

CLARIFYING THE CONSTITUTIONAL BOUNDARIES OF INCOME TAXATION AFTER *MOORE V. UNITED STATES*

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I. INTRODUCTION

Despite the significance of the term “income,” both the United States Supreme Court and the Internal Revenue Code do not provide an explicit definition of the term. This ambiguity causes the constitutionality of income taxation to remain a contested issue. Central to this ongoing debate is the issue of realization as a prerequisite for income taxation, exemplified by the case of *Moore v. United States*.¹ In a landmark decision, the Ninth Circuit ruled that realization is not a constitutional requirement for Congress to impose a tax exempt from apportionment under the Sixteenth Amendment.² This decision marked a pivotal departure from the longstanding judicial consensus that income must be realized before it becomes taxable.

Charles and Kathleen Moore, a retired couple from Redmond, Washington, found themselves at the center of this constitutional debate following their minority investment in KisanKraft, a controlled foreign corporation (“CFC”) based in India.³ In 2006, the Moores invested \$40,000 in KisanKraft, acquiring an 13% minority stake in the company.⁴ Since its inception, KisanKraft consistently turned a profit but never distributed any earnings to its shareholders, opting instead to reinvest all profits into the business.⁵

The Moores’ tax predicament originated from the passage of the Tax Cuts and Jobs Act (“TCJA”) of 2017, which introduced the Mandatory Repatriation

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¹ See *Moore v. U.S.*, 602 U.S. 572 (2024); see also *Moore v. United States*, 36 F.4th 930 (9th Cir. 2023) (holding for Commissioner); see also *Moore v. United States*, No. C19-1539-JCC, 2020 WL 6799022 (W.D. Wash. 2020) (holding for Commissioner).

² See *Moore*, 36 F.4th at 935, 937, 939 (holding for Commissioner).

³ See *Moore*, 602 U.S. at 572.

⁴ *Id.* at 580.

⁵ See *id.*

Tax (“MRT”). This provision requires certain U.S. shareholders to include their pro-rata share of the CFC’s accumulated earnings in their taxable income, regardless of whether the earnings had been distributed. Thus, the Moores declared \$132,512 in income under the MRT based on their pro-rata ownership of KisanKraft’s earnings, and in 2018, the Moores were subject to a \$14,729 tax liability.⁶

The Moores paid the tax and then sued for a refund, challenging the constitutionality of the MRT. The case was first heard in the Western District of Washington, which found for the commissioner and was then appealed to the Ninth Circuit, which affirmed the lower court’s ruling.⁷ The Ninth Circuit delivered a landmark decision, wherein it ruled that the realization of income is not a constitutional requirement for Congress to impose a tax exempt from apportionment under the Sixteenth Amendment.⁸ The Moores argued that this decision diverged from the constitutionally recognized understanding that income must be realized before it is subject to federal taxation.⁹

On June 20, 2024, the Supreme Court issued its decision affirming the tax finding the MRT does not exceed Congress’s constitutional authority.¹⁰ However, the Supreme Court did not attempt to resolve the party’s disagreement over whether realization is a constitutional requirement for an income tax. This ambiguity leaves open the potential for expansive interpretations of what constitutes taxable income.¹¹

As such, this article proposes that, in light of the holding in *Moore*, the Supreme Court provide Congress and taxpayers with a concrete definition of income consistent with the recognition of a realization requirement. Part II introduces the concept of realization in defining taxable income; the current statutory provisions regarding income; and the purpose and provisions of the MRT. Part III analyses the Supreme Court’s interpretation of income in *Moore*, discusses the implicit realization principle in well-established tax law doctrines, and highlights some concerns associated with taxing unrealized gains. Part IV concludes with a framework for defining taxable income that aligns with historical precedents and constitutional principles, aiming to protect constitutional constraints and ensure fair taxation.

⁶ *Id.*

⁷ See *Moore*, 2020 WL 6799022 at *6; see also *Moore*, 36 F.4th at 932.

⁸ See *Moore*, 36 F.4th at 935 (holding for Commissioner).

⁹ Brief for Petitioners at 16, *Moore*, 602 U.S. 572 (No. 22-800) (“The Court’s precedents from the decades prior to the Amendment’s adoption through to the current era consistently hold that income turns on realization by the taxpayer. That was the common understanding of the word ‘income’ at the time of the Amendment’s conception, drafting, and ratification . . .”).

¹⁰ See *Moore*, 602 U.S. at 599–600.

¹¹ See Arthur Delaney, *Elizabeth Warren Cheers Wealth Tax Prospects Following Supreme Court Decision*, HUFFPOST (June 20, 2024, 3:42 PM), https://www.huffpost.com/entry/elizabeth-warren-wealth-tax_n_66746341e4b069d92e249349 (“The court did not slam the door shut on Warren’s proposal, but it didn’t give it a green light, either.”).

II. BACKGROUND

A. WHAT IS REALIZATION?

The concept of realization is a cornerstone in the realm of income taxation.¹² A realization event is a specific occurrence that triggers the recognition of income or gain for tax purposes. For instance, if you own stock and it increases in value, you have not yet realized the gain, and thus you would not owe taxes on it until you sell the stock and secure the profit.¹³ This ensures that taxable income is not merely accrued but has been actualized in a manner that allows the taxpayer to have the necessary liquidity to meet their tax obligations.¹⁴

The debate over whether realization is a constitutional prerequisite for taxation is highly significant because the federal government's authority to impose unapportioned direct taxes is explicitly restricted to "incomes."¹⁵ The Sixteenth Amendment's ratification in 1913 was a pivotal moment in the history of U.S. taxation, granting Congress to authority to impose taxes "on *incomes*, from whatever source derived, without apportionment among the several States."¹⁶ To ensure the Amendment's application remains consistent with its original intent and the Constitution's requirements for direct taxes, it is crucial to accurately interpret the scope and meaning of "incomes" as intended by the framers of the Amendment and as understood in the legal context of the time.¹⁷

Shortly after the Sixteenth Amendment's ratification, the United States Supreme Court first defined income in *Stratton's Independence, Ltd. v. Howbert*

¹² See *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 570 (1991) ("It long has been established that gain or loss in the value of property is taken into account for income tax purposes only if and when the gain or loss is 'realized' . . .").

