THE REALIZATION RULE AS A LEGAL STANDARD

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Abstract

The realization "rule" in tax law is better characterized as a legal standard. This characterization matters after the Supreme Court's decision in Moore v. United States*, which sets the stage for future courts to decide that the Constitution mandates realization—an identifiable event before accrued income is reportable by taxpayers. The stakes of a constitutional realization requirement are underappreciated. Because current statutory law embeds realization as a background principle, a constitutional realization requirement would operate as a taxpayer-initiated antiabuse doctrine—a sword that taxpayers could use selectively to invalidate parts of the Internal Revenue Code and Treasury Regulations. This novel constitutional tool has adverse, and underappreciated, implications for the U.S. tax system's structure and complexity.*

Through the lens of the longstanding academic literature on legal rules and standards, the dangers of a constitutional realization requirement extend beyond top-down risks to individual Internal Revenue Code provisions or, as the Moore *majority posited, entire taxing regimes. Instead, a constitutional realization requirement threatens to erode federal income tax law from the bottom up, through incremental public and private challenges to the fundamental mechanics of taxation. Realization and nonrealization permeate business entity taxation in deeply technical ways. In these areas, a constitutional realization requirement may facilitate aggressive private planning, undermine the law's coherence, and dampen reform efforts. Even Moore's whisper of a constitutional realization requirement ventures into poorly charted territory, with potentially detrimental consequences that may prove difficult to unwind.*

Moreover, a constitutional realization requirement portends increased complexity in tax law. Government-asserted antiabuse doctrines constrain complexity by allowing lawmakers to write simpler rules that cover high-frequency transactions. Low-frequency transactions, including those that reflect inappropriate tax planning, are addressed through (and discouraged by) open-ended standards in the enforcement process. As a taxpayer-initiated antiabuse doctrine, a constitutional realization requirement would have the reverse effect, increasing complexity by increasing the frequency of tax-planned transactions, encouraging more costly government responses to taxpayer abuse, and changing the dynamics of enforcement. The resulting complexity would be systemic—and could increase over time.

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I. INTRODUCTION

Although often styled as a "rule,"[1] the realization requirement in federal income tax law is better characterized as a legal standard.[2] Realization—the idea that a "taxable event" fixes the timing and amount of income reportable by a taxpayer[3]—ultimately turns on the bespoke facts of each situation, as interpreted *ex post* in the enforcement process.[4] This characterization matters in the context of the Supreme Court's opinion in *Moore v. United States*, which considers (but does not decide) whether the Sixteenth Amendment mandates realization for income taxes exempt from the Constitution's limitations on direct taxes.[5] Because the Internal

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[1] *See, e.g.,* Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 TAX L. REV. 355, 355 (2004); *cf.* Alice G. Abreu & Richard K. Greenstein, *It's Not a Rule: A Better Way to Understand the Definition of Income*, 13 FLA. TAX REV. 101, 132 (2012) ("It is not surprising that in the unrelenting deluge of apparent commandments many tax scholars and other professionals have come to assume that all of the tax law is composed of rules.").

[2] The academic literature on rules and standards is large and long-standing. This Article defines rules as legal directives with greater *ex ante* content and standards as directives with more content developed *ex post*. In constructing laws, the stakes principally involve the costs of compliance and administration. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562-63 (1992). In taxation, private planning looms large in accounting for these costs. *See* David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 868-69 (1999); *see also infra* Part V. Other approaches to the rules-standards debate exist. *See, e.g.,* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72 (1983) (approaching regulatory precision from an efficiency perspective); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985) (arguing that conventional debates about rules and standards lack a cogent normative underpinning). In tax law, see, e.g., Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 331 (2011) (evaluating the aptness of rules and standards by "the ratio of easy to controversial applications"); David Elkins, *Rules, Standards, and the Value of Certainty in Tax Law*, 22 BERKELEY BUS. L.J. (forthcoming 2024) (arguing against standards in tax law because low audit rates create inequitable outcomes across taxpayers), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4782454 [https://perma.cc/3JJY-YD4J]; Andrew T. Hayashi, *A Theory of Facts and Circumstances*, 69 ALA. L. REV. 289, 292 (2017) (taking a game-theoretic approach to rules and standards where parties have private information).

[3] Classically, realization involves a "sale or other disposition of property." *See* I.R.C. § 1001(a) (1986). Henceforth, all "I.R.C. §" references are to the Internal Revenue Code of 1986, as amended (26 U.S.C.), and all "Treas. Reg. §" references are to the Treasury Regulations (26 C.F.R.). For a discussion of dispositions in the realization context, see Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 IND. L.J. 77 (2011).

[4] Although transactions are structured *ex ante*, advisors typically give legal advice based on probable outcomes in litigation before a hypothetical court that considers the relevant issues and possesses a comprehensive set of facts. *See* Linda Galler, *Tax Opinion Policies and Practices*, 75 TAX LAW. 443, 454 (2022); *see also infra* Part IV.

[5] *See* Moore v. United States, 144 S. Ct. 1680 (2024). In *Moore*, the Ninth Circuit found that a constitutional realization requirement did not exist. *See* Moore v. United States, 36 F.4th 930, 935 (9th Cir. 2022) ("Whether the taxpayer has realized income does not determine whether a tax is constitutional."). Then, the Supreme Court held in the government's favor on other grounds. *See Moore*, 144 S. Ct. at 1685. *Moore* has generated a large volume of academic and practitioner commentary. *See, e.g.,* Hank Adler & Madison S. Spach, Jr., *More on Moore*, 180 TAX NOTES FED. 2079 (Sept. 18, 2023); John R. Brooks & David Gamage, Moore v. United States *and the Original Meaning of Income* (Fordham L. Legal. Stud. Res. Paper No. 4491855, 2023); Lee A. Sheppard, *Supreme Court Urged to Rule on TCJA Transition Tax*, 179 TAX NOTES FED. 2113 (June 26, 2023). In addition, *Moore* has received extensive coverage in the popular press. *See, e.g.,* Ian Millhiser, *Billionaires Had a Surprisingly Bad Day in the Supreme Court Today* (Dec. 5, 2023), VOX,

Revenue Code (Code) and Treasury Regulations (Regulations) embed realization as a background principle,[6] a constitutional standard for realization would operate as a taxpayer-initiated antiabuse doctrine—a novel constitutional device that taxpayers could deploy selectively to erode the fundamental structure of the current Code and Regulations. This new device has adverse—and underappreciated—consequences for the structure and complexity of tax law going forward.[7]

From an economic perspective, rules and standards differ in how precisely their legal content is specified before the objects of this content take action.[8] Rules, such as numeric speed limits, provide greater specificity *ex ante*. By contrast, standards, such as laws prohibiting reckless driving, acquire their principal content *ex post*.[9] Identical legal content may be expressed through rules or standards.[10] Either design strategy may prohibit speeding, but rules contain specific up-front content, while the precise parameters of standards emerge through enforcement. In the tax context, many day-to-day questions of realization are uncontroversial, making many *ex ante* determinations relatively straightforward.[11] Just beyond the

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https://www.vox.com/scotus/2023/12/5/23989306/supreme-court-wealth-tax-billionaires-moore-united-states-elizabeth-warren [https://perma.cc/K9HN-CU8R]; Alan Rappeport, *How a Legal Fight Over a $15,000 Tax Bill Could Upend the U.S. Tax Code* (Dec. 5, 2023), N.Y. TIMES, https://www.nytimes.com/2023/12/05/us/politics/supreme-court-corporate-taxes-explainer.html [https://perma.cc/S3HM-LXFE]; Richard Rubin & Jess Bravin, *One Supreme Court Case Could Mess Up Chunks of the Tax Code* (Dec. 3, 2023), WALL ST. J., https://www.wsj.com/us-news/law/one-supreme-court-case-could-mess-up-chunks-of-the-tax-code-680a9ba6 [https://perma.cc/9XY9-36Z4]; Mark Joseph Stern, *Sam Alito's Lonely Fight to Defend His Friend's Harebrained Anti-Tax Scheme* (Dec. 5, 2023), SLATE, https://slate.com/news-and-politics/2023/12/sam-alito-moore-arguments-tax-scheme.html [https://perma.cc/Y3LB-ABF7].

[6] This statement is not controversial as a positive matter. *See* Boris I. Bittker et al., *Bittker, McMahon, & Zelenak: Federal Income Taxation of Individuals* § 3.2, Westlaw (database updated Apr. 2024) ("[R]ealization is nevertheless so basic to the taxing structure of existing law that the general principle is simply not challenged."). As a normative matter, the Code and Regulations' reliance on realization has provoked a large (and largely critical) academic literature. *See, e.g.,* Zachary Liscow & Edward Fox, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule,* 213 J. PUB. ECON. 104714 (2022) (exploring public perceptions of the realization requirement); David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549, 1552 (1998) (noting critiques and arguing that statutory realization operates as a subsidy for capital investment). Perhaps the most famous characterization of realization is as the "Achilles' Heel" of the income tax system. William D. Andrews, *The Achilles' Heel of the Comprehensive Income Tax*, in NEW DIRECTIONS IN FEDERAL TAX POLICY FOR THE 1980S 278, 280 (Charles E. Walker & Mark A. Bloomfield eds., 1983).

[7] This Article does not consider whether current law that does not satisfy a constitutional realization requirement could survive as an excise tax not subject to apportionment. *See* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 109-11 (2022) (describing the pre-*Macomber* case law addressing federal excise taxes).

[8] *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974).

[9] *See* Louis Kaplow, supra note 2, at 559-60. These categories operate as a continuum, with some legal commands as rule-like and others as standard-like. For example, custom and practice may permit drivers to exceed speed limits by five miles per hour under certain conditions. *Id.*

[10] *See id*. (distinguishing an economic approach to rules and standards from jurisprudential approaches).

[11] Many sales are easily identified as realization events. *See* Treas. Reg. § 1.1001-1(e)(2), ex. 1-4 (2017) (analyzing immediate and complete transfers of property in exchange for cash). Indeed, standards may become more rule-like over time, as iterative enforcement adds precision to the

quotidian, however, lies significant uncertainty,[12] and the essential inquiry retains a standard's fuzzy penumbra and after-the-fact adjudication.[13]

Realization's standard-like aspects emerge in relatively mundane situations.[14] Imagine a sale of Equipment from Owner to User. Sales are prototypical realization events, and Owner presumptively realizes (and takes into income) any gain or loss with respect to the Equipment.[15] Alternatively, Owner could lease the Equipment to User for a fixed term. Although not formally structured as a sale, this lease also may constitute a realization event for Owner.[16] Under the lease, the present value of all rental payments sum to the Equipment's current fair market value, and, when the lease terminates, the Equipment has no residual value.[17] In effect, Owner has sold the Equipment to User.[18] Under both scenarios, additional facts—or small variations in the given facts—may yield the opposite result.[19] In realization's open inquiry into the facts and circumstances,

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standard's content. *See* Kaplow, *supra* note 2, at 578-79; *see also* Schlag, *supra* note 2, at 428-29 ("Standards tend to become concretized by means of specific rules."). These emergent rules, of course, remain subject to challenge based on the underlying standard. *Id.* at 429 ("Rules tend to yield specific exceptions that are generated by appeal to other standards."); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 96-97 (1992) (discussing cyclical evolution in rules and standards).

[12] *See, e.g.,* Cottage Savings Assn. v. Comm'r, 499 U.S. 554, 560 (1991).

[13] *See* Richard L. Bacon et al., *American Bar Association Section of Taxation Task Force Report on Prop. Regs. § 1.1001-3: Modifications of Debt Instruments* (pts I-V), 47 TAX LAW. 987, 1010 (1994) ("[T]he definition of a realization event has been chiefly a judicial function.").

[14] This claim is distinct from the empirical observation that most questions of realization are easily resolved, either under the relevant legal precedent or because the issue simply is not scrutinized. *See* Abreu & Greenstein, *supra* note 2, at 336-39 (describing realization as rule-bound). The crucial point is that uncertainty about realization emerges in situations that are neither particularly exotic nor artificially constructed. *See* Weisbach, *supra* note 2, at 879 (noting that standard-based antiabuse rules operate more effectively when they do not "create uncertainty outside their intended scope").

[15] *See* I.R.C. § 1001(a) (defining realization); I.R.C. § 1001(c) (defining recognition).

[16] *See* Starr's Estate v. Comm'r, 274 F.2d 294, 295 (9th Cir. 1959) (holding that a lease involving a built-in sprinkler system was, in substance, a sale).

