NOTES & COMMENTS

MOORE V. UNITED STATES: THE CONSTITUTIONALITY OF THE TAXATION OF UNREALIZED GAINS

by
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Rarely in modern tax jurisprudence does the common adage "nothing is certain except death and taxes" receive a challenge in the highest court in the land. This year, the Supreme Court is considering the most existential question concerning the federal income tax in over a century: what is "income"? The definition of "income" has gone through several developments and adjustments since the enactment of the Sixteenth Amendment. Two taxpayers have reached the Supreme Court to challenge one such aspect of the definition of "income"—whether realization is a constitutional requirement as required by the Sixteenth Amendment. When an accession to wealth over which the taxpayer has complete dominion is not yet clearly realized, should the taxpayers be able to indefinitely defer their gains? Will this new challenge to the federal income tax change the way taxes are treated in the United States? What are the constitutional limits of Congress's taxing power? What would happen to the Internal Revenue Code, and Congress's ability to create new taxes and to fund the government? This Note examines the constitutionality of the Mandatory Repatriation Tax, an alleged direct wealth tax, ongoing litigation in Moore v. United States*, what a possible disposition of this case would mean for other*

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pending "wealth taxes" in Congress, and the future of the federal income tax generally.[1]

INTRODUCTION

The Supreme Court does not frequently hear tax cases, though when it does, it has the effect of worrying practitioners tremendously.[2] Many of the tax cases for which the Supreme Court has granted certiorari have undoubtedly made significant changes in the way practitioners navigate U.S. tax law.[3] The case currently before the Supreme Court is no exception.

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[1] Moore v. United States, 36 F.4th 930 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023). This Note was written before the Supreme Court delivered its disposition of *Moore*. This Note reflects my expectations and predictions as to how the Supreme Court should rule in *Moore*, and how any precedent established in *Moore* may dispose of proposed legislation, if enacted, currently pending in the 118th Congress.

[2] *See, e.g.*, Katherine Loughead, *Growing Number of State Sales Tax Jurisdictions Makes* South Dakota v. Wayfair *That Much More Imperative*, TAX FOUND. (Apr. 17, 2018), https://taxfoundation.org/data/all/state/growing-number-state-sales-tax-jurisdictions-makes-south-dakota-v-wayfair-much-imperative (in response to then-pending case South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)); Samantha Handler, *Supreme Court to Hear Foreign Earnings Tax Case in December*, BLOOMBERG TAX (Oct. 12, 2023, 10:47 AM), https://news.bloombergtax.com/daily-tax-report/supreme-court-to-hear-foreign-earnings-tax-case-in-december (highlighting progressive tax advocates' claims that *Moore* could strike down any future laws that tax wealth).

[3] *See, e.g.*, *Wayfair*, 138 S. Ct. at 2091 (sustaining a state tax "so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State

In fact, the case before the Court in its current term, *Moore v. United States*,[4] is further distinguishable from other tax cases the Court has heard in the last century. Specifically, the question for which the Court granted certiorari is one that is so fundamental to the entire topic of federal tax law that practitioners,[5] prominent members of Congress,[6] and columnists[7] have considered its very presence before the Court an existential threat to the federal income tax, at least in the way practitioners know it today.

Behind the potential reckoning that our tax code may face, the circumstances of *Moore* involve the representative fact pattern seen in many tax cases: (1) a tax provision is signed into law; (2) the taxpayers learn of this new law at or around April of the following year; (3) the taxpayers begrudgingly pay the new tax; and (4) subsequently initiate a refund suit in federal district court. The nuance and consequences in this particular case, however, compound quickly. While the taxpayers' demanded refund would initially cost the United States little, the question posed before the Supreme Court, if answered in the negative, could potentially cost the government nearly $340 billion in revenue.[8] Depending on the Court's disposition of *Moore*, this case may ultimately create long-lasting revenue impacts that could call into question whether the federal government is capable of funding itself at current levels.

The question before the Supreme Court is the following: does the Sixteenth Amendment "authorize[] Congress to tax unrealized sums without apportionment among the states[?]"[9] The question posed is so broad in scope that it has the potential to cause a wide variety of outcomes. Some potential outcomes are innocuous, though some pose consequences not only to the tax that the petitioners are challenging in *Moore*, but also to other taxes imposed without regard to whether a realization event occurs, as well as to legislation that is pending in Congress. Specifically, some decisions could significantly weaken the federal income tax, Congress's ability to tax generally and, consequently, the government's ability to function. Examples

provides"); United States v. Windsor, 570 U.S. 744, 750–52 (2013) (holding the federal estate tax exemption for surviving spouses applies to lawfully married same-sex spouses).

[4] *Moore*, 36 F.4th at 930.

[5] Steven M. Rosenthal, *An Expansive Decision in Moore Case Could Spell Trouble for Our Tax Code*, TAX POL'Y CTR.: TAXVOX (Oct. 10, 2023), https://www.taxpolicycenter.org/taxvox/expansive-decision-moore-case-could-spell-trouble-our-tax-code.

[6] *Id.* (quoting former House Speaker Paul Ryan, who "warned that a 'lot of the tax code would be unconstitutional'" if the Court finds for the petitioners).

[7] Natasha Sarin, Opinion, *The Supreme Court Tax Case that Could Blow a Hole in the Federal Budget*, WASH. POST (Oct. 5, 2023, 7:30 AM), https://www.washingtonpost.com/opinions/2023/10/05/supreme-court-tax-case-moore-government-revenue.

[8] Handler, *supra* note 2.

[9] Petition for Writ of Certiorari at i, Moore v. United States, No. 22-800 (U.S. Feb. 21, 2023).

include how lost revenue could impact the size of the administrative state, the availability of federal programs, or the ability of the federal government to pay its debts.[10]

On one hand, the Supreme Court could determine that, yes, Congress may tax unrealized gains. The reasoning behind this decision, which is also the focus of this Note, is a matter of constitutional and statutory interpretation. Specifically, this Note argues that the Constitution lacks an explicit or readily implied realization requirement, and the statute in question, whether or not it taxes unrealized gains, should be upheld under the principle that Congress's taxing power is broad enough to permit such a tax. Absent any ambiguity, the Supreme Court does not have the discretion to decide otherwise.

On the other hand, as this Note will also discuss, the Supreme Court may adopt a more creative interpretation of the Constitution such that a realization requirement—or some underlying event as to justify a deemed realization—is required before Congress may tax an accrual of wealth. For example, as the petitioners in *Moore* argue, the Sixteenth Amendment's (1) "income" and (2) "from any source derived" language carries with it an implied realization requirement, specifically due to the common meaning of the words "income" and "derive" at the time the Sixteenth Amendment was ratified.[11]

Answering the certified question in the negative could have sweeping policy implications. Former Representative and Speaker of the House Paul Ryan, who oversaw the passage of the tax in question in *Moore*, also remarked that a "lot of the tax code would be unconstitutional" if the Supreme Court approves of the petitioners' theory.[12] And that is not an overstatement—prominent examples of the Internal Revenue Code (the Code)[13] that would be susceptible to post-*Moore* litigation would include the current requirement for securities dealers to adjust their income annually on any gain (or loss) in the value of their inventory.[14] Any situation in

[10] *Cf.* Lucy Hooker, Michelle Fleury & Mariko Oi, *Fitch Downgrades US Credit Rating from AAA to AA+*, BBC NEWS (Aug. 1, 2023, 7:55 AM), https://www.bbc.com/news/business-66379366 (explaining a recent credit downgrade of the U.S. government, prompted by "political brinksmanship" over whether the government would commit to servicing its existing debt obligations; similar concerns would likely arise if the government were to be substantially less capable of generating tax receipts sufficient to offset spending outlays).

[11] Brief for Petitioners at 27–29, Moore v. United States, No. 22-800 (U.S. Aug. 30, 2023).

[12] Rosenthal, *supra* note 6.