¹³ See *U.S. v. Phellis*, 257 U.S. 156, 169 (1921) (characterizing income as "a gain derived from capital, not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, . . . coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal").

¹⁴ See EDWIN R. A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 19 (The Macmillan Company 2d ed. 1914) (1911) (ebook) ("[I]ncome as contrasted with capital denotes that amount of which flows in during a definite period and which is at the disposal of the owner for purposes of consumption, so that in consuming it, his capital remains unimpaired.").

¹⁵ See U.S. CONST. amend. XVI; see also U.S. CONST. art. I, § 2, cl. 3; see also U.S. CONST. art. I, § 8, cl. 1; see also U.S. CONST. art. I, § 9, cl. 4.

¹⁶ U.S. CONST. amend. XVI (emphasis added); see also *History and Purpose of the Amendment*, JUSTIA U.S. L., <https://law.justia.com/constitution/us/amendment-16/01-income-tax.html> (last visited Mar. 30, 2025) ("The ratification of the Sixteenth Amendment was the direct consequence of the Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.* holding unconstitutional Congress's attempt of the previous year to tax incomes uniformly throughout the United States.").

¹⁷ See *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (emphasizing the Sixteenth Amendment "shall not be extended by loose construction"); see also *MacLaughlin v. Alliance Ins. Co.*, 286 U.S. 244, 249 (1932) ("[S]ale or other disposition of property . . ."); see also *Kirby Lumber*, 284 U.S. 1, 2–3 (1931) (reasoning that a "clear gain" resulted from a corporation repurchasing bonds it issued for less than the corporation had initially "received [for] their par value").

(1913) as “the gain derived from capital, from labor, or from both combined,”¹⁸ thereby establishing the understanding of taxable income as the receipt of economic gain. Affirming the definition, the Court in *Eisner v. Macomber* (1920) provided further clarity by establishing the principle of realization in determining taxable income.¹⁹ In this case, the Court addressed the constitutional question of whether a stock dividend was gross income within the meaning of “income” as used in the Sixteenth Amendment.²⁰ Finding that Congress did not have the authority to tax a stock dividend as income, the Court explained that “the stockholder’s share in the accumulated profits of the company is capital, not income,”²¹ therefore emphasizing that mere appreciation in a capital investment is not income.

In *Helvering v. Horst* (1940),²² the Court addressed a broader form of realization by highlighting that income can be realized through the exercise of control and disposition of income-producing property, not just through the actual personal receipt of money. At issue was whether the taxpayer, an owner of negotiable bonds, realized taxable income upon the gift of the detached interest coupons to his son.²³ The Court ruled that the taxpayer did realize income upon the transfer, and this income was constitutionally attributed to the taxpayer.²⁴ The court reasoned that, for income tax purposes, “[t]he 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.”²⁵ Moreover, the coupons represented the right to receive interest and the taxpayer’s act of detaching them was the “last step” that converted the accrued economic gain (interest from the bonds) into a form that could be controlled and disposed of.²⁶

Further, in *Commissioner v. Glenshaw Glass Co.* (1955), the definition of “income” was established as an “undeniable accession[] to wealth, clearly

¹⁸ *Stratton’s Indep., Ltd. v. Howbert*, 231 U.S. 399, 415 (1913).

¹⁹ See *Macomber*, 252 U.S. at 219 (“After examining dictionaries in common use, we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909.” (citation omitted)).

²⁰ See *id.* (“[W]e are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder.”).

²¹ *Id.*

²² See *Helvering v. Horst*, 311 U.S. 112, 116 (1940) (“If the taxpayer procures payment directly to his creditors of the items of interest or earnings due him . . . he does not escape taxation because he did not actually receive the money.”).

²³ See *id.* at 114 (discussing the central legal issue of realization and taxable income).

²⁴ See *id.* at 120 (“[H]e has separated his right to interest payments from his investment . . . , he has enjoyed the economic benefits of the income . . . and . . . that the fruit is not to be attributed to a different tree from that on which it grew.” (citing *Lucas v. Earl*, 281 U.S. 111, 115 (1930))).

²⁵ *Id.* at 118.

²⁶ See *id.* at 115 (“Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him.”).

realized, and over which the taxpayers have complete dominion.”²⁷ In its opinion, the Court examined the well-established catchall provision in the statutory definition of gross income, “gains or profits and income derived from any source whatsoever.”²⁸ Furthermore, since *Glenshaw*, “income” in various contexts has been understood to include gains that are clearly realized and under the taxpayer’s complete dominion.²⁹ In 1990, the Supreme Court emphasized that “[m]ere variation in value -- the routine ups and downs of the marketplace -- do not in themselves have income tax consequences. This is fundamental in income tax law.”³⁰

B. CURRENT STATUTORY DEFINITION OF INCOME

Currently, Congress fails to provide an all-encompassing definition of income in the Internal Revenue Code (“I.R.C.”).³¹ I.R.C. § 63 provides that “‘taxable income’ means *gross income* minus the deductions allowed.”³² Failing to provide a concrete definition of “gross income,” § 61 using a broad and inclusive approach, stating: “Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items.”³³ It then lists of fourteen examples of income, such as compensation for services, business income, gains from property dealings, interest, rents, royalties, dividends, alimony, and pensions. Despite the lack of an explicit reference to realization in the code’s definition of “gross income,” the realization principle is embedded in the current statutory framework for computing an individual’s gain or loss in the value of property.³⁴

²⁷ See *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (determining whether money received as exemplary damages for fraud and as punitive damages for antitrust violations constituted gross income).

²⁸ See *id.* at 430 (“The importance of [the catchall provision of § 2(A)] has been too frequently recognized since its first appearance in the Revenue Act of 1913 to say now that it adds nothing to the meaning of ‘gross income.’”). See generally Revenue Act of 1913, ch. 16, § 2(A), 1913 Stat. 166.

²⁹ See, e.g., *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 569–70 (1991) (“It long has been established that gain or loss in the value of property is taken into account for income tax purposes only if and when the gain or loss is ‘realized,’”); see, e.g., *Ivan Allen Co. v. United States*, 422 U.S. 617, 627–29 (1975) (using the term “realized” in a case involving a tax on accumulated corporate earnings); see, e.g., *Comm’r v. Kowalski*, 434 U.S. 77, 83 (1977) (involving meal allowances); see also *Diedrich v. Comm’r*, 457 U.S. 191, 199 (1982) (using “derived” and “realized” more or less interchangeably).

