

MOORE THAN MEETS THE I.R.C.? THE
APPORTIONMENT RULE'S ORIGINALIST
BACKSTOP FOR I.R.C. § 877A

Renunciation of U.S. citizenship is no trivial act.¹ For most, it requires leaving the country,² appearing before a consular or diplomatic officer, signing an oath of renunciation,³ paying a \$2,350 fee,⁴ and being named in the *Federal Register*.⁵ Yet expatriates, ranging from singer Tina Turner to Facebook cofounder Eduardo Saverin,⁶ have risen dramatically in number since 2010.⁷ Some, like tennis player Naomi Osaka, renounce so they can represent another country in the Olympics.⁸ Others, like former Israeli politician Dov Lipman, do so to hold office in a foreign government.⁹ But for the purported majority of expatriates,¹⁰ ex-U.S. citizen and former U.K. Prime Minister Boris Johnson expressed their motive well: When asked about paying a tax bill from the IRS, he responded, “[I]t’s absolutely outrageous. Why should I?”¹¹

Policymakers have long expressed ire over reports of Americans renouncing citizenship to avoid taxes.¹² Beyond concerns about forgone

¹ See William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1351 (1991).

² 8 U.S.C. § 1483(a) (generally barring loss of citizenship within the United States).

³ 22 C.F.R. § 50.50 (2022).

⁴ *Id.* § 22.1 (Item No. 8). *But see* Schedule of Fees for Consular Services — Administrative Processing of Request for Certificate of Loss of Nationality (CLN) Fee, 88 Fed. Reg. 67687, 67687–88 (proposed Oct. 2, 2023) (to be codified at 22 C.F.R. pt. 22) (proposing \$450 fee).

⁵ I.R.C. § 6039G(d) (flush language).

⁶ See Jo Craven McGinty, *More Americans Are Renouncing Their Citizenship*, WALL ST. J. (Oct. 16, 2020, 5:30 AM), <https://www.wsj.com/articles/more-americans-are-renouncing-their-citizenship-11602840602> [<https://perma.cc/UAB7-9T25>].

⁷ See Andreas Kluth, Opinion, *U.S. Expats Can’t Renounce Their Citizenship Fast Enough*, BLOOMBERG (Aug. 31, 2020, 3:00 AM), <https://www.bloomberg.com/view/articles/2020-08-31/why-thousands-of-u-s-expats-are-renouncing-their-citizenship> [<https://perma.cc/KD9Z-PRL2>] (estimating roughly 31,500 renunciations occurred during the 2010s, a nearly 600% increase from the number of estimated renunciations from 2000 through 2009); 141 CONG. REC. 10770 (1995) (statement of Sen. Ted Kennedy) (estimating Treasury would lose \$3.6 billion over a ten-year period, starting in 1995, from roughly twenty-five wealthy Americans expatriating annually).

⁸ See Cindy Boren, *Tennis Star Naomi Osaka Gives Up Her U.S. Citizenship to Play for Japan in Tokyo Olympics*, WASH. POST (Oct. 10, 2019, 11:21 AM), <https://www.washingtonpost.com/sports/2019/10/10/tennis-star-naomi-osaka-gives-up-her-us-citizenship-play-japan-tokyo-olympics> [<https://perma.cc/BK4N-Q2AG>].

⁹ See Allison Kaplan Sommer, *Yesh Atid’s Dov Lipman to Relinquish U.S. Citizenship to Serve in Knesset*, HAARETZ (Jan. 23, 2013), <https://www.haaretz.com/2013-01-23/ty-article/.premium/rabbi-renounces-u-s-passport-for-knesset/000017f-f3f6-d487-abff-f3feca250000> [<https://perma.cc/VDJ4-LTE7>].

¹⁰ See McGinty, *supra* note 6 (“The most likely reason for the recent exodus, financial experts surmise, is a desire to stop filing U.S. tax returns . . .”).

¹¹ Diane Rehm, *Boris Johnson: “The Churchill Factor,”* WAMU, at 38:12 (Nov. 13, 2014, 11:00 AM), https://dianerehm.org/shows/2014-11-13/boris_johnson_the_churchill_factor [<https://perma.cc/BE24-ZL4R>].

¹² See, e.g., *Tax Treatment of Expatriated Citizens: Hearing on S. 453, S. 700, H.R. 831, H.R. 981, H.R. 1535, and H.R. 1812 Before the S. Comm. on Fin.*, 104th Cong. 2 (1995) (statement of Sen. Max Baucus) (labeling renunciant “greedy, unpatriotic people”).

revenue, these stories often spark indignation since such expatriates presumably valued their citizenship so cheaply to have sacrificed it for pecuniary gain.¹³ Congress has consequently sought to deter tax avoidance by abandonment of citizenship,¹⁴ and the same body of law establishing federal taxes — the Internal Revenue Code (I.R.C.) — provides a few tools to this end.¹⁵ For instance, I.R.C. § 877 imposes levies on U.S.-source income of certain high-income or wealthy renunciants for up to ten years after expatriation.¹⁶ Enacted in 1966 as the nation's first “expatriation tax,”¹⁷ the provision went unenforced for decades¹⁸ before returning to the spotlight when President Clinton read an article about six affluent Americans who had expatriated for tax purposes.¹⁹ Congress accordingly added disclosure obligations and a public-naming system for expatriates in the Code;²⁰ amended I.R.C. § 877 to presume a tax-avoidance purpose for those above a certain threshold of wealth;²¹ and enacted the Reed Amendment, which barred former U.S. citizens from reentering the country if they had renounced citizenship to avoid taxation.²² However, these renewed efforts still proved largely unfruitful in the battle against tax-motivated renunciations.²³

Cue I.R.C. § 877A. Enacted under the Heroes Earning Assistance and Relief Tax Act of 2008,²⁴ this provision establishes a different kind of expatriation tax: treating certain renunciants (generally those passing

¹³ E.g., *Primetime Live*, ABC, at 38:13 (television broadcast Feb. 22, 1995) (recording interview with Leslie B. Samuels, then Assistant Secretary for Tax Policy, stating, “one could kind of characterize them as ‘economic Benedict Arnolds’”); see also Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1091–92 (1996).

¹⁴ See Renee S. Liu, Note, *The Expatriate Exclusion Clause: An Inappropriate Response to Relinquishing Citizenship for Tax Avoidance Purposes*, 12 GEO. IMMIGR. L.J. 689, 695 (1998).

¹⁵ Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 867 (2004).

¹⁶ See I.R.C. § 877(a) (applying tax to, among others, those with net worth of at least \$2 million).

¹⁷ See Liu, *supra* note 14, at 689–90.

¹⁸ See STAFF OF J. COMM. ON TAX’N, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 62 (Comm. Print 1995) [hereinafter 1995 COMMITTEE REPORT] (noting “[t]he IRS appears to have devoted little in the way of resources to the enforcement of section 877,” issuing no regulations since the provision’s enactment).

¹⁹ Kenneth J. Cooper & R.H. Melton, *Tax Break for Wealthy Expatriates Sparks Class Warfare Charges*, WASH. POST, Mar. 31, 1995, at A14; see also Robert Lenzner & Philippe Mao, *The New Refugees*, FORBES, Nov. 21, 1994, at 131 (presumably the article President Clinton read).

²⁰ See I.R.C. § 6039G(b), (d) (flush language) (mandating renunciants disclose certain personal information and instituting quarterly publication of names in the *Federal Register*).

²¹ See *id.* § 877(a) (adding presumption of tax avoidance purpose for, inter alia, individuals with net worths exceeding \$2 million).

²² See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 352(a), 8 U.S.C. § 1182(a)(10)(E); STAFF OF J. COMM. ON TAX’N, 107TH CONG., DESCRIPTION OF THE CHAIRMAN’S MODIFICATION TO H.R. 5063, “ARMED FORCES TAX FAIRNESS ACT OF 2002,” at 14 (Comm. Print 2002).

²³ See Liu, *supra* note 14, at 698 (arguing the “numerous exceptions” to I.R.C. § 877 substantially decrease, if not eliminate altogether, the practical likelihood of this provision’s enforcement).