[13] Unless specifically indicated, references to the Code will be to the Internal Revenue Code of 1986, as amended. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 2, 100 Stat. 2095 (codified as amended at 26 U.S.C. §§ 1–9834).

[14] 26 U.S.C § 475(a)(2) (also known as the "mark to market accounting method") details:

> In the case of any security which is not inventory in the hands of the dealer and which is held at the close of any taxable year—
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> (A) the dealer shall recognize gain or loss as if such security were sold for its fair market value on the last business day of such taxable year, and
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> (B) any gain or loss shall be taken into account for such taxable year.

which a constructive sale is deemed by statute would also be at risk.[15] Looking ahead, a number of proposals to amend the Code by the president and more progressive members of Congress could be thwarted even before their bills could get their hearing in a committee. One such example is the proposal of the current Senate Finance Committee Chair, Senator Ron Wyden, who in 2021 first introduced his "Billionaires Income Tax," which would apply to taxpayers with more than $1 billion in assets or more than $100 million in income for three consecutive years.[16] Other proposals have been introduced by other members of Congress with similar goals of wealth redistribution and raising funds to pay for important federal programs.[17] Without even the possibility that such policies would survive litigation in federal court—should they ever be signed into law—Congress would essentially be barred from reaching what some economists claim to be "[t]he right solution . . . to avoid an endless inegalitarian spiral while preserving competition and incentives for new instances of primitive accumulation."[18]

This Note will proceed with a discussion of the constitutional foundation of Congress's taxing power, how it has changed through the Sixteenth Amendment, and how application of current law, the legislative history of the Sixteenth Amendment (or lack thereof), and the particular case in *Moore* find conclusively that unrealized gains are certainly within the purview of Congress's taxing authority, should it so choose. This is not without first providing a brief background of the particular tax at issue in *Moore*, as well as the relevant circumstances and applicable area of law in which the Moores found themselves in 2018.

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[15] *See, e.g.*, *id.* § 1259 (detailing constructive sales treatment for appreciated financial positions).

[16] Press Release, S. Fin. Comm., Wyden Unveils Billionaires Income Tax (Oct. 27, 2021), https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax [hereinafter Press Release, Billionaires Income Tax 2021]. Senator Wyden recently reintroduced his Billionaires Income Tax in the 118th Congress. *See* Press Release, S. Fin. Comm., Wyden Leads Democratic Colleagues in Introducing Billionaires Income Tax (Nov. 30, 2023), https://www.finance.senate.gov/chairmans-news/wyden-leads-democratic-colleagues-in-introducing-billionaires-income-tax.

[17] *See, e.g.*, Press Release, Sen. Elizabeth Warren, Warren, Jayapal, Boyle Introduce Ultra-Millionaire Tax on Fortunes Over $50 Million (Mar. 1, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-jayapal-boyle-introduce-ultra-millionaire-tax-on-fortunes-over-50-million (proposing a "2% annual tax on the net worth of households and trusts between $50 million and $1 billion" and a "1% annual surtax (3% tax overall) on the net worth of households and trusts above $1 billion").

[18] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 572 (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013) (advocating for a progressive annual tax on capital).

I. BACKGROUND

A. The Mandatory Repatriation Tax

The Mandatory Repatriation Tax (MRT)[19] is a portion of a significant tax reform package that President Donald Trump signed into law in December 2017, also known as the Tax Cuts and Jobs Act (TCJA).[20] While many taxpayers enjoy the overall benefit of the TCJA's temporary limitations on tax liabilities,[21] not all changes in the TCJA—as will soon be shown—involved tax cuts.

Prior to the passage of the TCJA, U.S. firms that conducted operations overseas were able to "indefinitely postpone paying U.S. tax on foreign income [simply] by operating through a foreign subsidiary and reinvesting the earnings abroad."[22] Corporations triggered U.S. tax obligations only when earnings were sent back (or voluntarily repatriated) back to the United States.[23]

The attention given to the MRT since the passage of the TCJA was to be expected given the sheer amount of wealth held overseas by U.S. corporations.[24] Prior to the enactment of the TCJA, the Joint Committee on Taxation (JCT) estimated that corporations operating abroad amassed approximately $2.6 trillion from their foreign subsidiaries.[25] The JCT further estimates that, between tax years 2018 and 2027, the MRT will raise $338.8 billion in revenue,[26] an amount more than what the Internal Revenue Service (IRS) collected in federal estate, gift, and excise taxes in 2021 and 2022 combined.[27]

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[19] 26 U.S.C. § 965.

[20] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, 2195 (codified in scattered sections of 26 U.S.C.).

[21] *See, e.g.*, 26 U.S.C. § 1(j) (lowering applicable income tax rates through 2025); *id.* § 63(c)(7)(A) (increasing the standard deduction for several filing statuses through 2025); *id.* § 2010(c)(3)(C) (increasing the unified credit for estate tax purposes, as well as gift tax purposes per 26 U.S.C. § 2505(a)(1)).

[22] CONG. RSCH. SERV., P.L. 115-97, ISSUES IN INTERNATIONAL CORPORATE TAXATION: THE 2017 REVISION 11 (2021), https://crsreports.congress.gov/product/pdf/R/R45186/23.

[23] *Id.*

[24] *See Key Elements of the U.S. Tax System*, TAX POL'Y CTR.: BRIEFING BOOK (2020), https://www.taxpolicycenter.org/briefing-book/what-tcja-repatriation-tax-and-how-does-it-work.

[25] Letter from Thomas A. Barthold, Chief of Staff, Joint Comm. on Tax'n, to Kevin Brady & Richard Neal, U.S. Reps. (Aug. 31, 2016), https://waysandmeans.house.gov/wp-content/uploads/2016/09/20160831-Barthold-Letter-to-BradyNeal.pdf.

[26] JOINT COMM. ON TAX'N, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 6 (2017), https://www.jct.gov/publications/2017/jcx-67-17.

[27] *See* INTERNAL REVENUE SERV., PUBL'N 55-B, INTERNAL REVENUE SERVICE DATA BOOK 3 (2022), https://www.irs.gov/pub/irs-pdf/p55b.pdf.

As a result of the passage of the TCJA, U.S. tax law now deems as Subpart F[28] income foreign earnings accumulated (after 1986) as repatriated without the requirement of an actual distribution.[29] The MRT requires a one-time mandatory inclusion of the aforementioned deferred foreign income by U.S. shareholders of controlled foreign corporations (CFC).[30] The applicable rates are as follows:

a. For deferred earnings held in cash, 15.5%; and

b. For other assets, 8%.[31]

If a U.S. shareholder owns at least a 10% of a CFC, that share would fall within the scope of the MRT, and their shares will then be treated under Subpart F, specifically meaning that their pro rata share will be included in their gross income.[32]

B. Taxpayers Impacted by the MRT in Moore

Given the nature and scope of the MRT, taxpayers whose income is derived from completely domestic sources will see no direct change in their tax obligations as a result of the MRT. The same cannot be said for taxpayers Charles and Kathleen Moore (the "Moores" or "petitioners") whose investments abroad caused a triggering of the MRT in their 2017 income taxes.[33]

In 2005, the Moores decided to invest $40,000 in a friend's business, KisanKraft, which supplies tools to small farmers in India.[34] At the time of KisanKraft's creation, the petitioners' investment constituted 11% of the company's "start-up capital."[35] In exchange, KisanKraft gave petitioners a roughly 13% ownership interest in the company's common shares.[36] While the Moores did not participate in the operations or management of the business, KisanKraft proved to successfully turn a profit every year.[37] KisanKraft never distributed any earnings to its

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[28] 26 U.S.C. §§ 951–965 (commonly referred to as "Subpart F"). Subpart F was enacted into law in part to prevent Americans from avoiding taxes by keeping their earnings offshore. This was done in part to tax individuals' pro rata shares of corporations' undistributed income. Subpart F applies to "United States shareholders" of a "controlled foreign corporation." *Id.* § 951(a).

[29] *Id.* § 965(a).

