NOTE

AN UNREALIZED OPPORTUNITY: WHAT *MOORE V. UNITED STATES* MEANS FOR THE EXISTENCE OF A CONSTITUTIONAL REALIZATION REQUIREMENT FOR INCOME TAXATION

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The United States Supreme Court disappointed tax practitioners and commentators when it declined to weigh in on whether realization—actual or constructive receipt of income as wages, salaries, interest, rent, business income, dividends, or gain from the sale of property—is a constitutional prerequisite for income taxation in *Moore v. United States*. The Court managed to avoid the realization question by holding that income realized by a foreign corporation could be attributed to the Moores as shareholders such that requiring them to pay a one-time Mandatory Repatriation Tax was constitutionally permissible. The shareholders could be taxed on the corporation's realized earnings, much as owners of pass-through entities are taxed on their share of the entity's earnings.

Despite the Court's apparent avoidance of the question, this Note will argue that various aspects of the *Moore* opinion suggest that a constitutional realization requirement does exist. However, such a requirement, if it exists, would do little to limit Congress's Sixteenth Amendment taxing power, as the Court's attribution analysis brings many existing Internal Revenue Code (I.R.C.) provisions within the ambit of taxability, mitigating fears of realization tearing a "blast radius" through the I.R.C. Furthermore, the design of effective policies that could tax wealth in spite of a realization requirement undermines arguments that realization could pose an obstacle to the future enactment of a wealth tax.

Although the Court's maintenance of the status quo with respect to realization as a constitutional prerequisite may be frustrating for commentators, it is unlikely to have a significant short-term impact on future tax policy, given that the recently passed One Big Beautiful Bill Act (OBBBA) maintains the status quo of 2017's Tax Cuts and Jobs Act (TCJA) by extending and making permanent many of TCJA's provisions. As the Court

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* J.D. Candidate, University of Wisconsin Law School, 2026. I would like to thank Professor Robert A. Schnur for inspiring my interest in tax law and Dean Emily Cauble for her invaluable insight and thoughtful suggestions throughout the writing process. I would also like to thank our 2025–26 Senior Editorial Board for their stewardship of the Law Review, and in particular Beeta Siwik, Emma Dzwierzynski, and DeMarcus L. Williams for their editorial guidance. A special thanks is due to Taryn L. Hanson, Margo D'Agostino, Teagan K. Clark, and Aaron Snyder for their careful attention to detail in editing this piece. I am also grateful to Margaret O. Brown for providing helpful research suggestions regarding OBBBA tax provisions. And finally, my deepest gratitude to my parents, the Honorable Jay N. Conley and Linda Conley for their unending support.

https://doi.org/10.59015/wlr.EAUB3362

was hesitant to limit Congress's ability to collect revenue via the taxing power by invalidating TCJA's Mandatory Repatriation Tax on realization grounds in *Moore*, the Court is likely to be similarly hesitant about using realization to invalidate any OBBBA tax provisions given projected decreases in federal income tax revenue over the coming decade.

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INTRODUCTION

On June 20, 2024, in the midst of a historic term that featured headline-grabbing opinions such as *Trump v. United States*[1] and *Loper Bright Enterprises v. Raimondo*,[2] the United States Supreme Court

1. 144 S. Ct. 2312 (2024).
2. 144 S. Ct. 2244 (2024).

decided *Moore v. United States*,[3] a lesser-publicized tax case with the potential to produce a "blast radius" in the Internal Revenue Code (I.R.C.) as we currently know it.[4] At issue in *Moore* was whether the Sixteenth Amendment to the United States Constitution imposes a "realization requirement" on the government's power to collect income taxes. In other words, does the Constitution require that income be "realized"—that is, actually or constructively received, as wages, salaries, interest, rent, business income, dividends, or gain from the sale of property[5]—before it can be included in a taxpayer's taxable gross income?

This is a question that commentators debated often in recent years,[6] but one that threatened wide-ranging implications if the Court answered definitively. The Court holding that the Constitution requires income to be realized before it can be taxed could significantly restrict Congress's taxing power under the Sixteenth Amendment, thereby invalidating numerous existing provisions of the I.R.C.[7] On the other hand, a holding that the Sixteenth Amendment imposes no such limitation on the government could allow for future income taxation of unrealized gains, such as the gain in value of an asset that the taxpayer has not sold.[8]

Confronted with the implications of its answer to the realization question, the Court in *Moore* declined to answer the question, specifying that it did not reach the issue of whether the Sixteenth Amendment imposes a realization requirement on Congress's taxing power in ultimately deciding to uphold the constitutionality of the challenged I.R.C. provision.[9] This was a disappointing result, not only for tax

3. 144 S. Ct. 1680 (2024).

4. *Id.* at 1693.

5. Renu Zaretsky, *No Taxation Without Realization?*, TAX POL'Y CTR. (July 5, 2023), https://taxpolicycenter.org/taxvox/no-taxation-without-realization; *see also* I.R.C. § 61. The definition of income provided by § 61 is broad in scope, encompassing "all income from whatever source derived," and thus this should not be seen as an exhaustive list of the ways in which income can be realized. *Id.*

6. *See* The Editorial Board, *Is a U.S. Wealth Tax Constitutional?*, WALL ST. J. (June 14, 2023, at 19:21 ET), https://www.wsj.com/articles/wealth-tax-ninth-circuit-moore-v-u-s-charles-and-kathleen-moore-supreme-court-constitution-6cdfba92?mod=hp_opin_pos_1.

7. *See* Reuven S. Avi-Yonah, *If* Moore *is Reversed*, TAX NOTES FED., June 26, 2023, at 2215, 2216–17 (noting that a realization requirement could impact the constitutionality of Subpart F and §§ 884, 1256, 817A, 877A, 475, 1291(d)(2) and 1366 of the I.R.C.).

8. Zaretsky, *supra* note 5.

9. *Moore*, 144 S. Ct. at 1696.

commentators,[10] but for the Moores as well, who explicitly framed their challenge in the context of a realization requirement.[11]

This Note will argue that the Court's avoidance of the realization question is largely motivated by a pragmatic desire to avoid creating chaos by bringing large portions of the I.R.C. under scrutiny.[12] This Note will further argue that, although the Court probably would find a constitutional realization requirement were it forced to answer this question,[13] such a requirement would do little in practice to limit Congress's taxing power under the Sixteenth Amendment. This is because the attribution of income analysis that the Court relies on in *Moore*[14] brings many I.R.C. provisions within the ambit of taxability, even if a realization requirement does exist. Similarly, the ability of policymakers to structure progressive tax policies or so-called "wealth taxes" in ways that would avoid running afoul of any realization requirement further underscores the limitations of realization as a check on Congressional taxing power. Finally, this Note concludes by arguing that although aspects of the *Moore* decision suggest the existence of a realization requirement, the Court is unlikely to formally enshrine realization as a constitutional prerequisite for income taxation in the near future in light of the recently passed One Big Beautiful Bill Act[15] (OBBBA). OBBBA extends and makes permanent many important provisions from 2017's Tax Cuts and Jobs Act,[16] leading to a corresponding reduction in federal income tax revenue, and thus the Court is unlikely to limit Congress's power to generate revenue even further by constitutionalizing realization.

I. THE CONSTITUTIONAL TAXING POWER AND THE REALIZATION REQUIREMENT THROUGHOUT HISTORY

This Part will proceed through three sections. First, it examines the constitutional basis for Congress's taxing authority, including how the Sixteenth Amendment expanded this power. This section will conclude

10. *See, e.g.*, Louis Vlahos, *The Supreme Court's Non-Opinion on the "Realization" of Income – A Lost Opportunity?*, RIVKIN RADLER: TAXSLAW (July 10, 2024), https://www.taxslaw.com/2024/07/the-supreme-courts-non-opinion-on-the-realization-of-income-a-lost-opportunity/#_edn9 [https://perma.cc/38TJ-S6MC].

11. Brief for Petitioners at i, *Moore*, 144 S. Ct. 1680 (No. 22-800) (stating the question presented by the Moores' appeal to be "[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.").

12. *Moore*, 144 S. Ct. at 1695–96 (concluding that "[t]he Constitution does not require . . . fiscal calamity.").

13. *See id.* at 1699 (Barrett, J., concurring in the judgement); *see also id.* at 1709 (Thomas, J., dissenting); *infra* Part III.

14. *Moore*, 144 S. Ct. at 1689–91.

15. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025).

16. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

by examining *Eisner v. Macomber*[17] and its holding that realization is a limit on Congress's power to tax incomes under the Sixteenth Amendment.[18] Second, this Part will examine the post-*Macomber* era, discussing the ways in which the Supreme Court apparently weakened and limited its holding in *Macomber*. Finally, this discussion of the post-*Macomber* era will conclude by exploring the Court's revitalization of *Macomber* through favorable citations in recent cases, noting that the tension between this revitalization and the Court's post-*Macomber* decisions poses significant questions about realization's continuing vitality as a constitutional limitation on Congressional taxing power.

A. The Constitutional Basis of Congress's Taxing Power

The U.S. Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises."[19] This power is subject to an important limitation, namely that so-called "direct taxes" must be "apportioned among the several States."[20] An apportioned tax requires each state to pay an amount in proportion to its percentage of the population as of the most recent census; for example, "if California has twelve percent of the United States' population, then it is responsible for paying twelve percent of the total tax imposed across all the states."[21] As a practical matter, apportioning a tax in such a manner is an impossibility;[22] differences in state demographics and population distributions would raise concerns about the fairness or feasibility of implementing a direct tax.[23] Accordingly, Congress has not attempted to impose an apportioned direct tax since the Revenue Act of 1861.[24]

For the first century of the United States' existence, courts held that the scope of the taxing power limited by the apportionment requirement

17. 252 U.S. 189 (1920).

18. *Id.* at 212–13, 219 (holding that a shareholder who received a *pro rata* stock dividend "has not realized or received any income in the transaction," thus placing this stock dividend beyond the scope of Congress's Sixteenth Amendment taxing power).

19. U.S. CONST. art. I, § 8.

20. U.S. CONST. art. I, §§ 2, 9.

21. Evgeny Magidenko, *Classifying Federal Taxes for Constitutional Purposes*, 45 U. BALT. L. REV. 57, 60 (2015).

22. For a thorough discussion of the difficulties of apportionment, see Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 GA. L. REV. 249, 258–60 (2023). *But see* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX. L. REV. 75, 78–79 (2022) (rejecting the argument that the apportionment requirement serves as a "substantive barrier" to future federal taxation).

23. Grewal, *supra* note 22, at 258–60.

24. Alex Zhang, *Rethinking* Eisner v. Macomber*, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 183 (2024).

was narrow, such that only "capitation" taxes[25] or taxes on real property were considered direct taxes.[26] This changed in *Pollock v. Farmers' Loan & Trust Co.*,[27] when the U.S. Supreme Court invalidated the Income Tax of 1894 as an unconstitutional direct tax without apportionment.[28] In response, the Sixteenth Amendment to the U.S. Constitution was passed by Congress and subsequently ratified in 1913, granting 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."[29] The Sixteenth Amendment abrogated *Pollock*'s holding that income could not be taxed without apportionment, allowing for the implementation of the federal income tax.[30]

The scope of Congress's new taxing power was further defined in the landmark case of *Eisner v. Macomber*, in which the U.S. Supreme Court struck down as unconstitutional portions of the Revenue Act of 1916 that regarded stock dividends as income equivalent to the cash value of the stock.[31] The *Macomber* Court defined income as "the gain derived from capital, from labor, or from both combined."[32] The Court distinguished these gains from mere "growth or increment value in the investment," holding that the "essential matter" is whether "something of exchangeable value, proceeding from" the property had been "severed from the capital."[33] Thus, the realization requirement was born. In order for a taxpayer to have received "income," a "realization of profits" is necessary; the taxpayer needs to receive something from their property that could be severed from the capital, as opposed to a mere increase in the value of that capital.[34] For the *Macomber* Court, realization was a "constitutional requirement" for income taxation without apportionment under the Sixteenth Amendment.[35] Because the stock dividends at issue "take nothing from the property of the corporation and add nothing to

25. Black's Law Dictionary defines a "capitation" as "[a] tax or payment of the same amount for each person." *Capitation*, BLACK'S LAW DICTIONARY (12th ed. 2024). It cites a poll tax as an example of a capitation. *Id.*

26. Zhang, *supra* note 24, at 183 (citing *Springer v. United States*, 102 U.S. 586, 602 (1880)).

27. 158 U.S. 601 (1895).

28. *Id.* at 637.

29. U.S. CONST. amend. XVI.

30. Jeffrey N. Schwartz, *What the 16th Amendment Didn't Change, and Why That's Important*, TAX NOTES (Feb. 11, 2025), https://www.taxnotes.com/special-reports/tax-history/what-16th-amendment-didnt-change-and-why-thats-important/2025/02/10/7qnfj.

31. *Eisner v. Macomber*, 252 U.S. 189, 219 (1920).

32. *Id.* at 207.

33. *Id.*; Jeffrey L. Kwall & Katherine K. Wilbur, *The Outer Limits of Realization:* Weiss v. Stearn *and Corporate Dilution*, 17 FLA. TAX REV. 47, 68 (2015).

34. *Macomber*, 252 U.S. at 207, 211.

35. Kwall & Wilbur, *supra* note 33, at 68.

that of the shareholder," the Court held that they do not constitute income to the taxpayer but are mere increases in the taxpayer's capital.[36]

*B. The Post-*Macomber *Era: Realization as an "Administrative Convenience"*

In a series of later decisions, the Court weakened the realization requirement, depriving it of its force as a constitutional requirement for taxation under the Sixteenth Amendment.[37] The first of these decisions, *Helvering v. Bruun*,[38] saw the Court rejecting a taxpayer's argument that realization only occurred at the disposition of the property in question.[39] The Court held that "the realization of gain need not be in cash derived from the sale of an asset," but could instead be "a portion of the value of property received by the taxpayer."[40] Thus, while the *Bruun* court did not eliminate the requirement entirely, it significantly widened the scope of activities that could constitute a realized gain.

In *Helvering v. Horst*,[41] the Court appeared to go further in stating that "the rule that income is not taxable until realized" is founded on "administrative convenience" and does not allow a taxpayer to escape taxation merely because they have not received a payment.[42] The Court emphasized that a taxpayer receives an economic benefit at the time they acquire a "right to receive income," and the realization requirement "postpone[s] . . . the tax to the final event of enjoyment of the income" but does not "exempt[] from taxation where the enjoyment is consummated by some event other than the taxpayer's personal receipt of money or property."[43] The Court, in emphasizing the administrative convenience of taxing income at the moment the taxpayer receives some tangible form of payment, undercut the idea that such receipt is a constitutional requirement for income taxation, especially given its statement that the absence of receipt of money or property does not exempt the taxpayer from taxation.

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36. *Macomber*, 252 U.S. at 212.

37. Eric Toder & Alan D. Viard, *A Proposal to Reform the Taxation of Corporate Income*, TAX POL'Y CTR. 77 (June 2016), https://taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000817-a-proposal-to-reform-the-taxation-of-corporate-income.pdf [https://perma.cc/TKZ7-V9F8] ("Commentators today overwhelmingly conclude that the realization requirement is merely an administrative – and not a constitutional – rule.").

38. 309 U.S. 461 (1940).

39. *Id.* at 469.

40. *Id.*

41. 311 U.S. 112 (1940).

42. *Id.* at 116.

43. *Id.*

Commissioner v. Glenshaw Glass Company[44] and *Cottage Savings Association v. Commissioner*[45] subsequently reinforced the Court's reasoning in *Horst*. In *Glenshaw*, the Court pushed back against the narrow definition of income articulated in *Macomber*––"the gain derived from capital, from labor, or from both combined"[46]––recognizing that although this definition was useful in the limited context of "distinguishing gain from capital," it was not "meant to provide a touchstone to all future gross income questions."[47] And in *Cottage Savings*, the Court quotes *Horst*'s assertion that the realization requirement is an "administrative convenience,"[48] affirming that as recently as 1991, realization's status as a constitutional force was at best dubious. Accordingly, some academic commentators argue that "*Macomber* . . . has been overruled in all but name."[49]

C. Contemporary Conflicts and Macomber *Revitalized*

However, according to commentators, *Macomber*'s favorable citation in *National Federation of Independent Business v. Sebelius* (*NFIB*)[50] has cast doubt on the contention that *Macomber* is a dead letter, potentially reinvigorating its status as an important constitutional precedent.[51] In *NFIB*, Chief Justice Roberts's majority opinion states that although the Sixteenth Amendment abrogated *Pollock*'s holding as to the constitutionality of an income tax, the Court thereafter "continued to consider taxes on personal property to be direct taxes" and thus unconstitutional without apportionment.[52] Because *Macomber* held that a tax on unrealized appreciation is not a tax on income, Roberts's citation of *Macomber* might mean that taxation of unrealized gains remains beyond Congress's taxing power under the Sixteenth Amendment, suggesting the continuing vitality of the realization requirement as a constitutional guardrail.[53]

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44. 348 U.S. 426 (1955).

