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Statutory Interpretation, Comparative Law, and Economic Theory: Discovering the Grund of Income Taxation

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Statutory Interpretation, Comparative Law, and Economic Theory: Discovering the *Grund* of Income Taxation

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TABLE OF CONTENTS

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"The notion of ambiguity must not be confused with that of absurdity. To declare that [law] is absurd is to deny that it can ever be given a meaning; to say that it is ambiguous is to assert that its meaning is never fixed, that it must be constantly won."[1]

I. INTRODUCTION

Income taxation is the primary way democratic societies allocate the financial burden of government to its people. As law, its ever-present form or superstructure has implications for a broad spectrum of human activity, including not only overtly financial activities, but also many

1. SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY 129 (Bernard Frechtman trans., 3d ed. 1967). The Author replaced "existence" with "law."

personal activities such as birth and death, marriage and divorce, charity, education, leisure, and work. Few laws have the force that income taxation has to reach into our private lives and alter our behavior and even our life choices.

The expanding meaning of income is the foundation of modern income tax law. The Supreme Court's interpretation of the concept of income has evolved over the years in a way that extends the reach of taxation to objects arguably not within the original meaning of the word. Such expansive interpretation of tax statutes, however, is out of step with the traditional precepts of tax law interpretation, which are still the norm in the world today.

This difference is reflected dramatically in the way Americans think and even teach taxation compared with their colleagues abroad. When comparing the United Kingdom and the United States, one notes that both nations began with similar attitudes toward the interpretation of tax statutes. The American approach changed dramatically over the years, from a formalism that still describes the prevailing world view today to a purposive approach that has expanded the concept of income. United States tax law developed general precepts in accordance with legislative purposes developed from the inner workings and practical necessity of the Internal Revenue Code (Code) as a whole.

In expanding the reach of income taxation, the United States Supreme Court repudiated the early Court's reliance on a formalist interpretive theory akin to modern-day textualism, substituting truth and reality for plain meaning. Its approach reflected the new developments in the interpretation of statutes in general, adopting a purposeful interpretation reflecting legal process theories. Income taxation was developed to meet changes in economic relations and new challenges to its effectiveness. The Court accomplished this by interpreting income as a *concept* not a rule.

Though unacknowledged by the Court, its approach to the concept of income was in keeping with the forgotten purpose behind income tax law in America. The historical forces that won the battle for the Sixteenth Amendment[2] and the modern income tax law justified radical interpretation of tax statutes.[3] This political context in America justifies a purposive interpretation of tax statutes. The fundamental belief of the

2. U.S. CONST. amend. XVI. The Sixteenth Amendment gave Congress the power to tax people on their income.

3. *See infra* text accompanying notes 215–26.

legal process theories, that American law was based on superior democratic decisionmaking, was, for once, a realistic assessment of the genesis of income taxation. In enacting the first income tax law in 1913 under the Sixteenth Amendment, Congress recounted the unique history of the birth of income taxation in America.[4] Our income tax law was the result of intense social struggle resulting in the triumph of democratic economic principle.[5] The motivating force underlying the income tax law and the Sixteenth Amendment that brought income taxation into being was to overcome economic inequality.[6] The fundamental concept of fairness enshrined in our income tax law was distributional justice. Thus, expansive interpretation of the concept of income to reach the economic resources of taxpayers in all their forms accords with this purpose and carries out the will of Congress and the American people. This approach is immune to charges of judicial lawmaking because such interpretation of tax statutes unites purposivism and intentionalism.

The methodology that best describes the Supreme Court's approach to the concept of income and justifies its development is a synthesis of the Anglo-American doctrine of the positive "equity of the statute" with the Roman civil-law doctrine providing for the analogical development of statutes. These doctrines provide the tools for a nonarbitrary development of the concept of income to cover unanticipated changes in the economic relations of taxpayers over time. Analogical development in accordance with the principle of distributive justice satisfies the democratic agenda constituted in the Sixteenth Amendment of the United States Constitution.

II. INTERPRETATION AND TEACHING METHODOLOGIES[7]

Throughout the world, income taxation is a sociopolitical force of immense proportions. And yet, as law it is rarely taught in the basic law school curriculum in European universities, except in the Netherlands and in the United Kingdom. Even in the United Kingdom, where many law departments have added a course in taxation over the last fifteen years, there are still some notable bastions of simpler times, such as Oxford University.[8]

4. *See infra* text accompanying notes 200–02.
5. *See infra* text accompanying notes 215–26.
6. *See infra* text accompanying notes 202–06.
7. The personal observations on legal education in taxation are based on the Author's extensive experience and countless conversations with colleagues both in the United States and abroad. In addition to twenty years' experience as a U.S. academic, the Author has been a visiting professor at the Universities of London, Dublin (Trinity College), Vienna, Oxford (visiting scholar), Cape Town, Witwatersrand, and the Free State. The Author presently holds, in addition to his U.S. academic position, a long-term appointment as visiting professor of law at the London School of Economics and Political Science where he teaches, among other tax courses, United Kingdom Income Tax Law.
8. The law department of Oxford University intends to add a course in taxation to

Unlike Europe, American law schools universally offer courses in taxation as part of the first degree. Many would argue that tax law is an indispensable part of a legal education; indeed, taxation is a required course in a substantial number of law schools. Significantly, the primary course in taxation in the United Kingdom is a general course that covers income taxation, capital gains, inheritance, social security, and consumption taxes (like the value added tax). In contrast, Americans do not teach a basic course in taxation, but one in federal *income* taxation.

Income taxation in the United Kingdom is often approached first as a general matter of statutory interpretation, especially as it relates to the courts' approach to tax avoidance. In the United States, academics start with, focus on, and devote considerable effort to examining the concept of income, but they rarely consider general theories of interpretation or focus on the subject of income as an explicit question of statutory interpretation. Instead, American academics look at "interpretation by doing," meaning that they examine what courts have said to develop the principles and content of law, much in the fashion of common-law case analysis. Thus, the study of tax, a subject that is and has always been a creature of statute, rarely confronts tax as legislative creation that should be called the best public law code in America but instead teaches statutory interpretation by osmosis.

Teaching methodologies in the United Kingdom and the United States essentially reflect the perspective of each nation in its approach to tax law interpretation. After all, teaching the law is interpreting the law. Certainly, teaching in the United Kingdom uses a process of examining the legal norm in terms of specific applications. However, analysis in the United Kingdom tends more toward a recitation of doctrine rather than analytical problem solving. Reported cases are primarily examined for their specific rules and not as a catalyst for the development of fundamental principles. This view is reflected in the fact that the question of the meaning of income in United Kingdom legislation is discussed within the confines of each source of income rather than comprehensively.

Unlike those who teach tax law in the United Kingdom, academics in the United States often teach tax principles analogically. That is, knowledge of the tax law is derived through analogical comparisons of specific fact situations with previously considered examples. As Roscoe

its first degree in law curriculum in the 2004–2005 academic year. Interview with Judith Freedman, Professor, Worcester College, in Oxford, Eng. (May 8, 2002).

Pound perceived, "All interpretations go on analogies. We seek to understand one thing by comparing it with another. We construct a theory of one process by comparing it with another."[9]

Thus, American teaching is developmental. Many scholars tend to focus more on first principles, use case law for its facts and holdings but not necessarily for its reasoning, and supply content to the imperatives by examining and testing situations beyond the cases that have been decided. Many scholars take it to heart that the content of a statute is not ultimately definable outside of its confrontation with specific applications.[10] Analysis should not end with established results, but must be a vehicle for solving new problems.

Hence, there is a direct link between teaching methodology and interpretation in taxation.[11] Because the interpretation and scope of law depends on value judgments, teaching tax must examine these judgments. Tax scholars in the United States, however, have been accused of not teaching the law, but of merely teaching their own "aesthetic preferences."[12] If true, this is a significant criticism. However, if the process is to teach congressional value choices and not personal "aesthetic preferences," then tax scholars in the United States can stand proudly behind their work.

Learning about income in the classroom, like interpreting tax law itself, is a "process of becoming." It is, in part, viewing income though the dialectic of the "is" and the "ought."[13] By examining doctrines in terms of economic principles, by comparing the realities and aspirations of law, one learns not only the scope and limits of the law in practice, but also the law's true consequences and significance.

III. INTERPRETATION OF TAX STATUTES: THE TRADITIONAL VIEW

Courts must interpret law as the result of the clash of interests between litigants. In private law, the object of law is to effectuate individual will. When private wills collide in society, judges must decide whose will best

9. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 151 (1930).

10. Giuseppe Zaccaria, *Analogy as Legal Reasoning: The Hermeneutic Foundation of the Analogical Procedure*, *in* LEGAL KNOWLEDGE AND ANALOGY: FRAGMENTS OF LEGAL EPISTEMOLOGY, HERMENEUTICS AND LINGUISTICS 42, 45 (Patrick Nerhot ed., 1991).

11. The relation between this approach to teaching and judicial method is reflected in the following statement by Justice Frankfurter: "The search for relevant meaning is often satisfied not by a futile attempt at abstract definition but by pricking a line through concrete applications. Meaning frequently is built up by assured recognition of what does not come within a concept the content of which is in controversy." Bazley v. Comm'r, 331 U.S. 737, 741 (1947).

12. Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 882–83 (1982).

13. LON L. FULLER, THE LAW IN QUEST OF ITSELF 9–10 (1940).

expresses the inherent public interest in individual acts. Whoever wins, the premise is that the parties willed the result as the proper outcome.

Taxation is public law; "the object of litigation is the vindication of constitutional or statutory policies."[14] Because the aim of public law is the general good, one clear conclusion is that individual will must give way to the public will. In tax, the clash in litigation can be perceived as a private interest in not paying tax juxtaposed against the public interest in collecting tax.

Unlike the regulation of individual conduct that focuses on conduct considered to be a danger to the public, there is nothing inherently sinister in not wanting to pay taxes. The classic nineteenth century view of taxation was that public taxation law deprived the individual of property due to the subjugation of the individual's will to that of the sovereign. Taxation was a necessary evil; thus, the obligation to pay tax had to be mandated in clear and unequivocal language. In England, the initial justification for income taxation was a national emergency—the need for greatly increased revenues to support the war against Napoleon.[15] The zeitgeist of the early legislation was uneasy tolerance and strict construction.[16] In the United States, there was a similar pattern in our short-lived experience with the early Civil War income tax acts. Even some proponents of the Civil War legislation lamented the tax's inquisitorial character but concluded that there was no other way to cope with the national crisis.[17] Thus, the prevailing attitude in the nineteenth century was that the property deprivation imposed by income tax law was analogous to the deprivation of life or liberty imposed by criminal law. This cultural context may help explain the basis for the classic approach to the interpretation of statutes that impose taxes.

A. The Traditional Approach in the United Kingdom

Even today, English courts conclude that a law's effect on a taxpayer should be certain; that is, the taxpayer must be aware of whether he is

14. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

15. 2 STEPHEN DOWELL, A HISTORY OF TAXATION AND TAXES IN ENGLAND 208–09 (3d ed. Frank Cass & Co. 1965) (1884).

16. Yitzhak Hadari, *Tax Avoidance in Linear Transactions: The Dilemma of Tax Systems*, 15 U. PA. J. INT'L BUS. L. 59, 63 n.11 (1994).

17. RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 9 (1954).

subject to a tax with respect to a particular financial happening.[18] In the United Kingdom, the burden to prove that a tax is due rests squarely upon the government.[19] This was succinctly stated by an English court in 1921:

> It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. . . . Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.[20]

As recently as 1971, these precepts were confirmed.[21]

This literal approach is still the dominant approach to the interpretation of tax statutes in the United Kingdom today. However, one might note that judges are now much more likely to consider an act's context and purpose in construing its meaning.[22] To establish parliamentary purpose, courts may now look at legislative history when the legislation is ambiguous or obscure.[23] Nevertheless, the use of legislative history has had little effect on the interpretation of legislation.[24]

Though the United Kingdom has been struggling for many years with the juridical role in combating tax avoidance through interpretation,[25] changes in approach have had little effect on the fundamental approach to income. This may be due in part to the form of the legislation and the early development of principles that are difficult to overcome later.

In the United Kingdom, the first income tax act, enacted in 1799, charged persons on income from certain activities and included "income not falling under any of the foregoing rules."[26] Both general and specific deductions were provided for in the act. In 1803, the legislation changed from a global or analytic system to a schedular form of income

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18. Vestey v. Inland Revenue Comm'rs, [1979] 3 All E.R. 976, 986, 984 (Eng.).

19. Tennant v. Smith, [1892] A.C. 150, 154 (appeal taken from Scot.).

20. Cape Brandy Syndicate v. Inland Revenue Comm'rs, [1921] 1 K.B. 64, 71 (Eng. C.A. 1920), *aff'd*, [1921] 2 K.B. 403 (Eng. C.A.).

21. Mangin v. Inland Revenue Comm'r, [1971] 1 A.C. 739, 793 (P.C. 1970) (appeal taken from N.Z.). In the United States this doctrine is still followed when considering penalties imposed upon taxpayers under the Internal Revenue Code. *See* Comm'r v. Acker, 361 U.S. 87, 91 (1959).

22. JOHN TILEY, REVENUE LAW 48 (2000).

23. Pepper v. Hart, [1993] 1 All E.R. 42, 47 (Eng.).

24. TILEY, *supra* note 22, at 49.

25. A more substantive approach to the application of tax statutes was first presented in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1982] A.C. 300, 329, 334 (H.L. Eng. 1981). Considerable development of principles combating tax avoidance has been significantly curtailed by the House of Lords in the recent case of *MacNiven v. Westmoreland Investments, Ltd.*, [2001] 1 All E.R. 865, 869, 874, 882 (H.L. Eng.).

