
Forthcoming, Utah Law Review**The Constitutional Meaning
of Financial Terms****Tomer S. Stein* and Shelby Ponton****

The Constitution has sixty-three financial terms. These financial terms include, for instance, “compensation,” “expenditures,” “debt,” “coin,” “revenue,” “securities,” and “bankruptcies”—all of which determine the elementary building blocks of our governmental makeup. When the Supreme Court interprets the meaning of these financial terms, it does so in isolation and without a consistent framework. This Article proposes a unified framework for the interpretation of financial terms in the Constitution, comprising of two fundamental canons of construction.

First, this Article proposes that all financial terms in the Constitution should be interpreted with fiscal and monetary neutrality—interpreting financial terms in a way that does not favor one kind of economic policy over another. The Supreme Court is not the right institution to manage the economy, as it lacks the expertise to do so. Moreover, fiscal and monetary policy are governmental objects that were intended to be governed by, and are best left to, the political process. The Supreme Court should thus interpret all financial terms in the Constitution in a manner that will leave fiscal and monetary policy open for implementation by either the legislative and executive branches, or the various states, as appropriate. Second, this Article proposes that if the Supreme Court is able to avoid deciding the meaning of a constitutional financial term, and, instead, decide the relevant case on another basis (such as either federal or state law, or procedural grounds), it should do so. In other words, the Supreme Court should invoke the constitutional avoidance doctrine when facing a constitutional financial term.

Together, fiscal and monetary neutrality, coupled with the constitutional avoidance doctrine, provides a consistent framework for the Supreme Court’s treatment of financial terms that serves both the intended meaning of these terms and their continued utility in today’s modern economy.

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Introduction

The text of the Constitution contains sixty-three financial terms.¹ When the Constitution uses terms such as “incomes,” “securities,” “bankruptcies,” or “revenue,” how are we to understand them? Should we utilize textbooks and treatises on the study of finance? Ought we to study the ordinary meaning of these terms? Should we use a time-bound dictionary or rely on the expert testimony of

¹ See U.S. CONST. art. I, §§ 2, 6–10 (“direct taxes,” “taxed,” “compensation,” “emoluments,” “revenue,” “taxes,” “duties,” “imposts,” “excises,” “debts,” “borrow,” “money,” “credit,” “commerce,” “bankruptcies,” “coin money,” “regulate the value,” “foreign coin,” “standard of weights and measures,” “securities,” “current coin,” “appropriation of money,” “tax,” “duty,” “dollars,” “capitation,” “direct tax,” “pay,” “treasury,” “appropriations,” “account,” “receipts,” “expenditures,” “public money,” “profit,” “present,” “emolument,” “bills of credit,” “gold,” “silver,” “payment,” “imports,” “exports,” “net produce,” “tonnage”); *id.* art. II § 1 (“compensation . . . increased nor diminished,” “emolument”); *id.* art. III, §§ 1, 3 (“compensation,” “forfeiture”); *id.* art. VI (“debts”); *id.* amend. V (“just compensation”), VII, VIII (“fines”), XI, XIV (“taxed,” “public debt,” “debts incurred for payment of pensions and bounties,” “obligation,” “claim”), XVI (“taxes,” “incomes”), XXIV (“pay,” “poll tax,” “other tax”), XXVII (“compensation”).

finance professionals? Which approach would best serve our constitutional makeup? What would be better for the economy?

The Supreme Court has had several occasions to opine on these questions.² Most recently, the Supreme Court has agreed to take on a case that will require it to adjudicate the meaning of “income.”³ As with past instances of Supreme Court determinations of constitutional financial terms, lawyers,⁴ judges,⁵ policymakers,⁶ and scholars⁷ have brought forth many compelling and insightful

² See, e.g., *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181 (1902); *Cont’l Ill. Nat’l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648 (1935); *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502 (1938); *Eisner v. Macomber*, 252 U.S. 189 (1920); *Merchant’s Loan & Tr. Co. v. Smietanka*, 255 U.S. 509 (1921); *United States v. Phellis*, 257 U.S. 156 (1921); *Rockefeller v. United States*, 257 U.S. 176 (1921); *Cullinan v. Walker*, 262 U.S. 134 (1923); *Weiss v. Stearn*, 265 U.S. 242 (1924); *Marr v. United States*, 268 U.S. 536 (1925); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

³ *Moore v. United States*, No. C19-1539-JCC, 2020 WL 6799022 (W.D. Wash. Nov. 19, 2020), *aff’d*, 36 F.4th 930 (2022), *cert. granted*, 143 S. Ct. 2656 (2023).

⁴ *Compare* Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (No. 22-800) with Brief for the United States in Opposition, *Moore*, 143 S. Ct. 2656 (No. 22-800).

⁵ See *Moore*, 2020 WL 6799022, at *2–3; *Moore*, 36 F.4th at 936.

⁶ *Compare* Amicus Brief of the State of Ariz., et al. in Support of Respondent, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *16 (showcasing sixteen states and the District of Columbia urging a decision for the Respondent because “Congress must retain flexibility to disincentivize noneconomic tax avoidance”) with Brief of Amici Curiae State of W. Va. and 16 Other States in Support of Petitioners, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *16 (explaining that reconfiguring “income” to include unrealized gains is antithetical to the well-being of the states and their populace); see also Brief for the Am. Tax Pol’y Inst. as Amicus Curiae in Support of Respondent, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *28 (urging that a continuous onslaught of tax litigation would ensue if the Mandatory Repatriation Tax (MRT) at issue in *Moore* is held unconstitutional). *But see* Brief for Indep. Women’s Law Ctr. as Amicus Curiae Supporting Petitioners, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *8–13 (enumerating how women investors and entrepreneurs are more likely to keep investments for longer durations and rely on their own capital, thus allowing unrealized gains to be taxed as income adversely impacts women).

⁷ See Brief of Amici Curiae Professors Akhil Reed Amar and Vikram David Amar in Support of Respondent, *Moore*, 143 S. Ct. 2656 (No. 22-800); Brief of Amici Curiae Professors Bruce Ackerman, et al. in Support of Respondent, *Moore*,

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arguments for how we should understand the meaning of the word “income.”⁸ These arguments all warrant much merit, but all also lack grounding in a general theory for understanding the constitutional meaning of financial terms. Breaking the silos containing each of these sixty-three constitutional financial terms, and providing a unified framework for all, is a necessary component for understanding their meaning.

This Article is the first to tackle this challenge and provide a novel and universal framework for the interpretation of financial terms in the Constitution. This framework calls for the employment of two canons of construction: (1) fiscal and monetary neutrality; and (2) the constitutional avoidance doctrine.

Fiscal and monetary neutrality requires interpreting constitutional financial terms in a way that does not favor one economic policy over another. For example, consider the various Supreme Court cases that called for drawing a distinction between “bankruptcy” and “insolvency,” such that one kind of corporation or individual can discharge their debts, but another cannot.⁹ In such cases, free-

143 S. Ct. 2656 (No. 22-800). *But see* Paul Caron, *Calabresi: Amar Brothers’ Moore Amicus Brief Ignores Constitution’s Plain Meaning to Justify Taxing Unrealized Gains*, TAXPROF BLOG (Nov. 25, 2023), https://taxprof.typepad.com/taxprof_blog/2023/11/amar-brothers-moore-amicus-brief-ignores-constitution-plain-meaning-to-justify-taxing-unrealized-gains.html; Brief Amici Curiae of the Manhattan Inst. For Pol’y Rsch. and Professors Erik M. Jensen and James W. Ely in Support of Petitioners, *Moore*, 143 S. Ct. 2656 (No. 22-800). For scholars who support neither side see Brief of Amici Curiae Professors of Law and Linguistics in Support of Neither Party, *Moore*, 143 S. Ct. 2656 (No. 22-800).

⁸ Beyond lawyers, policymakers, and scholars, financial and economic experts, as well as business-focused entities and organizations attempt to contribute to the discussion surrounding the constitutional meaning of “income.” See Brief for Tax Economists as Amici Curiae in Support of Respondent, *Moore*, 143 S. Ct. 2656 (No. 22-800); Brief of Main St. All., et al. as Amici Curiae in Support of Respondent, *Moore*, 143 S. Ct. 2656 (No. 22-800); Brief of Amicus Curiae the Chamber of Com. of the U.S. in Support of Petitioners, *Moore*, 143 S. Ct. 2656 (No. 22-800).

⁹ See, e.g., *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 185 (1902) (“[A] historical review of the colonial and state legislation will abundantly show that

market understandings of the relationships between creditors and debtors may point to excluding solvent entities or individuals, and welfare-oriented policies may, in diametric opposition, point to the inclusion of solvent entities or individuals in dire economic conditions.¹⁰ But the Court should resist both lines of reasoning. Instead, the Court should interpret the relevant constitutional term in a way that does not preclude the implementation of the economic policy favored by Congress, the Executive, or the various states, as appropriate. For instance, the Court may decide that the meaning of this term is one which Congress has the right to define over time. Indeed, long-standing precedent has at least implicitly adopted this use of fiscal and monetary neutrality: “The framers of the Constitution were familiar with Blackstone’s Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of ‘bankruptcies,’ and did not limit it by the language used.”¹¹

Fiscal and monetary neutrality should be exercised whenever needed, but, if possible, the Court should first exercise the constitutional avoidance doctrine. The constitutional avoidance

a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws.”); see also *Cont’l Ill. Nat’l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 667–68 (1935); *Sturges v. Crowninshield*, 17 U.S. 122, 194–95 (1819).

¹⁰ The *Marshall* case is a modern example of these competing interests. See *In re Marshall*, 300 B.R. 507 (Bankr. C.D. Cal. 2003), *aff’d*, 403 B.R. 668 (C.D. Cal. 2009), *aff’d*, 721 F.3d 1032 (9th Cir. 2013). In *Marshall*, a creditor asserted the debtor cannot constitutionally file for bankruptcy relief because the debtor was solvent. *Marshall*, 300 B.R. at 510. However, the *Marshall* Court rejected both a “balance sheet insolvency” (more liabilities than assets) and a “liquidity” insolvency (unable to pay debts as they arise) test, stating neither are constitutional requirements for bankruptcy. *Id.* In confirming there is no constitutional requirement of insolvency, the *Marshall* Court pointed to how the Supreme Court has outlined the policy behind Chapter 11 reorganizations is to “‘revive the debtors’ business and thereby preserve jobs and protect investors” even if this overrides a creditor’s free-market position. *Id.* at 522 (quoting *Toibb v. Radloff*, 501 U.S. 157, 163 (1991)).

¹¹ *Moses*, 186 U.S. at 187.

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doctrine calls on the Court, whenever possible, to avoid a constitutional law determination if another legal basis is available.¹² In other words, as per this maxim, the Court should exhaust its ability to adjudicate cases on the basis of federal law, state law, or procedural ripeness and mootness doctrines, among other factors, before it resorts to interpreting the Constitution.¹³ This canon of construction is particularly apt in the interpretation of constitutional financial terms. The Supreme Court and its justices have expertise in understanding legal terms, and in safeguarding social liberties, but they are not economists or finance professionals.¹⁴ Financial organization, and economic privileges and liberties, are thus better addressed by institutions such as Congress, the Executive, and the various state agencies.¹⁵ For instance, consider the case of *Moore v. United States*. This case was recently granted certiorari by the Supreme Court in order to determine whether a foreign corporation's income, not distributed to shareholders, can be taxed

¹² *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); see also Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 6, 51 (1996); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 21 (1962).

¹³ *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring).

¹⁴ See *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“It is Congress’s job to enact policy and it is this Court’s job to follow the policy Congress has prescribed.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (“Our deference in matters of policy cannot, however, become abdication in matters of law . . . [o]ur respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.”).

¹⁵ The Supreme Court may be especially dangerous to wield power in the economic sphere because of the modern trend of the Court to value personal liberties over economic liberties. See Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 5, 24–27 (1987) (“The problem of ‘dualism,’ by which I mean the paradox of the Supreme Court’s being passionately committed to liberty in the personal sphere and almost indifferent to liberty in the economic sphere.”). For more discussion on how the Court has shifted from safeguarding economic values over social liberties to the reverse see R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1947); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1905).

as the “income” of those shareholders under the Sixteenth Amendment.¹⁶ There are various strong arguments from both sides of this debate,¹⁷ but a proper exercise of the constitutional avoidance doctrine would have guided the Court to not hear the case in the first place. Instead of setting itself up to determine the fate of taxation for corporate America before the dispute between industry and the U.S. government had the opportunity to fully mature, and perhaps resolve itself, the Court should have exercised avoidance and denied certiorari.

Together, fiscal and monetary neutrality, coupled with the constitutional avoidance doctrine, provides a consistent and unified framework for the interpretation of financial terms. This approach both serves the relative institutional expertise of our differing branches of government and maintains consistency with the text of the Constitution. While the Supreme Court is, or at least ought to be,¹⁸ particularly skillful in securing social liberties, it is not the right institution for managing economics and finance. The political process, however, is the right method for doing so. Neutrality and avoidance allow the Court to maintain this institutional posture without running afoul of the text of the Constitution and both its ordinary and technical meanings. Indeed, these canons of construction for the meaning of constitutional financial terms are consistent with, and invariant across, both originalist and living-constitutionalist approaches to constitutional interpretation.

¹⁶ *Moore v. United States*, No. C19-1539-JCC, 2020 WL 6799022 (W.D. Wash. Nov. 19, 2020), *aff'd*, 36 F.4th 930 (2022), *cert. granted*, 143 S. Ct. 2656 (2023).

¹⁷ See various briefs cited *supra* notes 4, and 6–8.

¹⁸ Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 551–54 (1951); Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 33–34 (2003) (stating that even though the Court has traditionally had worthy views on economic liberties, a closer inspection reveals “advocacy of economic liberties in the Supreme Court has been about protecting the interests of corporations and the wealthy to be free from government regulation”).

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This Article proceeds in three parts. Part I develops our theory for interpreting financial terms in the Constitution. This Part unearths the hidden doctrines of fiscal and monetary neutrality and constitutional avoidance that underlie the Court's jurisprudence regarding constitutional financial terms and highlights how their explicit application by the Court would be both practical and seamless. Part II showcases the enormous normative implications of this theory on current Supreme Court cases and controversies by addressing the cases interpreting "bankruptcies" and "income." Part III demonstrates that the novel interpretive framework developed in this Article can be understood from within both originalist and living constitutionalism methodologies. A short Conclusion follows.