45. 499 U.S. 554 (1991).

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

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

48. *Cottage Sav. Ass'n*, 499 U.S. at 559 (citing *Helvering v. Horst*, 311 U.S. 112, 116 (1940)).

49. Brief of Amici Curiae Professors of Tax Law, Legal History, and Computational Science in Support of Respondent at 4, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

50. 569 U.S. 519 (2012).

51. *Id.* at 571; *see* Gene Magidenko, *Is a Broadly Based Mark-to-Market Tax Unconstitutional?*, TAX NOTES, May 26, 2014, at 952; *see also* Erik M. Jensen, *The Constitutionality of a Mark-to-Market Taxing System*, TAX NOTES, June 16, 2014, at 1300 (Magidenko and Jensen both argue that Chief Justice Roberts's favorable citation of *Macomber* in *NFIB* demonstrates *Macomber*'s continuing constitutional significance).

52. *NFIB*, 567 U.S. at 571.

53. *See* Jensen, *supra* note 51, at 1300–01.

Thus, uncertainty regarding the realization requirement's current strength prevailed at the time the Supreme Court heard *Moore v. United States*. On the one hand, decades of opinions appeared to weaken the requirement, potentially even depriving it of its constitutional significance; on the other hand, the recent decision in *NFIB* may have hinted at a desire to revitalize the requirement. In this climate, the Ninth Circuit attempted to deal the final death blow to the realization requirement when it heard *Moore* in 2022, stating in explicit terms: "[T]he Supreme Court has made clear that realization of income is not a constitutional requirement."[54] In granting certiorari to review the Ninth Circuit's decision,[55] the Supreme Court had an opportunity to definitively answer the question—was the appellate court correct in asserting that realization is no longer a constitutional requirement for unapportioned taxation under the Sixteenth Amendment, or does the requirement articulated in *Macomber* have continued force today?

II. *MOORE V. UNITED STATES* REINFORCES THE STATUS QUO WITH REGARDS TO THE REALIZATION REQUIREMENT

At issue in *Moore* is the constitutionality of the Mandatory Repatriation Tax (MRT), a component of the 2017 Tax Cuts and Jobs Act (TCJA).[56] Prior to the passage of this Act, owners of stock in foreign corporations were required to pay a 35 percent tax on overseas income when those earnings were "repatriated" to the U.S.; as a result, such corporations often deferred repatriation, choosing instead to leave their earnings overseas.[57] In this manner, Fortune 500 corporations accumulated more than $2.6 trillion in profits "permanently reinvested" in foreign subsidiaries.[58] The TCJA changed from a system of worldwide taxation, whereby corporate income earned abroad is taxed at the higher of the foreign rate or the U.S. rate (minus a credit for any foreign taxes paid) that would apply to the same income if earned domestically,[59] to a more "territorial" system, in which income is taxed based on where it is earned.[60] Among other changes, the TCJA exempts repatriated dividends

54. *Moore v. United* States, 36 F.4th 930, 936 (2022).

55. *Moore v. United States*, 143 S. Ct. 2656, 2656 (2023).

56. *See Moore v. United States*, 144 S. Ct. 1680, 1685–86 (2024); 26 U.S.C. § 965.

57. Zaretsky, *supra* note 5.

58. Matthew Gardner, *Fortune 500 Companies Hold a Record $2.6 Trillion Offshore*, INST. ON TAX'N & ECON. POL'Y (Mar. 28, 2017), https://itep.org/fortune-500-companies-hold-a-record-26-trillion-offshore/ [https://perma.cc/P67F-FJZX].

59. Eric Toder, *Territorial Taxation: Choosing Among Imperfect Options*, AEI ECON. PERSPS. (Dec. 2017), https://www.aei.org/wp-content/uploads/2017/12/Territorial-Taxation.pdf?x85095.

60. Zaretsky, *supra* note 5.

that U.S.-resident multinational corporations receive from foreign subsidiaries.[61]

This change created a potential windfall for those who accumulated earnings abroad that would have been taxed upon repatriation under the prior tax regime.[62] The MRT was Congress's response to this windfall problem.[63] It required U.S. shareholders owning more than 10 percent of a foreign corporation to pay a one-time tax of 15.5 percent on undistributed cash earnings of the corporation and 8 percent on all other undistributed earnings and profits.[64] The MRT is expected to raise $339 billion in revenue.[65]

The plaintiffs in *Moore* are two American taxpayers who own slightly more than 10 percent of KisanKraft, an Indian corporation that makes agricultural tools, who were required to pay approximately $15,000 under the MRT,[66] even though they claimed to have received "nothing . . . no return whatsoever" on an initial $40,000 investment in the corporation.[67] Accordingly, the Moores argue that the Sixteenth Amendment does not permit the MRT because the taxing power it grants Congress only allows for taxation on *realized* gains, and the earnings taxed by the MRT have not been realized because they were not distributed.[68]

The *Moore* Court held that the MRT was a constitutional exercise of Congress's Sixteenth Amendment taxing power, rejecting the Moores' argument that the MRT impermissibly taxed their unrealized gains.[69] The Court noted that "the MRT *does* tax realized income—namely, income realized by the corporation."[70] In so noting, the Court likened the MRT to taxation on "pass-through" entities, whereby a corporation's profits

61. Eric Toder, *Explaining the TCJA's International Reforms*, TAX POL'Y CTR. (Feb. 2, 2018), https://taxpolicycenter.org/taxvox/explaining-tcjas-international-reforms.

62. *See What is the TCJA Repatriation Tax and How Does it Work?*, TAX POL'Y CTR. (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-tcja-repatriation-tax-and-how-does-it-work.

63. Zaretsky, *supra* note 5.

64. Daniel J. Hemel, *The Low and High Stakes of* Moore, TAX NOTES (July 24, 2023), https://www.taxnotes.com/featured-analysis/low-and-high-stakes-moore/2023/07/21/7gzm7.

65. JOINT COMM. ON TAX'N, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE 'TAX CUTS AND JOBS ACT FISCAL YEARS 2018-2027,' JCX-67-17, at 6 (2017).

66. Hemel, *supra* note 64.

67. COMPETITIVE ENTERPRISE INSTITUTE, *CEI Helps Charles and Kathleen Moore Fight for the Rule of Law*, at 00:55–02:42 (YouTube, Feb. 9, 2023), https://www.youtube.com/watch?v=8iyqVFWXrAs.

68. Brief for Petitioner at 1–2, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

69. *Moore*, 144 S. Ct. at 1697.

70. *Id.* at 1688.

are taxed at the level of its shareholders rather than the entity level (as is the case with S corporations, for example), or a partnership's income is taxable to each of its partners.[71] Therefore, the Court narrowly framed the issue presented by this case: "whether Congress may attribute an entity's realized and undistributed income to the entity's shareholders or partners, and then tax the shareholders or partners on their portions of that income."[72]

This attribution issue then, rather than the realization one, guided the Court's analysis. According to the majority, the MRT operates by "attribut[ing] the undistributed income of American-controlled foreign corporations to their American shareholders" and then taxing the shareholders on this income.[73] This is a permissible exercise of Congress's taxing power under the Sixteenth Amendment because the tax is structured in the same way as numerous other I.R.C. provisions that tax pass-through entities via attributing their income to their shareholders, such as the provisions that tax partnerships, S corporations, and subpart F income.[74] The Court further emphasizes that this kind of taxation scheme is consistent with its previous decisions upholding Congress's authority to tax attribution of income, thus placing the MRT "squarely within Congress's constitutional authority to tax."[75]

In its focus on attribution, the Court expressly avoided the realization issue, stating that "whether realization is a constitutional requirement for an income tax" presents "potential issues for another day" that do not need to be resolved in order to decide this case.[76] The Court maintained the status quo concerning the realization debate, appearing to offer no greater clarity beyond existing precedent as to whether such a requirement is constitutionally required or whether it merely exists in its current state due to administrative convenience and/or the whims of Congress.

This Note will argue that the Court's decision in *Moore* suggests the existence of a constitutional realization requirement, even absent an explicit holding that such a requirement exists, or even a willingness in the majority to address the question. However, if such a requirement exists, it likely provides only minimal restrictions on Congress's Sixteenth Amendment taxing power, most notably an inability to tax illiquid assets.