[17] For lease-versus-sale treatment, the tax stakes are subtle. If the transaction is a lease for tax purposes, Owner has income equal to User's rental payments and recovers all basis in the Equipment through statutory depreciation deductions, while User can deduct rent paid to Owner under the lease. If the transaction is a sale, Owner recovers all basis in the Equipment and has gain or loss based on the sale price, while User has statutory depreciation deductions equal to the sale price. Although Owner and User generally have the same net income under either treatment, the timing and character of this income depends on myriad factors, such as the Equipment's useful life, the availability of expensing, the applicability of I.R.C. § 453A to any installment sale payments, the applicability of I.R.C. § 467 to any rental payments, and each party's tax position exclusive of the transaction. *See* Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 666-68 (2014) (distinguishing the rules-standards inquiry from "input-output" relationships); *cf. Starr's Estate*, 274 F.2d at 296-97 (noting that, after accounting for depreciation deductions and interest, "the attack on many of these 'leases' may not be worthwhile in terms of revenue").

[18] More precisely, the lease changes Owner's legal and economic relationship to the Equipment in a manner that replicates a conventional sale. *See* Cottage Savings Assn. v. Comm'r, 499 U.S. 554, 566 (1991) (examining legal entitlements to determine realization under the Code).

[19] For example, Owner might sell the Equipment to User subject to a right to repurchase after a fixed term, or Owner might lease the Equipment to User for a term shorter than the Equipment's useful life, an amount less than the Equipment's fair market value, or subject to informal understandings that negate the economics evidenced by formal documentation. *Cf.* Rev. Proc. 2001-28, 2001-1 C.B. 1156; Rev. Proc. 2001-29, 2001-1 C.B. 1160 (both providing advance IRS ruling guidance for

transaction-specific inputs dominate, leaving taxpayers to rely on their advisors' judgment or adjudicators' discretion.[20] In this sense, realization represents a quintessential legal standard, even for transactions as superficially straightforward as sales or leases under state law.[21]

By framing realization as a standard, this Article reveals novel stakes for constitutionalizing the principle.[22] Taxpayers and their advisors could leverage a constitutional realization requirement as a type of taxpayer-initiated antiabuse doctrine. That is, taxpayers could treat portions of the Code and Regulations as safe harbors, rather than as binding, with an open and inchoate option to challenge—and perhaps invalidate—these rule-bound regimes on a constitutional basis.[23] These mechanics run parallel to longstanding government-asserted antiabuse doctrines in tax law,[24] which also provide a standard-based backstop for the predominately rule-bound Code and Regulations.[25] During the enforcement process, the government asserts conventional antiabuse doctrines to disregard the Code's literal language or operation, instead substituting a tax result that better comports with broader values.[26] By contrast, taxpayers generally are bound by their return positions.[27] A

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leasing transactions).

[20] *See* Elkins, *supra* note 2, at 49 (arguing that taxpayers "are ordinarily free to ignore [standard-based antiabuse doctrines], or at least interpret them as leniently as possible").

[21] Other stakes for this inquiry involve arbitrage between nontax legal categories (such as a sale or lease under state law) and tax treatment (which typically requires a more holistic legal and factual analysis). *See generally* Victor Fleischer, *Regulatory Arbitrage*, 89 TEXAS L. REV. 227 (2010).

[22] For constitutional approaches to tax law, see Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999); Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on* Eisner v. Macomber *(1920)*, 16 DUKE J. CONST. L & PUB. POL'Y 65 (2020); Brooks & Gamage, supra note 7; Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020); Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799 (2014); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1 (1992); Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution,* Macomber*, and Mark to Market*, 13 VA. TAX REV. 1 (1993).

[23] For a rules-standards analysis of government-created safe harbors, see Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385 (2016).

[24] The substance-over-form doctrine, for example, derives from the well-traveled Second Circuit and Supreme Court opinions in *Gregory v. Helvering*. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934); Gregory v. Helvering, 293 U.S. 465 (1935). *See generally* Bittker et al., *supra* note 6, at § 1.14 ("These presuppositions or criteria are so pervasive that they resemble a preamble to the Code, describing the framework within which all statutory provisions are to function.").

[25] For a framing of antiabuse doctrines in terms of the choice between legal rules and standards, see Weisbach, *supra* note 2.

[26] *See* Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1 (2004).

[27] This principle sometimes is referred to as the *Danielson* doctrine, though its reach greatly exceeds the facts in that Third Circuit case. Commissioner v. Danielson, 378 F.2d 771 (3d Cir. 1967), *cert. denied*, 389 U.S. 858 (1967); *see* Bittker et al., *supra* note 6, at § 1.19 ("[I]t is easier for a camel to pass through the eye of a needle, than for a taxpayer to disavow the form of his own transaction."). Some standard-driven analyses, such as the twenty-factor distinction between employees and independent contractors, may involve substance-based determinations that either taxpayers or the government may assert. *See* Bartels v. Birmingham, 332 U.S. 126 (1947) (allowing taxpayers to disavow a standard employment agreement when the substance of the arrangement was an independent contractor relationship); *see generally* Emily Cauble, *Reforming the Non-Disavowal Doctrine*, 35 VA. TAX REV. 439 (2016); Robert Thornton Smith, *Substance and Form: A Taxpayer's*

constitutional realization requirement would flip the "one-way street" of conventional antiabuse doctrines on its head, giving taxpayers a unique tool against the government.[28] Because realization undergirds much of the current Code and Regulations, these challenges could be pervasive.

Justice Kavanaugh, writing for the majority in *Moore*, expressly recognized the potential "blast radius" of a broad constitutional realization requirement—the issue's potential to wreak "fiscal calamity" on the federal government.[29] Although Kavanaugh's opinion worked to minimize such havoc, there remains a strong possibility that the Court (or a U.S. Circuit Court of Appeals) will find a constitutional realization requirement in the future.[30] The resulting doctrinal shift would have systemic ramifications beyond those identified by Kavanaugh, who, like the parties and *amici* in *Moore*, focused on "top-down" threats posed by a constitutional realization requirement. These threats include the possible constitutional infirmity of both specific Code provisions and entire taxing regimes, such as those applicable to partnerships or S corporations. The at-risk list is long.[31]

But a constitutional realization requirement also presents a "bottom-up" threat, linked to the operation of a constitutional realization requirement as a taxpayer-initiated antiabuse rule. Realization and nonrealization are intertwined deeply with the current Code and Regulations. These principles constitute essential

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Right to Assert the Priority of Substance, 44 TAX LAW. 137 (1990).

[28] *See* Jamie Brown, *The State of the Non-Disavowal Principle After* Complex Media, 183 TAX NOTES FED. 1201, 1209 (May 13, 2024) (citing Higgins v. Smith, 308 U.S. 473 (1940)). This mechanic is, of course, how constitutional rights operate.

[29] Moore v. United States, 144 S. Ct. 1680, 1693, 1696 (2024).

[30] The Court did not expressly disavow *Eisner v. Macomber*, 252 U.S. 189 (1920), and, based on the opinions in *Moore*, at least four justices support a constitutional realization requirement (Barrett, Alito, Thomas, and Gorsuch). *See infra* Part II.C.

[31] In *Moore*, Kavanaugh lists I.R.C. § 305(c), I.R.C. § 446, I.R.C. § 448, I.R.C. § 951A, I.R.C. § 1256(a), I.R.C. § 1272(a), and all of subchapter K (partnership taxation, I.R.C. §§ 701-761), subchapter S (small business corporations, I.R.C. §§ 1361-1379), subpart F (antideferral for income earned by controlled foreign corporations, I.R.C. §§ 951-964), and the entire gift tax regime in I.R.C. §§ 2501-2524. As adduced by amici and commentators, the full at-risk list includes the corporate alternative minimum tax in I.R.C. § 55(b)(2); the rules applicable to stock dividends in I.R.C. § 305(b); the percentage completion method for long-term contracts in I.R.C. § 460; mark-to-market accounting for securities dealers and traders in I.R.C. § 475(a); the taxation of certain foreign intangible assets in I.R.C. § 367(d); the personal holding company rules in I.R.C. §§ 541-547; the grantor trust rules in I.R.C. §§ 671-679; mark-to-market accounting for life insurance companies in I.R.C. § 817A, the expatriation tax in I.R.C. § 877A; the branch profits tax in I.R.C. § 884; the global intangible low-taxed income rules in I.R.C. § 951A; the wash sale rules in I.R.C. § 1091; constructive sales in I.R.C. § 1259 (*see infra* Part III.A.1); and the passive foreign investment company rules in I.R.C. §§ 1291-1297. *See* Brief of American College of Tax Counsel as Amicus Curiae Supporting Respondent at 18-25, *Moore*, 144 S. Ct. 1680 (No. 22-800); Brief of American Tax Policy Institute as Amicus Curiae Supporting Respondent at 20-26, *Moore*, 144 S. Ct. 1680 (No. 22-800); Brief of Reuven Avi-Yonah et al. as Amici Curiae Supporting Respondent at 5-18, *Moore*, 144 S. Ct. 1680 (No. 22-800); Brief of National Taxpayers Union Foundation as Amicus Curiae Supporting Neither Party at 22-27, *Moore*, 144 S. Ct. 1680 (No. 22-800); Brief of Tax Law Center at NYU Law et al. as Amici Curiae Supporting Respondent at 23-25, *Moore*, 144 S. Ct. 1680 (No. 22-800); Brief of Theodore P. Seto as Amicus Curiae Supporting Respondent at 16-26, *Moore*, 144 S. Ct. 1680 (No. 22-800). As this Article elaborates, these lists are incomplete. *See, e.g.*, *infra* Part III.A.2 (discussing I.R.C. § 7872 and gift loans).

administrative infrastructure,[32] and revisiting realization in light of a constitutional requirement risks a sort of "hollowing out" of the existing income tax system. Each taxpayer action—each step taken, each move made—must be tested against the constitutional threshold for realization.[33] To the extent that the constitutional threshold controls (or is treated as controlling), the current Code and Regulations are eroded incrementally.[34] Realization is not just the pragmatic bedrock on which federal income taxation rests. In some sense, the U.S. income tax system, especially as it applies to businesses and high-income taxpayers, is realization questions all the way down.

More broadly, the ultimate stakes of a constitutional realization requirement involve the long-term structure and complexity of the U.S. tax system.[35] The heavily rule-bound Code and Regulations are notoriously complex—perhaps irreducibly so.[36] Conventional antiabuse doctrines tend to constrain this complexity by allowing lawmakers to write (simpler) rules that address only high-frequency fact patterns. Then, the enforcement process addresses low-frequency occurrences, including those that reflect inappropriate tax planning, through standard-based antiabuse doctrines.[37] As a taxpayer-initiated antiabuse doctrine, a constitutional realization requirement would have the opposite effect on complexity. Among other things, a constitutional realization requirement would lower the expected costs of tax planning that leverages a literalist reading of the Code and Regulations.[38] For this reason, even a whisper of a constitutional realization requirement ventures into poorly charted territory, with potentially detrimental consequences that may prove difficult to unwind.[39]

This Article proceeds as follows. Part II outlines the past, present, and

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[32] *See* Bittker et al., *supra* note 6, at § 3:2 ("[U]nrealized appreciation is treated as income only in very limited circumstances under very specific statutory provisions."). This infrastructure, of course, may not be necessary—at least not when cutting from whole cloth. *See* William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1129-31 (1974) ("The problems of defining realization and prescribing non-recognition would obviously disappear under either a true accretion-type or a pure consumption-type tax.").

[33] This testing may occur through litigation or through the positions taken by taxpayers in consultation with their expert advisors. *See infra* Part IV.

[34] This erosion may be good or bad, depending on the content of a constitutional realization requirement. Because that content is not specified ex ante (and because the current tax system is imperfect), normative claims are difficult to make. *See infra* Part V.

[35] These stakes differ from those typically associated with realization, which involve the effectiveness (or ineffectiveness) of taxes on capital income. *See* Ari Glogower, *Taxing Capital Appreciation*, 70 TAX L. REV. 111, 117 (2016).

[36] *See* Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 2 (1974); *see also* David A. Weisbach, *The Irreducible Complexity of Firm-Level Income Taxes: Theory and Doctrine in the Corporate Tax*, 60 TAX L. REV. 215, 215 (2007) (arguing that firm-level income taxes increase complexity by "creat[ing] the possibility of multiple realizations of the same economic income); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & CONTEMP. PROBS. 673, 702 (1969) ("The conclusion seems inescapable that the federal income tax system will require and involve a large mass of complex detail.").

