with, *Pollock* and the income tax were issues of major public debate and visibility. The decision itself was a major story,²⁰⁶ and generally presented in newspapers as either a victory of “selfishness over patriotism”²⁰⁷ by “corporations and Plutocrats”²⁰⁸ or a defeat of the “wave of socialistic revolution”²⁰⁹ and “ignorant class hatred,”²¹⁰ depending on the paper’s politics. The Democratic Party platform in the 1896 election renewed calls for an income tax,²¹¹ and by 1908 Republican President

203. 44 Cong. Rec. 4411, 4412, 4414 (1909) (Rep. Henry).

204. *Id.* at 4426–27 (Rep. Dies).

205. See LAWRENCE H. SELTZER, *THE PERSONAL EXEMPTIONS IN THE INCOME TAX* 62 tbl. 9 (1968).

206. See BLAKEY & BLAKEY, *supra* note 160, at 20 (noting “voluminous press comment”); RATNER, *supra* note 160, at 212–13.

207. *Income Tax Law Dead*, N.Y. WORLD, May 21, 1895, at 4.

208. ST. LOUIS POST-DISPATCH, May 20, 1895, at 4.

209. *Thank Heaven, the Danger Is Past!*, N.Y. SUN, May 21, 1895, at 6.

210. *The Income Tax Invalid*, N.Y. TRIBUNE, May 21, 1895, at 1.

211. See RATNER, *supra* note 160, at 216. The platform called more specifically for taxes by which “wealth may bear its due proportion” and expressed hope that *Pollock* would be repealed to allow for

Theodore Roosevelt and President-Elect William Howard Taft agreed that an income tax was needed, and *Pollock* likely needed to be overturned.²¹²

The press coverage of the Amendment also frequently mentioned its larger context, including its purpose of overruling *Pollock* and the Amendment's setting in a large body of constitutional tax law. For example, the *New York Tribune* in 1910 printed a long letter from Senator Elihu Root, in which he said that the Amendment would "leave[] the question 'What incomes are subject to national taxation?' to be determined by the same principles and rules which are now applicable to the determination of that question."²¹³ Root went on to explain at length the history of such tax rules, going back to the Constitutional Convention, including that the *Pollock* decision "had practically taken away" the income tax power from Congress and that the Amendment would cure the "evil" of creating a "practical immunity from taxation based upon the source from which [the incomes] were derived." He added:

This amendment will have no new grant of power. The Congress already has power to impose taxes on incomes from whatever source derived . . . but the taxes so imposed must be apportioned among the states. Under the proposed amendment there will be the same and no greater power to tax incomes from whatever source derived . . . but relieved from the requirement that the tax shall be apportioned.²¹⁴

The *Nashville Banner* in 1911 connected the proposed amendment to the Civil War income tax ("its constitutionality was not questioned") and the 1909 corporate income tax ("valid and constitutional because it is an excise and not a direct tax"), illustrating the importance of the larger legal context, and that the Amendment did not exist in a vacuum separate from prior and existing law.²¹⁵ The *New York Times* did the same:

The income-tax provision of the tariff act of 1894 was declared unconstitutional by the Supreme Court in May, 1895, on the ground that it was a direct tax and not apportioned among the several States according to their population, as the constitution then provided

that. *Id.* The Populist Party—which shared with the Democratic Party William Jennings Bryan as a nominee—called more specifically for a "graduated income tax" and said that *Pollock* was a "misinterpretation of the Constitution, and an invasion of the rightful powers of Congress over the subject of taxation." *Id.*

212. *Id.* at 265, 268–69. Taft vacillated as a candidate on whether an amendment was needed, or whether the Court would reverse itself. *See id.* at 269.

213. *Replies to Hughes: Root on Income Tax Amendment*, N.Y. TRIBUNE, Mar. 1, 1910, at 4.

214. *Id.*

215. *The Income Tax Amendment*, NASHVILLE BANNER, Mar. 16, 1911, at 8. The article went on to suggest opposing the amendment because of its potential to tax state bond interest.

should be done. It was to meet that decision that the recently adopted sixteenth amendment as brought forward.²¹⁶

In a syndicated column that ran in several newspapers between January 7 and 10, 1911, including the *Washington D.C. Star*, the *Buffalo Commercial*, the *Detroit Times*, the *Daily Missoulian*, and the *Salt Lake Telegram*, Frederic Raskin wrote that “[t]he income tax is far from a new institution in this country” and described the case law from *Hylton* to *Springer*, including how much *Pollock* departed from the holding of *Springer*.²¹⁷ He wrote that the “necessity for the proposed amendment . . . arises from the Supreme Court decision in the famous *Pollock* case.”²¹⁸

New Jersey Governor Fort’s message to the state legislature urging adoption of the amendment ran in dozens of newspapers, including the *Trenton Evening Times* and the *Morning Call* of Paterson, N.J. In his message, he also described *Pollock* as a departure from *Hylton* and *Springer* and stated that the amendment was necessary because *Pollock* had “practically destroy[ed] the laying of any tax whatever upon income.”²¹⁹

Accounts in newspapers critical of the Amendment presented it as authorizing a relatively sweeping power—perhaps even more than was intended. For example, the *Wall Street Journal* in 1913 reported that the Amendment “would . . . abrogate” the direct tax clause in Article 1.²²⁰ The *Boston Evening Transcript* in 1910 quoted testimony of politician Nathan Matthews,²²¹ saying that:

The farmer will pay one tax on his property to the State and another to the Federal Government. The 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, and the income would be spent elsewhere and not in Massachusetts.²²²

216. *The Income Tax Abroad*, N.Y. TIMES, Apr. 6, 1913, at 11.

217. Frederic J. Haskin, *Income Tax Amendment*, SUNDAY STAR (Washington, D.C.), Jan. 8, 1911, at 5; see also Frederic J. Haskin, *Income Tax Amendment*, BUFFALO COM., Jan. 7, 1911, at 7; Frederic J. Haskin, *The Income Tax*, DAILY MISSOULIAN (Montana), Jan. 8, 1911, at 3; Frederic J. Haskin, *Income Tax Amendment*, SALT LAKE EVENING TELEGRAM, Jan. 9, 1911, at 4; Frederic J. Haskin, *Income Tax Amendment*, DETROIT TIMES, Jan. 10, 1911, at 11. We are grateful to Ellen Aprill and Laura Cadra for directing us to this article.

218. *Supra* note 217.

219. *Fort Urges Legislature to Adopt Income Tax Amendment*, TRENTON EVENING TIMES, Feb. 8, 1910, at 2; *Urges the Income Tax*, THE MORNING CALL (Paterson, N.J.), Feb. 8, 1910, at 1; see also *Favors Income Tax*, N.Y. TRIBUNE, Feb. 8, 1910, at 4.

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

221. Perhaps the former mayor of Boston, but it is unclear from the article.

222. *Matthews on Income Tax*, BOSTON EVENING TRANSCRIPT, Feb. 14, 1910, at 2 (emphasis added) (quoting Nathan Matthews).

As we discuss below, these two articles present a contemporaneous understanding of the meaning of “income” as used in the Sixteenth Amendment that directly contradicts the arguments of the Corpus Linguistics scholars that no common uses of the word “income” at the time incorporated unrealized gain.²²³ This is because the articles’ understandings of the Amendment’s power necessarily incorporated taxation of unrealized gain—on the one hand, because it could allow direct taxation of property, and on the other because it could include net imputed rent.

This brief survey of the voluminous press coverage of the Sixteenth Amendment’s passage and ratification show that it was well understood and widely communicated that Congress had a practice of income taxation prior to *Pollock*, that *Pollock* was a sharp departure from prior law, and that the Sixteenth Amendment was directly intended to overrule *Pollock* and restore that pre-existing power of income taxation.

D. Post-Ratification Supreme Court Case Law

In early decisions after the ratification of the Amendment in which the Court was asked to interpret its meaning as applied to certain types of income, the Court reinforced both of the key points shown above—that the phrase “from whatever source derived” was intended to overrule the faulty source-based methodology of *Pollock* and that the Sixteenth Amendment generally was not intended to confer any new or different or (especially) more constrained power than that which Congress had prior to *Pollock*. We should note that these cases stand not only for their holdings themselves, but also as evidence of the original public meaning of the Amendment, because they were decided so close in time to the Amendment itself (and closer, even, than *Eisner v. Macomber*).

In particular, from *Brushaber v. Union Pacific Railroad Co.*:

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—*an authority already possessed and never questioned*—or to limit and distinguish between one kind of income taxes and another, but that 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. . . . [T]he Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the

223. See *infra* Section IV.C. for further discussion on this.

burden which resulted on the property from which the income was derived²²⁴

And, from *Stanton v. Baltic Mining Co.*:

[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.²²⁵

III. THE ORIGINAL MEANING OF “TAXES ON INCOMES” AND THE HISTORY OF TAXING UNREALIZED INCOME

The prior Part showed that the original meaning of the Sixteenth Amendment was both intended and generally understood as overruling *Pollock* and restoring Congress’s pre-existing income-tax power. Neither by its text nor by the original public understanding of that text did the Amendment in any way incorporate a new requirement that gain must be “realized” to be taxed. The first federal income tax was passed by Congress in 1861, more than fifty years prior to the Amendment, and at the time of the Sixteenth Amendment’s ratification a tax on corporate income had been operating for four years. In other words, Congress was not creating and communicating something new that had to be given content based on general meaning of language; it was instead re-establishing income taxation as it was understood at the time.

The existence and relevance of prior law is shown, ironically, by the opinion in *Macomber*—the only case in which the Supreme Court held that a portion of the income tax violated the Sixteenth Amendment. As we explained in Section I.C, one of *Macomber*’s many flaws was its dismissal of prior precedent that had upheld treating undistributed corporate earnings as the income of shareholders. The Court’s flawed circular reasoning was that the prior decision of *Collector v. Hubbard*—that undistributed corporate earnings were shareholders’ “income”—had been overruled by *Pollock*, and yet the Sixteenth Amendment’s subsequent overruling of

224. 240 U.S. 1, 17–18 (1916) (emphasis added).

225. 240 U.S. 103, 112–113 (1916) (emphasis added).

Pollock did not reinstate *Hubbard*'s holding that undistributed earnings were "income" because the Amendment only applied to "income."²²⁶

We mention this part of *Macomber* here to underscore the point that the Court was not disputing that undistributed corporate earnings had been treated as shareholder income under prior law—they were just choosing (erroneously) to reject that law.²²⁷ Whether or not *Macomber* is still good law on that point, it is clear from an originalist standpoint that the law at the time of the ratification of the Sixteenth Amendment, and prior to it, incorporated a broader definition of income, including both undistributed earnings and, in some cases, unrealized gains.

A. Undistributed Corporate Earnings

The Civil War era income taxes provided that "the gains and profits of all companies, whether incorporated or partnership . . . shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether *divided or otherwise*."²²⁸ As noted, the Supreme Court upheld this law in *Hubbard*. This fact alone should be dispositive on the issue raised in *Moore*, if, as we have shown, the Sixteenth Amendment restored Congress's power to tax income as it existed prior to *Pollock*.

We should note that *Hubbard* did not rest only on technical grounds and instead found sufficient normative reasons to treat undistributed corporate earnings as income earned by a shareholder, reasons that still apply with equal strength today:

[T]he owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the

226. See *supra* notes 108–10 and accompanying text.

227. The majority in *Moore* appears to agree with our characterization of this error in *Macomber*. See *Moore v. United States*, 144 S. Ct. 1680, 1692 n.5 (2024).

