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ASKED AND UNANSWERED: A CONSTITUTIONAL EXAMINATION OF FEDERAL TAXATION ON UNREALIZED SUMS WITHOUT APPORTIONMENT AMONG THE STATES

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EXAMINATION OF FEDERAL TAXATION ON UNREALIZED
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Jenna Barnes-Gutierrez²

INTRODUCTION

The United States has a complex and contentious history with taxation. The Articles of Confederation expressed an initial aversion to centralized tax collection, as it was devoid of federal taxing authority, highlighting a tension that would pervade American culture and governance: the need for revenue versus the fear of overreach.³ This tension prompted the Constitutional Convention, whereby Congress was granted the power to tax, albeit with limitations.⁴

The landscape of federal taxation was fundamentally altered with the ratification of the Sixteenth Amendment in 1913.⁵ This straightforward amendment which paved the way for the modern income tax system explicitly authorizes Congress to levy taxes on income “from whatever source derived,” without the need for apportionment among the States.⁶ The Sixteenth Amendment also came with significant implications and questions

¹ This research is dedicated to two individuals who have played pivotal roles in the author’s academic journey: the late **Tommy A. Corbell**, the author’s first mentor, who instilled in her the value of intellectual curiosity and perseverance, and **Professor Eric Reis**, her esteemed tax law professor, whose guidance and instruction were instrumental in shaping her understanding of the complex field of tax law.

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³ See ARTICLES OF CONFEDERATION of 1781, art. VIII.

⁴ *Articles of Confederation*, National Archives, <https://docsteach.org/document/articles-of-confederation/> (last visited Dec. 21, 2025) (on file with UNT Dallas College of Law).

⁵ U.S. CONST. amend. XVI.

⁶ *Id.*

for tax policy, wealth distribution, and economic growth.⁷ One such question remains today: does the Sixteenth Amendment permit the federal government to tax unrealized gains⁸ without apportionment?

In 2023, the Supreme Court granted review of this question in *Moore v. United States*.⁹ The petitioners, Charles and Kathleen Moore, disputed a tax assessment regarding their investment in KisanKraft, a foreign corporation controlled by American interests.¹⁰ KisanKraft retained accumulated earnings during the Moores' investment period and did not distribute this income to its American shareholders.¹¹ At the same time, Congress enacted a new tax law, the Mandatory Repatriation Tax (MRT)¹², which led to a significant tax bill for the Moores based on their share of KisanKraft's accumulated income.¹³ The Moores challenged the constitutionality of the MRT and asked the Court whether, like the constitutional requirement for direct taxes, the Sixteenth Amendment authorizes Congress to tax unrealized gains without apportionment among the States. The United States District Court for the Western District of Washington dismissed the Moores' case and the Ninth Circuit affirmed.¹⁴

On reaching the United States Supreme Court, the *Moore* majority sidestepped the crux of the Moores' challenge, leaving the question of a realization requirement untouched, by holding that the MRT taxes realized, not unrealized, gains.¹⁵ Although, the concurrence of Justices Barrett and Alito, and dissent of Justices Thomas and Gorsuch, do, in fact, address the

⁷ See generally Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057 (2001); see also Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW 295 (2013).

⁸ See *Unrealized Gain*, BLACK'S LAW DICTIONARY (12th ed. 2024); see also I.R.C. § 1001(a) (2024) (recognizing gain only upon "sale or other disposition" of property).

⁹ 602 U.S. 572 (2024).

¹⁰ *Id.*

¹¹ *Id.*

¹² 26 U.S.C. § 965; The MRT is a provision of the 2017 Tax Cuts and Jobs Act which introduced a one-time retroactive tax on accumulated foreign earnings. Pub. L. No. 115–97, 131 Stat. 2054 (2017). This provision operates by attributing the undistributed earnings held by American-controlled foreign corporations to their American shareholders, who are then taxed on their proportional share of the accumulated sums at rates ranging from 8% to 15.5%. 26 U.S.C. § 965(a)–(d). Later sections of this article reveal novel design features of the MRT that have no clear parallel in case law or acts of Congress. See *infra*, Section IV A.

¹³ *Moore*, 602 U.S. at 572.

¹⁴ *Id.*

¹⁵ *Id.* at 575.

underlying issue and conclude that the taxation of unrealized gains is unconstitutional.¹⁶ However, *Moore* is not the end of this constitutional quandary.

This article considers the constitutionality of taxing unrealized sums without apportionment, the implications of the MRT, and the *Moore* majority's reasoning for failing to address the issue of whether taxing unrealized gains is constitutional, and the historical context and case law surrounding the Sixteenth Amendment. This article concludes with an analysis of *Moore*'s potential impact on tax policy and investment strategies.

This article argues that while the Sixteenth Amendment grants Congress broad authority to tax income, it does not sanction the taxation of unrealized gains without apportionment among the States. Although the definition of income has evolved over time, the historical understanding of income at the time of the Sixteenth Amendment's ratification, as well as subsequent judicial interpretations, indicate that a realization event is required for income to be taxable. However, recent legislation and judicial actions have challenged the traditional realization requirement.

I. HISTORICAL DEFINITION OF TAXABLE INCOME

Our contemporary understanding of income taxation has diverged significantly from the nascent years of the United States. An American dictionary from the early nineteenth century defined income as “[t]hat gain which proceeds from labor, business, or property of any kind”—a definition synonymous with “revenue” and distinct from the underlying property.¹⁷ This definition made its way into the plain language of the Sixteenth Amendment, which was ratified on February 3, 1913.¹⁸ In October of that same year, Congress enacted the Revenue Act of 1913, defining net income as:

[G]ains, profits, and income derived from salaries, wages or compensation for personal service..., or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction

¹⁶ *Id.* at 620.

¹⁷ NOAH WEBSTER, CHAUNCEY A. GOODRICH, & JOHN WALKER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 441 (Joseph E. Worcester, ed., S. Converse, 3d ed. (1830)).

¹⁸ U.S. CONST. amend. XVI.

of any business carried on for gain or profit, or *gains or profits and income* derived from any source whatever....¹⁹

In 1924, the process of codifying tax laws began with the creation of the Joint Committee on Internal Revenue Taxation, which was tasked with studying tax laws and recommending simplification and improvement. The committee's work culminated in the enactment of the Internal Revenue Code (IRC) of 1939.²⁰ It was later replaced by the IRC of 1954,²¹ which was the first codification to broadly define gross income, reaffirming "from any source whatever," unless excluded by a specific provision of the Code.²²

While the Sixteenth Amendment broadly empowers Congress to tax income from any source, including property, it maintains a critical distinction between taxable income and the underlying property.²³ The Revenue Act of 1913's definition of net income clearly provides the same clarity by stating the property itself is not taxable, only the "gains, profits, and income" related to the ownership of the property or business transactions purposed for profit.²⁴ This distinction is rooted in the historical understanding of income as a flow of value derived from property rather than the property itself. Nearly twenty years after the 1913 Act, the Supreme Court reinforced this idea in *United States v. Safety Car Heating & Lightning Co.*, likening property to the "seed" and income to the "fruit."²⁵ Clearly, the Sixteenth Amendment eliminates the apportionment requirement for income taxes, but it does not alter the principle that property is not subject to unapportioned federal taxation.