I . Interpreting Constitutional Financial Terms

In *National Federation of Independent Business v. Sebelius*, a politically fraught case involving the Obama Administration's Patient Protection and Affordable Care Act of 2010 ("ACA"), where the Court interpreted the constitutional meaning of the financial terms "commerce" and "tax," Chief Justice John Roberts said it best: "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."¹⁹

This Part theorizes and argues for the adoption of fiscal and monetary neutrality and the constitutional avoidance doctrine when interpreting all constitutional financial terms. First, we demonstrate that neutrality is a practical canon for the Court to explicitly adopt because the Court has already implicitly adopted this canon, which we highlight via the Court's caselaw regarding the constitutional

¹⁹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012) ("We do not consider whether the Act embodies sound policies. That judgement is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.").

meaning of the financial terms “bankruptcies” and “income.” Second, illustrating its practicality, we illuminate how fiscal and monetary neutrality fits within other tenets and doctrines the Court regularly utilizes. One such tenet is the constitutional avoidance doctrine, which we show the Court has used in the same adjudicative and interpretive posture. In revealing these hidden doctrines that form the core of the Court’s jurisprudence underlying the meaning of constitutional financial terms, we provide the first uniform framework for the Court to adhere to when faced with such terms. Thus, this Part urges the Court to explicitly utilize fiscal and monetary neutrality and the constitutional avoidance doctrine when faced with the meaning of all constitutional financial terms.

A. Fiscal and Monetary Neutrality

The Court’s interpretation of constitutional financial terms is well-served by the adoption of fiscal and monetary neutrality. This canon of construction requires interpreting constitutional financial terms in a way that does not favor one economic policy over another. Often competing economic policies are on a spectrum with free-market rationales on one end and welfare enhancing rationales on the other, and a litany of additional rationales in between. Resisting the urge to interpret a term in accord with one policy over others is crucial when it comes to the meaning of constitutional financial terms. The neutrality canon provides a simple yet effective guidepost for courts to ensure they do not overstep. Said another way, fiscal and monetary neutrality forces the Court to stick to promulgating standards, as opposed to rules. A standard is an outcome that is efficiently reached on the front end and admittedly broad.²⁰ Standards are the antithesis of rules, which are costly to formulate

²⁰ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (adopting a definition of rules versus standards that rests on the whether “efforts to give content to the law are undertaken before or after individuals act”); Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974) (explaining how a standard is open-ended and allows for more than one consideration by a decision maker while a rule withdraws those considerations via pre-formulated specificity).

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up front because they are specific and thorough in nature.²¹ One disadvantage of standards is that their costs show up on the back end when courts are left to decide specific cases based on broad language, as opposed to being guided by thorough rules.²² However, when it comes to the meaning of constitutional financial terms, this disadvantage of standards (back-end costs) is actually an advantage. Congress, administrative agencies, and various state legislatures are vastly more equipped to rule-make on economic policy than the Supreme Court²³; thus, situating back-end rulemaking costs with these institutions is not only fitting, but best practice. Further, this Section urges the Court to explicitly adopt fiscal and monetary neutrality when faced with any constitutional financial term. This explicit use will be practical to implement because the Court has already implicitly adopted the neutrality principle, highlighted via caselaw on “bankruptcies” and “income.” Also, this canon of construction has the needed flexibility to complement other principles the Court frequently exercises in this same interpretive space, such as the constitutional avoidance doctrine. Before diving into the Court’s precedent, a brief look at history helps contextualize this issue.

History reveals the relationship between creditors and debtors was a violent one. From Mesopotamia around 4,000 B.C.E. and up to England in the 18th century, debtors who failed to pay their debts were met with consequences such as being beaten to death, indentured servitude and forced slavery, and revocation of

²¹ Kaplow explains how an efficient way to conceptualize a rule versus a standard is by viewing the promulgation through an ex ante versus ex post lens. Kaplow, *supra* note 20, at 559–60. There are a litany of approaches to distinguishing between rules and standards. See, e.g., Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–29 (1967); FREDERICK SCHUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

²² See Kaplow, *supra* note 20, at 572 (“The difference in promulgation costs favors standards, whereas that in enforcement costs favors rules.”).

²³ See an in-depth discussion of Congress’s capabilities compared to the Supreme Court in Pt. II .A.

citizenship, among others.²⁴ Aside from violence, history also tells us the procedural aspects of bankruptcy law greatly favored creditors. For the majority of history, only creditors could file bankruptcy to force a defaulting debtor to come before the court. Debtors themselves could not file bankruptcy until 1841 in the United States.²⁵ Thus, in the late 1700's, when the Framers were contemplating the United States Constitution, the only concept they had of "bankruptcy" was the violent historical analysis and the most recent English law, which declared only debtors who were traders qualify for bankruptcy relief and only creditors can file involuntary bankruptcies.²⁶ Referred to as the Bankruptcy clause, the Constitution states: "The Congress shall have power . . . To pass uniform laws on the subject of bankruptcies."²⁷ Despite the narrow framework available to the Framers—violence ridden and creditor

²⁴ See generally Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 (1995) ("History's annals are replete with tales of draconian treatment of debtors. Punishments inflicted upon debtors included forfeiture of all property, relinquishment of the consortium of a spouse, imprisonment, and death."); see also Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 226 (noting how under Roman Law in 118 B.C.E. a debtor "was liable for his debts with his life and body; if he did not pay, he was either killed, made a slave, imprisoned or exiled").

²⁵ *The Evolution of U.S. Bankruptcy Law: A Time Line*, FEDERAL JUDICIAL CENTER, https://www.rib.uscourts.gov/newhome/docs/the_evelution_of_bankruptcy_law.pdf (last visited Jan. 13, 2024) [hereinafter *Evolution of Bankruptcy Law*]; Tabb, *supra* note 24, at 17 ("While the 1800 Act was nothing more than a reprise of the old English bankruptcy model, the 1841 Act, because of its establishment of voluntary bankruptcy, was a watershed event in bankruptcy history.").

²⁶ *Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. RY. Co.*, 294 U.S. 648, 668 (1935) ("The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender. Anything in the nature of voluntary bankruptcy was unknown to that system."); *Evolution of Bankruptcy Law*, *supra* note 25 (describing how the U.S. Bankruptcy Act of 1800 was substantially the same as the most recent English law and "appl[ied] solely to merchant debtors with cases initiated by creditors").

²⁷ U.S. CONST. art. I, § 8, cl. 4.

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dominant bankruptcies—bankruptcy law today looks nothing like that narrow framework. What allowed for the prolific and comprehensive congressionally enacted Bankruptcy Code we know today? The Supreme Court has at the very least implicitly adopted the canon of fiscal and monetary neutrality, which is clear in the Court's precedent. The Court, in favoring a broad constitutional meaning of “bankruptcies” is exercising fiscal and monetary neutrality—or avoiding a narrow constitutional meaning that could favor one economic policy over others. In asking the Court to accept and implement a canon of construction, not only do we need to answer the question of “why,” but we need to answer the question of “how.” Before addressing the massive normative implications for why the Court should adopt this canon, grounding the discussion in practicality is necessary. Thus, we start by first answering the “how,” showing that the Court has every ability to properly execute this neutrality principle because they have already been doing it.

To understand the extent to which the Court has implicitly adopted fiscal and monetary neutrality, it is imperative to investigate the Court's precedent. In 1902, in the case of *Hanover National Bank v. Moyses*, the Court confronted the issue of whether individuals other than traders can be adjudicated as bankrupt.²⁸ The Court acknowledged how historically bankruptcies were only for traders.²⁹ However, instead of stating a narrow constitutional meaning of “bankruptcies” that could favor free-market and creditor-based policies over welfare enhancing ones, the Court exercised neutrality by opting for a broad understanding: “It is true that . . . the English bankrupt acts applied only to traders, but . . . ‘this is a mere matter of policy, and . . . [t]here is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate

²⁸ *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 184 (1902).

²⁹ *Id.* at 184–85 (quoting *Adams v. Storey*, 1 F. Cas. 141, 142 (C.C.D. N.Y.) (No. 66)) (“So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject.”).

but meritorious debtors.”³⁰ The *Moyses* Court approved Judge Catron’s determination in an 1843 case that any legislation falling between the “least limit” of the debtor’s property distribution and the “greatest limit” of the debtor’s discharge is within “the competency and discretion of Congress.”³¹ Last, the *Moyses* Court concluded that the Framers were aware of the violence and limitations embedded in English bankruptcy laws and other historical laws, yet chose to use no specific language to carryover those principles.³² Instead, the Framers “granted plenary power to Congress over the whole subject of ‘bankruptcies,’ and did not limit it by the language used.”³³ In *Moyses*, by holding that non-traders can file for bankruptcy, thus preserving a broad constitutional meaning of “bankruptcies,” the Court utilized fiscal and monetary neutrality.

In 1935, in another case where the Court implicitly adopted the neutrality canon, the Court held the reorganization of insolvent railroad corporations or those who are “unable to meet their debts as they mature”³⁴ is within the constitutional meaning of the

³⁰ *Id.* at 185–86 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1113 (Thomas M. Cooley eds., 4th ed. 1873)). The *Moyses* Court looked to even earlier precedent to bolster a broad interpretation of “bankruptcies.” The Court noted how in 1819, Chief Justice Marshall refused to say which persons should or should not come within the term “bankruptcies” (implicitly advocating for fiscal and monetary neutrality). *Id.* at 186 (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 195 (1819)) (“The bankruptcy law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.”).

³¹ *Id.*

³² *Id.* at 187.

³³ *Id.*

³⁴ The Court noted how the increasingly broad language used by Congress through time to identify those who can be a debtor is also well within the meaning of “bankruptcies.” *Cont’l Ill. Nat’l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 672–73 (1935). For example, “the subject of bankruptcies” is like a large circle with those who are “unable to meet their

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“subject of bankruptcies.”³⁵ At the time the *Continental Illinois* case was before the Court, there was a general understanding that bankruptcy laws were meant to liquidate, or sell off all of a debtor’s assets for the benefit of their creditors. However, a reorganization is where, instead of a liquidation, the debtor uses bankruptcy to find a way to alter its assets and liabilities moving forward such that it can remain a viable business and pay off its debts in the future. In considering whether such a reorganization, especially one where the corporation may not be insolvent but insolvency is impending, is within the constitutional meaning of “bankruptcies,” the Court noted how the limitation of Congress’s power under the Bankruptcy clause has never been clearly defined, and it is so broad that to define it would merely result in paraphrasing the Constitution itself.³⁶ The *Continental Illinois* Court highlights how fiscal and monetary neutrality can allow for a shift away from policies that unduly favor one group. The Court discusses how the first United States Bankruptcy Act (1800), like the English law, operated on the assumption that the debtor was dishonest and the Act was only in the interest of creditors.³⁷ However, the Bankruptcy Act of 1841 and later acts operated on the assumption that there are some honest yet unfortunate debtors who deserve an opportunity to start fresh without the oppressive weight of their debts.³⁸ Without the Court’s

debts as they mature” forming a smaller circle within “bankruptcies,” and “insolvency” forming a meaning encompassing a smaller circle within “debts as they mature.” *Id.* Yet, debtors meeting different formulations of these various terms are not meant to be treated under different “bankruptcy” or “insolvency” laws (as it developed in England); instead, the constitutional meaning of “bankruptcies” is so broad as to encompass all these iterations and more. *Id.*

³⁵ *Continental Ill.*, 294 U.S. at 675 (“[S]ection 77 [allowing reorganizations of railroad corporations] in its general scope and aim, is within the power conferred by the bankruptcy clause of the Constitution; and we so hold.”).

³⁶ *Id.* at 669–70. Displaying the broad interpretation of “bankruptcies,” the Court gave a favorable opinion of a lower court’s interpretation of the constitutional meaning of “bankruptcies”—“Congress has been authorized ‘to establish uniform laws on the subject of any person’s general inability to pay his debts.’” *Id.* at 671 (quoting *Kunzler v. Kohaus*, 5 Hill 317, 321 (N.Y. 1843)).

³⁷ *Id.* at 670.

³⁸ *Id.* at 670–71. In *Local Loan*, the Supreme Court accepted the major changes

continual adoption of neutrality via a broad constitutional meaning of “bankruptcies,” it likely would not have been possible for Congress to expand bankruptcy laws to account for more than simply the interests of creditors.³⁹ Thus, implicitly adopting fiscal and monetary neutrality, the *Continental Illinois* Court concluded a reorganization of a railroad corporation is perfectly within the “subject of bankruptcies,” even if it does not lead to a finding of the classically understood “bankruptcy” of the debtor.⁴⁰

In yet another example of the Court implicitly adopting the neutrality canon, in *Wright v. Union Central Life Insurance Co.* in 1938 the Court concluded the “subject of bankruptcies” is broader than simply the relationship between a debtor and her creditors.⁴¹ In *Wright*, the Court was faced with determining whether Congress has authority to affect the rights of a purchaser of the debtor’s property at a judicial sale via the extension of a redemption clause, or whether doing so is constitutionally considered on the “subject of bankruptcies.”⁴² Generally, redemption is referred to as the limited time an individual in default of real property has to rectify the default

stemming from the Bankruptcy Act of 1841 by cementing the modern notion of the “fresh start”—that an honest yet unfortunate debtor may receive a discharge of her debts. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”) (citations omitted).

³⁹ The *Continental Illinois* Court explained this point themselves: “The fundamental and radically progressive nature of [bankruptcy laws] . . . demonstrate . . . the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to present day.” *Continental Ill.*, 294 U.S. at 671.

⁴⁰ *Id.* at 672–73 (explaining “‘the subject of bankruptcies’ was nothing less than ‘the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief’”) (quoting *In re Reiman*, 20 F. Cas. 490, 496 (S.D.N.Y. 1874)).

⁴¹ *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 514–15 (1938).

⁴² *Id.* at 513–18.

and get their foreclosed property back.⁴³ Simply put, the Court held that Congress does have the authority to lengthen the time of redemption in a bankruptcy proceeding compared to the state law redemption timeframe.⁴⁴ Allowing for this federal change in redemption timeframes de facto means “bankruptcies” is broader than the relationship between a debtor and her creditors, impacting the rights of non-debtor and non-creditor purchasers at a judicial foreclosure.⁴⁵ The *Wright* Court stated this power is within the constitutional meaning of “bankruptcies” because “[t]he subject of bankruptcies is incapable of final definition,” “[t]he concept changes,” and “the purchaser at a judicial sale [of the debtor’s property] does enter into the radius of the bankruptcy power over debts.”⁴⁶ Again, the Court’s adamant adherence to a broad constitutional meaning of “bankruptcies” is an implicit adoption of the canon of neutrality. In the case of *Wright*, implicit fiscal and monetary neutrality allowed for a holding that did not favor free-market policies (strict state-law redemption period) over welfare enhancing ones (bankruptcy of individual debtor) but left open the opportunity for either to emerge victorious in the future under the federal bankruptcy regime.

