No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE and KATHLEEN F. MOORE,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE FORMER ATTORNEY GENERAL EDWIN MEESE III AND PROFESSORS STEVEN G. CALABRESI AND GARY S. LAWSON SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

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INTEREST OF AMICI[1]

The Honorable Edwin Meese III served as the Seventy-Fifth Attorney General of the United States. Previously, Mr. Meese was Counselor to the President. He is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation. During his tenure as Attorney General, the Department of Justice defended proper limits on federal power.

Professors Calabresi and Lawson are scholars of the original public meaning of the Constitution. Members of this Court have cited their work in the past. See, e.g., *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1544-52 (2022) (Thomas, J., concurring) (citing Calabresi); *id.* at 1552 (Gorsuch, J., concurring) (citing Lawson).

SUMMARY OF THE ARGUMENT

The Sixteenth Amendment authorizes Congress to tax "incomes, from whatever source derived" without apportionment among the states. Unrealized capital gains are neither "incomes" nor "derived" within the original meaning of the Amendment. Both popular and legal dictionaries from the years around the ratification of the Sixteenth Amendment confirm that point. So does the amendment's context. and this Court's near-

[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that this brief was not authorized in whole or in part by counsel for any party and that no one other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

contemporaneous decision in *Eisner v. Macomber*. All evidence demonstrates that the original meaning of the Sixteenth Amendment is the commonsense one: realization is a precondition for income; money must come into the hands of a taxpayer in order to be taxable "income."

The Ninth Circuit took a different, unprecedented view. The court of appeals concluded that realization is *not* a precondition for income, and so the Moores could be taxed on unrealized gains in wealth. That rationale is not limited to the Moores, or to the MRT the court applied. Rather, under the Ninth Circuit's analysis, investors might be taxed on their unrealized capital gains in their Vanguard funds or their stock portfolios. Moreover, homeowners might be taxed on their unrealized capital gains in their houses and land. The Ninth Circuit is the only federal court of appeals to so hold. This Court should reverse and restore the original, commonsense meaning of the Sixteenth Amendment.

The American Revolution of 1776 started as a tax revolt. The Framers at Philadelphia knew that a constitution which gave Congress the power to enact a general wealth tax would never have been ratified. So the Framers gave Congress a general power to levy *indirect* "Taxes, Duties, Imposts and Excises," but expressly forbade *direct* taxes unless they were apportioned among the states according to the census.

The Framers correctly anticipated that indirect duties, imposts, and excises would be the preferred route for federal taxation because there is always an

element of voluntariness when one buys an imported good which is subject to a tariff, pays a sales tax on the purchase of a commodity, pays a use or excise tax on a luxury item like a carriage, or pays a gift or an inheritance tax by giving property. The taxpayer can always avoid the federal tax by not buying an imported good or an item subject to a sales tax, by not using a carriage, or by not making a gift or will. A tax on unrealized capital gains is not a tax on a transaction initiated by the taxpayer. It is essentially a wealth tax, which is precisely the kind of head or capitation tax for which the Constitution requires apportionment.

A tax on the Moores' unrealized gain in wealth cannot be considered an indirect duty, impost, or excise. Rather, it is a direct tax. And that requires an apportionment among the several states according to the census, unless excused from apportionment by the Sixteenth Amendment—which it is not.

For these reasons, the tax assessed on the Moores is unconstitutional.

ARGUMENT

I. The Sixteenth Amendment Does Not Authorize Unapportioned Taxation of Unrealized Capital Gains.

Article I of the Constitution gives Congress "[p]ower [t]o lay and collect Taxes." U.S. Const. art. I, § 8, cl. 1. Different kinds of taxes are subject to different limitations: "all Duties, Imposts, and Excises

shall be uniform throughout the United States," *id.,* while "direct Taxes shall be apportioned among the several States, according to their respective Numbers." *Id.* art. I, § 2, cl. 3. More specifically, "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." *Id*. art. I, § 9, cl. 4.

In 1913, the Sixteenth Amendment removed the apportionment requirement for taxes "on incomes, from whatever source derived." *Id.* amend. XVI. The tax imposed on the Moores, which taxes shareholders for undistributed corporate earnings, was not apportioned. The Sixteenth Amendment does not apply to this tax because unrealized capital gains are neither "incomes" nor "derived" within the original meaning of the Sixteenth Amendment. The tax is accordingly unconstitutional.