Understanding the historical distinction between income and property is essential to interpreting the Supreme Court's flawed decision in *Moore v. United States*. In holding that a shareholders' proportionate share of "undistributed corporate income" from CFCs—traditionally considered part of the underlying property—should be treated as taxable income,²⁶ the Moore majority displaced this fundamental principle of the American tax regime.

¹⁹ Revenue Act of 1913, Ch. 16, 38 Stat. 114, 167 (1913) (emphasis added) (codified as amended in scattered sections of 26 U.S.C.A.) (West 2024).

²⁰ FLOYD M. HUBBARD, LEGISLATIVE HISTORY OF THE INTERNAL REVENUE CODE OF 1954 (1967).

²¹ *Id.*

²² I.R.C. § 61(a) (West 2024).

²³ *See* U.S. CONST. amend. XVI.

²⁴ Ch. 16, 38 Stat. 114, 167.

²⁵ 297 U.S. 88, 99 (1936).

²⁶ *Moore v. United States*, 602 U.S. 572, 598.

This shift represents a significant departure from the original conception of income and raises questions about the extent to which the Sixteenth Amendment can be interpreted to encompass such a broad definition. The ramifications of this decision reshape our understanding of taxable income and its relationship to property rights, and sheds light on why the Supreme Court in *Moore* strategically sidestepped the broader question presented.²⁷

A. *Early American Tax Law*

With the ratification of the Articles of Confederation in 1781, the United States was formed.²⁸ For funding, the newly-established central government relied on voluntary state contributions, with no authority or mechanisms for policy enforcement, which led to a fiscally unstable federal government.²⁹ This crisis prompted the Constitutional Convention in 1787, wherein the Framers sought to stabilize the nation by drafting the United States Constitution.³⁰

Article I of the Constitution explicitly grants Congress broad taxing powers by conferring authority to levy direct taxes on individuals and property, and indirect taxes on various transactions and activities.³¹ The Framers' awareness of the delicate balance between federal power and individual liberty is evidenced by the limits they placed on the government's taxing authority.³² One such constraint was the apportionment requirement for direct taxes, mandating that direct taxes be distributed among the States according to their respective populations.³³ Direct taxes include a capitation tax, which is paid by every person "without regard to property, profession or any other circumstance."³⁴ Indirect taxes, while not subject to apportionment,

²⁷ See *Moore*, 602 U.S. at 599–600.

²⁸ ARTICLES OF CONFEDERATION of 1781.

²⁹ See *id.* art. VIII.

³⁰ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xv–xxi (Max Farrand ed., Yale Univ. Press, 1911); see also THE FEDERALIST No. 30, at 187–90 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing for robust federal taxing authority to remedy the fiscal failures of the Articles of Confederation).

³¹ U.S. CONST., art I, § 8, cl.1; *Moore*, 602 U.S. at 582 (clarifying that direct taxes include taxes on property and that indirect taxes are taxes on activities or transactions).

³² See U.S. CONST., art. I, § 2, cl. 3; see also *id.*, art. I, § 9, cl. 4.

³³ *Id.*, art. 1 § 2, cl. 3; see also *id.*, art. 1, § 9, cl. 4.

³⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) (quoting *Hylton v. United*, 3 U.S. 171, 175 (1796)).

must be uniform across the nation, preventing discriminatory practice that could favor one region over another.³⁵

Despite the Constitution's revolutionary expansion of federal taxing power and inherent restrictions, early interpretations revealed its limits. In 1861, the Union's first federal income tax was implemented as a means to finance the Civil War; the tax expired without congressional resistance.³⁶ The Wilson-Gorman Tariff Act of 1894 included a provision for a two-percent income tax, marking the first peacetime federal income tax in United States history.³⁷ However, the Supreme Court found the Act unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, reasoning that taxes on income derived from property revenue constituted a direct tax that must be apportioned.³⁸ The Court relied on the constitutional interpretation of Framers such as Alexander Hamilton, equating the taxation of income derived from property to the well-settled taxation of property which is classified as a direct tax.³⁹ Notably, the Court provided insight into its view of the realization requirement:

A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the constitution.⁴⁰

However, the demands of a growing nation and the financial strain of the Civil War necessitated a shift in tax policy.⁴¹ In response, the Sixteenth Amendment was ratified, providing the government with a crucial new source of income, and marking a turning point in the country's taxing power.⁴²

³⁵ U.S. CONST., art. I, § 8, cl. 1.

³⁶ KixMiller & Baar, 1922 UNITED STATES INCOME AND WAR TAX GUIDE 6 (1922).

³⁷ Joseph Bishop-Henchman, *Today in History: Income Tax Ruled Unconstitutional in Pollock v. Farmers Loan Trust Co.* (April 8, 2013), <https://taxfoundation.org/blog/today-in-history-income-tax-ruled-unconstitutional-pollock-v-farmers-loan-trustco/#:~:text=in%20Pollock%20v.,Farmers%20Loan%20Trust%20Co.,two%20examples%20of%20indirect%20taxes.%20> (on file with UNT Dallas Law Review).

³⁸ *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 618 (1895) (superseded by U.S. CONST., amend. XVI).

³⁹ *Id.* at 623–24.

⁴⁰ *Id.* at 625.

⁴¹ *Id.* at 621 (acknowledging the Civil War's role in the genesis of federal income taxation); see also KixMiller & Baar, *supra* note 36 (documenting early federal income tax history including the Civil War tax).

⁴² Pollack, *supra* note 7, at 323–35.

B. Evolution of the Income Tax

The Sixteenth Amendment to the Constitution states, “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.”⁴³ The ratification of the Sixteenth Amendment marked a watershed moment in American tax history. In 1913, the Sixteenth Amendment overturned *Pollock* by explicitly authorizing a federal income tax decidedly classified as an indirect tax not subject to apportionment.⁴⁴ However, the Sixteenth Amendment did not overturn the established principle that taxes on property are direct taxes subject to apportionment. Thus, while earnings derived from property are not subject to apportionment, the underlying property, whether real or personal, is directly taxable and must be apportioned if taxed by the federal government.⁴⁵

This distinction has raised a foundational question in American taxation for over a century: when do undistributed gains derived from property cease to be considered part of the property itself and become classified as taxable income? In other words, the question is when do undistributed accumulated earnings from property transition from an increase in the value of property to realized taxable income, subject to taxation without apportionment under the Sixteenth Amendment?