²⁴ See Pub. L. No. 110-245, § 301(a), 122 Stat. 1624, 1638–44 (codified as amended at I.R.C. § 877A).

the same threshold from I.R.C. § 877²⁵) as if they had liquidated all of their assets at fair market value on the day before relinquishing citizenship.²⁶ Whereas the Code usually imposes income taxes only upon some realization event,²⁷ such as a disposition of property,²⁸ I.R.C. § 877A embraces an uncommon²⁹ mark-to-market regime in which assets are *deemed* sold — triggering taxable gain or loss³⁰ — despite remaining in the taxpayer’s real-world possession.³¹ Among other rationales,³² the statute is intended to tax appreciation that accrued during U.S. citizenship or residency but might have otherwise gone untaxed.³³

This linchpin mark-to-market scheme comes at a cost: dubious constitutionality.³⁴ Shortly after the ratification of the Sixteenth Amendment, which enables federal “taxes on incomes[] from whatever source derived,”³⁵ the Supreme Court interpreted this phrase to allow only levies involving a realization of changed wealth.³⁶ While subsequent case law has cast doubt on the validity of such a constitutional realization requirement,³⁷ the Court has also never expressly overruled this decision.³⁸ Accordingly, as the Justices gear up to confront the Sixteenth Amendment’s meaning in *Moore v. United States*,³⁹ many wonder if

²⁵ See I.R.C. § 877A(g)(1) (tying definition of “covered expatriate” to I.R.C. § 877 with exceptions for taxpayers who have held dual citizenship since birth, renounced citizenship before turning eighteen-and-a-half years old, or become subject to U.S. taxes as a citizen or resident after expatriation).

²⁶ See *id.* § 877A(a)(1).

²⁷ Alvin C. Warren, Jr., Commentary, *Financial Contract Innovation and Income Tax Policy*, 107 HARV. L. REV. 460, 462 (1993) (attributing this general rule to “considerations of administrability, liquidity, and political acceptability”).

²⁸ See I.R.C. § 1001(a) (determining “gain from the sale or other disposition of property”).

²⁹ See James S. Eustice, *Abusive Corporate Tax Shelters: Old “Brine” in New Bottles*, 55 TAX L. REV. 135, 142 (2002) (stating current income tax “lack[s] extensive mark-to-market rules”).

³⁰ Taxpayers may defer payment until disposing of the respective property, I.R.C. § 877A(b)(1), but this election requires providing “adequate security” and paying interest, *id.* § 877A(b)(4)(A)–(B).

³¹ See STAFF OF J. COMM. ON TAX’N, 110TH CONG., TECHNICAL EXPLANATION OF H.R. 6081, THE “HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008,” AS SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MAY 20, 2008, at 39 (Comm. Print 2008) [hereinafter 2008 COMMITTEE REPORT].

³² See Steven J. Arsenaault, *Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax*, 24 AKRON TAX J. 37, 57–60 (2009) (detailing many policy justifications).

³³ See STAFF OF JOINT COMM. ON TAX’N, 108TH CONG., REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY 196 (Comm. Print 2003) (“Some argue that it is appropriate to tax unrealized gains that accrue during the period that an individual was subject to U.S. taxation on a worldwide basis.”).

³⁴ See generally Mark E. Berg, *Bar the Exit (Tax)! Section 877A, The Constitutional Prohibition Against Unapportioned Direct Taxes and the Realization Requirement*, 65 TAX LAW. 181 (2012) (arguing I.R.C. § 877A unconstitutionally imposes a direct, nonincome tax without proper apportionment).

³⁵ U.S. CONST. amend. XVI.

³⁶ See *Eisner v. Macomber*, 252 U.S. 189, 212, 219 (1920).

³⁷ See *infra* notes 131–34 and accompanying text.

³⁸ Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on Eisner v. Macomber (1920)*, 16 DUKE J. CONST. L. & PUB. POL’Y 65, 67 (2021).

³⁹ See *Moore v. United States*, 36 F.4th 930 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023).

statutes relying on broader conceptions of income, such as I.R.C. § 877A, could soon be on the constitutional chopping block.⁴⁰

Such speculation has merit. Even if *Moore* does not fully revive the realization principle, evidence from the Sixteenth Amendment's passage and ratification — records persuasive to the increasingly originalist bench⁴¹ — supports circumscribing the constitutional definition of income. Moreover, while Congress generally enjoys broad authority over duties, imposts, and excises,⁴² the Court could cite documents from the Founding era to narrowly construe such terms. Under these readings, many taxes relying on expansive notions of income must derive constitutionality from a politically impossible requirement: being apportioned among states according to their respective populations.⁴³ But despite failing the text of this apportionment requirement, I.R.C. § 877A may still pass muster given ample evidence indicating that the Founders had never intended to bar an expatriate-only levy.

This Note investigates the constitutional prospects for I.R.C. § 877A. Part I chronicles the development of taxing powers and restraints in the Constitution, tracing their origins from the Articles of Confederation through landmark cases and up to *Moore*'s potential revival of a Sixteenth Amendment–based realization requirement. Part II analyzes the interaction between I.R.C. § 877A and this doctrine, scrutinizing three plausible routes to constitutionality as an income, indirect, or apportioned tax. This Note concludes that even in the worst-case scenario wherein the judiciary reads “incomes” narrowly but “direct taxes” broadly, I.R.C. § 877A should survive challenge through an interpretation of the apportionment rule that incorporates historical context. While leaving little room to support more controversial provisions and proposals, this escape hatch preserves the validity of I.R.C. § 877A via its exclusive application to expatriates — a class raising none of the Founders' concerns that originally fueled limits on federal taxing power.

I. THE CONSTITUTIONAL HISTORY OF TAXATION

Scholars have long debated the most proper theory of constitutional interpretation,⁴⁴ and this brief Note cannot meaningfully evaluate the merits of any position amid such extensive discourse. However, given originalism's proliferation across the federal judiciary, challenges to I.R.C. § 877A will likely address its interaction with the Constitution as originally understood. Indeed, originalist commentators have endorsed

⁴⁰ See sources cited *infra* note 151.

⁴¹ See Christopher S. Havasy, Joshua C. Macey & Brian Richardson, Essay, *Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. 899, 907 n.19 (2023).

⁴² See U.S. CONST. art. I, § 8, cl. 1.

⁴³ See *id.* § 2, cl. 3; *id.* § 9, cl. 4.

⁴⁴ Anthony J. Bellia Jr. & Bradford R. Clark, *The Constitutional Law of Interpretation*, 98 NOTRE DAME L. REV. 519, 521 (2022).

some of the narrowest constructions of congressional taxing authority,⁴⁵ and the petitioners in *Moore* heavily cited evidence from the Sixteenth Amendment's drafting and ratification to support their circumscription of federal income taxes.⁴⁶ Especially considering the ambiguity of constitutional taxing powers based on their text alone,⁴⁷ proper scrutiny of I.R.C. § 877A requires surveying the Constitution's context. To that end, this Part summarizes salient discourse and case law on the constitutionality of federal taxation, focusing largely on the Constitutional Convention and the Sixteenth Amendment's enactment and ratification. Such historical inquiry not only offers the best opportunity to glean how a lot of judges will assess this provision, but also elucidates the jurisprudential landscape most adverse to I.R.C. § 877A's constitutionality.

A. *The Taxing Clause and Uniformity*

Although there has been rekindled interest in the topic of late, the United States's struggle for taxing power predates the Constitution.⁴⁸ Among its now-notorious constraints on central government,⁴⁹ the Articles of Confederation denied the Confederation Congress meaningful authority to raise taxes; rather, it could merely issue requisitions for revenue "in proportion to the value of all land within each state."⁵⁰ These requests nominally imposed binding obligations, but in practice, the states treated themselves as independent sovereigns that could disregard such fundraising.⁵¹ Accordingly, the Founders sought to rectify this issue during the Constitutional Convention by empowering Congress to levy taxes itself.⁵² They eventually reached a general 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,

⁴⁵ See Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 747–52 (2020) (comparing scholarship on taxing clauses and noting Professor Erik Jensen supports broad application of the apportionment rule based on his interpretation of the Constitution's original meaning).

⁴⁶ Brief for Petitioners at 26–33, *Moore v. United States*, No. 22-800 (Aug. 30, 2023).

⁴⁷ See, e.g., 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) ("What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution.").

⁴⁸ See generally GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 74–101 (2017).

⁴⁹ See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 28 (2005) (noting Congress lacked "effective means" of executing key powers under the Articles of Confederation).

⁵⁰ See ARTICLES OF CONFEDERATION of 1781, art. VIII.

⁵¹ 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"). In 1786, for instance, the Confederation Congress mandated states pay nearly \$3.8 million via requisitions, yet it collected \$663 total. See ROGER H. BROWN, REDEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 26 (1993).

⁵² See, e.g., THE FEDERALIST NO. 30, *supra* note 51, at 184 (Alexander Hamilton) ("A complete power . . . to procure a regular and adequate supply of revenue . . . may be regarded as an indispensable ingredient in every constitution.").

Duties, Imposts and Excises”⁵³ Recognizing the potential abuse of this expansive language, however, the Founders added several caveats.