[30] *Id.*

[31] *Id.* § 965(c)(2)(A)–(B).

[32] *Id.* § 951(a)(1)(A).

[33] Moore v. United States, 36 F.4th 930, 933 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023).

[34] *Id.* at 932; *see also About Us*, KISANKRAFT, https://www.kisankraft.com/about (last visited Mar. 30, 2024).

[35] Petition for Writ of Certiorari, *supra* note 9, at App. E ¶ 9.

[36] Brief for Petitioners, *supra* note 11, at 11.

[37] *Moore*, 36 F.4th at 933.

shareholders (including the Moores) and instead reinvested its earnings as additional shareholder investments.[38]

For purposes of §§ 956 and 957, KisanKraft is a CFC. This is due to the fact that it is a foreign corporation majority-owned by citizens of the United States who each own at least a 10% share of the company.[39]

Prior to December 2017, the Moores operated under an understanding that so long as foreign earnings were not distributed back to them from KisanKraft, no tax would be due, unless special circumstances applied.[40] While the Moores' investment was steadily growing in value abroad, the TCJA was enacted into law, which, as described above, changed the tax treatment of their investment in KisanKraft. Specifically, the MRT created an additional tax liability of approximately $15,000 for the 2017 tax year, which was based on their pro rata share of KisanKraft's retained earnings of $508,000 (thus "subjecting them to an additional $132,512 in taxable income").[41] The tax liability was assessed despite the fact that KisanKraft retained all earnings or, in other words, the Moores did not experience a realization event with respect to the $132,512 in taxable income.

The Moores paid the MRT, but filed suit in federal court for a refund, arguing that the MRT violates the Apportionment Clause, Article I, section 9, of the Constitution on the grounds that it imposes an "unapportioned direct tax, rather than an income tax."[42] The district court granted the Government's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).[43] The Ninth Circuit affirmed, holding that the MRT does not violate the Apportionment Clause, and declaring further that "realization of income is not a constitutional requirement."[44] The Supreme Court granted certiorari and will decide in its October term whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the several states.[45]

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[38] *Id.*

[39] *See* Petition for Writ of Certiorari, *supra* note 9, at 3, 5.

[40] *See* 26 U.S.C. § 951(a). A taxpayer who owns at least 10% of a CFC, per Subpart F, could be taxed on a proportionate share of certain categories of undistributed earnings like dividends, interest, and earnings invested in some U.S. property. *Id.*

[41] *Moore*, 36 F.4th at 933.

[42] Moore v. United States, No. C19-1539, 2020 WL 6799022, at *2 (W.D. Wash. 2020).

[43] *Id.* at *2–3 ("Subsequent decisions dealing with foreign income have routinely departed from *Macomber*'s realization standard. . . . There are also numerous contemporary statutory regimes, outside of subpart F, that require the current taxation of unrealized income—none of which have been successfully challenged on *Macomber* grounds.").

[44] *Moore*, 36 F.4th at 936. The Ninth Circuit also held that the MRT does not violate the Fifth Amendment's Due Process Clause. *Id.* at 938.

[45] Moore v. United States, 143 S. Ct 2656 (2023) (mem.), *granting cert. to* 36 F.4th 930 (9th Cir. 2022).

On appeal to the Supreme Court, the Moores primarily argue that the MRT is not a tax on income "in any sense of the word" but is rather a direct tax on property.[46] The Government conversely argues that the MRT is an income tax squarely within the allowable parameters of the Sixteenth Amendment. While the Government concedes that "[r]ealization was a well-established concept when the Sixteenth Amendment was adopted," no reference to realization is made within the plain meaning of the Amendment.[47]

C. Constitutional Origins in Congress's Power to Lay Taxes

Congress's power to tax has its foundation in the Constitution, specifically within the enumerated powers of Article I, section 8, which gives it the "power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[48] While, in many cases, the power of Congress to tax was granted considerable deference and scope,[49] the Constitution and subsequent cases have also identified instances in which Congress applied its taxing power in a way that overstepped its constitutionally-granted power.[50] A powerful limitation in Congress's power to tax also has its foundation in the Constitution, which provides that "[n]o Capitation, or other *direct*, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[51] Despite these few constitutional limitations, the Court more often than

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[46] Brief for Petitioners, *supra* note 11, at 2.

[47] Brief for the United States at 9, Moore v. United States, No. 22-800 (U.S. Oct. 16, 2023).

[48] U.S. CONST. art I, § 8, cl. 1.

[49] *See, e.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796) ("The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government."); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013) ("The [Spending] Clause provides Congress broad discretion to tax . . . ."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012) ("[T]he breadth of Congress's power to tax is greater than its power to regulate commerce . . . .").

[50] *See, e.g.*, Child Labor Tax Case, 259 U.S. 20, 37–38 (1922) (invalidating a child labor tax as both a punitive measure exceeding congressional taxation authority and as intruding on regulatory powers reserved to the states); United States v. Constantine, 296 U.S. 287, 293–94 (1935) (invalidating a federal excise tax on liquor sales as a similarly punitive measure and as contravening the Eighteenth Amendment); United States v. Butler, 297 U.S. 1, 68–69 (1936) (invalidating a tax on agricultural producers in service of a commodity price control scheme as intruding on regulatory powers reserved to the states); *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 573 (noting that while the Supreme Court has "[m]ore often and more recently . . . declined to closely examine the regulatory motive or effect of revenue-raising measures," an exaction enacted by Congress may nevertheless become "so punitive that the taxing power does not authorize it").

[51] U.S. CONST. art I, § 9, cl. 4 (emphasis added).

not endorses a broader scope of Congress's taxing power, particularly because of the difficulties associated with laying taxes under the Articles of Confederation.[52]

This distinction between "direct" taxes (which require apportionment) and "indirect" taxes (which do not require apportionment) had been supported by the Supreme Court prior to 1913. Specifically, in *Pollock v. Farmers' Loan & Trust Co.*,[53] the Supreme Court struck down a tax on income as unconstitutional, reasoning that taxing income from property was the same as taxing property, and is thus a direct tax requiring apportionment.[54]

The Sixteenth Amendment, ratified in February 1913,[55] granted Congress the "power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[56] Passage of the Sixteenth Amendment was in response to the decision in *Pollock*, evident in part by the fact that the plain reading of the Amendment disposes of the apportionment requirement for income taxes.[57] The Amendment does not, however, completely vitiate the Apportionment Clause for other direct taxes.[58]

D. "Clearly Realized," Constitutional Requirement or Convenience?

A common recitation of the definition of "income" can be found in *Commissioner v. Glenshaw Glass Co.*,[59] specifically that income is an "[1] accession[ ] to

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[52] Springer v. United States, 102 U.S. 586, 595–96 (1881) (suggesting that the lack of effective taxing power under the Articles "was one of the causes that led to the adoption of the present Constitution").

[53] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

[54] *Id.* (holding that "taxes on personal property, or on the income of personal property, are likewise direct taxes" requiring apportionment, otherwise the tax is unconstitutional).

[55] *Income Tax Ratified by Delaware's Vote*, N.Y. TIMES, Feb. 4, 1913, at 5.

[56] U.S. CONST. amend. XVI.

[57] *See* 44 CONG. REC. 266 (1909) (statement of Rep. Frederick C. Stevens) ("The decision of Pollock against The Trust Company as to the income tax in the revenue act of 1894 has never been thoroughly satisfactory to the country.").

[58] But the Apportionment Clause has been limited such that a direct tax is "only capitation taxes [taxes paid by every individual regardless of other circumstances, also known as a "head tax"] . . . and taxes on real estate." Springer v. United States, 102 U.S. 586, 602 (1881); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) ("Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax."). Commentators have consistently advocated for courts to narrowly interpret "direct" taxes. *See* Letter from Thomas A. Barthold, Chief of Staff, Joint Comm. on Tax'n, to Richard E. Neal, U.S. Rep. (Oct. 3, 2023), https://taxprof.typepad.com/files/jct-on-moore-1.pdf.