[37] *See* Weisbach, *supra* note 2.

[38] *See infra* Part V.

[39] As commentators emphasized when the Court took *Moore* on *certiorari*, the reasoning in *Moore* matters more than the nominal outcome. *See* Daniel J. Hemel, *The Low and High Stakes of* Moore v. United States, 180 TAX NOTES FED. 563 (July 24, 2023).

possible future of the constitutional question presented by the taxpayers in *Moore*. Part III argues that, as a legal standard, a putative constitutional realization requirement would operate as a taxpayer-initiated antiabuse doctrine. Part IV outlines how a constitutional realization requirement could "hollow out" existing tax law, including examples not previously discussed in the literature. Part V details how a constitutional realization requirement could affect the overall complexity of the tax system. Part VI concludes.

II. REALIZATION'S PAST, PRESENT, AND FUTURE

In the United States, realization's constitutional basis stems from the Supreme Court's well-traveled 1920 decision in *Eisner v. Macomber*.[40] In *Macomber*, an individual shareholder received a stock-on-stock dividend that did not affect the shareholder's proportionate legal interest in the underlying corporation.[41] The shareholder challenged recently enacted legislation that included the stock dividend's market value in income.[42] Writing for the Court, Justice Pitney invalidated the statute, concluding that the Constitution did not permit income taxation of "a true stock dividend made lawfully and in good faith."[43] For the *Macomber* court, income famously comprised "the gain derived from capital, from labor, or from both combined," and "[n]othing else answers the description."[44] A significant academic literature mines *Macomber*'s holding and dicta, as well as subsequent judicial opinions, to discern realization's ongoing constitutional significance.[45]

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[40] 252 U.S. 189 (1920).

[41] *Id.* at 203. The Court also takes as fact that the value of the shareholder's holdings did not change as a result of the stock dividend, in which one share of new stock was distributed with respect to every two shares of old stock (a 3:2 stock split). *See* Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization*, in BUSINESS TAX STORIES 93, 101 (Paul L. Caron ed., 2003) (noting that the government essentially conceded this valuation issue). This factual conclusion requires some rounding, since the stock's trading price dropped by slightly less than the expected one-third as a result of the dividend. An empirical literature in finance finds, however, that stock splits increase share value (including over the long run) by increasing those shares' liquidity, signaling managers' optimism about the company, and targeting the optimal "tick size" for a stock (the ratio of the smallest allowable change in market price to the stock's per-share trading price). *See, e.g.*, Patrick Dennis, *Stock Splits and Liquidity: The Case of the Nasdaq-100 Index Tracking Stock*, 38 FIN. REV. 415 (2003) (liquidity); Robert M. Conroy & Robert S. Harris, *Stock Splits and Information: The Role of Share Price*, 28 FIN. MGMT. 28 (1999) (signaling); James J. Angel, *Tick Size, Share Prices, and Stock Splits*, 52 J. FIN. 655 (1997) (tick size).

[42] *Macomber*, 252 U.S. at 201 (challenging Revenue Act of 1916, Pub. L. No. 64-271, § 2(a), 39 Stat. 756, 757 (1916)). *Macomber*, like *Moore*, reflects cause lawyering. The dollar stakes in Macomber were small, and the case moved speedily through the federal court system. The taxpayer was represented by leading attorneys of the time. Kornhauser, *supra* note 41, at 99-100.

[43] *Macomber*, 252 U.S. at 219 (1920). Courts later discerned a number of exceptions to this rule, and Congress adopted the *Macomber* outcome (and many of these exceptions) in § 305(a) and (b). *See* Patricia Ann Metzer, *The "New" Section 305*, 27 TAX L. REV. 93 (1971) (discussing the history of, and revisions to, I.R.C. § 305 from 1954 to 1969).

[44] *Macomber*, 252 U.S. at 207-08.

[45] *Compare* Henry Ordower, *supra* note 22, at 56 (describing Macomber as recognizing "a fundamental realization principle in the Sixteenth Amendment"), *with* Alex Zhang, *Rethinking* Eisner v. Macomber*, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 228 (2024) (concluding that, among five possible readings, Macomber should be read as finding an

Before the Court's decision in *Moore*, the dominant view among scholars—and in casebooks and tax treatises authored by those scholars—was that, between 1940 and the mid-1950s, the Court effectively vitiated *Macomber*'s constitutional significance without expressly overruling the decision. Under this view, realization became a convention of "administrative convenience" that Congress and Treasury could deploy or abrogate on a pragmatic basis.[46] Hegemonic and little-challenged for seven decades,[47] this discourse helps to explain why the Court's grant of *certiorari* for *Moore* stirred so much discord among academic and other commentators.[48] This Part adduces the historical origins of the consensus around *Macomber*'s obsolescence (the past), the *Moore* Court's engagement with *Macomber* and a constitutional realization requirement (the present), and the potential, after *Moore*, for courts to find (or affirm) a constitutional realization requirement (the future).

A. The Past: Burying *Macomber*

Macomber's precipitous decline came less from Supreme Court pronouncements, which remained resolutely vague about realization as a constitutional principle, and more from an academic consensus that emerged two decades after the Court's 1920 decision. This consensus reflected work by a few well-known policy entrepreneurs—Stanley Surrey, Erwin Griswold, and Boris Bittker—in the context of three intersecting dynamics in 1940s. First, the Court issued a series of decisions that transparently loosened *Macomber*'s constraints on the definition of income. Second, revenue needs in World War II cemented the federal income tax's transformation from class tax to mass tax. This shift created new exigencies of administration to ensure that high earners contributed a fair share. Third, in law school curriculum, taxation grew to encompass the planning, administrative, and technical topics—all decidedly nonconstitutional—that define the subject's contours today. Overall, this context shows an academic movement, motivated by changes in the tax system, to refocus doctrinal questions away from the Constitution and, specifically, *Macomber*. These policy entrepreneurs' work, more than the Court's scattershot tax jurisprudence, effectively buried *Macomber* as a doctrinal matter for decades.

The academic movement to bury *Macomber* began in 1941, when Stanley Surrey disavowed *Macomber*'s constitutional holding in a law review article.[49]

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absence of income, rather than an absence of realization).

[46] Helvering v. Horst, 311 U.S. 112, 116 (1940). *See* John R. Brooks & David Gamage, *supra* note 7, at 126-34.

[47] In a statutory interpretation case, the Supreme Court supported the "administrative convenience" view. Cottage Savings Assn. v. Comm'r, 499 U.S. 554, 559 (1991).

[48] *See* Andrew Velarde, *Supreme Court to Hear Transition Tax Case with Vast Implications*, 180 TAX NOTES FED. 125 (July 3, 2023).

[49] Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779 (1941) [hereinafter Surrey, *Supreme Court*]. *See also* Ordower, *supra* note 22, at 8-9 (summarizing Surrey's conclusions, which "[c]ommentators almost universally accept[ed]"); Lawrence Zelenak, *Stanley Surrey and Taxing Unrealized Appreciation*, 86 LAW & CONTEMP. PROBS. 153, 161 (2022) ("Surrey was the first commentator to declare the death of *Eisner v. Macomber*, way back in 1941."). Perhaps with some tongue in cheek, Surrey

Surrey argued that, in the two decades since the Court decided *Macomber*, the tax system had evolved such that "the formalistic doctrine of realization . . . is not a constitutional mandate."[50] Indeed, Surrey contended that "the Sixteenth Amendment [itself] is an historical relic,"[51] no longer necessary to sustain income taxation. According to Surrey, "the Congressional architects may proceed to build a sensible tax structure without any fear that it will later be destroyed by attacks based on constitutional grounds."[52] The "tax Tower of Babel" constructed on *Macomber*'s realization "cornerstone" had been dismantled in favor of an edifice more conducive to revenue collection in a burgeoning administrative state.[53] Under this view, Congress's lawmaking authority was virtually unfettered when dealing with taxation.[54]

Surrey grounded his "sound conclusion" about *Macomber*'s constitutional relevance in the Court's 1940 decisions in *Bruun*[55] and *Horst*.[56] In *Bruun*, the Court addressed a landlord's consequences from improvements constructed by a tenant on leased land. Justice Roberts, writing for the Court, found that, on the tenant's termination of the lease, the landlord had income equal to the value of those improvements at the time of termination.[57] For Surrey, the landlord's receipt of possession of the land and improvements—a realization event, for the *Bruun* Court—was "hardly very significant" and simply represented an administrable alternative to other possibilities "differing only slightly in degree."[58] As long as "a recognizable variation [was] present," Congress and Treasury could impose tax, perhaps based on whichever facts presented "fewer difficulties."[59] From this perspective, *Bruun* "mark[ed] the end of one era in our tax history" and left

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described his article as "clearly one of the best [he] had written" and lamented his failure to publish the paper with the Harvard Law Review. STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY 46 (Lawrence A. Zelenak & Ajay K. Mehrotra eds., 2022).

[50] Surrey, *Supreme Court*, *supra* note 49, at 791.

[51] *Id.* at 792.

[52] *Id.* at 813-14.

[53] *Id.* at 782.

[54] Surrey argued in 1941 that, "[if] there be any constitutional issue in an income tax case today, it should be one of due process." *See id.* at 793. In *Moore*, the Court arguably revived substantive due process claims outside of contentions against retroactivity. *See* Moore v. United States, 144 S. Ct. 1680, 1697 (2024) ("To be clear, . . . the Due Process Clause proscribes arbitrary [income] attribution.").

[55] Helvering v. Bruun, 309 U.S. 461 (1940).

[56] Helvering v. Horst, 311 U.S. 112 (1940). Surrey also rooted his conclusions about the scope of tax law in a broader sense of the Court's jurisprudence. *See* Surrey, *Supreme Court*, *supra* note 49, at 813-16.

[57] Bruun, 309 U.S. at 466-67. The land almost certainly had depreciated during the lease's term, and so the landlord's net economic gain on termination likely was negative. *See infra* note 61.

[58] Surrey, *Supreme Court*, *supra* note 49, at 784. The *Bruun* Court faced essential difficulties in determining the amount and timing of income. The taxpayer's income could be measured by subjective or objective value and calculated either for the improvements or the real property as an integrated whole. Any income could be taken into account at the start or end of the lease, or spread evenly or otherwise over the lease's term. This range of outcomes emphasizes the standard-like nature of realization, as well as the policy factors that favor determinations based on administrative convenience. *Cf. infra* Part III.A.2. (discussing similar parameters for gift loans).

[59] Surrey, *Supreme Court*, *supra* note 49, at 784.

realization "no more than a recognition of an expedient procedure."[60] Surrey emphasized that the taxpayer's long-term economic interest in the land and improvements did not change when possession reverted.[61] By allowing the imposition of tax, the Court had effected "a complete denial of the doctrine that is the heart of *Eisner v. Macomber*."[62] By looking to changes in legal relationships, *Bruun* abrogated *Macomber*'s emphasis on income's economic origins.

In *Horst*, the taxpayer detached and gave some of a negotiable bond's interest coupons to his son, who redeemed those coupons for cash within the same year.[63] Justice Stone, writing for the Court, held that the interest income from the detached coupons was taxable to the donor, rather than his son.[64] Surrey notes that the Court eliminated "a rather neat [tax avoidance] device" to assign income among individuals with affective relationships.[65] The opinion, however, reaches further in its reasoning. For Surrey, Stone's choice to couch his opinion in terms of realization "has implications whose effect is not confined to the assignment cases."[66] But Stone's opinion treads perilously close to incoherence, implying that gifts constitute realization events to the extent of personal "satisfactions" derived from directing income to others and muddling assignment-of-income principles.[67] In clear dicta, Stone posits that realization is "founded on administrative convenience."[68] Surrey juxtaposes this statement with *Bruun*, stating that "[t]he *Horst* decision thus supplies the theoretical justification for the *Bruun* case" to vitiate *Macomber*.[69] Neither decision, of course, expressly repudiated *Macomber*, and both decisions could be read to support the decision's continuing vitality under the doctrine of *stare decisis*.[70] But the stage was set for academics to coalesce around Surrey's categorical proclamation.[71]

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[60] *Id*. at 783.