Indeed, one such limit resides in the same sentence. Requiring that “all Duties, Imposts and Excises shall be uniform throughout the United States,”⁵⁴ the Uniformity Clause establishes a relatively clear-cut restriction on these three indirect taxes⁵⁵: Congress may impose such levies so long as they “operate[] with the same force and effect in every place where the subject of [them] is found.”⁵⁶ Whereas duties, imposts, and excises defined in nongeographical terms generally satisfy the condition, those containing geographic language trigger “close[]” examination “to see if there is actual geographic discrimination.”⁵⁷ Although this clause leaves possibilities for unbalanced aggregate revenue collection between states,⁵⁸ it theoretically “cut[s] off all undue preferences of one State over another in the regulation of subjects affecting their common interests.”⁵⁹

B. *The Direct Tax Clauses and Apportionment*

But the Founders did not stop there. Elsewhere in the Constitution, they (1) required that revenue-raising bills originate in the House of Representatives,⁶⁰ (2) mandated all federal expenditures pay debts or provide for the country’s common welfare,⁶¹ and (3) barred duties on state exports.⁶² While these three clauses supply relatively bright-line rules, the Founders further incorporated one mechanism from the requisition system — apportionment — that continues to spark debate⁶³:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number

⁵³ U.S. CONST. art. I, § 8, cl. 1.

⁵⁴ *Id.*

⁵⁵ See THE FEDERALIST NO. 36, *supra* note 51, at 215 (Alexander Hamilton) (describing “duties and excises on articles of consumption” as taxes “of the *indirect* kind”).

⁵⁶ *Edye v. Robertson*, 112 U.S. 580, 594 (1884).

⁵⁷ *United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (citing *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 160–61 (1974)). Even the facially strict standard for geographically defined taxes does not guarantee judicial invalidation. *Id.* at 84. For example, while espousing this framework for the Uniformity Clause, the Court upheld a tax exemption on oil produced in areas of Alaska (and certain territorial waters) because Congress did not intend to discriminatorily favor Alaska and instead “determin[ed], based on neutral factors, that this oil required separate treatment.” *Id.* at 85; *see also id.* at 77–78, 85–86.

⁵⁸ See Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland* (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 19, 56 (Herbert J. Storing ed., 1981) (“[The Uniformity Clause] will not prevent Congress from having it in their power to cause [indirect taxes] to fall *very unequal* and much heavier [sic] on *some* States than on *others* . . .”).

⁵⁹ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 957, at 683 (Boston, Little, Brown & Co. 4th ed. 1873).

⁶⁰ See U.S. CONST. art. I, § 7, cl. 1.

⁶¹ See *id.* § 8, cl. 1.

⁶² See *id.* § 9, cl. 5.

⁶³ See, e.g., Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 119 n.37 (2018) (summarizing scholars’ stances on the meaning of “direct taxes”).

of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.⁶⁴

This excerpt's taxation language bore later repeating⁶⁵: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."⁶⁶ Whereas the Articles of Confederation tied taxation to land values,⁶⁷ the Constitution adopted a change from the Confederation Congress's final requisition by apportioning direct taxes based on population, a more administrable metric.⁶⁸ And beyond incorporating this prior formula, the Founders added two novel distinctions: (1) cabining apportionment to "direct" taxes, and (2) linking direct taxation to the House of Representatives.⁶⁹

In theory, this apportionment scheme promotes impartial governance by preventing a congressional majority from disproportionately reducing favored states' revenue obligations at the minority's expense.⁷⁰ Yet while population-based apportionment seemed sensible under the then-prevailing belief of equal per capita wealth across states,⁷¹ its fatal flaw rears its head when this condition no longer holds — as in the present-day United States.⁷² Even ignoring the administrative challenges of anything more complex than a capitation, this regime requires states with low per capita wealth to tax their residents at greater rates than those with high per capita wealth.⁷³ Given the unpopularity of such a perverse system, Congress rarely issued apportioned direct taxes and has

⁶⁴ U.S. CONST. art. I, § 2, cl. 3. This clause included the Three-Fifths Compromise wherein states with enslaved persons incurred greater apportionment of direct taxes in exchange for more power in the House of Representatives. See EDWIN R.A. SELIGMAN, *THE INCOME TAX* 549–51 (1911). Professor Bruce Ackerman argues such origins warrant limiting the definition of direct taxes to include only head taxes. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6–25 (1999); see also *id.* at 58 ("Given the Reconstruction Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power."). While compelling for living constitutionalists, this conclusion likely would not persuade the increasingly originalist Court. See Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 689–702 (1999) (criticizing Ackerman's analysis of the Constitution's original meaning).

⁶⁵ This second reference to direct taxes arose from a fear that "liberty might otherwise be taken to saddle the states with a readjustment, by this rule, of past requisitions of Congress." 5 JAMES MADISON, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 545 (Jonathan Elliot ed., Washington, D.C., 1845).

⁶⁶ U.S. CONST. art. I, § 9, cl. 4; see also *Capitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "capitation" as "[a] tax or payment of the same amount for each person").

⁶⁷ See ARTICLES OF CONFEDERATION of 1781, art. VIII.

⁶⁸ 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).

⁶⁹ See U.S. CONST. art. I, § 2, cl. 3.

⁷⁰ See Johnson, *supra* note 68, at 8 & n.26.

⁷¹ See *id.* at 13.

⁷² See Calvin H. Johnson, *Binding Constitutional History: Reverse Pollock and End Fatal Apportionment*, 25 FLA. TAX REV. 740, 761 (2022) (noting wealth and income inequality).

⁷³ See Calvin H. Johnson, *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162, 163 (2007) ("Apportionment by population especially victimizes poor states.").

abandoned them since the Civil War.⁷⁴ Some have claimed such impracticality is a feature, not a bug: the Founders repeatedly expressed concern over possible abuse of Congress's newfound taxing authority, so perhaps they intended apportionment to render direct taxes so nonviable that the federal government would never use them.⁷⁵ And although others have argued this theory exaggerates the extent to which people at the time thought apportionment would cripple direct taxation,⁷⁶ the Founders still recognized these levies posed a danger to neutral governance and accordingly sought to at least partially limit their imposition.⁷⁷

C. *The Direct/Indirect Dichotomy and Ambiguity*

In sum, the Constitution contains a bifurcated regime of taxation.⁷⁸ While indirect taxes largely just need to satisfy the undemanding Uniformity Clause, direct taxes trigger the onerous (if not insurmountable) mandate of apportionment. This two-tiered treatment naturally raises a question captured in James Madison's notes on the Convention: "[Rufus] King asked what was the precise meaning of *direct* taxation?"⁷⁹ Unfortunately for him and legal scholars,⁸⁰ "[n]o one answd [sic]."⁸¹

Indeed, this term's contours remain fuzzy given the meager guidance in the Constitution.⁸² But in general, direct taxes describe levies upon people, including their property, whereas indirect taxes apply to transactions.⁸³ And Founding-era evidence provides an intuitive rationale behind this distinction: since indirect taxes can often be passed onto customers by increasing the prices of affected products, market forces theoretically provide sufficient protection against excessive indirect taxation, warranting lighter constitutional restraint.⁸⁴ In contrast, direct taxes cannot be shifted since they, by definition, are linked to the people and property upon which they operate, justifying the stricter condition

⁷⁴ 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).

⁷⁵ See, e.g., Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2356 (1997).

⁷⁶ See, e.g., Johnson, *supra* note 68, at 14–24.

⁷⁷ See Erik M. Jensen, *The Taxing Power, The Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1077–78 (2001) ("[T]he Constitution makes [direct taxes] difficult, not impossible, to impose." *Id.* at 1077.).

⁷⁸ 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) (using corpus linguistics to find taxes must be either direct or indirect).

⁷⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., 1911).

⁸⁰ See Johnsen & Dellinger, *supra* note 63, at 119 n.37 (summarizing academic dialogue on topic).

⁸¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 79, at 350.

⁸² See Jensen, *supra* note 64, at 693 ("The direct-tax clauses therefore have fuzzy edges.").

⁸³ NICHOLAS KALDOR, AN EXPENDITURE TAX 21 (Routledge 2003) (1955).

