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**THE TAXING QUESTION OF INCOME: HISTORICAL INSIGHTS
ON THE MEANING OF “INCOME” MAY PRESERVE THE
INCOME TAX**

DONALD B. TOBIN AND ELLEN P. APRILL*

INTRODUCTION

In *Through the Looking Glass*, Humpty Dumpty explains, “When I use a word . . . it means just what I choose it to mean—neither more nor less.”¹ As Alice explores this interpretive method, Alice gives up; “[s]he was too much puzzled to make any other remark.”²

Many tax lawyers felt similarly confused by recent efforts by the petitioners in *Moore v. United States*³ to define the word “incomes” within the Sixteenth Amendment to include only “realized income.”⁴ The narrow definition of income proposed by the Moores would tax only a small subset of what economists, accountants, and tax lawyers consider to be income. This limited definition would significantly constrain Congress’s taxing power set out in Article I, Section 8 of the Constitution and reaffirmed in the Sixteenth Amendment.⁵

The Sixteenth Amendment provides Congress with the power to “lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several States.”⁶ Despite this clear statement, some

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* This article is derived from an Amicus Brief filed by Donald B. Tobin and Ellen P. Aprill in *Moore v. United States*, No. 22-800 (argued Dec. 5, 2023). See Brief of Tax Professors Donald B. Tobin and Ellen P. Aprill as Amici Curiae Supporting Respondent, *Moore v. United States*, No. 22-800 (filed Oct. 20, 2023). Special thanks to our wonderful librarians Laura Cadra, Susan McCarty, Jennifer Chapman, Tanya Thomas, Jenny Rensler, and our research assistant Abigail Hartnett. We also wish to thank the Maryland Carey Law for financial support for the brief and this article. A special thanks to Mark Graber, Richard Boldt, and Michael Van Alstine at Maryland Carey Law for their insight and comments.

1. LEWIS CARROLL, *THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE* 123 (1897).

2. *Id.* at 124.

3. *Moore v. United States*, No. 22-800 (argued Dec. 5, 2024).

4. Brief for Petitioners at 1, *Moore v. United States*, No. 22-800 (filed Aug. 30, 2023).

5. U.S. CONST. art. I, § 8; U.S. CONST. amend. XVI.

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

100 years after the passage of the Sixteenth Amendment, *Moore* asks the Supreme Court to examine whether the meaning of “incomes” within the Sixteenth Amendment includes only a specific type of income.

The taxpayers in *Moore* argue that an international tax provision in the Tax Cuts and Jobs Act (TCJA)⁷ is unconstitutional because it taxed unrealized gains.⁸ Although no constitutional or statutory provision defines “realization,” the concept is generally understood as the moment when taxpayers have sufficient control over income to make taxation appropriate. For example, a taxpayer realizes income when the taxpayer sells property for a gain, or receives wages, rents, interest, etc. In several cases, the Supreme Court has determined that realization is not a constitutional requirement for the taxation of income, but instead is a helpful concept often used by Congress for administration of the income tax.⁹

The Moores base their argument on the following facts. They were shareholders in a foreign controlled corporation.¹⁰ Under the provision introduced by TCJA, the Moores were liable for tax on income realized by the corporation. The Moores, however, argue that although the corporation realized the income, the Moores had not received the income from the corporation and thus there was not a realization event *as to them*.¹¹

The Moores then assert that unrealized gains are not “income” within the meaning of the Sixteenth Amendment.¹² The Moores rely principally on

7. Pub. L. No. 115-97, Sec. 14103(a), 131 Stat. 2054, 2195 (2017). The tax provision at issue in *Moore* is codified at 26 U.S.C. § 965 (2017).

8. Brief for Petitioners, *supra* note 4, at 10.

9. See *Helvering v. Horst*, 311 U.S. 112, 116 (1940) (“[T]he rule that income is not taxable until realized has never been taken to mean that the taxpayer . . . who has fully enjoyed the benefit of the economic gain represented by his right to receive income, can escape taxation because he has not himself received payment of it from his obligor. The rule, founded on administrative convenience, is only one of postponement of the tax to the final event of enjoyment of the income . . .”); *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 559 (1991) (“[T]he concept of realization is ‘founded on administrative convenience.’” (quoting *Horst*, 311 U.S. at 116)). *Eisner v. Macomber*, upon which the Moores rely, however, held that a stock dividend was not income because it was not realized. 252 U.S. 189, 209–10 (1920). *But see* John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. (forthcoming), <https://ssrn.com/abstract=4737106> (concluding that the realization requirement in *Macomber* is inconsistent with an originalist jurisprudential approach).

10. Under I.R.C. § 957, a controlled foreign corporation is a foreign corporation with more than 50% of voting power or value of its shares held by U.S. persons, each of which owns 10% or more of its stock.

11. Brief for Petitioners, *supra* note 4, at 12.

12. *Id.* at 12–13. In *Moore v. United States*, 36 F.4th 930, 936–37 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023), the Ninth Circuit ruled against the Moores and determined, relying on *Horst*, 311 U.S. at 116 (explaining the realization requirement is “founded on administrative convenience”), and *Cottage Sav. Ass’n*, 499 U.S. at 559 (quoting *Horst* for the notion that “the concept of realization is ‘founded on administrative convenience’”), that realization was not a constitutional prerequisite for taxation.

*Eisner v. Macomber*¹³ for the notion that income includes only income that is realized.¹⁴ In fact, the Moores argue that the phrase unrealized income is an “oxymoron.”¹⁵

Central to the Moores’ argument is the Supreme Court’s 1895 decision, *Pollock v. Farmers’ Home Loan & Trust Co.*¹⁶ The decision in *Pollock* found the income tax in the Wilson-Gorman Tariff Act of 1894 to be unconstitutional because it was a direct tax not apportioned among the States.¹⁷ Contrary to almost one hundred years of precedent, the Court in *Pollock* determined that a direct tax included not only a tax on property, but also the tax on income derived from that property.¹⁸ Then and now, requiring apportionment of a tax was thought to immediately defeat its implementation. The Court’s determination that the income tax was a direct tax invalidated the income tax at issue.¹⁹

The Sixteenth Amendment was ratified to address the ramifications of the Supreme Court’s decision in *Pollock*.²⁰ The Sixteenth Amendment explicitly provides that Congress has the power to tax income, whether or not it is a direct tax.²¹ Because the taxation of incomes is explicitly permitted in the Constitution, the Moores needed to argue that the money the Government sought to tax here did not constitute income within the meaning of the Sixteenth Amendment.

A number of tax scholars have argued that the Court’s current jurisprudence, including the proper application of originalism, should doom the petitioners in *Moore* and confirm a broad view of Congress’s power to tax income.²² We reach the same conclusion as many of these scholars but

13. 252 U.S. 189 (1920).

14. Brief for Petitioners, *supra* note 4, at 14.

15. *Id.* at 16.

16. 158 U.S. 601 (1895).