³⁰ *Cottage Sav. Ass’n*, 499 U.S. at 569–70.

³¹ See Robert Wood & Donald Board, *Rethinking Property, Terminations, and Gain After McKelvey*, TAX NOTES (May 9, 2024), <https://www.taxnotes.com/tax-notes-today-federal/gains-and-losses/rethinking-property-terminations-and-gain-after-mckelvey/2024/05/09/7jfpp> (“The code famously omits any single, overarching definition of income.”).

³² I.R.C. § 63 (emphasis added).

³³ *Id.* § 61.

³⁴ See I.R.S. Priv. Ltr. Rul. 202352011 (Sept. 29, 2023) (“[T]he Supreme Court described the language of § 1001(a) as providing a ‘straightforward test for realization’” (citing *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 559 (1991))).

The I.R.C. details the determination of gain or loss under § 1001, where gain is the excess of the amount realized over the adjusted basis provided in § 1011, and loss is the excess of the adjusted basis over the amount realized.³⁵ The amount realized includes any money received plus the fair market value of any property received.³⁶ Moreover, § 1001(a) provides the taxpayer must engage in a “sale or other disposition of [the] property” in order to realize a gain or loss.³⁷ Treasury Regulation 1.1001-1 further clarifies that “an exchange of property for other property differing materially in kind or in extent” constitutes a disposition of property.³⁸

Additionally, the Supreme Court in *Helvering v. Bruun* (1940) explains that gain can arise from various discernable events, such as the “exchange of property, payment of the taxpayer’s indebtedness, relief from a liability, or other profit realized from the completion of a transaction.”³⁹

C. PROVISIONS AND INTENDED PURPOSE OF THE MRT

The introduction of the TCJA of 2017 represented a significant shift in how the United States taxes foreign income held by U.S. shareholders.⁴⁰ Before the TCJA, U.S. shareholders of American-controlled foreign corporations were generally required to pay taxes on foreign earnings only when those earnings were repatriated or brought back to the United States, typically in the form of dividends.⁴¹ This system incentivized keeping profits abroad, leading to substantial accumulations of untaxed foreign earnings. To mention, “[t]he government estimated that, by 2015, CFCs had parked \$2.6 trillion offshore in undistributed retained earnings that were not presently subject to U.S. taxation.”⁴² However, the TCJA “transitioned the United States from a primarily deferral-based international tax system to a participation exemption system coupled with

³⁵ See I.R.C. § 1001; see also Wood & Board, *supra* note 31 (“[S]ection 1001 never purports to define gain and loss themselves. It simply provides uniform rules for calculating the amount of gain or loss realized from a sale or other disposition of property, which is all that Congress expected it to do.”).

³⁶ See *id.* § 1001(b) (“The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.”).

³⁷ *Id.* § 1001(a).

³⁸ Treas. Reg. § 1.1001-1(a).

³⁹ *Helvering v. Bruun*, 309 U.S. 461, 469 (1940).

⁴⁰ See Alan Cole, *The Impact of GILTI, FDII, and BEAT*, TAX FOUND. (Jan. 31, 2024), <https://tax-foundation.org/research/all/federal/impact-gilti-fdii-beat/> (“The Tax Cuts and Jobs Act of 2017 (TCJA) reformed the U.S. system for taxing international corporate income.”).

⁴¹ 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> (“[A] US corporation could defer foreign income by retaining earnings indefinitely through a foreign subsidiary. The US corporation would pay US tax on the foreign earnings only when they were repatriated . . .”).

⁴² Caroline Rule, *The Supreme Court Will Determine Constitutionality of the Mandatory Repatriation Tax*, AM. BAR ASS’N (Sept. 21, 2023), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/23sum/23sum-ac-rule-mandatory-repatriation/.

immediate taxation of certain offshore earnings.”⁴³ Thus, the TCJA eliminated the previous deferral advantages while the MRT was designed to ensure that accumulated foreign earnings were taxed, even if they were not repatriated.⁴⁴

The MRT, established under the TCJA, imposed a one-time tax on the accumulated post-1986 foreign earnings of these corporations, requiring U.S. shareholders owning at least 10% of a CFC to include their pro-rata share of the CFC’s accumulated earnings in their taxable income, regardless of whether these earnings have been distributed.⁴⁵ Since the MRT does not require the realization of income in the form of dividends, it imposes a tax on the potential value of the shareholders’ interests in the CFC.⁴⁶ Further, the tax rates under the MRT vary based on the form of the accumulated earnings: a rate of 15.5% applies to earnings held in cash or cash equivalents, and a rate of 8% applies to earnings held in illiquid assets.⁴⁷

In its application, the MRT fundamentally disregards the corporate form.⁴⁸ Traditionally, a corporation is treated as a separate legal entity from its shareholders for tax purposes. Income earned by the corporation is not taxed to the shareholders until it is distributed to them, typically in the form of dividends. The MRT, however, attributes the CFC’s accumulated earnings directly to its U.S. shareholders.⁴⁹ This approach effectively treats the earnings as if they were received directly by the shareholders, regardless of whether they have been distributed, thereby blurring the lines between corporate and individual income taxation.

It is essential to distinguish between the MRT’s treatment of CFCs and the existing rules under Subpart F of the Internal Revenue Code.⁵⁰ “In general,

⁴³ See *IRS Practice Unit: Overview Of Section 245A Dividends Received Deduction*, KPMG (Jan. 4, 2022), <https://assets.kpmg.com/content/dam/kpmg/us/pdf/2022/01/22004.pdf>.

⁴⁴ See TAX POL’Y CTR., *supra* note 41 (“[A]s a transition to the new system and to avoid a potential windfall for corporations that had accumulated unrepatriated earnings abroad, the new law taxes these earnings as if they were repatriated but at preferred lower rates.”).

⁴⁵ See I.R.C. § 965; see also Treas. Reg. § 1.965-1(a); see also I.R.C. § 957(a) (“‘[C]ontrolled foreign corporation’ means any foreign corporation if more than 50 percent . . . is owned . . . by United States shareholders on any day during the taxable year of such foreign corporation.”).