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71. *Id.* at 1689.
72. *Id.* at 1688–89.
73. *Id.* at 1696.
74. *Id.* at 1695–96.
75. *Id.* at 1696.
76. *Id.* at 1697.

III. WHY A CONSTITUTIONAL REALIZATION REQUIREMENT PROBABLY EXISTS POST-*MOORE*

This Part proceeds in two sections to analyze why a constitutional realization requirement likely exists post-*Moore*. First, it argues that *Moore* represents a turning tide on the Court; although the majority opinion deftly avoids the realization question, the case is nonetheless emblematic of a further shift towards revitalizing *Macomber*-era principles. It is noteworthy that numerous voices on the Court openly argued for the existence of a realization requirement in *Moore*, as can best be seen in Justice Barrett's concurrence and Justice Thomas's dissent. Second, this Part will argue that language in the majority opinion suggests that the Court would have found a constitutional realization requirement had it been unable to avoid the question. In particular, the majority's mapping of its discussion of direct and indirect taxes onto taxation of property and taxation of income, as well as its pragmatic justifications for avoiding the realization question suggests that the realization question still has constitutional force.

A. The Turning Tide Towards Realization--Justices Eager to Weigh In

As noted previously,[77] in recent years the Court has placed greater emphasis on *Macomber*, and it has even been cited favorably in notable recent cases such as *NFIB*.[78] As a result, a case that was once thought to have been "overruled in all but name"[79] appears to have a renewed and continuing vitality in the Court.[80] *Moore* represents another step towards a revitalization of *Macomber*, as concurring and dissenting opinions make explicit what the majority opinion only hints at—the importance of realization as a constitutional limitation on Congress's taxing power.

In a concurrence joined by Justice Alito, Justice Barrett disagreed with the Court's avoidance of the realization question, stating that the answer to the question on which review was granted, "'[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states,' . . . is straightforward: No."[81] Justice Barrett further stated that "[t]he Sixteenth Amendment's reference to income 'derived' from any source encompasses a requirement that

77. *See supra* Section I.C.

78. *See* 567 U.S. 519, 571 (2012).

79. Brief for Professors of Tax Law, Legal History, and Computational Science in Support of Respondent at 4, *Moore*, 144 S. Ct. 1680 (No. 22-800).

80. *See* Jensen, *supra* note 51.

81. *Moore*, 144 S. Ct. at 1700 (Barrett, J., concurring in the judgement). Although Barrett and Alito have no qualms about unequivocally stating that a constitutional realization requirement exists, they find against the taxpayer on other grounds.

income, to be taxed without apportionment, must be *realized*."[82] Justice Thomas, in a dissenting opinion joined by Justice Gorsuch, expressed a similar sentiment that a realization requirement is inherent in the text of the Sixteenth Amendment.[83] Thomas criticized the Court for "ignoring the question presented," namely the realization question, which Thomas argued was answered correctly by *Macomber*.[84] Accordingly, Justice Thomas asserted that "[t]he Ninth Circuit erred by concluding that realization is not a constitutional requirement for income taxes."[85]

Thus, although the majority opinion avoided the question of realization, *Moore* contains numerous voices that argue emphatically for its importance as a constitutional requisite. As Alex Zhang states, "[t]here are clearly four votes at the Supreme Court in favor of a constitutional realization requirement. With persuasion and changes in judicial personnel, a fifth vote may not be hard to find."[86] While this perspective has yet to win a majority on the Court, this likely only happened because the Court was able to avoid the question; the text of the majority opinion suggests that if this question were unavoidable, the Court would be willing to find that realization is a constitutional requirement for income taxation.

B. The Majority Opinion Suggests the Existence of a Realization Requirement

There are two primary reasons why this Note argues that the majority opinion implies a realization requirement even if it does not outwardly state one. First, the majority's discussion of direct and indirect taxes, which it paralleled with property and income taxes, suggests that certain kinds of accretions to wealth lie beyond Congressional taxing power. Second, the majority's pragmatic desire to avoid substantial upheaval to the current state of the tax code provides it with ample incentive to avoid the realization question.

1. Direct vs. Indirect Taxes

That a distinction exists in the treatment of direct and indirect taxes is well-established constitutional law; the former requires apportionment,

82. *Id.* at 1701 (Barrett, J., concurring in the judgement).
83. *Id.* at 1709 (Thomas, J., dissenting).
84. *Id.* (Thomas, J., dissenting).
85. *Id.* at 1710 (Thomas, J., dissenting).
86. Alex Zhang, *Analysis: Zhang on* Moore v. United States, EMORY L. NEWS CTR. (July 30, 2024), https://law.emory.edu/news-and-events/releases/2024/07/2024-07-30-zhang-moore-v-us-scotus.html [https://perma.cc/9PRK-A4QE].

whereas the latter does not.[87] Thus, it is unsurprising to see this distinction referenced in the *Moore* opinion. What is surprising, however, is the authority cited in support of this proposition, as well as some of the conclusions Justice Kavanaugh drew based on this distinction between direct and indirect taxation.

Namely, Justice Kavanaugh revived a distinction between taxes on property, which are direct taxes that must be apportioned, and taxes on income, which are indirect taxes that need not be.[88] In support of this distinction, Kavanaugh cited numerous of *Macomber*'s *Lochner*-era contemporaries, such as *Brushaber v. Union Pacific Railroad Company*,[89] *Pollock v. Farmers' Loan & Trust Co.*,[90] and *Helvering v. Independent Life Insurance Company*.[91] The *NFIB* decision, which as noted previously,[92] cites *Macomber* and *Pollock* favorably,[93] is also cited in this portion of the *Moore* opinion.[94]

In relying on this authority to distinguish taxes on property as direct taxes requiring apportionment, Justice Kavanaugh sought to draw a rigid distinction between taxation on the basis of property ownership and taxation of the labor or income that one might derive from property ownership.[95] This distinction parallels the realization debate; after all, a taxation on property would likely entail the ability to tax unrealized gains. If Congress could only tax income that a taxpayer realizes from their property ownership, this would suggest that a realization requirement indeed exists. Thus, according to Ian Millhiser, while the majority opinion "claims that it leaves the question of whether wealth taxes [which would likely rely on the taxation of unrealized gains] are constitutional unresolved," in actuality the opinion contains "a bonanza of loaded language that any competent tax lawyer can seize upon to protect their richest clients from wealth taxes."[96] In other words, while nominally avoiding the realization debate, the text of the opinion suggests how the Court would resolve such a debate in a future case where the question is unavoidable.

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87. *See* U.S. CONST. art. I, § 9.
88. *Moore*, 144 S. Ct. at 1688.
89. 240 U.S. 1 (1916).
90. 158 U.S. 601 (1895).
91. 292 U.S. 371 (1934).
92. *See supra* Part I.
93. Jensen, *supra* note 51, at 1300–01.
94. *Moore v. United States*, 144 S. Ct. 1680, 1687 (2024).
95. Ian Millhiser, *The Supreme Court's New Tax Decision is Great News for Billionaires*, VOX (June 20, 2024, at 12:20 CT), https://www.vox.com/scotus/355969/supreme-court-moore-us-wealth-tax-billionaires [https://perma.cc/Y7D3-F792].
96. *Id.*

2. The Court's Pragmatism—Why Avoiding the Question Answers the Question

The *Moore* decision was heavily anticipated by practitioners and commentators seeking additional guidance from the Court on the status of the realization requirement. Taxpayers with significant wealth holdings and those who represented their interests wanted the Court to find such a requirement[97] because the imposition of an additional constitutional limitation on Congress's taxing power would provide new ways to protect clients' assets from taxation.[98] However, many academics and others who favor a more expansive view of Congressional taxing power hoped that the Court would take the opportunity to explicitly overrule *Macomber* and its progeny and confirm that Congress is not limited constitutionally by a realization requirement.[99] Indeed, as noted in the dissent, "[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states," is the question specifically asked by the Moores' petition for certiorari.[100] Thus, declining to answer this question is in itself telling. This subsection will argue that the Court was motivated to circumvent the realization question by a pragmatic concern with avoiding extensive disruptions to the tax code as it currently exists.

A rough cost-benefit analysis of the implications of a finding either for or against a realization requirement demonstrates why this pragmatic concern exists on the Court. A finding of a constitutional realization requirement would potentially open up numerous portions of the current I.R.C. to taxpayer challenge.[101] If all of the current I.R.C. provisions that might be threatened by the finding of a realization requirement were to be invalidated, tax revenues could be reduced by nearly $5.7 trillion over the next ten years.[102] In particular, subpart F of the I.R.C., which

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97. *See* Vlahos, *supra* note 10.