Beyond “bankruptcies,” the Court has also implicitly adopted fiscal and monetary neutrality in their caselaw interpreting the constitutional meaning of “income” under the Sixteenth Amendment which reads: “The Congress shall have power to lay

⁴³ See *Redemption Property*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The payment of a defaulted mortgage debt by a borrower who does not want to lose the property.”); see also *Redemption Bankruptcy*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A debtor’s right to repurchase property from a buyer who obtained the property at a forced sale initiated by a creditor.”).

⁴⁴ *Id.* at 514–15.

⁴⁵ *Id.*

⁴⁶ *Id.* at 513, 514. The Court also noted how the broad constitutional meaning of “bankruptcies” is well understood to encapsulate the power to affect state property laws. *Id.* at 517 (“If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state laws.”).

and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”⁴⁷ The Sixteenth Amendment was ratified in 1913, and the Court, in two cases shortly thereafter, *Stratton’s Independence, Ltd. v. Howbert* in 1913 and *Doyle v. Mitchell Bros. Co.* in 1918, discussed the meaning of the word income under statutory provisions, and determined income to mean “the gain derived from capital, from labor, or from both combined.”⁴⁸ Then, in a landmark case, *Eisner v. Macomber*, in 1920, the Court declared it fitting for constitutional purposes to adhere to the definition of income delineated under statutory questions in *Stratton’s Independence* and *Doyle*.⁴⁹ Thus, the constitutional meaning of the financial term “income” in the Sixteenth Amendment also became “the gain derived from capital, from labor, or from both combined.”⁵⁰ This constitutional meaning of income is a very broad way to define the term which can be illustrated via comparison. A search of “income” in *Black’s Law Dictionary* brings up: “accrued income,” “accumulated income,” “accumulated taxable income,” “active income,” “adjusted gross income,” “adjusted ordinary gross income,” “aggregate income,” “assessable income,” “business income,” “current income,” “deemed income,” “deferred income,”

⁴⁷ U.S. CONST. amend. XVI.

⁴⁸ *Stratton’s Independence, Ltd. v. Howbert*, 231 U.S. 399, 415, 416 (1913) (discussing the meaning of income under the Corporation Tax Act); *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918) (same).

⁴⁹ *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (“[W]e find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909.”).

⁵⁰ *Id.* In a line of reasoning that became famous, or infamous, in the tax world, the *Eisner* Court actually described income more in-depth than either *Stratton’s Independence* or *Doyle*, declaring: “Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy . . . Here we have the essential matter: *not* a gain *accruing* to capital; *not* a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value.” *Id.* (emphasis in original). The *Eisner* Court continues, stating income is “*proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being ‘*derived*’—that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use.” *Id.* (emphasis in original).

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“discretionary income,” “disposable income,” “distributable net income,” “dividend income,” “earned income,” “exempt income,” “fixed income,” “gross income,” and the list just keeps going.⁵¹ This is a dizzying array of income definitions and *Black’s Law Dictionary* is a legal dictionary, not an economics-focused resource, which would undoubtedly contain even more nuanced and varying income definitions. This highlights why the standard-based approach, via fiscal and monetary neutrality, is crucial when the Court interprets the constitutional meaning of financial terms. Because any one of the aforementioned definitions, by its specificity, could close the constitutional door to certain economic policies, a power the Court itself recognizes it should not wield.⁵² In *Eisner v. Macomber* the Court recognized how specific or esoteric definitions for the constitutional meaning of income are misplaced, stating “we require only a clear definition of the term ‘income,’ as used in common speech, in order to determine its meaning in the amendment”⁵³ Thus, “the gain derived from capital, from labor, or both combined” is an example of a standard, and is also sufficiently neutral as to show the Court has implicitly adopted fiscal and monetary neutrality.

*Merchant’s Loan & Trust Co. v. Smietanka*⁵⁴ exemplifies the Court’s implicit adoption of the neutrality canon. In 1921, in *Smietanka*, the Court confronted the issue of whether capital gains qualify as “income” in a constitutional sense under the Sixteenth

⁵¹ See generally, *Income*, BLACK’S LAW DICTIONARY (11th ed. 2019) (listing various definitions of income).

⁵² See *License Tax Cases*, 72 U.S. 462 (1866) (“This court can know nothing of public policy except from the Constitution and the laws . . . It has no legislative powers . . . It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature.”); *The Star*, 16 U.S. 78, 88 (1818) (“[W]e are not at liberty to entertain any discussions in relation to the policy of the government, except so far as that policy is brought judicially to our notice in the positive enactments, and declared will of the legislature.”).

⁵³ *Eisner*, 252 U.S. at 206–07.

⁵⁴ *Merchant’s Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921).

Amendment.⁵⁵ In *Smietanka*, a trustee of an estate determined the difference between the cash value of 9,522 shares of a capital stock between March 1, 1913 of \$561,798 and when they were sold on February 2, 1917 for \$1,280,996.64 was not income, and instead described this difference as “principal.”⁵⁶ In *Smietanka* it was argued that it is inherent within the word “income” that capital gain resulting from an individual’s single sale of property is not income and only profits stemming from capital gains by those “engaged in buying and selling as a business—a merchant, a real estate agent, or broker—constitute income which may be taxed.”⁵⁷ This argument would clearly result in an economic policy favoring non-merchant individuals over businesses. The Court ardently refused to accept this contention.⁵⁸ Further, the *Smietanka* Court firmly communicated that “lexicographers” (an individual who creates dictionaries) and “economists” are not only unnecessary when interpreting the constitutional meaning of “income”; but, the Court “refuse[s] to enter into the[ir] refinements” and approves of the commonly understood meaning of the term.⁵⁹ This common understanding of the constitutional meaning of “income” as “the

⁵⁵ *Id.* at 515 (“The ground of the protest, and the argument for the plaintiff in error here, is that the sum charged as ‘income’ represented appreciation in the value of capital assets of the estate which was not ‘income’ within the meaning of the Sixteenth Amendment.”).

⁵⁶ *Id.* at 514–15.

⁵⁷ *Id.* at 520.

⁵⁸ *Id.* at 520–21 (“The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the ‘general understanding’ of the meaning of the word ‘income,’ fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the amendment.”).

⁵⁹ *Id.* at 519. For a modern, linguistic take on how the original public meaning of “income” does not support taxing unrealized gains see Thomas R. Lee et al., *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, DUKE L. J. ONLINE (forthcoming 2024). But see John R. Brooks & David Gamage, “From Whatever Source Derived”: *The Sixteenth Amendment and Congress’s Income Tax Power* (Oct. 7, 2023) (unpublished manuscript) (arguing the common meaning of income includes unrealized gain because at the time the Sixteenth Amendment was ratified federal and state income taxes explicitly reached unrealized gains).

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gain derived from capital, from labor, or from both combined”⁶⁰ is sufficiently broad as to help ensure the Court does not unduly favor one economic policy over others. This broad interpretation of the constitutional meaning of “income,” and refusal to find a narrow interpretation via dictionaries or various economic theories, illuminates the Court’s implicit adoption of fiscal and monetary neutrality.

Beyond the Court’s implicit adoption of neutrality, this canon will be seamless to implement because it fits within the Court’s other long used tenets and principles. The Court has time and again upheld the tenet of “substance, not mere form” when interpreting the meaning of income. What does this mean when it comes to the interpretation of a constitutional financial term? Simply put, it means despite what something looks like, the Court is going to consider how it acts or functions and heavily weigh that functionality in its determination of whether the case involves income in the constitutional sense. In *Eisner*, a case considering whether a stock dividend is income, Justice Pitney declared: “Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.”⁶¹ In analyzing substance versus form, Justice Pitney urged that while the form of the stock dividend may look like a gain, the government’s argument to recognize the stock dividend as income entirely conflates the stockholder (person receiving the stock dividend and being taxed in this case) with the corporation.⁶² In *United States v. Phellis*, also delivered by Justice Pitney, the Court held that if a corporate reorganization initiated to move the location of incorporation also issued new stock as part of that reorganization,

⁶⁰ *Id.* at 517 (quoting *Stratton’s Indep. v. Howbert*, 231 U.S. 399, 415 (1913)).

⁶¹ *Eisner v. Macomber*, 252 U.S. 189, 211 (1920).

⁶² *Id.* at 213–14. Further, Justice Pitney declared this conflation by the government fails “to appraise correctly the force of the term ‘income’ as used in the Sixteenth Amendment, or at least to give practical effect to it.” *Id.* at 213. The Court then states the substance is not a gain, and to describe it as so would be to “indulge the fiction that they [stockholders] have received and realized a share of the profits of the company which in truth they have neither received nor realized.” *Id.* at 214.

that new stock constituted income.⁶³ Justice Pitney begins the analysis by proclaiming: “We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder.”⁶⁴ Focusing on substance, the *Phellis* Court reasoned the reorganization changed the stockholder’s “situation materially,” and thus, unlike *Eisner*, constituted income. Crucially, fiscal and monetary neutrality fits in perfectly with the tenet of “substance, not mere form,” because they both serve the same goal—to ensure the constitutional meaning of income is not interpreted in a too narrow, or conversely, vastly overbroad way as to inherently favor one economic policy over another.

Relying on substance and not form has allowed the Court to maintain a broad constitutional meaning of income which serves the underlying purpose of the neutrality canon. Some commentators assert the Court’s income jurisprudence is inconsistent because *Eisner* does not fit in with later cases.⁶⁵ However, a deeper look

⁶³ United States v. Phellis, 257 U.S. 156, 175 (1921).

⁶⁴ *Id.* at 168, 175 (“It thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit derived from his capital interest in the old company, not in liquidation of the capital, but in distribution of accumulated profits of the company.”); see also, *Weiss v. Stearn*, 265 U.S. 242, 254 (1924) (stating “[q]uestions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants, and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form”).

⁶⁵ See, e.g., Noel B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A “Revolutionary” Approach to Ownership*, 47 TAX L. REV. 725, 741 n.69 (1992) (“Although an early case, *Eisner v. Macomber* . . . could be interpreted as supporting the restriction of income to realized gains, no case since then lends much credence to that argument . . . [t]he scholarly consensus is that Congress may treat gains as realized at any point.”) (citations omitted) (emphasis added); BORIS L. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ¶ 5.2, 5–19 (3d ed. 1999) (urging that the validity of realization as a constitutional requirement stemming from *Eisner* is “badly eroded, if not wholly undermined”); Bruce Akerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 52 (1999) (proclaiming *Eisner* is a dangerous precedent to rely on due to its dubious viability).

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illustrates a different view: *Eisner* and subsequent cases are consistent when viewed through the lens of fiscal and monetary neutrality. After *Eisner*, it was possible for the Court to continue down a narrow path concluding in all future cases stock dividends are never income and there is always an explicit realization requirement. These *Eisner* conclusions have validity by imbuing that holding with a narrow focus. However, such a focus would de facto make the Court the ultimate arbiter of proper economic policy by foreclosing a vast array of circumstances from falling under the constitutional meaning of “income.” Instead of a narrow vision of *Eisner*, the Court’s corporate reorganization cases highlight how the constitutional meaning of income as “the gain derived from capital, from labor, or from both combined” can be interpreted in a way that encapsulates *Eisner* without closing the constitutional door to other economic policies. For instance, in *United States v. Phellis*, *Rockefeller v. United States*, *Cullinan v. Walker*, *Weiss v. Stearn*, and *Marr v. United States*, among others, the Court exemplified fiscal and monetary neutrality.⁶⁶ In these cases, the Court, when considering the reorganization of a corporation, proclaimed what *Eisner* stands for long-term is something specific, that a stock dividend, like the one in *Eisner*, is not constitutionally understood as income until realization.⁶⁷ However, in the reorganization cases, the Court urges there is a difference between a reorganization that gives

⁶⁶ *United States v. Phellis*, 257 U.S. 156 (1921); *Rockefeller v. United States*, 257 U.S. 176 (1921); *Cullinan v. Walker*, 262 U.S. 134 (1923); *Weiss*, 265 U.S. at 252–54; *Marr v. United States*, 268 U.S. 536 (1925).

⁶⁷ *Phellis*, 257 U.S. at 169–70 (using *Eisner* in a neutral way to arrive at the opposite outcome, concluding when a reorganization provides corporate profits that one can “draw severally for their individual use and benefit” it is a gain constituting income); *Rockefeller*, 257 U.S. at 183–84 (explaining distributions stemming from the reorganization of an oil company, like *Phellis*, “was in substance and effect, not merely in form, a dividend of profits by the corporation, and individual income to the stockholder”). In *Cullinan v. Walker*, the Court had an opportunity to overrule *Eisner* with the government contending that the approaches to income under *Phellis* and *Rockefeller* were diametrically opposed to *Eisner*. *Cullinan*, 262 U.S. at 135. However, by simply distinguishing *Eisner*’s stock dividend on its facts, the Court was easily able to keep the constitutional meaning of income neutral enough to encompass the diverging cases. *Id.* at 137–38.

a stockholder “a different stock, or different proportionate interests, than before” and the type of stock dividend from *Eisner*.⁶⁸ Thus, despite continual pressure to assert the constitutional meaning of income as one specific meaning over others, the Court has time and again proven that the constitutional meaning of income must adhere to the canon of fiscal and monetary neutrality, which is a neutral enough place where both *Eiser* and post-*Eisner* cases can live.

Another aspect to note about the neutrality canon, a testament to its flexibility, is that it does not conflict with judicial minimalism, a canon within the constitutional avoidance doctrine.⁶⁹ Judicial minimalism is the thought that the Court should decide constitutional questions on the narrowest grounds possible, as to not issue overbroad constitutional rulings that could close off other branches of government from participating in further rulemaking regarding that constitutional question.⁷⁰ Fiscal and monetary neutrality asks the Court to interpret a constitutional financial term in a way that does not favor one economic policy over another; and this is often, but not always, accomplished by a broad interpretation of a term. However, neutrality does not then require a broad holding

⁶⁸ *Helvering v. Griffiths*, 318 U.S. 371, 374 (1943). Highlighting how the Court’s definition of income is capable of maintaining neutrality, in the reorganization case of *Weiss v. Stern*, the Court came to the opposite conclusion of *Phellis*, *Rockefeller*, and *Cullian*, while invoking those cases and *Eisner*, showing how the realization component is a fact question, not a definitional part of the constitutional meaning of income. See *Weiss*, 265 U.S. at 252–54.