26. 3 DOWELL, *supra* note 15, at 92–93 (discussing England's Property and Income Tax imposed in 1799); *see also* William B. Barker, *A Comparative Approach to Income Tax Law in the United Kingdom and the United States*, 46 CATH. U. L. REV. 7, 12 (1996).

taxation.[27] The charge to tax was then on the gains or profits described or comprised in the various schedules, some of which used different terms for the concept of income.[28] Even though the method of assessment changed from a global to a schedular system, income tax in the United Kingdom still begins with the concept of the taxpayer's total income.[29]

The question of "what constitutes income" has not been very important to tax law in the United Kingdom for several reasons. The legislation was passed before economists devoted much attention to the subject. The economic definition of income was that of income "from things" or "social income," which included the annual production of property and labor, minus an allowance for the costs of maintaining capital.[30] This economic concept of income complemented the English schedular approach that was soon adopted and which taxed income from various enumerated sources by schedular category and primarily collected taxes at the source.[31] Obviously, the fact that this schedular approach used different terms to describe income under its various schedules meant that income did not need to have the same meaning in each schedule. England's schedular system is in stark contrast with the American global system that approached income comprehensively in one section of the Code.[32]

Thus, the general approach to income taxation in England was relatively straightforward. One started the analysis by first identifying a statutory source such as land, employment, or a trade or profession, and then carefully linked the possible taxable amount to that source.[33] Income was that which proceeded from a source that was relatively permanent. The particular sources were meticulously defined by the courts. For this reason, many monetary benefits flowing to the taxpayer were not taxable because they did not have a source. Such benefits included capital gains, gambling receipts, horse racing proceeds, burglary and windfalls, and other wrongful activities that were not

27. 3 DOWELL, *supra* note 15, at 99–102 (citing Property and Income Tax Act, 1803, 43 Geo. 3, c. 122 (Eng.)); *see also* Barker, *supra* note 26, at 12–13.
28. Income and Corporation Taxes Act, 1988, c. 1, § 1(1)(1) (Eng.).
29. *Id.* § 1(1)(2).
30. *See* Barker, *supra* note 26, at 10.
31. *See id.* at 21.
32. I.R.C. § 61 (2000).
33. *See* Barker, *supra* note 26, at 21–22.

trades.[34] Nor were many items swept into the catchall provision: "income not falling under any of the foregoing rules."[35] This provision was always interpreted to only include items strictly comparable to the enumerated items in the schedules and was later limited by rewording the provision to only include "*annual* profits or gains [not charged under Schedule A or E]."[36] Income receipts that had the element of periodicity were to be distinguished from capital receipts. Thus, in the early years of tax legislation, when courts had to struggle with the fundamental scope of the charge to tax income, the United Kingdom followed a consistent pattern of literal statutory construction. In response, United Kingdom tax legislation has always been identified by precise, detailed provisions that complement literal interpretation.[37]

B. The Traditional View in the United States: A Comparison

The traditional interpretation of tax statutes in the United States echoes English doctrine: "[I]t is a settled rule that tax laws are to be strictly construed against the state and in favor of the taxpayer."[38] This doctrine of statutory construction has been said to be "founded so firmly upon principles of equity and natural justice, as not to admit of reasonable doubt."[39] One federal district court expressed the philosophy underlying this approach by stating that tax laws "are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."[40]

Clearly, classic interpretation of tax statutes in the United Kingdom and the United States adhered to literal interpretation even when statutory interpretation in other areas of law followed a more liberal approach. Interpreting the language of statutes in terms of their purposes had an early and long history in English law.[41] As early as 1584 in *Heydon's Case*, the method was described as follows: "The true reason of the remedy; and then the office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress

34. *See id*. at 22–23.
35. *See* 3 DOWELL, *supra* note 15, at 93.
36. Income and Corporation Taxes Act, 1988, c. 1, § 18(1)(b) (Eng.) (emphasis added).
37. For a proposal by a prominent scholar that the United Kingdom should consider more open-ended statutory formulations, see generally John F. Avery Jones, *Tax Law: Rules or Principles?*, 1996 BRIT. TAX REV. 580 (1996).
38. 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 66.01, at 1 (5th ed. 1992).
39. Cahoon v. Coe, 57 N.H. 556, 570 (1876).
40. United States v. Wigglesworth, 28 F. Cas. 595, 597 (C.C.D. Mass. 1842) (No. 16,690).
41. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (discussing English and American judges' use of the equity of the statute).

subtle inventions and evasions for continuance of the mischief . . . ."[42]

Purposeful interpretation in England included the examination of what was called the equity of the statute, which contained both a positive and a negative sense. Judges could extend the scope of statutes to provide for the historically novel case. Judges could also limit the meaning of the legislation upon a finding that the legislature could not have intended a particular result that fit within the literal language of the statute.[43] Thus, the goals, aims, or purposes of the statute were essential components of the statute to be applied.

Traditionally, liberal interpretation was not considered appropriate for tax statutes. Tax statutes were only considered to have one purpose: to collect revenue. There was no mischief the law meant to cure. Though the aim to support the state was a salutary one, it did not support an extension of an individual's obligation to pay tax by reason of equitable principles of rightness and justice. Neither did general doctrine in England embrace taxpayer equity that might limit the reach of the tax law. The clear sense was that general principles of fairness were incompatible with the arbitrariness of taxation.

Historically, this perspective was certainly logical. In considering certain taxes, there is ample justification for the view that the legislative need for revenue leads a legislature to tax whatever it can. Legislatures tax the ownership of carriages or land as well as the purchase of commodities of all sorts. They impose stamp taxes on documents and sometimes place huge taxes on items such as alcohol, tobacco, or tea because the taxes are effective in raising revenue or in acting as a deterrent. There is often no apparent justice in who pays or why—just the happenstance of personal preference or societal antipathy. Though these criticisms may be largely inapplicable to income taxation, income tax in England began at a time when it was perceived to be no different in character from the rest of taxes.

The English construction of income tax statutes embraced this attitude. Income taxation was an effective but disagreeable form of taxation. There was nothing special about the birth of income taxation in the United Kingdom other than that the country was in desperate need of money to pay for the war against Napoleon.[44]

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42. Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584).

43. *See* Manning, *supra* note 41, at 22–27 (explaining the nature of the doctrine of the equity of the statute).

44. *See* 2 DOWELL, *supra* note 15, at 208–09.

Initially, circumstances in America were not particularly different. After the Civil War, the income tax met its demise in 1872 and was not resurrected by Congress for over twenty years.[45] America's perception of the income tax changed in the interim. Income taxation became a celebrated cause in the 1890s and a permanent form of taxation in 1913 due to intense popular struggle for its existence.[46] Moreover, the 1913 Income Tax Act (1913 Act) was passed at a time when new theories of economics emerged and began to influence courts and legislators.[47] This was also a time when new views of the judiciary's role in affecting the course of the law began to emerge. These conflicts were eventually played out in the interpretation of the scope of income taxation. However, these developments initially had little impact on the Supreme Court's approach to income.

IV. THE UNITED STATES SUPREME COURT'S EARLY APPROACH TO THE CONCEPT OF INCOME

A. The Court Adopts the Traditional View

Whether in the United Kingdom or the United States, conventional statutory interpretation is the inquiry into the meaning of a legislative act as it applies to the particular situation involved. The meaning is that of the legislature, and thus interpretation deals with the legislature's intent in enacting the particular provision.[48] The initial query is how the lawmaker intended the reader to understand these words.

A cardinal principle of interpretation is that the one clear manifestation of the legislature's intent is the words the legislature actually used.[49] Moreover, lawmakers must have used the words in their ordinary sense. The plain meaning of the words governs the interpretation. The plain meaning rule is essentially literal linguistic interpretation. One should not look for any underlying aim or purpose other than what the words themselves convey, unless their meaning is uncertain or ambiguous. Even if there is ambiguity, uncertainty is construed against the drafter.[50]

In 1913, when the first modern income tax law was enacted, there was little in federal case law that dealt with the explication of the scope of

45. *See* PAUL, *supra* note 17, at 25.
46. *See infra* text accompanying notes 200–02.
47. *See infra* text accompanying notes 116–23.
48. Intent and purpose can arise in another context in taxation where the motivations of the taxpayer are relevant. *See* Walter J. Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 485–86 (1967) (taking an exploratory look at the role of state of mind in substantives rules of tax law).
49. Caminetti v. United States, 242 U.S. 470, 485 (1917).
50. Gould v. Gould, 245 U.S. 151, 153 (1917).

the concept of income.[51] The Civil War tax had been adopted merely as a temporary measure,[52] and the income tax enacted by Congress in 1894 had been quickly declared unconstitutional by the Supreme Court.[53] How was the Court to approach the construction of the term "income"? Few cases had dealt with the scope of the term. There was little authoritative interpretation to guide the Court's construction of income in the 1913 Act.[54]

The difficulty presented by the concept of income is obscured by the deceptive simplicity of the charge to tax. In the United States, the tax is imposed on the taxable income of each taxpayer.[55] The Code provides that "'taxable income' means gross income minus the deductions allowed."[56] The meaning of the term "gross income" is described as follows: "[G]ross income means all income from whatever source derived, including (but not limited to) the following items . . . ."[57] This language is remarkably similar to the 1913 Act, passed in accordance with the Sixteenth Amendment, which provided that "net income . . . shall include gains, profits, and income derived from [enumerated activities] or gains or profits and income derived from any source whatever."[58] Congress has indicated that the change in language was not

51. One important interpretation may be found in *Gray v. Darlington*, 82 U.S. (15 Wall.) 63, 64–65 (1872), where the Court concluded that the gain on the sale of treasury bonds held for several years was not taxed as annual income under the 1867 Act.

52. *See* ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913, at 53–56 (1993).

53. The principle cases of the Court were concerned with the appropriate classification of income taxes as direct taxes subject to the requirement of apportionment under Article I, Section 2 of the United States Constitution. The Supreme Court determined that the income tax was constitutional in *Springer v. United States*, 102 U.S. 586, 593 (1880) (dealing with the taxation of individuals), and *Pacific Insurance Co. v. Soule*, 74 U.S. (7 Wall.) 433, 446 (1868) (dealing with the taxation of companies). However, the Supreme Court found parts of the 1894 Act unconstitutional in *Pollock v. Farmers' Loan & Trust Co*., 157 U.S. 429, 586 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895). All three cases dealt with the concept of income in its general or fundamental aspects.

54. The principle source of guidance to the 1861 Act was provided by the administration. The commissioners' views were in most cases final. *See* EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 469 (2d ed. 1921). These interpretations had been published starting in 1865. *Id.* at 469 n.1. For a good summary, see generally INTERNAL REVENUE LAWS (1870).

55. I.R.C. § 1(a)–(e) (2000).

56. *Id*. § 63(a).

57. *Id*. § 61 (specifying fifteen items).

58. Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167.

intended as a change in substance.[59] This language was similar to that of the Civil War Act of 1861 (1861 Act) and the Revenue Act of 1894 (1894 Act).[60] The language of all subsequent acts differed in one important detail from the 1861 Act: Congress deleted the word "annual."[61] Significantly, the modern English income tax act added the word "annual" to quite similar language, legislating a more restrictive scope to the concept of income.[62]

Unlike property and sales taxes and duties where the subject matter is fairly narrow, immediately apparent in the 1913 Act is the potential breadth of the terms "gains or profits and income derived from any source whatever,"[63] or of the present formulation, that income is "income from whatever source derived."[64] Income is a legal abstraction of the financial activity of multidimensional man in civil society. This is the foundation upon which the structure of income taxation is erected. Establishing its scope was clearly an essential task.

The Supreme Court's initial response followed a traditional approach to taxation. One of the earliest issues before the Court was whether alimony payments were income to the recipient. The Court set the stage for its approach to income by citing traditional Anglo-American views of tax statutes:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.[65]

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59. House Report 1337 commented upon the definition of income in section 61 as follows:

> This section corresponds to section 22(a) of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).
>
> Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based on the 16th Amendment and the word "income" is used in its constitutional sense.

H.R. REP. NO. 83-1337, at A18 (1954).

60. *See* Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553; Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862).

61. *Compare* § 49, 12 Stat. 292 (using the word "annual" when referring to income), *with* § 27, 28 Stat. at 553 (not using the word "annual" when referring to income), *and* § IIB, 38 Stat. at 167 (also not using the word "annual" when referring to income).

62. *Compare* Income and Corporation Taxes Act, 1988, c. 1, § 18(3) (Eng.) (using the word "annual" when referring to income in modern English income tax act), *with* 3 DOWELL, *supra* note 15, at 92–93 (discussing England's Property and Income Tax imposed in 1799 and showing how the law did not use the word "annual" when referring to income).

63. § IIB, 38 Stat. at 167.

64. I.R.C. § 61(a) (2000).

65. Gould v. Gould, 245 U.S. 151, 153 (1917).

This narrow view of tax legislation led the Court to conclude that alimony was not taxable income under the 1913 Act. The Court reasoned: "The use of the word itself in the definition of 'income' causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed."[66]

While alimony did not fit within any of the specifically enumerated categories, the Court failed to address whether the receipt fell into the general category of "gains or profits and income derived from any source whatever."[67] The Court merely decided the case by fiat.[68]

There were two potential rationales for this narrow interpretation. The first is based on the source-based definition of income, adopted later by the Court in *Eisner v. Macomber*,[69] that monetary benefits not derived from either property or labor are not income.[70] The second is a more subtle and nuanced interpretation. It is based on the theory that the term "income" has different meanings in different contexts. Justice Holmes suggested elsewhere that Congress's intended meaning of "income" in the 1913 Act could be more limited than the term used in the Constitution when he said:

> [I]t is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.[71]

Even though the possibility and logic of separate meanings was emphatically denied in *Eisner*,[72] this notion later reappeared in a persuasive form in *United States v. Supplee-Biddle Hardware Co*.[73] In *Supplee-Biddle*, the Court suggested that, while it recognized that Congress might have the constitutional power to tax a particular receipt like life insurance proceeds, Congress would have to be much more

66. *Id.*
67. § IIB, 38 Stat. at 167.
68. The Court did mention the fact that the money was part of the former husband's income and his taxable income was not decreased by the payment. This indicated that the Court's decision to limit the statute was influenced by fairness considerations. *Gould*, 245 U.S. at 153.
69. 252 U.S. 189 (1920).
70. *Id.* at 206.
71. Towne v. Eisner, 245 U.S. 418, 425 (1918).
72. *Eisner*, 252 U.S. at 206.
73. United States v. Supplee-Biddle Hardware Co., 265 U.S. 189, 195 (1924).

explicit before the Court would go against the generally perceived view of the capital nature of the amount.[74]

Courts limit the meaning and scope of statutes when they conclude that Congress could not possibly have intended such a result. It is a generally recognized canon of interpretation that courts may limit the scope of a statute or adopt a less obvious definition of a term in order to avoid absurdity.[75] However, nothing in the Supreme Court's opinions would suggest that taxing insurance proceeds or alimony would be absurd. Instead, the Court was ruling on the basis of presumed intent—what Congress would have concluded had the specific problem been before it. This is one form of Anglo-American equity, the power of the courts to limit the text in order to effectuate a social goal. The premise in our society is that this goal is *Congress's* goal or underlying purpose. Courts often leave these goals in obscurity. The Supreme Court never referred to the purpose of the Act, not even the obvious congressional purpose to collect taxes. This inattention to rationale indicates that the Court was resting its decision on its own perception of good tax policy in providing exceptions and limitations to the scope of the statute. Experience has shown that the type of equity that diminishes goes hand-in-hand with strict construction, which fixes the original intent of the legislature, hypothesizes the meaning of a term, and ultimately places limits on the will of the legislature.

Several other cases are important in understanding the Court's early approach to income. One was not a Supreme Court opinion, but an opinion by the eminent circuit judge, Learned Hand. These cases dealt with the question of whether certain financial events produced income within the general notion of that concept.[76] One dealt with a specific congressional interpretation of what that norm included.[77]

In *United States v. Oregon-Washington Railroad & Navigation Co.*, in considering the effect of a cancellation of the taxpayer corporation's indebtedness by its shareholder, Judge Hand found that the meaning of the word "income" was "not to be found in its bare etymological

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74. *Id*.