228. Act of June 30, 1864, ch. 173 § 117, 13 Stat. 223, 282 (emphasis added).

market value of the shares, whether held by the original subscribers or by assignees.²²⁹

Closer in time to the Amendment, the proposed Bailey-Cummins income tax bill in 1909, which was being offered as a potential vehicle to challenge the Supreme Court’s *Pollock* decision, would have applied a similar partnership-like pass-through approach. Ultimately Congress decided to pass the Sixteenth Amendment instead of challenging the Court to overrule *Pollock*, but these bills and debates were happening in the same Congress that passed the Sixteenth Amendment, and at the same time, so they have particular relevance.²³⁰ In Cummins’s initial proposed version, individuals’ income included “the undivided profits of corporations issuing . . . stock[]” owned by those individuals.²³¹ The revised Bailey-Cummins version of the bill imposed that tax on corporations themselves, rather than individual shareholders, but appeared to treat corporations more as withholding agents for individuals, because the bill allowed individuals with income below the filing threshold to apply for a refund of their portion of any tax paid by the corporation²³²—an acknowledgement that the tax on corporate earnings was still in substance a tax on an individual’s income.

The 1913 income tax—the first after ratification of the Sixteenth Amendment—also expressly included undistributed corporate earnings in the income of at least some individuals. In that case, the tax was framed as a tax avoidance measure, like an excess profits tax—it would apply where a taxpayer “formed or fraudulently availed of [the corporation] for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed.”²³³ However, the statute further said that it was “prima facie” evidence of such a purpose if a corporation accumulated a surplus “beyond the reasonable needs of the business”²³⁴—high retained earnings was the only trigger needed to tax individuals on those earnings.²³⁵ The 1918 Act

229. *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1, 18 (1871) (footnote omitted).

230. For more on the history, see Brooks & Gamage, *supra* note 28, at 120–23 and n.246.

231. 44 CONG. REC. 1420; see Steven A Bank, *Entity Theory as Myth in the US Corporate Excise Tax of 1909*, in 2 STUDIES IN THE HISTORY OF TAX LAW 393, 402 (John Tiley, ed., 2007). The bill also separately enumerated in its list of items of income “[t]he gains or profits of all sales or dealings in property, whether real or personal” and “[a]ny other gains or profits growing out of the ownership of or interest in real or personal property.” 44 CONG. REC. 1420. This is merely a proposed bill and this portion does not appear to have been debated, but it could be read to include both realized and unrealized gains—both gains from “sales and dealings” in, and gains “growing out of ownership” of, property.

232. 44 CONG. REC. 3137; see Bank, *supra* note 231, at 403.

233. Tariff Act of 1913, ch. 16 § II(A)(2), 38 Stat. 114, 166.

234. *Id.*, 38 Stat. at 167.

235. To briefly explain why excess retained earnings can be a method of tax avoidance, if a corporation is taxed at a lower rate than the individual shareholders, then accumulating and retaining

also introduced “personal service corporations,” which were treated in a similar manner as partnerships, with the shareholders taxed on their share of the corporation’s income.²³⁶ Thus, in 1864 Congress chose to tax all of a shareholder’s share of corporate earnings as income, while in 1913 and after Congress exercised its discretion not to—to wait until distribution or realization, except when necessary to avoid abuse. It was not a question of Congress’s *power* to reach this income, but rather its pragmatic choice of when was most appropriate. Even if the anti-abuse motivation of the 1913 and 1918 regimes distinguishes them from 1864, that is immaterial to the question of Congress’s *power* to tax the income. Either corporate earnings are shareholder income or they are not—the relative size of those earnings is irrelevant to the definitional question. At any rate, the framers of the Sixteenth Amendment would have well understood that undistributed earnings were within the income concept.

B. Unrealized Gain in Appreciated Property

Looking beyond undistributed corporate earnings, we have also discovered new evidence not previously discussed in the modern literature that a contemporaneous corporate income tax law in effect when the Sixteenth Amendment was ratified included *unrealized* gain from appreciated property in “income.” This tax was thus in essence a limited “mark-to-market” income tax.

The Corporate Excise Tax of 1909 was a tax on corporate income passed by the same Congress that passed the Sixteenth Amendment. (Despite technically being an excise tax, later Supreme Court rulings made it clear that the concept of income under the 1909 law was the same as for the post-1913 income tax laws.²³⁷) In interpreting the law, the Treasury Department ruled that “increase in value of unsold property, if taken up on the books of the corporation, [are] to be included in income”²³⁸ and that “[a]ny increase in the value of the capital assets, as determined by a physical revaluation and taken cognizance of by the corporation in book entries, is gain and must

earnings in the corporation can provide a tax deferral to shareholders relative to distributing those earnings to the shareholders. In other words, the choice *not* to tax shareholders annually on their share of corporate income necessitates a corresponding anti-deferral rule to ensure that shareholders do not avoid taxation altogether. That this was understood as early as the first modern income tax underscores that legal actors at the time had a sophisticated understanding of income, timing, and deferral.

236. Revenue Act of 1918, § 218(e), 40 Stat. 1057, 1070.

237. See, e.g., *Stratton’s Indep., Ltd., v. Howbert*, 231 U.S. 399, 416–17 (1913); *S. Pac. Co. v. Lowe*, 247 U.S. 330, 335 (1918); *Merchants’ Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 517–20 (1921); *Edwards v. Cuba R.R. Co.*, 268 U.S. 628, 631 (1925) (“[T]he meaning of ‘income’ as used in the Corporation Excise Tax Law of 1909 is not to be distinguished from the meaning of the same word as used in the Income Tax Law of 1913 and the Revenue Act of 1916.”).

238. T.D. 1675 § 37, 14 Treas. Dec. Int. Rev. 16, 19 (1911).

be accounted for as income for the year in which such increase is so recognized and recorded.”²³⁹ Another Treasury Decision told a taxpayer that “appreciation in the value of securities” held by the taxpayer and taken account of as a book entry “should be accounted for in gross income”: “The appreciation having actually occurred and being so entered and carried on your books as to show that the value of your assets was greater by this amount at the close of the year than at the beginning, this increase must be accounted for as income.”²⁴⁰ The ruling also allowed the same treatment for declines in value, but in both cases distinguished between income and loss recorded on the taxpayer’s books and that not recorded on the books, which would not be included as gain or loss.²⁴¹ This was a modification of an earlier Treasury Decision instructing corporations to include as gross income *all* “increase[s] in value of unsold property,” whether or not taken account of on the books (further underscoring that income was understood broadly at the time).²⁴²

Treasury’s shift from looking at all assets and liabilities to looking only at those who value changes were taken up on the books suggests a connection with “single-entry” accounting, discussed in Section IV.B below. Our hypothesis is that Treasury adopted a mark-to-market approach to income measurement to accommodate firms who used that same method for their own financial accounting. We have not yet been able to show a definitive connection, however, and we hope to take this up in future work.

The 1909 law—including these Treasury rulings—was enforced through 1913, before the Corporation Excise Tax was replaced by a corporate income tax under the Tariff Act of 1913, and in applying the new law Treasury accommodated basis steps-up and -down that occurred as a result of any prior income inclusions.²⁴³ In other words, the income tax law *currently in operation during the ratification of the Sixteenth Amendment* treated some unrealized appreciation in the value of property as income for tax purposes. Furthermore, Treasury extended this rule in the first post-Amendment income tax regulations: from 1913 to 1918, corporate income also included unrealized gain in capital assets.²⁴⁴

239. T.D. 1742 § 48, 14 Treas. Dec. Int. Rev. 123, 127 (1911).

240. T.D. 1706, 14 Treas. Dec. Int. Rev. 75, 75 (1911).

241. *Id.* at 75–76.

242. T.D. 1606 § 40, 13 Treas. Dec. Int. Rev. 39, 42 (1910).

243. *See* T.D. 2130, 17 Treas. Dec. Int. Rev. 33, 33 (1915) (stating in the course of an unrelated ruling that “returns made for the years 1909 to 1913, inclusive” that were “strictly in accord with the regulations then in force” were those where “the increase in the book values of securities was returned as income and the shrinkage was deducted from gross income, as the regulations then required and permitted”).

244. Regulations No. 33, arts. 107, 111, 116, T.D. 1944, 16 Treas. Dec. Int. Rev. 29, 65–66 (1914) (gross income when increased value of capital asset is “taken up on the books” of the corporation);

At least one circuit court—in a statutory interpretation ruling two years after Amendment ratification—disagreed with Treasury on unrealized gain, however, saying that nothing was added to a corporation’s profit by revaluation, and the revaluation “can hardly be said to be income [under the statute], or even gain, in any proper sense. The company could not become either richer or poorer by making a few book entries that merely recorded a new estimate of how much it was worth.”²⁴⁵ We would argue that the corporation absolutely does become richer or poorer due to the change in value of its assets—even if not necessarily the book entries themselves—but our task here is not to claim legal authority but rather to demonstrate that even if the income concept was somewhat vague and disputed, to at least some lawmakers and legal actors, “income” could and did absolutely include the change in value of assets. And furthermore, that the members of the ratification conventions—many of whom were surely corporate owners or investors—may have been privy to this technical definition of income, because it was the law in effect at the time of those conventions.

Elements of mark-to-market taxation appear in some earlier income tax iterations as well. For example, the 1864 income tax states that income included “the increased value of live stock, *whether sold or on hand*.”²⁴⁶ We have not been able to find evidence of if or how this provision was enforced, but the provision itself is at a minimum a sign that Congress used language consistent with a broad concept of income.

C. *Accrual vs. Realization*

Several other opinions and rulings at the time implicitly acknowledged that income is accrued prior to its realization. That is, that it was a pragmatic choice of Congress to tax in the year of realization even as it understood that the income had been earned and accrued in an earlier period—that realization is a rule of *timing*, not of *creation*, of income. For example,

Regulations No. 33 (revised), arts. 101, 116, 20 Treas. Dec. Int. Rev. 127, 182, 186 (1918) (including gain on capital assets only when there has been a “sale or disposition”). It is not clear whether the 1913 regulation was applied consistently. *See, e.g.*, T.D. 2130, 17 Treas. Dec. Int. Rev. 33, 33 (1915) (stating that T.D. 2005 holds “in effect, that neither increase nor shrinkage in the book value of securities due to market fluctuations or otherwise is to be taken into account in making returns of annual net income”). *But see* T.D. 2005, 16 Treas. Dec. Int. Rev. 111 (1914) (holding only that *losses*, not gain, must be realized to be includible).

245. *Baldwin Locomotive Works v. McCoach*, 221 F. 59, 60 (3d Cir. 1915). Note that this was a statutory, not constitutional, decision.