[59] Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955).

wealth, [2] *clearly realized*, and [3] over which the taxpayers have complete dominion."[60] The crux of the case in *Moore* is to what extent "clearly realized" means, and on what basis it finds its authority.

The connection between income and realization was first established in great detail in *Eisner v. Macomber*.[61] There, the Court held that the taxpayer's receipt of pro rata stock did not qualify as income under the Sixteenth Amendment, reasoning that receipt of such stock "[did] not alter the preexisting proportionate interest of any stockholder or increase the intrinsic value of [each share]."[62]

The realization requirement outlined in *Macomber* stands for the proposition specifically that a gain will not be taxed (and, alternatively, a loss cannot be deducted) until there has been an event that occurs such that the event severs the gain from capital from which it derives.[63] Similarly, the Code adopts this proposition with respect to common sources of income, such as in § 1001(c), where "the entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized."[64]

As will be discussed later, the constitutional grounds upon which *Macomber* rested are shaky at best. Connecting to the case in *Moore*, petitioners argue there exists a constitutional realization requirement, found in the plain language of the Sixteenth Amendment.[65] While the Sixteenth Amendment exempts the apportionment requirement for "taxes on incomes, from whatever source *derived*,"[66] the petitioners argue that—particularly from the use of the word "derived"—the Sixteenth Amendment exempts the requirement to apportion the tax for income for which a realization event has occurred. In other words, the *Moore* petitioners claim that the Sixteenth Amendment requires realization.[67]

The petitioners in *Moore* are not alone in fighting against the Ninth Circuit's position that realization of income is not a constitutional requirement. The First Circuit has noted realization as a requirement, citing *Glenshaw Glass*.[68] The Fourth Circuit has suggested that the word "derive," either in its common meaning or its

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[60] *Id.* at 431 (emphasis added).

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

[62] *Id.* at 210–11.

[63] *See id.* at 207 ("Income may be defined as the gain derived from capital . . . ." (quoting Doyle v. Mitchell Bros Co., 247 U.S. 179, 185 (1918))).

[64] 26 U.S.C. § 1001(c).

[65] Brief for Petitioners, *supra* note 11, at 16.

[66] U.S. CONST. amend. XVI (emphasis added).

[67] Brief for Petitioners, *supra* note 11, at 26–27.

[68] *See* Quijano v. United States, 93 F.3d 26, 30 (1st Cir. 1996).

meaning as used in the Sixteenth Amendment, is synonymous with the term "realize."[69] With respect to *Moore*, a collection of dissenting judges have also raised the issue in the Ninth Circuit's denial to hear the case en banc:

> The Sixteenth Amendment thus struck a delicate balance for federal taxing power—freeing Congress from the unwieldy requirement of apportionment, but only for taxes on "incomes." Nothing in the Sixteenth Amendment relieved Congress of its duty to apportion other forms of direct taxation, such as a tax on property interests.
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> Now, more than a century after its ratification, our court upsets the balance reached by the people. We become the first court in the country to state that an "income tax" doesn't require that a "taxpayer has realized income" under the Sixteenth Amendment. Instead, we conclude that the Sixteenth Amendment authorizes an unapportioned tax on unrealized gains because the "realization of income is not a constitutional requirement." . . .
>
> Neither the text and history of the Sixteenth Amendment nor precedent support levying a direct tax on unrealized gains. Ratification-era sources confirm that the prevailing understanding of "income" entailed some form of realization.[70]

Judge Bumatay addresses key guidelines for the proper interpretation of the Sixteenth Amendment, something which cases like *Macomber* do not do. In the next Part, this Note will analyze the text and history of the Sixteenth Amendment as well as precedent relating to direct taxation on realized gains. Absent any constitutional limitations on Congress's power to tax unrealized gains, this Note proceeds to search deeper into statute and analyze whether federal courts have a role to play in the creation of limitations via federal common law.

II. ANALYSIS

Even though the Court has tended to dispose of cases in favor of the government,[71] the Court has also held, such as in *Macomber*, that the Constitution presents limits to Congress's taxing power. Here, as discussed, the Ninth Circuit and the petitioners in *Moore* have lifted two contrasting positions about the scope of the Constitution, specifically whether the Constitution imposes a realization requirement.

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[69] *See* Solomon v. Cosby (*In re* Solomon), 67 F.3d 1128, 1133 (4th Cir. 1995) ("Income is . . . derived, that is, received or drawn by the recipient for his separate use, benefit, and disposal." (quoting *Income*, BLACK'S LAW DICTIONARY (5th ed. 1979))).

[70] Moore v. United States, 53 F.4th 507, 507–08 (9th Cir.), *denying reh'g en banc to* 36 F.4th 930 (9th Cir. 2022) (Bumatay, J., dissenting) (internal citations omitted).

[71] *See supra* note 49 and accompanying text.

Macomber should not be construed to suggest that the Constitution requires that a gain must be realized before it can be considered income for federal income tax purposes. This Part will also consider the alternative in which the Supreme Court disposes of *Moore* in favor of the petitioners and will also demonstrate the implications of such a disposition by applying each rule to existing provisions of the Code, as well as proposals to amend the Code.

A. The Sixteenth Amendment Does Not Require Realization

This would not be the first time in which the Supreme Court has interpreted an amendment to the Constitution in a manner that goes beyond its plain meaning.[72] Here, the Supreme Court should not give the Sixteenth Amendment the same treatment.

First, Congress's taxing power has materially changed in a way that goes beyond what the Founders originally intended, or at least what the Supreme Court in *Pollock* thought the Founders intended.[73] This is largely due to the fact that, despite the original words of the Constitution having laid out in some detail the limitations of Congress's taxing power, the Sixteenth Amendment, enacted in 1913, materially changed those limitations, therefore outrightly—yet legitimately—thwarting the original language of the Constitution and supplanting the original intent of the Founders to establish Congress's taxing power with one that should necessarily include an interpretation consistent with the time in which the Sixteenth Amendment was drafted and ratified.[74] When the Court decided *Pollock*, the interpretation that an income tax was a direct tax requiring apportionment could have reasonably been

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[72] The Fourth Amendment, for example, is now replete with controversial interpretations of what constitutes a "search" in situations not replicable at the time of the Amendment's drafting and therefore necessarily beyond the plain meaning of the Amendment's text. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding police flyovers at 1,000 feet were not a search); Florida v. Riley, 488 U.S. 445, 450 (1989) (same); Lee v. United States, 343 U.S. 747, 754–55 (1952) (finding informant transmitting private conversation in real time to officers via secret microphone was not a search); Riley v. California, 573 U.S. 373, 386 (2014) (holding a warrant was required before searching contents of mobile phones). The Eleventh Amendment, according to current interpretation, now simply means something entirely different from its plain meaning. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991))).

[73] *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. STATE L.J. 1057, 1060 (2001) ("The [Sixteenth] Amendment was a response to *Pollock* . . . .").

[74] *See* C. HERMAN PRITCHETT, CONSTITUTIONAL LAW OF THE FEDERAL SYSTEM 37 (1984) (arguing that the Constitution's meaning should not be fixed in time, but that it instead should accommodate modern needs).

correct, despite the outrage it caused at the time.[75] The Apportionment Clause, after all, was written at a time when states—especially those with relatively larger populations or larger amounts of land—were worried about taxes falling disproportionately on them relative to smaller or less-populated states.[76]

Second, the intent of the drafters of the Sixteenth Amendment is detailed in the legislative history of the Sixteenth Amendment's passage through Congress. When potentially ambiguous language appears in the source text in question, the Court has previously given due regard to the legislative history in addition to the plain meaning of the text.[77] The history of the Sixteenth Amendment mentions in noticeably clear terms that the scope of the Amendment was drafted with the purpose of reaffirming Congress's authority to tax income, and thus overruling *Pollock*. For that reason, we need not go beyond the plain meaning of the Sixteenth Amendment to find its true scope.