75. *See* United States v. Am. Trucking Ass'ns Inc., 310 U.S. 534, 543–44 (1940).

76. *See* Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 171 (1926) (holding that the gain on the repayment of a loan denominated in German marks with much cheaper post-World War I marks was not income); Edwards v. Cuba R.R. Co., 268 U.S. 628, 632 (1925) (holding that subsidies from the Cuban government to build railway lines were capital receipts and not subject to income taxation); United States v. Or.-Wash. R.R. & Navigation Co., 251 F. 211, 212–13 (2d Cir. 1918) (holding that the cancellation of a taxpayer corporation's indebtedness by its shareholder should be treated as an increase in capital and not as income).

77. *See Eisner*, 252 U.S. at 203 (holding that a stock dividend is a capital increase and not income).

derivation."[78] Rather, its meaning was "to be gathered from the implicit assumptions of its use in common speech."[79] Implicit in an income tax was a distinction between capital receipts not subject to tax and income receipts, being "more or less periodic earnings."[80] Judge Hand concluded that the cancellation of the debt was not income. This result had little to do with his formulation of income as being "more or less periodic earnings," because that notion of income was primarily meant to distinguish between income gains and capital gains. This would have been a critical distinction under United Kingdom law because nonperiodic capital gains had never been included in income, but in the United States, certain gains from the sale of property had been included in income as early as the 1861 Act.[81]

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78. *Or.-Wash. R.R. & Navigation*, 251 F. at 212.

79. *Id*.

80. *Id*. In reaching this conclusion, Judge Hand was apparently unaware of the significance of the fact that the word "annual" had already been deleted from U.S. income tax acts.

The distinction between capital receipts, which did not qualify as income, and income receipts became an underlying principle of taxation that is still with us today. An early interpretation of this issue was made by the Court in *Edwards v. Cuba Railroad Co*., 268 U.S. 628 (1925). There the taxpayer had received subsidies from the Cuban government for building railway lines. *Id.* at 629. These receipts were determined to be capital receipts and hence not subject to income taxation even though the taxpayer had not reduced its costs by the amount of the recovery and would get capital recovery without having made an expenditure. *Id.* at 630–31. This was neither unrealized appreciation of the taxpayer's capital, nor indeed the taxpayer's capital until received. Though the Court denied it, it could only have been provided to the taxpayer for the service given to Cuba in building the railroad. *Id.* at 632. Thus, this case was not even consistent with the Court's own justification. Its only defense could have been the no longer valid view of regular or periodic receipts, or simply the dog-headed determination of the Court that the Sixteenth Amendment "is not to be extended beyond the meaning clearly indicated" to situations not already thought about by Congress. *Id*. at 631. The significance of this holding has been substantially diminished. *See infra* notes 158–61.

81. The relation between capital gains and the concept of income has not been free from controversy in the United States. The first Civil War income tax act did not address the issue directly other than to tax "the annual income . . . from any other source whatever." Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862). The Commissioner of Internal Revenue had ruled that a taxpayer who had purchased real property twenty years previously was taxable on the income determined by the difference between its sales price and his cost. CONG. GLOBE, 38th Cong., 1st Sess. 2516 (1864). The 1864 Act added specific language on the sale of real estate when purchased in the year of assessment. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281 (repealed 1933). The apparent reason was that Congress did not believe that the Act should apply to "purchases existing before we ever thought of passing an income tax or internal revenue tax." CONG. GLOBE, 38th Cong., 1st Sess. 2516 (1864). Also, in *Gray v. Darlington*, 82 U.S. 63 (1872), the Court held that the gain on the sale of bonds acquired in 1865 and sold in 1867 was not income under the Act. *Id*. at 64–67. The

The 1913 Act explicitly taxed capital gains as follows: "[T]he net income of a taxable person shall include gains, profits, and income derived from . . . sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property."[82] Though the Supreme Court initially took the position that capital gains were not income after the 1913 Act, the position was initially examined as part of the question of taxing gains that were accrued before income taxation in 1913, but realized in 1914.[83] One lower court concluded that Congress lacked the power to tax capital gains at all because "[t]he meaning of the word 'incomes' in the Sixteenth Amendment is no broader than its meaning in the act of 1867."[84] Nevertheless, the Court confirmed that capital gains were income in both *Doyle v. Mitchell Brothers Co.*[85] and *Eisner*.[86]

Hand's real reason for the *Oregon-Washington* decision was that the corporation simply did not have gain. In reaching this conclusion, Hand treated the cancellation of the debt as a contribution to the capital of the corporation. As such, it was not income. To determine the transaction's proper consequences, Hand looked to what he considered to be the *substance* of the transaction (a corporate-shareholder transaction) and not to the transaction's *form* (a debtor-creditor transaction).[87]

The Supreme Court affirmed this reliance on substance when it noted that it was substance, not form, that controlled tax questions.[88] This approach was applied in *Bowers v. Kerbaugh-Empire Co.* when the Court decided that the gain on repayment of a loan denominated in German marks with much cheaper post-World War I marks was not income.[89] The Court reached this conclusion because the essence of the transaction was a loss.[90] This construction treated the borrowing and the repayment, the spending of the loan proceeds and their loss, as one composite event for tax purposes.[91] The early Court's interpretation of statutes according to the substance of the financial activities is squarely

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Court concluded that gains accruing over a number of years were not "annual gains, profits or income" within the meaning of the 1867 Act. *Id.* at 65–67.

82. Act of Oct. 3, 1913, ch.16, § II(B), 38 Stat. 114, 167.

83. Lynch v. Turrish, 247 U.S. 221, 230 (1918).

84. Brewster v. Walsh, 268 F. 207, 214 (D. Conn. 1920).

85. 247 U.S. 179, 184–85 (1918).

86. Eisner v. Macomber, 252 U.S. 189, 207 (1920).

87. United States v. Or.-Wash. R.R. & Navigation Co., 251 F. 211, 212–13 (2d Cir. 1918).

88. United States v. Phellis, 257 U.S. 156, 168, 184 (1921).

89. Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 175 (1926).

90. *Id.*

91. *Id.*; *see* Burnet v. Sanford & Brooks Co., 282 U.S. 359, 362, 364–66 (1931) (repudiating this analysis).

within one aspect of the doctrine of the equity of the statute.[92] These interpretations provide graphic illustrations of courts imposing equitable restraints on statutory language by proposed determinations of their senses and reason.

The most sophisticated example of the Court's assertion that there were underlying principles that limited the meaning of income was in *Doyle*.[93] The question in *Doyle* was whether a taxpayer was permitted to offset his receipts by the amount of his acquisition costs in taxing the proceeds from the sale of property.[94] The tax act at that time did not contain explicit directions on this issue.[95] The Court found that offsetting the sale proceeds with its cost, allowing the tax free return of capital, was implicit in the definition of income:

> Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities.[96]

Doyle is an excellent example of appropriate judicial gap-filling. Capital gain, or the incremental change in an asset's value, was what Congress obviously meant to reach with its statutory concept of income.[97] The opinion can also be seen as an interpretation in the context of whether the statute and the Constitution used the word "income" to mean either gross income, which is the sum total of the inflow to the taxpayer, or net income, which is the result after allocating all costs to the inflow, including a provision for the preservation of capital. There is no question that the income tax statute is a law designed to tax net income. The important question is whether Congress is limited by the Sixteenth Amendment to taxing net income, or whether

92. *See infra* text accompanying notes 236–43, 258.

93. Doyle v. Mitchell Bros., 247 U.S. 179 (1918).

94. *Id.* at 181–82. The 1913 Act merely called for the taxation of the "income derived from . . . sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property." Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167.

95. Congress later amended the statute to explicitly provide for the recovery of capital lost utilizing the concept of basis. Revenue Act of 1918, ch. 18, § 202, 40 Stat. 1057, 1060 (1919).

96. *Doyle*, 247 U.S. at 185.

97. This should be a relatively uncontroversial point because allowing cost recovery was the original position of the Commissioner in interpreting the 1861 Act, *see* CONG. GLOBE, 38th Cong., 1st Sess. 2516 (1864), and it comports even with the most modern theories of income. *See infra* text accompanying notes 116–21.

the concept of net income and the allowance of a deduction is a matter of constitutional interpretation or congressional prerogative. This was an important question from the beginning; in the debates surrounding the passage of the 1861 Act, a strong move was made to include the word "net" before the word "income" in the statute. This language was rejected by parties who conceded that the tax was on net income. They wanted the details of the term to be provided by the Secretary of the Treasury and not the courts.[98]

B. The Court's Decision in Eisner v. Macomber*: Formalistic Interpretation Triumphs*

Eisner v. Macomber[99] represents the high watermark of the early Court's restrictive approach to congressional power under the Sixteenth Amendment. There, the Court was confronted with the question of whether corporate dividends paid in additional shares of the company were income when Congress had explicitly included these dividends as an enumerated item of gross income.[100] The Court began its analysis with a statement clarifying the relationship of the word "income" in the Constitution and in the statute that established a critical underlying principle of tax law.[101] The Court concluded that "income" in the statute was synonymous with the term in the Sixteenth Amendment and that Congress had intended to exercise the full measure of its constitutional powers in the Act.[102] Thus, the question of what was included in income was a matter of constitutional interpretation.

The Court's formal approach can only be described as the application of the plain meaning of the statute. The term "'incomes' . . . should be read in 'a sense most obvious to the common understanding at the time of its adoption.'"[103] This "common understanding" was "the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution."[104]

The Court remarked that all it needed to do to make its task "easy" was to derive a clear definition of income as used in the common speech.[105] Although the Court acknowledged that this question "has been much discussed" by the economists, it concluded that all it needed

98. CONG. GLOBE, 37th Cong., 1st Sess. 315 (1861).
99. 252 U.S. 189 (1920); *see also* Merchs.' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 517–18 (1921).
100. *Eisner*, 252 U.S. at 199–200.
101. *Id*. at 203.
102. *Id*.
103. *Id.* at 219–20 (Holmes, J., dissenting) (quoting Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1040 (Ind. 1898)).
104. *Smietanka*, 255 U.S. at 519.
105. *Eisner*, 252 U.S. at 206–07.

to do to form its definition was to consult several dictionaries and two prior cases.[106] From these sources, the Court adopted the following constitutional definition of income: "Income may be defined as the gain derived from capital, from labor, or from both combined."[107] The Court was forced to add that this definition should be understood to include income from the sale or conversion of capital assets because capital gains are not included in the Court's classic eighteenth century economic concept of income.[108]

Basing its decision on the common meaning of the term did not provide a ready solution for the Court. Standing in the way of the Court's decision was the fact that the United Kingdom, whose system was founded on this same principle of income, taxed stock dividends that represented accumulated profits as income even though the capital, income, and realization concepts were bedrock principles.[109] The reason for this taxation was simple. A taxpayer had more stock after the payment of the dividend. A stock dividend in law represented the distributed profits of the corporation. Realization, the inflow of money or property, had occurred.[110] In other words, all of these things were there as a matter of form.

Once again, the Supreme Court's analysis relied on its view of substance. The legal form of dividend distribution was immaterial; in substance, additional shares did not change the economic position of the shareholders because they did not change the value of the taxpayer's total stockholdings, and there was no true distribution of profits because the income surplus underlying the dividend was switched on the corporate books to capital.[111] Significantly, the Court implicitly proclaimed that the equity of the statute could use substance to overcome the form of the transaction and it could negate Congress's explicit command, which was in conformity with the legal construction of the transaction.

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106. *Id*.

107. *Id.* at 207 (quoting Stratton's Independence v. Howbert, 231 U.S. 399, 415 (1913); Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918)).

108. *Id*.; *see infra* text accompanying notes 116–21.

109. *See* Swan Brewery Co. v. Rex, [1914] A.C. 231, 234–36 (P.C. 1913) (appeal taken from W. Austl.) (holding that stock dividends were taxable income). The modern law on stock dividends is somewhat more lenient to taxpayers in the United Kingdom. *See* Income and Corporation Tax Act, 1988, c. 6, § 249 (Eng.).

110. *Swan Brewery Co.*, [1914] A.C. at 235–36.

111. *Eisner*, 252 U.S. at 208–12.

C. Eisner v. Macomber*: The Court Assigns a Meaning to the Term "Income" that Is at Variance with Contemporary Economic Approaches and Historical Understanding*

The interpretation of the Court began with the linguistic meaning, where all interpretation begins. One uses the conventions of speech to determine how the author intended that term to be understood. As pointed out by the Court, the linguistic meaning of "income" presents a very special issue in American law because one is interested not only in congressional intent, but also in the intent the American people had in using the term in the Sixteenth Amendment.[112]

The term "income" at the time the Sixteenth Amendment and statute were adopted was one that was generally used and that, in most cases, caused little misunderstanding. However, it was not simply a common term like "house" or "park." It was a term of importance in business, accounting, economics, and even the law. Within these fields, the term had various senses in different contexts. Whose meaning should prevail?

The Court in *Eisner* indicated that it was not particularly interested in economic concepts of income.[113] However, the result of that case enshrined one particular economic concept of income, which included several implications that were not necessary to that concept. These implications reflected an analysis published during the Court's consideration of the case by a prominent lawyer and economist, Edwin R.A. Seligman.[114]

The Court's conclusion that the concept of income in the statute and Constitution was a legal concept, and not an economic or accounting concept, was of critical importance to the future of income tax law. This determined that the scope of the income tax base should not be within the control of any particular profession or group other than Congress.[115]

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112. *See id*. at 206–07; *see also id*. at 237–38 (Brandeis, J., dissenting) ("That such a result was intended by the people of the United States when adopting the Sixteenth Amendment is inconceivable. Our sole duty is to ascertain their intent as therein expressed.").

113. *See id*. at 206–07.

114. *See* Edwin R.A. Seligman, *Are Stock Dividends Income?*, 9 AM. ECON. REV. 517, 519–20, 529, 532–33 (1919).

115. The importance of this distinction between legal meaning or meaning determined by some nongovernmental group can be seen in the provision that introduced accounting concepts into the Revenue Act of 1919. Net income was to be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but . . . if the method employed does not clearly reflect the income, the computation shall be made upon such basis . . . as . . . does clearly reflect the income." Act. of Feb. 24, 1919, ch. 19, § 212, 40 Stat. 1057, 1064–65 (repealed 1921). Here, the

However, this did not mean that the relevant analysis of economists, accountants, or even legal scholars should be ignored.

To discover meaning, interpretation should have confronted the term "income" in its multidimensional meaning. Yet the Court failed to consider over one hundred years of progress in economic and political thought. The Court had described income in terms of its most basic and historic sense as income derived from things or labor.[116] This included the value of the uses or services derived from property or labor and gain from transactions in the nature of a trade.[117] This concept was closely related to a second concept of income, which economists referred to as "national income." National income was the sum total of all of the economic activity of a community during a particular period of time, including the total value of all goods and services produced by the community.[118] However, economic thought had changed dramatically over the course of the nineteenth century—a movement that the Court largely ignored. By the time the Sixteenth Amendment was debated, economic theory had shown clear signs of the concept of income that we now refer to as the comprehensive income tax base.