246. Act of June 30, 1864, ch. 173 § 117, 13 Stat. 223, 282 (emphasis added).

judicial opinions²⁴⁷ and Treasury Regulations²⁴⁸ under the Corporation Excise Tax of 1909 and the Tariff Act of 1913 drew a sharp line on the date of enactment of those laws for purposes of distinguishing between “income” and “capital.” Because only income arising after the date of enactment could be subject to the new tax, these rulings said that the basis for determining any later realized gain would be the fair market value of the property on the date of enactment, so that only gain from that point forward would be subject to the tax.²⁴⁹

The logic underlying these rulings is directly contrary to a view that income only is created upon realization. If income only comes into existence in the year of realization, then the issue of when it accrues would be irrelevant—it should all fall into the tax year of realization. But instead, judges and others at the time understood that income was earned in the year that it accrued through an increase in the value of the property, even if it would only be taxed under the statute later upon realization. The Supreme Court said, for example, that gain that accrued prior to the date of the enactment of the law was earned prior to the law, and therefore not subject to it—even though the actual imposition of tax was not until some years later.²⁵⁰

Indeed, in an early case under the 1864 income tax, the Court followed a similar logic to an extreme. The case of *Gray v. Darlington*²⁵¹ is cited in some early sources as authority for the idea that capital gain—that is, “advance[] in [the] value” of property—is not income, even on conversion.²⁵² As the Court, said: “Mere advance in value in no sense constitutes the gains, profits, or income *specified by the statute*. It constitutes and can be treated merely as increase of capital.”²⁵³

That appears at first glance to be a strong version of the view that unrealized appreciation in the value of property is not “income.” (Indeed, the taxpayers in *Moore* cited it as such—though leaving out the phrase

247. See, e.g., *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 187–88 (allowing timber company a deduction for the value of its stumpage as of December 31, 1908).

248. See, e.g., T.D. 1571 art. 2, 12 *Treas. Dec. Int. Rev.* 131, 137–38 (1909) (“In ascertaining income derived from the sale of capital assets . . . [i]f the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall be deducted from or added to the gross income for the year in which the sale was made.”).

249. It is interesting to note that this is the inverse policy of the MRT, which taxes earnings before, rather than after, the date of enactment of a major legal change.

250. See *Doyle*, 247 U.S. at 185–87.

251. 82 U.S. (15 Wall.) 63 (1872).

252. See, e.g., HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS 107 (1st ed. 1913); HOLMES, *supra* note 167, at 489–90 (noting this frequent error in interpreting *Gray*).

253. *Gray*, 82 U.S. (15 Wall.) at 66 (emphasis added).

“specified by the statute.”²⁵⁴) But a closer look at the case reveals a very different point. First, in this case the taxpayer in fact sold bonds at a profit²⁵⁵—so there was a “realization” of cash. At a minimum, that reveals that the quoted language is dicta. But moreover, the Court held that the realized gain was not income *under the language of the statute*, because the gain had arisen, in part, in years prior to the tax year in question. The Act, the Court said, only included “such gains or profits as may be realized from a business transaction *begun and completed during the preceding year*”—that is, that realized gain *could* be taxed, but only if the gain clearly accrued during the tax year in question (because the property was bought and sold that year).²⁵⁶ Gains that accrued in years other than the current tax year could not be part of the taxpayer’s income in the current tax year—it was a prior year’s income, in essence. The Court’s concern with taxing all gains at realization was that it would lump prior-year gains and losses into a single year.²⁵⁷

The rule adopted by the officers of the revenue in the present case would justify them in treating as gains of one year the increase in the value of property extending through any number of years, through even the entire century. The actual advance in value of property over its cost may, in fact, reach its height years before its sale; the value of the property may, in truth, be less at the time of the sale than at any previous period in ten years, yet, if the amount received exceed the actual cost of the property, the excess is to be treated, according to their views, as gains of the owner for the year in which the sale takes place. We are satisfied that no such result was intended by the statute.²⁵⁸

In other words, central to the objection of the *Gray* Court was that realized gains were in fact accrued income from other periods, and that only gain accrued in the given period should be subject to that year’s tax. Its interpretation was that the Act *required* the government to tax gains in the year in which they accrued, not in which they were realized. Again, we do not look at *Gray* as legal authority—it is clearly a dead letter, and

254. Brief for Petitioners, *supra* note 29, at 27.

255. *Gray*, 82 U.S. (15 Wall.) at 64.

256. *Id.* at 65 (emphasis added); see *Hays v. Gauley Mountain Coal Co.*, 247 U.S. 189, 192 (1918) (describing *Gray* as holding that “[t]he expression ‘income received during such year,’ employed in the Act of 1909, looks to the time of realization rather than to the period of accrument”). To be clear, the *Gray* Court’s reading of the statute is extremely strained.

257. Ironically, this is usually given today as a policy *defense* of the realization requirement—that it wouldn’t tax fluctuations in value prior to converting the property into cash. See, e.g., JOSEPH BANKMAN, DANIEL N. SHAVIRO, KIRK J. STARK & EDWARD D. KLEINBARD, *FEDERAL INCOME TAXATION* 231 (18th ed. 2019).

258. *Gray*, 82 U.S. (15 Wall.) at 66–67.

furthermore was decided on statutory, not constitutional, grounds. But it shows that jurists and lawmakers existing contemporaneously (and prior) to the Sixteenth Amendment had a clear understanding of the difference between income *accrual* and income *realization*, and that they could understand realization as a *timing* rule for when to tax, not a rule for either *creation* of income or for what constitutes income.

D. State Taxes on Incomes

The understanding and experience of income taxation at the time of ratification was not confined to corporate income taxes or prior federal individual income taxes; several states had been experimenting with individual income taxes as far back as 1843.²⁵⁹ While the states are of course not bound by the Sixteenth Amendment, their practices help to inform what contemporaneous observers understood “taxes on incomes” to be, especially because these taxes were in operation at the time of the Amendment’s passage and ratification.

Early state income taxes were mostly limited and unsuccessful, but following the 1895 *Pollock* decision, states started to introduce income taxes that looked something more like modern income taxes, and some of these taxed items of income that could be considered “unrealized.”

For example, Virginia—which had arguably the first income tax in 1843—reformed its income tax in 1898, and included in an individual’s income undistributed corporate earnings: “The word ‘income’ shall include . . . the shares of the gains and profits of all companies, whether incorporated or partnership, of any person who would be entitled to the same if divided, *whether said profits have been divided or not.*”²⁶⁰

The Wisconsin Income Tax of 1911 included in income the imputed rent from owner-occupied housing.²⁶¹ In other words, homeowners were deemed to have income equal to “estimated rental value” of that property, even though they were the ones living there, and they received no cash payments of rent.²⁶² (The notion of taxing imputed rental income goes back further: the Commissioner of Internal Revenue suggested to Congress in 1863 that

259. EDWIN R.A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 402–03 (1911). Drawing a line is mostly impossible, but before that, taxes on income were more like what Seligman calls “faculty taxes,” *id.* at 368, or adjuncts to general property taxes.

260. Acts of Assembly, ch. 496, § 1, 1897–98 Va. Acts 527 (emphasis added).

261. The Income Tax Act, ch. 658, § 1087m–2(2)(a), 1911 Wis. Sess. Laws 985.

262. Net imputed rent has been included in several income taxes in other countries, see Paul E. Merz, *Foreign Income Tax Treatment of the Imputed Rental Value of Owner-Occupied Housing: Synopsis and Commentary*, 30 NAT’L TAX J. 435, 436–37 (1977), and also considered a form of personal income in the U.S. for national accounting purposes, see Brooks, *supra* note 2, at 299.

the federal income tax include imputed rent for owner-occupied housing, though Congress did not include it in the 1864 Act.²⁶³)

E. Legal Treatises

This broad understanding of income taxation at the time of ratification is also expressed by contemporaneous legal experts and authorities, even though some are critical of it. Some writers appear at first to state categorically that income means *realized* income, though a review of their work shows that those who favor a realization rule are generally expressing a policy preference, not describing contemporaneous “blackletter” law. They may be describing their understanding of what “income” should be defined as, and in that sense their opinions could be some evidence of original meaning. But they also acknowledge that theirs are not the only views, and that courts and other authorities (many of which we discussed above) have used broader income concepts.

For example, Henry Campbell Black (of Black’s Law Dictionary), in his *A Treatise on the Law of Income Taxation* (1913) writes that an income tax “is not a tax upon accumulated wealth, but upon its periodical accretions.”²⁶⁴ The Ninth Circuit dissenters appear to read that as distinguishing realized from unrealized gain,²⁶⁵ although we think a better interpretation is that this language just distinguishes income taxes (whether on realized or unrealized gain) from taxes on wealth or property value (where tax is owed regardless of any gains). Regardless, Black is just stating opinion, not law, and he accordingly provides no citation for that statement. This statement appears on the first page of the treatise, in an introductory section headed “Definitions and Other General Considerations.” But elsewhere in the treatise—where he discusses actual law—the issue is more nuanced. For example, in the section of his treatise on “Increase in Value Not Realized by Sale,” Black notes a split of authority.²⁶⁶ Black cites *Gray v. Darlington* to stand for the principle that “[m]ere advance in value in no sense constitutes the gains, profits, or income specified by the statute.”²⁶⁷ (As

263. See REPORT OF THE COMMISSIONER OF INTERNAL REVENUE ON THE OPERATIONS OF THE INTERNAL REVENUE SYSTEM FOR THE YEAR ENDING JUNE 30, 1863, at 11 (Wash., Gov’t Printing Office 1863). The Commissioner, Joseph Lewis, repeated the call for taxing imputed rent in 1864, saying “I am unable to see why a man who consumes his income should not be taxed for it as well as one who saves it, nor why one who lives in his own house should not be taxed on its rental value, as much as if he let it to another and put the rent in his purse.” REPORT OF THE COMMISSIONER OF INTERNAL REVENUE ON THE OPERATIONS OF THE INTERNAL REVENUE SYSTEM FOR THE YEAR ENDING JUNE 30, 1864, at 13 (Washington, D.C., Gov’t Printing Office 1864).

264. BLACK, *supra* note 252, at 1.

265. See, e.g., *Moore v. United States*, 53 F.4th 507, 512 (9th Cir. 2022) (Bumatay, J., dissenting).

266. BLACK, *supra* note 252, at 106–08.

267. *Id.* at 107 (citing *Gray v. Darlington*, 82 U.S. (15 Wall.) 63, 66 (1872)).

discussed above, this is an incorrect reading of the case, however.) But Black also summarizes T.D. 1742, one of the Treasury Decisions discussed above, that income includes an “increase in the value of the capital assets.”²⁶⁸

Black goes on to note that if that same construction applied to the 1913 individual income tax, then the increase in value of securities would be included in income.²⁶⁹ Thus, the body of his treatise describes whether income taxes can reach unrealized gain as an open question with authorities on both sides (though because he is mistaken about *Gray*, there is less of a split than he suggests).

On the subject of undistributed corporate earnings, Black writes that including them in shareholder income is “contrary to all the weight of authority.”²⁷⁰ But again he actually presents a split of authority, mentioning several examples of income taxes that did include undistributed earnings in shareholders’ income, including the 1913 income tax, the 1870 income tax, and a Canadian income tax.²⁷¹ Again, Black is presenting his view about the relative weight of legal authority, not an unambiguous shared understanding of the meaning of “income.”

Robert H. Montgomery’s *Income Tax Procedure* (1919) questions whether Congress has “the right to tax any transaction unless there is an actual realization of income, as distinguished from the apparent income which may be and often is due to temporary fluctuations in values.”²⁷² First, this passage does not speak to undistributed corporate earnings (at issue in *Moore*)—which are not a “fluctuation in value” and which Montgomery elsewhere notes correctly were included in shareholder income under some circumstances.²⁷³ But even so, Montgomery is just stating an opinion and a hope for how a future case might go. One page earlier, he notes that the income tax *does* include “appreciation of property values” in certain cases and laments that there is not yet an “authoritative definition of ‘income.’”²⁷⁴

Indeed, what stands out the most in a number of treatises is the fundamental ambiguity in the income concept, even at the time of the Sixteenth Amendment. Edwin Seligman—whose arguments in 1919 about “separation” of income from capital would persuade the Court in *Eisner v.*

268. *Id.* at 108 (citing T.D. 1742, 14 Treas. Dec. Int. Rev. 123, 127 (1911)). See *supra* note 239 and accompanying text for more discussion on T.D. 1742.