⁴⁶ See Joyce Beebe, *There Is More to Moore — Supreme Court Tax Decision May Have Wide-Ranging Impact*, BAKER INST. (Feb. 14, 2024), <https://www.bakerinstitute.org/research/there-more-moore-supreme-court-tax-decision-may-have-wide-ranging-impact> (“The MRT is not an excise tax on the use of property, they argue, but direct taxation upon property solely because of its ownership.”).

⁴⁷ See I.R.C. § 965(c); see also Treas. Reg. § 1.965-1(a) (“Section 1.965-3 provides rules regarding the determination of section 965(c) deductions.”).

⁴⁸ See *Moore v. United States*, 602 U.S. 572, 612 (2024) (“Put differently, can Congress disregard KisanKraft’s corporate form, attribute KisanKraft’s income to its shareholders, and tax its shareholders on that income?”).

⁴⁹ See *id.* at 584 (“The MRT attributes the income of the corporation to the shareholders, and then taxes the shareholders (including the Moores) on their share of that undistributed corporate income.”).

⁵⁰ See I.R.C. § 952 (defining Subpart F income for controlled foreign corporations, including categories such as foreign base company income, insurance income, and income subject to certain anti-

[Subpart F income] consists of movable income,” which is taxed to U.S. shareholders regardless of distribution.⁵¹ The enactment of Subpart F aimed to prevent tax deferrals on certain easily movable income types by including them in the shareholders’ current income.⁵² In contrast, the MRT applies more broadly to all CFC accumulated earnings.⁵³ The MRT, therefore, represents a more comprehensive approach to taxing foreign earnings, aimed at bringing all accumulated, undistributed foreign income subject to U.S. taxes.

III. DISCUSSION

A. THE U.S. SUPREME COURT’S MOST RECENT INTERPRETATION OF “INCOME” IN *MOORE*

The question granted review in *Moore* is “[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.”⁵⁴ The Supreme Court’s opinion in this case provides significant insights into the current interpretation of income, even though the Court stopped short of definitively resolving whether realization is a constitutional requirement.⁵⁵ This section critically examines the majority, concurring, and dissenting opinions, highlighting their contrasting views and the significance of realization within the tax framework.

In the majority opinion, delivered by Justice Kavanaugh and joined by Justices Roberts, Kagan, and Sotomayor, the Court upheld the MRT by examining Congress’s taxing authority under the Constitution, mainly focusing on the power to impose indirect taxes, such as income taxes, without apportionment.⁵⁶ Acknowledging that despite the breadth of Congress’ taxing power, the

deferral provisions, which are taxed currently to U.S. shareholders regardless of repatriation).

⁵¹ See *Overview of Subpart F Income for U.S. Individual Shareholders*, INTERNAL REVENUE SERV. 4 (Oct. 7, 2015), https://www.irs.gov/pub/fatca/int_practice_units/FEN9433_01_09R.pdf; see also I.R.C. § 951(a) (providing a U.S. shareholder is required to include in income currently its pro rata share of the CFC’s Subpart F income).

⁵² See INTERNAL REVENUE SERV., *supra* note 51 at 3.

Prior to the enactment of Subpart F, many U.S. taxpayers achieved deferral of U.S. tax on certain kinds of movable income, such as dividends, interest, rents and royalties, by earning such income through foreign corporations Congress determined that this type of deferral was inappropriate and reacted by enacting Subpart F.

Id.

⁵³ See Brief for Petitioners, *supra* note 9, at 44.

The MRT takes no account of whether the shareholders it targets have realized anything Unlike [Subpart F] provisions, MRT liability does not turn on any event of constructive realization of income by shareholders, such as the corporation’s receipt of investment earnings while subject to the shareholders’ control.

Id.

⁵⁴ *Id.* at 16.

⁵⁵ See *Moore v. United States*, 602 U.S. 572, 599 (2024) (“The Moores argue that realization is a constitutional requirement; the Government argues that it is not. . . . Those are potential issues for another day, and we do not address or resolve any of those issues here.”).

⁵⁶ See *id.* at 582–84 (noting the limitations provided in U.S. CONST. art. I, § 2, cl. 3; art. I, § 8, cl. 1; and art. I, § 9, cl. 4).

Sixteenth Amendment restricts Congress' broad authority to lay taxes by distinguishing between income and its sources.⁵⁷ The Court then affirmed that Congress can attribute a corporation's undistributed income to its shareholders, as it is consistent with the principles upholding similar taxes on partnerships, S corporations, and subpart F income.⁵⁸ Further, the Court relied on cases like *Burk-Waggoner Oil Assn. v. Hopkins* and *Heiner v. Mellon*, which established the principle that Congress has the discretion to tax either the entity or its shareholders on the entity's undistributed income.⁵⁹ Therefore, addressing the issue under a theory of attribution, the majority affirmed the MRT on the grounds that Congress has the authority to attribute an entity's income to its shareholders and tax them on their pro-rata shares of that income, regardless of whether the income has been distributed.⁶⁰

Importantly, while the majority did not explicitly answer the question on the taxation of unrealized sums, the Court did not dispute the notion that realization is what distinguishes income from property.⁶¹ The Court emphasized that its decision was narrowly focused on the specific context of the MRT and did not address the broader questions about realization.⁶² Moreover, their decision signifies the ambiguity in the definition of income as the broader question of realization was left for another day.⁶³

In her concurrence, Justice Barret is unequivocal on whether a government may tax unrealized income without apportionment. "The answer is straightforward: No."⁶⁴ Barrett argues that the Sixteenth Amendment's use of the term "derived" to describe income implies that income must be realized—converted

⁵⁷ See *id.* at 582 ("Generally speaking, direct taxes are those taxes imposed on persons or property. . . . By contrast, indirect taxes are the familiar federal taxes on activities or transactions. That category of taxes includes duties, imposts and excise taxes, as well as income taxes."); see also *id.* at 604 (Barret, J., concurring) ("The Constitution distinguishes between taxes on income and taxes on property.").

⁵⁸ See *id.* at 598 ("By doing so, the MRT operates in the same basic way as Congress's longstanding taxation of partnerships, S corporations, and subpart F income. And the MRT is consistent with the principles that this Court articulated in upholding those kinds of taxes . . .").