17. *Id.* at 634. Article I, Section 2 of the Constitution requires direct taxes to be apportioned among the states. U.S. CONST. art. 1, § 2. That is, in the case of a direct tax, Congress sets the total amount to be raised by a direct tax and divides that amount among the states according to each state’s population. *Id.* Thus, a state with five percent of the nation’s population would be responsible for five percent of the direct tax, without regard to the income or wealth of that state’s taxpayers.

18. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION, RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 175 (2022) (“[T]he Court held, in a century of decisions from 1796 to 1880, that a wide variety of taxes the federal government had imposed did not count as ‘direct’ taxes and so were not subject to [apportionment].”).

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

20. *See infra* Part II.D.

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

22. Calvin Johnson argues that if the Court is true to its originalism jurisprudence, *Pollock* should be overturned and “direct tax” would be interpreted as it had been for one hundred years prior to *Pollock*, as a tax on people and property. Brief of Calvin H. Johnson as Amicus Curiae Supporting Respondent at 19–20, *Moore v. United States*, No. 22-800 (filed Sept. 8, 2023).

take a slightly different approach by examining how economists, accountants, and legal scholars viewed the word “income” at the turn of the century. Our examination includes both the scholarship and theory of the time. It also includes the practice of accountants as they established a more formal system of accounting. Importantly, economists and accountants grappled with the complexities of “what is income” well before the debate surrounding the constitutionality of the income tax.

Often when the Supreme Court looks to the common understanding of a word, it looks to the understanding of the average person or examines the word as it is used in a legal context.²³ But in understanding the word income, law as a discipline was a latecomer. Economists and accountants were debating and contextualizing the term “income” prior to the Sixteenth Amendment and the Court’s decision in *Macomber*. When another discipline has developed a deep understanding of a term, we argue, that understanding should carry significant weight in determining a term’s meaning.²⁴

In the case of the Sixteenth Amendment, at the time Congress was debating the income tax, economists and accountants had already developed a sophisticated and broad understanding of the word “income.” While we also examine the work of leading legal scholars who were writing at the intersection of law and taxation, we highlight the treatment of the word “income” by economists and accountants because they demonstrated a sophisticated understanding of the concept prior to the passage of the Sixteenth Amendment.

The limited definition of income promoted by the *Moore* petitioners would significantly limit Congress’s taxing power in Article I, Section 8 and would create a far more complicated and inequitable tax code. The position also has the potential to overturn significant portions of the tax code that have been in place for over one hundred years. By looking at economists’ and

Professors Brooks and Gamage thoughtfully and thoroughly examine *Moore* through an original meaning lens. See Brooks & Gamage, *supra* note 9. Brooks and Gamage take a different approach from that of Johnson and argue that an examination of the original meaning of the word income at the time of the Sixteenth Amendment supports a broad definition of income. *Id.* at 5. Specifically, they show that Congressional action, existing practice, and a contemporary understanding of the word income indicates that the drafters and ratifiers did not intend the word income to include only income that was realized. *Id.* at 6. Under both the Brooks and Gamage approach and the Johnson approach, originalism would lead to a result that the tax at issue in *Moore* is constitutional.

23. Hundreds of law review articles have been written analyzing plain meaning and textualism. See, e.g., Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365 (2023) (empirically examining ordinary meaning and legal interpretation and concluding that ordinary people often understand words within their technical meaning and that textualists should look beyond ordinary meaning); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (“I look for the . . . original meaning of the text, not what the original draftsmen intended.”).

24. See Tobia, Slocum & Nourse, *supra* note 23, at 375–88 (arguing that textualists often apply a “technical meaning” when interpreting the meanings of words in the text).

accountants' treatment, as well as that of legal scholars, of the word income, we show that the word "incomes" in the Sixteenth Amendment should be interpreted broadly.

I. THE JOURNEY FOR A LIMITED DEFINITION OF THE WORD "INCOME"

During the late 1800s and early 1900s, often referred to as the *Lochner* era, the Court sought to undermine not only growth of the federal government but also efforts by Populists and Progressives to reduce wealth inequality and support workers.²⁵ The Court limited government regulation and constrained federal power. In examining the income tax, however, the Court was not writing on a clean slate. It faced precedent that contradicted its limited view of Congress's taxing power. As Professor Calvin Johnson explains, the direct tax provision at issue in *Pollock* had routinely been interpreted narrowly to include only direct taxes on people and property, such as head taxes and property taxes.²⁶ In addition, as early as 1861, the United States had a limited income tax designed to help fund the Civil War.²⁷ The Revenue Act of 1862 also included a more comprehensive income tax, but it expired in 1872.²⁸

The Populist Movement in the late nineteenth century strongly supported an income tax in order to fund government and to attack the large concentration of wealth in the United States.²⁹ In addition, the Southern States objected to a system that heavily relied on tariffs. The South argued that tariffs unfairly burdened the Southern States while much of the economic activity in the North escaped taxation.³⁰ It is not surprising that the first attempt at a modern income tax was part of the Wilson-Gorman Tariff Act of 1894.³¹ William Jennings Bryan, then a Congressman, and Benton McMillin offered an income tax amendment as part of the Tariff Act. The Tariff Act

25. See, e.g., 158 U.S. at 634 (1895) (finding the income tax to be a direct tax and thus unconstitutional unless apportioned among the states); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (finding unconstitutional a statute requiring insurance companies to be licensed within the state and to have at least one place of business within the state); *Lochner v. New York*, 198 U.S. 45 (1905) (finding maximum working hours for bakers unconstitutional).

26. Brief of Amicus Curiae Calvin H. Johnson, *supra* note 22, at 19–24.

27. Revenue Act of 1861, ch. 45, 12 Stat. 292.

28. Revenue Act of 1862, ch. 119, 12 Stat. 432; Stephanie Hunter McMahon, *A Law with a Life of Its Own: The Development of the Federal Income Tax Statutes Through World War I*, 7 PITT. TAX REV. 1, 18 (2009).

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

30. RICHARD F. BENDEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT, 1880-1980, 22–23 (1984).

31. Tariff Act of 1894, ch. 349, § 27, 28 Stat. 509, 553.

ultimately passed and provided for an income tax of two percent on incomes above \$4,000.³²

But Bryan and McMillin's victory was short lived, because the Court in *Pollock*³³ struck down the income tax, holding that the tax on income items such as rents, interest, and the return from property held for the production of income was a tax on the property itself.³⁴ The Court then concluded that, because the tax was a tax on property, it was a direct tax, and thus needed to be apportioned among the states.³⁵ Because it was not, the Court found it to be unconstitutional.³⁶

The Supreme Court in *Pollock* originally deadlocked four to four regarding the constitutionality of the income tax because one Justice was absent.³⁷ The case was reheard, and the ultimate decision was a five to four decision finding the tax provisions unconstitutional.³⁸

Congress debated how to respond to *Pollock*. Members differed as to whether to pass a new income tax in order to test whether the Supreme Court would once again hold that tax unconstitutional or whether the better option was to seek to amend the constitution.³⁹

Ultimately, Congress passed a constitutional amendment providing:

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.⁴⁰

The Sixteenth Amendment was ratified in February of 1913 with forty-two states ultimately ratifying the amendment.⁴¹ After its ratification,

32. For an excellent review of the history of the income tax, see Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 TAX LAW. 311 (2014) [hereinafter *The First National Income Tax*]; Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295 (2013) [hereinafter *Origins of the Modern Income Tax*].