269. BLACK, *supra* note 252, at 108.

270. *Id.* at 120.

271. *Id.* at 119–20.

272. ROBERT H. MONTGOMERY, *INCOME TAX PROCEDURE* 1919, at 198 (1919).

273. *Id.* at 385–86.

274. *Id.* at 197.

*Macomber*²⁷⁵—wrote in 1911: “Strictly speaking, income as contrasted with capital denotes that amount of wealth which flows in during a definite period and which is at the disposal of the owner for purposes of consumption, so that in consuming it, his capital remains unimpaired.”²⁷⁶ To us, the key here is the difference between *basis* and gain—that recovery of initial capital is not income—rather than the form the “flow” takes. Regardless, Seligman goes on immediately to say: “The problem, however, of defining income with such precision as completely to avoid any net impairment of capital is one that almost baffles the student; and certainly no such precision can be attained for purposes of taxation.”²⁷⁷ Shortly thereafter, he suggests that income necessarily should include the imputed rental income from owner-occupied housing (as in *Wisconsin*²⁷⁸) and also forms of “psychic income,” which would seem to contradict the importance of separating income from capital.²⁷⁹

Thomas Cooley—the foremost tax law expert of this time—in his *Treatise on the Law of Taxation* (1876) at one point describes income as “the creation of capital, industry and skill”²⁸⁰—without reference to realization, separation, etc. Indeed, elsewhere Cooley *criticizes* the Civil War era income tax for taxing property sales only on realization. After describing income taxes generally and some of their flaws, he then writes: “*In the United States, also, such a tax is unequal because those holding lands for the rise in value escape it altogether—at least until they sell, though their actual increase in wealth may be great and sure.*”²⁸¹ The taxpayers in *Moore* treated this as evidence that Cooley thought it impossible for an income tax to tax unrealized gain,²⁸² but the better reading is that Cooley is criticizing the specific income taxes imposed by the United States “during and immediately following the [Civil War]”²⁸³ for *failing*—statutorily—to adequately tax the real income of landowners (and only landowners because, as noted above, owners of corporate capital were taxed on their share of corporate earnings, as Cooley would have well understood).

275. Edwin R.A. Seligman, *Are Stock Dividends Income?*, 9 AM. ECON. REV. 517 (1919); see Kornhauser, *supra* note 31, at 100 n.11 (on Seligman’s article being submitted with the Defendant-in-Error’s brief).

276. SELIGMAN, *supra* note 259, at 19.

277. *Id.*

278. See *supra* Section III.D.

279. SELIGMAN, *supra* note 259, at 20–21.

280. THOMAS M. COOLEY, 1 A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 160 n.1 (1st ed., Chicago, Callaghan & Co. 1876) (citing *Wilcox v. Cnty. Comm’rs Middlesex*, 103 Mass. 544, 546 (1870)).

281. *Id.* at 20 (emphasis added).

282. Brief for Petitioners, *supra* note 29, at 30.

283. COOLEY, *supra* note 280, at 20.

The confusion about how to read *Cooley* is perhaps a sign of a broader confusion in the sources, about whether they are talking about the meaning of income as a concept, the meaning of income under the Constitution, or the meaning of income under particular tax statutes. George E. Holmes, in *Federal Income Tax* (1917), does a good job of separating the issues. He first acknowledges that different income concepts might be available:

One conception of income excludes gains or increment in the value of capital assets, but this conception was not that of Congress, since the tax is not only upon income conceived as a production of capital, but also upon gains and profits derived from sales or dealings in property, growing out of the ownership or use of or interest in property or from gains or profits from any source whatever.²⁸⁴

In discussing the definitions used by tax law, he repeatedly states that income is generally understood to be realized income, *unless Congress says otherwise*. For example: “The word ‘income’ as used in revenue legislation has a settled legal meaning. The courts have uniformly construed it to include only the receipt of actual cash as opposed to contemplated revenue due but unpaid, *unless a contrary purpose is manifest from the language of the statute*.”²⁸⁵ Under Holmes’s view, a realization requirement is something more like a canon of interpretation or rule of construction, but one which has to give way to Congress’s clear intent. In the same volume, for example, Holmes discusses the shareholder tax on excess undistributed corporate earnings that we mentioned earlier.²⁸⁶ Thus, Congress had the *power* to tax unrealized income, and sometimes exercised that power, though because the tax was generally on realized income, courts could presume that was what Congress intended unless stated otherwise. This confusion between statutory and constitutional meaning also helps to explain the misunderstanding of cases like *Gray v. Darlington* discussed above.²⁸⁷

IV. OTHER CONTEMPORARY SOURCES ON THE MEANING OF “INCOME”

The prior two Parts showed that the Sixteenth Amendment restored Congress’s pre-existing power to tax income, and that such power to tax income reached to items such as undistributed corporate earnings and unrealized gain in capital assets (and that income taxes in the U.S. at the

284. HOLMES, *supra* note 167, at 205.

285. *Id.* at 205–06 (emphasis added).

286. *Id.* at 18–19; see *supra* notes 231–32 and accompanying text.

287. See *supra* notes 251–58 and accompanying text; see also *supra* notes 168–70 and accompanying text (discussing a similar problem with misreadings of *Maryland Casualty*).

time also taxed imputed rent from owner-occupied housing). In this Part we now address the question of whether there was an alternative public meaning of “income” that might somehow contradict this. As we argued above, we think this is not the right way to frame the question—the original public meaning of the Sixteenth Amendment incorporated a technical meaning of “taxes on incomes” as a term of art, not a more general lay public meaning of the word “income.” But alternative meanings of the word could be relevant to some people’s understanding.

In this Part we look in particular at contemporaneous dictionary definitions—a common tool in originalist analysis and a tool heavily relied on by the petitioners and amici in *Moore*. We show that the dictionary definitions are at most ambiguous or silent on the issue of realization and in fact can be read as contrary to a realization requirement. It is telling, for example, that no major dictionary defines income by reference to realization.

We also look at contemporaneous financial accounting standards and show that established accounting practices at the time incorporated both accrual accounting²⁸⁸ and the measurement of a firm’s income by reference to the change in value of the firm’s assets and liabilities during the period in question—that is, that income was measured as the change in the net worth of a firm.

Finally, we further address the important analysis and arguments of the Corpus Linguistics scholars. They argue that a corpus linguistics analysis of the meaning of the word “income” shows that it was used in the corpus they studied only to refer to realized gains, and that they found no references to “increases” in “value” referred to as “income” in that corpus.²⁸⁹ While we have some concerns with the methodology of the study,²⁹⁰ addressing that fully is beyond the scope of this Article.²⁹¹ For our purposes, we want to note, first, that we disagree with the conclusions they draw from their sample. For example, several of their examples refer to unrealized increases in property value being referred to as “profit” or “gain,” words as shown

288. Accrual accounting is an accounting method whereby items of income and expense are recorded for tax purposes when they are earned and expended, respectively, even if the cash has not changed hands yet. It is in contrast to “cash-method” accounting, whereby items of income and expense are recorded only when the cash is received or spent. Accrual accounting is understood to be more accurate but also more complicated. *See, e.g.*, BANKMAN ET AL., *supra* note 257, at 208.

289. *See generally* Lee et al., *supra* note 6.

290. Briefly, we question the relatively small size of the sample they examined and the limited choices of words and concepts that they searched for (such as just “increases” in “value,” *id.* at 184, not other words or phrases that could constitute appreciation, gain, profit, etc.).

291. For a broader critique, see Brief of Amici Curiae Professors of Tax Law, Legal History, and Computational Science in Support of Respondent, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

below that are often treated as synonymous with income.²⁹² Second, and more importantly, we would acknowledge that the meaning of “income” used in the sort of popular sources their corpus covers—and outside of the context of law, accounting, business, or finance—typically referred to something like cash income. But as we have explained repeatedly, this is the wrong question—the question is the original meaning of the Sixteenth Amendment, not of the word “income” used in a vacuum and outside of that context. Indeed, in our section on contemporaneous newspaper coverage above, we provided several examples in which the income tax is explicitly or implicitly described as reaching items of unrealized gain and income.²⁹³ Those examples alone show that just examining the narrow use of the word “income” is not a sufficient test, particularly in light of the other evidence we present throughout this Article.

A. Dictionaries

We have surveyed all of the contemporaneous dictionaries that we could find, for definitions of “income,” “gain,” and “realize,” and those definitions are provided in an Appendix. The definitions do not show a significant amount of variation, except as described below. We look at definitions for these three words because of their interrelation to the question of whether unrealized gain is income.

1. *Income and Gain*

The strongest argument *for* a realization argument is to focus on definitions such as “[t]hat gain which proceeds from labor, business, property, or capital of any kind”²⁹⁴ or as that “which comes in to a

292. Lee et al., *supra* note 6.

293. See *infra* Section II.C.

294. WEBSTER’S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 745 (Noah Porter, ed., 1913). Webster’s is one of the main sources cited by the Ninth Circuit judges dissenting in *Moore*, who call for constitutionalizing a realization concept. In addition to our discussion below, around the meaning of words like “proceeds from,” “gain,” and “realize,” there are other reasons to be skeptical that this definition implies a strong realization requirement. For example, it lists as synonyms for income: “Gain; profit; proceeds; salary; revenue; receipts; interest; emolument; produce,” *id.*, a diverse list underscoring some of the potential ambiguity, but also including concepts that are not tied to anything like realization. Furthermore, Webster’s defines “income tax” as “a tax upon a person’s incomes, emoluments, profits, etc.” *Id.* Two additional words that appear in the definitions of both “income” and “income tax”—“profit” and “emolument”—also show a potentially broad meaning. Profit is defined as an “[a]cquisition beyond expenditure; excess of value received for producing, keeping, or selling, over cost.” *Id.* at 1144. Emolument is defined as “[t]he profit arising from office, employment or labor; gain; compensation; advantage; perquisites, fees, or salary.” *Id.* at 485. These again imply broad measures of economic benefit. Furthermore, we still do not see any inclusion of the word “realize” in any of these cross-referenced terms.

person . . . as gain from . . . the investment of capital”²⁹⁵ or which a person “derives” from property. These formulations are emphasized, for example, by the petitioners and Ninth Circuit dissenters in *Moore*. As noted, they also are somewhat in parallel with the definition applied in *Macomber*—“the gain derived from capital, from labor, or from both combined”²⁹⁶—and the phrase “from whatever source derived” in the Sixteenth Amendment.

The argument is that the verbs in these phrases—*proceeds*, *derives*, *comes in*—imply that income from property only comes into existence after some sort of action with respect to the property, such as conversion into cash.²⁹⁷ However, that is simply question-begging—the whole question is how to determine when a gain or other benefit has “come in” or been “derived.” Can income be derived from, for example, the growth in the value of property by the accumulation of corporate earnings? That cannot be answered just by looking at the word “derive.”²⁹⁸ Furthermore, if we dig further into these dictionaries, we can see that words like “derived” in the definition are not describing some *action* but are rather describing *sources* of income and distinguishing that income from the original capital invested (what tax law typically calls “basis”). In this sense, their use of “derive” is consistent with the proper understanding of the phrase “from whatever source derived”—the point is the *source*, not the method of derivation from that source.