A. Under the Original Public Meaning of the Sixteenth Amendment, Unrealized Gains Are Not "Income."

Congress proposed the Sixteenth Amendment in 1909, and the states ratified it in 1913. Dictionaries contemporaneous with enactment of the Sixteenth Amendment demonstrate that the ordinary public meaning of "incomes" and "derived' does not refer to unrealized capital gains. Start with the definition of "income" in the 1910 edition of *Black's Law Dictionary*:

> INCOME. The return **in money** from one's business, labor, or capital invested; gains, profit, or private revenue. ***

> "Income" means that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures; while "profits" generally means the gain which is made upon any business or investment when both receipts and payments are taken into account. "Income," when applied to the affairs of individuals expresses the same idea that "revenue" does when applied to the affairs of a state ***. (emphasis added).

BLACK'S LAW DICTIONARY 612 (1910) (emphasis added). Unrealized gains do not provide a "return in money," nor are they comparable to "revenue." No one thinks that the "revenue" of a government rises simply because asset values in its tax base increase. There is no "revenue" until some part of the asset value is transferred. That is the basic distinction between 'income" and "wealth," and the Sixteenth Amendment refers to "income."

The definition in *Black's Law Dictionary* is confirmed by definitions from the 1913 edition of *Noah Webster's Dictionary of American English*. The word "income" is defined as:

> **3.** 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** of a private person, or a corporation, from property; as, a large *income*. (emphasis added).

This is entirely consistent with the definition in *Black's Law Dictionary* (1910). Note that all of the examples given involve realization. No example involves a simple increase in asset value.

The 1913 edition of *Webster's* defines "gain" as:

> **1.** That which is gained, **obtained**, or **acquired**, as increase, profit, advantage, or benefit; -- opposed to *loss*. (emphasis added).

In context, that plainly requires realization. But suppose one disagrees and thinks that the word "gain" in the definition of "income" is ambiguous as to whether the "gain" must be realized. The other two terms in the definition -- "obtain" and "acquire" – dissolve any ambiguity. The 1913 edition of *Webster's* defines "obtain" in full as follows:

> **1.** To hold; to keep; to possess. **2.** To get hold of by effort; to gain possession of; to procure; to acquire, in any way.

Both meanings of "obtain" contemplate the holding, possession, or procuring of the riches sought. This requires the realization of capital gains. *Webster's* definition of "acquire" points the same way:

> **1.** To gain, usually by one's own exertions; to get as one's own; as, to acquire a title, riches, knowledge, skill, good or bad habits.

One does not "acquire riches" when one's house or stock portfolio goes up in value. One would not naturally speak of procuring or acquiring an *unrealized* capital gain. Obtaining or acquiring capital gains would in 1913 have been thought to mean realizing them in some fashion. To see this even more clearly, consider that the 1913 edition of *Webster's* defines "realize" as a transitive verb:

> **1.** To make real; to convert from the imaginary or fictitious into the actual; **2.** to bring into concrete existence; to effectuate; to accomplish; as to realize a scheme or project. **3.** To convert into real property; to make real estate of; as to realize his fortune. **4.** To acquire as an actual possession; to obtain as the result of plans and efforts; to gain; to get; as, to realize large profits from a speculation.

This definition, in conjunction with the others presented here, demonstrates that the word "income" in the Sixteenth Amendment is equivalent to the words "obtain and acquire." Unrealized capital gains are neither things that have been obtained nor are they things that have been acquired.

In addition, unrealized capital gains are not "derived," as that word is used in the Sixteenth

Amendment. *Webster's* 1913 dictionary defines "derive" as meaning "**2.** To receive, as from a source or origin; to obtain by descent or by transmission; to draw." One does not talk naturally about "receiving" or "obtaining" or "drawing" an unrealized capital gain.

"Receive" and "draw" take similar meanings. To "receive" is:

> **1.** To take, as something that is offered, given, committed, sent, paid, or the like; to accept; as, to receive money offered in payment of a debt; to receive a gift, a message, or a letter.