⁶⁹ See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999) (advocating that when the Court does reach the merits of a constitutional question the Court should “say[] no more than necessary to justify an outcome, and leav[e] as much as possible undecided”). Sunstein’s idea of judicial minimalism built off Alexander Bickel’s concept of “passive virtues.” See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

⁷⁰ *Id.* at 10–11, 13; see also Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1779 (2004) (explaining how Sunstein not only urges the Court to promulgate narrow factual decisions but also that the Court should reach decisions without issuing abstractions regarding principle that could constitutionally foreclose too many options).

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by the Court. Said another way, the Court can interpret a constitutional financial *term* broadly, while still issuing a narrow *holding* that adheres to the canon of judicial minimalism. The *Wright* bankruptcy case referenced earlier is a perfect example of how well fiscal and monetary neutrality can fit within already established canons of constitutional interpretation. The Court in *Wright* interpreted “bankruptcies” broadly to include those other than creditors and debtors, exercising fiscal and monetary neutrality; however, the Court still issued a narrow holding, exercising judicial minimalism—that federal redemption timeframes can override state law redemption timeframes for the purchaser of a debtor’s property at a judicial foreclosure.⁷¹

Thus, the culminating assertion from this Section is that the Court has every opportunity to explicitly exercise fiscal and monetary neutrality. This canon of construction is practical because the Court already knows how to reason and interpret within the neutrality canon’s standard-based boundaries, as shown via examples of “bankruptcies” and “income” cases. And this canon is flexible because it fits within and complements other frequently used canons and tenets by the Court. Therefore, moving forward, the Court must actively adopt fiscal and monetary neutrality when interpreting the constitutional meaning of all financial terms. The following Section shows that in addition to, and prior to, utilizing this neutrality principle, the Court should exercise the constitutional avoidance doctrine.

B. Constitutional Avoidance Doctrine

Reacting to the inherent issues of a monarchy, the American government was founded on the idea of separation of powers. The Constitution is premised on the concept that abusive and arbitrary governmental action stems from a single entity wielding multiple, distinct governmental powers.⁷² The separation of powers doctrine

⁷¹ See *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 514–15 (1938).

⁷² THE FEDERALIST NO. 48 (James Madison) (proclaiming “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of

is imbued into the text of the Constitution because the Constitution explicitly apportions governmental power into three branches by vesting judicial power in the Supreme Court and any other courts Congress creates, the executive power in the President, and the federal legislative power in Congress.⁷³ While the three branches of government are distinct, each meant not to encroach on the role and duties of the others, to avoid one branch from asserting capricious or oppressive power, the Constitution provides for checks and balances, the idea that there are certain safeguards in place to keep each branch from overstepping their limitations of power.⁷⁴ Examples of these checks and balances include Congress's power to impeach the President and the President's power to veto congressionally passed legislation.⁷⁵ One of the earliest controversies surrounding the separation of powers emerged in the famous case *Marbury v. Madison* where Chief Justice John Marshall proclaimed the Constitution to be the supreme law of the land, thus enabling the Supreme Court to overrule federal legislation that did not comport with the Constitution.⁷⁶ This meaning of *Marbury v. Madison* gave rise to the modern concept of judicial review—"A court's power to review the actions of other branches or levels of

one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny").

⁷³ See U.S. CONST. art. III, § 1; *id.* art. II, § 1; *id.* art. I, § 1; see also *Separation of Powers*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The division of governmental authority into three branches of government — legislative, executive, and judicial — each with specified duties on which neither of the other branches can encroach."); THE FEDERALIST NO. 47 (James Madison) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.").

⁷⁴ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (explaining "[t]he doctrine of separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power . . . [and] to save the people from autocracy").

⁷⁵ U.S. CONST. art. II, § 4; *id.* art. I, § 7, cl. 3.

⁷⁶ See *Marbury v. Madison*, 5 U.S. 137, 176–78 (1803) ("[D]eclaring what shall be the supreme law of the land, the *Constitution* itself is first mentioned; and not the laws of the United States generally . . . [t]hus . . . a law repugnant to the constitution is void.") (emphasis in original).

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government; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional."⁷⁷

Even though Alexander Hamilton famously downplayed the power of the judiciary,⁷⁸ the concept of judicial review gave rise to what is known as the "countermajoritarian difficulty"⁷⁹ which has spawned many protests against judicial review.⁸⁰ The countermajoritarian difficulty stems from the idea that of the three branches of government, the judicial branch is the only one not democratically elected by the people; instead, Supreme Court Justices are appointed for life.⁸¹ This fact makes the judiciary, of the three

⁷⁷ *Judicial Review*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 951–53 (2003).

⁷⁸ THE FEDERALIST NO. 78 (Alexander Hamilton) ("[T]he Judiciary . . . will always be the least dangerous to the political rights of the Constitution . . . [t]he Judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society, and can take no active resolution whatever.").

⁷⁹ The countermajoritarian difficulty was coined by Professor Alexander Bickel. See BICKEL, *supra* note 12, at 16 (proclaiming "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system").

⁸⁰ Thomas Jefferson detested judicial review. See *Letter from Thomas Jefferson to Spencer Roane* (Sept. 6, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 1816-1826, at 140 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899) (relenting against judicial review, stating "[e]ach of the three departments has equally the right to decide for itself what is its duty under the constitution"). Famously, Andrew Jackson used his veto power to dismiss the *McCulloch v. Maryland* decision upholding the constitutionality of the Bank of the United States. *McCulloch v. Maryland*, 17 U.S. 316 (1819); see also Andrew Jackson, *Veto Message* (July 10, 1832), available at http://avalon.law.yale.edu/19th_century/ajveto01.asp.

⁸¹ See U.S. CONST. art. III, § 1 (stating justices "shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office"). The Framers wanted to remove the judiciary from the reach of the people and from sway via compensation changes so the judiciary was appropriately situated to protect the people from the other branches' overreach via the Constitution. See THE FEDERALIST, NO. 78 (Alexander Hamilton) (describing the mindset of the Framers by stating, "courts were designed to be an intermediate body between the people and the legislature . . . to keep the latter within the limits

branches, the least accountable to the people and, in the words of some, antidemocratic.⁸² Also, the Court has no enforcement power, meaning the Court must rely on the other branches to enforce their decisions, even when these decisions may be antithetical to what the other branches view as the best outcome. These factors mean the Court's power stems from "its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."⁸³ Thus, the countermajoritarian difficulty refers to the Court's inherent need to exercise judicial review in a careful way, as aggressive judicial review can turn the populace and the other branches of government against the Court and decrease the legitimacy and efficacy of the Court.⁸⁴ In the ultimate example of aggressive judicial review, the Court in *Dred Scott v. Sandford* upheld the tenets of slavery, prompting the people and the President to seriously frown upon the Court's legitimacy, with President Abraham Lincoln proclaiming: "[I]f . . . vital questions . . . [are] irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers . . . resign[ing] their government into the hands of that eminent tribunal."⁸⁵ From this backdrop grew the constitutional avoidance doctrine.

assigned to their authority").

⁸² See, e.g., BICKEL, *supra* note 12, at 129–30; see also Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 S. CT. REV. 1 (2022); George Mace, *The Antidemocratic Character of Judicial Review*, 60 CALIF. L. REV. 1140 (1972).

⁸³ *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

⁸⁴ See *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting) (explaining how the Court abused judicial review in *Dred Scott* which was a factor leading to the Civil War); BICKEL, *supra* note 12, at 21; GERALD N ROSENBERG, *THE HOLLOW HOPE, CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1992); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

⁸⁵ See *Dred Scott v. Sandford*, 60 U.S. 393 (1875). But see Abraham Lincoln, *First Inaugural Address of Abraham Lincoln*, YALE LAW SCH.: THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/lincoln1.asp (last visited Jan. 14, 2024); see also Robert A. Burt, *What Was Wrong with Dred Scott, What's Right About Brown*, 42 WASH. & LEE L. REV. 1, 1 (1985) ("No Supreme Court decision has been more consistently reviled than *Dred Scott v. Sandford*.").

Justice Brandeis, in his *Ashwander v. Tennessee Valley Authority* concurrence, officially delineated the constitutional avoidance doctrine.⁸⁶ Justice Brandeis grounds his forthcoming promulgation in these simple words: “The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress.”⁸⁷ Justice Brandeis states the Court has amassed a group of rules for avoiding reaching the merits of constitutional questions, as to uphold the delicacy needed.⁸⁸ Collating the Court’s precedent, Justice Brandeis enumerates seven rules, which make up the constitutional avoidance doctrine: (1) the Court will not adjudicate friendly, nonadversary proceedings;⁸⁹ (2) ripeness—or that “[t]he Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it’”;⁹⁰ (3) judicial minimalism, the canon that “[t]he Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’”;⁹¹ (4) the Last Resort Rule, that the Court should not decide a constitutional question if the case can be resolved via federal or state law;⁹² (5) standing and mootness—there must be an injury for the Court to address the validity of a statute;⁹³ (6) constitutional estoppel, one cannot ask the Court to dissect the constitutionality of a statute that they have benefitted

⁸⁶ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

⁸⁷ *Id.* at 345.

⁸⁸ *Id.* at 346.

⁸⁹ *Id.*; see also *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

⁹⁰ *Ashwander*, 297 U.S. at 346–47 (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885)); see also *Abrams v. Van Schaick*, 293 U.S. 188 (1934); *Wilshire Oil Co. v. United States*, 295 U.S. 100 (1935); *Burton v. United States*, 196 U.S. 283 (1905).

⁹¹ *Ashwander*, 297 U.S. at 347 (quoting *Liverpool*, 113 U.S. at 39).

⁹² *Id.*; see also *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909); *Light v. United States*, 220 U.S. 523, 538 (1911); *Berea Coll. v. Kentucky*, 211 U.S. 45, 53 (1908).

⁹³ *Ashwander*, 297 U.S. at 347–48; see also *Tyler v. Judges, etc.*, 179 U.S. 405 (1900); *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915).

from;⁹⁴ and (7) the constitutional avoidance canon: “When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”⁹⁵ The goal of the rules comprising the constitutional avoidance doctrine, is that if properly utilized, they will greatly reduce the risk of overly aggressive judicial review, properly defer to the other branches of government on questions they are best equipped to rule-make on, and maintain the competency and legitimacy of the Court.

However, the Court does not always exercise the constitutional avoidance doctrine. And sometimes the Court exercises one prong of the doctrine while eschewing other prongs. A look at the Court’s approach in *Sebelius*, the high-stakes case involving the Obama administration’s ACA, illuminates the various ways the Court has and has not used the doctrine. In *Sebelius*, Chief Justice Roberts made clear the Court “do[es] not consider whether the Act embodies sound policies.”⁹⁶ Instead, the Court only asks, “whether Congress has the power under the Constitution to enact the challenged provisions.”⁹⁷ The ACA had an “individual mandate” which required people to obtain health insurance; otherwise, there would be a “penalty” assessed to them during that tax year, via the Internal Revenue Service, in the form of a “shared responsibility payment.”⁹⁸ Regarding the constitutionality of the individual mandate, in their analysis, the Court confronted the constitutional meaning of two financial terms, “commerce” and “tax.”⁹⁹ Not only was the ACA politically fraught, but the legal questions were

⁹⁴ *Ashwander*, 297 U.S. at 348; see also *Great Falls Mfg. Co. v. Att’y Gen.*, 124 U.S. 581 (1888); *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407 (1917); *St. Louis Malleable Casting Co. v. Prendergast Constr. Co.*, 260 U.S. 469 (1923).

⁹⁵ *Ashwander*, 297 U.S. at 348; see also *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

⁹⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 531–32 (2012).

⁹⁷ *Id.* at 532.

⁹⁸ *Id.* at 530–31, 539.

⁹⁹ *Id.* at 546–47.

difficult, leading to an array of results in the lower courts—the Eleventh Circuit held the individual mandate exceeded Congress’ power, because it was not constitutionally a “tax,” but that the individual mandate section could be severed from the ACA, leaving the rest of the ACA’s provisions intact; the Sixth Circuit and the D.C. Circuit, via Congress’s commerce power, upheld the constitutionality of the mandate; and the Fourth Circuit, exercising the Last Resort Rule of the constitutional avoidance doctrine avoided the constitutional questions by resolving the case on statutory grounds.¹⁰⁰ The Court declined to adopt the Last Resort Rule and decide the case on statutory grounds like the Fourth Circuit did.¹⁰¹ Put simply, the Anti-Injunction Act bars individual’s from litigating a tax before they have paid such tax, thus allowing litigation only to sue for a refund.¹⁰² The Fourth Circuit reasoned, because the individual mandate is a “tax” and this tax has not been paid, the Anti-Injunction Act bars litigation at this stage.¹⁰³ However, the Court reasoned that Congress expressly chose to label the “shared responsibility payment” in the ACA as a “penalty” not a tax, and the Anti-Injunction Act only applies to a tax.¹⁰⁴ Further, the Court observes that while substance over form is crucial in a *constitutional* question, and thus labelling something as a penalty could be interpreted as a tax if it nonetheless functions as a tax, when interpreting how the Anti-Injunction Act and the ACA fit with each other, substance over form is not necessarily the correct parameter.¹⁰⁵ Thus, because the Anti-Injunction Act and the ACA are both Congress’s own statutory creations, the statutory text controls, and if Congress wanted the ACA penalty to operate as a tax for Anti-

¹⁰⁰ *Id.* at 541–41.

¹⁰¹ *Id.* at 543–46.

¹⁰² See 26 U.S.C. § 7421(a); *Sebelius*, 567 U.S. at 543; see also *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8 (1962).

¹⁰³ *Sebelius*, 567 U.S. at 541; see also *Liberty Univ., Inc. v. Geithner*, 671 F.2d 391, 400–03 (4th Cir. 2011) (proclaiming “the individual mandate constitutes a ‘tax’ as defined in the Code’s assessment provisions” and “[f]or these reasons, the AIA bars this action”) (citations omitted).

¹⁰⁴ *Sebelius*, 567 U.S. at 543.

¹⁰⁵ See *id.* at 544.

Injunction Act purposes they would have used the word tax.¹⁰⁶ Therefore, the Court declined to invoke the Last Resort Rule and proceeded to address the merits of the case.

The battling economic policies surrounding the ACA were high stakes.¹⁰⁷ The premise behind the ACA, that the government can coerce, or incentivize (depending on your interpretation), individuals to obtain health insurance sharply divided America.¹⁰⁸ Illuminating

¹⁰⁶ See *id.* at 544–46.