Senator Norris Brown, a Republican representing the State of Nebraska, and the original drafter of the Sixteenth Amendment, characterized a then-draft Amendment as "an amendment to the Constitution which will give the court a Constitution that can not be interpreted two ways."[78] Additional remarks from Senator Isidor Rayner of Maryland clarified that the single issue before Congress was addressing the apportionment requirement for direct taxes.[79] The outcome of the actual language proposed: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, *without apportionment* among the several States, and without regard to any census or enumeration" is consistent with the legislative history and the goals raised by Senators Brown and Rayner.[80] If there was any concern about whether the Sixteenth Amendment goes further, Senator Brown

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[75] *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 5 (1999); *see also* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 136–37 (2022) (describing the evolution of the federal income tax).

[76] Neil S. Siegel & Steven J. Willis, *Direct and Indirect Taxes*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/757 (last visited Mar. 30, 2024).

[77] A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("Any exemption from . . . remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (recounting the legislative history of 42 U.S.C. § 1983 at length and qualifying the analysis conducted in Monroe v. Pape, 365 U.S. 167, 187 (1961)).

[78] 44 CONG. REC. 1568 (1909) (statement of Sen. Norris Brown).

[79] *See* 44 CONG. REC. 1569 (1909) (statement of Sen. Isidor Rayner). Senator Rayner, pointing out deficiencies of earlier drafts of the Sixteenth Amendment, said: "[I]f this amendment . . . were to go through, it would not affect the [direct tax clauses] and there would still have to be an apportionment." *Id.*

[80] U.S. CONST. amend. XVI (emphasis added); *see also* 44 CONG. REC. 266 (1909) (statement of Rep. Frederick C. Stevens) (concerning debate in the House with respect to intent behind amending the Constitution: "The decision of Pollock against The Trust Company as to the income tax in the revenue act of 1894 has never been thoroughly satisfactory to the country.").

later declared on the floor, "[M]y purpose is to confine [the Amendment's language] to income taxes alone, and to forever settle the dispute by referring [the Amendment] to the several States."[81]

Third, there is nothing in the plain meaning of the Sixteenth Amendment that shows a requirement for realization. Alternatively, even if there were, there is nothing to indicate that the Sixteenth Amendment was written with an intention to require realization. Petitioners insist that the word "*derived*" plainly means that Congress intended a realization requirement.[82] While petitioners draw from statutory and dictionary examples of the use of the word "derived,"[83] petitioners completely ignore contradictory legislative history that was—at best—silent on the topic of realization.

As originally introduced before committee markup, the proposed Amendment did not contain the "from whatever sourced derived" language which now exists.[84] A notable change to the proposed Amendment's language took place in committee markup, specifically where a revision to the Amendment deleted reference to "direct" taxes and instead added "from whatever source derived," ostensibly "to foreclose the possibility of any class of income being held exempt from taxation by the Court."[85] By contrast, petitioners' argument that the word "*derived*" carries a realization requirement not only fails to find support in the legislative history in the consideration of this amendment,[86] but is also contradicted by an intent to further expand the scope of the Sixteenth Amendment to all income regardless of source. Although petitioners state their proposition boldly, it is completely unsupported.

Because of this, there is a clear constitutional grant—and a significant amount of leeway—for Congress to implement new taxes. While this leeway has repeatedly been supported by previous decisions by the Supreme Court,[87] the petitioners heavily rely on *Macomber*, especially on the Court's usage of a definition of "income" as

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[81] 44 CONG. REC. 3377 (1909) (statement of Sen. Norris Brown).

[82] Brief for Petitioners, *supra* note 11, at 17–19.

[83] *Id.* at 28–29, 38.

[84] *See* S.J. Res. 8, 61st Cong., 44 CONG. REC. 263 (1909); *see also* Jensen, *supra* note 73, at 1115.

[85] JOHN D. BUENKER, THE INCOME TAX AND THE PROGRESSIVE ERA 127 (1985); *see also* Transcript of Oral Argument at 105, Moore v. United States, No. 22-800 (U.S. argued Dec. 5, 2023) ("[The Sixteenth Amendment] was an amendment to the Constitution that was specifically designed to restore a pre-existing power and the right way to look at . . . what that power means is to look at how it had actually been exercised before.").

[86] The proposed amendment to the Sixteenth Amendment's language contained truly little debate, and absent was the conversation with respect to realization. *See* 44 CONG. REC. 4391 (1909) (statement of Rep. Samuel W. McCall).

[87] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 572–73 (2012); Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).

"the gain derived from capital, from labor, or from both combined,"[88] and that "derived" means "*received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description."[89]

But petitioners erroneously rely on *Macomber* in isolation while ignoring other contemporary definitions of "income" used at the time. First, the definition of "income" provided in *Macomber* was never intended to be controlling. *Macomber* cited *Doyle v. Mitchell Bros. Co*, which itself noted a "difficulty" in defining a "precise and scientific definition of 'income.'"[90] In *Doyle*, the Court merely said that "[i]ncome *may* be defined as the gain derived from capital, from labor, or from both combined" without deciding on that particular definition as the one the Court adopts.[91] To the extent that *Macomber* adopts the *Doyle* definition of "income" as the conclusive definition of "income" as it relates to the Constitution, the *Macomber* Court's analysis fell far short of explaining why this particular definition is the one that is required by the Constitution. First, the Constitution provides no concrete definition of "income." Second, the Court's reasoning in *Macomber* was essentially limited to the following:

> Here we have the essential matter: *not* a gain *accruing to* capital . . . but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being "*derived*," that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property.
>
> The same fundamental conception is *clearly* set forth in the Sixteenth Amendment—"incomes, *from* whatever *source derived*"—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.[92]

Like petitioners, the *Macomber* court was overly concerned with the word "*derived*," a word which both petitioner and the *Macomber* Court ultimately misinterpret. The "harmony" *Macomber* finds between the Sixteenth Amendment and the rest of the Constitution was only found in the use of the word "*derived*," after consulting dictionaries and case law that used a definition the Court in *Doyle* never intended to be the conclusive definition of "income."[93] As the Government argues,

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[88] Eisner v. Macomber, 252 U.S. 189, 207 (quoting Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185 (1918)).

[89] *Id.*

[90] Doyle, 247 U.S. at 185.

[91] *Id.* (emphasis added) (quoting Stratton's Indep. v. Howbert, 231 U.S. 399, 415 (1913)).

[92] *Macomber*, 252 U.S. at 207–08.

[93] *See Doyle*, 247 U.S. at 185 (acknowledging the "difficulty . . . about a precise and scientific definition of 'income,'" that the term used was only limited to its "natural and obvious sense,"

contemporary dictionaries have varied in their definitions of "income."[94] One such dictionary defined "income" as "[g]ains, or private revenue, from business, labor or the investment of property."[95] In this definition, realization does not appear as a key requirement. Economists active around the time of *Pollock* and *Macomber* have also omitted realization as a requirement for income.[96]

The analysis in *Macomber* lacks the analytical procedures normally employed by the Court in its interpretation of the scope of provisions of the Constitution, which is necessary to conclude that the Sixteenth Amendment requires realization.[97] The Court did not examine the legislative history of the Sixteenth Amendment nor did it examine the underlying problem it sought to address (i.e., overturning *Pollock*). The *Macomber* Court even admits that its interpretation of the meaning of the Sixteenth Amendment was limited to the consideration of "a clear definition of the term 'income,' as used in common speech."[98] The Court did not engage in an original meaning interpretation of the Sixteenth Amendment as it should have in *Macomber*, particularly given how recently the legislative history and ratification of the Sixteenth Amendment developed relative to the Court's consideration of *Macomber*; instead, it focused on cherry-picked dictionaries and case law that were likely not written in contemplation of being widely adopted as a legal definition.[99]

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and that "income *may* be defined as the gain derived from capital, from labor or from both combined" (emphasis added) (quoting *Stratton's Indep.*, 231 U.S. at 415)).