In *Brushaber v. Union Pacific*, three years after the ratification of the Sixteenth Amendment, the Supreme Court considered whether the source of income can determine a tax’s status as direct or indirect.⁴⁶ The Court rejected the notion of source-based classification, reasoning that the Sixteenth Amendment was intended to eliminate the need to consider the source of income when determining the constitutionality of income taxes.⁴⁷ The *Brushaber* Court did not explicitly address the first holding in *Pollock*, which stated that taxes on personal property itself (not the income it generates) are direct taxes.⁴⁸ This distinction is important because it suggests that the *Brushaber* ruling might not apply to taxes on unrealized gains, which could be seen as a tax on the property itself rather than on the income it produces.

⁴³ U.S. CONST., amend. XVI.

⁴⁴ *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 15–18 (1916).

⁴⁵ See discussion *supra* Part I.

⁴⁶ *Brushaber*, 240 U.S. at 1.

⁴⁷ *Id.* at 18–19.

⁴⁸ *Id.*; *Pollock*, 158 U.S. at 618.

Brushaber’s rejection of the source-based approach to income taxation ignited debates throughout the United States.⁴⁹ These debates would continue to reverberate throughout American judicial history, particularly in relation to the realization of income—a concept that lies at the heart of *Moore*.⁵⁰

C. *The Realization Principle*

In *Helvering v. Horst*, the Supreme Court stated, “The power to dispose of income is the equivalent of ownership of it. The exercise of that power to procure the payment of income to another is the enjoyment and hence the realization of the income by him who exercises it.”⁵¹ The emergence of the realization principle, a crucial development in the Supreme Court’s conception of income, gradually gained prominence in the early twentieth century.⁵² The realization principle emerged as a pragmatic solution to the challenges of valuing and taxing unrealized gains, which are inherently speculative and prone to fluctuation.⁵³ The realization principle is rooted in the idea that income should be taxed when it is definitively established and can be accurately measured; it stipulates that income is generally not recognized for tax purposes until it is realized through a sale or exchange.⁵⁴ In the 1921 case *Merchants’ Loan & Trust Co. v. Smietanka*, the Supreme Court confirmed the realization principle as a tenet of taxable income:

A “gain or profit” “produced by” or “derived from” that investment, and that it “proceeded” and was “severed” or rendered severable from it by the sale for cash, and thereby became that “realized gain” which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress.⁵⁵

In 1975, the Court in *Ivan Allen Company v. United States* addressed the taxation of undistributed accumulated income and held that “any such

⁴⁹ *Pollock*, 158 U.S. at 618; *Moore v. United States*, 602 U.S. 572, 583–84 (2024).

⁵⁰ See *Moore*, 602 U.S. 572, 584 (2024).

⁵¹ *Helvering v. Horst*, 311 U.S. 112, 118 (1940).

⁵² See generally Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization*, in *Tax Stories: An In-Depth Look at Ten Leading Federal Income Tax Cases* 53, 55–62 (Paul L. Caron ed., 2d ed. 2009); see also Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 5.1 (3d ed. 2024) (tracing the doctrinal development of the realization requirement from the early twentieth century).

⁵³ *Cullinan v. Walker*, 262 U.S. 134, 138 (1923).

⁵⁴ *Merchs.’s Loan & Tr. Co. v. Smietanka*, 255 U.S. 509, 519–20 (1921); *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185, 188 (1918).

⁵⁵ *Smietanka*, 255 U.S. at 520 (1921).

unrealized appreciation does not enter into the computation of the corporation's 'income' and 'earnings and profits.'"⁵⁶ Relying on precedent, the Court further determined the taxation of accumulated income occurs at the stockholder level "only when distributed."⁵⁷ In 1982, the Court reaffirmed that "the substance, not the form, of the agreed transaction controls in determining whether taxable income was realized."⁵⁸ These holdings reiterate the realization doctrine as an essential factor of taxable income.

Before and after the ratification of the Sixteenth Amendment, the Supreme Court shaped the understanding of taxable income. In the early twentieth century, cases like *Pollock*, *Smietanka*, *Eisner v. Macomber*, *Cullinan*, *Safety Car*, and *Horst* were important precedents in defining income, its distinctiveness from the underlying property, and the realization requirement.⁵⁹ These cases stand as pillars in the evolution of the modern tax regime and continue to influence judicial interpretation of the Sixteenth Amendment, including its application to various forms of income and, most recently, unrealized gains.

II. EISNER V. MACOMBER'S LEGACY

In 1920, the Sixteenth Amendment's taxing authority faced its first legal challenge with arguments focusing on the constitutionality of taxing unrealized gains in *Eisner v. Macomber*.⁶⁰ The Supreme Court held that a federal tax levied on a stockholder's stock dividend was unconstitutional because the issuance of stock dividends did not increase the stockholder's wealth.⁶¹ Therefore, Congress lacked authority to tax stock dividends or "the accumulated profits behind it" as income under the Sixteenth Amendment or any other constitutional provision.⁶² The Court further stated that classifying stock dividends as income misconstrued the meaning of income as defined in the Sixteenth Amendment:

⁵⁶ *Ivan Allen Co. v. United States*, 422 U.S. 617, 627 (1975).

⁵⁷ *Helvering v. Chi. Stock Yards Co.*, 318 U.S. 693, 699 (1943); *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969); *Ivan Allen Co.*, 422 U.S. at 626 (1975).

⁵⁸ *Diedrich v. Comm'r*, 457 U.S. 191, 191 (1982) (citing *Old Colony Tr. Co. v. Comm'r*, 279 U.S. 716, 729 (1929); *Crane v. Comm'r*, 331 U.S. 1, 4 (1947)).

⁵⁹ *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 635–37 (1895); *Smietanka*, 255 U.S. at 519; *Eisner v. Macomber*, 252 U.S. 189, 199 (1920); *Cullinan v. Walker*, 262 U.S. 134, 137 (1923); *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936); *Helvering v. Horst*, 311 U.S. 112, 118 (1940).

⁶⁰ *See generally Macomber*, 252 U.S. 189.

⁶¹ *Id.* at 219.

⁶² *Id.*

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.⁶³

Likewise, the taxation of unrealized gains was a concept central to the question before the Court in *Moore*.⁶⁴ In *Moore*, the government asserted *Macomber* did not apply to the Moores' constitutional challenge; rather, the government argued, post-*Macomber* precedent was applicable.⁶⁵ However, a deeper study of *Macomber* indicates otherwise.