98. Katy Marquardt Hill, Moore v. United States*: A Supreme Court Case That Could Upend the Tax Code*, CU BOULDER TODAY (Feb. 13, 2024), https://www.colorado.edu/today/2024/02/13/moore-v-united-states-supreme-court-case-could-upend-tax-code [https://perma.cc/Z583-NM5L].

99. Brief of Amici Curiae Professors of Tax Law, Legal History, and Computational Science in Support of Respondent at 4, *Moore*, 144 S. Ct. 1680 (No. 22-800).

100. *Moore*, 144 S. Ct. at 1723 (Thomas, J., dissenting); Petition for Writ of Certiorari, *Moore*, 144 S. Ct. 1680 (No. 22-800).

101. Marquardt Hill, *supra* note 98.

102. 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/ [https://perma.cc/9VVW-LVQ7]. The authors note that such a result would be unlikely, but the 5.7 trillion figure represents the "upper bound" of what could happen if a realization requirement enables constitutional challenge against existing IRC provisions. *Id.*

allows for income earned by a controlled foreign corporation to be taxed to the corporation's U.S. shareholders even if the foreign corporation does not distribute said income to shareholders,[103] and § 475, which requires securities dealers to apply mark-to-market accounting on their inventory and recognize taxable gain or loss as if the asset was sold at market value on the last day of the taxable year,[104] would be among the provisions most susceptible to constitutional challenge.[105] Thus, finding that a constitutional realization requirement exists has immense disruptive potential for the tax code.

Accordingly, the Court had a practical incentive to decide the case on alternative grounds rather than enshrine realization as a constitutional requirement for income taxation. And this is exactly what we see reflected in the majority opinion for *Moore*. Justice Kavanaugh openly worried about the "blast radius" that would result in the tax code from a wholesale adoption of the Moores' argument and mentions subpart F seventeen times in his opinion, eventually deciding that it does not differ substantially enough from the challenged MRT to justify striking down one and ignoring the other.[106] Describing this "blast radius" in greater detail, Kavanaugh detailed the harms that could result from eliminating many provisions from the tax code, including trillions in lost revenue, cuts to national programs, or increases in constitutionally permissible kinds of taxation.[107] "The Constitution," he concluded, "does not require that fiscal calamity."[108]

So, if a constitutional realization requirement can potentially create constitutional chaos, why not just hold that no such requirement exists? Although such a finding may not create the same level of immediate chaos that the finding of a realization requirement would, it might nonetheless sow the seeds of what some would view as future chaos—without a realization requirement to hold it in check, what is to stop Congress from taxing unrealized gains in the form of a future wealth tax?[109] The Court is likely just as fearful of this possibility as it is of the undermining of the current tax code—hence why it draws such rigid lines

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103. *Overview of Subpart F Income for U.S. Shareholders*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/fatca/int_practice_units/FEN9433_01_09R.pdf [https://perma.cc/R4R9-3X5W] (last visited Sep. 19, 2025).

104. *Section 475 Mark-to-Market: Tax Essentials for the Banking Industry*, KPMG, https://kpmg.com/us/en/articles/2022/section-475.html [https://perma.cc/JN9D-5WG9] (last visited Sep. 19, 2025).

105. *See* Avi-Yonah, *supra* note 7.

106. *Moore v. United States*, 144 S. Ct. 1680, 1693 (2024).

107. *Id.* at 1696.

108. *Id.*

109. Ian Millhiser, *The Supreme Court Case Seeking to Shut Down Wealth Taxes Before They Even Exist*, VOX (Nov. 27, 2003, at 06:30 CT), https://www.vox.com/scotus/2023/11/27/23970859/supreme-court-wealth-tax-moore-united-states [https://perma.cc/ZY6K-6YUS].

between taxation of income and taxation of "property," as noted above.[110] Thus, the Court finds itself caught between a rock and a hard place, so to speak, and chooses to resolve its dilemma by gesturing at the realization requirement without expressly holding that it exists.[111] As Andrew M. Grossman, the attorney who argued the case for the Moores at the Supreme Court, said of the holding, "[d]ivorcing income from realization seems to me to be off the table when you read the opinion in its entirety. The court's opinion is best read to preserve the status quo and disapprove new kinds of income-taxation."[112] Ultimately, a constitutional realization requirement probably exists post-*Moore*—*Macomber* says that such a requirement exists, and the Court has never expressly overruled *Macomber*, even going out of its way to revive *Macomber*-era principles in recent years. Furthermore, members of the Court appear to be increasingly sympathetic towards reaffirming the existence and vitality of such a requirement today, with four firm votes in favor of a requirement and other voices appearing to lean in that direction.

IV. IMPLICATIONS OF A REALIZATION REQUIREMENT FOR FUTURE TAX POLICY

If, as argued previously, the *Moore* opinion suggests realization's continuing vitality as a constitutional prerequisite for income taxation in spite of its avoidance of a definitive answer, then examining the impact of such a holding on future tax policy will be beneficial. This Part will argue that the impact of a constitutional realization requirement on Congress's taxing power will be limited in scope. This Part proceeds in three sections. First, it argues that *Moore*'s discussion of attribution of income, if applied to other tax provisions at risk of challenge, should place these provisions beyond the scope of constitutional challenge on the basis of violating the realization requirement. Second, it argues that the most plausible understanding of a realization requirement limits Congress's ability to tax illiquid assets. And finally, it argues that many of the progressive tax policies that realization's proponents fear can be structured to avoid realization's pitfalls. Accordingly, a future Congress should not be

110. *See supra* Section III.B.1.

111. Although, interestingly, the Court does remind us in dicta that the *Macomber* Court held that income required realization. *Moore*, 144 S. Ct. at 1691.

112. Jeffrey H. Paravano & Andrew M. Grossman, *Supreme Court Decision on* Moore v. United States *Debated in Media*, BAKERHOSTETLER (June 27, 2024), https://www.bakerlaw.com/insights/supreme-court-decision-on-moore-v-united-states-debated-in-media/ [https://perma.cc/8X2P-SN6Y].

deterred by the realization requirement from pursuing a more expansive or progressive tax policy, such as implementing a wealth tax.[113]

A. Attribution of Income and the Existing Tax Code

As noted above, the majority in *Moore* frames the case as one about attribution of income, not primarily about realization.[114] The Court's discussion of attribution suggests that perhaps the "blast radius" that a realization requirement would inflict upon the I.R.C. might not be quite as wide-reaching as some commentators feared.[115] This is because, as the Court notes in its thorough historical discussion, attribution of the income of a pass-through entity to its owners is a "longstanding" Congressional practice.[116] Throughout this discussion, the Court presupposes the constitutionality of the numerous provisions of the tax code structured in this way—and even notes that the Moores likewise concede the constitutionality of such provisions.[117]

The Court concludes that the Moores are unable to "meaningfully distinguish" the MRT from any of the similar tax code provisions that attribute income of pass-through entities to their owners, characterizing their attempts to do so as "ad hoc distinctions."[118] Indeed, the similarity between the MRT and existing treatment of pass-through entities is crucial to the Court's determination of the MRT's constitutionality.[119] The analogous treatment of the MRT with taxation of pass-through entities should go a long way towards assuaging commentators who feared the implications of a ruling to the contrary[120]—in its finding that the MRT need not even be evaluated against a potential realization requirement, the Court in effect insulates "vast swaths" of the I.R.C. against similar constitutional challenge.[121] After all, if the issue of

113. Although it appears unlikely that Congress would seek to implement a wealth tax in the current political climate, an understanding of how a realization requirement would impact Congress's ability to implement such a tax will be useful for understanding what a future Congress might be able to accomplish in this regard.

114. *See supra* Part II.

115. *See, e.g.*, Brief for Tax Economists as Amici Curiae in Support of Respondent at 15–22, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800) (arguing that "the economic effects of [establishing a constitutional realization requirement]," including disruption of pass-through businesses, upending of tax rules regarding accelerated depreciation, and slow economic growth arising from legal uncertainty, "would be profound").

116. *Moore*, 144 S. Ct. at 1696.

117. *Id.* at 1693, 1695.

118. *Id.*

119. *Id.* at 1696.

120. *See* Steven M. Rosenthal, Moore *Could Invalidate Decades of Tax Rules*, TAX NOTES (Oct. 9, 2023), https://www.taxnotes.com/featured-analysis/moore-could-invalidate-decades-tax-rules/2023/10/06/7hdw9.