33. 158 U.S. 601 (1895).

34. *Id.* at 618.

35. *Id.* at 634.

36. *Id.*

37. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586 (1895), *reh'g granted*, 158 U.S. 601 (1895).

38. See 158 U.S. 601, 637 (1895). For discussions of William Jennings Bryan and the income tax, see ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX 1861–1913 162 (1993); Kurt Hohenstein, *William Jennings Bryan and the Income Tax: Economic Statism and Judicial Usurpation in the Election of 1896*, 16 J.L. & POL. 163 (2000).

39. See 44 CONG. REC. 534 (1909) (statement of Rep. Hull); see also AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013).

40. U.S. CONST. amend. XVI.

41. See S. DOC. NO. 71-240, at 10 (1931).

Congress then passed the Revenue Act of 1913, which provided for a progressive income tax.⁴²

II. OVERVIEW OF WHAT IS “INCOME”?

Understanding the meaning of the Sixteenth Amendment requires understanding the intellectual and political context from which it emerged. Such consideration demonstrates that the meaning of “incomes” in the Sixteenth Amendment is a broad one, permitting taxation of more than realized income. The Sixteenth Amendment clarifies that Congress, under Article I, Section 8, has the power to tax all income, even unrealized income.

During the late 1800s and early 1900s, leading economists espoused an inclusive and extensive definition of income. For example, both Irving Fisher and Robert Haig, two of the most prominent American economists of all time, stated unequivocally that the concept of income includes more than cash or property received at a point in time.⁴³ They made clear in their writing that income includes unrealized appreciation as well as realized income.

Accountants working in the early twentieth century also viewed income as an expansive concept. In a leading accounting treatise during that period, Arthur Lowes Dickinson clarified that, as an asset increases in value over time, partial realizations continue to take place such that “profit or loss [is] the estimated increase or decrease between any two . . . periods.”⁴⁴ Moreover, the Supreme Court has long accepted accrual accounting, an accounting method based on when income and expenses are incurred, not when they are paid or received. The justification for accrual accounting is that it more clearly reflects an entity’s income even though that income had not yet been realized.⁴⁵

Legal scholars at the time also recognized the broad meaning of income. In the very first page of Henry Campbell Black’s influential *Treatise on the Law of Income Taxation Under Federal and State Laws*, he characterizes income as “not a tax upon accumulated wealth, but upon its periodical accretions.”⁴⁶ Similarly, Thomas Cooley’s important treatise characterizes the Civil War income tax as “unequal because those holding lands for the rise

42. Revenue Act of 1913 (Underwood-Simmons Act), ch. 16, 38 Stat. 114.

43. IRVING FISHER, *THE NATURE OF CAPITAL AND INCOME* 106–08 (1906); ROBERT MURRAY HAIG ET AL., *THE FEDERAL INCOME TAX* 7, 27 (Robert Murray Haig ed. 1921).

44. ARTHUR LOWES DICKINSON, *ACCOUNTING, PRACTICE AND PROCEDURE* 67 (2d ed. 1918).

45. See *United States v. Anderson*, 269 U.S. 422 (1926); *Spring City Foundry Co. v. Comm’r*, 292 U.S. 182 (1934); MICHAEL A. DIAMOND, JAMES D. STICE, & EARL K. STICE, *FINANCIAL ACCOUNTING* 166 (5th ed. 2000); RAJ GNANARAJAH & MARK P. KEIGHTLEY, *CONG. RSCH. SERV.*, R44002, *CASH VERSUS ACCRUAL ACCOUNTING: TAX POLICY CONSIDERATIONS* 2 (2015).

46. HENRY CAMPBELL BLACK, *A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS* 1 (1913).

in value escape it altogether—at least until they sell, though their actual increase in wealth may be great and sure.”⁴⁷ Godfrey Nelson in his treatise describes the 1913 and 1918 Tax Acts.⁴⁸ In describing the Acts, Nelson recognizes that provisions in both Acts taxed unrealized income.

Similarly, legislators involved in drafting both income tax statutes and the Sixteenth Amendment recognized that income could include more than realized income. For both Republicans and Democrats, the Sixteenth Amendment offered a means of reducing the country’s reliance on a regressive system of tariffs, which taxed consumption but not capital. Supporters of a progressive income tax argued that the wealthy needed to pay their fair share of the revenue to support the needs of government. A Congress seeking to have the wealthy pay its fair share and interested in a progressive income tax would not have promoted a limited definition of income that would run counter to that goal.⁴⁹

The legislative history of the phrase “from whatever source derived” underscores the breadth of the Amendment. The version of the Amendment referred to the Senate Finance Committee did not include this phrase. The Finance Committee, however, reported a proposed Amendment with the language ultimately adopted and ratified.⁵⁰ The addition of this phrase made clear that the Amendment would overrule the holding in *Pollock* that the source of income could determine whether a tax on income was a direct tax.⁵¹ Moreover, letters written by Senator Knute Nelson regarding his insistence on including the phrase, explain that the changes to the original language of the Amendment were made in order for the power to tax incomes be as broad as possible.⁵² That language was not designed to limit the breadth of the income tax.

Congressional action that occurred directly after the ratification of the Sixteenth Amendment also adopted a broad definition of income. Shortly after passage of the Amendment, Congress passed a statute that taxed stock dividends, which are unrealized gains according to the petitioners in *Moore*, and the original Treasury Regulations implemented immediately after the

47. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 20 (1876). FISHKIN & FORBATH, *supra* note 18, at 75 (citing Cooley’s treatise to explain Cooley that suggests “As long as taxes have a ‘public purpose’ . . . there is ‘no reason for judicial interference’ with a decision that is fundamentally legislative in nature”).

48. GODFREY N. NELSON, INCOME TAX LAW AND ACCOUNTING 21–23 (2d ed. 1918); GODFREY N. NELSON, SUPPLEMENT TO INCOME TAX—LAW AND ACCOUNTING 7 (1918).

49. *See infra* Part II.E.

50. 44 CONG. REC. 3900 (June 28, 1909).

51. 158 U.S. 601, 637 (1895).

52. Harry Hubbard, “*From Whatever Source Derived*,” 6 A.B.A. J. 202, 203 (1920) (Hubbard quoting a letter from Senator Nelson explaining that the words “whatever source derived” were designed to make the power to tax incomes as broad as possible).

passage of the Sixteenth Amendment provided for the taxation of unrealized appreciation of capital assets in some circumstances.⁵³ Later developments, such as the international, pass-through, and financial tax regimes, have expanded taxation of unrealized income.⁵⁴

Economists, accountants, legal scholars, and legislators at the turn of the century would have been very surprised that the Court is now, over one hundred years later, reviewing a definition of income in the Sixteenth Amendment that is more like “money income” than the broader conceptions of income discussed at the time and implemented over the last hundred years. Based on the conceptions of income at the time of passage of the Sixteenth Amendment, realized income represented a subset, albeit an important one, of the types of income understood in 1913 to exist and to rest comfortably within the scope of the Sixteenth Amendment.