⁸⁴ See, e.g., THE FEDERALIST NO. 21, *supra* note 51, at 138 (Alexander Hamilton) ("Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will in time find its level with the means of paying them.").

of apportionment to replace market-based checks.⁸⁵

But this intuitive split suffers from a flawed execution. As early as 1796, the Court wrestled with the dichotomy when analyzing the constitutionality of a tax on carriages in *Hylton v. United States*.⁸⁶ Exemplifying the direct/indirect divide's tenuousness, the Court upheld this seeming direct tax on personal property by recharacterizing it as an excise on using carriages.⁸⁷ However, the Justices unanimously reached this outcome in their seriatim opinions by forgoing conceptions of direct taxation and instead criticizing apportionment on its merits.⁸⁸ Detached from constitutional text, Justice Iredell claimed direct taxes referred to levies that "could be apportioned,"⁸⁹ Justice Chase lobbied for requiring proportional taxes only when "reasonabl[e],"⁹⁰ and Justice Paterson labeled the apportionment rule "radically wrong."⁹¹ Questionable reasoning aside, *Hylton* established a narrow definition of direct taxes by ascribing the label exclusively to head taxes and levies on real property — a trend maintained throughout much of the nineteenth century.⁹²

Just before *Hylton*'s centennial, however, direct-tax jurisprudence was overhauled.⁹³ In *Pollock v. Farmers' Loan & Trust Co.*,⁹⁴ the Court struck down a two-percent tax on income exceeding \$4,000.⁹⁵ Writing his first majority opinion in the case, Chief Justice Fuller equated taxes on real property with taxes on income from real property,⁹⁶ a comparison summarized by quoting Lord Coke: "[W]hat is the land but the profits thereof?"⁹⁷ Initially split 4–4 on the constitutionality of taxing income from *personal* property,⁹⁸ a full Court revisited this matter after another hearing.⁹⁹ And Chief Justice Fuller delivered the same result in his second majority opinion: "[W]e are unable to conclude that the enforced

⁸⁵ See *id.* at 138–39 (explaining direct taxes "may admit of a rule of apportionment" because "no limits to the discretion of the government are to be found in the nature of the thing," *id.* at 139).

⁸⁶ 3 U.S. (3 Dall.) 171 (1796).

⁸⁷ 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" (emphases omitted)); *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").

⁸⁸ See Glogower, *supra* note 45, at 725 (stating they were "more concerned with the purpose and function of the apportionment requirement than the precise definition of the constitutional terms").

⁸⁹ *Hylton*, 3 U.S. (3 Dall.) at 181 (opinion of Iredell, J.) (emphases omitted).

⁹⁰ *Id.* at 174 (opinion of Chase, J.) (emphasis omitted).

⁹¹ *Id.* at 178 (opinion of Paterson, J.).

⁹² Johnsen & Dellinger, *supra* note 63, at 115.

⁹³ Jensen, *supra* note 75, at 2370.

⁹⁴ 158 U.S. 601 (1895).

⁹⁵ See *id.* at 618, 639.

⁹⁶ *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 580 (1895), *vacated on reargument*, 158 U.S. 601.

⁹⁷ *Id.* (quoting 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND ch. 1, § 1, at 4 (Garland Publ'g 1979) (1628)).

⁹⁸ *Id.* at 586.

⁹⁹ See *Pollock*, 158 U.S. at 617.

subtraction from the yield of all the owner's real or personal property . . . is so different from a tax upon the property itself, that it is not a direct . . . tax[] in the meaning of the Constitution."¹⁰⁰ Controversial then due to its protection of high-income taxpayers,¹⁰¹ *Pollock* remains at least partially valid for restoring teeth to the meaning of direct taxation.¹⁰² Unlike *Hylton*'s narrow reading of direct taxes that reflected broader skepticism of apportionment,¹⁰³ Chief Justice Fuller's interpretation revived evidence from the Founding¹⁰⁴ that tied the direct/indirect dichotomy to market dynamics:

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.¹⁰⁵

Ample precedent has since repudiated the oversimplified comparison between property and income taxes.¹⁰⁶ One opinion, for example, deemed "[t]he theory . . . that a tax on income is legally or economically a tax on its source" to be "no longer tenable."¹⁰⁷ And shortly after *Pollock*, the Court rejected its market-based approach to the direct/indirect dichotomy by stating "such [a] distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself."¹⁰⁸ However, Chief Justice Fuller's emphasis on returning to a Founding-era conception of taxation would likely resonate with a large portion of the present-day judiciary. And although some historical evidence contradicts the ubiquity of conflating indirect and shiftable taxes,¹⁰⁹ the documented support behind *Pollock*'s "shiftableness" logic¹¹⁰ nonetheless provides a valid avenue to broadly define direct

¹⁰⁰ *Id.* at 618.

¹⁰¹ See Joseph R. Long, *Tinkering with the Constitution*, 24 YALE L.J. 573, 576 (1915) (writing "probably no[] [decision] since the *Dred Scott Case* has been so widely condemned" and lamenting "the rich would escape their just share of taxation" if Congress could not practicably tax income).

¹⁰² See Jensen, *supra* note 75, at 2375 (stating *Pollock* gave "substance" to the Direct Tax Clauses).

¹⁰³ See *supra* notes 88–91 and accompanying text.

¹⁰⁴ See, e.g., THE FEDERALIST NO. 21, *supra* note 51, at 138–39 (Alexander Hamilton).

¹⁰⁵ *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 558 (1895), *vacated on reargument*, 158 U.S. 601.

¹⁰⁶ See, e.g., *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113–14 (1916) (naming it a "mistaken theory," *id.* at 113, and upholding corporate income tax as excise on results of business, *id.* at 114).

¹⁰⁷ *South Carolina v. Baker*, 485 U.S. 505, 520 (1988) (omission in original) (quoting *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939)); see also *id.* at 527 (upholding taxation of state bond interest).

¹⁰⁸ *Nicol v. Ames*, 173 U.S. 509, 515 (1899); see also *id.* at 519 (upholding tax on commodities sales because it was "in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act").

¹⁰⁹ See Johnson, *supra* note 68, at 69 ("Defining 'indirect taxes' as shiftable taxes on suppliers has support, but it is also contradicted by a far larger number of important usages.").

¹¹⁰ Jensen, *supra* note 75, at 2368; see *id.* at 2395 ("[T]he assumption of most founders was that . . . an indirect tax is one which the ultimate consumer can generally decide whether to pay by deciding whether to acquire the taxed product.").

taxes. Indeed, Chief Justice Roberts cited this case just over one decade ago to support classifying taxes on personal property as direct.¹¹¹ Far from being an antiquated relic of the early *Lochner* era,¹¹² *Pollock* represents a continuing opportunity for some jurists to narrowly construe indirect taxes and thereby circumscribe congressional authority.

D. *The Sixteenth Amendment and “Incomes”*

While the discussion of direct taxation in *Pollock* has retained some legal relevance, its core holding has not. With this decision receiving widespread condemnation and, in the words of then-President Taft, “injur[ing] the prestige of the Supreme Court more” than anything prior,¹¹³ Senator Norris Brown proposed a constitutional amendment in 1909 that would allow the federal government to enact direct taxes on income without any apportionment.¹¹⁴ After refining this draft’s language, Congress submitted one sentence to state legislatures for a potential Sixteenth Amendment: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”¹¹⁵ Over the next four years, forty-two states ratified the amendment.¹¹⁶ And in 1916, a unanimous Court cited it to uphold a tax on one percent of income above \$3,000,¹¹⁷ writing “the [Sixteenth] Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided.”¹¹⁸

In circumventing *Pollock*’s notorious result, however, the Sixteenth Amendment gave rise to another controversy: What was the precise meaning of “incomes[] from whatever source derived”?¹¹⁹ Creating constitutional déjà vu, Congress and the state debates supplied ambiguity rivaling that of the Convention’s response to Rufus King.¹²⁰ Nevertheless, dictionaries published around the time of the Sixteenth

¹¹¹ See *NFIB v. Sebelius*, 567 U.S. 519, 571 (2012).

¹¹² See Laurence H. Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 n.35 (1973) (citing *Pollock* among *Lochner*-era cases); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 388–89 (2011) (listing *Pollock* among cases recognized as “anticanon” or “antiprecedent”).

¹¹³ 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).

¹¹⁴ See S.J. Res. 25, 61st Cong., 44 CONG. REC. 1548 (1909).

¹¹⁵ S.J. Res. 40, 61st Cong., 44 CONG. REC. 4390 (1909) (enacted).

¹¹⁶ 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).

¹¹⁷ See Revenue Act of 1913, ch. 16, § 2(A)–(C), 38 Stat. 114, 166–68 (repealed 1916).

¹¹⁸ *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18 (1916).

¹¹⁹ U.S. CONST. amend. XVI.

¹²⁰ 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 the Sixteenth Amendment was passed were surprisingly uncertain.”).

Amendment's proposal and ratification generally defined income as an accession in wealth,¹²¹ and some went further in demanding separation between such accession and its underlying income-producing property.¹²² For example, Henry Campbell Black (author of *Black's Law Dictionary*) wrote during the ratification that "the farmer's crop is not his income; it is the source from which his income will be derived when it is converted into cash."¹²³ And the Court endorsed this view shortly thereafter; in *Eisner v. Macomber*,¹²⁴ Justice Pitney and a narrow majority struck down Congress's attempt to tax stock dividends without apportionment by promulgating the realization requirement¹²⁵:

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.¹²⁶

Over one century later, few have written positively of this opinion.¹²⁷ Although the practical result in *Macomber* may make economic sense,¹²⁸ many believe the majority adopted an overly restrictive interpretation of the Sixteenth Amendment¹²⁹ and failed to properly develop its realization concept.¹³⁰ Alongside such academic criticism, the Court has increasingly questioned *Macomber's* validity with statements such as "[w]e see nothing to be gained by the discussion of judicial definitions,"¹³¹ "[t]he [realization] rule[] [was] founded on administrative

¹²¹ 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).