⁵⁹ See *Burk-Waggoner Oil Ass'n. v. Hopkins*, 269 U.S. 110, 114 (1925) (holding that, for tax purposes, Congress could treat a partnership like a corporation when it acts like a corporation); see also *Moore*, 602 U.S. at 586 ("This Court upheld the tax on the partners, reasoning that it was immaterial that the partners did not actually receive the income earned by the partnership.").

⁶⁰ See *Moore*, 602 U.S. at 573–74 (explaining that "Congress can attribute the undistributed income of an entity to the entity's shareholders or partners, and tax the shareholders or partners on their pro rata share of the entity's undistributed income").

⁶¹ *Id.* at 615 (Barret, J., concurring) ("Today, the Court does not dispute either that income requires realization or that a tax on stock ownership must be apportioned.").

⁶² *Id.* at 598 ("[W]e emphasize that our holding today is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income.").

⁶³ *Id.* at 584 n.2 ("Our analysis today does not address the distinct issues that would be raised by (i) an attempt by Congress to tax both the entity and the shareholders or partners on the entity's undistributed income; (ii) taxes on holdings, wealth, or net worth; or (iii) taxes on appreciation.").

⁶⁴ *Id.* at 604 (Barret, J., concurring); see also *id.* at 608 ("The Government is unable to cite a single decision upholding an unapportioned tax on appreciation." (citation omitted)).

into tangible gain—before it can be taxed without apportionment.⁶⁵ Further, she asserts that mere appreciation in property value does not constitute taxable income until it is realized through a transaction.⁶⁶ Thus, because KisanKraft has never declared a dividend, nor have the Moores sold or otherwise disposed of their shares, “they have not ‘derived’ income from their shares because nothing has *come in*.”⁶⁷

Contrasting sharply with the majority opinion, Justice Thomas, joined by Justice Gorsuch, held that “Sixteenth Amendment ‘income’ is only realized income.”⁶⁸ Justice Thomas asserts that the Sixteenth Amendment, which authorizes Congress to tax income “from whatever source derived,” inherently requires that income be both realized and separated from the property that generates it.⁶⁹ He begins by explaining the historical context of the Amendment, arguing that because the Sixteenth Amendment was enacted immediately after the *Pollock* decision, which held that income could not be separated from its source for tax purposes, it did not eliminate the need for realization, and income must be both separated and distinct from its source before being taxed.⁷⁰ Justice Thomas further explains that “[t]he Amendment resolved a long-running conflict over the scope of the Federal Government’s taxing power. It paved the way for a federal income tax by creating a new constitutional distinction between ‘income’ and the ‘source’ from which that income is ‘derived.’ Drawing that distinction necessitates a realization requirement.”⁷¹

Justice Thomas criticizes the majority’s decision to uphold the MRT by framing it as a permissible attribution of a foreign corporation’s realized income to its American shareholders.⁷² He argues that this “attribution” doctrine is an

⁶⁵ See *Moore*, 602 U.S. at 606–07 (Barret, J., concurring) (explaining the Court has interchangeably used realization and derivation when discussing cases involving income taxes on corporate shareholders, debt discharge, real estate improvements, punitive damages, meal allowances).

⁶⁶ See *id.* at 608 (“[W]e have stressed that ‘economic gain is *not* always taxable as income.’” (citations omitted)).

⁶⁷ See *id.* (“In short, they have not ‘derived’ income from their shares because nothing has *come in*.”).

⁶⁸ *Id.* at 620 (Thomas, J., dissenting) (“Sixteenth Amendment ‘incomes’ include only income realized by the taxpayer.”).

⁶⁹ See *id.* at 621 (arguing that the Sixteenth Amendment provides that 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 census or enumeration).

⁷⁰ See *id.* at 639 (“[B]ecause the Amendment abolished *Pollock*’s rule that an income tax must be classified as direct or indirect based on whether a tax on the source of that income would be direct or indirect, the Amendment created a constitutional distinction between income and its source.”); see also *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 627–28 (1895) (holding that a tax on income from property equated to a tax on the property itself, and thus was a direct tax subject to apportionment).

⁷¹ See *Moore*, 602 U.S. at 622 (Thomas, J., dissenting) (“The Amendment resolved a long-running conflict over the scope of the Federal Government’s taxing power. It paved the way for a federal income tax by creating a new constitutional distinction between ‘income’ and the ‘source’ from which that income is ‘derived.’ Drawing that distinction necessitates a realization requirement.”).

⁷² See *id.* at 645 (“The Court thus refuses to address the ‘Government’s argument that a gain need not be realized to constitute income under the Constitution’ because the foreign corporation has

invention not supported by precedent.⁷³ Furthermore, he contends that the MRT is fundamentally different from other forms of pass-through taxation, such as those on partnerships and S corporations, because it does not account for the shareholder's control over the corporation's earnings.⁷⁴ Concluding that the MRT imposes a tax on unrealized income, which is unconstitutional under the Sixteenth Amendment, Thomas warns that the decision undermines the foundational principles of income tax law and sets a dangerous precedent for future taxation policies.⁷⁵

B. CURRENT JUDICIAL PARAMETERS INHERENTLY SUPPORT A REALIZATION REQUIREMENT FOR TAXABLE INCOME

The current judicial doctrines and administrative parameters surrounding the definition of taxable income inherently support a realization requirement. This section examines the substance over form doctrine, constructive receipt doctrine, and the wherewithal-to-pay principle, all of which support realization as a fundamental aspect of taxation.

i. Substance Over Form (Barret Concurrence)

The doctrine of “substance over form” is a fundamental principle in tax law, ensuring that the economic reality of a transaction dictates the tax consequences rather than its legal form. In *Commissioner v. Court Holding Co.* (1945), the Court emphasized that the substance of a transaction should prevail over its form when determining the taxable consequence.⁷⁶ Similarly, in *Gregory v. Helvering* (1935) the Court held that the substance of a transfer, made in pursuant of a plan of corporate reorganization, must have a legitimate business

realized the income.”).

