Hybrid Rights and Taxation

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* J.D. 2024, Harvard Law School; B.S.B. 2021, University of Minnesota. For their enlightening insight and comments, I give my deepest thanks to Professor Thomas Brennan and the members of the writing group on taxation at Harvard Law School: Nate Bartholomew, Sam Blackman, Audrey Cheng, Sophia Kwende, and Fritz Schemel. I also give my sincere thanks to the editors of the *Georgetown Journal of Law & Public Policy* for their invaluable work and feedback. All errors are my own.

INTRODUCTION

Across American history, taxes have had no shortage of critics. Writing about "[o]ur new Constitution" in a 1789 letter to Jean-Baptiste Le Roy, Benjamin Franklin famously declared "in this world nothing can be said to be certain, except death and taxes."[1] Nearly 150 years later, author Margaret Mitchell conveyed a similar sentiment in her Pulitzer Prize–winning novel, *Gone with the Wind*: "Death and taxes and childbirth! There's never any convenient time for any of them!"[2] Physicist Albert Einstein reportedly lamented to his accountant that "[t]he hardest thing in the world to understand is income taxes,"[3] comedian Jon Stewart once joked that the Internal Revenue Service "forc[es] Americans to live as borderline hoarders,"[4] and the late President Jimmy Carter labeled the Internal Revenue Code "a disgrace to the human race."[5] Even Chief Justice John Marshall, often praised as the greatest American jurist,[6] argued "the power to tax involves the power to destroy."[7]

He was far from the only prominent Founding-era figure airing this concern. Recalling then-recent frustrations with British levies during the colonial period, the Continental Congress sought to strictly circumscribe their newfound central government's taxing authority.[8] And despite widespread acknowledgment that the resulting Articles of Confederation failed largely due to these overly weak tax

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1. Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 12 THE WORKS OF BENJAMIN FRANKLIN 160, 161 (John Bigelow ed., federal ed. 1904).

2. MARGARET MITCHELL, GONE WITH THE WIND 668 (1936).

3. Leo Mattersdorf, Letter to the Editor, *Einstein on Taxes*, TIME, Feb. 22, 1963, at 12.

4. *The Daily Show with Jon Stewart: IRS—Straight Outta Incompetence*, COMEDY CENT., at 06:16 (television broadcast June 24, 2014).

5. Jimmy Carter, Address Accepting the Presidential Nomination at the Democratic National Convention in New York City (July 15, 1976), *reprinted in Transcript of Carter Address Accepting Democratic Nomination for Presidency*, N.Y. TIMES, June 16, 1976, at 10.

6. *See* OLIVER WENDELL HOLMES, *John Marshall. From the Bench, February 4, 1901 Address at Northwestern University Law School, 1902*, *in* COLLECTED LEGAL PAPERS 266, 270 (1920) (celebrating Chief Justice Marshall's legacy).

7. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

8. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 16 (2016).

provisions,[9] the delegates to the Constitutional Convention extensively debated[10] and ultimately established another scheme of governmental limits on,[11] and individual protections from,[12] taxation. Indeed, even when abrogating one of the most notorious Supreme Court decisions to date over one century after the Founding,[13] Congress and forty-two ratifying states[14] expanded the government's taxing powers subject to a crucial—yet still hotly contested[15]—condition.[16]

But to the presumed chagrin of statesmen from these pivotal moments, their seeming limits on taxation have proven ineffective. Through precedent dating back as early as 1796,[17] the Supreme Court has generally proven receptive to Congress's increasingly expansive,[18] intrusive,[19] and lucrative[20] taxing practices. And in the rare instances when this has not occurred,[21] the Court quickly returned to government-favored tax jurisprudence[22] after receiving sharp backlash from the academy and public alike.[23] It should come as no surprise, then, that many

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9. *See* ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 155 (1993) (arguing the requisition system's failure formed the "central impetus" for the Constitution).

10. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6 (1999) ("During the revolutionary era, taxation was at the very center of popular consciousness. The break with Britain was motivated largely by this issue, and debate continued unabated throughout the 1780s."); Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1, 2 (2013) ("Debates over which governmental body could impose taxes inflamed the delegates to the Constitutional Convention.").

11. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (establishing, inter alia, the apportionment rule).

12. *See, e.g.*, U.S. CONST. amend. V (establishing, inter alia, the Due Process Clause).

13. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 388–89 (2011) (listing *Pollock* among the "anticanon").

14. *See* JOHNNY H. KILLIAN ET AL., CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 33 n.8 (2004).

15. *See* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 741 (2020) (noting "[s]cholars continue to debate the limits of Congress's power" conferred under the Sixteenth Amendment).

16. *See* U.S. CONST. amend. XVI (empowering Congress to tax "income[]" without apportionment).

17. *See generally* Hylton v. United States, 3 U.S. (3. Dall.) 171 (1796) (upholding tax on carriage possession).

18. *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 43, 81, 83 (1900) (upholding estate taxes as indirect); Bromley v. McCaughn, 280 U.S. 124, 134, 138 (1929) (upholding gift taxes as indirect).

19. *See, e.g.*, Polselli v. IRS, 598 U.S. 432, 445 (2023) (upholding unnoticed and unchallengeable IRS summonses).

20. *See, e.g.*, Cook v. Tait, 265 U.S. 47, 56 (1924) (upholding tax on income generated by Mexican property while taxpayer lived in Mexico since "government by its very nature benefits the citizen and his property wherever found").

21. *See, e.g.*, Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 618 (1895) (invalidating pre–Sixteenth Amendment income tax); Eisner v. Macomber, 252 U.S. 189, 219 (1920) (invalidating post–Sixteenth Amendment stock split tax).

22. *See, e.g.*, Flint v. Stone Tracy Co., 220 U.S. 107, 177 (1911) (upholding pre–Sixteenth Amendment corporate income tax); United States v. Phellis, 257 U.S. 156, 165, 168–69 (1921) (upholding tax on distribution of subsidiary's stock).

23. *See, e.g.*, Letter from Archibald Butt to Clara Butt (July 1, 1909), *in* 1 TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 133, 134 (1930) ("Nothing has ever injured the prestige of the Supreme Court more than [*Pollock*] . . . ."); Thomas Reed Powell, *Income from Corporate Dividends*, 35 HARV. L. REV. 363, 376 (1922) (noting the oddity "in the idea that a man may indefinitely grow richer without ever being subject to an income tax").

scholars today describe congressional taxing authority as extremely capacious, if not outright unlimited.[24] To coopt a rhetorical question "[f]or folks at home" during President Joe Biden's last State of the Union address: "[D]oes anybody really think the tax code is fair?"[25]

Last year, the Court seemingly had a chance to correct course. In 2005, Charles and Kathleen Moore invested $40,000 for thirteen percent of the common stock in an Indian corporation that the Code deemed a "controlled foreign corporation" (CFC) due to its majority U.S. ownership.[26] While this business generated consistent profits between 2006 and 2017 (all of which it reinvested in itself), the Moores incurred zero taxes from the IRS;[27] instead, they received favorable treatment because Congress had exacted levies on only various passive categories of undistributed foreign receipts, not active business income.[28] This regime changed, however, with the overhaul of international taxation in the colloquially named Tax Cuts and Jobs Act of 2017.[29] As part of this reform, Congress enacted the Mandatory Repatriation Tax (MRT), which established a retroactive, one-time transitional levy on CFC profits made between 1987 and 2017 for certain U.S. investors—including the Moores.[30] Incurring nearly $15,000 in additional taxes from the MRT alone, they alleged this provision violated the Constitution[31] in *Moore v. United States*.[32]

Unfortunately for the Moores and other litigious taxpayers, seven Justices disagreed.[33] Writing for a five-member majority,[34] Justice Kavanaugh delivered a self-labeled "narrow"[35] holding wherein Congress may constitutionally tax an entity's realized yet undistributed income either by taxing the entity itself or by "attributing" such income to the entity's owners and then taxing them accordingly.[36] Repeatedly

24. *See, e.g.*, Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 555 n.65 (2011) (book review) (referring to "Congress's unlimited taxing power"); Abigail R. Moncrieff & Jonathan Dinerstein, *Will Uncooperative Federalism Survive* NFIB*?*, 76 MONT. L. REV. 75, 83 (2015) ("Congress holds an unlimited (legal) power to tax and spend."); Eric Kades, *Preserving a Precious Resource: Rationalizing the Use of Antibiotics*, 99 NW. U.L. REV. 611, 669 n.175 (2005) (describing "virtually unlimited taxation powers of Congress"); Charles E. Rice, *A Cultural Tour of the Legal Landscape: Reflections on Cardinal George's Law and Culture*, 1 AVE MARIA L. REV. 81, 87 (2003) (same).

25. President Joseph Biden, State of the Union Address (Mar. 7, 2024), *in* 170 CONG. REC. S2272, S2275 (daily ed. Mar. 7, 2024).

26. Moore v. United States, 144 S. Ct. 1680, 1686 (2024); *see also* I.R.C. § 957(a) (defining CFC).

27. *Moore*, 144 S. Ct. at 1686.

28. *Id.*

29. *Id.* at 1685–86; *see also* Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.).

30. *Moore*, 144 S. Ct. at 1686; *see also* I.R.C. § 965 (establishing said tax).

31. *See* Complaint for Refund of Federal Income Tax and Interest ¶¶ 24, 34–36, *Moore*, No. C19-1539.

32. 144 S. Ct. 1680.

33. *Id.* at 1684.

34. Justice Barrett, joined by Justice Alito, concurred in the judgment to both assert the presence of a realization requirement in the Sixteenth Amendment, *id.* at 1700 (Barrett, J., concurring in the judgment), and criticize the majority's overly lax approach toward the arbitrariness limit on income attribution, *id.* at 1708.

35. *Id.* at 1696 (majority opinion) ("[W]e emphasize that our holding today is narrow.").

36. *Id.* at 1688–89.

noting his opinion's consistency with "longstanding precedents,"[37] Justice Kavanaugh rejected the Moores' "inventive" attempts to distinguish both prior cases and similar attribution-based taxes.[38] Instead, he argued the MRT's unconstitutionality would throw a host of other foundational taxes into legal dubiety—depriving the federal government of "trillions in lost tax revenue," and ultimately creating "fiscal calamity."[39]

Indeed, the sheer volume of cases, statutes, regulations, and other legal authority threatened by the taxpayer's (now-hypothetical) victory in *Moore* was simply staggering.[40] In the buildup to *Moore*'s release, numerous well-established tax scholars observed the massive disruption that such a holding would impose across the Code, ranging from partnership tax[41] to original issue discount rules.[42] And although legal cynics often claim the Roberts Court no longer respects stare decisis,[43] even the most obstinate of jurists would look for feasible alternatives before casting doubt over such vast bodies of complex and significant law. Accordingly, without some principled means to distinguish controversial taxes of present from those imposed and upheld in the past, the Court seems destined to indefinitely repeat Justice Kavanaugh's maneuver in *Moore*: reaffirm precedent and continue endorsing ever-broader invocations of congressional taxing authority.

But there is a new, yet also familiar, path forward. Instead of hewing closely to stare decisis or dismantling much of the current Code, the Court can restore individual protections from taxation by adopting a doctrine commonly associated with its Free Exercise Clause jurisprudence: hybrid rights. By enabling litigants to combine multiple claims of constitutional impropriety into a single, more potent sum, this framework would repackage government-favored precedent on standalone clauses into meaningful overall protections for taxpayers—thereby foreclosing the most contentious proposals currently before Congress, including levies on wealth and unrealized gains.

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37. *Id.* at 1685, 1689, 1691.

38. *Id.* at 1693–96.

39. *Id.* at 1695–96.

40. *See* Brief of Amici Curiae Reuven Avi-Yonah et al. in Support of Respondent at 3–18, *Moore*, 143 S. Ct. 2656 (No. 22-800) (Oct. 19, 2023) (documenting numerous areas of tax law disturbed had the petitioners in *Moore* prevailed).

41. *See* Ari Glogower et al., Moore v. United States*: Avoiding a Damaging Limiting Principle in the Sixteenth Amendment*, YALE J. ON REG: NOTICE & COMMENT (Jan. 12, 2024).

42. *See* Reuven S. Avi-Yonah, Letter to the Editor, *If* Moore *Is Reversed*, TAX NOTES (June 26, 2023), available at https://www.taxnotes.com/featured-analysis/if-moore-reversed/2023/06/23/7gwyt [https://perma.cc/8VAM-LVBB].

43. *E.g.*, Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022) ("[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis."); Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 664 (2022) ("[T]he Roberts Court's textualist Justices have proved quite willing to reject stare decisis and overrule even directly on-point precedents . . . ."); *see also* William Baude, *Precedent and Discretion*, 2019 S. CT. REV. 313, 334 (2020) (anticipating "many reports in the coming years will likely assert that the Roberts Court has rendered stare decisis nothing but a pretense").

This Note investigates the prospects of such a doctrinal extension. Part I surveys tenable and commonly cited constitutional provisions that purport to constrain federal taxation, concluding each was originally intended to limit Congress but has since been rendered a nullity. Part II details hybrid rights recognized elsewhere in constitutional law; despite this doctrine's facial relegation to just the Free Exercise Clause, Justices of widely varying ideologies have substantively applied analogous logic across other individual rights and the Constitution more broadly. Finally, Part III leverages the reasoning detailed in Part II to circumvent the deficiencies identified in Part I, arguing that hybrid rights are especially well-suited for taxation given their ability to bolster governmental constraints without overruling precedent. While often characterized among legal conservatives as promoting extraconstitutional policymaking, this doctrine can facilitate principled decisions with desirable outcomes in certain contexts. And taxation is one of them.