The earliest approach to this notion of income was developed in Germany by Georg Schanz: "The concept of income turns out to be the increase in net assets during a discrete period of time including the uses and value of the work of third parties."[119] An American, Robert Haig, formulated a similar conception: "Income is the *money value of the net accretion to one's economic power between two points of time*."[120]

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accounting profession's understanding of the concept of net income is important, but it is only binding if it satisfies the legal standard that accounting practice must clearly reflect the income of the taxpayer. United States tax law, unlike United Kingdom tax law, is thus ultimately independent of the views of the accounting profession. The resolution of this problem in the United Kingdom is mainly the other way with accounting standards being the legally appropriate benchmark. *See generally* Judith Freedman, *Defining Taxable Profit in a Changing Accounting Environment*, 1995 BRIT. TAX REV. 434 (1995) (questioning the U.K.'s practice of applying accounting standards to its tax rules).

116. *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 44 (1938).

117. *See* I ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 365–75 (R.H. Campbell & A.S. Skinner eds., 1979). For a discussion of these points, see Barker, *supra* note 26, at 16–23.

118. *See* SMITH, *supra* note 117, at 286–87.

119. SIMONS, *supra* note 116, at 60 (quoting G. Schnaz, *Einkommensteuergestetze*, Fnancz Archiv., XIII (1896), 23) (translation of quoted material provided by Professor J. Muller-Peterson, Penn State Dickinson School of Law).

120. Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, *in* IX READINGS IN THE ECONOMICS OF TAXATION 54, 59 (Richard A. Musgrave & Carl S.

Haig's fellow American, Edwin Seligman, whose views had an important impact on the early development of income taxation in America, linked income to the ability to consume: "[I]ncome . . . denotes that amount of wealth which flows in during a definite period and which is at the disposal of the owner for purposes of consumption, so that in consuming it, his capital remains unimpaired."[121] As Robert Haig explained, income is defined "in terms of power to satisfy economic wants rather than in terms of the satisfactions themselves."[122] Implicit at least in the statements of Schanz and Haig is the concept made explicit years later by Henry Simons:

> Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning.[123]

Though one can hardly say that any particular concept of income was in the minds of the American people upon the passage of the Sixteenth Amendment, these concepts, unlike the concept of income from things or national income, theoretically justify certain features of United States taxation. An example would be the taxation of capital gains. In England, capital gains had not been considered income because it could not be gain derived from capital; it was the capital itself.[124] This was based on the view established when the basic form of wealth was real property. Land, whether it had grown more valuable in terms of market value or not, was still the same capital that needed to be preserved.

Capital gains, of course, also fail the requirement of periodicity. Capital gains taxation reflects in part new notions that income did not need to be recurring or periodic.[125] Of greater significance is that Schanz's, Haig's, and Simons's accretion concept of income reflects a more sophisticated view of capital that should remain undiminished and free from income taxation. The increase in capital as determined by market values is income, not capital. This is because market value determines one's command over resources and measures one's ability to consume.

In the Revenue Act of 1894, an obvious precursor to the Sixteenth Amendment, Congress had taxed as income the value of gifts and

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Shoup eds., 1959).

121. SELIGMAN, *supra* note 54, at 19.

122. Haig, *supra* note 120, at 59.

123. SIMONS, *supra* note 116, at 50.

124. *See* Graham v. Greene, [1925] 2 K.B. 37, 41 (C.A. Eng.).

125. Note that Seligman still accepted this notion of income, but never acknowledged its incompatibility with capital gains being included in income. *See* SELIGMAN, *supra* note 54, at 20.

inheritances received by taxpayers.[126] Under no possible interpretation of the Supreme Court's definition of income could these have been income. They are neither an amount, use, or service derived from property or labor, nor do they have the characteristic of periodicity. Under the Court's early approach, these items would have been nonrecurring capital receipts that could not be income in the constitutional sense.

It would be ludicrous to contend that an aspect of income that had been included in prior legislation was not in the minds of Congress and the American people when the Sixteenth Amendment was adopted. Yet only new economic concepts of income, apparently known to the Court, could justify past practice. Modern theories demonstrated that the traditional English practice of distinguishing capital receipts from income receipts was faulty. Capital is not income solely because it represents the value earned by the taxpayer that had already been subject to income taxation and, thus, should remain undiminished and not be subject to a second income tax. Its closest approximation is our modern notion of basis, representing taxpayer cost.

Finally, it must be noted that in all practicality the Supreme Court was not above ignoring its own definition in applying the equity that limits legislative enactments. A cardinal principle of American law is that imputed income, the personal consumption of the use value of one's own property or services, is not taxable income. The Supreme Court has told us that "[t]he rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."[127] According to the Court's approach, the taxability of imputed income depends on the common understanding of that term at the time of the passage of the Sixteenth Amendment. What was this understanding? From the time of Adam Smith to the work of Seligman in 1909, the market value of the use of one's own property had been income as a use value derived from property, fitting squarely within the Court's definition of income.[128] In fact, a strong inference based on prior

126. Act of Aug. 27, 1894, ch. 349, § 28, 28 Stat. 509, 553. The early interpretations of the Commissioner of Internal Revenue pursuant to the Civil War tax acts also included as income gifts of personal property ante mortem. *See* SELIGMAN, *supra* note 54, at 469.

127. Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 379 (1934). This statement was, however, not controlling because the Court found that Congress's language, taxing the rental value of the owner-occupied property, was not really a tax on that value as income, but was, in fact, an indirect way of denying a deduction for expenses. *Id.*

128. SELIGMAN, *supra* note 54, at 20–21.

income tax acts in the United States is that imputed rental income is income under the Internal Revenue Code. The original Civil War Income Tax Act of 1861 charged tax on the income from enumerated sources "or from any other source whatever."[129] The Act of 1863 allowed a taxpayer to take a deduction "for the rent of the dwelling-house or estate on which he resides."[130] In order to equalize the treatment of homeowners and renters who were receiving deductions for the rent, Congress in 1864 specifically exempted the imputed income from owner-occupied housing as follows: "[T]he rental value of any homestead used or occupied by any person, or by his family, in his own right or in the right of his wife, shall not be included and assessed as part of the income of such person."[131] Significantly, both the deduction for rent and the noninclusion of imputed rent was dropped from the 1894 Act. This suggests that the notion that income included the rental value of owner-occupied housing was commonplace and that even a nineteenth century literal interpretation of the Sixteenth Amendment would have included such gain. Congress's failure to exclude such gain from the 1913 Act should be persuasive evidence that statutory income includes such amounts. As any rudimentary law school tax course's economic comparison of homeowners and renters demonstrates, homeowners derive substantial financial benefit from the economic income derived from their own property, thus treating them more favorably than renters.

D. The Dissenting Opinions in Eisner v. Macomber *Foreshadow the Future*

1. The Majority's Narrow Definition of Income Was Not in Accord with the Plain Meaning of the Term

In critiquing *Eisner*, some might agree with the Court's methodology but simply conclude that its construction was wrong. Justice Holmes made this point when he stated in his *Eisner* dissent that stock dividends were income even though the term "'incomes' . . . should be read in 'a sense most obvious to the common understanding at the time of its adoption.'"[132] Justice Brandeis also pointed out the majority's mistaken interpretation of the common meaning in his *Eisner* dissent when he noted that stock dividends were considered taxable income in the United

129. Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862).
130. Act of Mar. 3, 1863, ch. 74, § 11, 12 Stat. 713, 723 (repealed 1864).
131. Act of June 30, 1864, ch. 173, § 117, 13 Stat. 223, 281 (repealed 1872).
132. Eisner v. Macomber, 252 U.S. 189, 219–20 (Holmes, J., dissenting) (quoting Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1040 (Ind. 1898)).

Kingdom and in Massachusetts even though, for the purpose of allocation between the life tenant and the remainder person, they might be considered capital.[133] But others would correctly view that the Court's myopic reading of the term "income" was a disingenuous misuse of statutes. The Court's early methodology was, in many respects, a perfect example of what Roscoe Pound described as the common-law judge's attempt to "impede or thwart social legislation."[134] Under this perspective, the judiciary is guilty of "narrow and illiberal construction of constitutional provisions" and a "narrow and illiberal attitude toward legislation . . . regarding it . . . as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language."[135]

2. The Majority's Narrow Definition Was Not in Accord with the Purpose Behind the Legislation

This observation provides the basis for a second critique of *Eisner*'s majority. Holmes also suggested in his *Eisner* dissent that the interpretation of "income" should be more than a question of plain meaning. He believed that the statute should be upheld because the intent of the Sixteenth Amendment was to remove the shackles on congressional taxing power by getting rid of the questions of direct and indirect taxes that had limited congressional power to tax citizens directly.[136] This argument was quite different from an argument over what the American people intended the term to mean. Here, Holmes was not referring to the common understanding of the term "income," but instead to the common understanding of the purpose behind the constitutional amendment and legislation.

In his *Eisner* dissent, Justice Brandeis developed Holmes's understanding that the Sixteenth Amendment should be interpreted in keeping with its purpose. Brandeis quoted the following language from a state court case that indicated how such amendments should be viewed:

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133. *Id.* at 236 (Brandeis, J., dissenting); *see also* Trefry v. Putnam, 116 N.E. 904, 906, 911–12 (Mass. 1917); Swan Brewery Co. v. Rex, [1914] A.C. 231, 234–36 (P.C. 1913) (appeal taken from W. Austl.). However, judicial disagreements about what the legislature or the common man must have meant when it used the term "income" are not particularly helpful because they are essentially disputes about the largely unknowable intent of large bodies of people, such as Congress or the American people, and they merely provide an avenue for the substitution of the courts' political judgment for the lawmakers.

134. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385 (1908).

135. *Id.*

136. *Eisner*, 252 U.S. at 220 (Holmes, J., dissenting).

> [An amendment to the Constitution] is a grant from the sovereign people and not the exercise of a delegated power. It is a statement of general principles and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a State and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.[137]

Brandeis concluded that the American people "intended to include thereby everything which by reasonable understanding can fairly be regarded as income."[138] This language represents a profound shift from a notion that income is defined by reference to a fixed semantic understanding to one based on a concept subject to reasoned elucidation and development.

3. Formalism's Defect: The Dissents

Though many modern scholars still would agree with the majority that interpretation is the process of determining the will of the lawmaker, modern theorists distinguish between legislative intent as intended meaning, which asks, "How did [the author] intend these words to be understood?" and legislative intent as purpose, which asks, "What did [the author] intend the enactment of the statute to achieve?"[139] Traditional interpretation only delves into purpose where the plain meaning is unclear or applying it would produce an absurd result.[140] In other words, taxpayers normally do not need to resort to legislative purpose in order to understand that the legislative meaning of the word "income" clearly includes many basic elements, like wages, interest, dividends, capital gains, and so forth.

The use of legislative purpose as a tool to decipher meaning is directly related to the legislative program's level of detail. Plain meaning is well suited to the particularization of rules. The more specific the language, the more one can speak of a precise meaning. Purpose, on the other

137. *Id.* at 237 n.1 (Brandeis, J., dissenting) (quoting Trefry v. Putnam, 116 N.E. 904, 906 (1917)).

138. *Id.* at 237.

139. GERALD C. MACCALLUM, JR., LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 6 (Marcus G. Singer & Rex Martin eds., 1993).

140. Three cases illustrate the importance of this approach. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court adopted the plain meaning despite dissents that, allegedly, the result was absurd. *Id.* at 184–85, 196. In *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the Court rejected the plain meaning of the statute because it determined that its application would produce an absurd result not in accordance with congressional intent. *Id.* at 459. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court refused to apply the plain meaning because it would "bring about an end completely at variance with the purpose of the statute." *Id.* at 202 (quoting United States v. Pub. Utils. Comm'n, 345 U.S. 295, 315 (1953)).

hand, deals with the general goals of the legislation; "[i]t is what is variously called the aim and object of the enactment, the spirit of the legislation, the mischief and the remedy."[141] Courts assume that the lawmakers attempt to accomplish a social purpose through their legislative acts. At the very least, knowing the goal of the legislation helps the interpreter understand what the legislator intended the words to mean.

Early Supreme Court interpretation of the charge to tax income was a quest for intent as meaning as understood by "the People" when the Sixteenth Amendment was adopted. Even the Court's broad construction—that Congress meant to exercise the full measure of a taxing power in taxing all income, gain, or profit from any source—was no more than a comment on the statute's plain meaning.

Justices Holmes and Brandeis both concluded that the purpose behind the amendment and the Act was important in determining the proper scope of income. This may have been the only time that the Court has directly utilized the aims and goals of the amendment in suggesting a construction of income.

Where did Justices Holmes and Brandeis find evidence of purpose? Purpose may be discovered by viewing a statute in context, that is, by discovering the statute's meaning from its role in the overall statutory scheme. Purpose can also be derived from historical context, that is, by viewing the statute as a reflection of the history of the times of which courts routinely take judicial notice. Purpose can also be discovered through Congress's statements about legislative objectives as embodied in legislative histories.

When viewed through this spectrum of purpose, Holmes's view can be said to be an assessment of the mischief and the remedy as learned from his assessment of the historical need for a constitutional amendment. Brandeis's view, on the other hand, is more in keeping with a sympathetic view that the effectiveness of statutory law should not be thwarted by illiberal construction. Neither Justice, however, described the historical context nor made reference to the Act's legislative history. Even though the Court's attitude toward income taxation has dramatically changed over the years, the Court has never discussed the historical context or the legislative history of the 1913 Act.

141. J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. TORONTO L.J. 286, 292 (1936).

V. FROM FORMALISM TO LEGAL PROCESS AND PURPOSIVIST INTERPRETATION: THE REVOLUTION IN INTERPRETATION, 1930–1956

The Supreme Court changed tack in the second third of the twentieth century. In 1929, the stock market crashed and the Great Depression began. Though the effect was not immediate, the Court began to change its attitude toward social legislation. The lack of justice in the income tax system became a celebrated cause in the national debate.[142]

A. The Supreme Court Applies Purpose and Limits the Scope of Prior Precedents

The Supreme Court had already provided a definition of income as a matter of constitutional law. A lower court judge, as early as 1927, shrewdly assessed the significance of the decision as a matter of common sense when he said:

> Whether this description of income is to be regarded as exclusive of everything not clearly within its terms, so that both the Sixteenth Amendment and the statute (which is said to be the fullest exercise of the constitutional power) are forever to be limited by a judicial definition, may still be doubtful, for the Supreme Court is not in the habit of defining words abstractly, but only for the purpose of determining whether the matter then under consideration comes within their fair intendment.[143]

However, this view is inconsistent with Anglo-American judicial method. A Supreme Court interpretation of a constitutional provision is an authoritative pronouncement of what the law is in a common-law jurisdiction. Courts no longer interpret the statutory term "income" as it applies to particular acts; courts now must interpret and apply the Court's definition of the term "income." Those who endeavor to interpret statutes in the Anglo-American systems must grapple with the common-law doctrine of stare decisis. Prior decisions are binding on courts because of the perception that the law should be certain.