121. *See Moore*, 144 S. Ct. at 1696.

realization need not be reached to determine that the MRT is constitutional, then similarly a realization requirement should have no bearing on the constitutionality of any of these analogous provisions.

B. A Realization Requirement as a Limitation on Congress's Ability to Tax Gains on Illiquid Assets as "Income"

To determine the limitations that a constitutional realization requirement would impose, further analysis of *Macomber*, the case where it originated, will be necessary. Alex Zhang argues that the holding of *Macomber* can best be understood in five ways: (1) Congress can only tax accretions to wealth (the "Income" reading), (2) Congress can only tax assets received that are separate from the initial capital, (3) Congress can only tax gains from liquid assets (the "functional severability" or "liquidity" reading), (4) Congress can only tax transactions in which the taxpayer disposes of their initial capital, or (5) Congress can only tax transactions in which the taxpayer gains full control of a new asset.[122] Zhang further argues that subsequent caselaw has undermined three of these interpretations, such that only the income and liquidity interpretations remain viable today.[123]

Zhang prefers the income reading of *Macomber*, arguing that even under the constraints of a realization requirement, Congress can tax any accretion to wealth as income.[124] However, he further notes that Judge Bumatay of the Ninth Circuit, dissenting from *Moore*'s denial of rehearing *en banc* at the appellate level, cited *Macomber* in support of the proposition that Congress cannot tax wealth directly, and also notes Justice Roberts's favorable citation of *Macomber* in *NFIB* in support of the proposition that taxes on personal property are impermissible direct taxes.[125] Accordingly, he expresses skepticism of the "odds of survival in federal courts of a true, full-fledged federal wealth tax."[126]

The majority opinion in *Moore* reasserts the importance of this distinction between taxation of property and taxation of income, holding that the former would constitute a direct tax requiring apportionment, whereas taxation of income—even income generated from property—was permissible.[127] Thus, it perpetuates the very distinctions that Zhang considers problematic for the possibility of a federal wealth tax. Put another way, the Court in *Moore* appears to reject a core concept of the

122. Zhang, *supra* note 24, at 228.
123. *Id.*
124. *Id.* at 242.
125. *See id.* at 242–43.
126. *Id.* at 243.
127. *Moore v. United States*, 144 S. Ct. 1680, 1688 (2024).

Haig-Simons definition of income[128]—the idea that income encompasses economic gain on property, as measured by comparing the change in value of property between two points in time.[129] This definition of income is arguably incompatible with the income/property distinction outlined by the *Moore* majority. After all, if taxing the change in value of a property, which is clearly an accretion to wealth, is an impermissible property tax and not a tax of income, then a class of accretions to wealth remains beyond Congress's taxing authority.[130] Accordingly, if *Macomber* could once be understood as a ratification of Congress's ability to tax any accretion to wealth as "income," as Zhang asserts,[131] then *Moore* casts doubt on the continued vitality of that understanding.

Accordingly, this Note concludes that the best understanding of the realization requirement's limitation on Congress is liquidity-based. In other words, Congress can tax, as income, liquid assets and the income they generate, but is limited in its ability to reach illiquid assets directly. A basic definition of a liquid asset is an asset that can quickly be sold or converted to cash.[132] The concept of liquidity can function differently depending on the financial context—for example, liquidity for stocks can refer to how quickly they can be sold, for markets can refer to a general ease in the flow of activity across the market, and for businesses can refer to their ability to maintain cash flows to meet short term financial obligations.[133]

Thus, under a liquidity-based understanding of *Macomber*, Congress will be limited in its ability to tax investments that cannot be easily and readily exchanged in the market, such as real estate, private

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128. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938) ("Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.").

129. *See* John R. Brooks & David Gamage, Moore v. United States *and the Original Meaning of Income* 13 (Fordham L. Legal Stud., Working Paper No. 4491855, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4491855.

130. The Court noted that the Sixteenth Amendment "reject[s] *Pollock*'s conflation of (i) income from property and (ii) the property itself." *Moore*, 144 S. Ct. at 1688. While a proponent of the Haig-Simons definition could utilize this distinction to argue for the permissibility of taxing accretions to property value (as these accretions are "income" within the Haig-Simons definition), the Court's earlier statement that "*direct* taxes are those taxes imposed on persons or property" undermines this argument. *Id.* at 1687 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570–71 (2012)). Presumably, a tax on a change in the value of property is a "tax[] imposed on … property," *Moore*, 144 S. Ct. at 1687, and thus constitutionally impermissible as a direct tax.

131. Zhang, *supra* note 24, at 242.

132. Jake Safane, *Liquidity: A Look into Finance's Most Essential Concept*, BUS. INSIDER (Oct. 2, 2024, at 17:36 CT), https://www.businessinsider.com/personal-finance/investing/what-is-liquidity [https://perma.cc/S3MM-287Y].

133. *Id.*

equity, and hedge fund investments.[134] This understanding is consistent with the Court's reaffirmation of the principle in *Moore* that "property taxes remain direct taxes that must be apportioned."[135] The rationale behind limiting Congress's taxing power in this way arises from a concern with placing an additional burden on the taxpayer by requiring them to dispose of a relatively illiquid asset just to pay a tax on it.[136] Furthermore, finding buyers for such assets on short notice might prove difficult, limiting a taxpayer's practical ability to make such a disposition even if the law required it.[137] But if the realization requirement limits Congress's ability to tax assets that cannot readily be sold or converted into cash, then how does *Moore* avoid running afoul of the realization requirement in upholding the MRT? After all, the MRT required the Moores to pay tax on income that, while earned by KisanKraft, had not been distributed to the Moores or any other shareholders.[138] It might appear that this is a relatively illiquid asset, as the Moores might have difficulty converting income held by KisanKraft into cash in order to pay their tax liability. How then, to square *Moore*'s holding with a liquidity-based understanding of the realization requirement?

The Court's attribution analysis provides an answer to these questions. Citing to Congress's longstanding practice of taxing pass-through entities at the individual, rather than the entity level, the Court stated that it "is axiomatic that each partner must pay taxes on his distributive share of the partnership's income without regard to whether that amount is actually distributed to him."[139] In other words, whether or not income has been distributed to the owner is immaterial in the context of a pass-through entity; regardless, Congress can attribute that entity's income to its owners and tax them on it individually. The perceived illiquidity of the Moores' investment in KisanKraft is not an issue then, even under a liquidity-based-understanding of the realization requirement, because what they are really being taxed on is the share of KisanKraft's income that has been attributed to them, and business

134. *See id.* (noting that real estate is on the less-liquid end of the "liquidity spectrum," while private equity and hedge fund investments are "for all intents and purposes illiquid").

135. *Moore*, 144 S. Ct. at 1688.

136. *See* Zhang, *supra* note 24, at 202 ("[W]ithout selling [the stock dividends], the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock." (alteration in original) (quoting *Eisner v. Macomber*, 252 U.S. 189, 213 (1920))). Zhang notes that although the Court's application of this analysis to a stock dividend might strike a contemporary reader as odd, stocks were much less liquid at the time *Macomber* was decided, thus making its analysis more applicable to the stock context at that time. Zhang, *supra* note 24, at 202–03.

137. *See id.* at 202.

138. *Moore*, 144 S. Ct. at 1686.

139. *Id.* at 1692 (citing *United States v. Basye*, 410 U.S. 441, 453 (1973)).

income is clearly taxable.[140] In other words, even if realization is a constitutional prerequisite for income taxation, that does not help the Moores as KisanKraft clearly realized income. As this liquidity-based analysis is more consistent with the *Moore* majority's reasoning than the income-based analysis advanced by Zhang, this Section concludes that the best understanding of *Macomber*'s realization requirement post-*Moore* is as a limitation on Congress's ability to tax illiquid assets.

C. How a Liquidity-Based Understanding of Realization Affects Future Tax Policy

If Congress is limited in its ability to tax illiquid assets, this will have profound implications for future tax policy, but should not ultimately prevent Congress from enacting a federal wealth tax. Rather, it will merely limit the kinds of wealth that Congress can reach. To best survive the constitutional scrutiny imposed by a realization requirement, Congress has a variety of options, two of which will be discussed in this Section: (1) Congress could enact what Ari Glogower refers to as "Wealth Integration" taxes, which adjust income tax liability based on the taxpayer's wealth;[141] and (2) Congress could structure a hypothetical future wealth tax as a broad-based mark-to-market tax.