The things described as to be received are tangible like "money in payment of a debt" or "a gift, a message, or a letter."

And to "draw" is: "**10.** To make a draft or written demand for payment of money deposited or due." An unrealized capital gain is not something that one has received or therefore derived. And an unrealized capital gain is the very antithesis of something for which one has demanded the payment of money. Unrealized capital gains would not have been considered to be "income" in 1913, nor would they have been considered to be "derived."

B. The Context of the Proposal and Ratification of the Sixteenth Amendment Confirms that Unrealized Gains Are Not "Income."

Obviously, the words of the Sixteenth Amendment must be looked at in context as well as in dictionaries. Structure and holistic interpretation are key aids to undertaking any good textual analysis. In this case, all contextual clues suggest that the dictionary definitions are accurate accounts of the Sixteenth Amendment's original meaning.

The Sixteenth Amendment was proposed in 1909 by President William Howard Taft to modify the holding of *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *affirmed on rehearing*, 158 U.S. 601 (1895). In that case, Chief Justice Fuller had held for a 5 to 4 majority that a federal tax on rental income on property owned by a taxpayer was a direct tax that had to be apportioned among the states. President Taft clearly recognized that a tax on stock holdings would be a "direct tax on property." 15 Comp. Mess. & Papers of Presidents 7391 (June 16, 1909). Although some people proposed getting rid of the direct tax rule altogether, President Taft—and ultimately the ratifiers of the Amendment—opted for the narrower approach of merely exempting income taxes from the Article I apportionment rule. As a result, the Sixteenth Amendment modified *Pollock*, but did not overturn *Pollock's* overruling of *Springer v. United States*, 102 U.S. 586 (1881).

President Taft's goal was to tax realized income from all sources, including real estate, which is why the Sixteenth Amendment was written to apply to all income "from whatever source derived" without the need for apportionment according to the census. The Supreme Court in the eighteenth and nineteenth centuries said that taxes on land were direct taxes that must be apportioned, and the *Pollock* Court was therefore especially wary of the income in that case because it came from land. Because no one doubts that rent from land is "income" by any dictionary definition, removing *Pollock's* focus on income sources clears the way for unapportioned taxes on rent. But the text of the Sixteenth Amendment removed apportionment requirements only for taxes on "incomes" that are "derived" from *whatever* source.

Nothing in the context of the Sixteenth Amendment suggests that these words mean anything other than what their public meanings indicate. The fact that the phrase "from whatever source derived" may have been included to make it clear that income from property was taxable under the Sixteenth Amendment is no excuse for waiving the requirement that the word "derived" implies "realization" in the case of the Moores' unrealized capital gains.

C. This Court's Precedents, Particularly *Eisner v. Macomber*, Confirm that Unrealized Gains Are Not "Income."

More than a century ago, this Court explained that capital gains—whether in one's home or in one's

stock portfolio—are not "income[]" that is "derived" from any source:

> After examining dictionaries in common use (Bouv. L.D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence v. Howbert,* 231 U. S. 399, 231 U. S. 415; *Doyle v. Mitchell Bros. Co.,* 247 U. S. 179, 247 U. S. 185), "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle* case, pp. 247 U. S. 183-185.
>
> Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*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 (the taxpayer) for his *separate* use, benefit and disposal -- *that* is income derived from property. Nothing else answers the description. ***

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from

> employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

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

Eisner has been distinguished in some lower court cases, but it has never been overruled and it remains good law today. The Ninth Circuit's decision cannot be reconciled with *Eisner*—indeed, the court below did not even try to do so. To affirm, this Court would have to overrule (or quietly ignore) its century-old precedent—one which correctly tracked the Sixteenth Amendment's original public meaning.

But overruling *Eisner* and affirming the Ninth Circuit would be bad law as a matter of constitutional interpretation. And the resulting principle—that unrealized gains are income—would have significant consequences for virtually every taxpayer. The Court would bless taxation of one's unrealized capital gains in one's house or stock portfolio, which would be tantamount to a wealth tax. Article I, Section 9, Clause 4 makes wealth taxes subject to the rule of apportionment. And as we explain below, it is untenable to read the Sixteenth Amendment—which

preserves the line between direct and indirect taxes—as allowing a wealth tax in the form of a tax on unrealized capital gains.