The American doctrine of stare decisis is more limited than the English doctrine, where judges are bound even by their own prior decisions.[144] Courts in America are only bound by courts that are directly superior in the appellate chain, and it has been argued that stare decisis is

142. *See* PAUL, *supra* note 17, at 199–208 (providing a historical account of taxation in the United States in the years 1936 and 1937).

143. Hawkins v. Comm'r, 6 B.T.A. 1023, 1024 (1927) (citation omitted).

144. *See* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 118 (1987) (discussing the differences in the two versions of the principle of stare decisis that have prevailed in the history of common law).

not a rigid requirement in America.[145] In tax, this translates into considerable diversity in the law. In tax litigation, taxpayers have a choice among three trial courts: the district courts, the Tax Court, and the United States Court of Federal Claims. Appeals are processed by the thirteen federal courts of appeals and, ultimately, the Supreme Court. Thus, judges are only bound by the circuit court to which their cases are appealed and by the Supreme Court. Except for Supreme Court decisions, there are few binding precedents, and judges are free to interpret statutes while fettered little by prior decisions. All judges are bound by the Supreme Court, except for the Court itself, which binds itself only to the extent it wishes to be so bound.

Judicial doctrine accepts the role of stare decisis even for the interpretation of statutes. Unlike the Roman civil-law tradition, where judges are required to interpret statutes while ignoring the previous mistakes of other judges,[146] the common-law trained jurist must deal with the gloss put on statutes by interpretation as law.

The common law is similar to Roman civil law in that it has always been developed to meet the needs of a changing society. Though contrary to traditional thought, the income tax statute at times has also been developed in much the same way as a private civil-law code would develop. But this process would appear to be in conflict with common-law methodology as applied to statutes and with traditional thought.

The common-law method involves invoking, developing, or overcoming the force of prior judicial decisions.[147] This applies whether or not the ultimate source of law is case law or statute. History shows that, beginning in the 1930s, the Supreme Court's decisions evinced a process of overcoming the force of the earlier Court's pronouncements on income. Because of the weight of stare decisis on statutory interpretation, much of this development was concealed.[148]

The jurisprudence of the early Court has since spent its force. *Gould v. Gould*[149] was overruled without judicial comment by section 71 of the Internal Revenue Code, which provides that alimony payments are income

145. *Id.*
146. *See* RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 183 (Michael Kindred ed., 1972).
147. *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 51–52 (1978).
148. This was Roscoe Pound's view of case law development of the common law. *See id*.
149. 245 U.S. 151 (1917).

to the recipient.[150] Though *Oregon-Washington*[151] has been considered without being specifically overruled, its underlying view of debt cancellation was reversed in *United States v. Kirby Lumber Co*.[152] Today, debt discharge is generally included as income subject to certain statutory exclusions.[153] Again, in *Burnet v. Sanford & Brooks Co.*,[154] the Court considered *Bowers v. Kerbaugh-Empire Co*.[155] with regard to a contract that had been performed over several years at a loss. Though the Court did not overrule *Kerbaugh-Empire Co*., it did limit the case to the facts.[156] The Court decided *Burnet* on the grounds that related transactions could not be collapsed and that each receipt and expenditure must be accounted for separately to preserve the integrity of the taxable year.[157] This doctrine robbed *Kerbaugh-Empire Co.* of its rationale. Finally, *Edwards v. Cuba Railroad Co.*,[158] which treated a foreign government subsidy as a capital (nonincome) receipt, was restricted in *Detroit Edison Co. v. Commissioner*.[159] Its anomalous result, to the effect that a capital contribution by a nonshareholder was not income and that the taxpayer had a fair market value basis in the property acquired with the contribution,[160] has been cured by the Code, which now provides that the property acquired shall have a zero basis.[161]

The Court has also indicated its disagreement with *Eisner v. Macomber*, that the Constitution's notion of income requires realization. In *Helvering v. Horst*,[162] realization was relegated to a rule "founded on administrative convenience."[163] Though the concept of realization is a fundamental principle of income taxation, it is considered so due to Congress's, not the Supreme Court's, intent.

Without doubt, the Court's expressed attitude to income tax law interpretation changed in the 1930s. Literal interpretation was abandoned for a more purposeful, contextual approach to interpretation[164] because literal interpretation "would often defeat the object intended to be

150. I.R.C. § 71 (2000).
151. United States v. Or.-Wash. R.R. & Navigation Co., 251 F. 211 (2d Cir. 1918).
152. 284 U.S. 1, 1–3 (1931).
153. I.R.C. § 61(a)(12).
154. Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931).
155. 271 U.S. 170, 175 (1926).
156. *Burnet*, 282 U.S. at 364.
157. *Id*. at 364–65.
158. 268 U.S. 628 (1925).
159. 319 U.S. 98, 103 (1943).
160. *Id*. at 101–03.
161. I.R.C. § 362(c) (2000).
162. 311 U.S. 112 (1940).
163. *Id*. at 116.
164. *See* Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93 (1934).

accomplished."[165] The Court remarked that a statute should be interpreted "in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."[166]

The income taxation crisis confronted by the Court in the 1930s and 1940s was not a question of what was included in the definition of income, but a question of whose income it was. Income tax over the years had quickly changed from a rather insignificant tax to one with much higher progressive rates. Tax avoidance by people with means became an important activity and an important issue in the Great Depression years.

The central issue of the times was the validity of property or services income assignment from one taxpayer to another. In these cases, taxpayers had transferred certain rights to income to others.[167] There was no question of whether these amounts were income; they clearly were. There also was another party, the actual legal owner of the amount in question, who was willing to report and pay tax on these items. The government claimed that the amounts given to others either through common-law forms or trusts were income taxable to the assignor.

The government's many victories through the courts can only be attributed to the application of the spirit of the law. Indeed, the Court explicitly applied a legislative purpose in creating a new legal doctrine, concluding that "[t]he dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid."[168] The Court derived this purpose not from any congressional statement but from its understanding of the legislation as a whole. The Court never explained why this purpose was so important. The explanation is self-evident once one understands how income taxation works. The reason necessitating income allocation to the proper taxpayer was the protection of the integrity of the personal, progressive income tax system.

In the United Kingdom, income taxation had been primarily withheld at source, and steeply progressive taxation was not a factor until the twentieth century. Traditionally, a taxpayer's identity was not significant.

165. Helvering v. N.Y. Trust Co., 292 U.S. 455, 464 (1934).
166. *Id.* at 465.
167. *See, e.g.*, *Helvering*, 311 U.S. 112, 114 (discussing assignment of interest income from bonds); Helvering v. Clifford, 309 U.S. 331, 332–34 (1940) (discussing assignment of income from property through a trust); Lucas v. Earl, 281 U.S. 111, 113–15 (1930) (discussing assignment of service income).
168. *Helvering*, 311 U.S. at 119.

When rates finally became steeply graduated and taxpayers became more likely to attempt tax avoidance, the courts, accustomed to their traditional role of literal interpretation, deferred to Parliament's authority and expertise in coping with the problem.[169] This was also the result of legislative distrust of the courts' ability to give proper effect to the ideas behind the legislation.[170] Thus, United Kingdom tax legislation has a long history of narrow, detailed drafting, restricting the role that legislative purpose has in the interpretive process.[171] However, in the United States, the Court "circled the wagons" to protect the tax system's integrity. Proper allocation of the burden of taxation to the appropriate taxpayer was deemed critical to the function of a personal, self-assessed, progressive system.

Though the assignment of income cases[172] do not shed light on the precise question of what income includes, they do show a change in attitude as to what the income tax law is all about. Courts began to recognize that Congress's goal was to tax each person's income comprehensively, in accordance with the substance and reality of the particular situation. No longer did courts ask what the common understanding was; courts now asked what the truth or reality was.

Thus, the meaning of income was changing from a fixed linguistic test of the common understanding of the people who adopted the Sixteenth Amendment to a concept of reason. In *Helvering v. Horst*,[173] the Court stated that to maintain that a taxpayer never had income when he anticipatorily assigned bond coupons "is to affront common understanding and to deny the facts of common experience."[174] The taxpayer had income even though he had received nothing because disposition of the coupons was the receipt of money's worth as it gave satisfaction to the taxpayer that could only be procured by the expenditure of money.[175]

The Court had adopted a new approach. It used an equitable principle of construction in favor of the government utilizing principles of right and justice derived from its construction of the legislative purpose to extend the statute in a way that made it effective. This purpose derived

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169. *Commissioners of Inland Revenue v. Duke of Westminster* was the high watermark of this traditional approach. There the House of Lords affirmed that the courts must respect the legal form that the parties had chosen. Comm'rs of Inland Revenue v. Duke of Westminster, [1936] A.C. 1, 15 (P.C. 1935). This was followed by the courts until 1982, when the House of Lords took a more substantive approach to tax avoidance in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1982] A.C. 300 (P.C. 1981).

170. *See* Jones, *supra* note 37, at 585.

171. *See* ATIYAH & SUMMERS, *supra* note 144, at 323.

172. *See* cases cited *supra* note 167.

173. 311 U.S. 112 (1940).

174. *Id.* at 118.

175. *Id.* at 117.

from the structure and practical processes of the Code as a whole. Justice Barton confirmed this understanding of what the Court was doing when he remarked that "Section 22(a) [now Section 61 on gross income], upon which the *Cifford* case rests its expansion of the traditionally taxable income of the taxpayer, invites or at least permits the broad interpretation given to it."[176]

Broad purposeful income tax law interpretation was clearly now the accepted norm, as artfully set forth by Justice Frankfurter: "Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed, particularly in the provisions of a tax law . . . ."[177] Yet, in viewing the changing attitudes of the Justices toward statutory interpretation, one needs to consider how these evolutions affected the Court's approach to past authoritative interpretation, which some Justices believed to be based on outmoded interpretive approaches. In the United Kingdom, when the House of Lords makes an authoritative interpretation, tradition dictates that the authority to change interpretations, whether to cure mistakes or to adapt legislation to unanticipated situations, belongs solely to Parliament.[178] However, U.S. courts, while acknowledging the importance of stare decisis in promoting certainty and continuity in the law and in sustaining the reasonable expectations of citizens, reserve the right to reexamine their own doctrines, especially in constitutional interpretation. In the United Kingdom, such interpretations are not fixed because Parliament can always overrule them. In America, if the Supreme Court could not overrule prior constitutional interpretations, only the people could, because Congress itself cannot.

B. The Supreme Court Overcomes the Force of Stare Decisis

Thus, 1940 marked an important turning point at which the Court openly rejected the fetters of past precedent in interpreting tax statutes. In *Helvering v. Hallock*, the Supreme Court considered the validity of an interpretation that had been followed for over ten years in over fifty Supreme Court and lower court decisions.[179] The Court emphasized the necessity that its interpretive role become unfettered from its own doctrine: "[W]e cannot evade our own responsibility for reconsidering in

176. Estate of Spiegel v. Comm'r, 335 U.S. 701, 713–14 (1949).
177. Griffiths v. Comm'r, 308 U.S. 355, 358 (1939).
178. *See* ATIYAH & SUMMERS, *supra* note 144, at 118.
179. Helvering v. Hallock, 309 U.S. 106, 123 (1940) (Roberts, J., dissenting).

the light of further experience, the validity of distinctions which this Court has itself created. Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications."[180]

In overruling its prior decision, the Court stated that it was not required to follow an interpretation that "on further examination, appear[s] consonant neither with the purposes of the statute nor with this Court's own conception of it."[181] This view of statutory interpretation was consonant with Justice Frankfurter's enunciated view of constitutional interpretation when he said, "But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[182] Here we see an approach that appears compatible with that of the Roman civil-law tradition, in that the Court interprets the statute and not its prior interpretations of the statute. The Court sees its role as dynamic, as an evolving process interpreting law in the light of new experience. At the same time, the Court sees its role as grounded in accomplishing Congress's purpose.

As previously noted, several cases in the early 1930s cast serious doubts on the Court's prior determinations of the scope of income.[183] However, these cases were quick to distinguish, and not to overrule, their predecessors, a technique that is frustratingly common in Anglo-American jurisprudence. With *Hallock*, however, the stage was set for the Court's fundamental change in its approach to the interpretation of the concept of income.

C. Intentionalism and Purpose in the Judicial Development of the Concept of Income in Commissioner v. Glenshaw Glass

The foundation of modern income analysis examined in every basic tax course is *Commissioner v. Glenshaw Glass Co*.[184] The actual holding, that punitive damages awarded in an antitrust case are income, is not what makes this case important. What is critical to the scope of the law can be summarized in two statements. First, the *Eisner v. Macomber* income definition was repudiated as an unwarranted limitation on the concept of income.[185] Second, the Court outlined a new approach to income: "Here we have instances of undeniable accessions to wealth,

180. *Id*. at 122.
181. *Id*.
182. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939).
183. *See* cases cited *supra* note 167.
184. 348 U.S. 426 (1955).
185. *Id*. at 430–31.

clearly realized, and over which the taxpayers have complete dominion."[186]

There is an almost mystical power to Chief Justice Warren's words. It is as if the student can (with the careful guidance of her professor) begin with these first principles and, step by step, unfold the very nature of income. One who knows what the law actually is understands the danger of this approach, because the Code is rifled with exceptions and qualifications. Yet, where the "is" varies from the "ought," where Congress does not live up to the potential of this approach, logic demands an explanation. Emphatically stated, this is the ideal approach to studying tax law because by contrasting the "is" and the "ought" of taxation, we establish the economic consequences, the imminent relevance, of Congress's and the Court's policies.

However, to look at *Glenshaw Glass* as the case that redefined income is in fact to betray its clear objective. Instead of precisely defining income, the Court repudiated the use of a definition to restrict congressional purpose. The Court did not say that the definition of "income" in *Eisner v. Macomber* was wrong; instead, the Court remarked that it had served a useful purpose in the context of distinguishing gain from capital. However, the definition "was not meant to provide a touchstone to all future gross income questions."[187]

The Court did not substitute a new definition. It merely stated that the item in question satisfied certain factors (accession to wealth, realization, and control) that were reflective of the statutory language. In other words, *Glenshaw Glass*'s moral is that courts should not try to frustrate congressional intent by providing a precise definition *when* Congress has not. The Court stated:

> This Court has frequently stated that this language was used by Congress to exert in this field "the full measure of its taxing power." Respondents contend that punitive damages, characterized as "windfalls" flowing from the culpable conduct of third parties, are not within the scope of the section. But Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature. And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted. . . . Such decisions demonstrate that we cannot but ascribe content to the catchall provision of § 22(a), "gains or profits and income derived from any source whatever."[188]

186. *Id*. at 431.
187. *Id*.
188. *Id*. at 429–30 (citations omitted).