I. THE INEFFECTIVENESS OF CONSTITUTIONAL TAX CLAIMS STANDING ALONE

Before extending the hybrid-rights doctrine any further, a crucial premise first warrants discussion: why can most taxpayer-litigants, including the Moores, not simply rely on standalone constitutional provisions? After all, the Framers tried to carefully circumscribe Congress's largely newfound taxing authority during the Constitutional Convention,[44] and these limits should presumably maintain potency across at least a substantial portion of modern jurists who claim to interpret the Constitution as originally understood.[45] However, given the ratification of the Sixteenth Amendment and a series of pragmatically reasoned cases, such constitutional restraints by themselves have proven futile in invalidating expansive invocations of federal taxing authority. This Part chronicles such developments, arguing that the clauses most directly intended to cabin Congress have instead, as interpreted by the Court, posed trivial or easily avoidable impediments.

A. The Uniformity Clause

As a preliminary matter, the Framers generally sought to expand federal taxing authority during the Constitutional Convention.[46] Whereas the Articles of

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44. OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 88–89 (1993) (noting "the constitutional context" was "defined by the desire to prevent abuses of the power of taxation").

45. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (describing the rise of originalism, which "regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation," over the second half of the twentieth century).

46. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 28–29 (2005) (noting "America needed a new system" after the Confederation period, *id.* at 29, due partially to Congress's inability to impose direct taxes, *id.* at 28); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 2 (2005) (labeling the Constitution a "pro-tax document").

Confederation fatally restrained its central government to nominally binding[47] requisitions "in proportion to the value of all land within each state,"[48] the Constitution responded to this condition's practical unworkability through its broad grant of taxing authority in the first enumerated power of Article I, the Taxing Clause: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."[49] Reminded of the British Parliament's perceived abusive taxes on American colonies,[50] however, the Framers conditioned this baseline power on several (seemingly) major caveats.

First, situated in the same sentence as the excerpt above, the Uniformity Clause provides that "all Duties, Imposts and Excises shall be uniform throughout the United States."[51] As repeatedly interpreted by the Court, this condition poses a clear-cut and undemanding test in which Congress may establish "indirect taxes" (a phrase technically never written in the Constitution)[52] so long as they "operate[] with the same force and effect in every place where the subject of [them] is found."[53] Stated more concretely, indirect taxes defined in nongeographical terms meet the standard whereas those containing geographic language trigger "close[]" examination "to see if there is actual geographic discrimination."[54] For example, Congress likely could not tax a sale in Iowa at a ten percent rate and an otherwise identical transaction in Minnesota at a five percent rate.

But even this facially invalid levy might pass muster with additional facts. In *United States v. Ptasynski*,[55] the Court (after reaffirming the general rules above) upheld a tax exemption on oil produced in areas of Alaska and certain territorial waters[56] because, according to Justice Powell, Congress did not intend to discriminatorily favor the state.[57] Rather, the legislature "determin[ed], based on neutral factors, that this oil required separate treatment," a rationale rendering the

47. *See* THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (noting "binding" requisitions "are mere recommendations which the States observe or disregard at their option").

48. ARTICLES OF CONFEDERATION OF 1781, art. VIII.

49. U.S. CONST. art. I, § 8, cl. 1.

50. *See* THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) (alleging King of Britain "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and *eat out their substance*" (emphasis added)).

51. U.S. CONST. art. I, § 8, cl. 1.

52. *See* THE FEDERALIST NO. 36, *supra* note 47, at 215 (Alexander Hamilton) (labeling "duties and excises" indirect).

53. Edye v. Robertson, 112 U.S. 580, 594 (1884).

54. United States v. Ptasynski, 462 U.S. 74, 85 (1983) (citing Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 160–61 (1974)).

55. 462 U.S. 74.

56. *See* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (repealed 1988) (the tax at issue).

57. *Ptasynski*, 462 U.S. at 86 (noting the absence of legislative history suggesting an "undue preference" for Alaska).

geographically delineated statute permissible under the Uniformity Clause.[58] In other words, this constitutional provision hardly poses a restraint on government; Congress effectively enjoys a safe harbor whenever it defines indirect taxes in nongeographical terms, and *Ptasynski* reserves room for validation of the already rare instances wherein indirect levies land outside this qualification.[59]

B. The Apportionment Rule

Restraints on direct taxation have not fared much better in checking congressional power. Incorporating a mechanism from the Confederation Congress's final requisition,[60] the Constitution provides "direct Taxes shall be apportioned among the several States which may be included within this Union[] according to their respective Numbers."[61] Further, to address a concern that Congress could exploit its direct taxing authority by overly burdening states that had been delinquent during the requisition system,[62] this clause bore later restating: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[63]

Under the then-common belief of equal per capita wealth across states,[64] apportionment theoretically promoted impartial governance by barring a congressional majority from tyrannically decreasing favored states' tax liabilities at the minority's expense.[65] But when the United States varies in interstate wealth and income (as it does today), this regime requires poor states to tax their residents at higher rates than rich states.[66] For example, based on current population statistics, residents of Kansas and Mississippi would collectively need to contribute almost identical amounts of direct taxes even though the per capita income of the former is over thirty percent higher than that of the latter.[67] Given the perverseness of

58. *Id.* at 85–86.

59. *See* Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1203 n.47 (1991) (arguing *Ptasynski* "was deliberately adopting a rule designed to make it easy for Congress to prevent uniformity clause challenges").

60. *See* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 13 (1998) (finding the final requisition contravened the Articles by being based on population).

61. U.S. CONST. art. I, § 2, cl. 3.

62. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 545 (Jonathan Elliot ed., 1845).

63. U.S. CONST. art. I, § 9, cl. 4; *see also Capitation*, BLACK'S LAW DICTIONARY 252 (10th ed. 2014) (defining "capitation" as "[a] tax or payment of the same amount for each person").

64. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 585 (Max Farrand ed., 1911).

65. *See* Johnson, *supra* note 60, at 8 n.26 (citing an array of Founding-era records evincing such concerns).

66. *See* Calvin H. Johnson, *Binding Constitutional History: Reverse* Pollock *and End Fatal Apportionment*, 25 FLA. TAX REV. 740, 761 (2022) (observing income inequality and lamenting "[t]he Constitution did not require idiocy").

67. *Compare Kansas*, U.S. CENSUS BUREAU, (2024) https://www.census.gov/quickfacts/fact/table/KS/PST045223 [https://perma.cc/9BEN-VAE9] (2,940,546 people and $38,108 per capita income), *with Mississippi*, U.S. CENSUS BUREAU (2024), https://www.census.gov/quickfacts/fact/table/MS/PST045223 [https://perma.cc/46TM-K6KL] (2,939,690 people and $29,209 per capita income).

such a system, Congress rarely imposed apportioned direct taxes before the Civil War and has abandoned them as a feasible revenue source since then.[68]

As a near-total opposite to the Uniformity Clause's lack of teeth, then, the apportionment rule effectively bars levies bearing the "direct tax" label. But therein lies the problem: the Framers never gave a definition for direct taxes.[69] An oft-quoted passage from James Madison's Founding-era notes encapsulates this dilemma: "[Rufus] King asked what was the precise meaning of *direct* taxation? No one answd [sic]."[70] And in the more than two hundred years since the Constitutional Convention, academics continue to robustly debate the meaning of these facially simple words.[71]

Landmark precedent has proven similarly controversial. Wrestling with the direct/indirect dichotomy as early as 1796, the unanimous Court in *Hylton v. United States*[72] upheld a seemingly direct tax on carriage possession by recharacterizing it as an excise on carriage use.[73] In their seriatim opinions, Justice Iredell argued that direct taxes referred exclusively to levies that "could be apportioned,"[74] Justice Chase lobbied for requiring apportioned taxes only when "reasonabl[e],"[75] and Justice Paterson deemed the apportionment rule "radically wrong."[76] While the Court did not establish a framework for conclusively identifying future direct taxes, several sentiments from the Justices (as confirmed by later commentary on *Hylton*[77]) suggested they would narrowly define the category to cover levies on people, land, and not much else.[78]

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68. *See* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 914 (2009).

69. *See* Brief for the United States, Hylton v. United States, 3 U.S. (3. Dall.) 171 (1796), *reprinted in* 8 THE WORKS OF ALEXANDER HAMILTON 378, 378 (Henry Cabot Lodge ed., Fed. Ed. 1904) ("It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution.").

70. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 350.

71. *See* Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 119 n.37 (2018) (summarizing debates over the topic and writing that "[c]ommentators provide impressive, detailed accounts of the origins of the 'direct' tax limitation in the course of reaching varying interpretations, narrow and broad").

72. 3 U.S. (3 Dall.) 171.

73. *See id.* at 175 (opinion of Chase, J.) ("[A] tax on *expence* is an *indirect* tax; and . . . an *annual* tax on a carriage for the conveyance of persons, is of *that kind* . . . ."); *id.* at 180 (opinion of Paterson, J.) ("All taxes on expences or consumption are indirect taxes. A tax on carriages is of this kind . . . ."); *id.* at 182 (opinion of Iredell, J.) ("This is not an apportionment, of a tax on *Carriages*, but of the money a tax on carriages might be supposed to produce . . . .").

74. *Id.* at 181 (opinion of Iredell, J.) (emphases omitted).

75. *Id.* at 174 (opinion of Chase, J.) (emphasis omitted).

76. *Id.* at 178 (opinion of Paterson, J.).

77. *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 635 (1895) ("[T]he court here treated the decision in the *Hylton case* as conveying the view that the only direct taxes were 'taxes on land and appurtenances.'").

78. *See Hylton*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.) ("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 . . . and a tax on land . . . ." (emphases omitted)); *id.* at 177 (opinion of Paterson, J.) ("Whether direct taxes . . . comprehend any other tax than a capitation tax, and a tax on land, is a questionable

Unfortunately, this once-simple doctrine has grown only more complicated over time. Just before *Hylton*'s centennial, the Court's direct-tax jurisprudence was overhauled in the notorious *Pollock v. Farmers' Loan & Trust Co.*[79] Striking down a two-percent tax on income exceeding $4,000,[80] Chief Justice Fuller spent over ten pages citing evidence from the Constitutional Convention, ratification debates, and state practices to conclude that indirect taxes describe those "paid primarily by persons who can shift the burden upon someone else," whereas direct taxes "cannot be avoided" since they apply to "property holders in respect of their estates, whether real or personal, or of the income yielded by such estates."[81] Founding-era records offer some intuition behind this argument: Since taxpayers can shift indirect levies onto other parties (such as by increasing the prices of affected goods), market forces theoretically confer sufficient protection against excessive taxation to warrant a low constitutional restraint.[82] Direct taxes, by contrast, justify the harsher apportionment rule to replace this market-based check.[83]

In addition to dramatically departing from precedent,[84] *Pollock* has come to represent a one-time high-water mark for the apportionment rule's reach.[85] Shortly after this decision, the Court referred to Chief Justice Fuller's market-based approach as a "distinction [that] rests more upon the differing theories of political economists than upon the practical nature of the tax itself,"[86] and the Court has never again hinged its direct/indirect determinations on whether the respective tax can be shifted.[87] Instead, it soon returned to an expansive notion of indirect levies, such as by upholding a pre–Sixteenth Amendment corporate income tax after recharacterizing it as an excise on the "privilege of doing business in a corporate capacity."[88] And in *Moore*, Justice Kavanaugh wrote that direct taxes "[g]enerally" refer to those "imposed on persons or property" while indirect taxes "are the familiar federal taxes imposed on activities or transactions," expressly slotting income taxes in the latter.[89] As a byproduct of this

point."); *id.* at 183 (opinion of Iredell, J.) ("A land or poll tax may be considered [direct] . . . In regard to other articles, there may possibly be considerable doubt.").

79. 158 U.S. 601 (1895).

80. *See* Wilson-Gorman Tariff of 1894, ch. 349, § 27, 28 Stat. 509, 553.

81. *Pollock*, 158 U.S. at 558; *see also id.* at 558–70.

82. *See, e.g.*, THE FEDERALIST NO. 21, *supra* note 47, at 138 (Alexander Hamilton) (comparing indirect taxes "to a fluid, which will in time find its level with the means of paying them").

83. *See id.* at 139 ("[N]o limits to the discretion of the government are to be found in the nature of [direct taxes].").

84. *See* Ackerman, *supra* note 10, at 25 ("Only in 1895 did the Court depart from this unbroken line of precedent to strike down a federal income tax statute in *Pollock* . . . .").

85. *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 1.2.4, at 1-26 (3d ed. 1999) (stating Direct Tax Clauses have "never again had the power" given to them in *Pollock* and *Macomber*).

86. Nicol v. Ames, 173 U.S. 509, 515 (1899).

87. *See* Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 339–50 (2004) (noting the immediate judicial and political "[w]ithering" of *Pollock*).

88. Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911); *see id.* at 177.

89. Moore v. United States, 144 S. Ct. 1680, 1687 (2024).

clarification, the majority suggested that the Sixteenth Amendment—passed and ratified in response to *Pollock*—was unnecessary.[90]

Despite this recent commentary, the precise line between direct and indirect taxes remains blurry; indeed, Justice Kavanaugh acknowledged in *Moore* itself that his opinion left ambiguous implications for the classification of wealth taxes.[91] But should the Court ever conclusively address this issue, it will likely side closer to *Hylton* than *Pollock*. Beyond respecting stare decisis and mitigating constitutional infirmities in the Code, a relatively expansive conception of indirect taxation wields crucial originalist support. Whereas scholars have extensively criticized *Pollock* for its slipshod historical analysis,[92] the four Justices in *Hylton* should presumably be experts on the Constitution's original meaning since they all partook in the Founding.[93] And under the latter's reading of the Direct Tax Clauses, the apportionment rule—while potent when invoked—extends to just a narrow subset of levies perhaps no greater than head and land taxes. In short, when compared to the Uniformity Clause, the apportionment rule has stronger teeth with little to bite.