II. The Tax Assessed on the Moores is a Direct Tax that Must be Apportioned Among the States.

A federal tax can avoid the apportionment requirement either by being a tax on "incomes . . . derived" within the meaning of the Sixteenth Amendment *or* by falling within the categories of "Duties, Imposts, and Excises." The Article I apportionment requirement applies only to "direct Taxes." Duties, imposts, and excises are *indirect* taxes and thus outside the apportionment rule; they are instead subject to the requirement that they be "uniform throughout the United States." Everyone agrees that the tax on the Moores was uniform. But that does not save the tax in this case, because it was not among the indirect "Duties, Imposts, and Excises" described in the Taxing Clause. It was a direct tax that must be apportioned unless apportionment is excused by the Sixteenth Amendment.

A. The Original Public Meaning of "Direct Taxes," "Duties," "Imposts," and "Excises" Shows that a Wealth Tax is a Direct Tax.

Article I, section 8, clause 1 gives Congress the 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," as

long as "all Duties, Imposts and Excises shall be uniform throughout the United States."

The power to tax is not unlimited. Article I, section 2 requires that "Representatives and direct taxes" be "apportioned among the several States" in accordance with the census. And Article I, section 9 adds that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken." The fact that the Framers mentioned the apportionment rule *twice* in the original Constitution is good evidence of how much they cared about it!

Different rules thus apply to direct and indirect taxes. So, what is the difference between a "direct tax" on the one hand and a "duty, impost[, or] excise" on the other?

The distinction between direct and indirect taxes is simple in concept, if sometimes difficult in application. A direct tax falls on a person without their taking any action, whereas an indirect tax falls on transactions. This is consistent with the ordinary meaning of "direct" as "[s]trait, not crooked." SAMUEL JOHNSON'S DICTIONARY OF THE ENGLISH LANGUAGE (1755). A direct tax falls "strait" on a person.

By contrast, duties, imposts, and excises fall instead on transactions among persons. Examples are easy enough to conjure: an import duty on imported goods, a sales tax on groceries, a use tax on luxury goods like carriages, or paying gift or inheritance taxes when transferring money from yourself to a child,

grandchild, or friend. This is confirmed by the definitions given to duties, imposts, and excises by *Samuel Johnson's 1755 Dictionary of the English Language*. To understand what a direct tax is, one must first understand what it is not.

> **Du'ty.** ***n.s.***
> **[from *due*.]**
> ***
>
> 7. Tax; impost; custom; toll.
> All the wines that come down from Tuscany make their way through several *duties* and taxes, before they reach the port.
>
> **I'mpost.** ***n.s.***
>
> [*impost,*
> *impôt,* French; *impositum,* Latin.] A tax; a toll; custom paid.
>
> Taxes and *imposts* upon merchants do seldom good to the king's revenue; for that that he wins in the hundred, he loseth in the shire.
> *Bacon's Essays.*
>
> **EXCI'SE.** ***n.s.***
>
> [*accijs,* Dutch; *excisum,* Latin.] A hateful tax levied upon commodities, and adjudged not by the common judges of property, but

> wretches hired by those to whom excise is paid.

The payment of duties, imposts and excises is in some sense voluntary, because if the rate is set too high, the buyer will simply decide not to engage in the transaction. So long as duties, imposts, and excises target voluntary behavior between a buyer and seller or a giver and recipient, the buyer or giver can always decline to make the transaction and avoid the tax. Thus, all the Constitution needed to do to guarantee justice in the imposition of duties, taxes and imposts was to require that they be uniform in Virginia, Massachusetts, and among the United States generally.

The payment of direct taxes, however, falls directly and straight upon the individual who is taxed. He cannot voluntarily escape direct taxes by not buying or giving something. Hence, the Constitution requires apportionment for direct taxes like capitation taxes. A tax on unrealized capital gains is obviously not a tax on a transaction engaged in by the stockholder. It is a direct tax.