1. "Wealth Integration" Taxation

Wealth Integration is an approach to income taxation that adjusts income tax liability based on a taxpayer's wealth.[142] Traditional wealth taxes impose tax liability on a portion of "a fixed stock of a taxpayer's wealth at a moment in the taxing period,"[143] thus using wealth as the starting point for determining liability. Wealth Integration, by contrast, uses gross income as the starting point for determining liability, after which the taxpayer's wealth is a variable used for adjusting liability.[144] Glogower proposes three different ways in which a Wealth Integration scheme could operate: (1) a taxpayer's wealth could be used to determine their access to tax deductions, by for example, limiting the availability of certain tax deductions to taxpayers above a given wealth threshold; (2) wealth could be used to determine the applicable rate schedule at which a taxpayer is taxed, such that wealthier individuals pay a greater percentage of their income in taxes than those with relatively less

140. *See* JOINT COMM. ON TAX'N, PRESENT LAW AND DATA RELATED TO THE TAXATION OF BUSINESS INCOME, JCX-42-17, at 17 (2017).

141. Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 720 (2020).

142. *Id.*

143. *Id.* at 746.

144. *Id.* at 752–53.

wealth;[145] or (3) wealth could be used to assess taxpayer eligibility for tax credits, most notably the child tax credit and earned-income tax credit, which could be disallowed for taxpayers who exceed a given wealth threshold.[146] Alternatively, Wealth Integration approaches could be used to benefit lower-income taxpayers (by increasing the deductions or credits available) rather than those with higher income (by limiting availability).[147]

A clear advantage of the Wealth Integration approach is that it is highly likely to survive constitutional scrutiny—a realization requirement is no impediment to the enactment of these policies because they rely on forms of income taxation already in use.[148] However, such policies also have noteworthy limitations, such as an inability to tax those without a preexisting income tax base[149] and no improvement to the ability to directly tax capital assets. Although Glogower argues that these drawbacks may be a "feature" of a Wealth Integration model rather than a "bug," due to mitigation of the potential efficiency costs of a traditional wealth tax and a reduction in the burden placed on the top tax brackets, these drawbacks nonetheless put a "ceiling" on the impact that a Wealth Integration approach can have on making the tax code more

145. Although this is similar to the current system of progressive marginal taxation used in the United States, whereby a taxpayer's tax rate can vary from as low as 10 percent to as high as 37 percent depending on the taxpayer's gross income, with the taxpayer paying the higher rates only on income received above a given threshold, *see* Alex Durante, *2025 Tax Brackets*, TAX FOUND. (Oct. 22, 2024), https://taxfoundation.org/data/all/federal/2025-tax-brackets/? [https://perma.cc/3BR9-MB6M], Glogower envisions more expansive adjustments to the applicable rate schedule based on wealth, including "backfilling" to tax the entirety of a wealthy taxpayer's income at their top marginal tax rate or disallowing the capital gains preference for taxpayers above a given wealth threshold. Glogower, *supra* note 141, at 754–56.

146. Glogower, *supra* note 141, at 752–57.

147. *Id.* at 770–72.

148. *Id.* at 766, 770 (noting that "[t]he Court could only strike down Wealth Integration by overruling . . . prior precedents"). While Glogower expresses some apprehension that the Court might "hold more broadly that wealth could never be a basis for tax" or attempt to distinguish Wealth Integration from taxation methods upheld by precedent, he nonetheless concludes that "[a] Court ruling that precluded Wealth Integration methods would fundamentally restrict Congress's taxing power under the Sixteenth Amendment and jeopardize essential features of the current income tax." *Id. But see* Ari Glogower, *The Constitutional Limits to Taxing Power*, 93 FORDHAM L. REV. 781, 797, 831–33 (2024). Glogower reads *Moore* as reflective of a "broad interpretation of apportionment" as a limitation on Congress's taxing power, and argues that Congress's taxing power should be limited by other constitutional constraints, such as Equal Protection. *Id.* While ordinarily, a move away from apportionment would be a net positive for progressive tax policy, and while Glogower notes that courts have rarely used Equal Protection as a ground for scrutinizing a tax, *id.* at 832, one might envision a Court skeptical of wealth taxes relying on an Equal Protection argument to invalidate a Wealth Integration scheme.

149. Glogower, *supra* note 141, at 721, 770.

progressive.[150] Regardless, Wealth Integration provides a good example of the kinds of tax policy that Congress could continue to enact, even if a future Court explicitly reaffirms the existence of a constitutional realization requirement.

2. Broad-Based Mark-to-Market Taxation

A mark-to-market tax is designed as an alternative to capital gains tax, in which an asset is taxed when sold.[151] In contrast to a capital gains tax, a mark-to-market system would annually tax the changes in an asset's year-to-year value.[152] Although many commentators argue that such a system taxes unrealized gains,[153] a mark-to-market taxation scheme is already used for certain types of securities under § 475 of the I.R.C.[154] Furthermore, a mark-to-market system is not inconsistent with an originalist understanding of the scope of the term "income," as Congress employed an approach similar to a contemporary mark-to-market tax as early as 1909, four years prior to the ratification of the Sixteenth Amendment;[155] accordingly, drafters of the Sixteenth Amendment––itself passed by Congress in 1909––would have been familiar and comfortable with the concept of income including the ability to reach assets in this manner.[156] Subsequent Court decisions clarified that the understanding of income in 1909 was the same as in tax laws passed after the Sixteenth Amendment was ratified.[157] Thus, by using a system of taxation already in existence as a model, that reaches a class of assets that would have been understood as "income" by the drafters of the Sixteenth Amendment, Congress could use a mark-to-market-based form of taxation in order to reach certain kinds of assets that are held by taxpayers for long periods of time that current capital gains taxation does not reach.

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150. *Id.* at 760.

151. *Mark-to-Market (MTM)*, TAX. FOUND: TAXEDU, https://taxfoundation.org/taxedu/glossary/mark-to-marketmtm/#:~:text=Taxing%20on%20a%20mark%2Dto,when%20an%20asset%20is%20sold [https://perma.cc/U25Q-UJQV] (last visited Sep. 18, 2025).

152. *Id.*

153. *See* Scott Eastman, Taylor LaJoie & Chad Qian, *Evaluating Mark-to-Market Taxation of Capital Gains*, TAX FOUND. 2 (Dec. 2019), https://files.taxfoundation.org/20191218121420/TaxFoundation_FF681.pdf [https://perma.cc/93ZR-Q2BM].

154. I.R.C. § 475.

155. John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1, 44 (2024).

156. *See id.* at 44–45.

157. *Id.* at 44, 44 n. 237 (quoting *Edwards v. Cuba R.R. Co.*, 268 U.S. 628, 631 (1925)) (alteration in original) ("[T]he meaning of 'income' as used in the Corporation Excise Tax Law of 1909 is not to be distinguished from the meaning of the same word as used in the Income Tax Law of 1913 and the Revenue Act of 1916.").

Alex Zhang proposes an alternative way of reaching gains on capital income, arguing that a wealth tax could survive constitutional scrutiny if it taxes imputed income; such a tax might, for example, assume a 10 percent return on capital and then tax a percentage of that return as income.[158] Accordingly, this model of taxation would function similarly to a mark-to-market system in its ability to reach changes in the value of an asset before it is sold. However, it is important to note that Zhang proposes this model of taxation under an income-based reading of *Macomber* rather than a liquidity-based one,[159] and thus the problems that *Moore* poses for the income-based reading, namely the income/property distinction discussed above,[160] might cast doubt on the future viability of such an approach.

Whether a future Congress chooses to act either by implementing Wealth Integration or a broad-based mark-to-market tax, such congressional action should be within the scope of the Sixteenth Amendment taxing power, the existence of a realization requirement notwithstanding. If a realization requirement can be best understood as a limitation on Congress's ability to tax illiquid assets, both of these policies represent a way that Congress can act to remedy wealth inequality without running afoul of this requirement. Thus, a realization requirement should not pose a barrier to the enactment of more progressive taxation policies by a future Congress, although the willingness of four Justices to wield realization as a cudgel against the MRT in *Moore*[161] might pose a cause for concern.

V. THE ONE BIG BEAUTIFUL BILL ACT AND THE FUTURE OF CONSTITUTIONAL REALIZATION

Finally, this Note concludes by examining changes to tax policy under the recently passed One Big Beautiful Bill Act (OBBBA),[162] arguing that OBBBA's reinforcement of TCJA's status quo will obviate the short-term need for the Court to provide further definitive guidance on whether realization is a constitutional prerequisite for income taxation.