¹²² See, e.g., *Income*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("'Income' means that which comes in or is received from any business or investment of capital" (emphases added)).

¹²³ HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF INCOME TAXATION UNDER FEDERAL AND STATE LAWS § 32, at 77 (1913).

¹²⁴ 252 U.S. 189 (1920).

¹²⁵ See *id.* at 219.

¹²⁶ *Id.* at 212 (emphasis added).

¹²⁷ See Ackerman, *supra* note 64, at 52 ("While [tax lawyers] continue to feature *Macomber* in their casebooks, their treatment of this 'leading case' is anything but respectful.")

¹²⁸ See Thomas Reed Powell, *Stock Dividends, Direct Taxes, and the Sixteenth Amendment*, 20 COLUM. L. REV. 536, 548 (1920) ("So far as *Eisner v. Macomber* turns on economic issues, the majority has much the better of the argument.")

¹²⁹ See, e.g., Thomas Reed Powell, *Income from Corporate Dividends*, 35 HARV. L. REV. 363, 376 (1922) ("[T]here is something strange in the idea that a man may indefinitely grow richer without ever being subject to an income tax.")

¹³⁰ Rodney P. Mock & Jeffrey Tolin, *Realization and Its Evil Twin Deemed Realization*, 31 VA. TAX REV. 573, 582 (2012). For comparison, the Haig-Simons model of income is often used in scholarship and captures "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

¹³¹ *United States v. Kirby Lumber Co.*, 284 U.S. 1, 3 (1931) (holding corporation that settled bonds below face value "realized . . . an accession to income" and thereby incurred taxable gain).

convenience,”¹³² “the original theoretical bases of [*Macomber*]” have been “undermined,”¹³³ and “[*Macomber*] was not meant to provide a touchstone to all future gross income questions.”¹³⁴ Yet, across this dicta, the Court has also never formally overruled *Macomber* — even when invited to do so.¹³⁵

But the Court will have another chance to revisit *Macomber*’s controversial holding this Term in *Moore*. In 2005, Charles and Kathleen Moore invested \$40,000 for eleven percent of the common stock in an Indian company that the Code deemed a “controlled foreign corporation” (CFC) due to its majority U.S. ownership.¹³⁶ Although this business consistently generated profits, all of which it reinvested in itself rather than distributing to shareholders, the Moores incurred zero U.S. tax between 2006 and 2017;¹³⁷ rather, they received favorable treatment because Congress had exacted levies on only specific passive categories of undistributed foreign receipts — not active business income.¹³⁸ However, in the colloquially named Tax Cuts and Jobs Act of 2017,¹³⁹ the federal government overhauled its taxation of earnings abroad.¹⁴⁰ Within this reform, Congress enacted a Mandatory Repatriation Tax (MRT) that established a retroactive, one-time transition tax on CFC profits made between 1987 and 2017 for certain U.S. investors.¹⁴¹ After paying \$14,729 in taxes as part of this group, the Moores alleged, *inter alia*, that the MRT unconstitutionally imposed a direct, unapportioned tax outside the Sixteenth Amendment.¹⁴²

The Western District of Washington¹⁴³ and Ninth Circuit disagreed.¹⁴⁴ Dismissing the taxpayers’ claims, both courts found the MRT valid under the Sixteenth Amendment by outlining *Macomber*’s erosion

¹³² *Helvering v. Horst*, 311 U.S. 112, 116 (1940); *see also id.* at 120 (holding donor of bond coupons “enjoyed the economic benefits of the income in the same manner and to the same extent as though the transfer were of earnings” and thereby realized taxable income).

¹³³ *Helvering v. Griffiths*, 318 U.S. 371, 394 (1943).

¹³⁴ *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) (deeming damages taxable as “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion”).

¹³⁵ *See, e.g., Griffiths*, 318 U.S. at 394 (“The Government says that the time has come when *Eisner v. Macomber* must be overruled To reach that question we must decide whether Congress intended by [taxing stock dividends] to do what *Eisner v. Macomber* squarely held that it could not. We cannot find that it did.”).

¹³⁶ *Moore v. United States*, 36 F.4th 930, 932 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023); *see also* I.R.C. § 957(a) (defining “controlled foreign corporation”).

¹³⁷ *Moore v. United States*, No. C19-1539, 2020 WL 6799022, at *1 (W.D. Wash. Nov. 19, 2020), *aff’d*, 36 F.4th 930, *cert. granted*, 143 S. Ct. 2656.

¹³⁸ *Moore*, 36 F.4th at 933.

¹³⁹ *See* Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.).

¹⁴⁰ *See Moore*, 36 F.4th at 933.

¹⁴¹ *Id.*; *see also* I.R.C. § 965 (establishing said tax).

¹⁴² *See* Complaint for Refund of Federal Income Tax and Interest ¶¶ 24, 34–36, *Moore*, No. C19-1539.

¹⁴³ *See Moore*, 2020 WL 6799022, at *6 (dismissing plaintiffs’ claims with prejudice).

¹⁴⁴ *See Moore*, 36 F.4th at 939 (affirming district court’s dismissal).

in the judiciary.¹⁴⁵ Additionally, over a spirited four-person dissent lobbying for the preservation of a constitutional realization requirement,¹⁴⁶ the Ninth Circuit declined to rehear the case en banc.¹⁴⁷ While *Moore* seemingly just formed another nail in *Macomber*'s coffin, the Supreme Court's grant of certiorari and impending decision have caused commentators to speculate about the Justices' possible return to narrowly defining "incomes."¹⁴⁸ Indeed, Justice Pitney wrote *Macomber* just seven years after the Sixteenth Amendment's ratification and reached his decision by consulting several dictionaries from that era¹⁴⁹ — two points persuasive to the increasingly originalist Court. And since much of the present-day Code relies on the Sixteenth Amendment for constitutionality,¹⁵⁰ many anticipate the Court's decision will have widespread implications for other tax statutes and proposals implicitly relying on expansive conceptions of "incomes," including a wealth tax, global intangible low-taxed income (GILTI), and I.R.C. § 877A.¹⁵¹

II. A CONSTITUTIONAL DEFENSE OF I.R.C. § 877A

As exemplified by the above (already abridged) discussion spanning numerous pages, the Constitution provides a disputed and complex approach to taxation. Yet for the run-of-the-mill tax statute, constitutional interpretation boils down to three inquiries: First, is it an income tax? The Sixteenth Amendment offers a safe harbor if so.¹⁵² If not, is it an indirect tax? The Uniformity Clause forms a simple blockade if so.¹⁵³

¹⁴⁵ See *Moore*, 2020 WL 6799022, at *2–3; *Moore*, 36 F.4th at 937.

¹⁴⁶ See *Moore v. United States*, 53 F.4th 507, 507, 510–15 (9th Cir. 2022) (Bumatay, J., dissenting from the denial of rehearing en banc).

¹⁴⁷ *Id.* at 507.

¹⁴⁸ See, e.g., Editorial, *A Wealth-Tax Watershed for the Supreme Court*, WALL ST. J. (June 27, 2023, 7:53 AM), <https://www.wsj.com/articles/supreme-court-moore-v-u-s-wealth-tax-patrick-bumatay-ninth-circuit-83610ed> [<https://perma.cc/2WCG-U8KK>] (“Judge Patrick Bumatay’s powerful dissent . . . will be a constitutional guide for the Supreme Court . . .”); *The Supreme Court Will Review the Constitutionality of Section 965 in Moore v. United States; Should Taxpayers Who Paid the Tax Seek a Refund?*, CAPLIN & DRYSDALE (July 24, 2023), <https://www.caplindrysdale.com/publication-the-supreme-court-will-review-the-constitutionality-of-section-965-in-moore-v-united-states-should-taxpayers-who-paid-the-tax-seek-a-refund> [<https://perma.cc/598L-AY4Y>] (“[T]he Supreme Court likely will reverse the Ninth Circuit’s holding in *Moore* . . .”).

¹⁴⁹ See *Eisner v. Macomber*, 252 U.S. 189, 207 (1920).

¹⁵⁰ See Rodney P. Mock & Jeffrey Tolin, *I Should Have Been a Rockstar: Deconstructing Section 1221(a)(3)*, 65 TAX LAW. 47, 50 (2011) (describing the “outgrowth” of the Sixteenth Amendment as “the foundation for our modern day Code”).