¹⁰⁷ On one side were strong paternalistic notions. See Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 133 n.1 (2006) (accepting the Stanford Encyclopedia's definition of paternalism as "the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm"). Under the ACA, the government would enforce the "individual mandate" (requiring individuals to purchase a health insurance policy providing a minimum level of coverage) via a "tax" or "penalty" (depending on one's interpretation) for those who did not comply. *Sebelius*, 567 U.S. at 539. Interestingly, the economic policies on this side went even deeper, with the government arguing that mandating individuals who ordinarily would forgo health insurance to get health insurance would decrease health insurance premiums for those who do ordinarily have health insurance, by avoiding the standard practice of fee shifting within the insurance industry. *Id.* at 547. In essence, the government argued the ACA allows for a classic utilitarian result, where more people benefit than are harmed, or in economic terms, is Kaldor-Hicks efficient. Juxtaposing strong paternalist notions, the other side was steeped in intense free market ideals, steadfastly believing in the right of a person to choose when, where, and how to enter into any financial transaction, including the decision to obtain health insurance. See Brief Amicus Curiae of Virginia Delegate Bob Marshall et al. in Support of Respondents (Minimum Coverage Position), *Sebelius*, 567 U.S. 519 (No. 11-398) at *36 ("What appears to be modern and enlightened, however, is feudal and enslaving . . . the Government acts as if it is a sole monopolistic proprietor, empowered to exercise virtual ownership of both sellers and buyers of health care insurance in a market in which the Government determines the demand for health care insurance, sets the terms and price, and keeps out the competition.").

¹⁰⁸ Compare Brief Amicus Curiae of Virginia Delegate Bob Marshall et al. in Support of Respondents, *supra* note 107 with Brief of the States of Maryland et. al in Support of Petitioners (Addressing Minimum-Coverage Provision), *Sebelius* 567 U.S. 519 (No. 11-398) at *26 (The minimum-coverage provision is an essential and lawful part of the Affordable Care Act's attempt to provide healthcare access to individuals with preexisting conditions, a group that is

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the political pressure in front of the *Sebelius* Court, President Obama was quoted as saying, “I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”¹⁰⁹ First, the Court determined the individual mandate was not constitutional under Congress’s “commerce” power because never before has the commerce power been used to create or compel commerce, as the individual mandate of the ACA does, but only to regulate commerce.¹¹⁰ However, in transitioning from interpreting the constitutional meaning of the financial term “commerce” to the term “tax,” Chief Justice Roberts, invoking precedent and harkening back to the words of Justice Story 180 years previously and Justice Holmes 85 years prior, made clear: “[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”¹¹¹ Thus, while the Court declined to exercise the Last Resort Rule, the Court did uphold the constitutional avoidance canon when they found the individual mandate to fall within the meaning of the constitutional financial term “tax.”¹¹² Further, *Sebelius* is the perfect case to showcase how well the constitutional avoidance doctrine and the canon of fiscal and monetary neutrality work together. When the Court interpreted the ACA’s individual mandate to be within the constitutional meaning of “tax,” despite that it was labelled as a “penalty” in the ACA itself,¹¹³ the Court left a door open for various

among the hardest of the uninsured to cover.”).

¹⁰⁹ Jeff Mason, *Obama Takes a Shot at Supreme Court over Healthcare*, REUTERS (Apr. 2, 2012, 6:46 PM), <https://www.reuters.com/article/2012/04/02/us-obama-healthcare-idUSBRE8310WP20120402/>.

¹¹⁰ *Sebelius*, 567 U.S. at 547–58.

¹¹¹ *Id.* at 562.

¹¹² *Id.* at 563 (“The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read . . .”).

¹¹³ *Id.* at 574 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

economic policies to fall within the constitutional meaning of the financial term “tax.”¹¹⁴ Here, the Court also invoked the substance over form tenet, outlining how the individual mandate functioned like a traditional tax, despite its label.¹¹⁵ In construing a non-narrow constitutional meaning of the financial term “tax,” the Court is not advocating for the wisdom or efficacy of the underlying financial policy the broader constitutional meaning allows for. However, by exercising fiscal and monetary neutrality, the Court is allowing the other branches of government, who are more accountable to the people, an opportunity to exercise their best economic judgment at any given time.

Fiscal and monetary neutrality and the constitutional avoidance doctrine, when used in tandem, provide the first uniform framework for the Court to utilize when confronted with the constitutional meaning of financial terms. In this Part we answered the “how” question: The Court should be able to easily adopt these canons as a unified framework because we unearthed how the Court has already implicitly exercised fiscal and monetary neutrality and how this canon has the requisite flexibility to fit within other long-used tenets and principles of the Court. One such principle we showed the neutrality canon works with is the constitutional avoidance doctrine which has also been used by the Court when interpreting the meaning of constitutional financial terms. Next, in answering the question “why,” we reveal the massive normative implications underpinning why the Court must adopt this unified framework for all constitutional financial terms moving forward.

¹¹⁴ *Id.* at 564 (describing the financial policy underlying the ACA, the Court stated “the payment is expected to raise about \$4 billion per year by 2017”).

¹¹⁵ The Court found the elements of the individual mandate that resemble a standard tax are (1) the amount due being less than the cost of insurance which may mean some willingly choose to pay the tax; (2) the lack of a scienter requirement; and (3) the tax is collected by the IRS like standard practice. *Id.* at 566.

II . Implications

The ratification of the Sixteenth Amendment itself illuminates how careful the Supreme Court must be when interpreting a constitutional financial term. A glimpse of history reveals how interpretation of constitutional financial terms must balance competing social, political, and economic policies, all of which are difficult for the Court to navigate—explaining why these terms are best left in the hands of other branches of the government. Federal income taxes were unheard-of before the Civil War. But, largely viewed as an emergency action in response to war-time pressures, the Supreme Court upheld the constitutionality of the Civil War era federal income taxes in *Springer v. United States*.¹¹⁶ However, the subsequent attempt at an income tax, the income tax of 1894, was considered to be a social and economic policy movement, as opposed to a wartime need.¹¹⁷ In reaction to a significant duration of economic difficulties, the income tax of 1894 was viewed as an intentional change in policy to “shift the tax burden to the wealthier group in the country, whom a substantial segment of the citizenry held responsible for their plight.”¹¹⁸ When the constitutionality of the act came before the Court in *Pollock v. Farmers’ Loan and Trust Co.*,¹¹⁹ instead of utilizing prongs of the constitutional avoidance doctrine or fiscal and monetary neutrality, the Court felt emboldened to react to the political pressures undergirding the new economic policy comprising a rudimentary form of graduated income taxes (income taxes that increase as wealth increases) and held it to be unconstitutional.¹²⁰ As one commentator put it: “There

¹¹⁶ *Springer v. United States*, 102 U.S. 586, 599 (1880).

¹¹⁷ Charles L.B. Lowndes, *Current Constitutional Problems in Federal Taxation*, 4 VAND. L. REV. 469, 470 (1951) (“It is extremely doubtful whether there was any new revelation about the constitutional conception of a direct tax between the two decisions. It is, perhaps, of greater significance that the Civil War income taxes were emergency measures, which lacked any particularly offensive political implications . . .”).

¹¹⁸ *Id.* (citing BLAKEY, THE FEDERAL INCOME TAX 8–20 (1940)).

¹¹⁹ *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1859).

¹²⁰ *Id.* The Court’s holding in *Pollock* is the result of what we would today call judicial activism (when judges look outside precedent or legal analysis and consider an array of social or political factors) because the income tax act that

is little doubt but that the aversion of the Court toward the 1894 tax was an instinctive conservative response to the social philosophy underlying the tax, rather than a reasoned deduction from any clear-cut constitutional definition of a direct tax.”¹²¹

Because the *Pollock* Court interpreted the constitutional financial term “tax” in a way that favored one economic policy over others, benefiting wealthier corporations and individuals, the result of the Court’s decision led to years of pressure from the people for a federal income tax to be enacted via an alternative route.¹²² However, it is difficult to overrule a broad constitutional decision from the Supreme Court, thus the people resorted to ratifying an Amendment to the Constitution which has only happened 27 times in the history of the United States, compared to 11,848 attempts as of 2019.¹²³ The statistics highlight just how crucial it is for the Court

was held unconstitutional in *Pollock* is nearly identical to the one held constitutional in *Springer*. President Richard Nixon infamously attributed judicial activism to describe the philosophy of the Warren Court. See Richard Nixon, *Remarks on Accepting the Presidential Nomination of the Republican National Convention*, UC SANTA BARBARA: THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=3537#axzz1lSqYlW00> (last visited Jan. 14, 2024). For background on judicial activism see David Fontana and Donald Braman, *Judicial Backlash? Evidence From a National Experiment*, 112 COLUM. L. REV. 731, 741 (2012). For the interesting intertwinement of judicial activism with politics and often economic policy see Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 6 S. CT. REV. 209 (2017).

¹²¹ Lowndes, *supra*, note 117, at 470.

¹²² See *id.* The *Pollock* Court enumerated a narrow, two-prong interpretation of the constitutional financial term “tax.” *Pollock*, 157 U.S. at. 580–83. First, the Court held that a tax on “the income or rents of real estate, imposes a tax upon the real estate itself,” and thus is a direct tax subject to the rule of apportionment. *Id.* at 555. Second, the *Pollock* Court held that issuing an indirect tax that impacts particular “corporations, companies, or associations . . . at a higher rate than the incomes of individuals or partnerships derived from precisely similar property or business” is not understood to fall within the uniformity needed for an indirect tax. *Id.*

¹²³ *Measures Proposed to Amend the Constitution*, U.S. SENATE, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm> (last visited Jan. 14, 2024).

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to exercise the constitutional avoidance doctrine and fiscal and monetary neutrality when faced with the interpretation of a constitutional financial term. If the Court eschews these principles, the people have shown the high economic policy stakes involved with the meaning of constitutional financial terms are strong enough to unite the populace against the Court, thus diluting the competence of the Court in the eyes of the people.¹²⁴ Therefore, because the *Pollock* Court failed to understand the careful need surrounding the interpretation of constitutional financial terms, we now have the Sixteenth Amendment to the Constitution.¹²⁵

This Part answers the “why” and illustrates the enormous implications in front of the Court when faced with the interpretation of constitutional financial terms. With too narrow an interpretation of a constitutional financial term, the Court can, advertently or inadvertently, cripple massive systems we have come to know today. Such systems include the congressionally enacted Bankruptcy Code, and the federal bankruptcy courts who oversee the Code’s implementation, and the Internal Revenue Code, enforced by the Internal Revenue Service, among others. As a normative assertion, we argue the Court should invoke fiscal and monetary neutrality and the constitutional avoidance doctrine due to the high-stake economic policies involved, superior ability of other branches of government to deal with such terms, and the need for the Court to maintain proper separation of powers principles. This “why” is revealed through the dissection of two current controversies before the Court, one regarding the constitutional meaning of “bankruptcies,” and the other regarding the constitutional meaning of “income.”

¹²⁴ See Part I.B. for why the public’s view of the Court’s competence is so crucial to the Court’s efficacy.

¹²⁵ U.S. CONST. amend XVI; see *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18 (1916) (explaining the Sixteenth Amendment was enacted to overrule the *Pollock* decision).

A. Bankruptcies

In 2023, the Supreme Court granted certiorari to hear the case of *Harrington v. Purdue Pharma*.¹²⁶ Because the Bankruptcy Code has unique aspects that cannot be achieved through standard litigation, bankruptcy has become a reprieve for companies facing mass tort liability.¹²⁷ Filing bankruptcy allows a corporation facing massive liability to stay all claims against them (stop litigation in its tracks) and force these disparate plaintiffs to continue with their claims under the umbrella of the federal bankruptcy court.¹²⁸ Now creditors, instead of plaintiffs; thus, what is or is not available to creditors under the Bankruptcy Code is very different from what was or was not available to them when they were plaintiffs in standard litigation.¹²⁹ *Purdue Pharma* asks the question of whether a bankruptcy court has authority to authorize a non-debtor, nonconsensual third-party release. When a corporation uses bankruptcy as a mechanism to reorganize, this process is focused on the debtor and their creditors; however, there are a lot of tertiary people and entities with relations to either the debtor or creditors who, to varying levels, may be impacted by a bankruptcy proceeding. Here is where the constitutional question comes in. The Constitution grants Congress the power to enact “uniform laws on the subject of bankruptcies”¹³⁰—so to what extent are third parties “on the subject of bankruptcies?” Tort victims sued Purdue Pharma in various courts across the nation for their role in the opioid crisis.¹³¹

¹²⁶ *Harrington v. Purdue Pharma*, 144 S. Ct. 44 (2023).

¹²⁷ See Robert Jones, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983); Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down but Not Out*, 63 NYU ANN. SURV. AM. L. 727 (2008).

¹²⁸ See 11 U.S.C. § 524.

¹²⁹ See *id.*; see generally Katherine M. Anand, *Demanding Due Process: The Constitutionality of the 524 Channeling Injunction and Trust Mechanisms That Effectively Discharge Asbestos Claims in Chapter 11 Reorganization*, 80 NOTRE DAME L. REV. 1187 (2005) (explaining just one of the ways a plaintiff's rights or options may change was funneled into the bankruptcy court, in this case a reduced version of due process).

¹³⁰ U.S. CONST. art. I, § 8, cl. 4.

¹³¹ See *In re Purdue Pharma L.P.*, 69 F.4th 45, 56 (2d Cir. 2023) (“The fallout from

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When Purdue filed for bankruptcy all of these various plaintiffs were funneled into the bankruptcy case and became creditors.¹³² The Sackler family, the family behind Purdue Pharma, is only willing to contribute a substantial sum of money to the fund that will compensate these creditors if they receive a release from liability.¹³³ Because Purdue Pharma is the debtor, not the Sacklers, this release substantially impacts the rights of a non-debtor.¹³⁴ Further, as part of the bankruptcy reorganization plan, the creditors will be forever barred from suing not only the debtor Purdue Pharma, but also the Sacklers, for their role in the opioid crisis.¹³⁵ This is true even though some of these creditors did not approve this plan and may not receive a payment from the trust that they believe adequately compensates them for their tort injuries.¹³⁶ The practical flipside is that if the Sackler's do not get this nonconsensual, third-party release, then they will not contribute six billion dollars to the fund; thus, substantially reducing the amount all creditors will receive.¹³⁷

Recall in *Moyses*, the Court approved the statement that any legislation falling between the “least limit” of the debtor’s property distribution and the “greatest limit” of the debtor’s discharge is within “the competency and discretion of Congress.”¹³⁸ However,

the crisis led to a veritable deluge of litigation against both Purdue and individual members of the Sackler family. Claimants, spread across the United States and Canada, included many sufferers of opioid addiction and the families of those lost to opioid overdoses.”).