The breadth of this view of the charge to tax is challenged by some. In discussing this language, Borris Bittker and Martin McMahon remark, "[T]his generalization is clearly too broad; it is obvious that Congress did not intend to tax a number of major items (e.g., home-produced goods and the rental value of owner-occupied residences), even though they constitute 'gains' and are not specifically exempted."[189] Though present doctrine excludes these items, one must be careful when conferring natural law status on an established interpretation. As previously shown, the evidence is formidably against the notion that imputed rent is not income.[190] With regard to home-produced goods, even eighteenth century concepts of income included these items as income. Moreover, in the 1894 Act, Congress specifically excluded these amounts, suggesting that the normal concept of income could include such amounts. The 1913 Act did not have a similar exclusion. Such an omission is evidence of a contrary intent and may well have led the Treasury Department to seek, unsuccessfully, to treat the value to a farmer of the consumption of self-produced goods as income in *Morris v. Commissioner*.[191]

Several years after *Glenshaw Glass*, Chief Justice Warren and the Supreme Court returned to the question of the fundamental nature of income in *James v. United States*.[192] There, the Court overruled its own precedent and found that the defendant embezzler had income subject to tax on his wrongful appropriations. The Court cited *Glenshaw Glass*, explaining in carefully chosen words that all income from whatever source derived has "been held to *encompass* all 'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'"[193] The word "encompass" reaffirms that the Court does not mean to limit the concept of income by its own language.

In *James*, the Court also established the equitable basis of a broad approach to income. It suggested that failing to correct its past error would "perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income."[194] Implicit here is an acknowledgment that an underlying goal of income taxation is that all should share the burden of government in accordance with the real command over resources. Of course, that is the

189. BORIS I. BITTKER & MARTIN J. MCMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 3.1, at 3-6 (1988).
190. *See supra* text accompanying notes 129–33.
191. 9 B.T.A. 1273, 1277–78 (1928).
192. 366 U.S. 213 (1961).
193. *Id*. at 219 (emphasis added) (quoting *Glenshaw Glass*, 348 U.S. at 431).
194. *Id*. at 221.

principle behind the doctrine that inclusions in the tax base should be liberally interpreted, while exemptions should be narrowly construed.[195]

VI. THE FORGOTTEN PURPOSE: THE HISTORY AND CONTEXT OF INCOME TAXATION IN AMERICA

The Supreme Court has found and frequently reiterated that Congress intended that the scope of the charge to tax income should be interpreted broadly. Though Congress intended income to be inclusive, that does not really answer the question as to what income means. The Court once believed that all it needed to do was have "a clear definition of the term 'income,' as used in common speech," and its task would be easy.[196] It was disingenuous to start with a narrow reading of income divorced from the contributions provided by economic and accounting theory while at the same time looking unofficially at what economists had to say for guidance. Considering the brief history of income taxation at the time, to assert that a concept like income was simply a symbol of a previously worked out series of detailed rules was puerile. This is not simply a modern-day judgment of the difficulty of ascertaining the parameters of this word. A prominent figure in the passage of the Sixteenth Amendment, Elihu Root, provided these thoughts at the time in response to a statement concerning people who had trouble understanding income taxation:

> I guess you will have to go to jail. If that is the result of not understanding the Income Tax law, I shall meet you there. We will have a merry, merry time, for all of our friends will be there. It will be an intellectual center, for no one understands the Income Tax law except persons who have not sufficient intelligence to understand the questions that arise under it.[197]

The early Court's narrow reading is also attributable in part to its refusal to consider the aim and purpose of income taxation when adopted by the American people and Congress. Even at that time, the use of purpose was commonplace as a tool in discovering the meaning of statutes.[198] To discover purpose, courts look at the statute as a whole, to the historical context in which the statute was enacted, and to any relevant legislative history. To seek help in every direction is natural, as noted by Chief Justice Marshall years ago: "Where the mind labours to

195. Comm'r v. Jacobson, 336 U.S. 28, 49 (1949).
196. Eisner v. Macomber, 252 U.S. 189, 206–07 (1920).
197. *See* PAUL, *supra* note 17, at 102.
198. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892).

discover the design of the legislature, it seizes everything from which aid can be derived . . . ."[199] Even when the Court adopted a more purposeful approach to income taxation, the Court never discussed either the Act's legislative history or the historical context leading to its passage.

A. The Purpose of Congress and the American People

As reported in the legislative history, enactment of the federal income tax was the culmination of years of political struggle:

> For 25 years a contest has been waged throughout the country in behalf of the adoption of a national income tax as a permanent part of our fiscal system, and the sentiment in favor of this movement finally became so strong that the people overturned a decision of the Supreme Court of the United States by writing into the Constitution the first amendment within 40 years.[200]

The income tax was the result of a long and often bitter struggle.[201] Proponents were spurred to persevere because of general resentment of the tax system then in place. In describing the previous system, that is, the "mischief," the House Committee remarked, "These taxes rest solely on consumption. The amount each citizen contributes is governed, not by his ability to pay tax, but by his consumption of the articles taxed. . . . The result is that the poorer classes bear the chief burden of [those taxes]."[202]

The purpose of this legislation was clear. The tax on net income "is in response to the general demand for justice in taxation, and to the long-standing need of an elastic and productive system of revenue."[203] Income was chosen as the basis for this system because "[t]he tax upon incomes is levied according to ability to pay, and it would be difficult to devise a tax fairer or cheaper of collection."[204] Moreover, not only does an income tax "equalize the tax burden,"[205] it also provides an important educative role in a democratic society. In contrast with many consumption taxes, which are hidden, "[a] personal knowledge of the amount of taxes required of the people would more closely enlist their interest and active cooperation in all the affairs of government, and especially with respect to revenues and expenditures."[206]

These powerful statements establish that the manifest goals of the income tax were the collection of revenue and economic justice.[207] This

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199. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).
200. H.R. REP. NO. 63-5, at XXXVII (1913).
201. *See generally* PAUL, *supra* note 17, at 30–109.
202. H.R. REP. NO. 63-5, at XXXVII.
203. *Id*. at XXXVI.
204. *Id*. at XXXVII.
205. *Id*.
206. *Id*. at XXXIX.
207. There has always been a debate over whether income taxation has any other

was not the individual, particular sense of justice enshrined in traditional taxation that equated the taking of property to the criminal law, but a general sense of justice, social justice, that regarded tax as a social duty and held that justice requires substantive equality of treatment. For the Sixteenth Amendment accomplishes an important gain for economic justice and bears a proud place in our Constitution's struggle for human justice.

B. The Role of Purpose in the Interpretation of the Concept of Income

How exactly did the people or Congress expect this to be achieved? How is a principle of justice made an organic part of legislation? Congress chose to tax the entire net income of the taxpayer. The substantive provisions of the 1913 Act were contained in only two pages. Though the charge to tax has been slightly modified, the intent has remained the same.

Present law declares that "gross income means all income from whatever source derived."[208] To the student who first reads section 61, the statement appears ridiculous. One should never define a word in terms of itself. However, to one who has been exposed to the purpose of Congress, the language is divine inspiration. The Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived."[209] The statute provides no room for equivocation; statutory income encompasses the full potential of the Sixteenth Amendment except to the extent that the term is limited by a specific congressional act. Moreover, Congress emphasized this in the language of the statutes from the start; it commanded that the concept of income should be taken in its broadest sense. The 1913 Act never attempted a comprehensive definition of income, but instead emphasized its inclusive nature by providing that "the net income of a taxable person

purpose than the collection of revenue. In the context of a more limited statute, Judge Easterbrook remarked: "[T]he ultimate purpose of a tax code is to raise revenue, and the many rough cuts that result from the political battles about how much will be paid by whom should not be revised, in litigation, to make them look more like one side's idea of an 'ideal' tax." Indianapolis Life Ins. Co. v. United States, 115 F.3d 430, 434 (7th Cir. 1997). Though this strong textualist argument may have some relevance to some detailed statutory provisions, it does not apply when one looks at the broad concept of income in the American context of the passage of the Sixteenth Amendment and the resulting language of the statute.

208. I.R.C. § 61 (2000).

209. U.S. CONST. amend. XVI.

shall include *gains*, *profits*, and *income* derived from salaries, wages, or compensation for personal service *of whatever kind* and *in whatever form paid*, . . . or gains or profits and income derived *from any source whatever*."[210]

Income is a concept, not a rule. Neither the Constitution nor Congress chose to contain it by defining it in all of its particulars. That decision was inspired. As shown by the history of the early Court's interpretation by selective definition, definitions have, as Pound put it, "nullif[ied] legislative action."[211] Clearly the Court's approach in *Glenshaw Glass* has superseded such archaic views.

Implicit in *Glenshaw Glass* is the recognition that the concept of income is not simply a series of substantive rules but rather a form of somewhat indeterminate content. Though much of the content was clear both in 1913 and more particularly today, this clarity has been the result of an evolving process of interpretation by supplying content. This was recognized by the Court in *Glenshaw Glass* when it stated, "[W]e cannot but ascribe content to the catchall provision of § 22(a), 'gains or profits and income derived from any source whatever.'"[212]

History has shown that one cannot supply content to this legal form by a mere logical unfolding of its meaning. There is no thing in itself of a knowable or unknowable nature that is called income. Instead, income as legal form is an abstraction of the economic and social acts of man in civil society. This norm is a general premise for juridical and juristic reasoning;[213] interpreters must conn its meaning out of the ever-changing complexities of human existence.

In order to interpret the concept of income, courts must consider the historical roots of income taxation in America. Yet the Court has never acknowledged the historical forces that raised this phoenix from the ashes to which the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*[214] had relegated it. Likely this is because it is impolitic to mention the history of class conflict as the context for the passage of both amendment and statute.

Income taxation in America was the culmination of a progressive democratic struggle starting in the nineteenth century to "reach the vast amounts of wealth generated by the rapid and massive industrialization of the United States, to shift the tax burden from real property and

210. Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167 (emphasis added).
211. Pound, *supra* note 134, at 387.
212. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955).
213. *See* POUND, *supra* note 147, at 56–57 (discussing legal rules and legal principles).
214. 158 U.S. 601, 634–35 (1895) (declining to consider conclusions not pertaining to the case at hand).

consumption onto financial and industrial assets."[215] The first major highlight was the bitter debate and passage of the 1894 Act. The 1894 Act was introduced with the charge that, under the previous system of consumption taxation, "want, not wealth, pays the taxes."[216] Congressional proponents of the measure denied its class base, describing income taxation as "a just principle of taxation"[217] or as providing "equality in taxation and in opportunity."[218] Opponents of the legislation decried its class basis and maintained that this principle of taxation was being taught to Americans by foreign socialists, communists, and anarchists.[219]

Though the legislation passed, the Supreme Court, in the opinion of some, saved the nation from anarchists and communists by declaring the income tax a direct tax and unconstitutional.[220] Arguments presented to the Court contained much of the same invective in opposition to the law.[221] Justice Field in his concurring opinion agreed that it was "class legislation" and found that its "essential character" was the same as a 1691 English tax act that taxed Protestants, Catholics, and Jews at different rates.[222] The dissents were not restrained either. Justice Harlan declared the decision to be "a disaster to the country."[223] Justice Brown saw the taxpayers' arguments that raised the specter of socialism for what they were—a conjuration "to frighten Congress from laying taxes upon the people in proportion to their ability to pay them."[224] Moreover, he recognized the class motivation in the majority's decision when he expressed his hope that this might not "prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth."[225] These same debates that had been presented both to Congress and the Court were repeated throughout the passages of the Sixteenth Amendment and the 1913 Act.[226]

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215. JOHN D. BUENKER, THE INCOME TAX AND THE PROGRESSIVE ERA 382 (1985).
216. 26 CONG. REC. app. 413 (daily ed. Jan. 29, 1894) (statement of Hon. McMillin).
217. PAUL, *supra* note 17, at 39.
218. *Id*. at 37.
219. *Id*. at 38.
220. *See generally* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *modified*, 158 U.S. 601 (1895).
221. *Pollock*, 157 U.S. at 450, 452, 497–98, 532.
222. *Id*. at 596 (Field, J., concurring).
223. *Pollock*, 158 U.S. at 684 (Harlan, J., dissenting).
224. *Id*. at 695 (Brown, J., dissenting).
225. *Id*.
226. *See* PAUL, *supra* note 17, at 71–109 (discussing the history of taxation in the

Those opposed to income taxation recognized that income taxation is an affront to private property, which is an American constitutional guarantee. Progressive income taxation in particular can affect the distribution of wealth which clearly limits the right of property which, in the words of the Declaration of the Rights of Man and the Citizen, is an "inviolable and sacred right."[227]

It is significant that the Sixteenth Amendment was the first change to our Constitution since the Civil War amendments. The American people do not amend their Constitution often. Up until that time, the object of the Constitution was to secure the democratic revolution, which established the freedom and equality of man as political man, as citizen. However, the original Constitution was not complete. In order to ensure certain liberties, the first ten amendments were added. In order to stamp out the inequity of slavery upon which the original Constitution was in part based, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted. In order to make America more democratic and extend participation in the body politic, the Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments were passed.[228]

In a democratic society, political equality does not mean economic equality. Civil society brings with it the reality of tremendous economic inequality. An income tax is aimed at bridging the gap between political and economic life. Progressive taxation subjugates the individual's free will to accumulate property to the societal interest in equitable taxation and in the redistribution of wealth. Thus, the historical context, the legislative history of income taxation, and the provisions of the 1913 Act itself, in particular its progressive features, all attest to the conclusion that the aim of the American people and Congress was to collect income in such a manner as to achieve distributive justice. Indeed, in terms of economic inequality it has been stated that "[b]efore the era of entitlements [the income tax] was the only direct way to address the class gap."[229] Thus, whereas the Constitution guards and fosters the potential of the American democratic revolution, the Sixteenth Amendment guards and fosters the potential of the American economic social revolution. Whereas the Constitution holds out the promise of greater

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United States and events leading to the adoption of the Sixteenth Amendment).

227. LA CONSTITUTION DU 1789, DECLARATION DES DROITS DE L'HOMME ET DU CITOYEN art. 17 (Fr.), *reprinted in* ERIC CAHM, POLITICS AND SOCIETY IN CONTEMPORARY FRANCE (1789–1971): A DOCUMENTARY HISTORY (1972).

228. U.S. CONST. amend. XVII (democratic election of senators); U.S. CONST. amend. XIX (women's suffrage); U.S. CONST. amend. XXIV (abolition of poll tax); U.S. CONST. amend. XXVI (franchise for eighteen-year-olds).

229. *See* STANLEY, *supra* note 52, at 244.

political equality, the Sixteenth Amendment holds out the promise of greater social and economic equality.