¹⁵¹ See, e.g., *A Wealth-Tax Watershed for the Supreme Court*, *supra* note 148 (“A ruling that upholds the Ninth Circuit would open the door for Congress to tax wealth . . .”); Jenny A. Austin & Gary B. Wilcox, *US Supreme Court to Determine Whether Section 965 Is Constitutional: What You Need to Know*, MAYER BROWN (July 24, 2023), <https://www.mayerbrown.com/en/perspectives-events/publications/2023/07/us-supreme-court-to-determine-whether-section-965-is-constitutional-what-you-need-to-know> [<https://perma.cc/JTZ4-9F3C>] (sharing speculation that *Moore* could threaten, inter alia, GILTI and I.R.C. § 877A).

¹⁵² See U.S. CONST. amend. XVI.

¹⁵³ See *id.* art. I, § 8, cl. 1.

And if not (for a second time),¹⁵⁴ is it apportioned among the states? The Direct Tax Clauses supply a final, uncommon escape if so.¹⁵⁵

Along any of these paths, I.R.C. § 877A can survive challenge. Amid the coverage on *Moore*, however, recent analysis of this tax has centered on its answer to just the first question.¹⁵⁶ Yet the analysis does not end there; in addition to the compelling arguments for categorizing I.R.C. § 877A as an income or indirect tax, this statute satisfies the apportionment rule because of its exclusive application to nonresidents — conferring an unexpected constitutional backstop via the Direct Tax Clauses. Accordingly, while *Moore* might raise skepticism over the longevity of other sections in the Code, I.R.C. § 877A should remain constitutionally sound regardless of changes in Sixteenth Amendment jurisprudence.

A. *Is I.R.C. § 877A an Income Tax?*

For its first path to constitutionality, I.R.C. § 877A could seek refuge as a tax on “income[] from whatever source derived” under the Sixteenth Amendment.¹⁵⁷ Even before formally disposing of property, taxpayers still enjoy substantive accessions in wealth from increases to the value of such property, which would constitute “income” under many conceptions of the term.¹⁵⁸ And although these expansive definitions contradict *Macomber*’s realization requirement,¹⁵⁹ the Court has since asserted that income need not require severance between gains and the property from which they came.¹⁶⁰ In fact, the Ninth Circuit upheld against a Sixteenth Amendment challenge a Code provision taxing annual changes in the fair market value of futures without requiring any sale¹⁶¹ — a mark-to-market regime comparable to that of I.R.C. § 877A.

This analysis naturally awaits guidance from *Moore*. If the Court resuscitates a robust realization requirement, little opportunity would remain to categorize I.R.C. § 877A as an income tax.¹⁶² The IRS might argue that a taxpayer’s renunciation of citizenship and relocation to another jurisdiction should still form a realization event given the changed relationship between the individual, U.S. government, and underlying

¹⁵⁴ Most scholars believe the Uniformity Clause and apportionment rule impose mutually exclusive requirements. Glogower, *supra* note 45, at 724 n.41.

¹⁵⁵ See U.S. CONST. art. I, § 2, cl. 3; *id.* § 9, cl. 4.

¹⁵⁶ See, e.g., Austin & Wilcox, *supra* note 151 (sharing speculation that *Moore* could place I.R.C. § 877A “at risk” without discussing the provision’s potential classification as an indirect or properly apportioned tax).

¹⁵⁷ See U.S. CONST. amend. XVI.

¹⁵⁸ See, e.g., SIMONS, *supra* note 130, at 50.

¹⁵⁹ See *Eisner v. Macomber*, 252 U.S. 189, 212 (1920).

¹⁶⁰ See *Helvering v. Bruun*, 309 U.S. 461, 469 (1940).

¹⁶¹ See *Murphy v. United States*, 992 F.2d 929, 930–31 (9th Cir. 1993) (upholding I.R.C. § 1256); I.R.C. § 1256(a)(1) (taxing certain contracts on a mark-to-market basis).

¹⁶² See Berg, *supra* note 34, at 208 (stating I.R.C. § 877A “squarely raises the question . . . of whether the realization principle articulated by the Supreme Court in *Macomber* is and continues to be a constitutional requirement”).

property.¹⁶³ But renunciation and relocation concern people, not property; for example, if someone owned a house abroad and moved into it after renouncing citizenship, nothing intuitively has been realized on the property itself. In short, should the Court deem the MRT unconstitutional through a *Macomber*-esque approach, it would likely find that I.R.C. § 877A falls out of the Sixteenth Amendment as well.

This conditional's inverse carries less certainty. If the Court dismantles its realization requirement and adopts a broad conception of "incomes," I.R.C. § 877A might find constitutionality under the Sixteenth Amendment. But a holding for the government in *Moore* does not guarantee this result. While the MRT imputes a foreign corporation's prior profits to shareholders,¹⁶⁴ I.R.C. § 877A imposes a mark-to-market regime based on changes in property values.¹⁶⁵ In other words, the former distinctly still involves the widely accepted realization event of earnings, albeit at the level of the foreign company rather than the taxpayer. Even if the Court dispels *Macomber*'s realization requirement, it will still need a replacement; after all, "incomes, from whatever source derived" must have *some* meaning.¹⁶⁶ And this revised definition could extend the Sixteenth Amendment's grasp to cover the MRT but no further, leaving taxes like I.R.C. § 877A in need of another theory for constitutionality.¹⁶⁷

B. Is I.R.C. § 877A an Indirect Tax?

Should the Sixteenth Amendment fall short, I.R.C. § 877A might still survive challenge by qualifying as an indirect tax that satisfies the Uniformity Clause. Mimicking its logic in *Hylton*, the government could frame I.R.C. § 877A as an excise on the act of renouncing U.S. citizenship rather than a direct levy on the property of expatriates.¹⁶⁸ And the Court has demonstrated receptiveness to comparably expansive conceptions of indirect taxes since this Founding-era decision; for example, the constitutionality of gift and estate taxes hinges on their application to transfers of property (instead of the property itself),¹⁶⁹ and the

¹⁶³ See 1995 COMMITTEE REPORT, *supra* note 18, at 80 (making this exact argument).

¹⁶⁴ *Moore v. United States*, 36 F.4th 930, 936 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023).

¹⁶⁵ See 2008 COMMITTEE REPORT, *supra* note 31, at 39.

¹⁶⁶ *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 . . .").

¹⁶⁷ The petitioners in *Moore* allege I.R.C. § 877A satisfies the realization requirement by allowing taxpayers to defer payment until disposing their property. Brief for Petitioners, *supra* note 46, at 52; see also *supra* note 30. However, the tax *liability* is still imposed on the day before expatriation, I.R.C. § 877A(a)(1), and the petitioners' argument disregards, inter alia, the security and interest charge required for this election. See Brief of Amici Curiae Reuven Avi-Yonah et al. in Support of Respondent at 10, *Moore v. United States*, No. 22-800 (Oct. 19, 2023) ("This is not an election to defer the deemed realization of gain or loss but, instead, is merely a deferral of payment . . .").

¹⁶⁸ See 1995 COMMITTEE REPORT, *supra* note 18, at 77 n.147 (asking if "one could characterize the expatriation tax proposals as an indirect, excise tax imposed on the act of expatriation").

¹⁶⁹ See *Knowlton v. Moore*, 178 U.S. 41, 43, 81, 83 (1900) (upholding estate taxes); *Bromley v. McCaughn*, 280 U.S. 124, 134, 138 (1929) (upholding gift taxes).

Court upheld a pre-Sixteenth Amendment corporate income tax as an excise on the “privilege of doing business in a corporate capacity.”¹⁷⁰ Indeed, the government has cited the latter decision in *Moore* to support its alternative argument that the MRT, regardless of the realization requirement’s validity, imposes a constitutional excise tax.¹⁷¹ Assuming similar framing of I.R.C. § 877A, the statute should enjoy constitutionality under the Uniformity Clause given its lack of geographical language.¹⁷²

Nevertheless, this argument contravenes the direct/indirect dichotomy of *Pollock*. Since taxpayers who trigger I.R.C. § 877A cannot simply “shift the burden upon some one else,” Chief Justice Fuller would have categorized it as a direct tax, “the payment of which cannot be avoided.”¹⁷³ And although many refute the validity of such market-based reasoning,¹⁷⁴ its documented origins from the Convention¹⁷⁵ could influence the increasingly originalist federal bench. Indeed, a broad definition of indirect taxes threatens the very balance struck by the Founders. If I.R.C. § 877A imposes an excise on the act of renunciation, Congress could plausibly recharacterize levies on, say, land (one of few taxes widely accepted to be direct¹⁷⁶) as taxing the privilege of possessing such property. Courts also need not contradict the aforementioned post-*Pollock* precedent in deeming I.R.C. § 877A direct; corporate income taxes now fall squarely within the Sixteenth Amendment,¹⁷⁷ and gift and estate taxes involve discrete transfers between parties who can freely agree to shift the resulting tax liabilities among each other.¹⁷⁸ Moreover, if the Court addresses this topic in *Moore*¹⁷⁹ and endorses the government’s claim that the MRT taxes “actual doing of business,”¹⁸⁰ such a fact-specific holding would leave at most nebulous implications regarding the broader distinction between direct and indirect taxes.¹⁸¹

¹⁷⁰ *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911); *see id.* at 177.