A. Influential Economists Prior to and at the Time of the Passage of the Sixteenth Amendment Recognized a Broad Definition of Income.

The definition of income historically had not been a legal one, but one developed by economists and accountants. During the late 1800s and early 1900s, economists took the lead in examining the theoretical underpinnings of the question, “What is income?” For example, Professor Alfred Marshall, in *Principles of Economics*, discusses the broad definition of income.⁵⁵ He demonstrates the important concept of self-created income by listing as examples people making their own clothes, digging their own gardens, or repairing their houses.⁵⁶ Professor Marshall continues, “For scientific purposes, it would be best that the word income when occurring alone should always mean total real income.”⁵⁷

Similarly, Professor Irving Fisher in *The Nature of Capital and Income* explains that income represents “services rendered by capital.”⁵⁸ He goes on to clarify that the word “by” in the phrase is not designed to require realization, but instead, differentiates the change in the value of the asset from the original capital.⁵⁹ This understanding is clear from his definition of

53. OFFICE OF COMM’R OF INTERNAL REVENUE: REGULATIONS NO. 33, Art. 107, LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES (1914).

54. See Eric Toder, *The Potential Economic Consequences of Disallowing the Taxation of Unrealized Income*, TAX POL’Y CTR. (Oct. 10, 2023), https://www.taxpolicycenter.org/sites/default/files/publication/165514/the_potential_economic_consequences_of_disallowing_the_taxation_of_unrealized_income.pdf.

55. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (3d ed. 1895).

56. *Id.* at 155.

57. *Id.*

58. FISHER, *supra* note 43, at 118.

59. *Id.*

income which includes “income realized plus appreciation of the capital (or minus its depreciation).”⁶⁰

Fisher, who has been called “this country’s greatest scientific economist,”⁶¹ notes that in business, one often refers to “money-income,” and that for commerce, this definition works well enough.⁶² But, Fisher continues, money income “is far from exhausting the complete income concept.”⁶³ To Fisher, the economic benefits, or what he refers to as service from capital, are income.⁶⁴ He notes that the “service of a dwelling to its owner (shelter or money rental), the service of a piano (music), and the service of food (nourishment)” constitute income, and the dwelling, the piano, and even the food are the capital.⁶⁵ For Fisher, realization is not a core component in the definition of income.⁶⁶

The Haig-Simons definition of income, on which policymakers today rely, emerged in the United States during this period in the work of Robert Murray Haig (and was further developed in the work of economist Henry C. Simons). The Joint Committee on Taxation recognized that “[e]conomists generally agree that, in theory, a Haig-Simons measure of income is the best measure of economic well-being.”⁶⁷ The Joint Committee writes:

Broadly speaking, Haig-Simons income is defined as consumption *plus changes in net worth*. Increases in net worth are generally derived from savings and become a source of a family’s consumption in a future year. Decreases in net worth are generally the result of drawing down a family’s past savings.⁶⁸

While the Internal Revenue Code does not adopt the Haig-Simons definition of income, the Haig-Simons definition creates the baseline for understanding the concept of income and for measuring the possible tax base.⁶⁹ This definition recognizes that income can be measured by

60. *Id.* at 333.

61. JOSEPH A. SCHUMPETER, *TEN GREAT ECONOMISTS FROM MARX TO KEYNES* 223 (Routledge 1997) (1952).

62. FISHER, *supra* note 43, at 103.

63. *Id.*

64. *Id.* at 106–07.

65. *Id.* (emphasis omitted).

66. *Id.* at 108.

67. J. COMM. ON TAXATION, *OVERVIEW OF THE DEFINITION OF INCOME USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION IN DISTRIBUTIONAL ANALYSES* 3 (2012); *see also* John R. King, *The Concept of Income*, in *IMF TAX POLICY HANDBOOK* 117 (Parthasarathi Shome ed., 1995) (Schanz-Haig-Simons definition of income is “probably the most influential definition of the personal income of an individual”).

68. J. COMM. ON TAXATION, *supra* note 67, at 3 (emphasis added).

69. *See* Boris I. Bittker, *A “Comprehensive Tax Base” as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 933–34 (1967); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION, PRINCIPLES AND POLICIES* 84 (7th ed. 2013).

components of behavior and that a change in wealth, not the wealth itself, is income. The Haig-Simons definition does not rely on realization. Changes in wealth, even if not realized, are income because they add to the resources available to a person or entity.⁷⁰ This definition is far broader than realized income, taxable income, net income, or adjusted gross income. It encompasses all the different types of income that together create the aggregate whole that is income.

Robert Murray Haig built his definition of income on the theoretical framework set out by Fisher, Marshall, and others. The definition encapsulated Fisher's view of income being services from capital and Marshall's view that income consisted of far more than "money" income.⁷¹ Although Haig's groundbreaking work was first published in 1921, he makes clear that the definition he is endorsing was developed before the adoption of the Sixteenth Amendment.⁷² That is, he wrote his seminal piece in the wake of debates surrounding enactment of an income tax and the passage of the Sixteenth Amendment.

Haig begins his analysis by characterizing economic conceptions of income as far broader than the interpretations offered by the judiciary. Haig minces no words: "Such decisions as have been handed down appear to be leading toward a definition of income so narrow and artificial as to bring about results which from the economic point of view are certainly eccentric and in certain cases little less than absurd."⁷³

Haig explains that when an economist speaks of income, the economist is doing so in terms that are "approximately the same sense as it is used in ordinary intercourse" and there has been "no revolutionary contribution" to economic thought on this topic since the passage of the Sixteenth Amendment.⁷⁴ "The economist and the man in the street both use the term now as they used it in 1913."⁷⁵ Haig, relying on definitions from economists in the late 1800s and early 1900s, defined income as "the money value of the net accretion to one's economic power between two points of time."⁷⁶ This

70. See HAIG ET AL., *supra* note 43, at 27. While these assets may not be liquid, they still form the basis of the person's resources. They may not be able to access those resources unless they sell, but in many cases, they are receiving the benefit of these resources through imputed income. In many other cases, these gains provide the capital necessary for businesses to obtain loans.

71. See generally *id.*

72. *Id.* at 2.

73. *Id.* at 1.

74. *Id.* at 2.

75. *Id.* (citing F.W. TAUSSIG, PRINCIPLES OF ECONOMICS 134 (1916) (income as the creation of utilities); IRVING FISHER, ELEMENTARY PRINCIPLES OF ECONOMICS 34 (1911) (flow of benefits over time)).