VII. EXPANSIVE INTERPRETATION OF TAX STATUTES IN THE CONTEXT OF MODERN APPROACHES TO STATUTORY INTERPRETATION

The purpose of Congress and the American people was clear, and modern interpretation recognizes that congressional purpose is relevant to statutory interpretation. Moreover, modern interpretation recognizes that legislative history may be used to determine that purpose. Where schools of interpretation differ is on the question of appropriate use. By examining the reasons underlying the different approaches in the context of income taxation, one can see that only certain approaches reflect the core values of a democratic society.

A. Textualism and the Heritage of Formalism

Textualists are the present-day representatives of traditional literal statutory interpretation.[230] They embrace the concept that the members of the judiciary are the faithful agents of the legislature whose task is to carry out the legislative design, not create one of their own.[231] They claim to be law declaimers, not lawmakers. They share with other schools the notion that what they need to determine is congressional intent. To textualists, intent is "'objectified' intent—the intent that a reasonable person would gather from the text of the law."[232]

Strong adherence to the words of the text is an important principle of statutory interpretation. Textualists justify their strong attachment to linguistic construction with their conception of the federal judiciary's appropriate role in a country governed by a written constitution that establishes the separation of legislative, executive, and judicial powers.

Lawmaking belongs to the legislature; law interpretation belongs to the courts. Interpretation is a process of declaring and elaborating the

230. Representative examples of textualist scholarship include, for example, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986–87).

231. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989).

232. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

written text in its application to the resolution of the parties' problems. Congressional intent alone must govern the outcome, but no matter how often textualists may look at other sources for meaning, they profess a strong commitment to the actual words used in the text.

Textualists see statutes not as policy, but as politics. They understand congressional intent as the sum of the individual intents of all the legislators voting in favor of the act, and they assert the unknowability of the individual motivations of the legislatures.[233] When dealing with the Constitution, the problem of the sum of the individual intents of those responsible for its adoption or amendment is compounded. Thus, the impossibility of determining the lawmakers' intent robs judges of justification for going beyond the text to discover it.

Textualists found this methodology on their conception of the constitutional framework for legislation and the checks this framework places on the role of the judiciary. Legislation is the result of bicameralism and compromise.[234] Federal legislation must go through two separate divisions, the House of Representatives and the Senate. Representation in the Senate favors smaller states. Thus, politics and the legislative process are a process of compromise; legislatures achieve what they can even if it is not all that the majority wants. Statutes do not enact broad policies, but instead specific compromises. Strong adherence to the text promotes the strength of political minorities in the process. The minorities involved are not those traditionally discriminated against, like African-Americans, non-Christian religious groups, or immigrants, but rather Americans resident in smaller states. The result is that textualists find the central core of our constitutional system in its opposition to democracy.

Whether or not this rationale is a correct reading on our constitutional structure, the textualist rationale does not apply to the concept of income. The language of the 1913 Act gives absolutely no indication that the concept of income represented a compromise in principle. Income was all "gains, profits, and income . . . of whatever kind and in whatever form paid . . . from any source whatever."[235] Moreover, amendments to the Constitution affect the constitutional structure of our society. The people spoke through the Sixteenth Amendment. Income taxation would not be limited by a constitutional scheme of tax apportionment based on nondemocratic states' rights that thwarted the people's desire for social reform.

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233. *See* Manning, *supra* note 41, at 19.
234. *See id*. at 71.
235. Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167.

B. Textualism, Purposivism, and Intentionalism: The Use of Concepts, Standards, and Principles

Most theories of interpretation recognize that statutes with a high level of detail require courts to adhere to more conventional approaches to interpretation unless such an approach produces an absurdity. But purposivists and textualists alike recognized that literalism may not be what Congress intends and that there is room for more dynamic court rules: "When flexibility is more crucial than precision . . . Congress is free to legislate in more open-ended terms."[236] Roscoe Pound described the distinction herein as between rules, which allow for little if any judicial discretion, and precept elements, which act as "guides to judicial decision and administrative action."[237] Pound includes concepts and standards as precepts principles.[238] Where Congress uses concepts, principles, or standards, as opposed to rules, even textualists recognize a more expansive form of interpretation relying on purpose.[239]

The difficulty for textualism in acceptance of these generalities is in the application. It might ultimately make little difference whether income is a rule or a precept because it appears that even the use of precepts cannot contradict the conventional meaning of a word.[240] A textualist requires that the meaning of the term "income" would be that of "a skilled, objectively reasonable user of words."[241] As Justice Scalia has stated, "[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny."[242]

Thus, modern textualists might very well have agreed with the early Supreme Court's narrow approach to income. "Income" was a word of fixed and determinate content; its meaning was that which most people would agree to at the time. This is the meaning of the lowest common denominator. However, such a narrow definition contradicts constitutional and congressional purpose and shows little respect for congressional legislative power.

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236. Manning, *supra* note 41, at 108.
237. ROSCOE POUND, OUTLINES ON LECTURES ON JURISPRUDENCE 76 (5th ed. 1943).
238. *Id*.
239. Manning, *supra* note 41, at 108.
240. *Id*. at 107.
241. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).
242. Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

Is income a precept or a rule? In common parlance, one speaks of the concept of income, not the rule of income. Hart and Sacks described a rule as "a legal direction which requires for its application nothing more than a . . . determination of *fact*."[243] Hart and Sacks recognized that there are different kinds of words used in statutes. Some words are "small and precise, . . . referring to more nearly regular patterns of experience[s]."[244] Others "are very large ones, on a high level of abstraction, carrying a very broad delegation of power."[245] A standard "requires a comparison of the quality or tendency of what happened in the particular instance with what is believed to be the quality or tendency of happenings in like situations."[246] Standards govern the resolution of problems by relating acts to principles or models of reasoning. Concepts, as abstractions or generalized ideas, should be viewed legally in the same way as standards and principles.

One knows that income is a concept with the possibility of development because both the American people, through the history of their struggle for reform, and Congress, through its legislative history, have told us that income tax was chosen for its manifestation of principle. Income tax establishes a principle of fair and just taxation based on the principles of one's ability to pay. This leads to redistributive justice accomplished directly through collection and indirectly by the provision of an elastic and productive system of revenue. These fundamental ideological truths, established through constitutional amendment and statute, are the motivating force which can only be given recognition by developing income as a concept in accordance with these principles.

The use of concepts, standards, and principles confers considerable discretion on the judiciary, and hence, lawmaking power of sorts. Textualists, in repudiating this role, reach a result that could not be more contrary to the design and purpose of the law. By asserting exclusive legislative lawmaking, legislative power is undermined by restricting the various means of accomplishing legitimate constitutional tasks. Purposivist interpretation, on the other hand, aims at molding legislation according to the teleology of congressional aim and purpose. The purposivist approach can justify discretionary lawmaking power in the branch formally unaccountable in the democratic process. Thus, the different schools expose the dilemma: Can there be a democratic judicial methodology in the United States?

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243. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 139 (1994).
244. *Id*. at 140.
245. *Id.*
246. *Id.*

It is clear that the Warren Court's approach to income in *Glenshaw Glass* embodies such an approach by treating income as a concept with the potential for development. Examining the parameters of judicial discretion through consideration of the English-American-Roman doctrine of the equity of the statute exposes a democratic justificatory basis for this approach.

C. The Anglo-American Doctrine of the Equity of the Statute

Since the time of James Landis, the doctrine of the equity of the statute is one that many scholars have evoked to justify judicial activism in dealing with statutes.[247] The doctrine's precepts are intertwined with modern interpretation and justifications for judicial discretion. John Manning has written a well-documented article that asserts that the case for this doctrine's survival and appropriate use as part of American judicial method is suspect, both historically and as a matter of the judiciary's constitutional power.[248] Manning is only partially correct. While one aspect of the doctrine, negative equity, is incompatible with our form of democratic government, the other form, positive equity, is compatible.

One of the oldest and best statements on the equity of the statute is found in Plowden's note to *Eyston v. Studd*.[249] He stated that "equity . . . enlarges or diminishes the letter" of the law in accordance with its sense and reason.[250] Negative equity, or the power to limit the natural meaning of the words of a statute, is clearly based on the view that the legislature could not have intended absurd or harsh results that are outside or that do not advance the statutory purpose.[251]

This expression of the equity of the statute doctrine in the least intrusive form of its negative aspect is compatible with textualism. Pure textualism will only abandon the obvious interpretation where there is a plausible alternative and the defect in the obvious construction is extreme. Both textualism and the equity of the statute doctrine can

247. *See generally* James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930) (discussing the importance of courts' attempts to give effect to the legislature's intent when interpreting statutes).

248. *See generally* Manning, *supra* note 41 (arguing that the English equity of statute doctrine failed to survive structural innovations that differentiated the U.S. Constitution from its English common-law ancestry).

249. Eyston v. Studd, 75 Eng. Rep. 688, 695, 699 (K.B. 1816).

250. *Id.* at 695.

251. *See* Comm'r v. Brown, 380 U.S. 563, 571 (1965); *see also* Manning, *supra* note 41, at 22, 32.

evaluate statutes, however, in terms of fundamental principles of justice outside the statute and limit statutes by these principles where they conflict. The equity of the statute doctrine justified such use on the conviction that there were immutable natural law principles that statutes must adhere to. Textualists usually conclude that only the Constitution provides principles of justice that control congressional acts.[252] But even textualists find deeply embedded principles to check statutes under the principle that Congress must be understood as acting in terms of the context of these principles of justice.[253]

Modern theory no longer relies on natural law justification. However, any generally derived standard of morality, as distinguished from one derived from the Constitution or a statute, is simply a new natural law justification that should have no force in our legal system to restrict congressional action. It is simply the judges' conceptions of what they believe to be accepted principles of morality, politics, or convenience that impose restrictions on the democratically elected lawmaker in the name of higher authority. The only authority higher than Congress is the Constitution.

Turning to Plowden's description of the equity of the statute, one sees that the language does not necessarily support a free-ranging judicial power to limit the scope of statutes by discovered principles outside specific constitutional requirements. It is the sense and reason of the statute that is the context for the exercise in the discovery of statutory meaning, not principles found outside legislative purpose. Thus, limiting meaning by an equitable negating power can be regarded as a fulfillment of legislative intent only if it is in accordance with the legislative aim and purpose. This sense of equity reflects its roots in Roman law.[254]

D. Roman Civil Law Analogical Development of Statutes

In the *Digests*, this rule of interpretation was stated by Paulus as "[b]ut what has been received into law contrary to the reason of the law is not to be carried out to its consequences,"[255] and by Iulianus as "[i]n cases where rules have been laid down contrary to the reason of the law, we cannot follow the rule of law."[256] In the Roman and modern civil-law tradition the reason of the law is the aim and purpose of the statute itself.

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252. *See* Manning, *supra* note 41, at 106–07.

253. Justice Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1914 (1999).

254. *See* Manning, *supra* note 41, at 30 & n.124.

255. ROSCOE POUND, READINGS IN ROMAN LAW AND THE CIVIL LAW AND MODERN CODES AS DEVELOPMENTS THEREOF 15 (2d ed. 1914).

256. *Id.*

The restriction of statutory scope is only justified on the basis of legislative objective, not principles discovered outside the legislative scheme. This is the traditional view of the civil-law tradition discussed by Salkowski, who severely limits this conception as follows:

> On the contrary, restriction of a statute according to its ground (*cessante legis ratione cessat lex ipsa*), to be distinguished from restrictive interpretation, is not allowable; that is, the application of a statute will not be prevented by the fact that we can find no inner basis for it, whether it appears irrational (unreasonable or inconvenient), or the circumstances for which it was designed have changed, or the *ratio* (motive or purpose) of the rule may not fit the particular case in hand.[257]

Traditional interpretation in the civil-law tradition is restrictive with respect to statutes that have been written too broadly, which is the civil-law form of our absurdity doctrine. Thus, like textualists, traditional civil-law doctrine rejects the equity of the statute's power to limit legislative acts in accordance with equitable principles of justice.

As noted previously, Manning has made an argument for the proposition that the equity of the statutes doctrine was incompatible with the new American constitutional system, which relied on the central concept of separation of powers. This view is amply justified historically when applied to negative equity. The French Revolution also produced a new regime and, in enacting the Civil Codes, it too considered the roles of legislatures and courts and the issue of judicial power and equity. Portalis, the spokesperson for the government, declared that equity under the new regime did not include the power to dispense with, or limit, statutes. He was reported as saying:

> One of the orators has pretended that we were giving to the judges a power denied by the Constitution. 'I think,' he has told us, 'that we have no tribunals of equity that may dispense with the statutes. There is a court of equity in England; in Rome the prater was the judge of equity; in France the King had the right to give dispensation, and the *Parlemens* often deviated from the letter of the statute. But, among us, the calling of the judge is confined to the faithful application of the statutes.[258]

Thus, the arguments against the negative application of the equity of the statute doctrine are the arguments of the French and American Revolutions resisting the power of judges to limit the democratic voice by discovering principles of natural law or justice outside the statute.

257. *Id*. at 19 (quoting SALKOWSKI, INSTITUTIONEN § 5).
258. I JEAN-GUILLAUME LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 480, 481 (1827).

This democratic starting point establishes the common sense proposition that statutes declaring norms do not contain an implicit power to suspend the force of these very norms by providing to the judiciary a general negative capability of undoing congressional acts.

The Supreme Court's early interpretation of income reflects this consequence. Literal interpretation may be negative equity by another name. It may accomplish much the same thing by limiting possible meanings. By selecting a limited meaning in *Eisner v. Macomber* from among various possibilities, the Court indirectly conformed the text to its view of the aims and purposes of the statute and the Sixteenth Amendment. Literal linguistic interpretation can conceal application of negative equity, which is an affront to the constitutional structure under which the judge is the faithful agent of the legislature. Thus, a rejection of the equity of the statute by formalism may be no more than the rejection of positive equity, the beneficial aspect of the doctrine.

Negative equity is the power to dispense with congressional design based on principles outside the statute's context. Positive equity is the power to affirm congressional design. Positive equity authorizes judges to elaborate, develop, and extend the statute's scope to cover problems not apparently covered by the written words. This is an aspect of classic purposivist interpretation, the ability to develop the statute in accordance with its aim or purpose. Though textualists strictly contain the doctrine, even they recognize possible grants of gap-filling authority to administrators and courts.[259]

Positive equity is thought to comply with the notion that the legislature is the lawmaker. Since Roman times, the perception has been that the courts merely carry out the legislature's intent. Iulianus reported: "Neither statutes nor *senatus consulta* can comprehend all points one by one, but when in any case their intent is clear the magistrate ought to proceed by analogy and thus declare the law."[260]

The French, notoriously adverse to judicial discretion at the time of their revolution, nevertheless adopted positive equity of the statute as a central tenant of their civil codes.[261] While negative equity was perceived as a power denied to judges by their constitution, positive equity was not.[262] The reason that elaboration or extension is compatible with the legislation's power over lawmaking is that the object of such "genuine interpretation is to discover the rule which the law-maker intended to establish."[263] Pound distinguished such genuine interpretation, where

259. Manning, *supra* note 41, at 21.
260. POUND, *supra* note 255, at 14 (quoting Digest I, 12 (Iulianus)).
261. *See* DAVID, *supra* note 146, at 158–59.
262. LOCRÉ, *supra* note 258, at 481.
263. Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

the judge tries to discover the legislative intent from the purpose found in the context and history of the act, from spurious interpretation, where the judge tries to determine that intent by assuming "the law-maker thought as we do on general questions of morals and policy and fair dealing."[264] Genuine interpretation answers the demand of democratic society for the judiciary to be true to the authentic lawmaker, the legislature.