⁷³ *Id.* (“The majority’s Sixteenth Amendment ‘attribution’ doctrine is a new invention. The majority justifies its creation by plucking superficially supportive phrases from an eclectic selection of tax cases.”)

⁷⁴ *See id.* at 650 (“But, unlike the rest of subpart F, the MRT has no connection at all to any ‘recognition event’ or ‘constructive receipt of income,’ and it offers no ‘rational basis for Congress to attribute income to a taxpayer.’”).

⁷⁵ *Id.* at 651 (“But, if Congress invites calamity by building the tax base on constitutional quicksand, ‘[t]he judicial Power’ afforded to this Court does not include the power to fashion an emergency escape.” (citation omitted)).

⁷⁶ *See Comm’r v. Court Holding Co.*, 324 U.S. 331, 334 (1945) (“The incidence of taxation depends upon the substance of a transaction. . . . [T]he transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant.”).

purpose beyond merely avoiding taxes.⁷⁷ Further, in *Diedrich v. Comm'r* (1982), the Court affirmed that realization is a question of substance, not form.⁷⁸

In matters of corporate form and income attribution, the substance over form doctrine is particularly relevant. Courts have consistently ruled that income must be attributed to the person who genuinely earns it, reflecting the economic substance of the transaction.⁷⁹ For instance, in *Lucas v. Earl* (1930),⁸⁰ the Court rejected a taxpayer's attempt to avoid taxation by assigning future income to his spouse through a contractual agreement, ruling that the economic control and origin of the income remained with the taxpayer. Similarly, in *Burnet v. Leininger* (1932),⁸¹ the Court addressed the anticipatory assignment of income doctrine involving a partnership, emphasizing that income is taxed to the person who earns it regardless of any pre-arranged assignment. This case reaffirmed that the economic reality of income generation and control dictates tax liability.

The recent Supreme Court decision in *Moore v. United States* (2024) revisits these principles in the context of the MRT because the taxpayers were taxed on earnings they have not yet received.⁸² Justice Barrett's concurrence in *Moore* provides that the substance over form principle allows Congress to disregard the corporate form, however, contending that precedence suggests that this power is limited.⁸³ In *Burk-Waggoner Oil Assn. v. Hopkins*, the Court upheld Congress's power to tax an "unincorporated joint stock association" as a corporation, despite state law treating it as a partnership, because it acted as a corporation.⁸⁴ However, Justice Barret emphasized an important limitation, exclaiming

⁷⁷ See *Gregory v. Helvering*, 293 U.S. 465, 470 (1935) ("The whole undertaking . . . was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation . . ."); see also *Court Holding Co.*, 324 U.S. at 334 ("To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.").

⁷⁸ See *Diedrich v. Comm'r*, 457 U.S. 191, 195 (1982) ("This Court has recognized that 'income' may be realized by a variety of indirect means. In *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929) . . . [t]he Court made clear that the substance, not the form, of the agreed transaction controls.").

⁷⁹ See *Blair v. Comm'r*, 300 U.S. 5, 12 (1937) (allowing avoidance of avoid tax liability on inherited income interest where taxpayer transferred his entire income interest to children).

⁸⁰ See *Lucas v. Earl*, 281 U.S. 111, 115 (1930) (holding that taxpayer cannot avoid income tax by anticipatory assignment of future salary earnings to spouse).

⁸¹ See *Burnet v. Leininger*, 285 U.S. 136, 142 (1932) (affirming Congress's ability to "ta[x] the salary and fees of the person who earned them"); see also *Comm'r v. Banks*, 543 U.S. 426, 433 (2005) ("A taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party.").

⁸² See *Moore v. United States*, 602 U.S. 572, 617 (2024) (explaining that the Court upheld Congress's authority to tax shareholders on undistributed income originating from American-controlled foreign corporations).

⁸³ See *id.* ("Our precedent does not give Congress carte blanche to attribute corporate income to a shareholder. Instead, it suggests that Congress has a limited power to do so that depends on the relationship between the shareholder and the income.").

⁸⁴ See *Burk-Waggoner Oil Ass'n. v. Hopkins*, 269 U.S. 110, 113–14 (holding that for tax purposes,

the Court “did not decide whether Congress may treat a corporation like a partnership—e.g., attributing its income to shareholders—when, in truth and substance, it operates as a corporation.”⁸⁵

In the context of income attribution and the MRT, the substance over form doctrine reinforces the need for a realization event before income can be constitutionally taxed.

ii. Constructive Receipt Doctrine

The constructive receipt doctrine mandates that income must be reported immediately when it can be reduced to the taxpayer’s possession. According to Treasury Regulation § 1.451-2(a), income is constructively received when it is credited to the taxpayer’s account, set apart for them, or otherwise made available so that they can draw upon it at any time.⁸⁶ This regulation inherently supports the realization requirement by stipulating that income must be both accessible and under the taxpayer’s control to be taxable. However, this doctrine also stipulates that income is not constructively received if the taxpayer’s control of its receipt is subject to substantial limitations or restrictions, further underscoring the necessity of realized access to income.

In *McKelvy v. United States* (1973), the United States Court of Claims found a distribution and loan-back transaction involving a Subchapter S corporation to be a taxable dividend, and thus includable in the shareholders’ gross income when ultimately distributed to the extent of the corporation’s earnings and profits.⁸⁷ The court noted that “Treas. Reg. § 1.451-2(b) (1969), which defines the constructive receipt doctrine, requires that dividends on corporate stock are constructively received when unqualifiedly made subject to the demands of the shareholder,”⁸⁸ underscoring the need for actual or constructive realization of income before taxation.

Similarly, in *Wolder v. Commissioner* (1974), the Second Circuit Court of Appeals held that a bequest of stock and cash given pursuant to an agreement was taxable in the year that appellant received it, rather than in the year of the

Congress could treat a partnership like a corporation when it acts like a corporation).

⁸⁵ *Moore*, 602 U.S. at 615 (“We did not decide whether Congress may treat a *corporation like a partnership* – e.g., attributing its income to shareholders – when, in truth and substance, it operates as a corporation.”).

⁸⁶ See Treas. Reg. § 1.451–52 (“Income . . . is constructively received by him in the taxable year during which it is credited to his account, set apart for him, [unless] its receipt is subject to substantial limitations or restrictions.”).