¹⁷¹ *See* Brief for the United States at 46–49, *Moore*, No. 22-800.

¹⁷² *See* *United States v. Ptasynski*, 462 U.S. 74, 84 (1983).

¹⁷³ *Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429, 558 (1895).

¹⁷⁴ *See, e.g.*, *Johnson*, *supra* note 68, at 69.

¹⁷⁵ *See* *Jensen*, *supra* note 75, at 2393–97.

¹⁷⁶ *See* *Murphy v. IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007).

¹⁷⁷ *See* Adam O. Emmerich, Comment, *Hybrid Instruments and the Debt-Equity Distinction in Corporate Taxation*, 52 U. CHI. L. REV. 118, 125 (1985) (presuming Sixteenth Amendment grants federal power to tax corporate income).

¹⁷⁸ *See* *Diedrich v. Comm’r*, 457 U.S. 191, 201 (1982) (Rehnquist, J., dissenting) (“I see no evidence in the tax statutes that Congress forbade the parties to agree among themselves as to who would pay the gift tax . . .”).

¹⁷⁹ *See* Brief for the United States, *supra* note 171, at 48 (asking to “[a]t minimum” remand this second argument since the Ninth Circuit never considered it). The Court could also avoid addressing the direct/indirect divide by finding the MRT constitutional under the Sixteenth Amendment.

¹⁸⁰ *Id.* (quoting *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911)).

¹⁸¹ Namely, the MRT plausibly satisfies *Pollock*’s framework because it can be shifted from U.S. shareholders to CFCs through, for instance, dividends. *Cf.* Brief of National Taxpayers Union Foundation as Amicus Curiae in Support of Neither Party at 14, *Moore v. United States*, No. 22-800 (Sept. 6, 2023) (labeling corporate income taxes indirect since they can be passed onto, among other groups, shareholders).

One more caveat about indirect taxes: despite the constitutional benefits of labeling I.R.C. § 877A an excise on expatriation, this strategy risks suggesting the statute violates principles of international law. In particular, both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) implicitly recognize a right to renounce citizenship.¹⁸² I.R.C. § 877A does not outright prohibit expatriation, but taxpayers could claim it substantively impedes their ability to renounce citizenship by bundling the act with a potentially substantial tax liability.¹⁸³ Accordingly, this burden might violate the agreements if deemed arbitrary or unreasonable,¹⁸⁴ which requires a facts-and-circumstances analysis weighing individual rights against the interest of the nation in enforcing its laws.¹⁸⁵ And should Congress frame I.R.C. § 877A as an excise on the act of expatriation instead of, say, “settling up” tax liabilities accrued during the taxpayer’s U.S. citizenship, its prospects in this balancing test weaken.¹⁸⁶

Of course, such agreements lack domestic legal effect standing alone; the Court has expressly stated that the UDHR “does not of its own force impose obligations as a matter of international law,”¹⁸⁷ and the ICCPR’s expatriation provision requires separately enacted legislation to become judicially enforceable given its non-self-executing status.¹⁸⁸ Moreover, the United States has demonstrated mixed obedience to international law in practice.¹⁸⁹ And although the Code’s first levy on expatriates once raised concerns over violating U.S. income tax treaties,¹⁹⁰ the federal government has since dodged this issue by reserving the right to tax former citizens in its international agreements.¹⁹¹ Nevertheless, the

¹⁸² International Covenant on Civil and Political Rights art. 12(2), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (“Everyone shall be free to leave any country, including his own.”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15(2) (Dec. 10, 1948) (“No one shall be arbitrarily . . . denied the right to change his nationality.”); *see also* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1430 n.81 (1997) (stating these agreements “enshrined” the right to expatriation).

¹⁸³ *See* 1995 COMMITTEE REPORT, *supra* note 18, at 93–94.

¹⁸⁴ *See* International Covenant on Civil and Political Rights, *supra* note 182, art. 12(3) (establishing exceptions to the right to expatriate); G.A. Res. 217 (III) A, *supra* note 182, art. 15(2) (barring “arbitrar[y]” denials of the right to change nationality).

¹⁸⁵ *See* HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 5 (1987) (explaining need to balance individual rights with community concerns).

¹⁸⁶ *See* 1995 COMMITTEE REPORT, *supra* note 18, at 77 n.147.

¹⁸⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

¹⁸⁸ 138 CONG. REC. 8071 (1992) (“The Senate’s advice and consent is subject to . . . the United States declar[ing] that the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing.”); *see also* *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008) (“[S]elf-executing’ [means] that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.”).

¹⁸⁹ Jenny S. Martinez, *Enforcing the Decisions of International Tribunals in the U.S. Legal System*, 45 SANTA CLARA L. REV. 877, 887 (2005) (noting such inconsistent “obedience and respect”).

¹⁹⁰ *See* H.R. REP. NO. 104-736, at 329 (1996) (Conf. Rep.).

¹⁹¹ *See* William L. Dentino & Christine Manolakas, *The Exit Tax: A Move in the Right Direction*, 3 WM. & MARY BUS. L. REV. 341, 407 (2012) (discussing consistent inclusion of such reservations).

UDHR and ICCPR lend credence to invoking the *Charming Betsy*¹⁹² canon, which requires that statutes be construed to avoid violations of international law and agreements “[w]here fairly possible.”¹⁹³ The interaction between this interpretive tool and non-self-executing treaties remains unclear,¹⁹⁴ but jurists — including originalists, some of whom have cited *Charming Betsy* in the recent past¹⁹⁵ — could credibly leverage this canon to resolve the otherwise ambiguous classification of I.R.C. § 877A.¹⁹⁶ In sum, what this tax gains in constitutionality through being deemed indirect, it loses in international agreements by suggesting the United States merely aims to penalize expatriation.

C. *Is I.R.C. § 877A Apportioned Among the States?*

Even under narrow conceptions of “incomes” and indirect taxes, the Constitution provides a last resort for I.R.C. § 877A through the Direct Tax Clauses. Normally, the apportionment rule sounds the death knell for direct taxes falling out of the Sixteenth Amendment; historical records suggest the Founders intended indirect taxes to predominantly fund the federal government,¹⁹⁷ and history itself demonstrates the political inviability of strictly apportioned levies.¹⁹⁸ Indeed, the *Hylton* Court primarily reached its narrow definition of direct taxes to mitigate the otherwise unworkable mandate of prorating levies on carriages nationwide.¹⁹⁹ And if the apportionment rule demands such formulaic allocations, I.R.C. § 877A seemingly fails with flying colors: not only does it disregard distributing taxes across states according to their populations, but it also does not apply to residents of the United States altogether.²⁰⁰

¹⁹² *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

¹⁹³ RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 114 (AM. L. INST. 1987).

¹⁹⁴ See *Saleh v. Bush*, 848 F.3d 880, 891 n.9 (9th Cir. 2017) (stating it “has been the subject of some debate by both courts and commentators” (citing *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring))).

¹⁹⁵ See, e.g., *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1705 (2023) (Gorsuch, J., dissenting).

¹⁹⁶ See *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .” (emphasis added)). Some have instead asserted the presence of a fundamental right to expatriate in the Constitution, triggering protection under the Due Process and Equal Protection Clauses. E.g., Michelle Leigh Carter, Note, *Giving Taxpatriates the Boot — Permanently?: The Reed Amendment Unconstitutionally Infringes on the Fundamental Right to Expatriate*, 36 GA. L. REV. 835, 839 (2002). However, the Court has never recognized a “right to voluntarily expatriate,” *L’Association des Américains Accidentels v. U.S. Dep’t of State*, 656 F. Supp. 3d 165, 179 (D.D.C. 2023), and it “exercise[s] the utmost care whenever . . . asked to break new ground” in its substantive due process jurisprudence, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

¹⁹⁷ See Jensen, *supra* note 75, at 2382–83.

¹⁹⁸ For example, former U.K. Prime Minister Margaret Thatcher’s “Community Charge,” which imposed a flat-rate tax on every adult, largely fueled her political downfall. See 3 CHARLES MOORE, MARGARET THATCHER: THE AUTHORIZED BIOGRAPHY 558, 730 (2019).

¹⁹⁹ See *supra* p. 1212.

²⁰⁰ See 8 U.S.C. § 1483(a) (generally barring renunciation of citizenship while in United States).