A. Case Background

Myrtle Macomber held a substantial number of shares in Standard Oil Company of California, a publicly traded corporation.⁶⁶ Following a period of significant growth, Standard Oil issued a stock dividend of fifty percent, resulting in Macomber receiving additional shares.⁶⁷ Under the Revenue Act of 1916, the federal government sought to tax Macomber on these additional shares as taxable income.⁶⁸ Macomber disputed, arguing that the stock dividend did not constitute taxable income, and she prevailed in the district court.⁶⁹ The case was subsequently brought before the United States Supreme Court for review, presenting the question of whether a stock dividend, issued in the form of additional shares, constitutes taxable income under the Sixteenth Amendment.⁷⁰

⁶³ *Id.* at 211 (emphasis added).

⁶⁴ *Moore*, 602 U.S. 572, 604 (2024)

⁶⁵ *Moore*, 602 U.S. 572, 588–96 (2024); Brief for the United States at 19–24, 35–38, *Moore v. United States*, 602 U.S. 572 (2024) (No. 22-800), 2023 WL 6927226.

⁶⁶ *Macomber*, 252 U.S. at 191.

⁶⁷ *Id.*

⁶⁸ *Id.*; see Revenue Act of 1916, ch. 463, § 2(b), 39 Stat. 756, 757-58 (1916).

⁶⁹ *Macomber*, 252 U.S. at 191.

⁷⁰ *Id.*

The Supreme Court held that a stock dividend, where a corporation distributes additional shares to its shareholders in proportion to their existing holdings, does not constitute taxable income.⁷¹ According to the Court, stock dividends merely alter the form of the shareholder's investment, not its substance, because the shareholder does not receive cash or other assets of value and the shareholder's proportional ownership in the corporation does not change.⁷²

The Court emphasized that to “distinguish between what is and what is not ‘income’ is of critical importance for future judicial interpretations which must apply such distinction according to truth and substance....”⁷³ Furthermore, the Court warned that “Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.”⁷⁴

B. The Realization Requirement

Macomber cemented the realization requirement as a cornerstone of United States income tax law. The Court emphasized that, under the Sixteenth Amendment's plain language, income must be realized—that is, separated from capital—before it can be subject to taxation.⁷⁵

Macomber also clarified the distinction between income and capital, highlighting that mere increases in an asset's value do not constitute taxable income unless and until that gain is realized through sale or other disposition.⁷⁶ According to the Court, such a realization is gain “received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property.”⁷⁷ This principle has been reaffirmed in subsequent decisions and remains a fundamental aspect of modern tax law.⁷⁸

⁷¹ *Id.*

⁷² *Id.* at 194.

⁷³ *Id.* at 193.

⁷⁴ *Id.*

⁷⁵ *Macomber*, 252 U.S. at 193.

⁷⁶ *Id.* at 207–09 (1920); *see also* *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991) (reaffirming that appreciation in value of property does not, standing alone, constitute a realization event).

⁷⁷ *Macomber*, 252 U.S. at 193.

⁷⁸ *See* *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (defining gross income as “undeniable accessions to wealth, clearly realized”); *Cottage Sav. Ass'n*, 499 U.S. at 559

C. *Subsequent Interpretations*

Since *Macomber*, Supreme Court decisions have expanded the definition of income, blurring the lines between realized and unrealized gains.⁷⁹ While *Moore* departed from the realization requirement, it did not explicitly overrule *Macomber*.⁸⁰ Instead, the *Moore* Court suggested that *Macomber*'s focus on shareholder control and dominion over the underlying property may no longer be the sole factor for income recognition and claimed *Macomber* did not address attribution, rendering that decision "implausible" by the Court's subsequent holdings.⁸¹ However, a thorough reading of *Macomber* reveals that this assertion by the *Moore* Court is misguided. *Macomber* specifically deemed the "characteristic and distinguishing attribute of income" as "essential for a correct solution" of the case at hand.⁸²

D. *Analysis and Critique*

The *Moore* Court declined to address whether the Constitution required realization for gain to be considered income, and while the Court did not overturn *Macomber*, we can infer that the realization requirement is not immaterial.⁸³

Macomber has been criticized for its intricate constitutional analysis of income, with some arguing the Court's emphasis on the separation and receipt of income for personal use is overly rigid and outdated.⁸⁴ This criticism misinterprets *Macomber*'s core principle. While the Court held that stock dividends, which do not involve a separation of corporate assets, are not

(affirming that the tax system "has long distinguished between a realization event, which triggers recognition of gain or loss, and the mere appreciation or depreciation of property").

⁷⁹ See *Glenshaw Glass Co.*, 348 U.S. at 431–32 (1955) (broadly defining gross income to include "any undeniable accessions to wealth, clearly realized"); see *Helvering v. Griffiths*, 318 U.S. 371, 394–95 (1943) (suggesting that post-*Macomber* case law had expanded the permissible scope of income taxation).

⁸⁰ *Moore v. United States*, 602 U.S. 572, 573 (2024).

⁸¹ *Id.* at 574.

⁸² *Macomber*, 252 U.S. at 207 (citing *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918) ("Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale of conversion of capital assets"))).

⁸³ *Moore*, 602 U.S. at 588 n.3; *id.* at 584 n.2.

⁸⁴ See, e.g., Kornhauser, *supra* note 52, at 76–84 (surveying scholarly criticism of *Macomber*'s realization framework).

taxable income, this does not mean that all unrealized gains are exempt from taxation.⁸⁵

The government in *Moore* mistakenly argued that cases subsequent to *Macomber* such as *Helvering v. Bruun* have abrogated *Macomber*'s holding.⁸⁶ However, these cases do not negate the principle of realization established in *Macomber*. Rather, they clarify and expand upon it, recognizing that income can be realized in various forms beyond physical severance from capital.

In *Bruun*, the Court held that leasehold improvements could be considered income even without severance from the underlying property.⁸⁷ This does not contradict *Macomber*. Rather, it refines the concept of realization, emphasizing that income is realized upon receipt, regardless of whether it is physically separated from the underlying capital.⁸⁸

The argument for retaining the realization requirement remains strong. The Sixteenth Amendment's reference to "incomes" has historically been interpreted to mean realized gains, raising constitutional concerns about taxing unrealized gains.⁸⁹ Additionally, the practical challenges of valuing and taxing unrealized gains, the potential negative impact on investment and economic growth, and liquidity issues faced by taxpayers holding illiquid assets all point in favor of this requirement.⁹⁰

Abandoning the realization requirement produces unpredictable and unfair tax implications. It imposes a tax burden on taxpayers who have not yet benefited from an increase in value. This potential for unfairness highlights the need for a clear and consistent definition of income for tax purposes.

⁸⁵ *Macomber*, 252 U.S. at 194–95.