[61] *Id.* at 784 ("If increase in value of property be conceded income in the economic sense the decision not to tax that increase for one reason or another is simply a decision to base the income tax for the time being on something less than a taxpayer's total income."). *Bruun*'s facts arose in the midst of the Great Depression. *Bruun*, 309 U.S. at 464. In *Bruun*, the tenant's abandonment of the lease reflected the property's probable decline in aggregate value at termination. Although not discussed explicitly in *Bruun*, the landlord presumably could have leased the property to another tenant at a lower amount of rent (an implicit loss), and the landlord had legal recourse to recover damages from the former tenant under the lease agreement (a recovery of some of this implicit loss). These subsequent events yield a fuller accounting of the economic gain or loss for the taxpayer in *Bruun*—and emphasize the imperfections of a realization-based regime.

[62] Surrey, *Supreme Court*, *supra* note 49, at 783.

[63] Helvering v. Horst, 311 U.S. 112, 114 (1940).

[64] *Id.* at 120. Section 1286 currently addresses the tax treatment of "stripped" bonds through a bifurcation approach. *See* I.R.C. § 1286(b).

[65] Surrey, *Supreme Court*, *supra* note 49, at 787, 791.

[66] *Id*. at 791.

[67] *Horst*, 311 U.S. at 116-17. Commentators typically read *Horst* as prohibiting taxpayers from directing the taxability of current-year income (the coupons) with respect to a retained capital investment (the bond). *See, e.g.*, Jerome M. Hesch & David J. Herzig, Helvering v. Horst: *Gifts of Income from Property*, 42 ACTEC L.J. 35, 38-39 (2016).

[68] *Horst*, 311 U.S. at 116.

[69] Surrey, *supra* note 49, at 791.

[70] *Cf.* Zelenak, supra note 49, at 161-62.

[71] Philip E. Heckerling, *The Death of the "Stepped-Up" Basis at Death*, 37 S. CAL. L. REV. 247, 264 (1964) ("[T]he tax law academicians appear to divide only on the question of *which* of the post-*Eisner v. Macomber* decisions held unrealized appreciation constitutionally taxable.").

Subsequent work followed Surrey's lead. In 1945, Roswell Magill of Columbia Law School published a revised edition of his treatise, *Taxable Income*, that drew on *Bruun* and *Midland Mutual Life Insurance*[72] to argue that the Court would permit Congress to tax unrealized appreciation.[73] *Midland Mutual* lent indirect support to an administrative convenience understanding of realization, stating that "[i]ncome may be realized upon a change in the nature of legal rights held, though the particular taxpayer has enjoyed no addition to his economic worth."[74] Surrey served as a research assistant on the 1945 revision of Magill's book, and his imprint is clear.[75] Then, in 1951, Erwin Griswold of Harvard Law School described *Macomber*'s "problems of realization" as "unduly conceptualistic."[76] Like Surrey, Griswold favored realization as a pragmatic concession to administrative considerations.[77] And Boris Bittker, in 1952, argued that, despite *Macomber*, taxpayers could be taxed annually on certain gains or losses without realization.[78] These positions emerged in the authors' three law school casebooks, which loomed large in the postwar tax curriculum.[79]

To some extent, these scholarly claims about *Macomber*'s demise are incongruous with the Court's decisions after Surrey's 1941 pronouncement.[80] In *Griffiths*[81] and *Sprouse*,[82] both decided in 1943, the government twice asked the Court to overrule *Macomber*, and the Court expressly declined. Each case involved common-on-common stock dividends, similar to the facts in *Macomber*.[83] Congress had amended the Code to tax stock dividends except "to the extent that

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[72] Helvering v. Midland Mut. Life Ins. Co., 300 U.S. 216 (1937) (holding that a lender had interest income when purchasing property out of foreclosure for the debt's principal amount, plus accrued and unpaid interest).

[73] *See* ROSWELL MAGILL, TAXABLE INCOME 119-20 (rev. ed. 1945) (arguing that, after *Bruun* and *Midland Mutual*, "the adoption by Congress of a general plan for taxing appreciation on an inventory basis [that is, mark-to-market] would probably be upheld").

[74] 300 U.S. at 225.

[75] Other portions of the book argue for *Macomber*'s continuing vitality. See MAGILL, *supra* note 73, at 44.

[76] Erwin N. Griswold, *Charitable Gifts of Income and the Internal Revenue Code*, 65 HARV. L. REV. 84, 86 (1951).

[77] Griswold conceded that realization formed part of the positive structure of income taxation. Erwin N. Griswold, *In Brief Reply*, 65 HARV. L. REV. 1389, 1389 (1952) ("[E]ven though [realization] may not necessarily be a constitutional requirement, it is a practical conclusion.").

[78] Borris I. Bittker, *Charitable Gifts of Income and the Internal Revenue Code: Another View*, 65 HARV. L. REV. 1375, 1380 (1952). *See also* Heckerling, supra note 71, at 270.

[79] *See* BORIS I. BITTKER, FEDERAL INCOME TAXATION CASES AND MATERIALS (1954); ERWIN N. GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION (1940); STANLEY S. SURREY & WILLIAM C. WARREN, FEDERAL INCOME TAXATION: CASES AND MATERIALS (1953).

[80] *See, e.g.*, Patricia Ann Metzer, *The "New" Section 305*, 27 TAX L. REV. 93, 107 (1971) ("The constitutional significance of the opinion in *Eisner v. Macomber* has been abrogated by subsequent Supreme Court decisions."); *see also* Zhang, *supra* note 45, at 185-86 (citing *Griffiths*).

[81] Helvering v. Griffiths, 318 U.S. 371, 404 (1943).

[82] Helvering v. Sprouse, 318 U.S. 604, 607 (1943), *rev'g* 124 F.2d 315 (2d Cir. 1941). *Sprouse* consolidated a third case, *Strassburger v. Commissioner*, 124 F.2d 315 (2d Cir. 1941), that involved a distribution of preferred stock with respect to common stock. The Second Circuit held for the government in *Strassburger* and was reversed by the Court. *Sprouse*, 318 U.S. at 607. The transaction in *Strassburger* was addressed in 1954 by I.R.C. § 306.

[83] *Sprouse* involved a distribution of nonvoting common stock with respect to voting and nonvoting common stock. *Sprouse*, 318 U.S. at 606.

[such dividends did] not constitute income to the shareholder within the meaning of the Sixteenth Amendment."[84] The IRS imposed tax on these common-on-common stock dividends, then asked the Court to reverse *Macomber* and clarify that the Constitution did not mandate realization in such circumstances. In both cases, the Court held that Congress intended to crystalize the Sixteenth Amendment's scope as reflected by *Macomber*'s outcome.[85] These stock dividends were not income under the Code, leaving no need to revisit constitutional questions of realization. At least as a formal matter, *Macomber* still stood.

In *Griffiths*, the government's brief spoke to the systemic upheaval faced by the federal tax system during the Second World War. For the government, *Macomber* impeded the equitable imposition of taxes at a time of exigent revenue needs—"considerations of great public importance" that "require[d]" the Court to revisit the constitutional realization requirement associated with *Macomber*.[86] As in *Macomber*, the problem involved the timing of taxes on corporations and shareholders. In 1936, Congress enacted an additional tax on corporations' retained earnings as a proxy for the taxes those corporations' shareholders would owe on those undistributed profits, if paid to shareholders.[87] Treasury estimated that these retained earnings totaled more than $4.5 billion in 1936—an implied revenue loss of more than $1.3 billion in shareholder-level taxes.[88] Under *Macomber*, corporations could not pay stock dividends to eliminate retained earnings and avoid additional corporate-level tax,[89] and these corporations complained that the choice between shouldering an additional tax burden or foregoing the reinvestment of retained earnings was "unsound from a business point of view."[90] The government contended that *Macomber* precluded "a much more complete and less circuitous solution" of taxing shareholders directly on retained corporate earnings. To placate corporate interests and advance "fundamental equity," the government asked the Court to abrogate *Macomber* and permit, essentially, mark-to-market taxation for corporate stock.[91] The Court refused,[92] leaving the wartime fiscal system to rely on corporate excess profits taxes, wage withholding, and individual surtaxes to fill revenue gaps.[93] *Macomber*'s *in terrorem* presence deterred direct congressional

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[84] Revenue Act of 1936, I.R.C. § 115(f)(1).

[85] *Griffiths*, 318 U.S. at 394-95 ("[W]hen these dividends were received *Eisner v. Macomber* fixed the meaning contrary to the Government's position.").

[86] Brief for Petitioner at 27, Helvering v. Griffiths, 318 U.S. 371 (1943) (No. 467).

[87] Revenue Act of 1936, I.R.C. § 14.

[88] Brief for Petitioner, *supra* note 86, at 31. *See also* Gary E. Bashian, *Stock Dividends and Section 305: Realization and the Constitution*, 1971 DUKE L.J. 1105, 1148 (1972) ("The statute and budgetary need of 1936 were [ ] conducive to rejection of the *Eisner v. Macomber* doctrine.")

[89] *See* Brief for Petitioner, *supra* note 86, at 31. Under the Code, such distributions were tax-free, consistent with *Macomber*.

[90] Brief for Petitioner, *supra* note 86, at 35.

[91] Brief for Petitioner, *supra* note 86, at 30-32.

[92] Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 516 (1945) (noting that the Court "refused to inter *Eisner v. Macomber*").

[93] Taxation of shareholders on retained earnings would have advanced Roosevelt's goals of progressive taxation and loophole-closing. *See* Joseph J. Thorndike, *Timelines in Tax History: From "Class Tax" to "Mass Tax" During World War II*, TAX NOTES: TAX HISTORY PROJECT (Sept. 19, 2022), https://www.taxnotes.com/tax-history-project/timelines-tax-history-class-tax-mass-tax-during-world-war-ii/2022/09/16/7f3s2 [https://perma.cc/3F55-J8CX].

action to tax returns to capital investments.[94]

Despite the government's failed "frontal assault" on *Macomber* in the early 1940s,[95] commentators coalesced around the views of Surrey, Griswold, and Bittker that denigrated *Macomber*'s prominence in the realization canon.[96] This literature openly touted *Macomber*'s "downfall."[97] Indeed, some read *Griffiths*'s refusal to repudiate *Macomber* as clear evidence that *Macomber* was, in fact, a dead letter: "[T]he [*Griffiths*] opinion leaves small room for doubt that the entire Court agreed that *Eisner v. Macomber* is wrong and that there is no constitutional prohibition against taxing *any* stock dividend as income."[98] The *Macomber* decision was rendered "a somewhat lonely, but somehow wonderfully defiant figure" in the canon of academic commentary.[99] All of this movement occurred before *Glenshaw Glass*,[100] which commentators read (again, despite language that income had to be "clearly realized"[101]) as standing for the end of *Macomber*'s constitutional restrictions on the definition of income.[102]

Notwithstanding an emerging academic consensus against *Macomber*'s constitutional realization requirement, tax practitioners generally (and unsurprisingly) viewed *Macomber* as an ongoing constraint on Congress's power. Robert Miller, "the dean of the tax bar," took realization as a background requirement in his 1951 exchange with Griswold in the *Harvard Law Review*.[103] Lawyers Edward and Sheila Roehner also argued in favor of a constitutional realization requirement, and *Macomber*'s vitality, in the *Tax Law Review*.[104] These perspectives gained little traction against the "host" of academic proponents of *Macomber*'s demise, which stood "monolithic in their unanimity."[105] In effect, there emerged a largely academic consensus that *Macomber* mattered not simply less in light of subsequent caselaw, but really not at all.

Finally, the early 1940s marked a transition in law schools' pedagogical

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[94] The *Moore* opinion similarly may chill congressional efforts to tax wealth. *See* Robert Goulder, *Losing the Battle, Winning the War: Making Sense of* Moore, 115 TAX NOTES INT'L 15, 18-19 (July 1, 2024); *see generally* Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421 (2018) (introducing a combined tax on wealth and taxable income through a "wealth annuity").

[95] James S. Eustice, *Corporations and Corporate Investors*, 25 TAX L. REV. 509, 538 (1970).

[96] *See* Henry Rottschaefer, *Present Taxable Status of Stock Dividends in Federal Tax Law,* 22 N.C. L. REV. 85, 85 (1944) ("The preponderant view seems to be that [*Macomber*] would be overruled [by the Court]. The attempt to do so is certain to encounter strenuous opposition from taxpayers and their counsel.").

[97] Charles L.B. Lowndes, *The Taxation of Stock Dividends and Stock Rights*, 96 U. PA. L. REV. 147, 170 (1947).

[98] *Id*. at 149. *See also* Rottschaefer, *supra* note 96, at 85.

[99] Joseph T. Sneed, *A Defense of the Tax Court's Result in* Prunier *and* Casale, 43 CORNELL L.Q. 339, 348 (1958).

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

[101] *Id*. at 431.