C. The General Welfare Clause

Despite being discussed first, the Uniformity Clause forms the second restraint on federal power within the Taxing Clause; continuing the quotation from this Part's introductory paragraph, the Framers wrote that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, *to pay the Debts and provide for the common Defence and general Welfare of the United States*."[94] Debates over this italicized excerpt's meaning have persisted for centuries and trace back to two prominent Framers: whereas James Madison believed the General Welfare Clause constrained congressional authority by requiring that taxes fund expenditures related to powers enumerated in the Constitution,[95] Alexander Hamilton argued (albeit after ratification) for a broad interpretation wherein fiscal policy need only abstractly advance society and avoid favoring certain regions.[96] Reviewing this discourse decades later, Justice Story embraced

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90. *See id.* at 1688 (noting "income taxes are indirect taxes" and "permitted under Article I, § 8 without apportionment").

91. *Id.* at 1697 (describing taxes on wealth and unrealized appreciation as "potential issues for another day").

92. *See, e.g.*, Johnson, *supra* note 60, at 78 ("The *Pollock* court overruled [the Framers'] intent for reasons private to the judges and not legitimate by constitutional policy."); Ackerman, *supra* note 10, at 26 ("We should recognize *Pollock* for what it was: an illegitimate departure from the *Hylton* tradition of judicial restraint.").

93. *See, e.g.*, Johnson, *supra* note 60, at 74–75 ("*Hylton* has a special legitimacy on both its holding and its functional perspective on constitutional construction, because of who the actors were.").

94. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

95. *See, e.g.*, THE FEDERALIST NO. 41, *supra* note 47, at 258–59 (James Madison) ("It has been urged and echoed that the [General Welfare Clause] amounts to an unlimited commission to exercise every power[.] . . . But what color can th[is] objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon?").

96. *See* ALEXANDER HAMILTON, FINAL VERSION OF THE REPORT ON THE SUBJECT OF MANUFACTURES (1791), *reprinted in* 10 THE PAPERS OF ALEXANDER HAMILTON 230, 303 (Harold C. Syrett et al. eds.,

the Hamiltonian-esque view of Thomas Jefferson,[97] asserting that the General Welfare Clause qualifies federal taxation by mandating that expenditures concern matters of general interest to the United States.[98]

If this standard sounds generous, it should. Indeed, just one year after expressly adopting Justice Story's construction,[99] the Court held that it must defer to congressional interpretations of the general welfare "unless the choice is clearly wrong."[100] In other words, what might have been a limit on taxation instead turned into a freestanding "Spending Clause."[101] And despite some recent interest in reviving Madison's narrow reading,[102] the General Welfare Clause has hardly posed a barrier to Congress's taxing power—a reality that will persist into the foreseeable future.

D. The Due Process Clause

The Founding-era Constitution continued its theoretical restraints on federal levies with the Bill of Rights. For example, the Court has read the Free Press Clause to prohibit taxes "singl[ing] out" newspapers,[103] and the Establishment Clause has previously been cited to nullify tax credits and deductions for parents of children receiving non-public education.[104] Yet despite the undoubted importance of these constitutional protections for American society, they generally lack tax-specific doctrines. Rather, taxpayers invoke them only in limited circumstances wherein unique facets of a given tax, such as its exclusive imposition on certain newspapers[105] or disproportionate relief for people paying tuition at religious schools,[106] render it constitutionally dubious.

1976) ("It is therefore of necessity left to the discretion of the National Legislature, to pronounce, upon the objects, which concern the general Welfare, and for which under that description, an appropriation of money is requisite and proper.").

97. *See* Thomas Jefferson, Opinion on the Constitutionality of a National Bank (Feb. 15, 1791), *reprinted in* 6 THE WORKS OF THOMAS JEFFERSON 199–200 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1904) ("[Congress is] not to lay taxes ad libitum for any purpose [it] please[s]; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose." (emphases omitted)).

98. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 924, at 653 (Boston, Little, Brown & Co. 4th ed. 1873) ("The preamble of the Constitution declares one of the objects to be, to provide for the common defence and to promote the general welfare; and if the power to lay taxes is in express terms given to provide for the common defence and general welfare, what ground can there be to construe the power short of the object?").

99. United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he reading advocated by Mr. Justice Story is the correct one.").

100. Helvering v. Davis, 301 U.S. 619, 640 (1937).

101. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003).

102. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 206 (2023) (Thomas, J., dissenting) ("The General Welfare Clause is thus most naturally read as a qualification on the substantive taxing power.").

103. Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983).

104. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789, 798 (1973).

105. *See Minneapolis Star & Trib.*, 460 U.S. at 578–79.

106. *See Nyquist*, 413 U.S. at 761–69.

Nevertheless, one guarantee in the Bill of Rights warrants special focus above all others: the Due Process Clause. In addition to its outsized influence on constitutional law more broadly,[107] this provision often receives attention from hopeful taxpayer-litigants as a possible means of escaping controversial levies. Indeed, although the Court at one point seemed to foreclose all Fifth Amendment challenges of federal taxes,[108] it has since conveyed interest in reviewing such claims with the same degree of (albeit heavily government-favored) scrutiny that it applies to other economic legislation.[109] And while most of the sitting Justices have little desire to expand substantive due process jurisprudence into new domains[110] (presumably including tax), two well-established—and Supreme Court–recognized—due process doctrines supply ostensibly enticing ammunition for taxpayers alleging constitutional impropriety: attribution and retroactivity.

1. Attribution

Ranging from Subchapter K[111] to Subpart F,[112] the Code constantly attributes taxable income to parties who did not directly generate or receive such earnings. For example, the global intangible low-taxed income (GILTI) regime taxes certain shareholders of foreign corporations based on the latter's earnings, as adjusted for various expenses and excluded categories, regardless of whether the former received any corporate distributions.[113] And the Court has held Congress may constitutionally attribute income in such fashion absent a showing that "lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit."[114]

As evinced by this excerpt's capacious language, taxpayers can rarely craft plausible arguments of unconstitutional attribution. Indeed, while the majority in

107. *See* MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE ix (2001) ("[T]he most significant and enduring development [in twentieth-century constitutional law] has been [incorporation] and the doctrine that there are rights that are so 'fundamental' that any restriction is subject to judicial 'strict scrutiny.'").

108. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24 (1916) ("So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution . . . .").

109. *See* BITTKER & LOKKEN, *supra* note 85 ¶ 1.2.5, at 1-28 ("[C]ourts have applied to the distinctions drawn by Congress . . . the familiar rule now used in reviewing regulatory and other economic legislation: 'Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts.'" (quoting United States v. Md. Savings-Share Ins. Corp., 400 U.S. 4, 17–18 (1970)).

110. *See* Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529, 594 (2023) (noting the "Roberts Court's increasing skepticism of substantive due process claims").

111. *See* I.R.C. § 702(a) (attributing partnership income to partners rather than partnership).

112. *See* I.R.C. § 951(a)(1)(A) (attributing CFCs' income to their U.S. shareholders on a prorated basis).

113. *See generally* I.R.C. § 951A.

114. Burnet v. Wells, 289 U.S. 670, 679 (1933).

Moore just briefly mentioned this arbitrariness limit (since the Moores did not raise it),[115] Justice Barrett labeled its contours "uncertain" and noted the Court "ha[s] never before applied the arbitrariness test to a tax law that attributes a corporation's income to its shareholders."[116] The Due Process Clause accordingly places some distant boundary on attributed income in egregious scenarios,[117] but nearly all taxes that survive Article I's burdensome legislative process should encounter little question of validity under this doctrine alone.

2. Retroactivity

While constitutional due process rights trigger comparatively stricter review for all retroactive legislation,[118] tax statutes disproportionately find themselves within this doctrine because they are often at least partially backward-looking in application.[119] For instance, Congress sometimes updates the Code's tax rate schedules or substantive provisions during the same taxable year in which such amendments arise,[120] and it has even enacted taxes exclusively targeting periods that ended before the respective statute's passage.[121] Indeed, instances of the former have proven so commonplace that the Court categorically upholds them;[122] as succinctly explained by Justice Holmes, "[w]e all know that we shall get a tax bill every year."[123]

Taxes with longer windows of retroactivity generally still survive challenge, but they prove to be closer calls. Analyzing a due process challenge (under the Fourteenth Amendment) to a state tax imposed on dividends received two years

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115. *See* Petition for Writ of Certiorari at i, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (listing the meaning of the Sixteenth Amendment as the sole question presented).

116. *Moore*, 144 S. Ct. at 1708 (Barrett, J., concurring in the judgment).

117. Justice Barrett listed three potential factors relevant to this analysis: (1) "whether the taxpayer has 'sufficient power and control over . . . the income'"; (2) "whether the taxpayer receives a special 'privilege or benefit' from the entity that earns the income"; and (3) "whether the corporation is foreign and thus outside the reach of an accumulated earnings tax." *Id.* (quoting Comm'r v. Sunnen, 333 U.S. 591, 604 (1948); *Burnet*, 289 U.S. at 679).

118. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) ("The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive legislation." (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976))).

119. *See* United States v. Darusmont, 449 U.S. 292, 296 (1981) ("In enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment.").

120. *See generally* Lauren Williams, *Retroactivity in the Federal Tax Field*, 12 U. SO. CAL. 1960 TAX. INST. 79 (extensively documenting this practice).

121. *See, e.g.*, Revenue Act of 1918, 40 Stat. 1057 (1919) (raising income tax rates for the previous calendar year); Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112 (imposing a new tax effective the year before enactment).

122. *See* Stockdale v. Atl. Ins. Co., 87 U.S. (20 Wall.) 323, 331 (1873) ("The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.").

123. Untermyer v. Anderson, 276 U.S. 440, 446 (1928) (Holmes, J., concurring).

before the levy's enactment into law,[124] the Court wrote that retroactivity-based impropriety requires case-by-case scrutiny into "the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."[125] It justified this position as follows:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process . . . .[126]

Six decades later, the Court shed further light when assessing the retroactive application of new qualification criteria for an estate tax deduction.[127] Rejecting the taxpayer's due process challenge while writing for the majority, Justice Blackmun noted two facets that fueled the tax's validity: Congress "acted promptly and established only a modest period of retroactivity," and its "purpose in enacting the amendment was neither illegitimate nor arbitrary."[128] As with the Court's government-favored framework for attribution, Justice Blackmun's two-part test has proven easily satisfied; indeed, the Moores forwent their retroactivity argument after the Ninth Circuit quickly rejected it,[129] and no federal income tax has ever been deemed unconstitutional on this ground.[130]

E. The Sixteenth Amendment

As mentioned in section I.B, *Pollock* quickly proved controversial among academics and the public; equated in disfavor to *Dred Scott*[131] and (according to then-President Taft) "injur[ing] the prestige of the Supreme Court more" than anything before,[132] Chief Justice Fuller's holding received spirited condemnation for unduly protecting wealthy taxpayers during the Gilded Age, a period of rampant economic inequality.[133] Accordingly, less than two decades after *Pollock*, Congress submitted one sentence to state legislatures for an eventually ratified Sixteenth Amendment: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the

124. *See* Welch v. Henry, 305 U.S. 134, 141 (1938).
125. *Id.* at 147.
126. *Id.* at 146–47.
127. *See* United States v. Carlton, 512 U.S. 26, 28–29 (1994).
128. *Id.* at 32.
129. Moore v. United States, 144 S. Ct. 1680, 1686 (2024).
130. BITTKER & LOKKEN, *supra* note 85 ¶ 1.2.7, at 1-35.
131. *See* Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 576 (1913) ("[P]robably no[] [decision] since the *Dred Scott Case* has been so widely condemned.").
132. Letter from Archibald Butt to Clara Butt, *supra* note 23, at 134.
133. *See* BENJAMIN I. PAGE & MARTIN GILENS, DEMORACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 4 (2017) (describing the Gilded Age as a period involving "extreme inequalities of income and wealth" that "empowered the wealthy few and undermined democracy").

several States, and without regard to any census or enumeration."[134] Since the other doctrines in this Part consistently fall short, many taxpayer-litigants, including the Moores, have opted to root their constitutional challenges in this language.

As a preliminary matter, the frequency of such claims should give pause. The Constitution contains several express limits on federal taxation, yet alleged improprieties generally rely on the Sixteenth Amendment—a provision worded and intended to expand congressional power.[135] By starving taxpayers of colorable arguments elsewhere in the Constitution, the Court has ironically relegated them to a provision that, at first blush, dramatically expands possibilities for valid federal levies. Indeed, so long as it imposes taxes on "incomes[] from whatever source derived,"[136] Congress need not worry about apportionment. But as with the direct/indirect dichotomy from over one century ago,[137] therein lies the question: what is the constitutional meaning of income?

The answer is similarly unclear.[138] For instance, whereas several dictionaries and treatises dated near the Sixteenth Amendment's ratification define income to involve an accession in wealth potentially requiring some concrete separation between such accession and the income-producing property,[139] tax experts in the nineteenth century often denominated state property taxes as levies on income.[140] Perhaps in recognition of this ambiguity, the Court dodged analyzing the meaning of income in its earliest applications of the Sixteenth Amendment by instead effectively deferring to the government's interpretation—even over objections to its excessive breadth.[141] But in 1920, this judicial abdication ended. Denying Congress's attempt to tax pro rata stock dividends without apportionment under

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134. S.J. Res. 40, 61st Cong., 44 CONG. REC. 4390, 4411 (1909) (enacted); *see also* U.S. CONST. amend. XVI.

135. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 18 (1916) ("[T]he [Sixteenth] Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided.").

136. U.S. CONST. amend. XVI.

137. *See supra* note 70 and accompanying text.