For example, each of the income definitions above—and a substantial majority of the definitions in the Appendix—says that “gain” from property or capital is a component of income. But what is “gain”? *Webster’s Revised Unabridged Dictionary* (1913) defines “gain” as “[t]hat which is gained, obtained, or acquired, as *increase*, profit, advantage, or benefit” and “[t]he obtaining or *amassing* of profit or valuable possessions; acquisition;

295. 4 THE CENTURY DICTIONARY AND CYCLOPEDIA 3040 (William Dwight Whitney ed., New York, Century Co. 1899).

296. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

297. Brief for Petitioners, *supra* note 29, at 29.

298. In a brief in support of the petitioners in *Moore*, Ed Meese, Steven Calabresi, and Gary Lawson cite the Webster’s (1913) definition of “derive”—“To receive, as from a source or origin; to obtain by descent or by transmission; to draw”—and argues that it can only mean something like the delivery of something new. Brief of Amici Curiae Former Attorney General Edwin Meese III and Professors Steven G. Calabresi and Gary S. Lawson Supporting Petitioners, at 8, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800). First, if that is the meaning, it is telling that the word “derive” is not included in the Webster’s definition of income (just as we note below that the definition does not include the word “realize”). Second, they elide over the inclusion of “source” in the Webster’s definition. With gains from property, the source is the property itself—any gains are “derived” from that property, or more precisely the investment of initial capital. That initial investment generates the gains and thus the gains are received—“derived”—from that capital. More importantly, as we showed above, the phrase “from whatever source derived” in the Sixteenth Amendment was addressing an entirely different question.

accumulation.²⁹⁹ *Black's Law Dictionary* (1910) defines gain as “[p]rofits; winnings; increment of value.”³⁰⁰ *The Century Dictionary and Cyclopedia* (1899) similarly defines “gain” as “[t]hat which is acquired or comes as a benefit; profit; advantage: opposed to *loss*.”³⁰¹ These broad definitions of “gain”—which clearly encompass unrealized gain and other kinds of “accumulation” and “amassing”—show that the “derives from” and “proceeds from” language of the income definitions above should not be read as words of limitation, but rather as a way to point to *sources* of gain that can be considered “income” (as opposed to other kinds of gain, for example, of friends or of knowledge).

In support of this reading, other contemporary dictionaries contain definitions of income that do not use words like “derive.” For example, *The Dictionary of American and English Law* (1888) defines income as “[g]ains, or private revenue, from business, labor, or the investment of property.”³⁰² *The Concise Legal Dictionary* (1909) says income is “profit or gains from business; property or other sources of wealth.”³⁰³ *Black's Law Dictionary* (1910) states simply that income includes “gains, profit, or private revenue.”³⁰⁴

Considering these definitions together, there is thus no strong demand to read “derives,” “proceeds,” etc. in just some of the definitions as necessitating some action or event before “income” comes into being. The definitions that use those words also incorporate unrealized gain (for

299. WEBSTER'S, *supra* note 294, at 607 (emphasis added). The Meese et al. amicus brief in *Moore* puts emphasis on the words “obtained” and “acquired” to suggest that something like separation or delivery is required. *see* Brief of Amici Curiae Former Attorney General Edwin Meese III and Professors Steven G. Calabresi and Gary S. Lawson Supporting Petitioners, *supra* note 298, at 6, but their choice of meaning would erase the word “increase”—what does it mean to “obtain” by “increase” except through appreciation?

300. *Gain*, BLACK'S LAW DICTIONARY (2d ed. 1910).

301. 3 THE CENTURY DICTIONARY AND CYCLOPEDIA 2429 (William Dwight Whitney ed., New York, Century Co. 1899).

302. 1 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS 644 (Jersey City, Frederick D. Linn & Co. 1888).

303. CHARLES E. CHADMAN, A CONCISE LEGAL DICTIONARY 199 (1909).

304. *Income*, BLACK'S LAW DICTIONARY (2d ed. 1910). Black's definition in full is “The return in money from one's business, labor, or capital invested; gains, profit, or private revenue.” *Id.* Consistent with other definitions in this edition of Black's, we read the two phrases separated by a semicolon as alternative definitions. The first definition refers to a return “in money” from capital, but we think it can only be read as “in money [value],” because it is quite clear that non-monetary returns (such as payments in kind) can also be “income” even under the narrowest definitions.

In *Moore*, the Ninth Circuit dissent and the petitioners in their Supreme Court brief misreport the Black's definition of *income* as “that which *comes in* or is *received from* any business or investment of capital.” Brief for Petitioners, *supra* note 29, at 29, but that language is not in the definition and instead comes from an explanatory paragraph in small type distinguishing “income” from “profit” in a business context, where “profit” allows for the deduction of certain expenditures—that is, the work this phrase is doing is *distinguishing*, not *defining*, and that distinction turns on the role of deductions, not the source of income. *Income*, BLACK'S LAW DICTIONARY (2d ed. 1910) (explanatory paragraph).

example, through use of the word “gain”) and many definitions do not use those words at all.

2. Realization

Strong evidence *against* realization being incorporated into the original meaning of income is the fact that the words “realize” and “realization” do not appear in any of the dictionary definitions we survey (with one minor exception).³⁰⁵ This is so even though several of the dictionaries define “realize.” For example, *Webster’s* (1913) defines “realize” as “[t]o convert any kind of property into money, especially property representing investments, as shares in stock companies, bonds, etc.” and also as “[t]o convert into actual money; as, to realize assets.”³⁰⁶ *Black’s* (1910) similarly defines “realize” as “[t]o convert any kind of property into money; but especially to receive the returns from an investment.”³⁰⁷ *The Century Dictionary and Cyclopaedia* (1899) defines realize, in part, as “[t]o bring into form for actual or ready use; exchange for cash or ready means; as, to realize one’s stock or securities.”³⁰⁸ These are unambiguous definitions—which makes it notable that neither of those three dictionaries’ “income” or “gain” definitions uses the word “realize.” It was a clearly defined and unambiguous concept but was not used to clarify the meaning of income or gain. Nor could it be, because these definitions of “realize” described only the conversion of property *into money*, whereas even the narrowest lay understandings of income would encompass, for example, in-kind payments for property.

Realization, at that time, is perhaps better understood as a form of conversion from something relatively illiquid or speculative into something less so (especially cash)—making an asset more “real.”³⁰⁹ The example provided by *Webster’s* is a line from a Washington Irving essay, referring

305. William C. Cochran defines income as “the profits *realized* from property, labor, business, or the loaning of money.” WILLIAM C. COCHRAN, *THE STUDENTS’ LAW LEXICON: A DICTIONARY OF LEGAL WORDS AND PHRASES WITH APPENDICES* 142 (Cincinnati, Robert Clarke & Co. 1888) (emphasis added). We would not read this definition too literally, in part for its odd list of sources and because this dictionary does not define “realize.” In searches on Westlaw and Google Scholar, we can find only two state or federal cases that cite to the dictionary, neither from before 2017.

306. WEBSTER’S, *supra* note 294, at 1195.

307. *Realize*, BLACK’S LAW DICTIONARY (2d ed. 1910).

308. 6 THE CENTURY DICTIONARY AND CYCLOPEDIA 4687 (William Dwight Whitney ed., New York, Century Co. 1899). Another Century definition is “[t]o bring or get into actual possession; make one’s own; clear as a profit or gain; obtain a return of; as, to realize a fortune from speculation.” *Id.* This meaning of the word, we would argue, implies that a “mere” increase in the value of property is, in fact, “realized,” in the sense of leading to a real gain in one’s fortune. But for our purposes here, we focus on the more accepted definition of realization as conversion.

309. To be clear, our current meaning of realization is broader than this, but that linguistic drift is likely due to the application of 100+ years of tax law since 1913.

to a failed speculative investment scheme in Mississippi in 1719: “The shares of the bank and of the company began to decline in value. Wary men took the alarm, and began to *realize*, a word now first brought into use, to express the conversion of *ideal* property into something *real*.”³¹⁰ Similarly, *Black’s* single example cited for its definition of “realize” is an 1899 civil action in New York involving a complicated debt arrangement, which uses “realize” to mean “conversion of claims or demands into money.”³¹¹ (The opinion also states that “realize” is “a very broad term, probably as broad as any in language or law.”)³¹² “Realize” in this sense means a move to safety, to liquidity—*independent of whether there is gain or loss*.³¹³

This meaning of “realization” is both narrower and broader than its use later in *Eisner v. Macomber*, for example, where the Court equated it to any kind of *separation* of income from capital.³¹⁴ On the one hand, “realization” describes only a certain unidirectional conversion of property—from the more “ideal” to the more “real”—whereas the separation notion in *Macomber* would not require any comparison of, for example, relative liquidity of property. Exchanging bonds for common shares, or short-term bonds for long-term bonds would, presumably, satisfy a “separation” test even though the new assets are further from being money and thus less “real” (in this sense).

On the other hand, there can be realization without there being any gain at all. It is just a particular kind of conversion, separate from the measurement of any gain. This use of “realization” is actually consistent with the Tax Code’s use today, in contrast to *Macomber’s* usage. *Macomber* refers to “realiz[ing] a *profit* or *gain*” or “*income*,”³¹⁵ but in the Code, gain is “the excess of the *amount realized*” from sale or disposition of property over the adjusted basis.³¹⁶ What is realized is the *payment* for the property, not the gain. It is an act of conversion, not the creation of income.

With this full context, there is no requirement to read any contemporary dictionary definitions of *income* as requiring realization, separation, conversion, or any other kind of act. And, in particular, the

310. WASHINGTON IRVING, *The Great Mississippi Bubble: “A Time of Unexampled Prosperity.”*, in THE CRAYON PAPERS 41, 57 (New York, John B. Alden 1886).

311. *Bittiner v. Gomprecht*, 58 N.Y.S. 1011, 1013 (App. Term. 1899).

312. *Id.*

313. In *Doyle*, the government argued that the conversion of property into cash should be considered “gross income” in the full amount of the amount realized, a view which would be consistent with the theory that realization itself creates income. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 183–84 (1918). The Court said no, that only gain is gross income, and that gain is the excess of the amount realized over basis. *Id.* at 184–85. We do not endorse the government’s theory here but mention it to underscore these different interpretations—*income based on realization for cash versus income as gain*.

314. *Eisner v. Macomber*, 252 U.S. 189, 207–08 (1920).

315. *Id.* at 209 (emphasis added).

316. I.R.C. § 1001(a) (emphasis added).

contemporaneous meaning of *realization* is both unincorporated into, and incompatible with, the contemporaneous meaning of *income*.

B. Accounting Practices

Also relevant to the public understanding of income, particularly in its technical sense, is the practice of accounting and bookkeeping at the time. In the context of income taxation, it would have been clear that “income” was a financial measure of economic capacity and success—even to those who may not have understood the implications of income as a legal term of art.

The “accrual method” of accounting is long-standing and ubiquitous, including at the time of the Sixteenth Amendment. Under this method of accounting (to quote from a contemporaneous accounting treatise), “[i]ncome derived from many different sources is never fully received at the close of the fiscal period” yet those earnings should still be shown “in the period in which they actually accrue.”³¹⁷ This method was likely in use since at least the mid-nineteenth century.³¹⁸ There were (and are) of course debates about how to apply this methodology to any particular item of income or expense, but the larger point is that it was well understood that, for accountancy purposes, an income concept should extend beyond cash income, and should include at least some items of unrealized income.