During President Trump's 2024 campaign, he pledged to extend provisions of the TCJA that were due to sunset at the end of 2025.[163] Among the significant provisions due to sunset were increases in estate

158. Zhang, *supra* note 24, at 244.

159. *Id.* at 243.

160. *See supra* Section IV.B.

161. *See supra* Section III.A.

162. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025).

163. Kody Carmody, Jonathan Huntley, Ed Murphy & Brendan Novak, *The 2024 Trump Campaign Policy Proposals: Budgetary, Economic & Distributional Effects*, BUDGET MODEL (Aug. 26, 2024), https://budgetmodel.wharton.upenn.edu/issues/2024/8/26/trump-campaign-policy-proposals-2024 [https://perma.cc/RZR9-7RUL].

and gift tax exemption limits; an increase in the standard deduction available to individual taxpayers; doubling of the Child Tax Credit; a qualified business income deduction that allows owners of pass through entities to deduct up to 20 percent of their qualified business income from their taxable income; and bonus depreciation that allows businesses to expense 100 percent of the cost of qualified property in the year it enters service.[164] This impending sunset prompted some tax advisors to express concern about the "big shock" that could be caused by sudden changes to individual and business tax liability.[165]

OBBBA makes many of the most impactful provisions of the TCJA permanent, including those listed above, and thereby prevents tax benefits from sunsetting.[166] Although it adds a variety of important new tax provisions, such as the addition of an above-the-line deduction of up to $10,000 for qualified passenger vehicle loan interest and the creation of "Trump Accounts" as an alternative to existing tax-advantaged savings accounts like 529 plans,[167] OBBBA is therefore perhaps most noteworthy for its reinforcement of the TCJA's status quo. Nonetheless, the bill's impact on government revenue is projected to be significant—modeling of the revenue impact of OBBBA estimates that federal revenues will be reduced by approximately $5 trillion between 2025 and 2034.[168] Of this $5 trillion, $974 billion is estimated to come from the new tax provisions of the bill, whereas over $4 trillion comes from extending TCJA provisions.[169]

If OBBBA can best be understood as both a reaffirmation and an amplification of TCJA's tax regime—a permanent adoption of numerous important TCJA provisions that leads to even greater decreases in federal

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164. *A Different Kind of Sunset: Navigating the Looming Tax Changes of the Tax Cuts and Jobs Act Expiration*, J.P. MORGAN WEALTH MGMT., https://www.jpmorgan.com/content/dam/jpm/wealth-management/documents/sunset-tax-cuts-and-jobs-act.pdf [https://perma.cc/9Y9D-JUU5] (last visited Sep. 18, 2025).

165. Angie O'Leary & Bill Ringham, *Opinion: Preparing for the Great Sunset: What you Need to Know if Tax Code Provisions Expire*, MARKETWATCH (Mar. 25, 2022, at 14:05 ET), https://www.marketwatch.com/story/preparing-for-the-great-sunset-what-you-need-to-know-if-tax-code-provisions-expire-11648229412 [https://perma.cc/RVL3-NB8B]; *see also* J.P. MORGAN WEALTH MGMT., *supra* note 164 (noting that unprepared taxpayers may be surprised by "substantial shifts" in tax liability that would result from a sunset).

166. Garrett Watson et al., *One Big Beautiful Bill Act Tax Policies: Details & Analysis*, TAX FOUND. (July 4, 2025), https://taxfoundation.org/research/all/federal/big-beautiful-bill-senate-gop-tax-plan/ [https://perma.cc/2L27-QV9N].

167. *The One, Big, Beautiful Bill Act – Summary and Analysis of the Tax Title*, BROWNSTEIN (July 8, 2025), https://www.bhfs.com/insight/the-one-big-beautiful-bill-act-summary-and-analysis/ [https://perma.cc/VRJ4-MRYD].

168. Watson et al., *supra* note 166. Dynamic estimates of revenue, which incorporate a projected long-run GDP gain of 1.2 percent, suggest that only $4.1 trillion of revenue will be lost over that same time period. *Id.*

169. *Id.*

income tax revenue when extrapolated into future years—then OBBBA's passage is likely to vindicate the Court in its decision to avoid the realization question. Justice Kavanaugh's majority opinion demonstrates a clear concern with ensuring that the Congressional taxing power remains a viable means of revenue generation, both in its lamentation that the elimination of tax provisions similar to the MRT would "deprive the U.S. Government and the American people of trillions in lost tax revenue"[170] and its discussion of the historical importance of granting Congress an "expansive taxing power" so that the federal government need not fund itself primarily on contributions from the states.[171] Given the Court's hesitation to open new avenues to constitutional challenges of I.R.C. provisions under the TCJA taxation regime,[172] it stands to reason that the Court would be similarly hesitant to answer the realization question in the affirmative under an OBBBA regime that largely reinforces and extends TCJA's major provisions, foregoing trillions of dollars of federal government revenue in the process.[173]

Thus, the Court is unlikely to formally enshrine realization as a constitutional prerequisite for income taxation, notwithstanding its suggestions that such a requirement probably exists.[174] To a pragmatic Court, realization is more useful as a Sword of Damocles,[175] looming over any hypothetical wealth taxes that might be passed by a future Congress,[176] than it is as a formal legal requirement restricting

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170. *Moore v. United States*, 144 S. Ct. 1680, 1696 (2024).

171. *Id.* at 1687.

172. *See* Lily Batchelder et al., *The Moores Lost Their Claim and* Moore, TAX NOTES (Aug. 19, 2024), https://www.taxnotes.com/featured-analysis/moores-lost-their-claim-and-moore/2024/08/16/7kkw7; *see also* Jonathan D. Grossberg, *The Ramifications of* Moore v. United States, THOMSON REUTERS TAX & ACCT. (Sept. 23, 2024), https://tax.thomsonreuters.com/news/the-ramifications-of-moore-v-united-states/ [https://perma.cc/E22J-VDHG] (quoting Kelsey Merrick, who argues that Moore's emphasis on the importance of the existing tax system will make it harder for litigants to bring constitutional challenges to taxes in future cases). *But see* Milhiser, *supra* note 95 (arguing that wealth taxes, in particular, might be easier to challenge on constitutional grounds post-*Moore*).

173. My thanks to Dean Emily Cauble for this suggestion. *See also* Batchelder et al., *supra* note 172 (arguing that the Court's desire to prevent "dire consequences" associated with limiting Congress's taxing power may lead the Court to uphold passthrough and accrual taxes in future cases, even if these kinds of taxes implicate questions of realization).

174. *See supra* Part III.

175. *See* MARCUS TULLIUS CICERO, CICERO'S TUSCULAN DISPUTATION (BOOK V) ¶ 21 (C. D. Yonge trans., Harper & Brothers 1877).

176. Although this Note argues that a wealth tax could be structured in a constitutionally permissible way even if a realization requirement exists, *see supra* Part IV, there is reason to doubt that the Court would view a wealth tax favorably. *See* Millhiser, *supra* note 95. Formally adopting a constitutional realization requirement is one way the Court could strike down a future wealth tax. *See* Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America

Congress's taxing power and wreaking havoc within the current system of taxation. So long as the approach taken by TCJA and OBBBA remains the status quo, the Court's avoidance of the realization question likely will also.

CONCLUSION

While *Moore v. United States* was not the definitive end to the realization debate that commentators hoped, it managed to be noteworthy in its avoidance of the question, reasserting the status quo while simultaneously hinting at the existence of a constitutional realization requirement. *Moore* therefore is emblematic of the Court's recent tendency to approach *Macomber* and its conceptualization of realization, even if it has not yet gone all the way in formally enshrining realization as a constitutional requirement. If, as this Note argues, such a requirement does exist post-*Moore*, it can best be understood as a limitation on Congress's ability to tax illiquid assets. While this has the potential to make a profound impact throughout the I.R.C., a variety of factors ought to limit its real-world impact in scope, most notably the Court's reaffirmation of Congress's power to tax the shareholders of pass-through entities and the ability to structure progressive tax legislation with an awareness of a realization requirement as to avoid running afoul of such a requirement. Furthermore, given the status quo of taxation under the TCJA and OBBBA and the potential "fiscal calamity" that could result from opening up new avenues for challenging I.R.C. provisions, the Court is unlikely to formally enshrine realization as a constitutional prerequisite for income taxation, despite the recent trends in its jurisprudence and in the *Moore* opinion that suggest the existence of such a requirement.

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in Support of Petitioners at 11–12, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800) (arguing that dispensing with a realization requirement for income taxation opens the door to the taxation of wealth, property, unrealized gains, rental value, or short-term gains on volatile cryptocurrencies).