B. The Context of Article I Confirms that a Wealth Tax is a Direct Tax.

Direct taxes replaced the old Articles of Confederation system whereby the Continental Congress had requisitioned the 13 states to pay money to the federal government, with only some states complying. The provision of federal power to impose apportioned direct taxes on individuals bypassed the

state governments altogether and thus did not allow some states to cheat or freeload off of other states. This grant of federal power to tax directly stirred fear among the opponents of the Constitution, who remembered all too well the abuses the English government had made of the power of taxation in the 1760's and 1770's.

The Framers response was twofold: First, they insisted that, in times of peace and not of war, the federal government would be funded solely by duties, imposts, and excises. Second, the Framers insisted that, if in time of war, a direct tax was needed, it would be apportioned among the states equally according to their population. There would be no more free riding where some state citizens paid federal requisitions through their state legislatures and others did not. The reason the Framers limited the federal taxing power as much as they did is because they knew that the American Revolution of 1776 was (in large part) a tax revolt. A proposed Constitution in 1787 that gave the federal government broad power to tax wealth would never have been ratified by the states.

James McHenry, a Maryland Delegate to the Constitutional Convention, explained it this way to the Maryland House of Delegates shortly after the Convention:

> [The] Convention have also provided against any direct or Capitation Tax but according to an equal proportion among the respective States: This was thought a necessary precaution though it was the

> idea of everyone that government would seldom have recourse to direct Taxation, **and that the objects of Commerce would be more than Sufficient to answer the common exigencies of State** and should further supplies be necessary, the power of Congress would not be exercised while the respective States would raise those supplies in any other manner more suitable to their own inclinations.

The Records of the Federal Convention of 1787, 3:149 (Max Farrand ed., University Press 1937), https://press-pubs.uchicago.edu/founders/documents/a1_9_4s5.html (emphasis added).

And James Madison, who needs no introduction here, explained in The Federalist No. 54 (emphasis added):

> The establishment of the same rule for the apportionment of taxes, will probably be as little contested ***. **[I]t has reference to the proportion of wealth,** of which it is in no case a precise measure, and in ordinary cases a very unfit one.

And as Robert Natelson explains in *What the Constitution Means by "Duties, Imposts, and Excises" -- and "Taxes" (Direct or Otherwise),* 66 Case West. L. Rev. 297, 308-09 (2015):

During the founding era, the distinction between direct and indirect taxes seems not to have been obscure. Among British sources, the distinction appears in Adam Smith's *Wealth of Nations* (a text whose influence was greater among Americans than once believed), newspapers and pamphlets, Parliamentary proceedings, and government documents.

American references to the distinction are, if anything, even more plentiful, and many Americans apparently were familiar with the criteria that classified a levy as "direct" or "indirect." As John Marshall, the future Chief Justice, observed in a speech at the Virginia ratifying convention, "The objects of direct taxes are well understood." Marshall listed them as "[l]ands, slaves, stock [i.e., business capital] of all kinds, and a few other articles of domestic property." Another future Chief Justice—Connecticut's Oliver Ellsworth—told his state's ratifying convention that targets of direct taxes included (he did not say "were limited to") the "tools of a man's business . . . necessary utensils of his family." Ellsworth thus corroborated Marshall's references to "stock" and "domestic property." After the Pennsylvania ratifying convention, delegates in the Anti-Federalist minority issued a

> statement that identified the subjects of direct taxes as those on polls (as confirmed by the Constitution) and on "land, cattle, trades, occupations, etc." The most highly regarded of the Anti-Federalist writers, the "Federal Farmer," listed as objects of Congress's power of direct taxation, "polls, lands, houses, labour, &c." Remarks such as these strongly suggest that direct taxes included a good deal more than, as is sometimes claimed, land levies and capitations.

Land was thus a mere proxy for wealth in the 1780's to an extent that is no longer true in the United States today in 2023. As a result, we should understand a few of the Framer's references to "land" taxes as being direct taxes to mean that wealth taxes play the role in 2023 that land taxes used to pay. In 1770, more than half of all capital was held in agricultural land and 80 percent of all capital was held in a combination of agricultural land and housing. By 2010, however, only 5 percent of capital in the United States was held in agricultural land and 35 percent in agricultural land plus housing. In 2010, at least 60 percent of wealth was held as other domestic capital, probably invested in stock markets, bond funds, and hedge funds as well as bank accounts.