The Roman principle of the analogical development of statutes, which seeks to treat the unanticipated case similar to that which the statute explicitly provided for, is also the basis for the English doctrine of the equity of the statute. Henrici de Bracton remarked, "Equity is the bringing together of things, that which desires like right in like cases and puts all like things on an equality. Equity is, so to speak, uniformity, and turns upon matters of fact, that is, the words and acts of men."[265] This is the principle of analogy, which is "a principle of justice conceived as proportion."[266]

VIII. THE PRINCIPLED DEVELOPMENT OF THE CONCEPT OF INCOME: PURPOSIVIST INTERPRETATION AND INTENTIONALISM UNITED

Income is a concept informed by principle and not a rule. This premise suggests that the content of the norm cannot simply be explained or declared as a matter of linguistic interpretation; it is greater than the collective unknowable thoughts of the individual legislators or the common understanding of that term. For the common understanding of a broad concept like income is not precisely knowable. Moreover, the debates in politics and economics show that the word "income" did not have a fixed or predetermined meaning.

Thus, the jurisprudence of income taxation allows for the development of the concept of income by analogy. Simply put, the legal concept is developed through judicial method in accordance with Congress's policies and principles. This process is similar to an aspect of the English equity of the statute. It is fundamentally the Code-based civil-

264. *Id.* at 381.

265. 2 HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 25 (George E. Woodbine ed., Samuel E. Thorne trans., 1968).

266. Patrick Nerhot, *Introduction to* LEGAL KNOWLEDGE AND ANALOGY: FRAGMENTS OF LEGAL EPISTEMOLOGY, HERMENEUTICS AND LINGUISTICS 6 (Patrick Nerhot ed., 1991).

law tradition of the analogy of a law whereby the statutory text is employed through analogy to provide for the unanticipated case.

The choice of the word "unanticipated," and not the words "unprovided for," is significant. New developments were provided for because Congress chose a concept governed by principle and not simply a rule. The principle established by Congress and the American people and the legal method for its determination allows for historical development of the law in a nonarbitrary fashion.

Thus, the legal imperative contained in the word "income" is an instruction to supply content to the norm in order to effectuate these purposes. It is the plan of both Congress and the American people that income be construed to effectuate the just principle that people should be taxed in accordance with their ability to pay and in accordance with their command over resources. Thus, while specific changes in economic behavior, legal forms of investments, and ownerships may not have been anticipated by the American people and Congress, they were provided for because Congress instructed the people to pay tax on their income, a concept that unfolds in light of the principles of ability to pay and distributive justice. As a legal form, income invokes a command to develop its content analogically. This is precisely what happened in the assignment of income cases[267] and in *Glenshaw Glass*. This relation between purpose and the meaning of the term "income" was astutely put in the early years of taxation by Judge Sternhagen in *Hawkins v. Commissioner*: "[I]t is conceivable that . . . the income tax is primarily an application of the idea of measuring taxes by financial ability to pay, as indicated by the net accretions to one's economic wealth during the year . . . ."[268] Economist Henry Simons expressed this approach even more instrumentally and abstractly when he suggested, "[income's] meaning may be sought by inquiring what definition would provide the basis for most nearly equitable levies."[269]

This suggests that the interpretation of income tax law in America presents an important development in the history of jurisprudence. Traditional Anglo-American jurisprudence does not allow for the development of tax statutes through analogical reasoning or positive equity. Similarly, analogical development of statutes was only applied by the legal method of Roman or civil law to general laws.[270] Public laws like tax and criminal laws did not permit extension due to the general civil-law doctrine that laws imposing disabilities on individuals

267. *See* cases cited *supra* note 167.
268. 6 B.T.A. 1023, 1024 (1927).
269. SIMONS, *supra* note 116, at 42.
270. *See* Mitchell Franklin, *Equity in Louisiana: The Role of Article 21*, 9 TUL. L. REV. 485, 500–01 (1935).

were narrowly construed.[271] The American experience with income taxation has been different. Americans started with a general, comprehensive code of income tax law. Over the years, the Code has been interpreted in accordance with the evolving principle that the social interest in the just and comprehensive exercise of the public power to tax, which was established through constitutional amendment, justifies analogical development of the text.

Often, the debate over the appropriate use of purpose in statutory interpretation is examined in terms of the differing approaches to what courts should do when "a statutory text fits poorly with the purpose apparently underlying its enactment."[272] In such cases, purposivists believe that literalism must give way to purpose; the textualists favor linguistic interpretation enforcing "the conventional meaning of a clear text."[273] However, the Court's present approach to income indicates that the intended meaning of income and the purpose underlying the Act are not in conflict. That should not be surprising because concepts reflect their underlying purposes and principles. Thus, because the purpose derived from the forces that brought the legislation into being, purposivism and intentionalism united.

Concepts, standards, and principles are dynamic by their very nature.[274] They can develop to provide general premises for judicial reasoning in order to "supply new rules, to interpret old ones, [and] to meet new situations."[275] This understanding of principles provides a clear break with the understanding of textualists. Though some recognize that principles are open-ended, their conception of the faithful agent hypothesis limits their consideration to the meanings and knowledge of those responsible for the legislation.[276] The dilemma is whether one can allow for development and still remain true to legislative intent. When the lawmaker enacts standards and makes clear its aim and purpose, courts become truer agents of the legislature when they effectuate these policies and not when they turn their backs on these policies and limit

271. *See* DAVID, *supra* note 146, at 158.
272. Manning, *supra* note 41, at 3.
273. *Id*. at 4.
274. Roscoe Pound described three categories of norms other than rules: principles, concepts, and standards. POUND, *supra* note 147, at 56–57. He described conceptions as "more or less exactly defined types." *Id*. at 57. The concept of income is a type that should be developed in accordance with its underlying principles.
275. *Id*. at 56.
276. *See* Manning, *supra* note 41, at 109, 125.

legislation's effectiveness to a limited time and place. The key is whether meaning is to be derived solely from the historical knowledge of the time, or whether there is elasticity to the concept capable of taking into consideration new knowledge to meet new situations and to reconsider old. Textualists assert that certainty in the law is a fundamental principle of justice that favors the individual and the status quo, a principle of continuity that restricts the development of social legislation. Whereas standards like the "reasonable man" in torts or "good faith" in contracts are acceptable, these areas of private law traditionally have been dominated by the judicial development of common-law principles.

Purposivists relegate certainty to a lesser position that does not have the force to overcome clear congressional purpose in the light of new social relations. This attitude was provocatively summarized by the realist Jerome Frank: "[Y]et law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.*"[277] Concepts, standards and principles create uncertainty. It is neither possible nor desirable to provide a fixed and absolute content to their form. However, their economical expression is the foundation of the two-hundred-year-old success of our Constitution[278] and the ninety-year success of the Sixteenth Amendment and the federal income tax system. Laws limited to particular social conditions cannot pass the test of time. Laws based on principles capable of development can continue to provide the basics for just law. Income remains the basis for our tax system today, which must contemplate a much different economic order. Justice Brennan's lines regarding the Constitution apply with equal force to the Sixteenth Amendment and the Internal Revenue Code: "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[279]

Textualists resist such a role because it grants discretionary lawmaking power to the judiciary. Textualists assert that judicial lawmaking power, outside the historically sanctioned judicial power in private law developed through common-law method, is improper in light of separation of powers. Yet they accept grants of lawmaking powers to the executive

277. JEROME FRANK, LAW AND THE MODERN MIND 7 (Anchor Books 1963) (1930).

278. *See generally* Mitchell Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government:* Griswold v. Connecticut*;* South Carolina v. Katzenbach, 40 TUL. L. REV. 487, 504 (1966).

279. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 GUILD PRAC. 1, 7 (1986).

branch.[280] However, textualists make a critical objection from our democratic society's point of view. They allege that some purposivists authorize judges to substitute their own judgments as to proper policy for that of the legislature.[281]

As clearly pointed out, extensive interpretation does not necessarily need to embrace the substitution of the judiciary's judgment for that of the legislature. The basis for the positive equity of the statute is Roman analogy, which in its modern traditional form asserts: "By analogy we understand the extension of a rule according to its inner basis (*ratio legis*) to analogous cases not foreseen in the expression of the rule, founded upon the internal consistency of the rule . . . ."[282] The analogical method appropriately expounds the legislative design because analogy is based on "a principle of justice conceived as proportion, since what is at the basis of analogy is the principle of universality,"[283] that is, the principle that similar cases should be treated similarly. Because a principle of justice must guide analogical inference, this method justifies historical development without arbitrary departure from the legislative design.[284] Nerhot suggested that "the logical form of analogy is in the last analysis based on a principle of *distributive justice*,"[285] which is the foundation principle of the Sixteenth Amendment and our tax law. The American people reformed their Constitution to provide for taxation based on adherence to the principle of taxation in accordance with ability to pay to create democratic economic justice. Thus, the guiding principle of justice is that the analogical development of the concept of income is that of the lawmakers, Congress and the American people.

The Supreme Court in *Glenshaw Glass* established the genuine legal role of the legislative text by expansive development of the concept of income. This treatment is justified in terms of constitutionally required deference to the legislature where the analogical unfolding of the text produces the real possibilities of the *lawmaker's* text. It is only legitimate interpretation when it reflects the ideologies that undergird congressional

280. *See* Manning, *supra* note 41, at 21.
281. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 116 (1994); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522–23 (1998); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 585 (1988).
282. POUND, *supra* note 255, at 19 (quoting SALKOWSKI, INSTITUTIONEN § 5).
283. Nerhot, *supra* note 266, at 6.
284. *Id.*
285. *Id*.

enactment of progressive income taxation.

To recognize that the norm is form is to understand that the content of law is, at least in part, ambiguous. Justice Frankfurter concluded, "Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding."[286] Frankfurter's ambiguity is the indeterminacy of the standard Congress has chosen.

The indeterminacy of form can lead to different possible interpretations, especially at the edges. The early Court, employing a textualist-like approach, imposed a historical concept of income on the Code that was out of sync even with the thought of the times and with legislative practice. This is an example of the dominance of legal method or form over the content or substance of the law. However, purposivists recognize that teleology should dominate legal method. In other words, the content and command should be developed in terms of the law's purpose. Traditional Roman extensive interpretation and traditional doctrine of equity of the statute does just that. Some purposivists enlarge judicial power by making provision for statutory development in accordance with the judge's conception of the appropriate purpose for the statutes substituted for that of the legislature. This is one form of dynamic purposeful interpretation, as described by Eskridge. It is invoked "whenever the perspective of the interpreter departs from the perspective of the statute."[287] The judge perceives a contradiction between original intent and current societal goals. This encourages the judge to displace the original purpose with his new perspective. The interpreter replaces the ideology of Congress with his own.[288] The judge's purpose, not that of Congress, thus controls the outcome. As one author has expressed, income could mean anything depending on one's concept of equity.[289] These views attest to the tremendous power of legal method when it is freed from the purpose of the lawmaker. Legal method as form is a priori; content as substance is a posteriori.[290] Legal method controlled by newly conceived purposes transforms lawmaking from a legislative prerogative to a judicial one.

Pound put this point forthrightly by branding this procedure as

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286. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

287. ESKRIDGE, *supra* note 281, at 11.

288. *Id*. at 77.

289. Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 53 (1990).

290. *See* Mitchell Franklin, *Influence of the Abbé de Mably and of Le Mercier de la Rivière on American Constitutional Ideas Concerning the Republic and Judicial Review*, *in* PROSEPCTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 96, 98–102 (Roscoe Pound et al. eds., 1964) (discussing how some scholars justify the hegemony of subjective form or of the a priori over the content or a posteriori).

spurious interpretation or judicial lawmaking.[291] The judge assumes that the lawmaker "thought as we do"[292] and develops the content of the law in a way "which appeals most to our sense of right and justice for the time being."[293] Pound recognized that "the object of spurious interpretation is to make, unmake, or remake, and not merely to discover,"[294] and justifies such judicial legislation "in formative periods by the paucity of principles, feebleness of legislation, and rigidity of rules characteristic of archaic law."[295] Pound's own rationale, however, could hardly justify such liberties with the concept of income.

Principles of justice govern juristic reasoning. Interpretation requires "a value judgment, an assessment of the *ratio* of the norm and of the teleology inherent in it."[296] The value judgments may be those of the statute itself or those of the normative system in general. The teleology may be that of the democratically elected lawmaker or that of the appointed judge.

Democratic society has formally conferred the choice of values on the legislature. Analogical development is "justified only if such development reflects or deepens the policy and aims of the lawmaking or authentic power."[297] Hermeneutic philosophies of interpretation provide a justification for the judge to reinterpret the problem in light of the judge's superior understanding of the problems the judge must face.[298] This is simply a substitution of the judge's preferences of justice for those of the authentic power of the legislature.

By enacting the federal income tax, Congress clearly expressed a preference for the principles of societal justice over individual will, for a system based on using state power to change the distribution of wealth. The early Court's legal method limited meanings in opposition to this purpose. The Court's approach, developed over the years, now sees the meaning of the term "income" in terms of this purpose.

Following historical purpose as the principle of justice governing

291. Pound, *supra* note 263, at 381.
292. *Id.*
293. *Id.*
294. *Id.* at 382.
295. *Id.* For a similar view that the doctrine of the equity of the statute had a similarly appropriate place in the pre-Constitution development of American law, see Manning, *supra* note 41, at 113.
296. Zaccaria, *supra* note 10, at 54.
297. Mitchell Franklin, *A Study of Interpretation in the Civil Law*, 3 VAND. L. REV. 557, 563–64 (1950).
298. *See* ESKRIDGE, *supra* note 281, at 4–5.

analogical development aligns the judiciary with the historical forces that created the income tax as a mechanism for economic justice in allocating society's resources. The demands of the American people or of democratic society have not changed over the years from the original intent of income taxation. Departing from original intent in any way by limiting the reach of income taxation to a less comprehensive measure because of a judge's conception of new societal needs would change the statute's meaning in accordance with the undemocratic forces that wish to veer the income tax system away from its progressive foundation to accomplish the preservation of inequitable taxation and the status quo. The ambiguity of legal form or method is at the heart of this struggle. To say that the concept of income is ambiguous is to say that it is not fixed, that is, its meaning must be constantly won.[299] Interpretation is a struggle for meaning in which various forces try to impose their value choices on the content of law. Congress and the American people clearly enunciated the goal of income taxation, which must now be constantly affirmed.

299. DE BEAUVOIR, *supra* note 1, at 129.