76. HAIG ET AL., *supra* note 43, at 7, 27 (emphasis omitted).

formulation, according to Haig, is “the closest practicable approximate of true income.”⁷⁷

Haig’s broad definition of income was not unique to American economists. In the late 1800s, Georg von Schanz published his work, *The Concept of Income and Income Tax Laws*.⁷⁸ In this seminal work, Professor von Schanz discusses at length the concept of income and the definition proposed by different scholars. Importantly, von Schanz defines income broadly as the quantity of goods or their value resulting from production or acquisition in a certain period of time, services to third parties, entitlements and *increases in value*.⁷⁹

At the same time that he defined income broadly, Haig understood that tax legislation would fail to tax many items that would be included in his definition of income. As he writes, “[i]t is an equally long step for the economist between his general definition of income and the content of the category which in his opinion forms the best basis for the imposition of an income tax.”⁸⁰ Legislators, he recognizes, may decide not to tax an item for a number of reasons.⁸¹ “[A]ctual conditions under which the law must function” may require “concessions made to the exigencies of a given situation.”⁸² He then notes that one may choose not to tax appreciated gains until sale, but that decision is because of administrative concerns, not because it is not income.⁸³

Edwin Seligman, considered the “dominant academic voice” in this debate, spent his career as a professor of political economy at Columbia University but has been thought of as an economist.⁸⁴ Like Haig, he distinguished between what can be taxed and what should be taxed.⁸⁵ He recognized that, although Congress had the power to tax income broadly, “[t]he framers of the present law . . . thought it wise to follow the almost universal European example and to confine the term ‘income’ to the ordinary

77. *Id.* at 7.

78. Georg von Schanz, *Der Einkommensbegriff und die Einkommensteuergesetze* [The Concept of Income and Income Tax Laws] 13 PUB. FIN. ANALYSIS 1 (1896).

79. *Id.* (translation from German by Professor Michael van Alstine) (the translated German sentences are “Eine Schwierigkeit ergibt sich, wenn es sich darum handelt zu entscheiden, ob auch Nutzungen, geldwerte Dienstleistungen Dritter, Berechtigungen und Werterhöhungen einzurechnen sind. Man wird diese Frage im allgemeinen bejahen müssen”).

80. HAIG ET AL., *supra* note 43, at 13.

81. *Id.* at 14.

82. *Id.*

83. *Id.*

84. Ajay K. Mehrotra, *Edwin R.A. Seligman and the Beginnings of the U.S. Income Tax*, 108 TAX NOTES 933, 933, 946 (2005). He did receive an LLB, and his work includes many legal arguments. *Id.* at 937.

85. Edwin R. A. Seligman, *The Federal Income Tax*, 29 POL. SCI. Q. 1, 3 (1914).

conception of actual money income.”⁸⁶ He characterized this decision as one of prudence and not of constitutional requirement. That is, his analysis assumes that the Sixteenth Amendment permitted Congress to enact an income tax statute that taxed income broadly, even if it chose not to do so in 1913.

A later work of Seligman’s, *Are Stock Dividends Income?*, is perhaps less clear regarding the distinction between constitutional reach and legislative determinations.⁸⁷ In it, Seligman addressed the question whether stock dividends constitute income,⁸⁸ a question that was coming before the Court for a second hearing in *Macomber*.⁸⁹ Seligman concluded that stock dividends are not income because they are not realized and not separated from the underlying asset.⁹⁰

Although apparently addressing his argument specifically to the question before the Court in *Macomber*, Seligman falls short of arguing that his position is constitutionally required. He first asserts that “[t]he most natural definition of income is all wealth that comes in.”⁹¹ He further explains that the definition of income changes over time. Seligman, however, then takes the position that income, which he views as the inflow of satisfactions, must be realized before we can “predicate of it the quality of income.”⁹²

Nonetheless, in reaching this conclusion, Seligman relies on “almost all modern income tax laws.”⁹³ That is, he relies on statutory examples and not on the constitution.⁹⁴ He thus maintains, without stating so explicitly, the difference between the two.

In short, economists writing before, during, and soon after the debate on the Sixteenth Amendment clearly understood the definition of income to be very broad. At the same time, in the context of enacting an income tax, many of these economists understood that tax legislation would not tax many items that would be included in their definition of income. In reaching this conclusion, however, they do not rely on a limited definition of income. Instead, they recognize that an item may be within the definition of income, but legislators may determine that it is not the proper subject of taxation. Such determinations are proper determinations for the legislature to make in crafting an income tax. They are not, however, constitutional principles

86. *Id.* at 4.

87. Edwin R. A. Seligman, *Are Stock Dividends Income?*, 9 AM. ECON. REV. 517 (1919).

88. *Id.*

89. 252 U.S. 189 (1920).

90. Seligman, *supra* note 87, at 519.

91. *Id.* at 517.

92. *Id.* at 518.

93. *Id.* at 529.

94. *Id.*

limiting Congress's power to tax incomes without apportionment under the Sixteenth Amendment.

The definitions and discussions by early twentieth century economists demonstrate that at the time of the drafting and adoption of the Sixteenth Amendment, economists and "the man in the street" both understood income to be a broad concept.⁹⁵ The fact that the Sixteenth Amendment provides Congress with broad discretion to tax income without apportionment does not mean Congress should or must do so. The power to decide lies with Congress.

Economists during the turn of the century would have been very surprised by the Moores' assertion that realized income is an oxymoron. Economists would have recognized that realized income is one subset of the types of income economists would have understood to exist in 1913.

B. Accountants Working in the Early Twentieth Century Recognized a Broad Definition of Income.

Accountants working in the early twentieth century also viewed income as an expansive concept. The "income statement" or "balance sheet" was designed to reflect the health of a business.⁹⁶ While accounting as a profession was still in its infancy, accounting concepts were already recognizing that an income statement and a business's books reflected more than a business's cash accounts.⁹⁷

In Arthur Lowes Dickinson's leading accounting treatise, which was authored around the time of the passage of the Sixteenth Amendment, he describes accountants' understanding of realization.⁹⁸ For accountants, as an asset increases in value over time, "partial realizations are continually taking place."⁹⁹ This increase takes place even if the profit is not taxed until the ultimate sale of the asset. Dickinson recognizes that in creating proper income accounts, one cannot continually report a gain on a return, but the value can be estimated over the period in question.¹⁰⁰ The profit or loss is therefore the "estimated increase or decrease between any two such periods."¹⁰¹ In order to clearly reflect income, accountants allocated the gain

95. HAIG ET AL., *supra* note 43, at 2.

96. ROY BERNARD KESTER, ACCOUNTING THEORY AND PRACTICE: A TEXT-BOOK FOR COLLEGES AND SCHOOLS OF BUSINESS ADMINISTRATION 22 (2d ed. 1922).

97. For an explanation of how bookkeeping worked in the early twentieth century, see DICKINSON, *supra* note 44, at 13–30.

98. *Id.*

99. *Id.* at 67.