Furthermore, “single-entry” accounting—which measures profit and loss by comparing changes in the net worth of an enterprise over a period—was in common use at the time.³¹⁹ This method dovetails with the mark-to-market income concept—income can be measured by comparing the change in value of assets over a period. According to the prominent early twentieth-century accountant and scholar George May in 1943, “American accounting in its earlier stages seems to have been based on a concept of income as an accretion to net worth,”³²⁰ a phrase that lines up almost exactly with Robert Haig’s famous phrasing of the income concept (in accordance with mark-to-market principles) as “the money value of the net accretion to one’s economic power between two points of time.”³²¹

317. 2 ROY B. KESTER, *ACCOUNTING THEORY AND PRACTICE* 248–49 (1918); *see also* A.C. LITTLETON, *AN INTRODUCTION TO ELEMENTARY ACCOUNTING* 57–62 (1920).

318. *See* A.C. LITTLETON, *ACCOUNTING EVOLUTION TO 1900*, at 150 (A.P. Richardson ed., 1933).

319. *See* 1 ROY B. KESTER, *ACCOUNTING THEORY AND PRACTICE* 520–28 (1919).

320. GEORGE O. MAY, *FINANCIAL ACCOUNTING: A DISTILLATION OF EXPERIENCE* 28 (Macmillan 1943).

321. Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, in *THE FEDERAL INCOME TAX I*, 7 (Robert Murray Haig ed., 1921) (emphasis omitted).

Consider the following contemporaneous description of “single-entry” accounting, which we quote at length for clarity (with the reminder that, per the dictionaries above, “profits” is synonymous with “income”):

In the widest possible view, profits may be stated as the realized increment in value of the whole amount invested in an undertaking; and, conversely, loss is the realized decrement in such value. Inasmuch, however, as the ultimate realization of the original investment is from the nature of things deferred for a long period of years, during which partial realizations are continually taking place, *it becomes necessary to fall back on estimates of value at certain definite periods, and to consider as profit or loss the estimated increase or decrease between any two such periods. . . .*

This method would permit any business concern to revalue periodically the whole of its assets and liabilities, and to record the difference between its surplus so ascertained at the commencement and the end of the year as its profit or loss, respectively; and provided that this estimate were fairly and reasonably made, there would be no objection to such a course. *In other words, every appreciation of assets is a profit, and every depreciation a loss*; and in many private concerns this method, technically known as “single entry,” of ascertaining profits has been regularly adopted for years without bad results.³²²

To be clear, this accounting method was sometimes not recommended, precisely because it treated as profits—and thus as surplus available for dividend distributions—gains that had not yet been realized and also because it could lead to complications with calculating depreciation. These are, however, practical and prudential concerns, not definitional ones. For example, single-entry bookkeeping might make it possible for a corporation to distribute cash dividends above the cash received from its business. But even those highly critical of the practice—such as the earlier-cited Robert Montgomery—acknowledged its lawfulness and use.³²³

Even for those firms that relied on double-entry accounting (which included measuring income through receipts and outlays), it was understood the income they measured through receipts and outlays should tie back to changes in the value of assets and liabilities recorded on the balance sheet.³²⁴ That is, that both methods of income-measurement should show that same

322. ARTHUR LOWES DICKINSON, ACCOUNTING PRACTICE AND PROCEDURE 67–68 (1914) (emphasis added).

323. ROBERT H. MONTGOMERY, AUDITING THEORY AND PRACTICE 201–18 (Student’s ed. 1915).

324. See, e.g., MAY, *supra* note 320, at 14.

amount of “income,” including through changes in the book value of asset and liabilities. It may not have been until around the 1930s that accountants began to discourage treating unrealized appreciation as a form of income for accounting purposes.³²⁵ Though, to be clear, that was not because of some shift in the income concept; rather, it was for prudential reasons, so that businesses could not use that tool to inflate their reported earnings.³²⁶

As noted above, there is an intriguing connection between this method of accounting and the mark-to-market elements of the 1909 corporate income tax—if firms used “single-entry” accounting for their own measurement of income, it is likely that Treasury had to follow suit (remember that this was a new tax, and firms would not have been maintaining separate accounting records for tax purposes). We have not yet found direct evidence for that connection, but a dialogue between the accounting profession and the government on a related matter suggests that Treasury understood these issues.

When the law was first passed, some leading accounting firms (including Deloitte and Price Waterhouse) read the statute as requiring essentially cash-basis accounting—that income and expenses could only be included when actually received or paid. They wrote to Attorney General George Wickersham saying that this was an error, that it did not reflect how their firms or their profession measured income and expenses, and that it would be difficult to administer.³²⁷ Their main concern was on the expenses side of things—that expenses should be recorded in the periods in which they were accrued, not necessarily when they were paid—but the same argument applies to the income side of the ledger.

The Attorney General wrote back rejecting their concerns and saying that, in his view, the law did intend to look at expenses “actually paid” not those “actually incurred.”³²⁸ He somewhat sardonically dismissed their concerns about administrability, saying “My personal acquaintance with you and a number of the other signers of the letter leads me to the belief that you have underestimated your capacity.”³²⁹ The accountants wrote back, repeating their objections,³³⁰ but the Attorney General did not budge, saying

325. *Id.* at 91–92.

326. *See id.* at 93 (criticizing write-ups “not based on satisfactory evidence,” as opposed to “the procedure itself”).

327. Letter of July 8, 1909, in *THE CORPORATION TAX LAW OF 1909: A LETTER TO THE MEMBERS OF THE AMERICAN ASSOCIATION OF PUBLIC ACCOUNTANTS 9* (1909) [hereinafter *LETTER TO THE MEMBERS*]. We are grateful to Henry Franks for directing us to this source.

328. Letter of July 12, 1909, in *LETTER TO THE MEMBERS*, *supra* note 327, at 13, 14.

329. *Id.*

330. Letter of July 21, 1909, in *LETTER TO THE MEMBERS*, *supra* note 327, at 15.

that in any event “it is now too late to attempt to recast the corporation tax amendment bill.”³³¹

But Wickersham was not quite right about that, because once Treasury was handed the law and given the assignment of administering it, they “soon realized the justice of the criticisms that had been offered”³³² and issued regulations that, *inter alia*, interpreted the phrase “actually paid” as including expenses accrued before any actual disbursement—that “an item would be deemed to be paid as soon as the taxpayer recognized that it had to be paid by recording it as a liability.”³³³

While this episode focused on the tax and accounting treatment of accrued expenses, it may mirror what also happened on the income measurement side, with Treasury realizing that they needed to make some strategic accommodations to accounting practices in order to administer the new law, including, perhaps, the measurement of income using single-entry bookkeeping.

In any event, the larger point is that corporate accounting practice at the time incorporated a concept of income that closely mirrors the mark-to-market (and Haig-Simons³³⁴) concept of economic gains between two points in time, as measured by the change in the value of assets and liabilities over that time—that is, that income is reflected in an increase in net worth, and vice versa. Again we see that the concept of income, and of income taxation, at the time of the Sixteenth Amendment’s ratification was broad and incorporated items of unrealized income.

C. *Corpus Linguistics*

Another approach for empirically studying the common meaning of terms as they were used in lay speech and writings during a particular period of time is to use “a historical corpus—a database of naturally occurring language from the time period in question.”³³⁵ The Corpus Linguistics scholars employ this approach to search “for every instance of *income* or *incomes* from 1900 to 1912” within the Corpus of Historical American English.³³⁶ They found “881 instances” of usage of the word “*income*” and “97 instances of *income(s)*.”³³⁷ Of these instances, their coding methodology “identified 280 results of the search for *income(s)* that

331. Letter of July 22, 1909, in LETTER TO THE MEMBERS, *supra* note 327, at 19, 19.

332. MAY, *supra* note 320, at 68.

333. *Id.*

334. For discussion of the Haig-Simons income concept, see Brooks, *supra* note 2, at 262–66.

335. Lee et al., *supra* note 6, at 162.

336. *Id.* at 180.

337. *Id.*

included enough context to code as determinate.”³³⁸ They report that “in every single one of those 280 results, the context expressly indicated that the *income(s)* in question were separate, usable property of the recipient; there were no examples of *income(s)* clearly referring to an unrealized gain.”³³⁹

To begin with, we note that this is quite a small sample set. Both today and historically, the most common usages of the term income are almost certainly in reference to the receipt of cash salaries and other cash payments. But it would be absurd to argue that the entirety of what is encompassed by the term “income” should be limited to its most common instances. To assess the fullness of what is encompassed by the term “income,” one would need a much more extensive database. Moreover, the 280 results relied on by the Corpus Linguistics scholars contain “many repeated sources.”³⁴⁰ Indeed, ten percent of the results come “from language contained in just *six* works of fiction,” respectively titled *The Scarlet Feather*, *True Loves Reward*, *Lion Mouse Story*, *Shuttle*, *Metropolis*, and *The Fashionable Adventure of Joshua Craig*.³⁴¹ Again, this evidence does lend some support to the notion that the most common usages of the term “income” at the time referred to the receipt of “separate, usable property.”³⁴² But this evidence does not shed much if any light on the entirety of what was encompassed in how the term was used.

The Corpus Linguistics scholars also “searched for all forms of the word *increase* within six words of *value* from 1900 to 1912” and found “94 results” of which their coding methodology identified “34 that involved an increase in monetary value of an asset without a realization event.”³⁴³ They report that “[n]one of the 34 results that refer to unrealized gains spoke of such gains as *income(s)*” and that “[i]nstead, speakers used other words, such as *value*, *gain*, *profit*, *fortune*, or *prosperity*.”³⁴⁴ As we explained above, a substantial majority of the dictionary definitions that we surveyed and report in the Appendix include “gain” from property or capital as a component of “income.” We thus question whether it is meaningful that some of the Corpus Linguistics scholars’ results used terms like “gain” or “profit” instead of “income.” However, the Corpus Linguistics scholars further report that in five of their results, the term “income” also appeared

338. *Id.* at 182.

339. *Id.*

340. Brief of Amici Curiae Professors of Tax Law, Legal History, and Computational Science in Support of Respondent at 18, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

341. *Id.* at n.6.

342. Lee et al., *supra* note 6, at 182.

343. *Id.* at 184–85.

344. *Id.* at 185.

and that in “at least some of those [five] results, *income* was used in *contrast* to unrealized gains.”³⁴⁵

Without further quibbling about either the small number of these results or with the Corpus Linguistics scholars’ interpretations of the specific usages in this subset of their five results, we agree that this evidence probably does imply that sometimes in common usage the word “income” was used in a manner that would seem to exclude unrealized gains. As we noted at the outset, “there is no objective definition of the term ‘income’”³⁴⁶ and “[e]conomists, tax scholars, policymakers, and others have struggled with the income concept for well over a hundred years, with no solution in sight.”³⁴⁷ It would thus be surprising if there were not examples of narrow usages of the term “income” in common speech and writing.

Moreover, as we explained in Part III, a number of contemporary court decisions and legal treatises understood the realization requirement as akin to a canon of interpretation or rule of construction whereby only realized income would be subject to taxation unless the legislature clearly specified that forms of unrealized gains were also to be included in taxable income. Today’s income tax operates similarly, with a statutory provision excluding most unrealized gains from being included in income, but with other statutory provisions overriding that presumption to include specified forms of unrealized gains within income.³⁴⁸ Importantly, the default and most common treatment was and remains to exclude unrealized gains. We suspect that these legal practices both influenced and were influenced by the common lay usages.