[94] Brief for the United States, *supra* note 47, at 18–19.

[95] 1 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAWS 644 (1888); *see also* CHARLES E. CHADMAN, A CONCISE LEGAL DICTIONARY 199 (1909) (defining income as "[t]he profit or gains from business; property or other sources of wealth").

[96] *See* Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, *in* THE FEDERAL INCOME TAX 7 (Robert M. Haig ed., 1921). Professor Haig, known for the Haig-Simons definition of income, defined "income" as "the *money value of the net accretion to one's economic power between two points in time*." *Id.*

[97] *See* BRANDON J. MURRILL, CONG. RSCH. SERV., MODES OF CONSTITUTIONAL INTERPRETATION (2018) (providing an overview of eight modes of constitutional interpretation); John R. Brooks & David Gamage, Moore v. United States and the Original Meaning of Income 6 (July 2, 2023) (unpublished preliminary draft) (on file with Fordham University School of Law) ("[T]he *Macomber* Court explicitly declined to do an original meaning analysis.").

[98] Eisner v. Macomber, 252 U.S. 189, 206–07 (1920).

[99] *See id.* at 207 ("After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 . . . ."). Here, the Court outright declined to consider an original meaning analysis, which would have considered the meaning of the Sixteenth Amendment's text at the time of its drafting and ratification. This would include looking at the original intent of those who drafted, proposed, adopted, or ratified the amendment. *See* Honorable Judge Robert H. Bork, D.C. Cir., Tradition and Morality in Constitutional Law (Dec. 6, 1984), *in* AM. ENTER. INST. FOR PUB. POL'Y RSCH., THE FRANCIS BOYER LECTURES ON

During oral arguments, petitioners continued to defend the use of dictionaries, specifically by espousing the idea that the use of contemporaneous dictionaries is in line with a proper original meaning analysis.[100] But this argument continues to fail to hold water. The problem yet exists, first, that the definitions of "income" vary between contemporaneous dictionaries.[101] Second, the assertion that "income," a term that carries highly technical nuances and exceptions, can possibly be comprehensively defined through use of non-legal dictionaries is problematic. Such an assertion requires that the common meaning of "income" contemplates (or is even capable of contemplating) a requirement of—or definition for—realization.[102] Petitioners, instead, appear to create a fiction that the common meaning of "income" at the time of the ratification of the Sixteenth Amendment contemplated realization as a prerequisite before a gain can be considered income, and subsequently ask the Court to raise this definition to a constitutional status. Put simply, "income" is a technical and complicated term, and its meaning should not come from a source, like a dictionary, that is not capable of delivering a precise definition.[103] Instead, given that income can mean many different things given the circumstances of an individual taxpayer,[104] the definition of "income" should fit squarely within Congress's responsibilities.[105]

PUBLIC POLICY 10 (1984) ("[T]he framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed.").

[100] Petitioners urged the use of

> corpus linguistics analysis . . . which looks at how the word was used in everyday language at that time, and it concludes that, unanimously, where it's possible to distinguish, "income" meant realized gains. . . . "[D]erived" was generally meant to refer to concepts like receipts. And . . . when income was described as being derived, it was always used in that fashion.

Transcript of Oral Argument, *supra* note 85, at 14–15.

[101] *See* Brief for the United States, *supra* note 47, at 14–15.

[102] For example, during oral arguments, Justice Jackson inquired:

> [W]hether you think Congress has the authority to define what constitutes realization or not[,] . . . who gets to decide what the realization line is?
>
> . . . .
>
> [C]ould we find that there is realization in this case[?] . . . [W]ho makes the definition of "realization"? Could the Court determine that there's realization here under a definition that we are appreciating?

Transcript of Oral Argument, *supra* note 85, at 53.

[103] *See id.* at 33 (Justice Sotomayor: "[W]hy should [shareholders] get to choose and not the government where to attribute the income[?]").

[104] *See id.* at 105 (Justice Sotomayor: "[T]he tenor of the questions is that nobody's happy with anybody's definition of anything . . . .").

[105] During oral arguments, Solicitor General Elizabeth Pregolar claimed:

> [I]f there is a lesson to be drawn from Macomber, it's that there is a real danger in trying to . . . as an abstract matter, define "income" for all purposes, or . . . as Glenshaw Glass said, to provide a touchstone for all future cases, in part because our experience with the Tax Code is that taxpayers often latch on to those statements and use it as a basis to try to avoid taxation going forward.

In sum, the Constitution provides no definition of the meaning of "income." It is within the role of Congress to draft this definition, and it is the Court's role to interpret that definition thereafter. Even if there did exist a constitutional definition, a realization requirement is not immediately obvious from the plain meaning of the text of the Constitution.

B. Realization Requirements, if Any, Arise in the Internal Revenue Code

Even if the definition of "income" were controlling at the time the Court decided *Macomber*, it cannot possibly be controlling now. In the absence of a constitutionally-derived definition of "income," the Code delivers the following: "[e]xcept as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to)" a non-exhaustive list of examples of what qualifies as income, including "[g]ains derived from dealings in property."[106]

Administrative rules follow the statutory definition of gross income: "Gross income means all income from whatever source derived, unless excluded by law. Gross income *includes* income realized in any form, whether in money, property, or services."[107] While Treasury Regulation § 1.61-1(a) names realization as an includable source of gross income, it does not explicitly exclude unrealized gains.[108]

Whether unrealized gains were to be explicitly included as gross income appears to be at the discretion of Congress. For example, the Department of Treasury's guidance on the Corporation Excise Tax of 1909, a tax passed by the same Congress that drafted and sent the Sixteenth Amendment off for ratification, specifically included as income the "increase in [the] value of unsold property, if taken up on the books of a corporation."[109] As mentioned previously, beyond the Corporation Excise Tax of 1909, there are a wide array of taxes imposed that forego realization as a requirement.[110] Subpart F, on which the MRT relies in recognizing the petitioners' unrealized share of KisanKraft as gross income, was litigated decades ago and found to be constitutional.[111]

Id. at 90–91.

[106] 26 U.S.C. § 61(a)(3).

[107] Treas. Reg. § 1.61-1(a) (1957) (emphasis added).

[108] *Id.*

[109] T.D. 1742, 14 Treas. Dec. Int. Rev. 127 (1911); *see also* Tariff Act of August 5, 1909, ch. 6 § 38, 36 Stat. 11, 112.

[110] *See, e.g.*, 26 U.S.C. § 475 (imposing an annual mark-to-market requirement on stock held by securities dealers); *id.* § 1256 (imposing a mark-to-market regime on the holders of certain options and futures contracts); *id.* § 551 (regarding tax levied on U.S. shareholders on undistributed earnings of foreign personal holding companies).

[111] Eder v. Comm'r, 138 F.2d 27, 29 (2d Cir. 1943).

In general, Congress has blazed a trail in federal income tax law that imposes a realization requirement where administratively convenient,[112] or just as a matter of public policy. In other instances, perhaps for the same reasons, Congress has also foregone the realization requirement.[113] In either case, it is in the realm of Congress to make these decisions. If the Supreme Court struck the MRT without a constitutional basis for doing so, it would essentially make a policy decision—a decision that Congress should make, not the Supreme Court.

C. Reconciling Macomber*: The Place of Federal Common Law*

Where, in the case of the imposition of federal income tax, the Constitution grants considerable leeway for Congress to establish such a tax, and Congress has exercised its constitutional authority by crafting a detailed federal income tax system, accompanied by administrative rules and regulations, what space is there for the federal courts to impose their own interpretation of what classifies as income? The short answer is that there is generally no room, and federal courts are—or should be—precluded from considering cases involving the definition of "income."