[102] *Macomber*'s academic downfall paved the way for a movement towards "accretionism" that began in the 1970s. *See generally* Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861 (1997).

[103] Erwin Griswold, *Charitable Gifts of Income and the Internal Revenue Code*, 65 HARV. L. REV. 84, 86 (1951).

[104] Edward T. Roehner & Sheila M. Roehner*, Realization: Administrative Convenience or Constitutional Requirement?*, 8 TAX L. REV. 173 (1953).

[105] Sneed, *supra* note 99, at 351.

approaches to tax law.[106] Erwin Griswold's casebook turned away from the constitutional issues of prior decades to the more granular details of how income taxation worked. At Yale Law School, Gerald Wallace developed a tax class based principally on administrative materials—again, focused on the tax system at an operational level. Wallace later joined the faculty at NYU School of Law, where he helped build the institution's storied tax law program.[107] These shifts made the turn away from constitutional issues convenient and appropriate under what would grow into today's contemporary income tax system.[108] The training of tax professionals largely minimized constitutional questions in favor of the pragmatic design issues faced by lawyers, lawmakers, and regulators. Through the intellectual work of legal academics, structural changes to the U.S. tax system, and pedagogical shifts in legal education, *Macomber* was buried by the mid-1950s. By the end of the 1960s, few commentators—even among practitioners—gave significant credence to realization as a constitutional backstop.[109]

B. The Present: Decisions and Indecision

The constitutional outcome in *Moore* seemed largely predetermined after oral arguments.[110] There, the Justices highlighted definitional issues associated with the realization doctrine. Justice Thomas asked the first question of the taxpayers' counsel: "When you say 'realization,' what—do you have a definition for that or an explanation as to exactly what it is . . . ?"[111] Thomas reprised his query as the Solicitor General's first question.[112] Prudently, neither lawyer offered a generalizable answer.[113] Justices Jackson and Kagan expressly pressed the Moores' counsel on Thomas's query.[114] Justice Sotomayor also returned to Thomas's topic, stating that "a word like 'realization' [requires] a working definition that applies to every piece of property and every way in which people gain wealth."[115] But,

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[106] *See* Leo A. Diamond, Book Review, 19 U. CHI. L. REV. 147, 148 (1951) (reviewing STANLEY S. SURREY & WILLIAM C. WARREN, FEDERAL INCOME TAXATION: CASES AND MATERIALS (1950) and WILLIAM C. WARREN & STANLEY S. SURREY, FEDERAL ESTATE AND GIFT TAXATION: CASES AND MATERIALS (1950)) (noting "the 'new look' in law school teaching").

[107] Boris I. Bittker, *Woodworth Lecture November 1, 1996 Federal Income Taxation—Then and Now*, 23 OHIO N.U. L. REV. 617, 617-19 (1997).

[108] *See* Kornhauser, *supra* note 22, at 21 ("The motivating force for this abandonment [of *Macomber*] lies in the fact that a narrow interpretation of 'income' would cause the Court to be called upon constantly to decide whether a particular provision fell within that narrowly prescribed definition of income.").

[109] This trend largely held through the Court's turn toward textualism in the 1980s. *See* Ordower, *supra* note 22, at 3-4.

[110] *See* Goulder, supra note 94, at 16 ("Consider the oral arguments from last December. Certain things were telegraphed, early on, in the verbal exchanges."). Indeed, a substantial portion of *Moore*'s oral argument addressed attribution of income, which Kavanaugh relied on in the *Moore* majority opinion. Transcript of Oral Argument *passim*, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800).

[111] Transcript of Oral Argument at 5, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[112] *Id.* at 57-58.

[113] *Id.* at 5-6. Taxpayer's counsel, Mr. Grossman, gave several examples of realization. Solicitor General Prelogar called the facts in *Moore* "a paradigmatic case of realization." *Id.* at 58.

[114] *Id.* at 36-39.

[115] *Id.* at 18.

according to Sotomayor, to "announce what realization is out of context" would be both illogical and "dangerous."[116] Later, Sotomayor quipped, "I guess the tenor of the questions is that nobody's happy with anybody's definition of anything, okay?"[117]

This definitional dissatisfaction highlights the standard-like features of the oft-maligned but omnipresent realization requirement.[118] As the Justices noted, the concept resists *ex ante* specification and begs for *ex post* elaboration—a task that seven out of nine Justices avoided in *Moore*. Instead, the five-Justice *Moore* majority found unequivocal realization by a legal entity owned by the taxpayers, coupled with permissible attribution of this realized income from the entity to the taxpayers that owned stock in the entity. The Justices left open realization's constitutional status. This Section establishes the facts in *Moore* and why those facts implicated realization.[119] Then, this Part discusses the *Moore* opinions, in which four—and perhaps more—Justices clearly support a constitutional realization requirement in some form.[120]

1. Realization in Moore

In *Moore*, the question presented asked "[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums."[121] Although *Moore* held that the taxpayers clearly realized income (and thus did not reach the constitutional question presented), the loose and easy reasoning in the *Moore* majority opinion belies the fact that the existence of realization or nonrealization under *Moore*'s facts was a difficult question for the Court as a whole.[122] In large part, this question's difficulties arise from the fact that realization, as a standard-like concept, is not well-defined at its edges.[123] Because *Macomber*'s presumed demise yielded

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[116] *Id.* at 18.

[117] *Id.* at 105. Justices Alito, Barrett, Gorsuch, and Kavanaugh asked questions that touched on the definition of realization. Although Chief Justice Roberts did not directly interrogate the parameters of realization, he presumably was familiar with the concept's vagaries. In 1991, Roberts argued for the government as Acting Solicitor General in *Cottage Savings Assn. v. Comm'r*, 499 U.S. 554 (1991), which addressed realization outside of the constitutional context. Transcript of Oral Argument at 1, *Cottage Savings*, 499 U.S. 554 (No. 89-1965).

[118] *See* Lily Batchelder et al., *The Moores Lost Their Claim and* Moore, 184 TAX NOTES FED. 1509, 1510 (Aug. 19, 2024) ("[T]he concept of realization defies a clear definition.").

[119] The Court presumably took *Moore* on *certiorari* because the Ninth Circuit stated that *Macomber* was no longer good law, even though the Court has never expressly overruled the case. *See* Moore v. United States, 36 F.4th 930, 935-38 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (2023), *aff'd*, Moore v. United States, 144 S. Ct. 1680 (2024). The Ninth Circuit's view reflected the general consensus among legal academics prior to *Moore*, and this consensus had a strong basis in subsequent Supreme Court cases. By expressly overruling *Macomber*, however, the Ninth Circuit may have overstepped its authority, at least from the Supreme Court's perspective.

[120] The contours of any constitutional realization requirement remain inchoate. *See* Batchelder, *supra* note 118, at 1512 ("[T]he Moores failed to offer a workable constitutional realization rule, and it is unclear if there is one.").

[121] Petition for Writ of Certiorari at i, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[122] In *Moore*, the majority opinion was joined by five Justices, with two concurring in the result and two dissenting. *See* discussion *infra* Section II.B.2.

[123] *See Moore*, 144 S. Ct. at 1704 (Barrett, J., concurring) ("Our cases describe many ways income might be realized; a rigid definition does not capture them all."). This feature is, of course, classically

substantial discretion to Congress in stipulating realization's parameters, these definitional edges remain significant.

The facts in *Moore* are as follows. The taxpayers in the case, the Moores, acquired an 11% interest in KisanKraft, an Indian company that supplied agricultural machinery, for an investment of $40,000 cash in 2005. Between 2005 and 2017, KisanKraft earned profits but distributed no money or property to its shareholders, and the Moores had no U.S. tax liability with respect to any of KisanKraft's profits.[124] Under this regime, the Moores had no income until KisanKraft distributed profits, and taxation on their share of KisanKraft's profits was deferred until that time.

Then, in 2017, Congress enacted the Tax Cuts and Jobs Act (TCJA),[125] which, among other things, transitioned the United States from taxing worldwide income to a quasi-territorial business tax system that effectively exempted some foreign earnings.[126] As part of this transition, the TCJA imposed a one-time tax, known as the mandatory repatriation tax (MRT), on the accumulated profits of certain foreign corporations with U.S. shareholders.[127] The MRT taxes these accumulated profits at highly preferential rates—as low as 8% for reinvested earnings, and only 15.5% for earnings held in cash—and, at taxpayers' election, on a deferred basis.[128] The MRT applies only to U.S. shareholders that do not receive distributions of cash or property out of these accumulated profits.[129]

The Moores took the position that the MRT does not satisfy an implicit realization requirement in the Sixteenth Amendment, which authorizes Congress to tax incomes without apportionment based on states' population.[130] One tension in *Moore*—and the factor that proved determinative in the case's outcome—is that the Moores' tax consequences were largely inextricable from those of KisanKraft. While the Moores did not receive distributions from KisanKraft, the company itself realized profits over more than a decade. These company-level profits established a pool of potential taxable income for KisanKraft's U.S. shareholders, which included the Moores. From this perspective, the Moores' contentions revolved around the timing of income, rather than the existence of any income at all.[131]

The facts and doctrinal elements involved in this timing question are, however, open-ended. The source and uses of KisanKraft's profits, the composition

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standard-like.

[124] *Moore*, 36 F.4th at 932-33.

[125] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

[126] *See* I.R.C. § 245A (applying to domestic corporations that own 10% or more of certain foreign corporations).

[127] *See* I.R.C. § 965.

[128] For individual shareholders that structured their ownership appropriately, the deferral could be indefinite. *See* I.R.C § 965(h), (i). The Moores, obviously, did not avail themselves of this statutory benefit, which would have mooted the issue in *Moore*.

[129] *See* I.R.C. § 965(d).

[130] *See* U.S. CONST. art. I, §§ 2, 9 & amend. XVI. The Moores, of course, relied on *Macomber* for their position. *See* Brief for Petitioners at 16, 40, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800).

[131] The Moores did not press due process arguments, which might have implicated which of KisanKraft's shareholders—past or current—were properly taxable on the company's profits. *See Moore*, 144 S. Ct. at 1686 (Kavanaugh, J.); *see also* Moore v. United States, 36 F.4th 930, 938-39 (9th Cir. 2022) (finding no due process violation).

of KisanKraft's ownership in 2017,[132] and the Moores' historical ownership of KisanKraft all matter under the MRT—and could matter under any constitutional realization requirement. In addition, adjudication could turn on the presence or absence of various doctrinal elements, such as the degree of actual control or influence exerted by the Moores over KisanKraft, the existence of tax avoidance or abuse (defined objectively or subjectively), or the scope of transactions that generate realization at the entity level. These facts and doctrinal elements, to the extent relevant, also could affect the amount of income taxable to the Moores.[133] These uncertainties—implicated by the Justices in oral arguments and alluded to in the *Moore* opinions—show that, when the question turns to realization, the inquiry is inchoate in terms of both the relevant facts and doctrinal elements involved. The specific content of any constitutional realization requirement is left to enforcement and adjudication—a quintessential legal standard.

2. *The* Moore *Opinions*

The *Moore* opinions establish a much more fragile dynamic than the 7-2 outcome might suggest.[134] In *Moore*, a five-justice majority held in favor of the government, with Justice Kavanaugh writing the opinion.[135] Justice Barrett concurred in the result but disagreed significantly in her reasoning, and Justice Alito joined this concurrence. Finally, Justice Thomas, joined by Justice Gorsuch, dissented, with reasoning that largely aligns with Justice Barrett's concurrence. Taken together, the Barrett and Thomas opinions strongly support a constitutional realization requirement, while the Kavanaugh majority avoids taking a position on the issue.[136] Only Justice Jackson's concurrence takes a clear position against constitutional realization, and the absence of other Justices joining her opinion emphasizes the Court's instability on the issue.

In the majority opinion, Kavanaugh argues that "the precise and narrow question" in *Moore* is "whether Congress may attribute an entity's realized and undistributed income to the entity's shareholders or partners."[137] For Kavanaugh,

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[132] For example, if a domestic corporation owned 10% of KisanKraft but U.S. shareholders did not own more than 50% of KisanKraft. *See* I.R.C. §§ 951(b), 957(a) (defining United States shareholders and controlled foreign corporations).

[133] For example, the Moores could be taxable on KisanKraft's 2017 income but not on prior years' income. Transcript of Oral Argument at 29-31, 49, 98, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[134] Some commentators argue that *Moore* demonstrates the continued strength of a norm of congressional deference. *See* Batchelder et al., *supra* note 118, at 1510 (arguing that "four is not five"); *see also infra* Part II.C (discussing the four-justice threshold for *certiorari*). To the extent there is not complete deference to Congress, constitutional realization likely has the "bottom up" effects described in this article. *See infra* Part IV.A.