Hugh Williamson, in a debate on cod fisheries in the House of Representatives said on February 3, 1792 that:

In the Constitution of this Government there are two or three remarkable provisions, which seem to be in point. It is provided, that direct taxes shall be apportioned among the several States according to their respective numbers. It is also provided that all duties, imposts, and excises, shall be uniform throughout the United States; and it is provided, that no preference that no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over another. The clear and obvious intention of the articles mentioned was, **that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another.** It appeared possible, and not very improbable, that the time might come, when, by greater cohesion by more unanimity, by more address, **the Representatives of one part of the Union might attempt to impose unequal taxes, or to relieve their constituents at the expense of other people.** To prevent the possibility of such a combination, the articles that I have mentioned were inserted in the Constitution.

Wherefore was it provided that no duty should be laid on exports? Was it not to defend the great staples of

> **the Southern States---tobacco, rice and indigo---from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes?**

Annals of Congress. The Debates and Proceedings in the Congress of the United States, 378-80 (Gales & Seaton 1834-1856), https://press-pubs.uchicago.edu/founders/documents/a1_9_4s11.html (emphasis added).

As it happens, the U.S. Chamber of Commerce has produced a chart, which shows the enormous geographic inequities a wealth tax would result in if imposed in the United States today.[2] The ten richest states are in order of their wealth: Connecticut, Massachusetts, New York, Alaska, New Jersey, North Dakota, Maryland, Hawaii, Wyoming, and Minnesota. They are followed by a lower tier of 29 states, which in order of their respective wealth includes: Delaware, New Hampshire, California, Vermont, Washington, Colorado, Rhode Island, Virginia, Illinois, Oregon, Pennsylvania, Wisconsin, Nebraska, Iowa, Kansas, Montana, Ohio, Michigan, Maine, Utah, Texas, Missouri, Nevada, Indiana, Florida, New Mexico, Tennessee, North Carolina, and Georgia. The poorest eleven states and jurisdictions by wealth are in order: Oklahoma, Arkansas, Arizona, Kentucky, South

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[2] *How Rich Is Each State?*, U.S. Chamber of Commerce, https://www.chamberofcommerce.org/how-rich-is-each-us-state/ (last visited Sept. 5, 2023).

Carolina, West Virginia, Idaho, Louisiana, Alabama, Mississippi, and the District of Columbia.

This chart strongly suggests that a wealth tax today would be as inequitable as a land tax in 1787 would have been in the way in which it would fall upon the states. Clearly, the Rule of Apportionment should apply to wealth taxes and not the more easily satisfied Rule of Uniformity.

One final textual puzzle remains. Why does the Constitution in Article I, Section 2 and in Article, I, Section 9 refer to "*direct*" taxes and not just to taxes? We suspect the reason is because Samuel Johnson's 1755 Dictionary of the English language confusingly defined the word "tax" as:

1. An impost; a tribute imposed; an excise: a tallage.

Article I, Section I, Clause 1, however, says that "imposts" like "duties" and "excises" are indirect taxes that are subject to only the Rule of Uniformity because the consumer can always refuse to buy the goods in question and thus avoid the tax. By using the adjective "*direct*" before taxes in Article I, Section 2 and in Article I, Section 9 the Constitution makes it crystal clear that unavoidable taxes that an individual must pay, i.e. "direct" taxes, are subject to the onerous Rule of Apportionment. That rule replaced the Articles of Confederation's system of requisitions upon the states with a direct tax, which was apportioned according to the census, which the citizens of each state must pay.

C. Case Law in *Hylton v. United States* and *Pollock v. Farmer's Loan & Trust Co.* Does Not Establish that Wealth Taxes Are Indirect

From time to time, the Court has opined in dictum that the only "direct Taxes" described in the Constitution are head taxes and land taxes. That is obviously wrong as a matter of original meaning, and there is no holding that requires such an incorrect result. The Constitution would never have been ratified had direct taxes meant only capitations and real estate taxes.

The Court first addressed this issue in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), which upheld the constitutionality of a federal *excise* tax on horse-drawn carriages, a luxury item. Before enactment of the tax, there took place the following discussion in the House of Representatives.