138. *See* Charlotte Crane, *Pollock, Macomber, and the Role of the Federal Courts in the Development of the Income Tax in the United States*, LAW & CONTEMP. PROBS., Winter 2010, at 1, 6 (2010) ("The meanings of 'income' and 'income tax' at the time of the Sixteenth Amendment was passed were surprisingly uncertain.").

139. *See, e.g.*, HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS § 32, at 77 (1913) ("[T]he farmer's crop is not his income; it is the source from which his income will be derived when it is converted into cash."). *Compare* Benjamin G. Barokh, Note, *The Meaning of "Incomes" in the Sixteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 409, 422–23 (2017) (citing four dictionaries from that era to conclude "income necessitates an increase in *monetary* wealth," *id.* at 423 (emphasis added)), *with* John R. Brooks & David Gamage, *Moore v. United States* and the Original Meaning of Income 9 (July 13, 2023) (available at https://ssrn.com/abstract=4491855 [https://perma.cc/9GLL-Q8RJ]) (arguing none of the dictionaries from that era include a realization concept).

140. *See* EDWARD R.A. SELIGMAN, THE INCOME TAX 367–91 (1911) (surveying numerous pre–Sixteenth Amendment levies that, despite being denominated "income taxes," were closer in substance to property taxes).

141. *See* Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. U. L. REV. 171, 179 n.21 (2006) (noting the Court in this era "indicated little interest in interfering with Congress's definition of 'income' despite complaints from the [taxpayers]").

the Sixteenth Amendment,[142] Justice Pitney promulgated the colloquially named realization requirement while writing for a narrow majority in *Eisner v. Macomber*[143]:

> We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows *he has not realized or received any income in the transaction*.[144]

However, this single taxpayer victory was followed by more than a century of resounding losses.[145] Within one year of *Macomber*, for instance, the Court had deemed taxes on capital gains and distributions of a corporate subsidiary's stock to both land within the Sixteenth Amendment.[146] Alongside scholarly criticism of a constitutional realization requirement,[147] numerous Justices have cast doubt over *Macomber*'s longevity with less-than-charitable comments such as "[w]e see nothing to be gained by the discussion of judicial definitions,"[148] "[t]he [realization] rule[] [was] founded on administrative convenience,"[149] "[*Macomber*] was not meant to provide a touchstone to all future gross income questions,"[150] and "*Macomber* dies a slow death."[151] Indeed, although the Court has not yet formally overruled *Macomber*,[152] many have justifiably cited this case law to argue

142. *See* Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756 ("[T]he net income of a taxable person shall include . . . dividends . . . [*p*]*rovided*, [t]hat the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation . . . whether in cash or in stock . . . ."); Eisner v. Macomber, 252 U.S. 189, 199–200, 219 (1920).

143. 252 U.S. 189.

144. *Id.* at 212 (emphasis added).

145. *See* BITTKER & LOKKEN, *supra* note 85 ¶ 1.2.4, at 1-26 ("*Eisner v. Macomber* was the high-water mark in the Supreme Court's attempt to provide an all-purpose definition of 'income.'").

146. *See* Merchants' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 515, 519–20 (1921) (upholding capital gains tax); Eldorado Coal & Mining Co. v. Mager, 255 U.S. 522, 526 (1921) (same); Goodrich v. Edwards, 255 U.S. 527, 533–35 (1921) (same); Walsh v. Brewster, 255 U.S. 536, 537–38 (1921) (same); United States v. Phellis, 257 U.S. 156, 165, 168–69 (1921) (upholding tax on distribution of subsidiary's stock); Rockefeller v. United States, 257 U.S. 176, 180–84 (1921) (same).

147. *See, e.g.*, Ackerman, *supra* note 10, at 52 ("While [tax lawyers] continue to feature *Macomber* in their casebooks, their treatment of this 'leading case' is anything but respectful."); Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3, 4 (1987) ("Even in law school, once the instructor has finished flogging *Eisner v. Macomber*, the class usually moves on to the 'real' issues of federal income taxation . . . .").

148. United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931).

149. Helvering v. Horst, 311 U.S. 112, 116 (1940).

150. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (citing Helvering v. Bruun, 309 U.S. 461, 468–69 (1940); *Kirby Lumber*, 284 U.S. at 3).

151. Helvering v. Griffiths, 318 U.S. 371, 404 (1943) (Douglas, J., dissenting).

152. *See* Lawrence Zelenak, *The Income Tax, the Constitution, and the Unrealized Importance of* Helvering v. Griffiths, 43 VA. TAX REV. 257, 259 (2023) ("*Macomber* is still there, never overruled . . . .").

that Justice Pitney's holding applies only to pro rata stock dividends and nothing more.[153]

Of course, the Court could have decisively revitalized or "stabbed" (in the words of Chief Justice Roberts[154]) this realization principle in *Moore*. But it opted for neither. Instead, the majority clarified that it need not resolve the issue because, assuming arguendo the Sixteenth Amendment demands a realization event, the MRT satisfies this requirement by validly taxing foreign corporate earnings—albeit through a retroactive levy attributed to shareholders.[155] And while five Justices expressed a willingness to conclusively answer this matter in one direction[156] or the other,[157] the remainder of the Court was content in maintaining its habit developed over the last century of Sixteenth Amendment cases: uphold the tax at issue and keep *Macomber* clinging to life support.

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With the drawn-out downfall of a realization requirement, the Court has hammered its final nail in the coffin for constitutional challenges to federal taxes. Although the Framers set forth an array of seemingly meaningful protections during the Constitutional Convention, such guarantees have waned in potency through, inter alia, a narrow view of direct taxation; the ratification of the Sixteenth Amendment and its expansive, at least as later interpreted, permission to tax "incomes"; and the government-favored tests for clauses elsewhere that might have otherwise circumscribed congressional power. When mixed, these trends leave few chances to raise even tenable arguments of constitutional impropriety. For better or worse, taxpayer-litigants are almost doomed to fail if they ground their cases in the Constitution's tax-related clauses—standing by themselves, that is.

II. THE COMPLICATED AND CONTROVERSIAL DEVELOPMENT OF HYBRID RIGHTS

Cue hybrid rights. Facially originating from a Justice Scalia–authored opinion on the Free Exercise Clause[158] but substantively dating back to one of the Court's

153. *See, e.g.*, MICHAEL J. GRAETZ, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 201 (Foundation Press, 2d ed. 1988) ("[A]lthough the court has not overruled *Macomber*, it has confined the decision to its facts"); Thomas L. Evans, *The Taxation of Nonshareholder Contributions to Capital: An Economic Analysis*, 45 VAND. L. REV. 1457, 1464 n.19 (1992) (citing the previous source and an assortment of other scholarship reaching similar conclusions).

154. *See, e.g.*, Transcript of Oral Argument at 61, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-800_097c.pdf [https://perma.cc/QK5V-HJ35] (fearing that Solicitor General Elizabeth Prelogar "stabbed *Macomber*" by limiting application of its holding to just pro rata stock dividends).

155. *Moore*, 144 S. Ct. at 1688 ("Critically, however, the MRT *does* tax realized income—namely, income realized by the corporation, KisanKraft.").

156. *See id.* at 1689 (Jackson, J., concurring) (rejecting the presence of a realization requirement). No other Justice joined this concurrence or expressly rejected a constitutional realization requirement elsewhere in *Moore*.

157. *See id.* at 1704 (Barrett, J., concurring in the judgment) (confirming the presence of a realization requirement); *id.* at 1722 (Thomas, J., dissenting) (same). Justice Alito joined Justice Barrett while Justice Gorsuch joined Justice Thomas.

158. *See* Emp. Div. v. Smith, 494 U.S. 872, 881–82 (1990); *infra* section II.A.

earliest landmark cases on congressional power,[159] this doctrine permits the judicial recognition of rights stemming from interactions between two or more clauses in the Constitution—even when these provisions alone fall short of conferring such protection. In other words, hybrid rights form the jurisprudential embodiment of "the whole is greater than the sum of its parts." Indeed, they prove especially salient when constitutional challenges invoke elements of multiple provisions yet reside just inside the bounds of propriety for each of them individually. In such instances, the hybrid-rights doctrine can deliver the final nudge needed for judicial invalidation. And given the ineffectiveness of taxpayers' arguments under each of the Constitution's taxing clauses by themselves, hybrid rights provide a colorable means to repackage these unsuccessful claims into a potent amalgamation.

But there is a catch: hybrid rights have a complex past, controversial present, and uncertain future. Among other scathing critiques, respectable jurists have labeled the doctrine "untenable,"[160] "completely illogical,"[161] and "not intended to be taken seriously."[162] Indeed, just four years ago, one-third of the current Court (Justices Thomas, Alito, and Gorsuch) expressed interest in outright eliminating recognition of such rights since they purportedly "baffled the lower courts" and had not enjoyed Supreme Court–level endorsement in over three decades.[163]

Yet remarkably, the doctrine (at least on its surface) remains good law across most of the nation and (in substance) supports well-known precedent beyond its explicit origins in the Free Exercise Clause. This Part accordingly surveys foundational precedent to grasp the theoretical and historical underpinnings of otherwise elusive hybrid rights. In doing so, it posits that the Court has repeatedly applied this doctrine in landmark cases outside both First Amendment jurisprudence and individual rights more broadly—thereby laying the groundwork for its extension into taxation.

A. *Alfred Smith and the Terrible, Horrible, No Good, Very Bad Doctrine*[164]

Coverage of hybrid rights often starts (and ends) with the Court's controversial decision in *Employment Division v. Smith*.[165] Writing for the narrow majority, Justice Scalia rejected a First Amendment challenge to Oregon's denial of unemployment compensation for a member of the Native American Church who had lost his job after illegally consuming peyote, a hallucinogen, as part of a religious

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159. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819); *infra* section II.C.

160. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (Souter, J., concurring in part and concurring in the judgment).

161. Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993).

162. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990).

163. Fulton v. City of Philadelphia, 593 U.S. 522, 600, 603–04 (2021) (Alito, J., concurring in the judgment).

164. *Cf.* JUDITH VIORST, ALEXANDER AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY (1972) (cover).

165. 494 U.S. 872.

ceremony.[166] Effectively performing (without stating as such) rational basis review,[167] Justice Scalia concluded—to many commentators' surprise[168]—that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[169] Reconciling his bright-line rule with decades of seemingly contradictory precedent, Justice Scalia argued such past cases "involved not the Free Exercise Clause alone, but the Free Exercise Clause *in conjunction with other constitutional protections*."[170] In his view, these "hybrid situation[s]"[171] warranted stricter judicial review because they implicated multiple areas of the Constitution, such as freedom of speech and the press, simultaneously.[172] And it is this portion of Justice Scalia's opinion that, technically without ever mentioning the two-word phrase, formed the Court's seminal guidance on hybrid rights.

While *Smith* superficially remains good law, its days are numbered; after over three decades of criticism from within[173] and beyond[174] legal academia, the core of Justice Scalia's opinion—requiring merely a rational basis for most neutral, generally applicable laws that burden religious practice—received skepticism or outright disdain from five sitting Justices in *Fulton v. City of Philadelphia*.[175] Namely, Justices Alito and Gorsuch (both of whom were joined by Justice Thomas as well as each other) endorsed overruling the "fundamentally wrong"[176] and "mistaken"[177] holding in *Smith* whereas Justice Barrett (joined only by Justice Kavanaugh in this portion of her concurrence) signaled she would reach the same conclusion in a future case and expressed the Court's need for a suitable doctrine in *Smith*'s wake.[178] Perhaps unsurprisingly, countless scholars have

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166. *See id.* at 874, 890.

167. *See, e.g.*, Jamal Greene, Essay, *The Age of Scalia*, 130 HARV. L. REV. 144, 163–64 (2016) (referring to the test applied in *Smith* as "rational basis review," *id.* at 163).

168. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1 (1991) ("*Smith* produced widespread disbelief and outrage.").

169. *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

170. *Id.* at 881 (emphasis added).

171. *Id.* at 882.

172. *See id.* at 881–82.

173. *See, e.g.*, Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV. 259, 269 (1993) ("Criticizing *Smith* is no longer original or useful; we have all become repetitive in our criticisms, and by now, our audiences are either persuaded or turned off."); Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 11 n.2 (2004) (citing other scholarly attacks, and some defenses, of *Smith*).

174. *See, e.g.*, *The* Smith *Decision*, PEW RSCH. CTR. (Oct. 24, 2007), https://www.pewresearch.org/religion/2007/10/24/a-delicate-balance6/[https://perma.cc/ZR97-RBCF] ("The *Smith* decision produced a significant political protest from religious organizations and civil liberties groups . . . .").

175. 593 U.S. 522 (2021); *see id.* at 543 (Barrett, J., concurring); *id.* at 545 (Alito, J., concurring in the judgment); *id.* at 618 (Gorsuch, J., concurring in the judgment).

176. *Id.* at 545 (Alito, J., concurring in the judgment).

177. *Id.* at 618 (Gorsuch, J., concurring in the judgment).

178. *See id.* at 543–44 (Barrett, J., concurring).

scrutinized replacements for *Smith* in seeming anticipation of its eventual downfall.[179]

But the hybrid rights baby need not be thrown out with the rational basis bathwater. Despite collectively indicating their interest in overruling *Smith* to the extent that it imposed rational basis review, these five Justices lacked comparable consensus on the portions of Justice Scalia's opinion concerning hybrid rights. Justice Alito criticized this "curious doctrine" as (among other things) "unworkable" in his three-vote concurrence,[180] but Justice Barrett's three-vote concurrence—and Chief Justice Roberts's majority—forwent discussing the matter.[181] Further, any future rejection of *Smith*'s holding does not necessitate simultaneously eliminating the hybrid-rights doctrine. Indeed, in ironic attempts to cabin the latter's relevance, the Second, Third, and Sixth Circuits have deemed Justice Scalia's discourse on hybrid rights "dicta" that could accordingly be ignored.[182] Leveraging this same label, future jurists could credibly argue for the continued vitality of the hybrid-rights doctrine regardless of the Court's growing disfavor toward other portions of *Smith*.