[135] *Moore*, 144 S. Ct. at 1697 (Kavanaugh, J.) (affirming the Ninth Circuit's judgment).

[136] Although the majority opinion declares that income taxes are indirect taxes (and not subject to apportionment), the majority opinion leaves open the possibility that realization is essential to the existence of income—and a tax without realization would remain a direct tax on property (and subject to apportionment). *See id*. at 1688; *see also* Batchelder et al., *supra* note 118, at 1512-13 (arguing that *Moore* "partly overruled" *Pollock*). The majority's declaration further unsettles the scope of any constitutional realization requirement, since such a requirement might not be tied to the Sixteenth Amendment's text (specifically, the use of the word "derived").

[137] *Moore*, 144 S. Ct. at 1688.

lawmakers face a choice in business entity taxation. With respect to undistributed but realized earnings, Congress may treat these entities either as taxpayers themselves or on a pass-through basis.[138] Either an entity reports its own income, or the entity's owners report income that is attributed to them.[139] Congress cannot, however, choose both instruments, which Kavanaugh terms "double taxation."[140] Presumably, a distribution of earnings represents a second realization event on which Congress may impose another round of tax; this well-pedigreed mechanism is fundamental to classical corporate taxation.[141] Critically, however, Kavanaugh states that *Macomber* "has no bearing on the attribution issue" raised in *Moore*.[142] For this reason, Kavanaugh's opinion does not reach the status of any putative constitutional realization requirement.[143]

Justice Barrett, concurring in the result, argues that the Constitution clearly requires realization, and that the Moores realized no income from KisanKraft directly.[144] Barrett concludes, however, that the Moores conceded the MRT's constitutionality when they allowed that the MRT's structural antecedent, subpart F, was constitutional.[145] In addition, Barrett complicates the broad discretion that Kavanaugh's opinion gives to Congress in taxing business entities.[146] Barrett essentially constructs Kavanaugh's attribution theory as an inquiry into economic substance as that doctrine apples to realization.[147] The substance of the Moores' relationship with KisanKraft might indicate that any income realized by KisanKraft was actually realized by the Moores.[148] Indeed, subpart F does this work through statutory rules: the regime targets abusive arrangements and mechanically taxes owners on income earned through controlled foreign corporations.[149] These types of substance-oriented inquiries are inherently standard-like.[150]

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[138] *Id.* at 1690. Although Kavanaugh describes pass-through taxation as based on owners' "pro rata share of the entity's undistributed income," *id.*, the Constitution presumably permits other economic arrangements.

[139] *See id.* at 1697 (arguing that taxation of an entity and its shareholders on undistributed income "would not simply be a traditional pass-through"). The limitation on attribution is due process. *See id.* at 1691 n.4.

[140] *Id.* at 1691.

[141] Less clear is whether Congress could tax entities on a pass-through basis and impose a second tax on distributions of cash from the entity. Similarly, Kavanaugh's opinion draws into question layered rates, such as ordinary taxes and surtaxes, which have the same effect as the type of entity-level and shareholder-level taxation that Kavanaugh finds objectionable. *See id.* at 1688, 1691.

[142] *Id.* at 1691.

[143] *Id.* at 1697 ("To decide this case, we need not resolve that [constitutional] disagreement over realization.").

[144] *See id.* at 1702, 1704 (Barrett, J., concurring).

[145] *See id.* at 1709. Whether this analogy works is less clear, given the somewhat distinct antiabuse purposes of subpart F and the MRT. One way to reconcile Barrett's conclusory reasoning is to treat deferral of any kind as intrinsically abusive, which seems like a stretch.

[146] *Id.* at 1700 ("I think the issue is more complex than the Court lets on.").

[147] *See id.* at 1704.

[148] *See id.* at 1704-05 ("As I understand our precedent, it leaves room for Congress to disregard the corporate form in some circumstances.").

[149] *See* I.R.C. §§ 951-965.

[150] *See Moore*, 144 S. Ct. at 1707 (Barrett, J., concurring) (arguing that Congress's ability to attribute an entity's income to shareholders "depends on the relationship between the shareholder and the income.").

Similarly, Barrett's construction of constitutional realization emphasizes the inquiry's broad, contextual nature. Barrett draws on *Bruun* and *Horst*, the same authorities cited by Surrey to bury *Macomber*. For Barrett, these cases simply rejected overly narrow constructions of the still-vital constitutional concept.[151] Although *Bruun* expanded the category of realization events, "[n]one of that remotely suggests that realization is not required or (relatedly) that appreciation counts as taxable income."[152] And, while *Horst* indicates that "[r]ealization does not depend on how the user chooses to enjoy the income," the decision does not change *Macomber*'s essential edict that realization is constitutionally mandated.[153] For Barrett, "[o]ur cases describe many ways income might be realized; a rigid definition does not capture them all."[154] This analysis potentially presages the open-ended, standard-driven analysis that the Court might apply to a constitutional realization requirement.

Justice Thomas, dissenting, argues that the Constitution requires realization, and that the Moores did not realize income from KisanKraft under any theory of the concept.[155] For Thomas, realization is formalistic except (perhaps) in cases of abuse, and, under the facts in *Moore*, any attribution theory fails rational basis review. Like Barrett, Thomas treats Kavanaugh's permissive attribution doctrine as "an unsupported invention."[156] Thomas's dissent previews the ways in which a categorical realization requirement would create "constitutional quicksand" that could envelop much of the current tax system.[157]

Finally, Justice Jackson, concurring in the majority opinion, argues that the Constitution does not require realization.[158] Instead, "in matters of tax policy, Congress's view [is] controlling" with only narrow constitutional limitations.[159] Jackson's concurrence aligns with the postwar academic consensus about *Macomber*, stating that the case "has long been deemed outmoded, if not overruled."[160] No other Justices join Jackson in this position, leaving four possible additional supporters of a constitutional realization requirement, only one of which is needed for a five-Justice majority. In this way, Jackson's concurrence emphasizes the tenuous ties holding together Kavanaugh's five-Justice majority.

C. The Future: Circuit Courts and Certiorari

The *Moore* opinions are relevant to future challenges aimed at establishing

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[151] *See id.* at 1703 ("What we *have* done is reject efforts to narrow what it means to realize income."). Again, this perspective broadens the standard-like inquiry into realization.
[152] *Id.*
[153] *Id.* at 1704. Barrett's emphasis on *Horst*'s "satisfactions" language implies that any gift of appreciated property could represent a realization event for the donor. This outcome would break significantly from current understandings of the realization requirement.
[154] *Id.* (adding that "realization may take many forms").
[155] *Id.* at 1709 (Thomas, J., dissenting).
[156] *Id*. at 1710.
[157] *Id*. at 1726.
[158] *Id.* at 1698 (Jackson, J., concurring).
[159] *Id*. at 1697-99 ("[T]his Court's role in [policy-driven tax] disputes should be limited.").
[160] *Id*. at 1698 (citing Comm'r v. Obear-Nester Glass Co., 217 F.2d 56, 60 (7th Cir. 1954); United States v. James, 333 F.2d 748, 752 (9th Cir. 1964); Prescott v. Comm'r, 561 F.2d 1287, 1293 (8th Cir. 1977)).

realization's constitutional status unambiguously. At least four Justices in *Moore* support a constitutional realization requirement,[161] which is enough for a grant of *certiorari* in a future case.[162] Practitioners and commentators generally seem comfortable that, given appropriate facts (without, for example, the complications caused by subpart F in *Moore*), the Court could find a constitutional realization requirement.[163] Finally, the Moores came to the Court through an express political project to revive a version of the *Macomber* holding that mandates realization under the Constitution, and the Court left this question unanswered. In this context, commentators anticipate further action at the Court with respect to the question presented (but not decided) in *Moore*.[164]

Federal circuit courts seem likely to accelerate the Court's return to realization as a constitutional issue. Activist litigation has leveraged judge-shopping and various circuits' polarization to create circuit splits and present the Court with compelling *certiorari* petitions. More critically, circuit courts offer opportunities for taxpayers to wreak havoc with respect to the existing tax system. As this Article emphasizes, an asymmetry exists for taxpayers and the government with respect to cases that assert a constitutional realization requirement as a tax-reduction mechanism. To win, taxpayers only need circuit courts to affirm *Macomber* as establishing a constitutional realization requirement—a relatively uncontroversial reading of the decision.[165] By contrast, circuit courts would need to distinguish *Macomber* to break with a constitutional realization requirement, and such courts may be loath to risk reversal in this way, especially after *Moore*. This asymmetry illustrates how the issue could foment legal activity involving constitutional realization—and potentially sow chaos as lower courts decide cases on the topic.

The reasons to be skeptical of this trajectory are similar to those raised by *Griffiths* in 1943: Then, academic prognosticators anticipated that the Court would quickly overturn *Macomber* "on the first opportunity," with the constitutional issue squarely presented.[166] The important questions (similar to those addressed in this

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[161] These Justices are Barrett and Alito in concurrence, and Thomas and Gorsuch in dissent. *See Moore,* 144 S. Ct. 1680, 1683.

[162] *See* Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 975 (1957). This future case may have facts that are more favorable than those in *Moore*.

[163] *See* Reuven S. Avi-Yonah, *Taxation with Realization After* Moore, 115 TAX NOTES INT'L 25, 25 (July 1, 2024) ("The same organized groups that brought us *Moore* are likely to try again, and at some point, they may succeed."); Jasper L. Cummings, Jr., Moore*:* Macomber *Was Wrongly Decided and Other Considerations*, 180 TAX NOTES FED. 2307, 2307 (Sept. 25, 2023) ("If the Supreme Court reverses the Ninth Circuit in *Moore*, or even if it affirms, the opinion likely will state grounds that will enmesh the income tax in a series of constitutional controversies not seen for a century."); Goulder, *supra* note 94, at 15 ("When a more suitable case comes along, those who favor limitations on the congressional taxing power may find themselves quite pleased."). A change in the Court's membership also could make this outcome more or less likely. *See* Joshua David Odintz et al., Moore *Thoughts: An Incremental Opinion from the U.S. Supreme Court*, Holland & Knight Alert (June 26, 2024), https://www.hklaw.com/en/insights/publications/2024/06/moore-thoughts-an-incremental-opinion-from-the-us-supreme-court [https://perma.cc/JC4A-3SNK].

[164] *See* Reuven S. Avi-Yonah, *What Is the Best Candidate For a Post*-Moore *Constitutional Challenge?*, 113 TAX NOTES INT'L 17 (Jan. 1, 2024) (discussing I.R.C. § 877A).

[165] *But see* Zhang, *supra* note 45, at 186 (reading *Macomber* to permit Congress to tax unrealized accretions to wealth).

[166] Rottschaefer, *supra* note 96, at 111.

Article) involved broader implications flowing from "the reasoning [in] the overruling decision."[167] The Court, obviously, did not revisit *Macomber* for more than eight decades, and, during this period, the government did not pursue the issue of constitutional realization through litigation with any degree of fervor.[168] As in *Griffiths*, the *Moore* Court demurred to address realization in the constitutional context, while leaving ample breadcrumbs to imply the potential for future success in better-framed cases. After *Moore*, however, the situation is somewhat different—a public-private asymmetry in litigation incentives. Taxpayers, not the government, would litigate in favor of a constitutional realization requirement, and there are more groups and more potential controversies that might fuel this project. Even if only one such effort succeeds, that success may implicate constitutional realization across broad swaths of the Code and Regulations. This context implies a much higher likelihood of the *Moore* project proving successful in an ultimate sense and leading to a revitalized constitutional realization requirement.

III. CONSTITUTIONAL REALIZATION AS AN ANTIABUSE DOCTRINE

Seven decades after *Macomber*'s interment, the *Moore* opinions, taken together, raise the specter of a constitutional realization requirement. Although the precise substantive contours of a constitutional realization requirement remain relatively uncertain,[169] this Article gauges the effects of such a requirement by examining its form and function as operationalized by taxpayers in their annual reporting to the IRS and as potential litigants in future tax controversies. This Part frames a constitutional realization requirement as a taxpayer-initiated antiabuse doctrine. Such a requirement allows taxpayers to assert, to the IRS or in court, that a specific portion of the Code or Regulations is constitutionally infirm and unenforceable—a prerogative traditionally reserved for the government in evaluating taxpayers' positions under the Code and Regulations. This framing—and the novel legal tool that constitutional realization gives taxpayers—has important implications for how an emergent constitutional realization requirement would affect the Code and the Regulations going forward.