100. *Id.*

101. *Id.*

in an asset as accurately as possible over the period of the gain.¹⁰² According to Dickinson, a business's yearly income would include its profit, which would be measured by its total assets at the beginning and end of the year.¹⁰³

Dickinson also describes how in a single-entry bookkeeping system, which he notes was "adopted for years without bad results," a business can measure its profit by measuring the "surplus so ascertained at the commencement and the end of the year as its profit or loss."¹⁰⁴ Dickinson then clarifies, "every appreciation of assets is a profit, and every depreciation a loss."¹⁰⁵ Similarly, Kester in his treatise, while strongly advocating for a double-entry accounting system, recognizes in a single-entry system, profit is measured by "comparative net worth" for the period provided.¹⁰⁶ To clearly reflect a business' income, income statements in the early 1900s often reflected items of income that had not yet been realized.¹⁰⁷

Supreme Court cases recognize such accounting practices. In *United States v. Anderson*,¹⁰⁸ the corporation "set up on its books of account all the obligations or expenses incurred during the year whether they fell due and whether they were paid during that year."¹⁰⁹ The Court in *Anderson* explicitly recognized that items not yet received in cash, money, or money equivalent would be considered "income" and subject to tax.¹¹⁰ Under the Moores' definition of income, items not yet received, like those referenced in *Anderson*, would escape taxation because they were not realized. *Anderson* indicates that as early as 1916, the definition of income did not require realization.¹¹¹

Similarly, in *Spring City Foundry Co. v. Commissioner*,¹¹² the Supreme Court concluded that accounts receivable were income in 1920, the year the obligation to pay was incurred not in the year in which it was paid.¹¹³ The Court approved the accrual method of accounting to include the accounts

102. *Id.*

103. *Id.*

104. *Id.* at 67–68.

105. *Id.* at 68.

106. KESTER, *supra* note 96, at 22; *see also* Re Spanish Prospecting Co., Ltd., [1911] 1 Ch. 92; [1908-10] All E.R. Rep. 573 at 576 (UK) (Moulton, J.) (the best measure of a company's profits "can only be ascertained by comparison of the assets of the business at the two dates").

107. DICKINSON, *supra* note 44, at 67–68; *United States v. Anderson*, 269 U.S. 422 (1926) (involving accrual accounting and the 1916 taxable year); *Spring City Foundry Co. v. Comm'r*, 292 U.S. 182 (1934) (same as to 1920 taxable year).

108. 269 U.S. 422 (1926).

109. *Id.* at 436.

110. *Id.* at 440–41.

111. *Id.* at 436, 441.

112. 292 U.S. 182 (1934).

113. *Id.* at 189–90.

receivable in income, even though the actual payments had not yet been received.¹¹⁴

While accounting statements and income statements are not the method our tax laws follow in taxing income, this decision reflects Congress's legislative choice. Accountants clearly understand that the definition of income is far broader than the one suggested by the Moores. Congress has the authority to limit the definition of income to only realized income, but that is a decision for Congress. The history and tradition of the way the term has been used in the trade, both in the early part of the twentieth century and today, indicates that a limited definition of income is not the one that should be enshrined in the Constitution.

C. The Leading Legal Treatises of the Time Also Acknowledged the Broad Meaning of Income.

Legal treatises at the time also grappled with the breadth of the term "income." Henry Campbell Black, in *A Treatise on the Law of Income Taxation Under Federal and State Laws*,¹¹⁵ recognized both a broad definition of the word income but advocated for a more limited statutory definition of the word. In the first page of his treatise discussing income, Black notes "[i]t is not a tax upon accumulated wealth, but upon its periodical accretions."¹¹⁶ This understanding directly supports the notion that changes of wealth, not the wealth itself, fall within the broad definition of income. In his history of the income tax, Black also notes that the Tax Act of 1870 "elaborately defined and described" income and included "interest accrued within the year but unpaid, if collectible" and "a stockholder's proportionate share of the undivided profits of the corporation."¹¹⁷ This statement once again shows that Black understood income to be far broader than realized income.

Black also recognizes that Congress has broad discretion with regard to taxation. In discussing the breadth of Congress's power to tax incomes, he notes,

[W]e must not forget that the right to select the measure and objects of taxation devolves upon the Congress, and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. It is no part of the function of a court to inquire into

114. *Id.* at 190.

115. HENRY CAMPBELL BLACK, *A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATES LAWS I* (1913).

116. *Id.*

117. *Id.* at 15.

the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.”¹¹⁸

Despite Black’s understanding that the word income could be defined broadly for purposes of the income tax, Black clearly believed that it was preferable to tax on money received.¹¹⁹ His preference, however, was a policy preference. He advocates that income, for purposes of a *statute* taxing income, should be limited to all that a person “receives in cash during the year.”¹²⁰ Nonetheless, his history of the income tax, however, clearly evidences an understanding that in certain instances, income had been interpreted more broadly than his preference. He notes, for example, that Wisconsin’s income tax law of 1911 provided that “‘income’ shall include the estimated rental value of residence property occupied by the owner.”¹²¹ In addition, Black recognized that the original tax Acts of 1864 and 1870 specifically excluded from income the rental value of a home. Black pointed out that, in contrast, “English and Scotch courts hold that the annual rental value of a house which a man owns and in which he lives . . . is a part of his income for purposes of taxation,” and that on economic grounds such a policy is “more easily defensible.”¹²² That is, he acknowledges that a statute could define income more broadly than he himself would prefer.

Black favors a realization requirement as a statutory matter in constructing an income tax. But he also recognizes that at the time of the Sixteenth Amendment, the definition of income did not require realization. Realized income is a type of income, but the word income, as a concept, does not include only realized income.

Thomas Cooley’s important treatise, *A Treatise on the Law of Taxation*, also distinguishes statutory choices regarding “income” from the potential reach of the concept of income under the Sixteenth Amendment. In discussing the Civil War income tax, for example, Cooley observes, “[i]n 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.”¹²³ Cooley’s comments do not support the notion that changes in wealth are beyond the reach of an income tax.¹²⁴ To the contrary, he points out that, as enacted, the Civil War income tax was unequal because changes in wealth escaped tax. This analysis is best

118. *Id.* at 28 (quoting *Flint v. Stone Tracy Co.*, 220 U.S. 107, 167 (1911)).

119. *See id.* at 76–78.

120. *Id.* at 78.

121. *Id.* at 84; *see also* *State v. Frear*, 134 N.W. 673 (Wis. 1912).

122. BLACK, *supra* note 116, at 85.

123. COOLEY, *supra* note 47, at 20.

124. Brief for Petitioner, *supra* note 4, at 30.

read as an endorsement by Cooley that future income tax laws could reach changes in wealth.

Godfrey Nelson in his *Income Tax and Accounting* also recognizes that while many provisions in the 1913 and 1916 Tax Acts rest on realized income, those provisions do not indicate that only realized income may be taxed.¹²⁵ In fact, Nelson specifically recognizes that accrual accounting taxes some unrealized income.¹²⁶

All of these legal treatises distinguish personal policy preferences and Congressional statutory decisions from the full reach of constitutional authority. Congress can choose how broadly a tax provision should reach.