The key question then is whether the original meaning of the Sixteenth Amendment was to only authorize Congress to levy taxes on the most common usages of the term “income” or whether instead the Amendment restored “the previous complete and plenary power of income taxation possessed by Congress from the beginning.”³⁴⁹

This brings us back to our primary points of disagreement with the Corpus Linguistics scholars. The Sixteenth Amendment refers not to “income” but to “taxes on incomes, from whatever source derived.” As we have documented with extensive historical evidence throughout this Article, it was generally understood during the time period leading up to ratification that the meaning of the Amendment was to restore Congress’s pre-existing income tax power to what it had been prior to *Pollock*, so that Congress could legislate the varieties of “taxes on incomes” that were familiar at that

345. *Id.* at 185.

346. Glogower, *supra* note 2, at 737.

347. Brooks, *supra* note 2, at 253.

348. *See supra* note 114 and accompanying text.

349. *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916).

time. In the voluminous historical literature on the ratification debates covering discussions in Congress, state legislatures, and the popular press, we are unaware of any historical actors making any arguments or claims that the Sixteenth Amendment might do anything less than fully authorize Congress to levy the entire variety of “taxes on incomes” as had existed at that time or previously.³⁵⁰

We have documented that the “taxes on incomes” that existed during and preceding ratification sometimes reached forms of undistributed corporate profits and unrealized gains. Moreover, contemporaneous newspaper discussions of the debates over ratifying the Sixteenth Amendment understood the phrase “taxes on incomes” as reaching items of unrealized gain.³⁵¹ The historical context thus reveals that the original meaning of the Sixteenth Amendment did not limit Congress to only taxing the most common usages of the term “income” but rather restored to Congress the full power to levy the entire variety of “taxes on incomes” that had existed during and preceding ratification.

CONCLUSION

We have focused in this Article on unearthing the original meaning of the Sixteenth Amendment, and specifically on whether that original meaning requires that only “realized” income can be taxed. The constitutional status of realization is a vital question, that speaks not only to the general understanding of both the Constitution and tax law, but also to the viability of a set of tax reform proposals designed to more effectively tax the income of the wealthiest households. As others have explained, there is no persuasive *stare decisis* argument for constraining Congress’s income tax power to anything less than the original meaning, and “[m]any of the Justices on the current Court have expressed their commitment to an originalist approach to constitutional interpretation,”³⁵² and so we agree that discerning the original meaning is “crucially important”³⁵³ to understanding Congress’s income tax power.

We conclude with two hypotheticals for conveying the essence of our arguments in this Article. The first is more fanciful and colorful (pun intended) and perhaps fun. The second is more technical and apt.

For our first concluding hypothetical, imagine that in some future year a majority of the Justices on the Supreme Court were to become sick from eating blueberries imported from abroad, and that the Court was to

350. See *supra* Part II.

351. See *supra* Section II.C.

352. Lee et al., *supra* note 6, at 161.

353. *Id.* at 188.

subsequently rule it unconstitutional for Congress to permit blueberries to be imported from abroad.³⁵⁴ Further imagine that this Court decision then generated such a public outcry that a new Amendment was added to the Constitution, with the full text reading: “Congress shall have power to authorize the importation of blueberries, from wherever grown.”

Now imagine that following the ratification of this new Amendment, the Court were to rule that Congress only had the power to authorize the importation of berries that are clearly blue in color, and that the Constitution thus prohibits the importation of purplish-colored berries, even when such berries are within the blueberry family and are of the sort that used to be marketed and sold as “blueberries.” (Note that many berries currently sold and marketed as “blueberries” are indeed purplish in color.)

That ruling would be absurd. The historical context of the hypothetical Amendment should make it clear that the term “blue” in the Amendment should not be interpreted narrowly, in isolation, as only referring to berries that are visually blue. Rather the Amendment should be understood as authorizing Congress to legalize importation of the full variety of berries that were encompassed within the label “blueberries” at the time of ratification, even if purplish in color.

For our second concluding hypothetical, note that value added taxes³⁵⁵ are currently in widespread use around the world but not in the United States.³⁵⁶ Imagine that in some future decade multiple U.S. states were to enact state-level value added taxes and that subsequently Congress was to also enact a new federal-level value added tax. Following this, imagine that the Supreme Court was to rule that this new federal value added tax was unconstitutional on account of its taxing value derived from property that is not income.³⁵⁷ Finally, imagine this ruling then generated so much backlash that a new Amendment was added to the Constitution, with the full text reading: “Congress shall have power to lay and collect taxes on value added, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”

354. We leave it to readers to imagine what (if any) possible legal justifications there might be for such a ruling.

355. Value added taxes as a form of consumption tax, similar to a sales tax except that taxes are collected at each stage in the product’s supply chain on the basis of “value added” at each stage.

356. David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 NW. U. L. REV. 295, 334 (2017); David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 402–03 (2015).

357. Erik Jensen has previously argued that a personal consumption tax would not be authorized by the Sixteenth Amendment and so if the Court were to adopt Jensen’s reasoning and then also hold (based on reasoning similar to *Pollock*) that an unapportioned value added tax reaching value derived from property was a direct tax, and not an excise, then a holding of this sort might be possible (though in our view extremely unlikely). See Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997).

The proper approach for interpreting this hypothetical new Amendment would not be to focus on the definition of the word “value” as an isolated term. Instead, the historical context should make clear that the meaning of the phrase “taxes on value added” encompasses the entire variety of value added taxes in use at the time of the Amendment’s ratification. If the drafters of the Amendment had wanted to limit the Amendment to only certain forms of value added taxes it would have been easy for them to specify this in the Amendment’s language. Absent any indications from either the Amendment’s text or the history of its enactment that only certain forms of value added taxes were meant to be authorized, the Amendment should be understood as authorizing the full variety of value added taxes as had existed during and prior to the Amendment’s ratification.

For the same reasons, we have argued that the original meaning of the Sixteenth Amendment authorizes Congress to levy the entire variety of “taxes on incomes” as had existed during or prior to the time of its ratification. We have documented that these varieties of “taxes on incomes” sometimes reached forms of undistributed corporate profits and unrealized gains. Accordingly, the Sixteenth Amendment should not be interpreted to constrain Congress’s taxing powers based on narrowly defining the word “income” as an isolated term. In particular, the Amendment should not be interpreted to require Congress to tax only “realized” gain.

From the earliest federal income taxes over 150 years ago, Congress has used its income tax power broadly. That power was tested and challenged, but after decades of political and public debate it was solidly reaffirmed by passage of the Sixteenth Amendment over one hundred years ago. And it should be equally affirmed today.

APPENDIX

<i>Adjudged Words and Phrases (1882)</i> ³⁵⁸	
“Income” Definition	(1) “[T]he gain which proceeds from property, labor, and business.” (citing <i>Sim’s Appeal</i> , 44 Pa. 345, 347 (1863)). (2) “[T]hat which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures” (citing <i>People v. Board of Supervisors of Niagara</i> , 4 Hill 20, 23 (N.Y. Sup. Ct. 1842)).
“Gain” Definition	N/A
“Realize” Definition	N/A

<i>The American Dictionary of Commerce, Manufacturers, Commercial Law, and Finance (1880)</i> ³⁵⁹	
“Income” Definition	“[A] stipend; the receipts or gains derived from labor, business, or property of any kind; as from the produce of a farm; the rent of houses or land; the proceeds of literary or professional business; the profits of commerce or of occupation; the interest on funded property; or joint-stock securities.”
“Gain” Definition	“[P]rofit; overplus in a computation.” Gainings: “[T]he acquisitions made by a successful trade.”
“Realize” Definition	N/A

358. CHARLES H. WINFIELD, ADJUDGED WORDS AND PHRASES, BEING A COLLECTION OF ADJUDICATED DEFINITIONS OF TERMS USED IN THE LAW, WITH REFERENCES TO AUTHORITIES 310–11 (Jersey City, J.J. Griffiths 1882).

359. L. DE COLANGE, THE AMERICAN DICTIONARY OF COMMERCE, MANUFACTURES, COMMERCIAL LAW, AND FINANCE 425, 572 (Boston, Estes & Lauriat 1880).

<i>Bouvier's Law Dictionary and Concise Encyclopedia</i> (1839) ³⁶⁰	
“Income” Definition	<p>(1) “The gain which proceeds from property, labor, or business . . . The word is sometimes considered synonymous with ‘profits,’ the gain as between receipts and payments” (citing <i>People v. Board of Supervisors of Niagara</i>, 4 Hill 20, 23 (N.Y. Sup. Ct. 1842)).</p> <p>(2) “[I]t may mean ‘money’ or the expectation of receiving money” (citing <i>United States v. Schillinger</i>, 27 F. Cas. 973 (C.C.S.D.N.Y. 1876) (No. 16,228); <i>Gray v. Darlington</i>, 82 U.S. (15 Wall.) 63 (1872)).</p> <p>(3) “[O]f shares of stock, it is not synonymous with increase, and while it will include dividends from the stock, will not embrace the sum by which the stock has increased.” (citing <i>Spooner v. Phillips</i>, 24 A. 524 (Conn. 1892)).</p>
“Gain” Definition	N/A
“Realize” Definition	N/A

360. 3 JOHN BOUVIER, *BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 1527–28 (Francis Rawle, ed., Vernon L. Book Co. & W. Publ'g Co. 3d rev., 8th ed. 1914) (1839).

<i>The Century Dictionary and Cyclopaedia (1899)</i> ³⁶¹	
“Income” Definition	“That which comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc.; receipts or emoluments regularly accruing, either in a given time, or, when unqualified, annually; the annual receipts of a person or corporation; revenue”
“Gain” Definition	<p>(1) “[G]ain, profit, advantage. . . . That which is acquired or comes as a benefit”</p> <p>(2) “The act of gaining; acquisition; accession; addition”</p> <p>(3) “To make progress; advance; increase; improve; grow”</p>
“Realize” Definition	<p>(1) “To bring or get into actual possession; make one’s own; clear as a profit or gain; obtain a return of”</p> <p>(2) “To bring into form for actual or ready use; exchange for cash or ready means: as to <i>realize</i> one’s stock or securities.”</p> <p>(3) “To obtain ready money or profits by sale of property.”</p> <p>Realization: “The act of realizing upon something; conversion into money or its equivalent; exchange of property for its money value.”</p>

361. 3, 4, 6 THE CENTURY DICTIONARY AND CYCLOPEDIA 2429–30, 3040, 4986–87 (William Dwight Whitney ed., New York, Century Co. 1899).

<i>The Century Dictionary and Cyclopedia with a New Atlas of the World</i> (1911) ³⁶²	
“Income” Definition	“That which comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc.; receipts or emoluments regularly accruing, either in a given time, or when unqualified, annually; the annual receipts of a person or corporation; revenue”
“Gain” Definition	(1) “[G]ain, profit, advantage . . . That which is acquired or comes as a benefit.” (2) “The act of gaining; acquisition; accession; addition.” (3) “To make progress advance; increase; improve; grow.” (4) “To accrue; be added.”
“Realize” Definition	(1) “To bring or get into actual possession; make one’s own; clear as a profit or gain; obtain a return of” (2) “To bring into form for actual or ready use; exchange for cash or ready means: as to <i>realize</i> one’s stock or securities.” (3) “To obtain ready money or profits by sale of property.”