This Part establishes realization's standard-like features, including the nuanced factual inquiries implicated by realization,[170] as well as the difficulty of

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[167] *Id.*

[168] After the Second World War, Congress flirted with direct contraventions of realization, *see* Michael J. Graetz, *Taxation of Unrealized Gains at Death—An Evaluation of the Current Proposals*, 59 VA. L. REV. 830, 830 (1973); Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1365 (1970), and Treasury expanded regulations that skirted strict interpretations of realization. Among academics and other policy-oriented experts, debates largely abandoned tethers to realization. *See* David Elkins, *The Myth of Realization: Mark-to-Market Taxation of Publicly-Traded Securities*, 10 FLA. TAX REV. 375, 376 (2010); Zelinsky, *supra* note 102, at 861-62. Perhaps wisely, however, administrative actors did not press to overturn *Macomber* through the court system.

[169] After *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955), judicial opinions on realization took a statutory approach. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 554-55 (1991). Constitutional issues in this period tended to focus on Fifth Amendment due process. *See, e.g.*, Estate of Whitlock v. Comm'r, 59 T.C. 490, 507 (1972) (dismissing an argument that subpart F violated due process).

[170] *See infra* Section III.A.

identifying which doctrinal factors bear on questions of realization.[171] Then, this Part argues that policy values traditionally associated with realization—administrative ease and efficiency—shed little light on the nature of a constitutional realization requirement.[172] Finally, this Part delineates how a constitutional realization requirement would operate as a taxpayer-initiated antiabuse doctrine.[173]

A. Realization's Facts and Circumstances

Any realization requirement must distinguish between facts that yield a "taxable event" and facts that do not.[174] This inquiry is open-ended, and the breadth of facts and circumstances relevant to realization generally precludes rigorous *ex ante* specification.[175] As a concept, realization requires myriad inputs to construct a binary output, and the relationship between inputs and output emerges only afterwards, on case-by-case basis. Even relatively common fact patterns require textured distinctions to determine realization: the delineation between sales and various combinations of financial instruments, such as leases, loans, and more complex products[176]; transactions involving parties with preexisting family, social, or legal relationships[177]; and changes in contractual or legal rights, such as modifications to an agreement or the division of property among co-owners.[178] Examples from each of these categories illustrate the standard-like nature of realization,[179] as well as how current law might diverge from a newly invigorated constitutional realization requirement.

1. Constructive Sales

The Code establishes a framework for determining when taxpayers account

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[171] *See infra* Section III.B.
[172] *See infra* Section III.B.
[173] *See infra* Section III.C.
[174] Realization is inextricably linked to the definition of ownership for tax purposes, which also depends heavily on factual context. *See* Alex Raskolnikov, *Contextual Analysis of Tax Ownership*, 85 B.U. L. REV. 431, 431-32 (2005).
[175] This Article does not define rules and standards based on adjudicators' "discretion." *See* Sullivan, *supra* note 11, at 57-58 (defining rules and standards by reference to discretion); *see also* Schlag, supra note 2, at 406-07 (arguing that discretion emerges whether directives are framed as rules or standards). Instead, this Article looks to when legal precepts acquire definitive content.
[176] *See, e.g.*, Rev. Proc. 2001-28, 2001-1 C.B. 1156; Rev Proc. 2001-29, 2001-1 C.B. 1160 (each establishing facts required by Treasury for advance rulings on the characterization of certain leasing arrangements). *See generally* Reid Thompson & David Weisbach, *Attributes of Ownership*, 67 TAX L. REV. 249 (2014) (developing a series of examples involving ownership of financial instruments).
[177] *See, e.g.*, Friedland v. Comm'r, 82 T.C.M. (CCH) 492, T.C.M. (RIA) 2001-236 (2001) (finding no realization on a father-guarantor's transfer of stock in satisfaction of a debt owed by his son's wholly owned corporation to a third party); I.R.C. § 267(f)(2) (deferring losses on sales among members of a controlled group).
[178] *See, e.g.*, Treas. Reg. § 1.1001-3(c), (e) (as amended in 2011) (defining a "significant modification" for debt instruments).
[179] Other examples run throughout the Code. *See, e.g.*, I.R.C. § 165(g) (addressing the timing of worthlessness for securities); I.R.C. § 631 (allowing taxpayers to treat the cutting of timber as a sale). Any accounting for the bargain component in below-market sales also implicates realization. *See, e.g.*, Treas. Reg. § 1.1001-1(e) (computing gain on sale transactions with gift components).

for income on appreciated financial positions in the absence of an unambiguous realization event.[180] For these assets, constructive sales occur, and income is accounted for, when taxpayers enter into contractual arrangements that "reduce or eliminate [those taxpayers'] risk of loss (and opportunity for gain)" with respect to an appreciated financial position.[181] These offsetting positions encompass various financial instruments—short sales, notional principal contracts, and futures or forward contracts—that involve the same appreciated financial position or something "substantially identical."[182] Multiple offsetting positions may be aggregated to yield a constructive sale for one financial asset, and a single offsetting position may trigger a constructive sale for only a portion of a financial asset.[183] Making these fact-intensive determinations requires as much art as science, and, within the predominantly rule-bound Code, the constructive sale regime acquires much of its legal specificity *ex post* during the interpretive or enforcement processes.[184] In this sense, constructive sales represent a prototypical legal standard.[185]

Constructive sales have a fraught relationship with the legal concept of realization.[186] The House report on the constructive sale regime states that "[t]ransactions designed to reduce or eliminate risk of loss on financial assets generally do not cause realization."[187] This statement presumably refers to the

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[180] *See* I.R.C. § 1259(a), (c). "Appreciated financial positions" are any interest, including futures or forward contracts, shorts sales, or options, with respect to stock, certain debt instruments, and partnership interests, if realization with respect to that interest would result in gain. I.R.C. § 1259(b).

[181] H.R. REP. NO. 105-148, at 439 (1997). For example, consider a taxpayer that owns ten shares of stock in Company X. The taxpayer enters into a "short against the box," in which the taxpayer borrows ten shares of Company X from a third party (with a promise to repay in-kind), then sells those borrowed shares for cash (a short sale). Because the taxpayer can repay the third party with the already-owned shares of Company X (which are in the "box"), the taxpayer no longer is subject to fluctuations in value with respect to Company X stock. Under I.R.C. § 1259, this type of transaction results in gain as if the taxpayer sold the already-owned Company X shares.

[182] *See* I.R.C. § 1259(c)(1)(A)-(D); *see also* David M. Schizer, *Hedging Under Section 1259*, 80 TAX NOTES 345, 346-47 (1998) (describing constructive sales as "a hybrid that triggers recognition of gain, but not loss"). Section 1259 uses similar qualifiers to define forward contracts and offsetting notional principal contracts. *See* I.R.C. § 1259(d)(1)-(2). This language also is used in the wash sale rules, though loss disallowance may not have constitutional implications under the legislative grace doctrine. *See* I.R.C. § 1091(a). In the wash sale context, the underspecified content of "substantially identical" has motivated significant tax planning. *See* Paul Kiel & Jeff Ernsthausen, *How the Wealthy Save Billions in Taxes by Skirting a Century-Old Law*, PROPUBLICA (Feb. 9, 2023), https://www.propublica.org/article/irs-files-taxes-wash-sales-goldman-sachs [https://perma.cc/6Z7T-Z7YN].

[183] H.R. REP. NO. 105-148, at 440-41 (1997).

[184] *See* Andrea S. Kramer & William R. Pomierski, *New Constructive Sale Rules Make It Tougher to Avoid Tax on Built-In Gain*, 25 EST. PLAN. 291, 300 (1998).

[185] In addition, the constructive sale regime operates within a network of provisions that target abuses involving financial instruments. *See, e.g.*, I.R.C. § 1233(b) (preventing taxpayers from using short sales to accelerate losses or manipulate holding periods for capital gains purposes).

[186] For a broader discussion of realization in the context of financial instruments, see David M. Hasen, *A Realization-Based Approach to the Taxation of Financial Instruments*, 57 TAX L. REV. 397 (2004).

[187] H.R. REP. NO. 105-148, at 438 (1997). *See* Rev. Rul. 72-478, 1972-2 C.B. 487 (deferring gain or loss on a short sale when the taxpayer held the same underlying securities in a separate brokerage account).

Code, not the Constitution, which implies that the Code's concept of realization is more restrictive than any constitutional threshold.[188] Alternatively, a constitutional threshold for realization may be lower (or functionally nonexistent) in abusive situations, such as those expressly targeted by the constructive sale regime.[189] For these reasons, constructive sales under the Code, or some subset of these transactions, may trigger realization under a constitutional standard.[190] The constructive sale regime, in whole or in part, has plausible routes to survive a constitutional realization requirement.

Still, the statutory mechanics of constructive sales reflect possible congressional concerns about realization. Nomenclature notwithstanding, constructive sales themselves do not trigger realization on those terms.[191] Instead, the Code requires taxpayers to "recognize" income with respect to any appreciation,[192] then adjust any subsequently (and actually) realized gain or loss based on this recognized income.[193] Constructive sales essentially bypass the Code's typical two-step mechanic of realization to establish gain or loss followed by recognition to bring that gain or loss into income.[194] Legislative history affirms this idiosyncratic treatment by clarifying that constructive sales are not treated as sales for other tax purposes.[195] A constructive sale simply generates income on a taxpayer's return, full stop.

These statutory machinations emphasize the interpretive difficulties posed by a constitutional realization requirement. The constructive sale regime is an analytic framework aimed at particular abuses, most prominently "short sale against the box" transactions.[196] As enacted by Congress, the regime reaches more broadly, across several categories of financial products and with some fuzziness to anticipate private parties' permutations in response to the statute.[197] But how the

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[188] When Congress enacted the constructive sale regime as part of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, the scholarly and judicial consensus treated realization as a matter of "administrative convenience"—a very low threshold for constitutionality. *Cf.* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991) (citing *Horst*).

[189] In *Moore*, various briefs (and portions of oral arguments) focused on realization thresholds in abusive situations. *See, e.g.*, Transcript of Oral Argument at 89-90, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (discussing the constructive sale rules).

[190] No direct authority, including I.R.C. § 1259's legislative history, speaks to these constitutional issues. *Cf.* Part I.A.

[191] This feature of I.R.C. § 1259 supports an argument that the provision operates as a constitutional excise tax, regardless of whether realization is constitutionally required for an income tax. *See* Avi-Yonah, *supra* note 163 (listing provisions where "a good defense" supports excise tax characterization).

[192] I.R.C. § 1259(a)(1).

[193] I.R.C. § 1259(a)(2), (e)(1). That is, income from constructive sales does not create basis in an asset. This result deviates from fundamental principles of income taxation. *Cf.* I.R.C. § 1012(a) (establishing basis in an asset as a taxpayer's cost, paid in after-tax dollars).

[194] *See* I.R.C § 1001(a), (c).

[195] H.R. REP. NO. 105-148, at 440 (1997) ("Except as provided in Treasury regulations, a constructive sale would generally not be treated as a sale for other Code purposes.").

[196] *See* Thomas J. Brennan, *Law and Finance: The Case of Constructive Sales*, 5 ANN. REV. FIN. ECON. 259 (2013) (discussing high-profile transactions that motivated I.R.C. § 1259).

[197] *See* Estate of McKelvey v. Comm'r, 906 F.3d 26 (2d Cir. 2018) (concluding that a modification of variable prepaid forward contracts constituted a constructive sale based on the probability of their exercise). Congress also authorized Treasury to promulgate regulations to expand the constructive

constructive sale regime intersects with realization remains unclear.[198] When combined with an appreciated financial position, offsetting positions change legal entitlements with respect to property, and these changes potentially qualify as a constitutional realization event, absent any specific statutory authority.[199] Similarly, transactions at the penumbra of constructive sales may trigger realization, even if the constructive sale regime itself does not apply.[200] And, if the constructive sale regime targets abuse, perhaps realization simply is irrelevant, and the statutory recognition mechanic governs. The Code sheds only indirect light on any constitutional standard for realization. In the context of constructive sales, a constitutional realization requirement would require adjudicators to divine the appropriate factual inquiry, as well as adduce the proper transactional scope, to determine the extent to which Congress's enactments survive a constitutional analysis.