D. Prior to and During the Drafting and Ratification of the Sixteenth Amendment, Both Its Drafters and Supporters Characterized It as Having the Potential to Tax More Than Realized Income.

The history surrounding the passage of the Sixteenth Amendment demonstrates that the Amendment was designed to provide Congress with broad authority to tax incomes without apportionment. For both Republicans and Democrats, the Sixteenth Amendment offered a means of reducing the country's reliance on a regressive system of tariffs, which taxed consumption but not capital.¹²⁷ The legislative history demonstrates that the constitutional meaning of "taxes on incomes" authorized by the Sixteenth Amendment had the potential to address more than realized income.

125. Nelson explains in his treatise that "[a]n increase in the book value of assets to conform with appraisal values, or for other purposes, does not render such increase taxable as income." GODFREY N. NELSON, *INCOME TAX AND ACCOUNTING* 36 (1918). This sentence could be read to suggest that Nelson was arguing that the word income does not include increases in value. In this section of the treatise, however, Nelson is discussing a new decision by the Treasury Department to modify its regulations to no longer authorize the taxation of increases in the book value of an asset. *Id.* Nelson then refers to a letter from the Collectors of Internal Revenue discussing that modification. *Id.* Nelson is, therefore, referring to a change in the Department of Treasury's interpretation of the statute, not a constitutional definition of income. Nelson then recognizes that some unrealized gains may be taxed. *Id.* at 39.

The original Treasury Regulations promulgated under the 1913 Act provided for taxation of the increase in the value of an asset in certain circumstances. A 1913 Treasury Regulation indicated "gross income embraces not only the operating revenues, but also income, gains, or profits from all other sources . . . and appreciation in values of assets, if taken up on the books of account as gain." OFFICE OF COMM'R OF INTERNAL REVENUE, REGULATIONS NO. 33, Art. 107, LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES 65 (1914) (emphasis added). Nelson, writing with this history in mind explains that this is no longer the case.

126. *See id.* at 39 (accrual method taxpayers should include rent in income when earned even if it is not received); *id.* at 197-98 (recognizing the use of accrual method); *id.* at 45 (recognizing interest not yet received is included if on the accrual basis).

127. *Origins of the Modern Income Tax*, *supra* note 32, at 329.

After the Supreme Court's decision in *Pollock*,¹²⁸ holding that the 1894 Income Tax was a direct tax requiring apportionment, debate arose in the Congress and the country regarding the proper way to implement an income tax in light of the Court's decision.¹²⁹ Some favored passing another statute with the hope that the Court would change its mind, while others proposed a constitutional amendment to allow for a broad-based income tax.

The income tax was a response to an exceedingly regressive tariff-based tax system. Progressives joined with tariff opponents in the South to create a system that would rely less on tariffs and more on taxing the incomes of wealthy individuals.¹³⁰

In spring of 1909, prior to the introduction of the Sixteenth Amendment or President Taft's June 16, 1909, statement in support of a constitutional amendment authorizing an income tax, debate on tax legislation focused on inclusion of an income tax in a tariff bill. Representative Cordell Hull (D-Tenn.) expressed his support for an income tax because it was important for the wealthy in society to pay their fair share. In his comments supporting the income tax, he indicated "the wealth of the country should bear its just share of the burden of taxation and that it should not be permitted to shirk that duty."¹³¹ A few weeks later, moderate Republican Senator Borah from Idaho endorsed an income tax to be enacted "not for the purpose of putting all the burdens of government upon property or all the burdens of government on [the wealthy], but that it may bear its just and fair proportion of the burdens of this Government."¹³² Senator Borah also asserted that the income tax proposal should be seen "not as an assault upon wealth, but as an assault upon the vicious principle of exemption of wealth."¹³³

The drafters and supporters of the Sixteenth Amendment saw it as permitting sufficient revenue for the government, while increasing progressivity and fairness with an income tax. Promoters wanted to tax the incomes of those at the top. They certainly would not have sought to exclude even the possibility of taxing unrealized income, such as stock appreciation. In fact, shortly after passage of the Amendment, Congress sought to tax stock dividends, and the original Treasury Regulation implemented immediately after the passage of the Sixteenth Amendment provided for the taxation of

128. *Pollock*, 158 U.S. at 601.

129. 158 U.S. 601 (1895).

130. See Pollack, *supra* note 32, at 312 & n.102 (quoting *Democratic Party Platform of 1908*, in NATIONAL PARTY PLATFORMS, 1840–1972, at 144, 147 (Donald Bruce Johnson & Kirk H. Potter eds., 5th ed. 1975)) (noting that the platform endorsed a "constitutional amendment specifically authorizing congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government").

131. 44 CONG. REC. 533 (Mar. 29, 1909).

132. 44 CONG. REC. 1682 (May 3, 1909).

133. 44 CONG. REC. 4000 7 (July 1, 1909).

unrealized appreciation of capital assets.¹³⁴ There is no clear evidence for concluding that, at the time of passage of the Sixteenth Amendment, Congress intended the limited definition of income promoted by the Moores.

A drastic limitation of the word “incomes” to include only realized income would have reduced the progressivity of the income tax and would have shifted the tax from a tax on the wealthiest in society to one where large holders of capital could avoid tax and high wage earners could not.

Ignoring capital appreciation and other unrealized gains and taxing only realized income fails to ensure a just and fair share for those whose wealth far exceeds income. Statements from the Amendment’s supporters strongly suggest that, at the time of its adoption, the Amendment was broadly understood as permitting taxation of more than realized income. The income tax was not, and is not, a wealth tax. Promoters of a fairer tax system also sought a corporate tax and estate tax, both of which were held constitutional.¹³⁵ The income tax was designed to reach the annual accretions of wealth, not the wealth itself. That accretion of wealth is income, and it is income whether or not it has been realized.

In short, the legislative history surrounding the adoption of the Sixteenth Amendment demonstrates that it authorized Congress to tax more than realized income.

E. The Phrase “From Whatever Source Derived” Became Part of the Sixteenth Amendment to Ensure Its Breadth, Not to Constrict Its Reach.

President Taft sent a message to Congress on June 16, 1909, recommending an amendment to the Constitution “conferring the power” upon Congress to levy an income tax.¹³⁶ The next day Senator Norris Brown (R-Neb.) introduced a resolution proposing the following amendment: “The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population.”¹³⁷

Senator Brown’s proposed amendment was referred to the Finance Committee, chaired by Senator Nelson Aldrich (R-R.I.). On June 28, 1909, the Committee reported a proposed amendment with revised language: “The Congress shall have power to lay and collect taxes on incomes, from

134. OFFICE OF THE COMM’R OF INTERNAL REVENUE, REGULATIONS No. 33, Art. 107, LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES 65 (1914).

135. See *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 348 (1921) (finding the estate tax constitutional); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 177 (1911) (upholding the Corporate Income Tax).