362. 4, 5, 8 THE CENTURY DICTIONARY AND CYCLOPEDIA WITH A NEW ATLAS OF THE WORLD: A WORK OF GENERAL REFERENCE IN ALL DEPARTMENTS OF KNOWLEDGE 2429–30, 3040, 4986–87 (Benjamin E. Smith ed., 1911).

<i>A Concise Legal Dictionary (1909)</i> ³⁶³	
“Income” Definition	“The profit or gains from business; property or other sources of wealth.”
“Gain” Definition	N/A
“Realize” Definition	N/A

<i>The Cyclopedic Dictionary of Law (1901)</i> ³⁶⁴	
“Income” Definition	“The gain which proceeds from labor, business, or property of any kind. It is as large a word as can be used to denote a person’s receipts and means ‘gross income,’ not ‘profits’ though the contrary has been held.” (citations omitted).
“Gain” Definition	(1) “Profits.” (2) “[T]he reduction of a loss being a gain.” (citation omitted).
“Realize” Definition	N/A

363. CHARLES E. CHAPMAN, *A CONCISE LEGAL DICTIONARY* 199 (1909).

364. WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, *THE CYCLOPEDIA OF LAW COMPRISING THE TERMS AND PHRASES OF AMERICAN JURISPRUDENCE, INCLUDING ANCIENT AND MODERN COMMON LAW, INTERNATIONAL LAW, AND NUMEROUS SELECT TITLES FROM THE CIVIL LAW, THE FRENCH AND THE SPANISH LAW, ETC., ETC. WITH AN EXHAUSTIVE COLLECTION OF LEGAL MAXIMS* 402, 472 (1901).

<i>The Cyclopedic Law Dictionary (1922)</i> ³⁶⁵	
“Income” Definition	“The gain which proceeds from labor, business, or property of any kind. It is as large a word as can be used to denote a person’s receipts, and means ‘gross income,’ not ‘profits’ though the contrary has been held.” (citations omitted).
“Gain” Definition	(1) “Profits.”; (2) “[T]he reduction of a loss being a gain.” (citation omitted).
“Realize” Definition	N/A

<i>A Dictionary of American and English Law (1888)</i> ³⁶⁶	
“Income” Definition	“Gains, or private revenue, from business, labor, or the investment of property.”
“Gain” Definition	N/A
“Realize” Definition	N/A

<i>Black’s Law Dictionary (1891)</i> ³⁶⁷	
“Income” Definition	“The return in money from one’s business, labor, or capital invested; gains, profit, or private revenue.”
“Gain” Definition	“Profits; winnings; increment of value.”
“Realize” Definition	“To convert any kind of property into money; but especially to receive the returns from an investment.”

365. JAMES C. CAHILL, *THE CYCLOPEDIA LAW DICTIONARY* 444, 522 (2d ed. 1922).

366. 1 STEWART RAPALJE & ROBERT L. LAWRENCE, *A DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS* 644 (Jersey City, Frederick D. Linn & Co. 1888).

367. *Income, Gain, Realize*, BLACK’S LAW DICTIONARY (1891).

<i>Dictionary of Political Economy (1896)</i> ³⁶⁸	
“Income” Definition	“[M]ay be defined as the wealth, measured in money, which is at the disposal of an individual, or a community, per year or other unit of time. This term is not easily freed from ambiguity.”
“Gain” Definition	N/A
“Realize” Definition	N/A

<i>A Dictionary of Words and Phrases Used in Ancient and Modern Law (1899)</i> ³⁶⁹	
“Income” Definition	“That which one receives as the result of labor or earnings of capital.”
“Gain” Definition	“Profit. To acquire. To get. Increase. Addition. The profit obtained by cultivating land.”
“Realize” Definition	“To receive value or money.”

368. 2 DICTIONARY OF POLITICAL ECONOMY 374 (R.H. Inglis Palgrave ed., London, Macmillan & Co. 1896).

369. ARTHUR ENGLISH, A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 388, 439, 671 (Washington, D.C., Wash. L. Book Co. 1899).

<i>Judicial and Statutory Definitions of Words and Phrases</i> (1904 & 1905) ³⁷⁰	
“Income” Definition	<p>(1) “[T]hat gain which proceeds from labor, business, or property of any kind; the profits of commerce or business.” (citing Braun’s Appeal, 105 Pa. 414, 415 (1884));</p> <p>(2) “‘Income,’ as defined by Webster, is ‘that gain which proceeds from labor, business, property, or capital of any kind, as the produce of a farm, the rent of houses, the proceeds of professional business, the profits of commerce or of occupation, or the interest of money or stock in funds, etc’” (citing Mundy v. Van Hoose, 30 S.E. 782, 786 (Ga. 1898)).</p> <p>(3) “The word ‘income’ has a broader meaning than ‘dividend,’ but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with ‘increase.’ The value of stock may be increased by good management, prospects of business, and the like; but such increase is not income. It may also be increased by an accumulation of surplus; but so long as that surplus is retained by the corporation, either as surplus or increased stock, it can in no proper sense be called ‘income.’” (citing Spooner v. Phillips, 24 A. 524 (Conn. 1892)).</p>
“Gain” Definition	<p>(1) “[T]hat which is acquired or comes as a benefit.” (citing Thorn v. De Breteuil, 83 N.Y.S. 849, 856 (N.Y. 1903)).</p> <p>(2) “Mere advance in value in no sense constitutes the ‘gains’ specified in the revenue law as gains of the owner for the year in which the sale of the property was made. Such advance</p>

370. 4 EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM, JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 3022, 3501 (1904); 7 EDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM, JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 5952 (1905).

	<p>constitutes and can be treated merely as an increase of capital.” (citing <i>Gray v. Darlington</i>, 82 U.S. (15 Wall.) 63, 65).</p> <p>(3) “The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the ‘gains, profits, or income’ of the statute above referred to.” (citing <i>Gray v. Darlington</i>, 82 U.S. (15 Wall.) 63, 65).</p>
<p>“Realize” Definition</p>	<p>“The word ‘realize,’ as used in a contract whereby a party agreed to pay another a certain sum of money in case he should realize a certain amount for certain land, etc., means to bring into actual possession. It is ordinarily used in contrast to ‘hope’ or ‘anticipation.’” (citing <i>Lorillard v. Silver</i>, 36 N.Y. 578, 579 (1867)).</p>

<i>The Judicial Dictionary, of Words and Phrases Judicially Interpreted</i> (1903) ³⁷¹	
“Income” Definition	“Extraordinary Profits of a Company are ‘Income’ or ‘Capital’ according to the way in which the Co (acting within its powers) deals with them;— if they are distributed as a Dividend, they are ‘Income;’ if properly used for creating new Shares, they are ‘Capital.’” (citations omitted).
“Gain” Definition	(1) “[S]omething obtained or acquired. It is not limited to pecuniary gain.” (citing <i>In re Arthur Average Ass’n</i> , [1875] 10 Ch App. 572). (2) “A diminution of a loss, is a ‘Gain’ within the meaning of the section.” (citing <i>In re Padstow Assurance Assoc.</i> , [1882] 20 Ch D 137). (3) “‘Gains’ of a trade are that which is gained by the trading, for whatever purpose it is used — whether it is gained for the benefit of a community or for the benefit of individuals. Whether the benefit is to be obtained by dividends, or whether it is to be obtained by lightening and diminishing public burdens, it is all the same.” (citing <i>Mersey Docks & Harbour Bd. v. Lucas</i> , [1883] 8 App. Cas. 891).
“Realize” Definition	“Where Articles of Association of a Company provide that no dividend shall be payable except out of realized <i>Profits</i> , the word Realized must have its ordinary meaning, which, if not equivalent to Reduced to actual cash in hand, must at least be Rendered tangible for the purpose of division.” (citing <i>In re Oxford Benefit Bldg. & Inv. Soc’y</i> , [1886] 35 LRCh. 502) (internal quotation marks omitted). *Technically, this is

371. 2 F. STROUD, THE JUDICIAL DICTIONARY, OF WORDS AND PHRASES JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS 793, 948 (2d ed. 1903); 3 F. STROUD, THE JUDICIAL DICTIONARY, OF WORDS AND PHRASES JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS 1662–63 (2d ed. 1903).

	under the definition for “realized.”*
--	---------------------------------------

<i>A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and the Several States of the American Union</i> (1883) ³⁷²	
“Income” Definition	“The gain which proceeds from property, labor, or business: it is applied particularly to individuals; the income of the government is usually called revenue. As to what will be considered income, see 15 Wall. 63”
“Gain” Definition	“Profits.”
“Realize” Definition	N/A

<i>Black’s Law Dictionary</i> (1910) ³⁷³	
“Income” Definition	“The return in money from one’s business, labor, or capital invested; gains, profit, or private revenue.” (citations omitted).
“Gain” Definition	“Profits; winnings; increment of value” (citations omitted).
“Realize” Definition	“To convert any kind of property into money; but especially to receive the returns from an investment.” (citation omitted).

372. 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 703, 784 (Franci Rawle ed., 15th ed., Philadelphia, J.B. Lippincott & Co. 1883).

373. *Income, Gain, Realize*, BLACK’S LAW DICTIONARY (2d ed. 1910).

<i>The Students' Law Lexicon</i> (1888) ³⁷⁴	
"Income" Definition	"[T]he profits realized from property, labor, business, or the loaning of money."
"Gain" Definition	N/A
"Realize" Definition	N/A

<i>Webster's Revised Unabridged Dictionary of the English Language</i> (1913) ³⁷⁵	
"Income" Definition	"That gain which proceeds from labor, business, property, or capital of any kind, as the produce of a farm, the rent of houses, the proceeds of professional business, the profits of commerce or of occupation, or the interest of money or stock in funds, etc.; revenue; receipts; salary; especially, the annual receipts if a private person, or a corporation, from property."
"Gain" Definition	(1) "To get, as profit or advantage; to obtain or acquire by effort or labor" (2) "That which is gained, obtained, or acquired, as increase, profit, advantage, or benefit; – opposed to <i>loss</i> ." (3) "To have or receive advantage or profit; to acquire gain; to grow rich; to advance in interest, health, or happiness; to make progress"
"Realize" Definition	(1) "To convert any kind of property into money, especially property representing investments, as shares in stock companies, bonds, etc."

374. WILLIAM C. COCHRAN, *THE STUDENTS' LAW LEXICON: A DICTIONARY OF LEGAL WORDS AND PHRASES WITH APPENDICES* 142 (Cincinnati, Robert Clarke & Co. 1888).

375. WEBSTER'S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 607, 745, 1195 (Noah Porter ed., 1913).

	<p>(2) “To convert into real property; to make real estate of”</p> <p>(3) “To acquire as an actual possession; to obtain as the result of plans and efforts; to gain; to get”</p> <p>(4) “To convert into actual money”</p>
--	---

<i>Words and Terms Judicially Defined (1914)</i> ³⁷⁶	
“Income” Definition	“[T]he balance of gain over loss made in the fiscal year, and where no such balance of gain has been made, there is no income or fund which is capable of being assessed.” (citations omitted).
“Gain” Definition	“[T]hat which is derived or comes as a benefit, profit or advantage, and it may be derived indirectly as well as directly. An actual substantial profit is not the proper test as to whether a place is kept for ‘gain’; it may be kept for gain even if there is no profit.” (citation omitted).
“Realize” Definition	N/A

376. C. H. WIDDIFIELD, WORDS AND TERMS JUDICIALLY DEFINED 162, 188–89 (1914).