> An engrossed bill, laying *duties* upon carriages for the conveyance of persons, was read for the third time [and amended]
>
> Mr. Madison objected to this tax on carriages as an unconstitutional tax; and as an unconstitutional measure he would vote against it.
>
> Mr. Ames said, that it was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the

> gentleman who spoke last. *In Massachusetts, this tax had been long known; and there it was called an excise.* It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so. The duty falls *not on the possession, but the use;* and it is very easy to insert a clause to that purpose, which will satisfy the gentleman himself. Mr. Madison had said that the introduction of this tax would break down one of the safeguards of the Constitution. Mr. A. really saw very little danger to the Constitution from it.

4 ANNALS OF CONG. 729-30.

The tax on carriages was entitled as being a *duty*, or *excise* tax, and the statements of individual Supreme Court justices in *Hylton* purporting to limit direct taxes to capitations and land taxes were all dicta.

There are numerous reasons why *Hylton* is not controlling. First, the case was obviously contrived, and the Court had no jurisdiction. *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?,* 97 COLUM. L. REV. 2334, 2351 (1997):

> [*Hylton*] was a test case crafted out of whole cloth by a number of Virginians unhappy with the tax—'everyone knew

> that the case … was feigned,' writes William Casto [WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 101 (1995)]—and it was embraced by a Federalist bench that, one might infer, wanted to make a statement about national power. Hylton claimed to have 125 carriages for his use own use (more, wrote Edward Whitney, "than then existed in Virginia"), presumably because the threshold jurisdictional amount required for Supreme Court review was $2,000 (125 carriages with tax and penalties totaling $16 per carriage). Even if believed, the patently phony claim should not have worked: for Supreme Court jurisdictional purposes, the dollar amount at issue was supposed to *exceed*, not merely equal, $2,000, and as the parties had agreed that any liability of Hylton's could be discharged for only sixteen dollars, equaling the tax due on one carriage plus penalties. Nevertheless, *Hylton* went ahead without any Justice questioning the Court's power to nullify congressional acts on constitutional grounds.

Second, the views of all four of the seriatim opining justices were unelaborated dicta. Justice Chase accepted the statutory classification of the tax as a duty, which was enough to resolve the case, but

he added at the end of his opinion: "I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply without regard to property, profession or any other circumstance; and a tax on land" 3 U.S. (3 Dall.) at 175 (emphasis added). Next up was Justice Patterson, whose rambling, policy-filled opinion openly sought to limit rather than interpret the Apportionment Clause, which he dismissed as a bad idea. *See id.* at 177-78. He acknowledged that "[w]hether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper." *Id.* at 176. Justice Iredell puzzlingly concluded that the carriage tax must be an indirect tax because it would be hard to apportion, *see id.* at 181-82, but he eschewed adopting any general approach beyond the facts of the case, saying that "[t]here is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases." *Id.* at 183. Justice Cushing did not participate in the case, and Justice Wilson said nothing. *See id.* at 183-84. There is nothing in *Hylton* that provides a general test for distinguishing direct from indirect taxes.

Moreover, we live in a world where sixty percent of our capital assets or more are in stocks, bonds, or mutual funds and not in land or houses. Land or houses were a proxy for wealth at the founding. If the direct tax clause forbade a founding

era wealth tax on land, it should be read as forbidding a modern era wealth tax on financial assets as well.

This Court in *Scholey v. Rew*, 90 U.S. 331, 348 (1875), correctly upheld the constitutionality of an estate tax that applied to land, saying that it was not a direct tax on land, but instead "an excise on the passage of value, and excises need not be apportioned." That was a transactional tax, which is clearly indirect. In *Springer v. United States*, 102 U.S. 586 (1881), the Supreme Court declared for the first time that direct taxes were only capitation or real estate taxes. *Id.* at 602. Fourteen years later, however, the Supreme Court overruled *Springer* in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), thereby expanding direct taxes to include income realized from property.

In *Pollock*, which has not been overruled, and which remains good law today, the Supreme Court accepted the *Hylton* dictum that taxes on land are quintessentially direct taxes but concluded that there was no constitutionally significant difference between a tax on land and a tax on the income from land. Both diminish the value of real property and so both are subject to the Rule of Apportionment.