⁸⁶ *Moore*, 602 U.S. at 588 n.3.; Brief for the United States at 35–38, *Moore v. United States*, 602 U.S. 572 (2024), No. 22-800, 2023 WL 6927226 (citing *Helvering v. Bruun*, 309 U.S. 461 (1940); *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)); see *Bruun*, 309 U.S. 461, 461, 469.

⁸⁷ *Bruun*, 309 U.S. at 469.

⁸⁸ See Revenue Act of 1916, ch. 463, § 2(b), 39 Stat. 756, 757-58 (1916).

⁸⁹ *Ivan Allen Co. v. United States*, 422 U.S. 617, 634–35 (1975); U.S. CONST. amend. XVI.

⁹⁰ *Id.*

III. DISTINGUISHING THE MANDATORY REPATRIATION TAX

A. Overview

i. The Pre-Existing Rule

Prior to the enactment of the MRT in 2017, the United States operated under a deferral system for the taxation of foreign earnings held by U.S. multinational corporations (MNCs).⁹¹ Under this system, U.S. MNCs were not subject to U.S. tax on their foreign earnings until those earnings were repatriated, either through dividend distribution or other taxable event.⁹²

This deferral system, while intended to promote competitiveness, led to an accumulation of an estimated two trillion six hundred billion dollars in untaxed foreign earnings held overseas by U.S. MNCs by 2017.⁹³ This accumulation raised concerns about tax evasion and disincentives to invest in the U.S. economy.⁹⁴ Thus, the deferral system presented a challenge in balancing the need for revenue with overreach in taxing foreign earnings.⁹⁵

In *Limited, Inc. v. Commissioner*, the Court highlighted the history of repatriation provisions and legislative efforts to prevent the spending of untaxed foreign earnings, demonstrating the evolution of the tax code to address the complexities of foreign earnings.⁹⁶

The pre-MRT deferral system incentivized the accumulation of untaxed earnings abroad.⁹⁷ The introduction of the MRT marked a significant shift in this regime, subjecting accumulated foreign earnings to immediate

⁹¹ Lyman P. Q. Johnson, *Organizing Corp. & Other Business Enterprises* § 4.10 (John C. P. Goldberg et al. eds., 5th ed.) (2025).

⁹² *Id.*

⁹³ Jane G. Gravelle, Cong. Rsch. Serv., R45186, *Issues in International Corporate Taxation: The 2017 Revision* (P.L. 115-97) p.31 (2018).

⁹⁴ *Id.*

⁹⁵ Jane G. Gravelle, Cong. Rsch. Serv., R42624, *Moving to a Territorial Income Tax: Options and Challenges* p. 22 (2012).

⁹⁶ *Ltd., Inc. v. Comm’r*, 113 T.C. 169, 183–185 (1999).

⁹⁷ See Gravelle, *supra* note 93, at 31; see also Staff of J. Comm. on Tax’n, JCS-1-18, *General Explanation of Public Law 115-97*, at 369 (2018) [hereinafter JCT Blue Book] (describing Congress’s finding that the pre-TCJA deferral system “created an incentive for U.S. companies to accumulate earnings offshore”).

taxation and significantly impacting the financial strategies of U.S. MNCs with substantial foreign holdings.⁹⁸

ii. The 2017 Tax Cuts and Jobs Act MRT Provision

The MRT imposed by the 2017 Tax Cuts and Jobs Act marked a significant departure from the previous deferral system, subjecting accumulated foreign earnings to immediate taxation by the United States. The specifics of the MRT, including payment schedules and conditions for acceleration, are outlined in 26 U.S.C. § 965. Under this section, a U.S. shareholder of a specified foreign corporation, as defined under the Controlled Foreign Corporation rules, is required to reclassify the corporation's accumulated deferred foreign income as Subpart F Income.⁹⁹ This amount is then included in the shareholder's taxable income for the 2017 tax year.¹⁰⁰ 26 U.S.C. § 962 allows individual U.S. shareholders to elect to be taxed on certain foreign income as if received by a domestic corporation, potentially reducing their tax liability.

The constitutionality of the MRT was called into question by legal scholars even before *Moore*. Legal scholars posit that I.R.C. § 965 (the codification of the MRT), due to its structure, constitutes a direct tax.¹⁰¹ According to the Constitution, direct taxes must be apportioned among the states based on population.¹⁰² It is contended that the MRT does not qualify as an income tax because it is not levied on an action that generates income for the U.S. shareholder.¹⁰³ Instead, it taxes excluded income directly in the hands of the shareholders, diverging from the traditional model where income

⁹⁸ See JCT Blue Book, *supra* note 97, at 369–72; see also Gravelle, *supra* note 93, at 31–35 (analyzing the MRT's structural shift from the deferral system and its financial impact on U.S. multinationals).

⁹⁹ 26 U.S.C. § 965.

¹⁰⁰ *Id.*

¹⁰¹ See Andrew D. Berg & Bret N. Feingold, *The Deemed Repatriation Tax—A Bridge Too Far?*, 159 TAX NOTES 1345, 1346 (2018); see also Hank Adler & Lacy Willis, *The Worst Statutory Precedent in Over 100 Years*, 160 TAX NOTES 1413, 1413 (2018); 26 U.S.C. § 965.

¹⁰² U.S. CONST. art I, § 9, cl. 4.

¹⁰³ See Berg & Feingold, *supra* note 101, at 1346–49; Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, YALE J. ON REG.: BULLETIN (Nov. 8, 2018), <https://www.yalejreg.com/bulletin/the-mandatory-repatriation-tax-is-unconstitutional-2/> (on file with UNT Dallas Law Review) (arguing the MRT lacks a taxable event attributable to the U.S. shareholder that would generate income under the Sixteenth Amendment).

tax was imposed on the receipt of income.¹⁰⁴ Thus, the constitutionality of the MRT remains a compelling question.

B. Tax Provision Comparisons

i. Revenue Act of 1937

The Revenue Act of 1937 (the “Act”) marked a pivotal moment in U.S. tax history, emerging as a response to the financial demands of President Franklin D. Roosevelt’s New Deal programs during the Great Depression.¹⁰⁵ Among its progressive reforms, the Act introduced provisions to curb tax avoidance using foreign corporations.¹⁰⁶

The Act’s primary target was foreign companies with a limited number of shareholders, often family-owned or controlled by a small group of individuals, of which U.S. shareholders collectively own more than fifty percent of the voting power or value.¹⁰⁷ Recognizing the potential for these corporations to be used to shield income from U.S. taxation, the Act introduced the concept of the foreign personal holding company (FPHC).¹⁰⁸

The FPHC regime established by the Act served as a legislative precursor to the broader CFC framework enacted in 1962 which expanded Congress’s approach to taxing U.S. shareholders on undistributed foreign income.¹⁰⁹ United States multinationals, however, are large corporations with operations in multiple countries, including the United States.¹¹⁰ While they may own or control foreign subsidiaries, these subsidiaries are not necessarily

¹⁰⁴ See Berg & Feingold, *supra* note 101, at 1346–48; Adler & Willis, *supra* note 101, at 1413–14.