As discussed in *Moore*, the MRT explicitly lays out the treatment of this one-time tax:

> In the case of the last taxable year of a deferred foreign income corporation which begins before January 1, 2018, the subpart F income of such foreign corporation (as otherwise determined for such taxable year under section 952) shall be increased by the greater of—
>
> (1) the accumulated post-1986 deferred foreign income of such corporation determined as of November 2, 2017, or
>
> (2) the accumulated post-1986 deferred foreign income of such corporation determined as of December 31, 2017.[114]

In other words, in the case of petitioners, all accumulation of deferred foreign income, such as the gains accumulated through KisanKraft's business dealings in India, after 1986 and before 2017 will be treated as gross income. This tax incidence occurs only "[i]n the case of the last taxable year of a deferred foreign income corporation which begins before January 1, 2018."[115] The statute does include unrealized gains, as the statute continues: "the subpart F income of such foreign corporation . . . shall be increased."[116]

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[112] *See* Helvering v. Horst, 311 U.S. 112, 116 (1940) (recognizing that the realization rule, when imposed, is "founded on administrative convenience").

[113] *See supra* note 110 and accompanying text.

[114] 26 U.S.C. § 965(a)(1)–(2).

[115] *Id.* § 965(a).

[116] *Id.*

With the supplied intention of Congress clearly laid out in § 965 through the plain language of the statute, deferred foreign income is treated as gross income for the taxpayers' 2017 income taxes. The analysis should end there.

In the current constitutional and statutory landscape in which taxpayers and practitioners find themselves, what role do federal courts have in supplying definitions and rules concerning the federal income tax, especially the question of what is considered "income" in general terms? Federal courts' role in determining whether a taxpayer's specific accession to wealth is considered gross income under § 61 is not contested, but where a taxpayer presents a situation that does not squarely fit in the general definition of gross income under § 61, nor is squarely excluded under § 1001 or similar Code sections, the courts should be able to rely on federal common law to fill in gaps.

If the federal government takes an action that is authorized by a federal statute or another source of federal law, then federal law dictates the outcome of disputes arising from that action, though federal common law may be applied in an action brought by the United States to enforce its rights with respect to the federal government's interests.[117] But federal common law should be applied "in an area comprising issues substantially related to an established program of government," and where Congress has not spoken on the exact issue.[118]

Here, under federal tax law, two elements exist that conflict with one another. On one hand, the federal government's ability to lay and collect taxes goes beyond the standard of an "established program of government"—it is integral to the government's very existence. At the very least, the federal income tax is, in essence, a program of the government in that it is one of many taxes that the government authorizes. This area, very much like the federal government's control of federal commercial paper in *Clearfield Trust Co.*,[119] is an area of law substantially related to an established program of government. On the other hand, however, Congress has spoken at great length on the topic of the federal income tax.[120] In many tax cases, the task for federal courts is to assess the taxpayer's situation, apply the applicable Code provision (notwithstanding any constitutionality arguments), and dispose of the case.

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[117] Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (holding that federal common law applied in an action brought by the United States to enforce its rights with respect to commercial paper that it issues).

[118] United States v. Kimbell Foods, Inc. 440 U.S. 715, 727 (1979) (quoting United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)).

[119] *Clearfield Trust Co.*, 318 US at 363.

[120] *See* Scott Greenberg, *Federal Tax Laws and Regulations Are Now Over 10 Million Words Long*, TAX FOUND (Oct. 8, 2015), https://taxfoundation.org/blog/federal-tax-laws-and-regulations-are-now-over-10-million-words-long.

In *Macomber*, a case decided in 1920, the Court considered the case of a taxpayer at a time when the predecessor of the 1986 Internal Revenue Code was less developed, and at a time when the Sixteenth Amendment was less than a decade old.[121] In *Macomber*, the Court turned to judicially-created definitions of "income" and conferred with contemporary definitions of "income" found in dictionaries.[122] By contrast, courts today assess whether a taxpayer had an accession to wealth by applying the definition in § 61 and any applicable regulations.[123]

By necessity, due to the highly-developed nature of federal tax law, the applicability of federal common law is limited in instances in which neither Congress (within its constitutionally-granted realm of ability to lay taxes) nor the Internal Revenue Service (within its congressionally-delegated powers guided by an intelligible principle)[124] can speak. Thus, federal common law, such as a court providing its own definition of "income," is generally not to be developed.

Given the unambiguous text of the Sixteenth Amendment, the clear intent by Congress in passing § 965, and absent any space for the federal common law to fill in gaps, there is little space for the Court to issue any major or sweeping decision favoring the petitioners. Limited even to the facts in *Moore*, if there did exist a constitutional realization requirement, a realization event likely occurred by the actions of KisanKraft, and Congress, through § 965, attributed that realization to the taxpayers.[125] In any case, the Court does not even need to arrive at the certified question. If the Court did want to answer the question in this case, the Court should reexamine the rule decided in *Macomber* and its progeny and affirm the Ninth Circuit's decision.

III. IMPACTS OF ANSWERING *MOORE* IN THE NEGATIVE

There are several variations in which the Court could potentially find in favor of the *Moore* petitioners.

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[121] Eisner v. Macomber, 252 U.S. 189 (1920); *see also Income Tax Ratified by Delaware's Vote*, *supra* note 55.

[122] *Macomber*, 252 U.S. at 207.

[123] *See, e.g.*, Cesarini v. United States, 296 F.Supp. 3, 4–5 (1969) (applying 26 U.S.C. § 61 and applicable Treasury Regulations, such as Treas. Reg. 1.61-1(a)).

[124] *See* J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (finding a delegation of legislative powers to an administrative agency tasked with collection of tariffs is permissible if the legislative act contains "an intelligible principle").

[125] *But see* Transcript of Oral Argument, *supra* note 85, at 43 (Justice Gorsuch suggesting: "I suppose we could and maybe would have to draw lines as to how far back—in time one could go in assessing that chain of realization."); *id.* at 47 (Justice Barrett on the same issue: "[I]s [whether realization can be established by someone other than the taxpayer] a Sixteenth Amendment problem, or is this a due process problem where we have to draw lines about when it's fair to attribute one person's income to someone else?").

First, among the many variations of holdings the Supreme Court could make in finding for the petitioners in *Moore*, the one with the most ripple effects would be a strict realization finding or, in other words, one that finds a constitutional realization requirement for purposes of the federal income tax. It would be immediately clear that the MRT would be held unconstitutional because a deemed repatriation entails recognizing as income unrealized accruals of wealth. A taxpayer in a similar situation to the petitioners would likely be able to seek a refund from the IRS.[126] At the time the MRT was drafted in Congress, it was estimated that undistributed post-1986 earnings (not previously taxed) would be approximately $2.6 trillion, the amount of refunds to be processed would be a significant blow to tax revenue.[127]

Second, the Court could craft a more limited finding that, while realization is not necessarily required by the Constitution, recognition of unrealized income can only be appropriate in situations in which, after "look[ing] through the form of the corporation," the "entire identity between [the shareholder] and the company" is such that it is appropriate to conclude that the shareholders have essentially received income.[128] This would have the effect of limiting the impact of the Supreme Court's ruling to the MRT, or a smaller collection of Code provisions.

Third, the Court could rule, as petitioners suggest, that the Sixteenth Amendment requires a transaction to be undertaken, or to receive something of value during the taxable year.[129] In other words, some underlying event must have occurred, perhaps something short of a direct event to the petitioners that otherwise would regularly be considered to be a realization event (such as a sale or transfer). This route, if adopted, would open up considerable doubt as to what specific events

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[126] *Cf.* 26 U.S.C. § 6511 (a "claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid"). In pending litigation, taxpayers may preserve a claim to a tax refund by filing a protective refund claim if such right to a refund is contingent upon a decision by a court in another taxpayer's favor. *See* United States v. Kales, 314 U.S. 186, 195–96 (holding "appropriate . . . for the present assertion of an alternative claim with respect to which a taxpayer in his presentation of an informal tax refund claim, should be in no less favorable position than the plaintiff in a suit at law who is permitted to plead his cause of action in the alternative"). Some law firms have offered insight into how, in light of *Moore*, a taxpayer may file for a protective refund claim. *See, e.g.*, Lewis M. Horowitz & Eric J. Kodesch, *Moore or Less (Tax): U.S. Supreme Court Action Signals Need for Protective Refund Claims for IRC § 965 Inclusions*, LANE POWELL (June 29, 2023), https://www.lanepowell.com/Our-Insights/263503/Moore-or-Less-Tax-US-Supreme-Court-Action-Signals-Need-for-Protective-Refund-Claims-for-IRC-965-Inclusions.