136. 44 CONG. REC. 3344-45 (June 16, 1909).

137. 44 CONG. REC. 3377 (June 17, 1909).

whatever source derived, without apportionment among the several States and without regard to any census or enumeration.”¹³⁸ Thus, the amendment as proposed by the Finance Committee and ultimately adopted by the Senate both removed the word “direct” from Brown’s resolution and added “from whatever source derived.”¹³⁹ The legislative record does not include any explanation for these changes.¹⁴⁰

The phrase “from whatever source derived” quickly became controversial. In his message of submission to the legislature in 1910, New York Governor Hughes stated that, while he was in favor of granting the power to levy an income tax to the Federal Government, he nonetheless opposed ratification of the Amendment because he viewed the phrase as permitting taxation of income derived from state and municipal bonds. According to Governor Hughes, ““To place the borrowing capacities of the state and its government agencies at the mercy of the Federal taxing power . . . would be an impairment of the essential right of State. . . .”¹⁴¹

Republican Senators Elihu Root, William Borah, and Dennis Brown and Democratic Representative Cordell Hull, along with influential economist Edwin R.A. Seligman, countered Governor Hughes. They argued that Congress had had the power to tax the income from state and municipal bonds for over a century but had chosen not to exercise it: “Seligman, Brown and Hull further argued that, since the income from all securities would be taxed equally, it would not be unconstitutional to tax that from state and municipal bonds.”¹⁴² Nonetheless, governors and legislators in Connecticut, Massachusetts, Louisiana, South Carolina, and Utah echoed Governor Hughes’s concern.¹⁴³ New York’s legislature rejected the Amendment three times in 1910, but ratified it in 1911, after Governor Hughes was appointed to the Supreme Court and New York elected a new Democratic administration and legislature.¹⁴⁴

In 1916, in an 8-0 decision including former New York Governor Hughes, now an Associate Justice, the Supreme Court in *Brushaber v. Union Pacific Railroad*¹⁴⁵ rejected a challenge to the Income Tax Act of 1913. “[T]he whole purpose of the [Sixteenth] Amendment,” the Court wrote, was

138. 44 CONG. REC. 3900 (June 28, 1909).

139. 44 CONG. REC. 4120-21 (July 5, 1909) (passage in the United States Senate); 44 CONG. REC. 4440 (July 12, 1909) (passage in the House of Representatives).

140. See EDWIN R.A. SELIGMAN, INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 595 (1911).

141. John D. Buenker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 190 (1981) (quoting N.Y. TIMES, Jan. 6, 1910).

142. *Id.* at 190.

143. *Id.* at 191.

144. MEHROTRA, *supra* note 39, at 275–76.

145. 240 U.S. 1 (1916).

to overrule the principle of *Pollock* that the determination of whether a tax on income was direct depended on “a consideration of the source whence the income was derived.”¹⁴⁶ The phrase “from whatever source derived” accomplished this goal.¹⁴⁷

Not long after the adoption of the Sixteenth Amendment, Harry Hubbard published an article in the *Harvard Law Review* arguing that the words “from whatever source derived” had broad meaning and “clearly gives power to Congress to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.”¹⁴⁸ Hubbard wrote another article later in 1920,¹⁴⁹ prompted by the decision in *Evans v. Gore*,¹⁵⁰ that the income tax could not reach the salaries of federal judges.¹⁵¹ There, Hubbard reported that after publication of the *Harvard Law Review* piece, he received two letters from Senator Knute Nelson, who was a member of the Senate Judiciary Committee in 1909.¹⁵² Senator Nelson was also disturbed that *Evans* ignored the phrase “from whatever source derived.” In his September 10, 1920 letter, Senator Nelson wrote:

The words “from whatever source derived” were inserted in the amendment in the Senate at my instance and on my insistence. . . . The record may not show it but I introduced the amendment and the facts are that at that time Mr. Aldrich was Chairman of the Finance Committee and I discussed the matter with him and insisted on the amendment being inserted and he concurred with me and reported the bill with the phrase “from whatever source derived.”¹⁵³

Hubbard then concludes, “The word ‘direct’ was taken out, in order not to limit income taxes to those which were ‘direct,’ . . . and the words ‘from whatever source derived’ were inserted, in order to make the power to tax incomes as broad as ‘incomes’ themselves could possibly be.”¹⁵⁴

146. *Id.* at 18.

147. *See also* 44 CONG. REC. 3344-45 (June 16, 1909) (President Taft endorsing constitution amendment to undo Supreme Court income-tax cases); 44 CONG. REC. 4401 (July 12, 1909) (Rep. Hull of Tennessee) (amendment as adopted by the House overruled *Pollock*); 44 CONG. REC. 4408-11 (July 12, 1909) (Rep. Bartlett of Georgia) (same).

148. Harry Hubbard, *The Sixteenth Amendment*, 33 HARV. L. REV. 794, 812 (1919-1920).

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

150. 253 US 245 (1920).

151. *Id.* at 255-256, 264.

152. *Id.* at 203.

153. Hubbard, *supra* note 145, at 203.

154. *Id.* (emphasis in original); *see also* Edwin R.A. Seligman, *The Income-Tax Amendment*, 25 POL. SCI. Q. 193, 198 (1910) (“To say ‘from whatever source derived’ is simply another way of saying ‘irrespective of the source,’ or a shorter way of saying ‘from all sources alike, whether the source be one that previously made apportionment necessary or not.’”).

Such is what the drafting history of the Sixteenth Amendment demonstrates, and such was the drafters' intent. Many factors, among them political and administrative concerns, will shape a statute enacted pursuant to broad constitutional authority. A broad understanding of "incomes" for purposes of interpreting the reach of the Sixteenth amendment includes both realized and unrealized income, even if the 1913 implementing legislation establishing an income tax chose not to tax unrealized income broadly. The fact that Congress chose not to tax income to the full extent of its taxing power does not indicate that Congress lacked the power to do so. Congress is not required to enact legislation that exercises the full extent of its constitutional power.

CONCLUSION

Economists, accountants, and lawyers in the early Twentieth Century all defined income in broad terms, embracing the definition of income as more than money income and including unrealized gain. The legislators who passed the Sixteenth Amendment also envisioned a broad definition of income and clearly understood the word income to include unrealized income. Those legislators were familiar with the income tax statutes that existed before and directly after ratification that taxed unrealized gain. During the period of time near the enactment of the Sixteenth Amendment, prominent critiques of a particular tax act or statutory provision, including the extent to which a tax act did or should tax unrealized gain, were arguments about legislative policy decisions, not the reach of the power granted to Congress in the Sixteenth Amendment.

Key to understanding the word income in the Sixteenth Amendment is understanding the way professionals and scholars in the field were using the term. Article I and the Sixteenth Amendment provide Congress with broad taxing authority. Congress should exercise good judgment in legislating, but the Constitution places that responsibility with Congress, not the courts. In deciding *Moore*, the Court should neither usurp congressional power nor substitute its judgment regarding tax policy for that of Congress by creating a limited definition of income.