¹³² *Id.*

¹³³ *Id.* (“To settle the mass of civil claims, the parties, including Purdue and the Sacklers, agreed that in exchange for Purdue filing for bankruptcy, the Sacklers would personally contribute billions of dollars to the bankruptcy if all civil claims against them were released.”).

¹³⁴ *Id.*

¹³⁵ *Id.* at 56–57.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 186 (1902) (“It extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is the discharge . . . [a]nd all intermediate legislation, affecting substance and form . . . are in the competency and discretion of Congress.”).

there are strong arguments that a bankruptcy judge releasing a non-debtor third-party, when this release is not consensual, from liability and thereby removing the ability of victim-turned-creditors to sue the third-party in the future is beyond the greatest limit of the debtor's discharge, because the ones being discharged, the Sackler's, are not the debtor.¹³⁹ This issue has presented a Circuit split for a long time in the bankruptcy world and not only presents the Court with a difficult and complex constitutional issue, but a difficult and complex issue of statutory interpretation.¹⁴⁰ In *Purdue Pharma*, the Court has every opportunity to exercise the Last Resort Rule of the constitutional avoidance doctrine. The Last Resort Rule requires the Court to avoid a constitutional question if the case can be solved on procedural grounds, or via federal or state law.¹⁴¹ Instead of the question being does the Constitution confer the power to Congress to give bankruptcy judges the ability to issue non-debtor, nonconsensual third-party releases via the Bankruptcy Code, the question can, and should be: does the Bankruptcy Code grant bankruptcy judges the power to issue non-debtor, nonconsensual third-party releases. With proper framing, via the Last Resort Rule, this moves from a constitutional question to a statutory question. Most courts have viewed this issue through the statutory question and, in granting certiorari, the Supreme Court seems to have approved the framing of the question within the

¹³⁹ See Brief for Amici Curiae Bankruptcy Law Professors Ralph Brubaker, et al in Support of Petitioner, *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (No. 23-124).

¹⁴⁰ *Compare* *Monarch Life ns. Co. v. Ropes & Gray*, 65 F.3d 973 (1d Cir. 1995), *In re* *Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005); *In re* *Lower Bucks Hosp.*, 571 Fed. App'x 139 (3d Cir. 2014), *Nat'l Heritage Found., Inc. v. Highbourn Found.*, 760 F.3d 344 (4th Cir. 2014), *In re* *Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002), *In re* *Airadigm Commc'ns, Inc.*, 519 F.3d 640 (7th Cir. 2008), *In re* *Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015) (all holding nonconsensual third-party releases as valid) *with In re* *Pac. Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), *In re* *Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995), *In re* *W. Real Est. Fund*, 922 F.2d 592 (10th Cir. 1990) (all holding the nonconsensual third-party releases were invalid).

¹⁴¹ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

statutory lens, as opposed to the constitutional lens.¹⁴² However, the statutory view is not cemented, because the combination of the high social and economic implications of the *Purdue Pharma* case,¹⁴³ Judge Wesley's Second Circuit concurrence which implied underlying constitutional issues,¹⁴⁴ and scholars who point to constitutional problems¹⁴⁵ may push the Court to see the case in a new light.

It is crucial for the Court to avoid the constitutional question in *Purdue Pharma* because Congress is vastly more equipped to weigh all the competing pros and cons of a mechanism such as non-debtor, nonconsensual third-party releases. This area of bankruptcy law is very complex, and it is almost inescapable to leave certain parties without their vision of complete justice. The Second Circuit recognized this stark reality: "Bankruptcy is inherently a creature of competing interests, compromises, and less-than-perfect outcomes. Because of these defining characteristics, total satisfaction of all that is owed—whether in money or in justice—rarely occurs."¹⁴⁶ There are strong institutional justifications for why

¹⁴² See Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 92 FORDHAM L. REV. 429, 432 n.9 (2022) (collecting cases to demonstrate the vast majority of non-debtor releases have been adjudicated statutorily, not on the constitutional question); see also *Harrington*, 144 S. Ct. 44 ("The parties are directed to brief and argue the following question: Whether the Bankruptcy Code authorizes a court to approve, as part of a plan of reorganization under Chapter 11 of the Bankruptcy Code, a release that extinguishes claims held by nondebtors against nondebtor third parties, without the claimants' consent.").

¹⁴³ See Abbie VanSickle & Jan Hoffman, *What to Know About the Purdue Pharma Case Before the Supreme Court*, N.Y. TIMES (Dec. 4, 2023), <https://www.nytimes.com/article/purdue-pharma-supreme-court.html> ("The settlement involving Purdue, the maker of the prescription painkiller Oxycontin, touches on one of the country's largest public health crises.").

¹⁴⁴ *In re Purdue Pharma L.P.*, 69 F.4th 45, 90–91 (2023) (Wesley, J., concurring) ("As it stands, a nondebtor's ability to be released through bankruptcy turns on where a debtor files. Forum-dependent results are anathema to the establishment of 'uniform Laws on the subject of Bankruptcies throughout the United States.'").

¹⁴⁵ See Levitin, *supra* note 142, at 435–38; Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 674–75 (2004).

¹⁴⁶ *In re Purdue Pharma*, 69 F.4th at 56.

the Court should avoid interpreting constitutional financial terms. The superior ability of other institutions to appropriately handle financial questions compared to the Supreme Court is clear. A simple look at how active Congress has been in bankruptcy rulemaking highlights this disparity. Congress has made at least eleven major alterations to federal bankruptcy laws.¹⁴⁷ Looking at these alterations, it becomes obvious that not only does Congress have a greater capacity to conduct in-depth investigations into best policies but also has a willingness to react to current societal impacts. However, the Supreme Court has a miniscule capability to investigate various economic policies at stake, and the Court is generally supposed to consider solely legal doctrines without taking account of current societal happenings.¹⁴⁸ A short delineation of Congress's role in bankruptcy legislation illuminates these differences.

The first United States Bankruptcy Act was passed in 1800 in response to the economic panic of 1797.¹⁴⁹ The second United States Bankruptcy Act was enacted in 1841 after fears stemming from the economic panic of 1837.¹⁵⁰ The 1841 Act was a major shift from prior understandings of bankruptcy, allowing voluntary bankruptcies for the first time (bankruptcies initiated by debtors) and eligibility was extended to "all persons whatsoever owing debts."¹⁵¹ The third United States Bankruptcy Act was enacted in

¹⁴⁷ See generally Tabb, *supra* note 24 (delineating the litany of congressional action on bankruptcies and stating "[s]everal factors have spurred Congress into almost non-stop consideration of the federal bankruptcy laws since 1978").

¹⁴⁸ See *Ysleta Del Sure Pueblo v. Texas*, 596 U.S. 685, 706 (2022) ("It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt.").

¹⁴⁹ See Tabb, *supra* note 24, at 14; Bankruptcy Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). See generally *Evolution of Bankruptcy Law*, *supra* note 25 ("Citing excessive costs and corruption, Congress repeals the Act of 1800. For the next three decades, the states will fill the legal void.").

¹⁵⁰ See Tabb, *supra* note 24, at 14; Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843).

¹⁵¹ *Evolution of Bankruptcy Law*, *supra* note 25. Again, the Bankruptcy Act of 1841 was repealed in 1843 due to "[h]igh administrative costs, lack of state law

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1867 in response to the Civil War.¹⁵² Next, after the panic of 1893, the Bankruptcy Act of 1898 was passed.¹⁵³ This Act demarcates the solidification of federal bankruptcy regulation, with state laws preempted.¹⁵⁴ The Bankruptcy Act of 1898 was in full effect until the most recent Bankruptcy Act was enacted in 1978, which is still used today.¹⁵⁵ Reacting to the Great Depression, in the 1930's Congress issued a group of reorganization laws, expanding the concept of "bankruptcies" from pure liquidations to allow for debtors to find a way to use the bankruptcy system to emerge as a viable business or individual capable of paying their future debts.¹⁵⁶ The Chandler Act of 1938 was a substantial revision to the Bankruptcy Act of 1898 and solidified reorganization provisions, by organizing them into "Chapters."¹⁵⁷ In a wave of Bankruptcy reforms in the 1970's, Congress created its first Bankruptcy Review Commission which issued a report in 1973 and held hearings in 1975 and 1976.¹⁵⁸ This led to President Carter signing the Bankruptcy Reform Act in 1978.¹⁵⁹ This was the first major reform not in response to an economic panic or war, signaling Congress's intention to regularly reassess and revamp bankruptcy law in accord with various economic policies over time.

In 1984 the Bankruptcy Amendments and Federal Judgeship Act was enacted, largely in response to two Supreme Court cases,

exemptions, and creditor frustration." *Id.*

¹⁵² See Tabb, *supra* note 24, at 14; Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878).

¹⁵³ See Tabb, *supra* note 24, at 14; Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

¹⁵⁴ See Tabb, *supra* note 24, at 23 ("The 1898 Act remained in effect for eighty years . . .").

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 27–28 ("After the Depression came crashing down in 1929, Congress passed several pro-debtor amendments that facilitated rehabilitation through bankruptcy.").

¹⁵⁷ *Id.* at 29–30 ("The Chandler Act substantially revised virtually all of the provisions of the 1898 Act."); The Chandler Act, Ch. 575, 52 Stat. 840 (repealed 1978).

¹⁵⁸ Tabb, *supra* note 24, at 32–33.

¹⁵⁹ *Id.* at 34.

Marathon Pipeline and *NLRB v. Bildisco & Bildisco*.¹⁶⁰ In 1986 there was a temporary enactment of Chapter 12, dealing with family farmers in response to a farm crisis.¹⁶¹ The 1994 Act created the second National Bankruptcy Review Commission which issued a comprehensive report in 1997.¹⁶² The most recent amendment to the Bankruptcy Code came in 2005 with the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) which was more than five-hundred pages and promulgated many changes in bankruptcy law with the most substantial change for consumer debtors.¹⁶³ Consumer creditors spent more than two decades lobbying for stricter rules for consumer debtors for what the creditor industry believed to be “can pay” debtors who were getting discharges from their debts even when they had the capacity to pay them.¹⁶⁴ After years of carefully considering this policy (which the 1997 report rejected), in BAPCPA Congress officially took a pro-creditor stance to consumer debtors with the enactment of a strict “means test.”¹⁶⁵ Simply put, the means test is a complex formula that disallows a debtor to file a chapter 7 liquidation, and get a subsequent discharge of their debts, if they fail the means test.¹⁶⁶ Instead, debtors who fail the means test are essentially forced into a chapter 13 reorganization where they must provide a viable plan to

¹⁶⁰ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982) (holding the jurisdiction given to bankruptcy judges in the 1978 Act was unconstitutional); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984) (proclaiming there was no unfair labor practice when a collective bargaining agreement was rejected in a Chapter 11 proceeding by a debtor in possession); Tabb, *supra* note 24, at 38–39.

¹⁶¹ Tabb, *supra* note 24, at 40 (“The farm crisis motivated Congress to pass yet another major bankruptcy bill just over two years after BAFJA became law.”).

¹⁶² Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106; Tabb, *supra* note 24, at 42–43.

¹⁶³ Bankruptcy Abuse Prevention and Consumer protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 199 Stat. 23; see generally Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (issuing an in-depth guide to the underpinnings of BAPCPA).

¹⁶⁴ See Jensen, *supra* note 163, at 485–93.

¹⁶⁵ *Id.* at 562–568.

¹⁶⁶ See 11 U.S.C. § 707.

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reorganize and pay their creditors for three to five years in the future.¹⁶⁷

When it comes to non-debtor, nonconsensual third-party releases, the issue in *Purdue Pharma*, Congress has regulated in this space before. After society recognized the danger of asbestos, Congress added § 524(g) to the Bankruptcy Code.¹⁶⁸ Section 524(g) allows companies facing massive asbestos-related tort liability to create a trust and channeling injunction.¹⁶⁹ The trust is a legal entity formed to compensate present and future creditor-tort victims over time and the channeling injunction forces all present and future asbestos creditor-victims to be compensated via the trust, barring litigation.¹⁷⁰ After courts had success with trusts and channeling injunctions in high profile asbestos bankruptcies, Congress officially added these mechanisms to the Bankruptcy Code in 1994.¹⁷¹ As part of the trust and channeling injunction set up, Congress added a section allowing for third-party releases in asbestos cases, typically taking the form of insurance companies.¹⁷² However, when Congress added these amendments, they did so only for asbestos cases and nowhere else in the Code does it expressly state non-debtor releases for third parties are affirmatively allowed in non-asbestos cases.¹⁷³ In allowing non-debtor releases in non-asbestos cases, bankruptcy

¹⁶⁷ See *id.*

¹⁶⁸ 11 U.S.C. § 524(g).

¹⁶⁹ *Id.* at § 524(g)(1)–(3).

¹⁷⁰ *Id.*

¹⁷¹ *In re Purdue Pharma L.P.*, 69 F.4th 45, 77 (2d Cir. 2023) (explaining how “in 1994 Congress enacted 11 U.S.C. § 524(g), which expressly allows for the injunction of third-party claims against non-debtors” for asbestos-related claims).

¹⁷² 11 U.S.C. § 524(g)(4) (“[S]uch an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction . . . and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor . . .”).

¹⁷³ Judge Wesley explains in his concurrence that “nowhere—apart from asbestos-related bankruptcies—does the Code” authorize nondebtor releases and the provisions “of the Bankruptcy Code say nothing about nondebtor releases.” *In re Purdue Pharma L.P.*, 69 F.4th at 85–86 (Wesley, J., concurring).

courts have relied on § 105(a) of the Bankruptcy Code which states: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”¹⁷⁴ Because Congress had the opportunity to legislate for non-asbestos, non-debtor releases, and yet chose not to, there is major debate surrounding whether the Bankruptcy Code actually confers this power upon bankruptcy judges.¹⁷⁵ Ultimately, due to the complexity and potential ramifications, the Court should avoid the constitutional question in *Purdue Pharma*. Carving the answer to non-debtor, nonconsensual third-party releases into the constitutional meaning of the financial term “bankruptcies” would immediately close the constitutional door to a litany of economic policies in favor of one. However, by focusing on the statutory issue, the Court appropriately leaves the underlying policy question for Congress, the body that is vastly more equipped to answer it.