[127] Letter from Thomas A. Barthold to Kevin Brady & Richard Neal, *supra* note 25, at 3.

[128] Reply Brief for Petitioners at 5, Moore v. United States, No. 22-800 (U.S. Nov. 15, 2023) (quoting Eisner v. Macomber, 252 U.S. 189, 214 (1920)).

[129] *Id.* at 6–7.

would constitute an event such that realization can be deemed to have occurred. A multi-factor balancing test could lead future cases to address this ambiguity.

A. Congress's Taxing Power: Current Law

Breathing new life into *Macomber* by declaring a constitutional requirement may render many aspects of the current Code unconstitutional in subsequent litigation.

For example, § 475, which imposes an annual mark-to-market requirement on stock held by securities dealers, and § 1256, which imposes a mark-to-market regime on the holders of certain options and futures contracts, would likely be scrutinized under an opinion adopting a look-through construction of the Sixteenth Amendment or an opinion limiting deemed realization. Additionally, § 551 taxes on U.S. shareholders on undistributed earnings of foreign personal holding companies, which would be impermissible under *Macomber*, would likely fail under any of the three options listed above. The original issue discount rules of §§ 1271–1275 would also be scrutinized under a strict realization interpretation of the Sixteenth Amendment.

Also, in question could be whether Subpart F or Global Intangible Low-Taxed Income (GILTI) (which builds on Subpart F), could later be held unconstitutional despite the fact that Subpart F had been held to be constitutional, at least in the Second Circuit.[130] Under a strict realization holding, future litigants could point to *Moore* as the cornerstone that revitalized *Macomber* and argue, perhaps successfully, that Subpart F's treatment of undistributed income in controlled foreign corporations cannot be reached. In one of the most extreme of holdings, a repeal of GILTI would result in a loss of $352.3 billion between 2024 and 2033.[131] Under a "deemed realization" approach, it would be an administratively challenging task to determine what events would be sufficient to require a taxpayer to include any gains as gross income. Whatever event it may be, they should be subject to the discretion of Congress, as any definition of what an event could be is more a matter of policy than it is a legal question for courts to decide.

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[130] Eder v. Comm'r, 138 F.2d 27, 29 (2d Cir. 1943).

[131] Daniel Bunn, Alan Cole, William McBride & Garrett Watson, *How the Moore Supreme Court Case Could Reshape Taxation of Unrealized Income*, TAX FOUND. (Aug. 30, 2023), https://taxfoundation.org/research/all/federal/moore-v-united-states-tax-unrealized-income. *But see* Transcript of Oral Argument, *supra* note 85, at 97 (Justice Alito opining: "[H]ave we ever said—and maybe we should in this case say—that the Sixteenth Amendment applies differently to income or property that is obtained abroad than it does to income or property possessed within the United States?").

B. Congress's Taxing Power: Pending Legislation

If the Supreme Court adopts any of the three aforementioned holdings, there are several pieces of pending legislation that would be rendered so legally unviable that it would effectively halt any momentum for their passage.

Perhaps the most prominent proposal that would run into a Sixteenth Amendment challenge post-*Moore* would be the proposal raised by President Biden, which his administration characterized as a "billionaire minimum tax," and specifically imposes a 25% tax on taxpayers with "wealth of more than $100 million."[132] Such a proposal has been questioned as unconstitutional even before the Supreme Court granted certiorari in *Moore*.[133] Under an opinion that interprets the Sixteenth Amendment as requiring realization, or even under a lower standard of disallowing "deemed realization" without some underlying transaction, this proposal would fail without more details. Like in the case of the petitioners in *Moore*, no underlying event (beyond gradual accrual of income) occurred for the MRT to apply; instead, it applies automatically based on the circumstances of the taxpayer. Such a proposal, for this reason, would fail.

A small variation on the President's proposal, which contains an important nuance, may survive under a standard requiring an underlying transaction. In 2021, Senator Ron Wyden announced a proposal of his own titled the "Billionaires Income Tax."[134] Under this proposal, "[t]radable assets like stocks would be marked-to-market every year. Billionaires would pay tax on any gain," realized or otherwise.[135] On one hand, one provision of the bill would fail in a manner similar to President Biden's wealth tax proposal, which includes the proposition that stocks would be "marked-to-market every year" and that a tax would be imposed on any gain accrued, but not realized.[136]

This proposal, however, includes a second feature, which imposes a capital gains tax, plus an interest charge—referred to as a "deferral recapture amount"—when high-net-worth individuals sell "non-tradable assets, like real estate or business interests."[137] The deferral recapture amount is calculated as "the amount of interest that would be due on tax owed if the asset had been marked to market each year and the tax had been deferred until sale."[138] Such a premium tax paid in addition

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[132] THE WHITE HOUSE, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2024, at 2, 44–45 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.

[133] *See* Opinion, *Biden's Big Wealth Tax? Unconstitutional*, WALL ST. J. (Mar. 10, 2023, 6:54 PM), https://www.wsj.com/articles/president-biden-wealth-tax-16th-amendment-asset-appreciation-db12372c.

[134] Press Release, Billionaires Income Tax 2021, *supra* note 16.

[135] *Id.*

[136] *Id.*

[137] Press Release, Billionaires Income Tax 2021, *supra* note 16.

[138] *Id.*

to going capital gains rate could withstand any of the three potential opinions listed above. Here, there is a sale or, in other words, a realization event that satisfies a hypothetical constitutional realization requirement. In a sale, one's property interest terminates, and income has been accrued, potentially in the form of liquid assets. In this fact pattern, a premium paid on the sale of an asset could represent the time value of a taxpayer deferring taxation until a later date. The one caveat raised here, however, is that such a proposal strays far away from some policy advocate's preference to tax wealth outright, without having to wait for an underlying event that could be deemed a realization event.

CONCLUSION

Moore is a case that the Supreme Court simply cannot get wrong. There are often cases where the Court has had to balance the constitutionality of an issue with contrasting public policy considerations.[139] Here, there is no such contrast. This Note has illustrated a unique situation in which the constitutional question posed, and public policy considerations underlying the question, so clearly point to approving of the MRT and other statutes that tax unrealized gains as constitutional recognitions of gross income under § 61.

With respect to the Constitution, the original meaning of "income"—as well as the understanding of "income" at the time of the ratification of the Sixteenth Amendment—completely ignored the topic of realization throughout the legislative history of the Sixteenth Amendment. The true definition of "income," whatever it may be, instead falls squarely in the realm of Congress, which is consistent with a history of the Supreme Court granting wide leeway to the legislative branch in determining the scope of its taxing power.

This Note has also demonstrated that *Macomber* is long overdue to either be explicitly limited to its facts[140] or to be overruled, at least to the extent that it declares a Sixteenth Amendment requirement for realization. Failure to do so or—worse—revitalization of *Macomber* to find a constitutional requirement for realization will have severe legal impacts for the federal income tax, as well as immense difficulty for lawmakers to reach "the right solution . . . to avoid an endless inegalitarian spiral while preserving competition and incentives for new instances of primitive accumulation."[141]

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[139] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803) (resolving the issue of the Supreme Court's ability to conduct judicial review, but declining to find jurisdiction in the face of parties who otherwise would be unwilling to abide by a potential grant of a writ of mandamus).

[140] *See, e.g.*, Helvering v. Griffiths, 318 U.S. 371, 375 (1943) (suggesting that *Macomber* is limited to its facts).

[141] PIKETTY, *supra* note 18, at 572.