Another problem looms large: the Court has thus far expressly invoked hybrid rights in only cases involving the Free Exercise Clause's alleged interaction with some other constitutional provision.[183] That is to say, for litigants raising claims of unconstitutionality elsewhere, this doctrine may not apply altogether. Especially when combined with the justified concerns over *Smith*'s continued validity, novel theories further propagating the hybrid-rights doctrine must offer support beyond Justice Scalia's widely panned and largely one-off opinion. Fortunately, the Court has repeatedly applied this now-contested framework in well-known decisions outside the context of the First Amendment—just without acknowledging as such.[184]

B. The (Real) Origins of Hybrid Rights

From one controversial case to another, the Court in *Griswold v. Connecticut*[185] invalidated a state law that barred "[a]ny person," including married couples, from using "any drug, medicinal article or instrument for the

179. *See, e.g.*, Stephanie H. Barclay, *Replacing* Smith, 133 YALE L.J. F. 436, 439 (2023) (arguing for strict scrutiny); Christopher C. Lund, *Answers to* Fulton'*s Questions*, 108 IOWA L. REV. 2075, 2093 (2023) (same).

180. *Fulton*, 593 U.S. at 599 (Alito, J., concurring in the judgment).

181. *See id.* at 543–44 (Barrett, J., concurring); *id.* at 526–43 (majority opinion).

182. *See* Knight v. Conn. Dept. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 247 (3d Cir. 2008); Watchtower Bible & Tract Soc'y of N.Y, Inc. v. Village of Stratton, 240 F.3d 553, 561 (6th Cir. 2001).

183. *See* Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 2 (2012) ("[T]he hybrid rights doctrine permits courts to aggregate two weak constitutional claims as long as one involves free exercise of religion.").

184. Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2363 (2020) (arguing the Court in *Smith* and *Obergefell* simply "acted as it routinely acts in dealing with rights-related disputes").

185. 381 U.S. 479 (1965).

purpose of preventing conception."[186] Writing for the majority, Justice Douglas deemed this statute unconstitutional through a now-famous and oft-criticized[187] argument strikingly similar to Justice Scalia's conception of hybrid rights: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[188] He next posited that "[v]arious" of these "guarantees create zones of privacy," including the First Amendment's freedom of association, the Third Amendment's prohibition against forcibly quartering soldiers during peacetime, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's Self-Incrimination Clause, and the Ninth Amendment's guarantee that enumerated rights "shall not be construed to deny or disparage others retained by the people."[189] Emphasizing that both the Fourth and Fifth Amendments limited "governmental invasions 'of the sanctity of a man's home and the privacies of life,'"[190] Justice Douglas cited several cases wherein the Court established "penumbral rights of 'privacy and repose'" to conclude "the right of privacy which presses for recognition here is a legitimate one."[191]

Albeit without writing the word "hybrid," Justice Douglas in *Griswold* substantively relied on the same analytical approach as that of Justice Scalia squaring away precedent in *Smith*.[192] Just as the Free Exercise Clause purportedly supplies stronger protection for religious practices involving some second domain of the Constitution,[193] the scattered privacy-conferring elements in the Bill of Rights allegedly combine to guarantee contraceptive access for married couples even though no standalone constitutional provision offers such protection.[194] Further evidencing this analogousness, the academic barrage toward *Smith*'s hybrid rights generally applies with equal fervor to *Griswold*'s penumbras. For instance, Professor John Hart Ely labeled Justice Douglas's opinion "vague and open-ended,"[195] and Professor Cass Sunstein has more recently asserted that "almost no one defends *Griswold* as originally written."[196] Indeed, these criticisms share many of the same critics; for instance, both one year before and after joining

186. CONN. GEN. STAT. REV. § 53-32 (1958).

187. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 234 (1990) (referring to Justice Douglas's opinion as an "intellectual catastrophe").

188. *Griswold*, 381 U.S. at 484.

189. *Id.*

190. *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

191. *Id.* at 485.

192. *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1078, 1081 (2016) (arguing both *Smith* and *Griswold* exemplify "right/right combinations" that "find a reason to invalidate government action in the combined operation of two or more rights-related provisions").

193. *See* Emp. Div. v. Smith, 494 U.S. 872, 881–82 (1990).

194. *See Griswold*, 381 U.S. at 484.

195. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 929 n.69 (1973).

196. Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 261 (2008).

Justice Alito's *Fulton* concurrence lambasting the hybrid-rights doctrine,[197] Justice Thomas criticized *Griswold*'s logic as "mystifying," "baseless,"[198] and deserving of the Court's "reconsider[ation]."[199]

Yet simultaneously, and again like *Smith*, the "penumbral reasoning" of *Griswold* facially remains good law.[200] Although Justice Thomas expressly supported reexamining this precedent when the Court rejected a constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*,[201] none of his colleagues joined the call to action. Instead, the majority clarified its decision had no bearing on the validity of *Griswold* (among other case law),[202] and four Justices further stressed this assurance across two opinions—one concurring[203] and the other dissenting.[204] Accordingly, while *Dobbs* casts nonnegligible uncertainty over precedent on constitutional rights to reproductive freedom, *Griswold* need not fall in tandem with *Roe* and *Casey*.[205] Far from being isolated to Justice Scalia's one-time harmonization of precedent involving the Free Exercise Clause, the hybrid-rights doctrine first received support from a majority of Justices at least twenty-five years earlier in a case that remains good law and resides outside the First Amendment context.

C. A More Recent, Yet in Denial, Invocation of Hybrid Rights

Thus far, the cases invoking hybrid rights enjoy weak relevance today; *Fulton* all but sounded the death knell for *Smith*, and the Court has rarely endorsed constitutional penumbras in the sixty years since *Griswold*.[206] Recently, however, the Court marked its return to the hybrid-rights doctrine—again without explicitly saying so—in yet another hotly contested decision: *Obergefell v. Hodges*.[207] Writing for a one-vote majority, Justice Kennedy deemed a series of state restrictions on same-sex marriage unconstitutional[208] through an argument comparable to both Justice Scalia's hybrid rights and Justice Douglas's penumbras:

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197. *See supra* note 176 and accompanying text.

198. June Med. Servs. v. Russo, 591 U.S. 299, 372 (2020) (Thomas, J., dissenting).

199. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

200. *See* Marc Spindelman, Dobbs' *Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 168 (2023).

201. *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

202. *Id.* at 295 (majority opinion) ("[T]he dissent suggests that our decision calls into question *Griswold* . . . [b]ut we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.'" (quoting *id.* at 290 (alteration in original))).

203. *Id.* at 346 (Kavanaugh, J., concurring) (listing *Griswold* among cases possibly thrown into question after *Dobbs* but reaffirming that "[o]verruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents").

204. *See id.* at 386 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("If we had to guess, we suspect the prospects of this Court approving bans on contraception are low.").

205. *Cf.* William W. Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L. J. 1677, 1683 ("*Griswold*, then, did not imply *Roe*, or anything even close.").

206. *See* Mary Anne Case, *Donorsexuality After* Dobbs, 2022 U. CHI. LEGAL F. 101, 123 ("[T]he reasoning and language of *Griswold* . . . have never been taken up in later cases . . . .").

207. 576 U.S. 644 (2015).

208. *See id.* at 653–54, 681.

> The Due Process Clause and Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances they may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[209]

In the words of Chief Justice Roberts's dissenting opinion, this reasoning is "quite frankly, difficult to follow."[210] While some read *Obergefell* to suggest that *either* the Due Process Clause or the Equal Protection Clause suffice in establishing a constitutionally protected right to gay marriage,[211] many believe Justice Kennedy grounded his holding in some unspecified *combination* of these provisions[212] as evidenced by, inter alia, his emphasis on their "interrelation"[213] and "synergy."[214] Under this latter reading, the Court again interpreted the Constitution in a manner substantively comparable to Justice Scalia's reconciliation of precedent in *Smith*.[215] Even though due process and equal protection rights, when standing alone, might not guarantee access to same-sex marriage,[216] the overall bounds of constitutional protections expand to encompass such access when analyzing these provisions in combination with each other. In other words, without writing the phrase "hybrid rights," the Court substantively reaffirmed Justice Scalia's facially controversial doctrine in a watershed decision released just ten years ago.[217] And building on *Griswold*, it did so not only outside the context of the First Amendment, but also partially outside the Bill of Rights.

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209. *Id.* at 672.

210. *Id.* at 706 (Roberts, C.J., dissenting).

211. *See, e.g.*, Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 179 (2016) ("Justice Kennedy arguably held that the marriage laws before the Court violated due process and equal protection . . . .").

212. *See, e.g.*, David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 6 (2015) ("The Court in *Obergefell* explicitly conflated the Due Process and Equal Protection Clauses, and that is unusual." (footnote omitted)).

213. *Obergefell*, 576 U.S. at 672.

214. *Id.* at 673.

215. *See* Coenen, *supra* note 184, at 2357–58 (analogizing *Smith* and *Obergefell*).

216. *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1335 (2017) ("The Court implied that the discrimination claim and the fundamental rights claim, standing alone, were not as strong.").

217. *See* Coenen, *supra* note 184, at 2358 ("Then came *Obergefell v. Hodges*. In that watershed ruling, the Court again put hybrid-rights reasoning to work in invalidating all state restrictions on same-sex marriage." (footnote omitted)).

At this point, the main problem with citing *Obergefell* should sound familiar: this case risks being overruled.[218] Alongside criticizing *Griswold*, Justice Thomas in *Dobbs* casted doubt over *Obergefell* "[b]ecause any substantive due process decision is 'demonstrably erroneous.'"[219] Yet while anxiety over *Obergefell*'s downfall[220] carries some merit, a sufficiently large subset of the Court does not seem to share Justice Thomas's vindictiveness; his *Dobbs* concurrence received no other votes,[221] several Justices signaled support for *Obergefell* in that same case,[222] and even Justice Thomas acknowledged the possibility of a right to same-sex marriage existing elsewhere in the Constitution (namely, the Privileges or Immunities Clause).[223] Indeed, in a six-vote per curiam opinion from 2017 that included Chief Justice Roberts (who concurred with the judgment in *Dobbs*[224]), the Court began by confirming that "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'"[225] In other words, although *Obergefell* does not stand on the surest footing, it provides a recent application of the hybrid-rights doctrine that should resonate with a nonnegligible portion of the current Court.

D. The Government's Hybrid Powers

While *Smith*, *Griswold*, and *Obergefell* provide the three most well-known invocations of hybrid rights (presumably due to their political salience), the Court has leveraged this doctrine—be it expressly or impliedly—in numerous contexts across the broader realm of individual liberty.[226] And the binding precedent does not end there; dating back to *McCulloch v. Maryland*,[227] the Court has recognized a governmental cognate to hybrid rights (which this Note names "hybrid powers") wherein multiple constitutional provisions intersect to expand the breadth of federal authority.[228] In particular, despite the Constitution's facial

218. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 758 (2024) ("[T]here is every reason to fear that *Obergefell* could be next.").

219. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (Thomas, J., concurring) (quoting Ramos v. Louisiana, 590 U.S. 83, 138 (2020) (Thomas, J., concurring in the judgment)).

220. *See, e.g.*, Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1897 n.257 (2023) (citing an assortment of scholarly anxiety about other precedent, including *Obergefell*, being overruled after *Dobbs*).

221. *See Dobbs*, 597 U.S. at 330 (Thomas, J., concurring).

222. Both Justices Alito and Kavanaugh listed *Obergefell* alongside *Griswold* when stating that *Dobbs* does not require overruling any other landmark precedent. *See Dobbs*, 597 U.S. at 295; *id.* at 346 (Kavanaugh, J., concurring).

223. *See Dobbs*, 597 U.S. at 333 (Thomas, J., concurring) ("[W]e could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States.'" (quoting U.S. CONST. amend. XIV)).

224. *See id.* at 347 (Roberts, C.J., concurring in the judgment).

225. Pavan v. Smith, 582 U.S. 563, 564 (2017) (per curiam) (quoting Obergefell v. Hodges, 576 U.S. 644, 676 (2015)).

226. *See* Coenen, *supra* note 192, at 1080–82 (citing other invocations of the hybrid-rights doctrine).

227. 17 U.S. (4 Wheat.) 316 (1819).

228. *See* Coenen, *supra* note 192, at 1078 (referring to this same concept wherein "combinations find a reason to validate congressional action in the combined operation of two or more constitutional grants of lawmaking authority" as "power/power combinations").

silence regarding Congress's ability to charter a national bank, Chief Justice Marshall concluded that no such language was needed since the Necessary and Proper Clause impliedly vested the legislature with authority over measures "incidental" to its enumerated powers.[229] He found this standard satisfied via five distinct clauses:

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.[230]

Roughly fifty years later, the Court in *Knox v. Lee*[231] (one of the *Legal Tender Cases*) conveyed even clearer support for hybrid powers when defending the constitutionality of paper money[232]: "It is allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred."[233] The reasoning in these landmark decisions tracks that of *Smith*'s hybrid rights, *Griswold*'s penumbras, and *Obergefell*'s synergies.[234] Indeed, whereas critics of the latter cases (and any related precedent) inevitably emphasize the absence of language in the Constitution conferring such individual protections,[235] the Necessary and Proper Clause requires interplay with other constitutional domains since it has long been deemed to "not itself [be] a grant of power."[236] And although the Court has rarely embraced hybrid *enumerated* powers (i.e., the combination of provisions beyond the Necessary and Proper Clause), scholars attribute this phenomenon to the expansiveness of certain standalone provisions—primarily the Commerce Clause[237]—that preclude the need for the hybrid-powers doctrine.[238] Consequently, in addition to exemplifying still-well-renowned invocations of combinatory constitutional analysis, *McCulloch*

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229. *McCulloch*, 17 U.S. (4 Wheat.) at 406, 411–12.