Despite this facial violation of constitutional text, I.R.C. § 877A raises none of the original concerns justifying apportionment. In particular, the Articles of Confederation required that all requisitions follow a comparable (and later identical) apportionment scheme²⁰¹ given fears that the newfound central government could tyrannically loot residents of minority states.²⁰² And as the Founders sought to further empower Congress by terminating the requisition system, such uneasiness only grew more warranted.²⁰³ However, since I.R.C. § 877A inherently affects just those who have relinquished citizenship and already left the country, this threat of regional favoritism entirely dissipates. Alternatively, some claimed apportionment would protect the taxing jurisdiction of states, which allegedly generated most of their revenue from direct levies, against encroachment by the federal government.²⁰⁴ But even assuming this concern existed in the Founding era²⁰⁵ and remains colorable after the Sixteenth Amendment's ratification, I.R.C. § 877A still poses little issue since nothing suggests states traditionally taxed expatriates. In fact, the Constitution limited extraterritorial taxation *inside* the country's borders by barring states from disproportionately taxing nonresident citizens via the Privileges and Immunities Clause.²⁰⁶

Applying apportionment to I.R.C. § 877A is like dividing by zero: the statute textually falls within the formula for proportional distribution, but the interaction between I.R.C. § 877A and the Constitution lacks substantive meaning.²⁰⁷ Further, this conceptual clash has rational roots; across the Convention and ratification process, debates over taxing powers operated under the premise that Congress would establish levies involving only some discrete connection to the United States, such as continuous citizenship.²⁰⁸ Indeed, “no taxation without

²⁰¹ See Johnson, *supra* note 68, at 13.

²⁰² See Robert G. Natelson, *What the Constitution Means by “Duties, Imposts, and Excises” and “Taxes” (Direct or Otherwise)*, 66 CASE W. RESV. L. REV. 297, 334 (2015).

²⁰³ See Jensen, *supra* note 75, at 2397 (“Direct taxes were dangerous because they were fundamentally different from requisitions.”).

²⁰⁴ Brutus I, N.Y. J., Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 366 (“[W]hen the foederal government begins to exercise the right of taxation in all its parts, the legislatures of the several states will find it impossible to raise monies to support their governments.”).

²⁰⁵ See Dodge, *supra* note 74, at 893–96 (challenging the evidence behind this concern).

²⁰⁶ See U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871) (stating the Privileges and Immunities Clause protects nonresidents of states from “any higher tax or excise than that exacted by law of such permanent residents”).

²⁰⁷ *Cf. Hylton v. United States*, 3 U.S. (3 Dall.) 171, 182 (1796) (opinion of Iredell, J.) (“If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.”).

²⁰⁸ See, e.g., THE FEDERALIST NO. 30, *supra* note 51, at 184 (Alexander Hamilton) (“A complete power . . . to procure a regular and adequate supply of revenue, *as far as the resources of the community will permit*, may be regarded as an indispensable ingredient in every constitution.” (emphasis

representation” formed a common rallying cry during the American Revolution.²⁰⁹ And to the extent the United States has ever closely embraced this sentiment,²¹⁰ I.R.C. § 877A satisfies it in substance despite facially applying to noncitizens. Namely, this statute extends to just those who have willingly forfeited their representation knowing (at least constructively) about the tax consequences — provisions they theoretically could have changed before expatriation. Although historical evidence does not expressly address the constitutionality of an expatriation tax, this absence is understandable. Given technological constraints at the time, those in the Founding era would have presumably viewed such a levy as practically infeasible. Yet I.R.C. § 877A does not contradict the principles undergirding apportionment; rather, its constitutionality falters under only the most mechanical reading of this constitutional mandate.²¹¹

In short, while the arguments for categorizing I.R.C. § 877A as an income or indirect tax have merit, the provision enjoys an uncommon backdoor to constitutionality regardless through the Direct Tax Clauses. With any nascent or proposed tax that debatably violates the Constitution (including I.R.C. § 877A itself²¹²), academic discourse often strictly focuses on its validity under the Sixteenth Amendment or Uniformity Clause given the apportionment rule’s rigidity. If the judiciary opts for

added)); James Madison, Address to the Virginia Convention (June 11, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 247, 253 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) (“[T]hose who fix the public burdens will feel a greater degree of responsibility, when they are to impose them *on the citizens* immediately . . .” (emphasis added)).

²⁰⁹ See, e.g., *No Taxation Without Representation*, LONDON MAG., Feb. 1768, at 89.

²¹⁰ See, e.g., *Heald v. District of Columbia*, 259 U.S. 114, 124 (1922) (“There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.”).

²¹¹ The Court has recently suggested in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), that the Constitution’s plain text outweighs conflicting sentiments from Founders. See *id.* at 2326 (concluding states may enforce an elector’s pledge in presidential elections, despite some comments from Founders suggesting otherwise, because such Founders “did not reduce their thoughts . . . to the printed page”). To the extent this principle accurately depicts the Justices’ jurisprudence altogether, the Court simultaneously supported this decision by citing historical practices consistent with its interpretation. *Id.* at 2326–28; see also Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Chiafalo: Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL’Y REV. 15, 30 (2020) (“*Chiafalo* is not a textualist case. *Chiafalo* fits with a recent line of Supreme Court cases using historical practice to give meaning to the Constitution.”). Applying such analysis to I.R.C. § 877A, common law historically prohibited renunciations of citizenship absent governmental permission. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 41–42 (New York, O. Halsted 1827) (“From this historical review of the principal discussions in the federal courts . . . a citizen cannot renounce his allegiance to the United States without the permission of government . . .”). Indeed, citizenship-based taxation arose from congressional disapproval of wealthy Americans who lived overseas during the Civil War to avoid taxes. Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT’L 389, 390 (2010). Accordingly, assuming the apportionment rule supplies one clear reading based on its text, see Glogower, *supra* note 45, at 747–52 (comparing conflicting academic readings of the rule), *Chiafalo* endorses reading this language against the backdrop of the United States’s historical disfavor toward tax-motivated expatriation.

²¹² See generally Berg, *supra* note 34.

narrow definitions of income and indirect taxes, however, apportionment could experience a resurgence in striking down controversial levies. Under this constitutional landscape, for instance, recent federal proposals to tax the net worth or unrealized gains of wealthy taxpayers²¹³ would likely not survive challenge because such levies apply to property and involve neither income nor apportionment.²¹⁴ But such a fate need not extend to existing mark-to-market taxes with special attributes, such as unique coverage over expatriates; although I.R.C. § 877A seemingly forms an apt candidate for similar constitutional attack, it falls out of the apportionment framework based on writings and discussions from the Founding — evidence that should convince the same originalist mindset driving discussion to the Direct Tax Clauses in the first place.

CONCLUSION

I.R.C. § 877A is a strange tax. After decades of unsuccessfully deterring tax-motivated expatriation, Congress perceived the need for a stronger penalty in the Code that deemed assets sold upon expatriation. And while this relatively uncommon mark-to-market regime raises plausible constitutional questions, its equally uncommon expatriate-only coverage dispels such concerns. Accordingly, even if the Court closes two doors to I.R.C. § 877A's constitutionality as an income or indirect tax, this statute entirely falls out of the framework required under its last resort, the Direct Tax Clauses. Under the same originalist methodology that generally fuels narrow constructions of federal taxing authority, I.R.C. § 877A would have substantively presented no issue with the apportionment requirement as understood at the Founding. Some expatriates likely view this statute with disdain comparable to former U.K. Prime Minister Boris Johnson's choice words for American taxes, but one part of I.R.C. § 877A should survive criticism: its constitutionality.

²¹³ *E.g.*, Make Billionaires Pay Act, S. 4490, 116th Cong. (2020) (Senator Bernard Sanders's proposal); Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (2021) (Senator Elizabeth Warren's proposal); Babies over Billionaires Act of 2022, H.R. 7502, 117th Cong. (2022) (Representative Jamaal Bowman's proposal); Billionaire Minimum Income Tax Act, H.R. 6498, 118th Cong. (2023) (President Biden's proposal, as introduced by Representative Stephen Cohen).

²¹⁴ See Erik M. Jensen, *An Unapportioned Wealth Tax Has Constitutional Problems*, A.B.A. TAX TIMES, Nov. 2019, at 10, 16–17. Professor Louis Kaplow asserts that a proportional income tax equals a wage tax and ex ante wealth tax. Louis Kaplow, *Taxation and Risk Taking: A General Equilibrium Perspective*, 47 NAT'L TAX J. 789, 792–93 (1994). But even accepting his model's assumptions, see Thomas J. Brennan & Robert L. McDonald, *Protean Capital Income Taxes* 13 (May 12, 2023) (unpublished manuscript) (on file with the Harvard Law School Library) (stating Kaplow's equivalence does not hold under different premises), this recent academic argument was presumably not understood during the Sixteenth Amendment's enactment and ratification.