Looking at congressional action regarding bankruptcy through the years highlights how much more time and capability, via commissions and hearings, Congress has to carefully consider various economic policies that drive decisions, as well as various economic policies that may be implicated by constitutional meanings. Also, history shows Congress has the ability to react to societal happenings such as economic panics, the Great Depression, the Civil War, and a farm crisis, amongst others, which the Supreme Court is supposed to remain neutral about, only guided by legal authority. Additionally, history shows Congress has a willingness to independently review and update the Bankruptcy Code as well as update the Code in response to major holdings from the Supreme Court. Ultimately, the comprehensiveness, scope, capability, and flexibility of Congress, administrative agencies, and state legislatures proves these institutions should be the ones to conduct the careful considerations needed when it comes to economic policies, which often require expert financial or economic

¹⁷⁴ 11 U.S.C. § 105(a).

¹⁷⁵ “Congress once provided clarity on the propriety of third-party releases in bankruptcy [for asbestos cases only]. It could do so again, but, since 1994, has not.” *In re Purdue Pharma L.P.*, 69 F.4th at 86 (Wesley, J., concurring).

knowledge beyond the expertise of the Supreme Court. Bankruptcies are not the only financial enterprise Congress, administrative agencies, and state legislatures are invested in. In fact, economic arenas tend to be highly regulated by administrative agencies and of great interest to Congress and state legislatures. Therefore, the Supreme Court, when confronted with the constitutional meaning of financial terms should utilize the canon of constitutional avoidance, and if that is unfitting, should always exercise fiscal and monetary neutrality.

B. Income

Since the *Eisner v. Macomber* case, the question of whether the Sixteenth Amendment has a realized gain requirement has been long debated.¹⁷⁶ In *Eisner*, the Court held that a stock dividend (when stockholders receive a payment of additional shares as opposed to a cash payment) is not constitutionally income before it is sold or converted, and then only if that sale or conversion amounts to a gain as it relates to the original investment in the stock.¹⁷⁷ In reaching this result, Justice Pickney explained while a stock dividend appeared on its face to be a gain, a gain only comes within the constitutional meaning of income when the gain is “severed from the capital” or “drawn by the recipient for his separate use.”¹⁷⁸ Proponents of Justice Pickney’s reasoning have come to describe this as the concept of “realized gain,” advocating that the constitutional meaning of the financial term “income” has a realized gain requirement.¹⁷⁹ Thus, if there is no realized gain, there is no income, and Congress cannot tax that gain without apportionment under the Sixteenth Amendment. However, that is a broad reading of *Eisner* and one that does not uphold fiscal and monetary neutrality. Time and again, in post-*Eisner* cases, the Court has reiterated that what *Eisner* stands for is only that a stock dividend, that has comparable aspects to the dividend in *Eisner*, is not constitutionally understood

¹⁷⁶ See cases cited *supra* pt. I.A. and sources cited *supra* note 65.

¹⁷⁷ *Eisner v. Macomber*, 252 U.S. 189, 211 (1920).

¹⁷⁸ *Id.* at 207.

¹⁷⁹ See various briefs supporting Petitioner *supra* notes 6–8.

as income.¹⁸⁰ This narrowing of *Eisner* and other tactics, such as the constitutional avoidance doctrine, have allowed the Court to adjudicate cases that involve the question of whether the constitutional meaning of income has a realization requirement without actually answering that question.

The Court epitomized this mindset, invoking canons of avoidance and neutrality, in *Helvering v. Griffiths*.¹⁸¹ In *Helvering*, the government expressly asked the Court to overrule *Eisner*.¹⁸² However, the Court rightly invoked ripeness, one of the prongs of the constitutional avoidance doctrine.¹⁸³ Recall that a claim is not ripe for the Court to adjudicate “if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’”¹⁸⁴ First, the Court understood the impact of overruling *Eisner*, as the government requested: “It should be observed that the question of the constitutional validity of *Eisner v. Macomber* is plainly one of the first magnitude, but this is not to say that it is presented in this case.”¹⁸⁵ Second, the Court invoked ripeness by expressly stating

¹⁸⁰ See reorganization cases in pt. I ; see also *Koshland v. Helvering*, 298 U.S. 441 (1936) (holding a dividend was constitutionally income when the Commissioner applied an allocation rule which decreased the cost basis of the old stock which then increased the taxpayer’s gain on the redemption of that old stock and explicitly limited *Eisner* to only the kind of dividend at issue in that case).

¹⁸¹ See generally, *Helvering v. Griffiths*, 318 U.S. 371 (1943) (declining to overtly overrule *Eisner* or to answer whether the constitutional definition of income has a realized gain requirement); see also *Stratton’s Indep., Ltd. v. Howbert*, 231 U.S. 399, 415, 414 (1913) (proclaiming the importance of the constitutional avoidance canon by stating “if it were demonstrable that to read the act according to its letter would render it unconstitutional, or glaringly unequal, or palpably unjust, a reasonable ground would exist for construing it according to its spirit rather than its letter”).

¹⁸² *Helvering*, 318 U.S. at 371 (“The question in this case is whether the Acts of Congress and the administrative regulations thereunder afford a basis on which we may reconsider the decision is *Eisner* . . . and pass on the Government’s request that if [sic] be overruled.”) (citation omitted).

¹⁸³ *Id.* at 394.

¹⁸⁴ *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985)).

¹⁸⁵ *Helvering*, 318 U.S. at 394 (emphasis added).

they do not adjudicate tax issues until they determine Congress has actually laid said tax.¹⁸⁶ The Court determined because they did not believe Congress's statutory language was meant to overturn *Eisner*, nor was the question ripe, there were no grounds to answer the constitutional question.¹⁸⁷

Building off *Helvering*, the Court again confronted how the *Eisner* decision impacts the meaning of income in *Commissioner of Internal Revenue v. Glenshaw Glass Co.*¹⁸⁸ In *Glenshaw Glass*, the Court investigated whether punitive damages can be taxed under § 22(a) of the Internal Revenue Code ("IRC").¹⁸⁹ Because the Court assumes Congress intends to enact the full scope of its taxing power under the IRC, often the Court fails to provide a distinction between the meaning of "gross income" under the IRC and "income" under the Sixteenth Amendment.¹⁹⁰ While the Court does conflate these meanings at times, it cannot track as true that what is gross income under the IRC is automatically income under the Sixteenth Amendment, unless the Court explicitly and affirmatively states this maxim in that particular case. However, because the Court does fail to distinguish between these two meanings in some cases, it is instructive to extract the necessary lessons from IRC questions that could impact the constitutional meaning of income. The Court's interpretation of gross income under the IRC further shows the Court's implicit adoption of fiscal and monetary neutrality. In *Glenshaw Glass*, the Court made it clear that the meaning of income in *Eisner* as "the gain derived from capital, from labor, or from both combined" is relevant in that factual context but is not meant to be a benchmark for all gross income questions under the IRC.¹⁹¹ In fact, the Court reasoned that the meaning of gross income could be even

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 404.

¹⁸⁸ *C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

¹⁸⁹ *Id.* at 430.

¹⁹⁰ *Id.* at 429; *see also* *Eisner v. Macomber*, 252 U.S. 189, 219–20 (1920) (Holmes, J., dissenting) (stating there is a difference between the meaning of income under statutes versus under the Sixteenth Amendment and the Court should take care not to conflate these).

¹⁹¹ *Glenshaw Glass*, 348 U.S. at 430–31.

broader than the already broad income definition in *Eisner*; thus, allowing even greater flexibility for multiple economic policies to enter within the scope of income.¹⁹² For instance, in *Glenshaw Glass*, the Court determined that punitive damages are taxable as gross income because in substance they are a gain, even though in form they appear more as a “windfall” as opposed to being derived from capital or labor.¹⁹³ While the *Glenshaw Glass* Court made no explicit statement that the constitutional meaning of income is something grander than “the gain derived from capital, from labor, or both combined,” it can be argued that this precedent implies such an inference, which, upholding fiscal and monetary neutrality, keeps the constitutional door open to an even greater scope of possible income scenarios than in *Eisner* alone.

In addressing the current controversy of *Moore v. United States*, the Court must stick to the unified framework of fiscal and monetary neutrality and the constitutional avoidance doctrine, just as they have in the past when confronted with the constitutional meaning of financial terms. Whether there is a realized gain requirement in the meaning of income under the Sixteenth Amendment is being framed as the heart of the case *Moore v. United States* that the Supreme Court granted certiorari for in June of 2023.¹⁹⁴ More specifically, *Moore* asks whether the Mandatory Repatriation Tax (“MRT”) imposed upon Charles and Kathleen Moore was a tax on “income” under the Sixteenth Amendment and thus within Congress’s constitutional enforcement power; or was it not a tax on “income,” and thus a direct tax that is not within Congress’s constitutional authority unless it is properly apportioned (which it was not in this case).¹⁹⁵ In 2017, the Tax Cuts and Jobs Act (“TCJA”) went into

¹⁹² *Id.* at 432–33.

¹⁹³ *Id.* at 429–30, 432–33.

¹⁹⁴ See Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (2023) (No. 22-800), at * i (stating the question presented as “Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states”).

¹⁹⁵ *Moore v. United States*, 36 F.4th 930 932–35 (9th Cir. 2022).

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effect.¹⁹⁶ The TCJA instituted a shift in corporate taxation, one away from a worldwide system of taxation, where corporations were taxed irrespective of location, and toward a territorial system, where domestic profits became the main source of corporate taxation.¹⁹⁷ In response to this change, the government instituted the MRT.¹⁹⁸ The MRT focuses on controlled foreign corporations (“CFC”) which are “foreign corporation[s] whose ownership or voting rights are more than 50% owned by U.S. persons.”¹⁹⁹ The MRT is a one-time tax that categorizes “CFC earnings after 1986 as income taxable in 2017.”²⁰⁰ Specifically, individuals in the United States who “own[] at least 10% of a CFC are taxed on the CFC’s profits after 1986 at either 15.5% for earnings held in cash or 8% otherwise.”²⁰¹ The crux of the controversy: the MRT is imposed on shareholders meeting the 10% or greater criteria, even if the CFC never distributed earnings to those shareholders.²⁰²

A friend of the Moores wanted to enrich the lives of Indian farmers and conceived a business idea to supply modern tools to farmers in India.²⁰³ For their friend’s goal to come to fruition, the Moores invested \$40,000 in return for 13% of the common shares in the company, KisanKraft.²⁰⁴ KisanKraft qualifies as a CFC, and at 13%, the Moores are slightly above the 10% threshold, thus triggering the MRT.²⁰⁵ KisanKraft was profitable every year, however never distributed earnings to their shareholders, instead choosing to reinvest their earnings in their business.²⁰⁶ This means the Moores

¹⁹⁶ *Id.* at 933.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* See generally Christopher H. Hanna, Moore, *the Sixteenth Amendment, and the Underpinnings of the Deemed Repatriation Provision*, 76 SMU L. REV. F. 156 (2023) (explaining the background and rationales of the MRT).

¹⁹⁹ *Id.* at 932.

²⁰⁰ *Id.* at 933.

²⁰¹ *Id.*; see also 26 U.S.C. § 965(c).

²⁰² Moore, 36 F.4th at 933.

²⁰³ Brief for Petitioner, Moore, 143 S. Ct. 2656 (2023) (No. 22-800), at *11.

²⁰⁴ *Id.*

²⁰⁵ Moore, 36 F.4th at 933.

²⁰⁶ *Id.*

never had profit in their hand from their investment. Yet, because they met the qualifications for the MRT, on their 2017 tax return they had to show “an additional \$132,512 in taxable income” from their KisanKraft holding, despite never receiving tangible profit from their investment.²⁰⁷ Thus, with showing this additional income, the Moores’ “tax liability for 2017 increased by roughly \$15,000 because of the MRT.”²⁰⁸ The Moores filed suit, claiming the MRT is unconstitutional because it is not taxing “income” under the Sixteenth Amendment.²⁰⁹ The District Court granted the government’s motion for summary judgment.²¹⁰ The Ninth Circuit affirmed the District Court’s opinion.²¹¹ The ultimate resolution of this case awaits the Supreme Court.

As a threshold argument, the government contends the Supreme Court should not take up this issue because “the MRT is a one-time tax applicable only to pre-2018 income, the case lacks pressing prospective importance. This Court’s review is unwarranted.”²¹² Further, the government asserts that no other lower case has interpreted the constitutionality of the MRT and “this Court should await further percolation before resolving the MRT’s constitutionality.”²¹³ The Court denying certiorari is an effective way to exercise the underlying rationales of the constitutional avoidance doctrine.²¹⁴ Often, cases that reach the Supreme Court are legally complex, and sometimes matters of first impression, thus the Court is well-served to allow these issues time to be investigated and dissected by Circuit and District courts before the Supreme Court

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (2023) (No. 22-800), at * i .

²¹⁰ *Moore*, 36 F.4th at 933.

²¹¹ *Moore*, 36 F.4th at 933.

²¹² Brief for the United States in Opposition, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *8.

²¹³ *Id.* at *20.

²¹⁴ See Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 989 (2022); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 18–19, 58–64 (2016); Bickel, *supra* note 69, at 75.

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addresses the issues with finality. However, despite the government's argument, the Supreme Court granted certiorari. Thus, the Court must invoke other tools in their avoidance toolbox. The Moores frame the question before the Court as one that demands a specific definition of the constitutional meaning of a financial term—that the meaning of “income” in the Sixteenth Amendment requires realization.²¹⁵ However, the government has a two-fold approach. First, the government contends that the Petitioners are erroneously framing the question. Instead, the correct question is whether the MRT is income under the Sixteenth Amendment.²¹⁶ The government has the better approach here, and the Court must view this case through that lens to properly uphold the unified framework of neutrality and avoidance. The Moores argue that the Court's precedent clearly shows a realization requirement and that the Ninth Circuit erroneously held that the Sixteenth Amendment does not have a realization requirement.²¹⁷ However, as the preceding Part of this Article proved, the Court has upheld a broad enough meaning of “income,” as to actually allow for income determinations that are not rooted in a specific definition that either requires or bans realization, but are based on a case-by-case analysis that prioritizes substance over form and adheres to fiscal and monetary neutrality.²¹⁸

This segways to the second argument of the government's two prong approach. The government insists that what is really happening is that the corporation KisanKraft earned income, which is uncontroverted, and through the MRT the IRS is simply disregarding the corporate form to “attribute[] a corporation's income pro-rata to its shareholders.”²¹⁹ Again, this is the proper means to view the

²¹⁵ Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *16.

²¹⁶ Brief for the United States in Opposition, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *24 (“The Court should not grant review to issue what would effectively be an advisory opinion about whether the Sixteenth Amendment implicitly contains a realization requirement.”).

²¹⁷ Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (No. 22-800), *3, *16–22.

²¹⁸ See cases cited *supra* pt. I.A.