¹⁰⁵ *Timelines in Tax History: Moralistic Tax Policy in the 1930s*, FORBES (Sept. 6, 2022, 08:00), <https://www.forbes.com/sites/taxnotes/2022/09/06/timelines-in-tax-history-moralistic-tax-policy-in-the-1930s/> (on file with the UNT Dallas Law Review).

¹⁰⁶ Revenue Act of 1937, Pub. L. No. 75-377, 50 Stat. 817–26 (codified as amended in scattered sections of 26 U.S.C. §§ 551–558 (foreign personal holding company income) and §§ 951–965 (controlled foreign corporations)).

¹⁰⁷ Revenue Act of 1937, Pub. L. No. 75-377, §§ 351–355, 50 Stat. 817, 826–33 (introducing foreign personal holding company provisions).

¹⁰⁸ *Id.*

¹⁰⁹ I.R.S. Practice Unit, INT-P-U-0023-13, *Concepts of Foreign Personal Holding Company Income* (Feb. 2, 2016), https://www.irs.gov/pub/fatca/int_practice_units/DPLCU_P_2_3_13.pdf (on file with the UNT Dallas Law Review).

¹¹⁰ See U.S. Gov’t Accountability Off., GAO-18-270, Report to Congressional Committees: Personnel Security Clearances: Additional Guidance and Oversight Needed at DOD to Ensure Consistent Application of Revocation Process 1 (2018), <https://www.gao.gov/assets/pad-78-58.pdf>.

CFCs or FPHCs, as their ownership and income structures can be vastly different.¹¹¹

The Act also taxed FPHCs' undistributed income, making a significant step in closing tax loopholes and ensuring that U.S. taxpayers could not easily avoid taxes by using foreign corporations.¹¹² It laid the groundwork for future tax reforms, including the Subpart F provisions introduced in 1962, which further addressed the issue of tax deferral on foreign income.

ii. Subpart F

Subpart F of the Internal Revenue Code was enacted as part of the Revenue Act of 1962 to curtail the use of "tax havens" and prevent erosion of the U.S. tax base.¹¹³ It does so by establishing rules that immediately tax certain categories of income—known as Subpart F income—earned by CFCs.¹¹⁴ Subpart F income includes passive income, such as dividends and interest, and active income that can be easily moved and manipulated to avoid taxation.¹¹⁵

Two crucial sections within Subpart F are Sections 951 and 956. Section 951 dictates that U.S. shareholders of a CFC must include their pro rata share of the CFC's Subpart F income in their gross income, even if that income has not been distributed as a dividend.¹¹⁶ This prevents U.S. shareholders from indefinitely deferring taxes on this type of income. Section 956 complements Section 951 by addressing the situation where a CFC invests its earnings in U.S. property.¹¹⁷ It treats these investments as distributions to U.S. shareholders, triggering tax liability.¹¹⁸ This provision closes a potential loophole where CFCs could effectively repatriate earnings without formal dividend distributions.

¹¹¹ *Id.*; See I.R.S. Practice Unit, *supra* note 107.

¹¹² Revenue Act of 1937, Pub. L. No. 75-377, § 351, 50 Stat. 817, 826; see also S. Rep. No. 75-1242, at 1–5 (1937), reprinted in 1937-2 C.B. 609 (explaining that the FPHC provisions were designed to prevent U.S. taxpayers from using foreign corporations to shelter passive income from U.S. taxation).

¹¹³ *The Ltd., Inc.*, 113 T.C. at 183.

¹¹⁴ I.R.C. § 951.

¹¹⁵ *Id.*

¹¹⁶ See I.R.C. § 951.

¹¹⁷ See I.R.C. § 956.

¹¹⁸ See *id.*

Over time, Subpart F has evolved through legislative amendments. For example, in 1976, Congress recognized that the scope of Section 956 discouraged investments that would benefit the U.S. balance of payments.¹¹⁹ Consequently, exceptions were added to the definition of U.S. property, including certain investments in unrelated domestic corporations.¹²⁰

The legislative intent behind Subpart F remains clear: curbing tax deferral and ensuring certain types of foreign income earned by CFCs are subject to U.S. taxation.¹²¹ Subpart F represents a significant tool in the U.S. government's efforts to protect its tax base and prevent the erosion of tax revenue through offshore tax havens. While Subpart F effectively addressed tax deferral concerns related to controlled foreign corporations, a similar issue persisted with passthrough entities.

iii. Passthrough Entities

Prior to the Sixteenth Amendment and the establishment of the modern income tax system, passthrough entities—primarily partnerships—were not subject to federal income tax.¹²² At that time, income generated by the partnership was taxed directly to each partner, regardless of whether the income was distributed or retained within the partnership.¹²³ With the advent of the corporate income tax, a distinction emerged between corporations and passthrough entities. Corporations faced double taxation, with income taxed at the corporate level and when distributed to shareholders as dividends.¹²⁴ In contrast, passthrough entities, including partnerships and S corporations, continued to be taxed only at the owner level, with income flowing through to the individual owners' tax returns.¹²⁵

¹¹⁹ Tax Reform Act of 1976, Pub. L. No. 94-455, § 1022(a), 90 Stat. 1520, 1618 (1976); S. Rep. No. 94-938, at 295 (1976) (stating that the definition of “United States property” in prior law “created a disincentive for certain foreign corporations to invest in the United States”).

¹²⁰ I.R.C. § 956(c)(2)(F), (G).

¹²¹ *The Ltd, Inc.*, 113 T.C. at 185.

¹²² See William S. McKee, William F. Nelson & Robert L. Whitmire, *Federal Taxation of Partnerships and Partners* ¶ 1.01[1] (4th ed. 2007) (noting that prior to the modern income tax era, partnerships were not subject to an entity-level federal income tax, with income flowing directly to partners).

¹²³ See I.R.C. § 701 (2024) (partners, not the partnership, are taxed on partnership income); see also *id.* at ¶ 1.01[2] (explaining the foundational rule that partnership income is taxed at the partner level regardless of distribution).

¹²⁴ Payne-Aldrich Tariff Act, ch. 6, 36 Stat. 11, 112–113 (1909).

¹²⁵ I.R.C. §§ 1361, 703.