230. *Id.* at 407.

231. 79 U.S. (12 Wall.) 457 (1871).

232. *See id.* at 529, 552.

233. *Id.* at 534.

234. *See* Coenen, *supra* note 192, at 1077–78 (lumping "'right/right' combinations" and "'power/power' combinations," *id.* at 1078, into the broader category of "combination analysis," *id.* at 1077).

235. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 716 (2015) (Scalia, J., dissenting) ("We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text . . . .").

236. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960).

237. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 n.255 (1995) (noting that, by the middle of the twentieth century, the Court "construed Congress's commerce powers as virtually unlimited").

238. *See, e.g.*, Coenen, *supra* note 192, at 1088 ("[W]hy bother combining the Commerce Clause with another power-related provision when the Commerce Clause will most likely suffice to uphold an enactment on its own?").

and *Knox* demonstrate that the federal government enjoys a slice of the hybridity pie.

E. A Hybrid of Hybrid Rights and Hybrid Powers

One more category: alongside individual-specific hybrid rights and government-specific hybrid powers, the Court has occasionally analyzed intersections *between* these two categories of provisions. For a recent and well-known application of this doctrine, Justice Kennedy returns with his majority opinion in *United States v. Windsor*.[239] In striking down a section of the Defense of Marriage Act (DOMA) that purported to deny federal recognition of same-sex marriages,[240] he not only relied upon equal protection and substantive due process rights (as in *Obergefell*),[241] but also fundamental principles of federalism: "DOMA, because of its reach and extent, departs from [the United States'] history and tradition of reliance on state law to define marriage."[242] The outcome-determinative linchpin in *Windsor* remains ambiguous[243] (especially since *Obergefell* found a constitutional right to same-sex marriage despite lacking federalism concerns[244]), but Justice Kennedy's emphasis on state power suggests that *Windsor* would have come out differently had the Court been unable to cite such structural concerns alongside the Equal Protection and Due Process Clauses.[245] And while some contest this interpretation of *Windsor*,[246] earlier opinions have more expressly leveraged analogous reasoning regardless. For instance, the Court in *Hampton v. Mow Sun Wong*[247] combined principles of equal protection and nondelegation to invalidate an agency regulation that barred noncitizens from employment in federal civil service positions.[248]

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239. 570 U.S. 744 (2013).

240. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

241. *Windsor*, 570 U.S. at 769 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

242. *Id.* at 768.

243. *See id.* at 799 (Scalia, J., dissenting) ("Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways.").

244. *See* Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

245. *Compare, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 379 (4th Cir. 2014) ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights . . . ."), *with id.* at 398 (Niemeyer, J., dissenting) ("The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.").

246. *E.g.*, Douglas Nejaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 219 (2013) ("[T]hough the U.S. Supreme Court's decision in Windsor's favor is sprinkled with elements of federalism and due process, it ultimately rests on equal protection grounds."); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 871 (2014) ("*United States v. Windsor* was (at least in part) an equal protection decision—about that, lower courts are in agreement.").

247. 426 U.S. 88 (1976).

248. *See* Coenen, *supra* note 192, at 1083–84 ("Though ostensibly grounded in equal protection principles, [*Mow Sun Wong*] also pointed to the absence of presidential or congressional involvement . . . .").

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Admittedly, none of the mezzanine-hybrid cases connect their analytical frameworks to the hybrid rights and hybrid powers precedent detailed earlier. Yet all three categories, in substance, rely on the same foundation[249]: certain constitutional provisions mix to create a whole greater than the sum of its parts. Despite being often restricted to the Free Exercise Clause (and perhaps substantive due process[250]), hybrid rights and powers have permeated through landmark precedent from the Court—spanning a diverse array of constitutional provisions—for over two centuries. Several sitting Justices might downplay the marked influence of this doctrine on present-day jurisprudence,[251] but such an approach requires either overruling or overhauling the logic behind numerous legally and politically salient cases. Accordingly, while the Court has proven reluctant to endorse new constitutional rights, future litigants can cite the cases above to credibly argue that still-valid precedent justifies the extension of hybrid constitutional analysis into new forays.

III. THE PLAUSIBLE PROSPECTS FOR HYBRID RIGHTS IN TAXATION

As the prior discussion elucidates, hybrid rights and powers firmly reside within the Court's constitutional jurisprudence yet suffer from an outsized share of criticism and inconsistent application. However, since all of the relevant precedent in Part II remains good law (at least for the moment), hopeful litigants should consider resorting to such hybrid theories when raising constitutional challenges that lack compelling arguments under standalone clauses. And if the Court continues its trend of expanding federal taxing powers while simultaneously narrowing procedural safeguards (as Part I had detailed), this strategy offers one of the few remaining routes for taxpayers to escape constitutionally dubious levies. Consequently, this Part discusses the prospects for extending the hybrid-rights doctrine into taxation, explaining the basic mechanics of such a maneuver before addressing its jurisprudential coherence and challenges.

A. The Fundamentals

First, the groundwork: rather than the current landscape wherein taxpayer-litigants raise ill-fated claims of constitutional impropriety on a clause-by-clause basis, the hybrid-rights doctrine would recognize challenges that incorporate elements from multiple tax-related provisions. Just as the Court has previously found, say, "penumbras" across the Bill of Rights[252] and "synergy" between due process and equal protection principles,[253] it could endorse a legally relevant

249. *See id.* at 1078 (lumping "right/right," "right/no-power," and "power/power" combinations into the overarching category of "combination-based reasoning within operative constitutional doctrine").

250. *See* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991) (noting that hybrid rights "are restricted to express constitutional protections such as freedom of speech, and firmly recognized substantive due process rights").

251. *See supra* note 180 and accompanying text.

252. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

253. Obergefell v. Hodges, 576 U.S. 644, 673 (2015).

intersection connecting, say, the Direct Tax Clauses with the Sixteenth Amendment. Through this expansion, the hybrid-rights doctrine would create better opportunities for courts to invalidate taxes that approach the bounds of several constitutional provisions yet do not transcend any of them individually. In other words, while retaining the centuries of still-valid case law from Part I, taxpayer-litigants could credibly cite the centuries of still-valid case law from Part II to justify repackaging the Constitution's oft-futile restraints on federal taxation into a single, potent whole.

For a concrete example of this doctrine, look no further than the taxpayers' oral argument in *Moore*. While the Court granted certiorari for the MRT's alleged unconstitutionality under the Sixteenth Amendment only,[254] this tax simultaneously raises due process concerns for two reasons: it attributes income from CFCs to U.S. shareholders and retroactively taxes up to thirty years of past earnings.[255] Without explicitly conceding as such, the petitioners in *Moore* substantively relied on the same logic underpinning the hybrid-rights doctrine; namely, responding to skepticism from Justices Sotomayor and Barrett regarding the alleged difference in constitutionality between the MRT and Subpart F, the taxpayers argued the latter distinctly "looks at income *as it comes in* while the controlling shareholder has the *ability to redirect that stream of income*"[256]—the italicized language of which (as noted by these two Justices) sounds more like an issue of due process than of realization.[257] But since the petitioners framed their argument as concerning the Sixteenth Amendment and Direct Tax Clauses on standalone bases,[258] the Court never addressed possible interactions between any constitutional provisions.[259] Even still, *Moore* exemplifies taxpayers' hunger for new frameworks.

Within the broader category of hybrid rights, this hypothesized variety in *Moore* most closely parallels the case law of section II.E. In particular, the petitioners were combining a constitutional restraint on congressional taxing authority (the Sixteenth Amendment's reference to "incomes") alongside a constitutional protection for individuals (the Due Process Clause) to reach a limit-powered hybrid right. But this need not be the doctrine's sole iteration for

254. *See* Petition for Writ of Certiorari, *supra* note 115, at i ("The question presented is: Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.").

255. *See* I.R.C. § 965(a) (increasing the "subpart F income" of certain foreign corporations by "the accumulated post-1986 deferred foreign income of such corporation"); I.R.C. § 951(a)(1)(A) (requiring certain U.S. shareholders of foreign corporations to include their "pro rata share" of "subpart F income" in "gross income").

256. Transcript of Oral Argument, *supra* note 154, at 11 (emphasis added).

257. *See id.* at 10 ("It sounds to me that what you're attacking is only a due process issue . . . ." (statement of Sotomayor, J.)); *id.* at 11 ("But isn't that then just a question of whether it's fair to attribute—fair from a due process point of view, as Justice Sotomayor was saying . . . ?" (statement of Barrett, J.)).

258. *See* Brief for Petitioners at 15, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (concluding the summary of its argument by writing "the MRT is an outright tax on property because of ownership" and "petitioners realized *nothing* from their ownership of shares").

259. *See generally Moore*, 144 S. Ct. at 1684–97.

federal taxes; rather, the following table supplies a nonexhaustive list of individual rights and governmental limits that, except for the mutually-exclusive-apportionment rule and Uniformity Clause (since a given tax cannot be both direct and indirect[260]), could all plausibly synergize with each other:

Individual Right	Governmental Limit
Due Process Clause	Uniformity Clause
Equal Protection Clause	Apportionment Rule
Establishment Clause	General Welfare Clause
Free Press Clause	"Incomes" in the Sixteenth Amendment

As mentioned in section I.D, many of the items on the left lack tax-specific doctrines yet would prove useful in certain conditions. For example, while the Seventh Circuit recently rejected an Establishment Clause challenge to I.R.C. § 107(2)'s exclusion from gross income for "rental allowance[s]" of "minister[s] of the gospel,"[261] the hybrid-rights doctrine could enable taxpayer-litigants to pair this same claim with religious discrimination under the Equal Protection Clause.[262] However, in general, controversial tax laws would create room for plausible arguments spanning some blend of the Sixteenth Amendment, the apportionment rule, and the Due Process Clause because these provisions often already supply grounds for facially colorable claims of impropriety.

B. (Relative) Doctrinal Coherence

Despite the academic battles waged against hybrid rights as conceived in the context of the Free Exercise Clause,[263] tax-related constitutional provisions assuage a key concern shared across such criticism: unpredictability. Thirty-five years after *Smith*, academics and jurists have observed striking inconsistency in its implementation.[264] For example, Justice Alito's *Fulton* concurrence noted the doctrine "divided [courts] into at least three camps" of interpretation, including

260. *See* John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of "Direct Taxes" in* Hylton v. United States, 45 HARV. J.L. & PUB. POL'Y 523, 550 (2022) (noting, based on corpus linguistics, that the term "direct tax" was "frequent[ly] use[d] as encompassing all non-indirect taxes").

261. Gaylor v. Mnuchin, 919 F.3d 420, 423, 437 (7th Cir. 2019); *see also* I.R.C. § 107(2).

262. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (noting the Court would apply more rigorous scrutiny to, inter alia, "statutes directed at particular religious . . . minorities" (citations omitted)).

263. *See supra* note 173 and accompanying text.

264. *See, e.g.*, William L. Esser, IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242 (1998) ("Analysis of hybrid claims in the lower courts leads to the unmistakable conclusion that the hybrid 'calculus' or logical interpretation (i.e., two loser constitutional claims = one winner constitutional claim) simply is not being applied."); Porat & Posner, *supra* note 183, at 49 n.126 (noting that many academics "argue that

circuits that "openly refus[e] to follow" it.[265] But such categorical rejections (and other circuits' narrow interpretations[266]) are not fueled by ideological defiance of *Smith*; rather, they reflect the difficulty that lower courts often encounter when asked to recognize new hybrid rights—a hardship that, in reality, stems from the distinct complexity of present-day First Amendment jurisprudence.

Put bluntly, the Court's case law on the First Amendment, especially the Religion Clauses, is a mess.[267] With various hazily understood degrees of scrutiny and still more hazily understood tests for determining when each degree of scrutiny should apply,[268] lower courts struggle to digest precedent in this area before even considering other constitutional domains.[269] Moreover, litigants generally invoke hybrid rights to combine Free Exercise Clause challenges with equally, if not more, elusive doctrines elsewhere in the Constitution. Indeed, two of Justice Scalia's paradigmatic hybrid rights cases in *Smith* concerned intersections of the Free Exercise Clause with freedom of speech[270] (a "notoriously turgid and confused" field according to Professor Robert Post[271]) and substantive due process[272] (a framework that "unquestionably involves policymaking rather than neutral legal analysis" according to Justice Scalia himself[273]). It should therefore come as no surprise that lower courts widely fluctuate in their treatment of hybrid rights. Like the expression "garbage in, garbage out" from computer science,[274] judges cannot coherently apply the hybrid-rights doctrine when the underlying analytical frameworks for these rights are themselves incoherent.

But doctrines on taxation are different. In general, once the Court draws a line demarcating a tax-related provision's threshold for constitutionality, the

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the [hybrid-rights] doctrine makes no sense on its own terms and has sown confusion among the lower courts").

265. Fulton v. City of Philadelphia, 593 U.S. 522, 604 (2021) (Alito, J., concurring in the judgment); *see also supra* note 182 and accompanying text.

266. *See* Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 331 (D.C. Cir. 2018) (stating that hybrid rights "require[] independently viable free speech and free exercise claims"); Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 18–19 (1st Cir. 2004) (similar); Axson-Flynn v. Johnson, 356 F.3d 1277, 1296–97 (10th Cir. 2004) (similar).

267. Louis Michael Seidman, *The* Dale *Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1562 (2008) ("[I]t is hardly surprising that First Amendment law is a mess.").

268. *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 4 (2023) (stating the Court's First Amendment doctrines have become "bloated, unwieldy, and difficult to hold together").