²¹⁹ Brief for the United States in Opposition, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *10.

question through. This is not to say the government will or should win the argument. Fiscal and monetary neutrality simply demands the Court interpret the constitutional meaning of “income” in such a way as to not take the side of one economic policy over another. Expressly deeming a realization requirement or, conversely, expressly deeming no realization requirement is not necessary. The Court has shown the utility of this neutral posture to be true time and again.²²⁰ This is how *Eisner* and post-*Eisner* cases both still have viability today. The Court must continue this approach. Just like in previous cases, the Court can take a fact-specific approach to answer whether it is constitutional for the MRT to disregard the corporate form to tax the shareholder pro rata for the company’s income.²²¹ The fact that the income is not realized by the shareholders, the Moores, but is realized by KisanKraft, will be essential *facts* the Court must use in their reasoning, but not the essential *holding*. This approach properly upholds fiscal and monetary neutrality because it allows the constitutional meaning of income to continue on in a way that does not close the constitutional door to many viable economic policies in favor of another and it rightly invokes judicial minimalism, a prong of the constitutional avoidance doctrine.

The Court must be careful because both the government and the Moores, in their own ways, want to make the constitutional meaning of income more specific, which it should not be. In their brief, the government asserted the Ninth Circuit held the constitutional meaning of income does not require realization.²²² However, while the Ninth Circuit did state “the Supreme Court has made clear that

²²⁰ See cases cited *supra* pt. I.A.

²²¹ Other scholars support the fact-specific approach to the *Moore* decision. See Daniel J. Hemel, *The Low and High Stakes of Moore*, 180 TAX NOTES FED. 563, 563 (2023) (arguing, with a fact-centric view, the meaning of “income” in the Sixteenth Amendment is flexible enough to encompass multiple outcomes, one such is a holding that deems the MRT unconstitutional but allows for other unrealized gains that have long been taxed to remain in force).

²²² Brief for the United States in Opposition, *Moore*, 143 S. Ct. 2656 (No. 22-800), at *7.

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realization of income is not a constitutional requirement,”²²³ the Supreme Court has not actually made this clear. In some cases, the Court has noted that the potential income being unrealized was the determining factor in their finding that it was not income.²²⁴ In other cases the Court has found that there was income without the traditional concept of realization, but in substance, not in form, the taxpayer still materially gained, thus there was income.²²⁵ The Court has not made clear that realization of income is not a constitutional requirement as the Ninth Circuit asserts; instead, the Court has made clear that realization is a *fact* issue. Realization, or lack thereof, is not a definitional issue that must be intertwined within the constitutional meaning of income. The Ninth Circuit themselves noted this: “The courts have given a wide scope to the income tax, but have realized that the borderline content of “income” must be determined case by case. Essentially the concept of income is a flexible one”²²⁶ Thus, properly understood, the Ninth Circuit’s proclamation that the Court does not have realization as a constitutional requirement for income, is best construed as dicta, not a holding, and is also best construed to mean the Court treats realization as a fact issue, so realization as a positive or negative should not be definitionally ensconced in the constitutional meaning of income.

Alternatively, the Moores argue that the Court and the First and Fourth circuits have established that the constitutional meaning of income has a clear realization requirement.²²⁷ Again, this interpretation of precedent is misguided. The First Circuit in *Quijana v. United States*, cabined their reasoning regarding the constitutional meaning of income around realization because there was obvious

²²³ *Moore*, 36 F.4th at 936.

²²⁴ See, e.g., *Eisner v. Macomber*, 252 U.S. 189 (1920); *Weiss v. Stearn*, 265 U.S. 242 (1924).

²²⁵ See, e.g., *United States v. Phellis*, 257 U.S. 156 (1921); *Rockefeller v. United States*, 257 U.S. 176 (1921).

²²⁶ *Moore*, 36 F.4th at 935 (quoting *United States v. James*, 333 F.2d 748, 753 (9th Cir. 1964)).

²²⁷ Brief for Petitioner, *Moore*, 143 S. Ct. 2656 (2023) (No. 22-800), *16–22.

realization in that case, so it made for the easiest fact-based way to adjudicate the case.²²⁸ But when the First Circuit explained the Supreme Court's view on the constitutional meaning of income, they stated the Court has "described" income as "instances" where there is realization,²²⁹ a clear factual analysis, as opposed to proclaiming the Court has held the constitutional meaning of income must always have a realization requirement. Further, the Fourth Circuit, in *Simmons v. United States*, also made no express holding that realization is a constitutional requirement for income in a definitional sense.²³⁰ Instead, the Fourth Circuit relied on one of the main tenets of the Supreme Court, substance over form, declaring: "[I]t is the status in the recipient's hands of the money being taxed which is the crucial factor, while the source of the money is not relevant."²³¹ Thus, both attempts by the government and by the Moores to imbed a specific realized or unrealized component into the constitutional meaning of income is not only misplaced and antithetical to the Court's precedent, but is dangerous.

The IRS is vastly more equipped to decide when realization is needed or not needed for income, and in which scenarios those incomes should be taxed. The IRS already taxes some specialized incomes without realized gain and obviously taxes a vast majority of other income once there is realized gain.²³² The Court has noted that Congress's varying approaches to when realization is or is not needed for income under the IRC is a decision based on administrative convenience that is best left to Congress.²³³ In fact, if the Court takes an overzealous approach in the *Moore* case and decides to imbue the constitutional meaning of income with a

²²⁸ *Quijana v. United States*, 93 F.3d 26, 27–30 (1996).

²²⁹ *Id.* at 30.

²³⁰ *Simmons v. United States*, 308 F.2d 160 (1962).

²³¹ *Id.* at 167.

²³² See 26 U.S.C. §877(a) (taxing U.S. citizens who gave up their citizenship as if their assets were sold prior to expatriation); 26 U.S.C. § 1256(a)–(b) (taxing futures contracts); 26 U.S.C. 475(a) (taxing the securities of securities dealers); 26 U.S.C. 817A(b) (taxing specific assets held by like insurance companies).

²³³ *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991).

positive or negative realization component, in a definitional sense, this could impact many long-standing provisions of the IRC such as “subchapter K, subchapter S, subpart F, original issue discount, sections 475, 1256, and 877A, global intangible low-taxed income, and the corporate alternative minimum tax, among others.”²³⁴ Therefore, it would be erroneous for the Court in *Moore* to constitutionally imbed realization, one way or the other, into the meaning of income. In *Moore*, the Court must adhere to fiscal and monetary neutrality and the constitutional avoidance doctrine to ensure rule-making power remains with the proper branch of government with the required flexibility to assert realization on a case-by-case basis.

The implications of constitutional financial terms are vast. The Court needs to consider such terms carefully, and only when they must. This Article offers the first unified framework for the Court to adhere to when confronted with the constitutional meaning of financial terms. The tandem of the constitutional avoidance doctrine and fiscal and monetary neutrality ensures the Court only interprets these high stakes meanings when absolutely necessary, and then interprets them in a way as to not constitutionally prefer one economic policy over others. Thus, the Court must always adopt this Article’s uniform framework for the interpretation of constitutional financial terms to make certain the economic policies at stake are left in the hands of institutions best equipped to handle them and to avoid violating long-standing separation of powers principles.

III. Invariance Across Constitutional Methodologies

The incorporation of fiscal and monetary neutrality and the constitutional avoidance doctrine, as applied to constitutional financial terms, is not only desirable and deeply rooted in our constitutional tradition, but also invariant across constitutional methodologies. Whether a judge chooses to interpret the Constitution using originalist or living-constitutionalist

²³⁴ See Reuven S. Avi-Yonah, *Can Moore Be Limited?*, 112 TAX NOTES INT’L 963, 963 (2023).

methodologies undoubtedly impacts the outcome of a case.²³⁵ Unsurprisingly, the debates over which methodology is correct or appropriate have been a source of much disagreement between jurists, scholars, and non-lawyer citizens alike.²³⁶ But constitutional progress cannot be held back due to these hard to resolve disagreements. If that were the case, it would be hard to imagine ways for us to improve our understanding and use of our constitutional structure. This Part aims to show that the adoption of fiscal and monetary neutrality and the constitutional avoidance doctrine, as applied to financial concepts, does not require a commitment to any of these methodologies. Or, in other words, that it can be supported from within any of these methodological commitments. This will further prove the usefulness and practicality of utilizing these constitutional canons for resolving the meaning of constitutional financial terms.

There are many conceptualizations and variations to both originalism and living constitutionalism.²³⁷ For instance, some originalists argue that the meaning of words in the constitution must be determined by appeal to the meaning assigned by the Framers,²³⁸ while other originalists argue that constitutional meaning should be determined by appeal to the meaning assigned by the public at the time the Constitution was written.²³⁹ In order to show that fiscal and

²³⁵ Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245 (2019) (describing the origins, impact, and conceptual structure of the debate).

²³⁶ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (providing an argument for originalism) and William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (describing the merit of living constitutionalism and its limits).

²³⁷ For a discussion and comprehensive account of the concepts and major works involved in the debate see Solum, *supra* note 235.

²³⁸ See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (explaining the position which requires that the intentions of the Framers should govern the assignment of constitutional meaning).

²³⁹ See, e.g., Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 718–26 (2009)

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monetary neutrality and the constitutional avoidance doctrine, as applied to financial terms, are compatible with both camps, we need not wrestle with each and every variation of these interpretive methodologies.²⁴⁰ Instead, it is sufficient to show compatibility with the core tenets of both originalism and living constitutionalism, in their most demanding form. This will help remove any remaining obstacles to the adoption of the approach to the constitutional meaning of financial terms advocated for in this Article.

The most demanding tenet of originalism is the requirement that the meaning of constitutional terms is fixed in time.²⁴¹ To show that the neutrality and avoidance principles advocated for in this Article are compatible with such an approach, it is important to show that doing so would not necessitate a deviation from such historic accounts of meaning. Indeed, they do not. To illustrate this point, imagine, for argument's sake, that the Framers of the Constitution never intended the word "income" to include any money derived from selling sexually explicit content on the internet. Imagine further that this is the case because the Framers never contemplated that such activities would ever be permitted, let alone be utilized for commercial purposes. If such a content provider refused to pay taxes to the federal government on the grounds that any money received from this activity is not "income" under the Sixteenth Amendment, how should the court resolve this dispute? Assuming that Congress's position is that such money does count as income, would it be incompatible with originalism for the Court to not intervene with the tax collection? Enter underenforcement.²⁴² Even if the Court agreed with the content provider's position, the Court

(explaining the original public meaning position).

²⁴⁰ For a modern account that sits between and combines elements from both methodologies see Alex Stein, *Probabilism in Legal Interpretation*, 107 IOWA L. REV. 1389 (2022).

²⁴¹ Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the Fixation Thesis.").

²⁴² Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

may refuse to enforce this meaning of the Constitution. This is because it is one thing for a court to determine the legal meaning of the term, and it is another thing for the court to also take the position that it has the power or right to enforce that meaning. In fact, underenforcement is common in the constitutional practice of the Supreme Court.²⁴³ For instance, in Fourteenth Amendment cases, the Court would, at times, underenforce the meaning of the Amendment in order to encourage Congress or the various States to collaboratively participate in the protection of individual rights.²⁴⁴ Following the same approach, utilizing fiscal and monetary neutrality would never require incompatibility with originalism. Even in the extreme case in which the original meaning of a term already adopted a certain fiscal or monetary policy, a Court refusing to require such a meaning is simply refusing to enforce that meaning, rather than requiring that the opposite meaning should be adopted. It simply leaves the work of enforcing the meaning of that financial term to Congress, the Executive, or the various states. It should be noted that it is also unlikely that such commitments to fiscal or monetary policies actually do exist in the Constitution. As Parts I and II show, much of our constitutional history in the financial context is marked by an attitude of flexibility in the eyes of both the Framers and the public. But since we did not engage in originalist analysis of each and every constitutional term, we do not have the temerity to argue that such incorporations of policies do not exist. But even if they did, it would not be un-originalist for the Court to either avoid the issue altogether or refuse to enforce such a certain meaning. Such judicial attitude of underenforcement merely invites one of the other branches of government to be the arbiter of constitutional meaning in that particular case.

The most demanding tenet of living constitutionalism is the requirement that the meaning of a constitutional term change to align with a certain value currently believed in society.²⁴⁵ Here too,

²⁴³ *Id.*

²⁴⁴ *Id.* at 1263.

²⁴⁵ Solum, *supra* note 241, at 14 (“Living constitutionalism: Refers to the view that the content of constitutional doctrine ought to change over time; some living

neither fiscal and monetary neutrality nor the constitutional avoidance doctrine, as applied to constitutional financial terms, necessitates a deviation from such an interpretive commitment. An illustration is helpful to demonstrate this point. For the sake of the argument, imagine that the meaning of “bankruptcies” used to exclude debtors engaged in lawful business that is nonetheless against public policy, and that the current Congress is taking a more lenient approach that does not discriminate on the basis of public policy. Imagine further that certain other groups are arguing that the Supreme Court should not allow such debtors to benefit from the laws of bankruptcy. Whether living constitutionalism requires an adjustment of meaning for the word “bankruptcies” or not, courts deciding not to interfere with the congressional judgment on the matter, or courts allowing the broadest possible meaning of the term, are simply not taking a position. Again, utilizing underenforcement, a court utilizing either fiscal and monetary neutrality or the constitutional avoidance doctrine will simply refuse to enforce an interpretive position that requires it to exclude certain economic policies, but it will still allow Congress, the Executive, or the various states, to do so if they please.

In other words, both fiscal and monetary neutrality, as well as the constitutional avoidance doctrine, as applied to constitutional financial terms, are invariant across constitutional methodologies. Both canons are deeply rooted, albeit implicitly, in our precedent, and their ability to be flexibly incorporated under all constitutional methodologies makes them a practical and palatable avenue for the courts, and the Supreme Court in particular.

Conclusion

The Constitution’s sixty-three financial terms should not be perceived as siloed problems of interpretation. Rather, they should be addressed within a common interpretive framework. Under this

constitutionalists believe that the changes in doctrine should respond to changes in circumstances and values.”).

unified framework, the Supreme Court should expressly adopt two fundamental canons. First, whenever possible, the Court should implement the constitutional avoidance doctrine and sidestep the need to assign meanings to constitutional financial terms. Second, when assigning such meanings is unavoidable, the Court should exercise fiscal and monetary neutrality—it should resist assigning constitutional meanings that favor one fiscal or monetary policy over another. This unified framework of constitutional decision-making would enable the Court to maintain the delicate balance among the judicial, executive, and legislative branches of our government in the uniquely complex and consequential world of finance.