The rise of the “check-the-box” regulations in the 1990s further solidified the distinction between corporations and passthrough entities by allowing unincorporated business entities to elect their tax classification.¹²⁶ This increased the flexibility for businesses to choose the most tax-advantaged structure, leading to significant growth in the number of passthrough entities.¹²⁷

Under Section 301.7701-3 of the Treasury Regulations, the classification of a foreign entity for federal tax purposes as either a corporation or a passthrough entity depends primarily on two factors: the number of owners and the existence of limited liability.¹²⁸ Foreign entities that have a single owner are generally treated as a disregarded entity, unless it elects to be classified as an association and thus taxed as a corporation.¹²⁹ Foreign entities with multiple owners must consider the presence or absence of limited liability—a corporate characteristic—to determine the appropriate default classification.¹³⁰

The MRT is analogous to taxing the undistributed income of passthrough entities. Both involve taxing income that has not been distributed to owners. According to Treasury Regulations, the American-controlled foreign corporation in which the Moores invested was only subject to default passthrough taxation treatment if (1) the foreign entity had not made an election otherwise or (2) one of its members did not have limited liability.¹³¹

The *Moore* decision, while upholding the MRT, will have implications for the taxation of undistributed income in passthrough entities. *Moore* emphasized the importance of distinguishing between income and property. The Court’s avoidance of the realization requirement raises significant questions about Congress’s authority to determine the tax classification of foreign corporations with total disregard to their elected

¹²⁶ 26 C.F.R. §§ 301.7701-2, -3.

¹²⁷ See Michael Cooper et al., *Business in the United States: Who Owns It, and How Much Tax Do They Pay?*, 30 TAX POL’Y & ECON. 91, 93–96 (2016) (documenting significant growth in the share of business income earned by pass-through entities following the 1996 check-the-box regulations); see also U.S. Gov’t Accountability Off., GAO-14-616, *Large Pass-Through Entities and Their Use of Tax Expenditures*, at 1–4 (2014).

¹²⁸ 26 C.F.R. §§ 301.7701-3.

¹²⁹ *Id.* at § 301.7701-3(b)(2)(i).

¹³⁰ *Id.*

¹³¹ *Id.* at § 301.7701-3(d), (b)(2)(i).

status and existing treasury regulations at the time of formation. If Congress has such authority, it could potentially tax undistributed income in passthrough entities without a realization event—a move that would be unprecedented and lacks clear constitutional or statutory basis.

IV. *MOORE V. UNITED STATES* ANALYSIS

It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.¹³²

—Chief Justice Marshall, 1819

In *Trustees of Dartmouth Coll. v. Woodward*, Chief Justice Marshall argued that claiming a specific situation was unforeseen by the Constitution’s Framers insufficient.¹³³ According to Marshall, one must demonstrate that, had the present case been considered, the Constitution’s language would have explicitly excluded or made a special exception for it.¹³⁴ If a case falls within the plain meaning of the Constitution’s text, it should be subject to its provisions unless the literal interpretation leads to absurd, harmful, or contradictory outcomes.¹³⁵ Today, over two centuries later, Chief Justice Marshall’s articulation of the plain meaning principle of constitutional interpretation resonates in judicial reasoning.

The Moores raised questions about the original intent of the Sixteenth Amendment and whether it was meant to encompass such a broad interpretation of income.¹³⁶ Applying Marshall’s approach the Court must consider not only the specific circumstances of *Moore*, but whether a broader

¹³² *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 644–645 (1819).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Moore v. United States*, 602 U.S. 572, 573 (2024); The facts of *Moore v. United States* are summarized on p. 2, *infra*.

interpretation of the Sixteenth Amendment would lead to absurd or unjust results. By declaring the foreign corporation earnings as realized to the U.S. shareholder, the Moore Court never reached an analysis of the latter.¹³⁷

A. Arguments and Outcomes

In the United States District Court, the Moores argued that the MRT violated the Fifth Amendment's Due Process Clause because it is retroactive.¹³⁸ They contended that taxing accumulated foreign earnings that predated the MRT constituted an unconstitutional retroactive application of the law.¹³⁹

However, the Ninth Circuit rejected this argument, relying on the Supreme Court's decision in *United States v. Carlton*.¹⁴⁰ The court reasoned that while the MRT was retroactive, it was not an entirely new tax.¹⁴¹ Rather, it was a remedial measure designed to address uncertainty in the law and incentivize U.S. taxpayers to repatriate foreign earnings.¹⁴² Despite the lower court rulings, the Moores did not seek certiorari on this issue, and thus the Supreme Court majority did not provide guidance on it.¹⁴³ This is unfortunate, as the due process argument may have offered a stronger challenge to the MRT in the specific circumstances of their case.

The Ninth Circuit's reliance on *Carlton* seems questionable, as *Carlton* dealt with a retroactive amendment to a tax deduction provision, which is different from the MRT's taxation of previously untaxed income.¹⁴⁴ Additionally, the MRT's retroactive application to past earnings raises concerns about its fairness under the Due Process Clause, especially for taxpayers who acquired their shares in foreign corporations after those earnings were accumulated. In turn, the question of whether the MRT unfairly penalized taxpayers for actions taken before the law was enacted is a valid inquiry.

¹³⁷ *Id.* at 575.

¹³⁸ *Moore v. United States*, 126 A.F.T.R. 2d (RIA) 2020-6944, No. C19-1539, 2020 U.S. Dist. LEXIS 216771, at *4 (W.D. Wash. Nov. 19, 2020); *Moore v. United States*, 36 F.4th 930 (2022).

¹³⁹ *Moore*, 36 F.4th 938-39.

¹⁴⁰ *Id.*; *United States v. Carlton*, 512 U.S. 26 (1994).

¹⁴¹ *Moore*, 36 F.4th at 938-939.

¹⁴² *Id.*

¹⁴³ *Moore v. United States*, 602 U.S. 572, 572 (2024).

¹⁴⁴ *Carlton*, 512 U.S. 26.

B. Potential Violations of the Direct Tax Clause

The Moores also challenged the MRT as a violation of the Constitution's Direct Tax Clause. They argued that the MRT was a tax on property rather than income, and as such, should have been apportioned among the States based on population.¹⁴⁵ Their challenge centered on the fact that the MRT taxed undistributed foreign earnings held by a CFC, which the Moores argued were property, not realized income.¹⁴⁶

The government countered by asserting that the MRT was a tax on income, not property, as it targeted the accumulated earnings of CFCs, which are ultimately income.¹⁴⁷ They argued that the Sixteenth Amendment grants Congress broad authority to tax income "from whatever source derived," and that this encompasses the undistributed earnings of CFCs.¹⁴⁸ Furthermore, the government emphasized that the realization requirement, which typically necessitates a sale or exchange of property for income to be recognized, does not apply to all forms of income, citing instances where Congress has taxed undistributed income in the context of partnerships and trusts.¹⁴⁹

The government drew a parallel between the MRT's attribution of CFC income to shareholders and the taxation of passthrough entities, arguing that both involve taxing income at the owner level.¹⁵⁰ They contended that the MRT, like the taxation of passthrough entities, did not violate the Direct Tax Clause because it was a tax on income, not property.¹⁵¹

The Moores countered this argument by asserting that the MRT's disregard for the election of tax classification, a feature inherent in the taxation of passthrough entities, rendered the comparison invalid.¹⁵² They argued that the MRT's mandatory attribution of CFC income to shareholders, without the option to elect passthrough status, was fundamentally different from the taxation of partnerships or S corporations, where such an election is available.¹⁵³

¹⁴⁵ *Moore*, 602 U.S. at 584.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ U.S. CONST. amend. XVI; *Moore*, 602 U.S. at 612 (Barrett, J., concurring).