269. Alexander Tsesis, *Levels of Free Speech Scrutiny*, 98 IND. L.J. 1225, 1226 (2023) ("The Court relied on various heightened scrutiny tests that, in their current forms, provide insufficient guidance to lower courts . . . .").

270. *See* Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

271. Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995).

272. *See Smith*, 494 U.S. at 881 (citing two cases that relied on substantive due process, Justice Scalia specifically noted the intersection between the Free Exercise Clause and "the right of parents . . . to direct the education of their children" (citation omitted) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972)).

273. United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., concurring in the judgment).

274. *See, e.g.*, Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2224 n.23 (2019).

implications for virtually all other levies become apparent. Regarding the Sixteenth Amendment, for instance, few would dispute that I.R.C. § 1001(a) rests on surer footing of being a "tax[] on incomes" than I.R.C. § 1256, and few more would dispute that I.R.C. § 1256 rests on surer footing of being a "tax[] on incomes" than a wealth tax. Similarly, and in stark contrast to the amorphousness of substantive due process, courts can often formulaically identify when levies involve retroactivity or attribution: in many instances, a given tax either has backward-looking application and/or attribution to third parties, or it does not. Consequently, whereas the Court's recognition of, say, a fundamental right to childrearing[275] leaves few inferences for, say, a fundamental right to assisted suicide,[276] lower courts could readily resolve most Sixteenth Amendment challenges if the Court endorsed or abandoned the realization requirement. And although the Justices must undergo the ambiguous process of interpreting "taxes on incomes," they would need to do so regardless of the hybrid-rights doctrine being invoked.

In sum, much of the criticism toward this doctrine derives from the malleable constitutional provisions upon which hybrid rights are found. Instead of relegating this framework to solely Free Exercise Clause jurisprudence,[277] the Court should search for other constitutional domains wherein judges and litigants can endorse hybrid rights in a more principled manner. And the Constitution's tax-related provisions offer especially apt fora; even if given just a handful of cases applying the doctrine in this field, lower courts would be well-equipped to reliably decide future tax disputes.

C. *Modern Applications*

To concretize this theory and demonstrate its likely appeal among members of the federal judiciary, some real-world applications will prove helpful. At the outset, as shown by the taxpayers' substantive reliance on the hybrid-rights doctrine in *Moore*, the MRT could have landed outside a combination of the Due Process Clause (along both its attribution and retroactivity principles) and the Sixteenth Amendment. However, considering the petitioners' outward reliance on just the realization requirement, the Court unsurprisingly analyzed the attribution and realization doctrines in isolation of each other. Yet even in this post-*Moore* landscape, the hybrid-rights doctrine would lay principled grounds for invalidation of the most controversial taxes currently being considered:

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275. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (deeming state prohibition on teaching in non-English languages to violate liberty interests guaranteed under the Fourteenth Amendment's Due Process Clause).

276. *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (upholding state prohibition of assisted suicide against a Fourteenth Amendment challenge).

277. *See* Burwell v. Hobby Lobby Stores, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring) ("[I]n a complex society and an era of pervasive government regulation, defining the proper realm for free exercise can be difficult.").

1. The "Billionaire's Tax"

During his final State of the Union address, President Biden repeated his call for "a minimum tax of 25 percent for billionaires"[278] to resounding applause from Democratic congressmembers. Despite the vagueness of this sentence alone, he was presumably referring to his recent proposal for a twenty-five percent minimum tax on *all* gains—realized and unrealized—for households worth over $100 million.[279] "All" has been italicized for a reason: under President Biden's proposal, this tax would capture unrealized gains generated in the past.[280]

The current constitutional landscape already renders this proposal suspect, but invalidation under standalone clauses poses several hurdles. On the Sixteenth Amendment front, a finding of unconstitutionality necessitates reviving *Macomber*'s realization rule at the cost of overruling dicta across over one century of case law and eliminating several preexisting provisions in the Code. And on the due process front, while skeptical jurists could stress that this tax's extensive backward-looking application exceeds "a modest period,"[281] they would struggle to label the levy "harsh and oppressive"[282] given its exclusive application to high-net-worth individuals.[283] Leveraging the hybrid-rights doctrine, however, a reviewing court could easily strike down President Biden's tax without these side effects by simply finding it invalidly positioned at the borders of both the Sixteenth Amendment and the Due Process Clause. Moreover, the key defects of his proposal—its retroactivity and imposition on unrealized gains—form foundational features of the tax that cannot be sacrificed. Indeed, much of the alleged $500 billion in revenue that could be raised from this tax over the next decade[284] derives from its one-time, backward-looking application to unrealized gains.[285] Without retroactive mark-to-market imposition, President Biden's tax loses its teeth. But with these attributes, the hybrid-rights doctrine would make short work of its unconstitutionality.

278. Biden, *supra* note 25, at S2275.

279. *See* Billionaire Minimum Income Tax Act, H.R. 6498, 118th Cong. (2023) (President Biden's proposal, as introduced by Representative Stephen Cohen).

280. *See id.* (taxing "net unrealized gain," defined as "the aggregate gains which would be recognized if such taxpayer sold each asset held at the close of such taxable year," regardless of the respective asset's date of acquisition or accrual of gains, "for such asset's estimated value . . . over . . . the aggregate losses which would be so recognized").

281. United States v. Carlton, 512 U.S. 26, 32 (1994).

282. Welch v. Henry, 305 U.S. 134, 147 (1938).

283. *See* H.R. 6498 (in addition to certain trusts and estates, applying tax only to individuals worth over $100,000,000).

284. *See* Biden, *supra* note 25, at S2275.

285. *Cf.* Garrett Watson & Erica York, *Analysis of Harris's Billionaire Minimum Tax on Unrealized Capital Gains*, TAX FOUNDATION (Sept. 4, 2024), https://taxfoundation.org/blog/harris-unrealized-capital-gains-tax/[https://perma.cc/TPF2-8YAW] (explaining, for then–presidential candidate Kamala Harris's comparable tax proposal, that "[m]uch of the estimated revenue it would raise in the first decade is from taxing previously accumulated capital gains").

2. A Wealth Tax

Switching lenses to Congress, even more ambitious and constitutionally dubious endeavors await. In particular, proposals for a "wealth tax" applying annually to taxpayers' assets—regardless of realized or unrealized income—have been championed by Senators Elizabeth Warren and Bernie Sanders. Whereas the former's "Ultra-Millionaire Tax Act" would impose taxes of 2% on net worth above $50 million and up to 6% on net worth above $1 billion,[286] the latter's "tax on extreme wealth" effectively leverages the same regime with finer brackets.[287]

As an initial matter, the Sixteenth Amendment does not validate these taxes under even its most government-favored construal. After all, "incomes[] from whatever source derived"[288] must have *some* meaning,[289] and stagnant property cannot plausibly land inside it. Instead, many experts have alleged that wealth taxes qualify as indirect, thereby triggering and satisfying the Uniformity Clause.[290] Just like the standalone constitutional claims ostensibly supporting President Biden's proposal, this argument is debatable but has merit. For instance, some originalist jurists would treat the 1796 Court's commentary on apportionment in *Hylton* as conclusive evidence regarding the provision's original meaning,[291] and stare decisis arguably justifies departing from *Pollock* given the Court's repeated disfavor of this case in the 129 years since its pronouncement.[292] Additionally, even though the retroactive imposition of wealth taxes raises facial due process issues (given their indiscriminate coverage over property acquired in the past), courts would again reject designating these levies as "harsh and oppressive"[293] since they apply to only the top fraction of the wealthy.[294] Leveraging the hybrid-rights doctrine, however, taxpayer-litigants could credibly argue that wealth taxes invalidly reside at the cusp of both the direct/indirect dichotomy and the Due Process Clause. As with its implications for the

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286. *See* Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) (Senator Warren's proposal).

287. *See Tax on Extreme Wealth*, BERNIE (last visited Mar. 13, 2024), https://berniesanders.com/issues/tax-extreme-wealth/[https://perma.cc/3C54-B5NV] (proposing tax of 1% on net worth from $32 million to $50 million, 2% from $50 million to $250 million, 3% from $250 million to $500 million, 4% from $500 million to $1 billion, 5% from $1 billion to $2.5 billion, 6% from $2.5 billion to $5 billion, 7% from $5 billion to $10 billion, and 8% for net worth over $10 billion).

288. U.S. CONST. amend. XVI.

289. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . .").

290. *E.g.*, Letter from Ari Glogower, David Gamage, Erin Scharff, Brian Galle, John R. Brooks, Calvin H. Johnson, Darien Shanske & Carolyn Jones to Elizabeth Warren, Sen. (Feb. 25, 2021), *available at* https://www.warren.senate.gov/imo/media/doc/Wealth%20Tax%20Constitutionality%20Letter%20-%20Glogower%20Et%20Al.pdf [https://perma.cc/J44E-JUPA] ("A tax on an individual's net wealth, however, is not a direct tax, and need not be apportioned among the states according to their population.").

291. *See supra* note 93 and accompanying text.

292. *See supra* notes 84–90 and accompanying text.

293. Welch v. Henry, 305 U.S. 134, 147 (1938).

294. *See* Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) ($50 million threshold); *Tax on Extreme Wealth*, *supra* note 287 ($32 million threshold).

"billionaire's tax," the hybrid-rights doctrine supplies a principled means to warrant judicial nullification of wealth taxes without disturbing longstanding precedent.

While lacking the high degree of salience as the proposals above, several other bills employ equally expansive taxing mechanisms[295] and should accordingly be met with the same fate. But as the two case studies in this section elucidate, taxpayer-litigants opting for standalone constitutional arguments first enjoy superficially tenable positions yet soon encounter the insurmountable hurdle of reconciling the doctrinal disorder that their arguments create. The hybrid-rights doctrine offers a cleaner alternative: rather than casting doubt over countless statutes, regulations, guidance, and cases, this theory enables judges to repackage presently weak individual protections into a more potent sum. Taxpayer-litigants must still convince reviewing courts to adopt reasoning akin to that in *Smith*, *Griswold*, and *Obergefell*, but recent history has demonstrated that this is an easier pill for jurists to swallow than reviving *Pollock* or *Macomber*—even for legal conservatives.[296]

D. The Counterarguments

But there must be a catch. After all, the Court has never remotely considered establishing hybrid protections from taxation, and none of the Justices suggested doing so in *Moore* despite the petitioners invoking this doctrine in substance. And indeed, any claim relying on hybrid rights seems destined for defeat: legal conservatives have derided the practice of creating constitutional rights for decades,[297] so litigants should hesitate before invoking similar logic before the current supermajority of such members on the Court.[298] Nevertheless, when carefully delineated, the hybrid-rights doctrine has persuaded a sufficient number of conservative Justices in specific contexts.[299] This section accordingly addresses three counterarguments from legal conservatives, concluding that hybrid rights offer the most appealing means to cabin taxes despite their oft-disfavored status.

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295. *See, e.g.*, Babies over Billionaires Act of 2022, H.R. 7502, 117th Cong. (2022) (then-Representative Jamaal Bowman's proposal to tax unrealized capital gains of individuals with net worth exceeding $100 million).

296. *See* Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1333 (1992) ("Upon even a cursory examination, it becomes apparent that judges and scholars on the right have been as willing as those on the left to rely on reasoning and authority that are not explicit in the language of the Constitution."); Bruce Ackerman & Anne Alstott, *Why (and How) to Tax the Super-Rich*, L.A. TIMES (Sept. 20, 2011, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-2011-sep-20-la-oe-ackerman-wealth-tax-20110920-story.html [https://perma.cc/7RFP-6RE6] (speculating the Court will not revive *Pollock* because "[t]he Roberts court may be conservative, but it is not quite as reactionary as all that").

297. *E.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("Where constitutional materials do not clearly specify [a] value to be preferred, there is no principled way to prefer any claimed human value to any other.").

298. *See* Margaret Talbot, *Amy Coney Barrett's Long Game*, NEW YORKER (Feb. 7, 2022), https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game [https://perma.cc/A8Z9-LZK5] (noting that Justice Barrett's confirmation "gave the conservative wing of the Court a 6–3 supermajority").

299. *See* Reynolds, *supra* note 296, at 1333.

1. "Hybrid Rights Promote Judicial Policymaking"

Start with the inevitable: as noted in the prior analysis of *Smith*, *Griswold*, and *Obergefell*, legal conservatives criticize hybrid rights for facilitating judicial activism without any constitutional basis.[300] Namely, even assuming this doctrine supplies lower courts with sufficient guidance for principled adjudication, nothing would prevent the Supreme Court from commandeering hybrid rights to constitutionalize its subjective policy preferences.[301] Or in the words of Justice Scalia while discussing an alleged constitutional right to privacy, such a right "comes from penumbras and emanations, blah blah blah, garbage."[302]

Yet amid his lifelong war against penumbral reasoning, Justice Scalia also championed the substantively identical hybrid-rights doctrine. He was not alone; in a dose of legal realism,[303] many of *Griswold*'s biggest critics have relied on Justice Douglas–like logic to reach conservative results elsewhere, ranging from standing[304] to sovereign immunity.[305] Presumably, none of them consider their own arguments "blah blah blah, garbage."[306] And for an example more recent than Justice Scalia in *Smith*, simply look at his successor: Justice Gorsuch cosigned Justice Alito's disapproval of hybrid rights in *Fulton*[307] and has separately mocked penumbral reasoning,[308] but he elsewhere asserted—while writing for all of the sitting conservatives—that the Free Exercise and Free Speech Clauses "work in tandem[,] . . . provide[] overlapping protection[,] . . . [and] doubly protect[] religious speech."[309] Far from being the bygone product of the Supreme Court's progressive past, the hybrid-rights doctrine resonates with conservative jurists when applied to conservative causes.