⁸⁷ See *McKelvy v. United States*, 478 F.2d 1217, 1219 (Fed. Cir. 1973); see also *Comm’r v. Sunnen*, 333 U.S. 591, 604 (1948) (“The crucial question remains whether the assignor retains sufficient power and control over the assigned property or over receipt of the income to make it reasonable to treat him as the recipient of the income for tax purposes.”).

⁸⁸ *McKelvy*, 478 F.2d at 1219; see also Treas. Reg. § 1.451–2 (“**General rule.** Income although not actually reduced to a taxpayer’s possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time . . .”).

client's death, because it was not unqualifiedly subject to appellant's demand.⁸⁹ The court stated that "[t]he key inquiry, of course, is whether or not in fact the taxpayer has the income readily available to him, that is, subject to his 'unfettered command.'"⁹⁰ Moreover, the court found that income under the taxpayer's unfettered command and available for the taxpayer's enjoyment constitutes taxable income, whether or not the taxpayer chooses to utilize it. This principle further reinforces that realization, whether through receipt or the ability to control the income, is a prerequisite for taxability. The taxpayer's ability to command and enjoy the income equates to its realization, making it taxable.

iii. Wherewithal-to-Pay Principle

The wherewithal-to-pay principle posits that tax should be imposed when the taxpayer is best able to pay, and the government is best positioned to collect. For example, consider XYZ Corp., which owns a commercial office building and Tenant agrees to prepay five years of rent in advance. Although such rent would be recognized as earned over the five-year period for financial accounting purposes, the entire amount is taxed immediately in the year of receipt. Since Tenant prepaid the entire rent upfront, XYZ Corp. has gained an economic benefit that is readily available for tax purposes. Thus, the wherewithal-to-pay principle justifies taxing the entire prepaid rent amount in the year of receipt, aligning with the realization requirement, and ensuring that the taxpayer has the necessary funds to satisfy their tax obligation.⁹¹

Further, this principle is embedded in several non-taxable exchange provisions, such as I.R.C. §§ 1031 and 1033, and in statutes permitting tax-free formations of corporations (I.R.C. § 351) and partnerships (I.R.C. § 721).⁹² "The central concept of section 1031 is that an exchange of business or investment assets does not trigger recognition of gain or loss because the taxpayer in entering into such a transaction does not 'cash in' or 'close out' his or her investment."⁹³ Moreover, the purpose of section 1031 is to defer the recognition of gain until the taxpayer receives cash or other non-like-kind property, ensuring that the taxpayer is not taxed on a paper gain that remains tied up in a continuing investment.⁹⁴ Section 1033 deals with involuntary conversions, such as

⁸⁹ See *Wolder v. Comm'r*, 493 F.2d 608, 613 (2d Cir. 1974).

⁹⁰ *Id.* at 612–13 (citing *Corliss v. Bowers*, 281 U.S. 376, 378 (1930)).

⁹¹ See Rev. Rul. 60-85, 1960-1 C.B. 181 ("Prepaid income from contracts to furnish services, and other types of prepaid income, such as prepaid royalties, rent, bonuses, etc., will constitute income taxable in the year of receipt, regardless of whether the period of proration is definite or indefinite . . .").

⁹² See Richard A. Epstein, *Realization and Recognition Under the Internal Revenue Code*, 39 SOC. PHIL. & POL'Y 11, 15 (2023) ("[T]ypically, the contribution of appreciated property into a partnership or corporation is not a taxable event. Instead, the parties receive a lower basis for their shares in the corporation or the partnership interest, leading to a higher amount realized . . .").

⁹³ *Starker v. United States*, 602 F.2d 1341, 1355 (9th Cir. 1979).

⁹⁴ See I.R.C. § 1031.

property destroyed by casualty, theft, or condemnation.⁹⁵ It allows taxpayers to defer gain recognition if they reinvest the proceeds in a similar property within a specified period.⁹⁶ This ensures that taxpayers are not taxed on compensation received for lost property until they have the funds or equivalent property to support the tax obligation.

Section 351 permits the tax-free formation of corporations by allowing shareholders to transfer property to a corporation in exchange solely for stock without recognizing gain or loss, provided they control the corporation immediately after the exchange.⁹⁷ In other words, the shareholder simply changed the form of the investment from direct ownership of property to ownership of stock in a corporation. Therefore, the gain is deferred until a future realization event occurs, such as the sale of stock or the distribution of cash or other property from the corporation. Additionally, similar to I.R.C. § 351, I.R.C. § 721 allows tax-free formation of partnerships. Investors can contribute property to a partnership in exchange for an interest in the partnership without recognizing gain or loss.⁹⁸

These provisions illustrate that gain is not taxable unless the taxpayer receives non-similar property, which represents the wherewithal to pay the tax. The implicit realization requirement here is that the taxpayer must have actually received an economic benefit or gain that they can utilize to pay the tax. Without the realization of an economic benefit, the taxpayer does not possess the wherewithal to pay the tax, highlighting the intrinsic link between realization and the ability to satisfy tax obligations.

C. DANGERS OF TAXING UNREALIZED GAINS

There are severe implications to the Ninth's Circuit holding that the realization of income is not a constitutional requirement.⁹⁹ Taxing unrealized gains represents a significant departure from traditional income recognition principles. A definition of income that does not require realization raises significant concerns regarding liquidity, investment behaviors, and broader economic policy ramifications. This section will discuss the concerns articulated in various amicus briefs submitted in *Moore*.

i. Liquidity Issues

Taxing unrealized gains poses significant liquidity challenges for taxpayers. Unrealized gains are increases in the value of an asset that have not yet been converted into cash through a sale or disposition. When taxpayers are required

⁹⁵ See *id.* § 1033.

⁹⁶ See *id.*

⁹⁷ See *id.* § 351.

⁹⁸ See *id.* § 721.

⁹⁹ See *Moore v. United States*, 36 F.4th 930, 936 (9th Cir. 2023) (ruling that realization is not a constitutional requirement for Congress to impose a tax exempt from apportionment).

to pay taxes on these unrealized gains, they might not have the necessary liquid assets to cover the tax liability.¹⁰⁰ Thus, taxpayers might face substantial tax liabilities without having the necessary cash on hand to pay these taxes.