¹⁴⁹ *Moore*, 602 U.S. at 606–07, 585–90.

¹⁵⁰ Brief for the United States at 35–38, *Moore v. United States*, 602 U.S. 572 (2024) (No. 22-800), 2023 WL 6927226.

¹⁵¹ *Id.* at 38–42.

¹⁵² *Moore*, 602 U.S. at 593–95.

¹⁵³ *Id.*

In its decision, the Supreme Court, with only a four-justice majority, sidestepped the realization requirement issue, focusing instead on the broader question of whether the MRT was a tax on income or property.¹⁵⁴ The Court ultimately held that the MRT was a tax on income, not property, and thus did not violate the Direct Tax Clause.¹⁵⁵ However, the decision did not definitively address the constitutionality of Subpart F or the implications of the MRT for the taxation of undistributed income in passthrough entities.¹⁵⁶

Justice Barrett's concurrence (joined by Justice Alito) and Justice Thomas's dissent (joined by Justice Gorsuch) criticized the majority for disregarding the realization requirement established in *Macomber*.¹⁵⁷ Justice Thomas argued that the MRT, by taxing undistributed income, violated the realization requirement and thus exceeded Congress's authority under the Sixteenth Amendment.¹⁵⁸

Moore leaves many questions unanswered, particularly regarding the constitutionality of taxing undistributed income and the future of Subpart F. The Court's assertion that the MRT shares the same essential features as Subpart F overlooks a crucial distinction. Unlike other provisions within Subpart F, the MRT lacks any connection to a realization event or constructive receipt of income, raising questions about whether it truly taxes income, not property.¹⁵⁹ As one scholar argued, the MRT lacks a "rational basis for Congress to attribute income to a taxpayer," as it hinges solely on stock ownership on a specific date, diverging significantly from the rest of subpart F and potentially raising constitutional concerns.¹⁶⁰

While novelty is not necessarily unconstitutional, the MRT's uniqueness compared to traditional income taxes cannot be ignored.¹⁶¹ Its imposition based solely on share ownership, rather than on realization of income, suggests a departure from established principles of income taxation.¹⁶² This deviation raises questions about the MRT's constitutional validity and its alignment with the Sixteenth Amendment's authorization to

¹⁵⁴ *Id.* at 593–95.

¹⁵⁵ *Moore*, 602 U.S. at 599–600.

¹⁵⁶ *Id.* at 598.

¹⁵⁷ *Id.* at 614–17 (Barrett, J., concurring); *Id.* at 620 (Thomas, J., dissenting); see *Macomber*, 252 U.S. 189.

¹⁵⁸ *Moore*, 602 U.S. at 620–52 (Thomas, J., dissenting).

¹⁵⁹ *Id.* at 650.

¹⁶⁰ McElroy, *supra* note 103.

¹⁶¹ *Moore*, 602 U.S. at 650 (Thomas, J., dissenting).

¹⁶² *Id.* at 650–52 (Thomas, J., dissenting).

tax income. It highlights the ongoing tension between the government's broad taxing power and the constitutional limitations on that power, leaving room for further legal challenges and legislative action in this complex area of tax law.

C. *Impact on Tax Policy*

The *Moore* decision has significant implications for future tax policy. Initial concerns about a broad ruling that could cost taxpayers trillions of dollars were assuaged as the Court's holding narrowly affirmed the existing tax regime that controls income shifting by multinational corporations.¹⁶³ However, the decision sheds light on the Court's potential stance on proposed tax reforms. Proposals like former President Biden's mark-to-market income tax, which aimed to tax unrealized gains, face an uncertain future considering the *Moore* ruling.¹⁶⁴ Moreover, the *Moore* decision could impact the viability of a wealth tax. The opinion highlighted the government's concession during oral arguments that a wealth tax would be unconstitutional without apportionment, suggesting that such a tax might face significant legal challenges.¹⁶⁵

The ruling underscores the importance of structuring proposed tax laws as income taxes, allowing for the taxation of both net gains and losses. A tax that only targets gains, without allowing for full deductibility and carryovers, may not meet the criteria for an income tax, potentially facing constitutional scrutiny under the *Moore* precedent.

V. CONCLUSION

In the annals of American taxation, the concept of income has undergone a continuous evolution, reflecting the dynamic nature of economic activities and the ongoing tension between the need for government revenue and the safeguarding of individual liberties. From its origins as a flow of value derived from labor, business, or property to its present-day interpretation under the Sixteenth Amendment, "income" continues to evolve.

The MRT's unique features, particularly its departure from the traditional realization requirement and its mandatory attribution of income to shareholders, raise questions about its constitutional validity. These questions

¹⁶³ *Id.* at 579, 600.

¹⁶⁴ U.S. Dep't of Treasury, General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals 59–68 (2021).

¹⁶⁵ See *Moore*, 602 U.S. at 599.

are compounded by the differing viewpoints within the Court which expressed concerns about the MRT's compatibility with the Sixteenth Amendment and established principles of income taxation.¹⁶⁶

Moore was a missed opportunity to definitively address the constitutionality of taxing unrealized gains without apportionment. Instead of being a litmus test for the broader question, the case ultimately served as an international tax case, upholding the government's sixty-year-old effort to tax U.S. multinationals on income earned abroad.¹⁶⁷

The central question concerning the realization requirement remains unsolved by the Supreme Court, and is likely to resurface in the future, particularly with regard to mark-to-market taxation or wealth taxes where the issues of taxing unrealized gain is directly implicated.

In conclusion, *Moore v. United States* underscores the enduring complexity of income taxation in the United States. It reflects the ongoing struggle to balance the government's need for revenue with the protection of individual property rights and the constitutional limitations on federal power. *Moore* serves as a reminder that the definition of income is constantly under attack, and the extent of Congress's authority to tax it remains an open question with significant implications for the future of tax policy in the United States.

¹⁶⁶ *Id.* at 620.

¹⁶⁷ *Id.* at 603.