The Justices seem categorically skeptical of hybrid rights, but this appearance realistically reflects legal conservatives' greater reluctance to enshrine individual

300. *See, e.g.*, BORK, *supra* note 187, at 99 ("[T]he protection of marriage was not the point of *Griswold*. The creation of a new device for judicial power to remake the Constitution was the point.").

301. *See id.* (criticizing *Griswold* majority because "'privacy' will turn out to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy").

302. Adam Serwer, *Scalia on Privacy: 'Blah Blah Blah, Garbage*,' NBC NEWS (Sept. 27, 2013, 12:49 PM), https://www.nbcnews.com/id/wbna53124148 [https://perma.cc/N6HX-3UBE].

303. *See* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 44 (2013) ("Judges are supposed to lay their preconceptions to one side when deciding a case . . . [b]ut when one must make a decision under uncertainty, it is impossible to banish preconceptions . . . .").

304. *See* Reynolds, *supra* note 296, at 1337 ("The doctrine of standing is one product of penumbral reasoning.").

305. *See id.* at 1341 (arguing Eleventh Amendment jurisprudence "involves a sort of penumbral reasoning . . . .").

306. Serwer, *supra* note 302.

307. Fulton v. City of Philadelphia, 593 U.S. 522, 544, 604 (2021) (Alito, J., concurring in the judgment).

308. *See* Roman Cath. Diocese v. Cuomo, 592 U.S. 14, 24 (2020) (Gorsuch, J., concurring) (sarcastically writing that "some [judges] have found [emergency restrictions on rights] hiding in the Constitution's penumbras").

309. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022).

rights in the Constitution[310] rather than their disfavor toward the hybrid-rights doctrine on its merits. Indeed, for the relatively uncommon scenarios wherein conservatives can co-opt this reasoning to their advantage, such as religious liberty[311] and standing,[312] they have not hesitated to do so. And given the capacity of the hybrid-rights doctrine to invalidate the most controversial tax proposals of late, future taxpayer-litigants should contemplate incorporating this framework into allegations of unconstitutionality.

2. "There Are Better, Less Subjective Options Available"

Even with its favorable prospects for circumscribing taxation, the hybrid-rights doctrine would ordinarily not be the optimal means of constitutional tax jurisprudence among legal conservatives; if nothing else, their reliance on this methodology could expose them to allegations of partisanship should they later refute other alleged hybrid guarantees in the Constitution.[313] But for those legal conservatives interested in narrowing congressional taxing power, alternative solutions introduce a worse headache: stare decisis.

While the Court might consider bolstering protections granted by standalone constitutional provisions, it could not feasibly reconcile this maneuver with centuries of conflicting cases and statutes. For example, had the Justices in *Moore* invalidated the MRT by resuscitating a realization requirement in the Sixteenth Amendment, they would have somehow needed to situate this holding within contradictory statements in cases such as *Helvering v. Horst*,[314] *Helvering v. Griffiths*,[315] and *Commissioner v. Glenshaw Glass Co.*[316] as well as contradictory taxing principles in the Code such as I.R.C. § 877A,[317] I.R.C. § 1256,[318] original issue discount rules,[319] Subpart F,[320]

310. *See* Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 598–99 (1991) ("[T]he domination of federal courts by judges appointed by Republican presidents undermines any basis for confidence in the federal bench as a source of systematic protection of individual liberties."); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1222–23 (2004) ("Faced with an increasingly conservative federal bench and a spate of social issues being addressed in liberal ways by state governments, liberals may come again to disfavor federal courts." (footnote omitted)).

311. *See Kennedy*, 597 U.S. at 523.

312. *See Reynolds*, *supra* note 296, at 1337.

313. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

314. 311 U.S. 112 (1940); *see id.* at 116 ("The [realization] rule[] [was] founded on administrative convenience . . . .").

315. 318 U.S. 371 (1943); *see id.* at 394 ("[Various past cases] undermined the original theoretical bases of the decision in *Eisner v. Macomber*.").

316. 348 U.S. 426 (1955); *see id.* at 431 ("[*Macomber*] was not meant to provide a touchstone to all future gross income questions.") (citing Helvering v. Bruun, 309 U.S. 461 (1940); United States v. Kirby Lumber Co., 284 U.S. 1 (1931)).

317. *See* I.R.C. § 877A(a) (taxing property of certain expatriates on a mark-to-market basis).

318. *See* I.R.C. § 1256(a)(1) (taxing certain contracts on a mark-to-market basis).

319. *See* I.R.C. §§ 1272–1273 (imputing income daily for bonds issued at a discount).

320. *See* I.R.C. § 951(a)(1)(A) (attributing CFCs' income to their U.S. shareholders on a prorated basis).

GILTI,[321] Subchapter S,[322] and Subchapter K.[323] As much as commentators claim the Roberts Court does not respect precedent,[324] such vast bodies of legal authority being disturbed would cause even the most headstrong jurists to search for another approach—especially in taxation, a convoluted realm for most Article III judges.[325] Although courts could preserve some of this law on a tax-by-tax basis via fact-specific arguments,[326] this strategy would administratively burden the judiciary and still fail to save significant portions of the Code. The Court could technically alter its tax jurisprudence while citing stare decisis to justify retaining any past cases rendered erroneous, but this approach would require the Justices to recognize their upholding of unconstitutional case law despite having emphasized elsewhere that stare decisis is "at its weakest when [the Court] interpret[s] the Constitution."[327] Such a concession seems even less likely to occur than the Code being bulldozed.

The hybrid-rights doctrine delivers the best of both worlds: in addition to striking down progressive tax policies, it need not disturb existing law. Indeed, just as Justice Scalia espoused the doctrine to reconcile seemingly contradictory precedent on the Free Exercise Clause, legal conservatives could leverage this technique for the same end in the taxation context. For example, if the Court hypothetically invalidated President Biden's mark-to-market tax purely by reviving a constitutional realization requirement, it would then need to address, inter alia, I.R.C. § 877A, I.R.C. § 1256, and more than a century of case law casting doubt over *Macomber*. But if the Court instead invalidated this tax by attacking its position at the outer bounds of the Due Process Clause and Sixteenth Amendment, these other statutes and cases would no longer be inherently threatened since they do not trigger retroactive imposition to the same extent as a statute taxing unrealized gains from the distant past. Ultimately, whether viewed as an affirmatively good strategy or merely the least destructive option, the hybrid-rights doctrine gives legal conservatives what they want without the insurmountable obstacles blocking alternative paths.

3. "Hybrid Powers Exist Too"

For their last facially plausible retort, legal conservatives could flip this Note on its head; namely, rather than interpreting the right-hand column of the table in section III.A as a set of governmental *limits* fueling the hybrid-*rights* doctrine, a

321. *See* I.R.C. § 951A(a) (attributing "global intangible low-taxed income" from certain foreign corporations to their U.S. shareholders).

322. *See* I.R.C. § 1366(a)(1) (attributing income from S corporations to their shareholders).

323. *See* I.R.C. § 702(a) (attributing partnership income to partners).

324. *See* sources cited *supra* note 43.

325. *See* Charles L.B. Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222, 225 (1960) (stating the Supreme Court's tax opinions are marred by "triviality and futility").

326. *See, e.g.*, Note, Moore *than Meets the I.R.C.? The Apportionment Rule's Originalist Backstop for I.R.C. § 877A*, 137 HARV. L. REV. 1204, 1223–24 (2024) (arguing for the fact-specific constitutionality of a mark-to-market exit tax).

327. Agostini v. Felton, 521 U.S. 203, 235 (1997).

tax-friendly court could view it as a set of governmental *authorizations* fueling the hybrid-*powers* doctrine.[328] After all, the Court has demonstrated receptiveness to recognizing hybrid powers for over two centuries, and many of the alleged limits on federal taxation reside within constitutional provisions that were intended to expand governmental authority. Indeed, Chief Justice Marshall lists "lay[ing] and collect[ing] taxes" as the first of Congress's "great powers" in *McCulloch*[329]—one of the paradigmatic hybrid-powers cases.[330] So why should the Court depart from such precedent here?

The answer to this loaded question rests in correcting a mistaken premise. While the Court has previously recognized hybrid powers to justify alleged federal intrusions upon states, it has never done so amid countervailing constitutional rights for individuals. In *McCulloch*, for instance, Chief Justice Marshall never considered individual protections because the case concerned only issues of federalism;[331] if anything, the United States' victory in *McCulloch* benefited individual consumers by providing them with a competitive commercial bank rendered immune from state taxation.[332] Similarly, and as evinced by being a dispute between two private parties,[333] *Knox* lacked any direct aggrandizement of congressional authority at the expense of individual rights. This case perhaps created opportunities for the government to itself issue bonds payable with paper money and subsequently print money in such a volume so as to effectively deprive creditors of their property, but the Court in these decisions considered only a private party's alleged deprivation of property to the benefit of another private party—a key distinction in the *Legal Tender Cases*.[334]

Taxes, by contrast, inherently involve transfers from people to the government. Even when the Framers sought to expand congressional taxing authority in the Constitutional Convention,[335] they did so within expressly delineated bounds to

328. *Cf.* Alex Kozinski & Eugene Volokh, Commentary, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1657 (1993) ("[P]enumbral thinking cuts both ways: It can be used to expand individual rights (at the expense of our right to self-government), but it can also be used to expand the powers of government (sacrificing personal rights).").

329. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

330. *See* Coenen, *supra* note 192, at 1086–88 (citing *McCulloch* among a handful of hybrid-powers cases before the Court dramatically expanded standalone constitutional powers, particularly the Commerce Clause).

331. *See* McHenry County v. Raoul, 44 F.4th 581, 592 (7th Cir. 2022) (naming it "canonical" to federalism).

332. Notably, the First and Second Banks of the United States combined commercial banking with some central banking functions. *See* Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 775 n.195 (2019) (noting these banks "act[ed] as market participants, accept[ed] deposits, ma[de] loans, and set[] interest rates on those loans").

333. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 457–58 (1871) (summarizing the facts as a dispute over a court's instructions regarding the currency of a civil judgment).

334. *See id.* at 551 ("[The Fifth Amendment] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.").

335. *See* KLARMAN, *supra* note 8, at 216.

mitigate oppression from the government.[336] Similarly, although the drafters and ratifiers of the Sixteenth Amendment intended to expand such taxing authority beyond these original bounds,[337] they expected that meaningful restraints would remain intact.[338] As a result, taxation is categorically ill-suited for the hybrid-powers doctrine; if courts could combine tax-authorizing clauses to validate levies that land beyond such clauses standing alone, they would risk negating the carefully crafted compromises between governmental power over, and individual protections from, taxation.[339] Yet simultaneously, given the Framers' solicitude for liberty and freedom,[340] courts could credibly combine tax-related limits to invalidate certain levies on fact-specific grounds without disturbing these same compromises. In other words, when hybrid rights and hybrid powers ostensibly contradict each other, the former should prevail.

* * *

Despite their justifiable bases in these counterarguments, legal conservatives have deemed them insufficient for rejecting hybrid rights in other contexts when push comes to shove. Taxation should be no different; rather than upsetting the current Code by resuscitating some doctrine of old, tax-skeptical judges can reach their presumably desired outcome—invalidating the federal government's most controversial ongoing proposals—by simply reaffirming the rationales in *Smith*, *Griswold*, *Obergefell*, *McCulloch*, *Windsor*, and many other still-valid cases. At a surface level, this theory uses progressive legal reasoning to reach a politically conservative outcome. But in reality, jurists across both camps avail themselves of this doctrine when given the right set of conditions. And to the extent the judiciary wants to foreclose taxes currently being proposed, these conditions comfortably sit in their Goldilocks zone: not strong enough to nullify past taxes, not weak enough to rubber-stamp future taxes, but just right to reach a principled middle ground.[341]

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336. *See* THE FEDERALIST NO. 36, *supra* note 47, at 216 (Alexander Hamilton) (noting the apportionment rule "effectually shuts the door to partiality or oppression" and that "[t]he abuse of [direct] taxation seems to have been provided against with guarded circumspection").

337. *See supra* note 135 and accompanying text.

338. *See* Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 392–403 (2004) (arguing "[a] conscious decision was made to limit the Sixteenth Amendment's scope to 'taxes on incomes,'" *id.* at 398, and citing historical evidence consistent with this conclusion, *see id.* at 398–403).

339. *See* Gillian E. Metzger, *The Supreme Court, 2011 Term—Comment: To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 90 (2012) (describing the apportionment rule as "part of the critical compromise over slavery").

340. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 4 (2003) (arguing the Framers held the view that "first come rights, and then comes the Constitution").

341. *Cf.* ROBERT SOUTHEY, *The Story of the Three Little Bears*, *in* THE DOCTOR 327, 328 (John Wood Warter ed., London, Longman, Brown, Green, & Longmans 1856) ("[A] little old Woman . . . went to the porridge of the Little, Small, Wee Bear, and tasted that; and that was neither hot, nor too cold, but just right . . . .").

CONCLUSION

The Code wields the power to destroy,[342] but heedless revival of age-old tax restrictions wields the power to destroy the Code. Excluding its one-off and widely unpopular decisions in *Pollock* and *Macomber*, the Court has consistently interpreted standalone constitutional provisions that could have protected taxpayers—be it the apportionment rule, the General Welfare Clause, due process rights, or the Sixteenth Amendment—in favor of the federal government. Rather than reinterpreting these clauses and stampeding over stare decisis, jurists can turn to another doctrine comprehensively developed in other constitutional domains: hybrid rights. By melding elements from multiple provisions into a single argument, future taxpayer-litigants could credibly challenge today's most intrusive levies without needing to reconcile the parade of horribles cited against their predecessors. As much as legal conservatives purport to detest hybrid rights, they have not shied away from substantively identical reasoning when it preserves precedent and supports their desired outcome. And the Court now has a ripe opportunity to conduct this exact maneuver with taxation.

342. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).