This concern is underscored by the amicus brief the Landmark Legal Foundation, which highlights the risk of taxpayers being forced to sell their illiquid assets, such as homes, farms, or closely-held businesses, to meet their tax obligations.¹⁰¹ Additionally, the Buckeye Institute's brief exclaimed that a tax on the unrealized appreciation on one's property would have a disastrous impact because "the Buckeye Institute's home state of Ohio, for example, has more than 75,000 farms, and 90 percent of those are run by families."¹⁰² Thus, it is foreseeable that a family-run farm would not be able to afford a tax on the unrealized appreciation of their property, forcing them to sell or otherwise lose their property.

ii. Distortions in Investment Behavior

The potential negative impact on investment behaviors is another significant concern. Investors might become reluctant to invest in assets that have the potential for significant appreciation due to the fear of incurring tax liabilities on gains that have not yet been realized. The Chamber of Commerce noted that a tax on unrealized appreciation in assets "would mean that businesses withhold capital that would otherwise go to beneficial investments. Businesses may also avoid otherwise profitable endeavors because of uncertainty over how the results of such investments will be taxed."¹⁰³ Similarly, the Atlantic Legal Foundation argued that unapportioned taxes on the appreciated value of investments disincentivizes investment, entrepreneurship, and innovation, which would have nationwide economic repercussions.¹⁰⁴

Further, the Independent Women's Law Center addresses the gendered impact of the MRT, shedding light on how taxes on unrealized gains disproportionately impacts women. They note that the Ninth Circuit ruling "permits Congress to impose a particularly onerous burden on women, who tend to invest for

¹⁰⁰ See U.S. Dep't of the Treasury, Blueprints for Basic Tax Reform 25–32 (1977).

¹⁰¹ See Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioners at 15, *Moore v. United States*, 602 U.S. 572 (2024) (No. 22-800) ("Even the most committed advocates of the wealth tax recognize that such a 'regime may force cash-poor taxpayers to sell assets to pay their tax liabilities on unrealized profits.'"); see also Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 Tax L. Rev. 355, 363–64 (2004) (stating that there are "legitimate liquidity concerns" for "a taxpayer whose only asset is his home, a family farm, a single heirloom, or a cash-starved small business, and who had no source of funds other than a disposition of the asset").

¹⁰² Brief of Amicus Curiae The Buckeye Institute in Support of Petitioners at 14, *Moore*, 602 U.S. 572 (No. 22-800).

¹⁰³ Brief of Amicus Curiae The Chamber of Commerce of the United States of America in Support of Petitioners at 16, *Moore*, 602 U.S. 572 (No. 22-800).

¹⁰⁴ See Brief of Atlantic Legal Foundation as Amicus Curiae in Support of Petitioners at 2–3, *Moore*, 602 U.S. 572 (No. 22-800).

a longer duration than men and, when working as entrepreneurs, often have no choice but to rely on their own capital rather than external investment.”¹⁰⁵

iii. Economic Policy Considerations

From a broader economic policy perspective, taxing unrealized gains undermines fundamental principles of economic liberty and fairness. The Manhattan Institute for Policy Research suggest “[t]axes on wealth undermine fundamental principles of economic liberty, discouraging entrepreneurship, innovation, and upward mobility. By subjecting such taxes to the onerous requirement of apportionment, the Framers thus established a sound bulwark against ruinous tax policy.”¹⁰⁶ This perspective emphasizes the foundational principle that income should not be taxed until it is realized, as established in *Helvering v. Horst*, where the rule that income is not taxable until realized is based on administrative convenience.¹⁰⁷

Additionally, high rates of income taxation raise familiar problems, such as individuals engaging in tax avoidance, choosing leisure over labor, and potentially emigrating to low-tax jurisdictions.¹⁰⁸ In essence, when the government taxes wealth, it eats the seed needed for investment, which is necessary to create jobs.

IV. CONCLUSION

The Supreme Court’s decision in *Moore* leaves the critical question of whether income must be realized before it is constitutionally taxable unanswered.¹⁰⁹ This article recommends that the Supreme Court seize the opportunity to explicitly define “income” in a manner consistent with historical precedents and the original intents of the Sixteenth Amendment. A clear and concrete definition recognizing realization as a requirement under the Sixteenth Amendment would serve to ensure fairness and practicality in tax

¹⁰⁵ Brief for Independent Women’s Law Center as Amici Curiae Supporting Petitioners at 3, *Moore*, 602 U.S. 572 (No. 22-800).

¹⁰⁶ See Brief Amici Curiae of The Manhattan Institute for Policy Research and Professors Erik M. Jensen and James W. Ely in Support of Petitioners at 18, *Moore*, 602 U.S. 572 (No. 22-800).

¹⁰⁷ See *Helvering v. Horst*, 311 U.S. 112, 116 (1940) (explaining the realization principle is founded upon administrative convenience).

¹⁰⁸ See Reuven Avi-Yonah, *What Matters in Moore*, TAX NOTES (Feb. 12, 2024), <https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/what-matters-moore/2024/02/12/7j4js#7j4js-0000102> (explaining that data suggest that the answer to solving the problem of increasing inequality is not more progressive income taxation”); see also Cristina Enache, *The High Cost of Wealth Taxes*, TAX FOUND. (June 26, 2024) (“They raise little revenue, create high administrative costs, and induce an outflow of wealthy individuals and their money.”).

¹⁰⁹ See *Moore*, 602 U.S. at 599 (“The Moores argue that realization is a constitutional requirement; the Government argues that it is not. To decide this case, we need not resolve that disagreement over realization. Those are potential issues for another day, and we do not address or resolve any of those issues here.”).

administration, aligning taxpayers' obligations with their actual financial capacity and reinforcing the integrity of the constitutional framework for income taxation.

By adopting a definition that requires realization, the Court would not only honor the original intent of the Sixteenth Amendment but also provide a stable and predictable standard for both taxpayers and the IRS. Moreover, it is essential to distinguish between what is and what is not "income" as the term is used in the Constitution; and to apply the distinction as cases arise according to the economic reality of the situation. In conclusion, the Supreme Court's clarification of "income" in line with the principles of realization would not only resolve current ambiguities but also fortify the constitutional underpinnings of income taxation in the United States.