Chief Justice Fuller aptly explained that indirect taxes include "taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal obligation to pay them." *Pollock*, 157 U.S. at 558. But "a tax on property holders . . . or of the income yielded by such estates" which "cannot be avoided" is a direct tax.

As Jensen argues, "The apportionment rule was in part a response to the fundamental deficiency of the requisitions process: '[T]here were no means of compulsion, as Congress had no power whatever to lay any tax upon individuals.' With the power to tax individuals came a check—the apportionment requirement. And as Fuller emphasized, 'The men who framed and adopted [the Constitution] had just emerged from the struggle for independence whose rallying cry had been that 'taxation and representation go together,'" Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?,* 97 COLUM. L. REV. at 2369. The Sixteenth Amendment, proposed by President William Howard Taft in 1909, and ratified in 1913 provided that, contrary to *Pollock*, income taxes could be collected without reference to the Rule of Apportionment, but it did not do away with that rule for other direct taxes like the wealth tax on unrealized capital gains assessed against the Moores in this case.

The Supreme Court's most recent tussle with direct taxes took place in the Chief Justice's opinion in *NFIB v. Sebelius*, 567 U.S. 519 (2012). There, a majority of the Court agreed that the Affordable Care Act's mandate that people buy health insurance exceeded congressional power under the Commerce and Necessary and Proper Clauses. The Chief Justice concluded, however, that the mandate could be considered to be a tax, and he upheld it as a direct tax because it was not a capitation tax or a land tax or a tax on personal property like the tax on the Moores in this case. 567 U.S. at 571. This dictum on an issue not briefed by the parties was unnecessary. The

Affordable Care Act mandate was a direct tax, but it fell under the Sixteenth Amendment exception from apportionment for income taxes. The penalty for not buying health insurance under the ACA was payable only by people making more than $43,000 a year on their income tax. The ACA tax was thus a direct tax, but it was a direct tax on income supported by the Sixteenth Amendment.

Some may say that the Direct Tax Clauses are irredeemably tied to the original sin of slavery because Article I, Section 2 said before Reconstruction that "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." The Direct Tax Clause of Article I, Section 9 contains no such taint and has no three-fifths clause. The only reason direct taxes were mentioned in conjunction with the three-fifths clause in Article I, Section 2 was because that was the basis of representation prior to the Reconstruction Amendments. "Taxation without representation" was recognized as being contrary to the principles of the American Revolution and fundamentally unjust.

There is no reason to damn a system in which the government was originally funded in normal times only by indirect taxes called "duties", "imposts", and "excises" while retaining federal power in times of war and emergency to go beyond requisitioning the states

for money and tax citizens directly "in Proportion to the Census or enumeration herein before directed to be taken." "No taxation without representation" had been the rallying cry of the great tax revolt that was the American Revolution. Obviously, at the time of the Framing the unavoidable obligation to pay direct taxes simply had to be tied to the system of representation.

Moreover, the New Deal did not effectuate a constitutional moment or revolution that threw enumerated powers federalism, including the Direct Tax Clause, out the window. This Court has repeatedly enforced enumerated powers federalism provisions in other contexts. See *United States v. Lopez*[3]; *United States v. Morrison*[4]; *City of Boerne v. Flores*[5]; and *Shelby County v. Holder*.[6] While some may wish the New Dealers had adopted a constitutional amendment abolishing enumerated powers federalism in 1937, no such enactment was ever proposed or ratified. It is just as important to enforce enumerated powers federalism constraints in the Tax Clauses as it is in the Commerce Clause, the Necessary and Proper Clause, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment. The New Deal did not repeal the idea of "no taxation without representation."

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[3] 514 U.S. 549 (1995).
[4] 529 U.S. 598 (2000).
[5] 521 U.S. 507 (1997).
[6] 570 U.S. 529 (2013).

In sum, there is no binding case authority that requires ignoring the Constitution's original meaning.

CONCLUSION

The tax imposed on the Moores' unrealized capital gain is not an income tax within the meaning of the Sixteenth Amendment. It is instead a wealth tax, and wealth taxes are direct taxes, which must be apportioned among the States.

Respectfully submitted,

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