2. Gift Loans

Social context also bears on the legal concept of realization. The Code, for example, assigns additional income to lenders that charge too little interest, "where the forgoing of interest is in the nature of a gift."[201] Typically, these gift loans—and the "phantom" income they produce—involve members of a family or other individuals with deep social ties.[202] The statute does not question gift loans' veracity, or the fact that relationships influence these loans' terms, often to the

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sale regime to transactions "hav[ing] substantially the same effect" as transactions enumerated in the statute. *See* I.R.C. § 1259(c)(1)(E). Congress also instructed Treasury to develop "necessary or appropriate" regulations under I.R.C. § 1259. *See* I.R.C. § 1259(f). Treasury has not promulgated regulations under either provision. *See generally* Frank G. Colella, *Pinch-Hitting for the IRS: Second Circuit Adopts Phantom Regulations to Curb a Monster Abuse of Financial Derivatives*, 4 BUS. ENTREPRENEURSHIP & TAX L. REV. 26 (2020) (critiquing *McKelvey* as circumventing Treasury's obligation to issue regulations under I.R.C. § 1259); John Kaufmann, *Pontifications on* McKelvey, 155 TAX NOTES 1749 (June 19, 2017) (critiquing the Tax Court's holding in favor of the taxpayer on reasoning similar to the Second Circuit).

[198] For example, *McKelvey* considers probabilities in determining a constructive sale but not the relative magnitudes of possible outcomes. *See* Thomas J. Brennan & David M. Schizer, *Transaction-Specific Tax Reform in Three Steps: The Case of Constructive Ownership*, 15 COLUM. J. TAX L. 1, 49-50 (2024).

[199] *See* Elkins, *supra* note 168, at 392 n.29 ("From an economic perspective, short-against-the-box transactions look too much like sales for them to be not treated as realization events."); *see also* Bradford v. United States, 444 F.2d 1133 (Ct. Cl. 1971) (treating a purchase combined with a forward contract to sell as a realization event on the date of purchase).

[200] *See* Anschutz Co. v. Comm'r, 135 T.C. 78 (2010), *aff'd*, 664 F.3d 313 (10th Cir. 2011) (holding that a prepaid variable forward contract, combined with a loan of the underlying securities, constituted a sale for tax purposes but not a constructive sale under I.R.C. § 1259); *see also* Progressive Corp. v. United States, 970 F.2d 188 (6th Cir. 1992) (treating the issuance of an in-the-money call option with respect to stock as a sale of that stock when exercise of that option was "virtually certain"); *see generally* Morse, *supra* note 23, at 1393 (describing the space between a "sure shipwreck" and a "safe harbor" for purposes of I.R.C. § 1259).

[201] I.R.C. § 7872(f)(3).

[202] *See* Stephen R. Akers & Philip J. Hayes, *Estate Planning Issues with Intra-Family Loans and Notes*, 38 ACTEC L.J. 51, 70 (2012).

borrower-donee's benefit.[203] Instead, this regime has an antiabuse function.[204] For gift loans that exceed certain (generous) thresholds,[205] the lender-donor must include a proxy for forgone interest payments from the borrower-donee. This proxy is less than the borrower-donee would pay to an unrelated party but greater than zero[206]—a legislative compromise in the treatment of fundamentally nonmarket transactions.

Consider Parent, who loans $200,000 cash to Child, interest-free. Child invests the cash in assets that yield a simple annual return of 10%, or $20,000 per year. If the tax system respects this arrangement, Parent has, in effect, shifted $20,000 of capital income to Child, where that income may face lower marginal rates or otherwise incur lower tax liabilities. Furthermore, the $200,000 loan is not permanent, and Parent can recall the capital on demand or after a term formally or informally negotiated with Child.[207] The relationship between Parent and Child mediates these economic transactions and facilitates joint decision-making about which person should report taxable income earned on Parent's capital.

The gift loan rules crimp this flexibility (and combat tax gaming) by requiring Parent to recognize interest income based on market yields on U.S. Treasury bonds—an interest rate historically treated as connected to (although almost certainly less than) the risk-free rate of return to capital.[208] Assume, for this example, that the assigned interest rate is 2%, or $4,000 per year in interest on the $200,000 loan from Parent to Child. Income arises through a pair of constructive transactions. Parent is treated as transferring $4,000 to Child (presumably as a gift), and Child is treated as paying the $4,000 back to Parent as taxable interest.[209] No cash, of course, actually changes hands in this round-trip arrangement, but Parent

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[203] *Cf.* Rev. Rul. 86-106, 1986-2 C.B. 28 (disregarding a loan between a parent and a trust that benefitted the parent's children).

[204] Indeed, this antiabuse purpose mirrors—and perhaps is more compelling than—that of I.R.C. § 1259. *See supra* Part III.A.1.

[205] Under I.R.C. § 7872, lender-donors do not have interest income if either (1) the gift loan's principal amount does not exceed $10,000 and the borrower-donee does not use the loan to acquire income-producing assets per I.R.C. § 7872(c)(2), or (2) the gift loan's principal amount does not exceed $100,000 and the borrower-donee has no more than $1,000 of annual net investment income under I.R.C. § 7872(d)(1). For (2), the lender-donor has interest income only to the extent of the borrower-donee's annual net investment income, if such income exceeds $1,000. *Id. See* Leigh Osofsky & Kathleen Delaney Thomas, *The Surprising Significance of De Minimis Tax Rules*, 78 WASH. & LEE L. REV. 773, 833 (2021) (noting the complexity of I.R.C. § 7872's de minimis rules).

[206] *See* I.R.C. § 7872(e)(2), (f)(2)(B) (calculating forgone interest for gift loans based on short-term applicable federal rates); I.R.C. § 1274(d)(1)(C)(i) (basing applicable federal rates on market yields for U.S. Treasury bonds).

[207] In this sense, gift loans are distinguishable from assignment-of-income issues involving gifts of property. *See* Helvering v. Horst, 311 U.S. 112 (1940); Blair v. Comm'r, 300 U.S. 5 (1937).

[208] *See* Jules H. van Binsbergen, William F. Diamond & Marco Grotteria, *Risk-Free Interest Rates* 1-2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26138, 2019) (finding that government bonds slightly understate the risk-free rate of return); *see also* John R. Brooks, *Taxation, Risk, and Portfolio Choice: The Treatment of Returns to Risk Under a Normative Income Tax*, 55 TAX L. REV. 255, 292-93 (2013) (describing various proxies for the risk-free return to capital).

[209] I.R.C. § 7872(a)(1)(A), (B) (using the verb "treated" to describe these transactions). This example is constructed to avoid various rules that exclude smaller or nonabusive gift loans from this treatment. *See supra* note 206.

has $4,000 of ordinary income to report to the IRS on Parent's tax return.[210]

Gift loans, taken in their factual context, raise questions of realization on multiple levels. First, gift loans may or may not be realization events under a currently underspecified constitutional standard.[211] Although gifts traditionally have not qualified as realization events,[212] the Code's construct of gift loans illustrates how foregone interest still may represent income to the lender-donor.[213] Gift loans involve an ongoing economic relationship between the two parties with affective ties.[214] The initial loan of cash, coupled with eventual repayment or forgiveness, provide actual acts that support a finding of realization. Borrower-donees on gift loans may not pay periodic cash interest to lender-donors, but these other tangible transactions give ample legal tether for assigning an interest component to gift loan arrangements—perhaps based on specific facts or the parties' intent.[215] Furthermore, the Code's gift loan rules operate as a type of safe harbor that relieves pressure on more fundamental questions of characterization. If a constitutional realization requirement precludes an assessment of interest income to the lender-donor, then enforcement may focus on whether these loans are better characterized as gifts or other arrangements.[216] A constitutional realization requirement greatly expands the factual and legal inquiry required for gift loans.

Second, a constitutional realization standard may require a different timing of income inclusions than the linear annual amounts specified in the Code. Simple annual interest represents an administrable solution, but courts may characterize interest as prepaid or postpaid, consistent with either the initial loan of cash or the loan's eventual resolution—physical transfers of cash that may provide a touchstone for realization. A constitutional realization standard might find Child to have prepaid interest on the initial loan, or Parent to have foregone interest up-front. Alternatively, this standard might view Child as postpaying interest at the end of the loan, or Parent as forgiving accrued interest after-the-fact.[217] Finally, postpaid

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[210] For tax purposes, circular flows of cash generally are disregarded, even if they physically occur. I.R.C. § 7872 imposes a constructive transaction that reflects the converse of this principle.

[211] *See* Kornhauser, *supra* note 22, at 39 (discussing the income and gift tax treatment of below-market loans).

[212] *See* Kwall, *supra* note 3, at 110 ("Although a gift has not historically been treated as a realization event, there is nothing inherently unique about a gratuitous transfer that would preclude Congress from treating a gift as a realization event.").

[213] That is, the gift is the value of the foregone interest, rather than the interest payment itself. This construction is consistent with the forgiveness of loans by gift. In these situations, the lender-donor is treated as gifting the loan's principal amount to the borrower-donee, and the borrower-donee is treated as repaying the loan in full (that is, there is no cancellation of indebtedness income). *See* Jeffrey H. Kahn & Douglas A. Kahn, *Cancellation of Debt and Related Transactions*, 69 TAX LAW. 161, 197-98 (2015) ("If a creditor forgives a debt as a gift to the debtor, the COD is excluded from the debtor's income by section 102.").

[214] By contrast, constructive sales may involve one or more coordinated or unilateral acts at arm's length. *See supra* Part III.A.1.

[215] *Cf.* Diedrich v. Comm'r, 457 U.S. 191, 197 (1982) (holding that a gift conditioned on the donee's payment of the donor's gift taxes results in income to the donor to the extent the gift tax liability exceeds the donor's basis); *see also* Kornhauser, *supra* note 22, at 16-17 (discussing *Diedrich* in the context of the Supreme Court's avoidance of constitutional tax issues).

[216] For concomitant effects on complexity, see *infra* Part V.

[217] These timing questions are parallel to those raised by *Helvering v. Bruun*, 309 U.S. 461, 465-66 (1940) (describing alternatives in which a landlord's income from tenant improvements could be

interest could be assigned over the loan's term using the time-value principles associated with original issue discount (OID), which would yield gradually increasing inclusions over the loan's term.[218] In these ways, a constitutional realization requirement unsettles the Code's clear rules about the timing and amount of income.

Third, the amount of any income inclusions may depend on the relevant constitutional analysis. The statutory gift loan regime uses a below-market rate to assign income to the lender-donor. The borrower-donee would pay a higher interest rate on a comparable arm's length loan from an unrelated party, such as a bank, and courts might look to this interest rate when assigning income to the lender-donor.[219] On the other hand, a lower rate may better account for the realities of the related-party arrangement intrinsic to gift loans, where risk of repayment may not factor into the decision of whether, or on what terms, to extend credit. No market transaction exists. In addition, a gift loan may contemplate that the borrower-donee will satisfy the loan's principal fully with property, forgiveness by the lender-donor, or some combination of the two.[220] For these reasons, a risk-free rate of return may better represent the parties' underlying economic arrangement. If so, the Code's statutory rate understates the amount of the lender-donor's true interest income[221]—and perhaps survives constitutional scrutiny because of this design choice. More broadly, however, gift loans' facts and circumstances (including the nature of family or social relationships[222]) imply a range of possible income inclusions under a realization-oriented constitutional analysis.

3. Debt Modifications

Contractual arrangements (and changes to those contracts) can affect taxpayers' relationships to property in ways that implicate realization. These issues arise, for example, when holders and obligors agree to modify the terms of a lending arrangement evidenced by a debt instrument.[223] The debt instrument is property for

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taken into account on construction of the improvements or termination of the lease).

[218] For the Code's treatment of OID, see I.R.C §§ 1272-1275. Courts may apply time-value principles differently.

[219] This referent historically has been used in the international tax context to apportion income across jurisdictions. *See generally* Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study of the Evolution of U.S. International Taxation* (John M. Olin Ctr. for L. & Econ., Working Paper No. 07-017, 2007).

[220] The precise combination may be contingent on when the loan is made. *See* Rev. Rul. 77-299, 1977-2 C.B. 343 (finding no loan where there was a prewired intent to forgive).

[221] If I.R.C. § 7872 seeks to deter tax gaming, then this lower rate might be optimal, depending on the provision's effect on tax-motivated transactions.

[222] The scope of familial connections may depend on context. *See* Cerone v. Comm'r, 87 T.C. 1, 3, 22 (1986) (outlining a limited role for family discord in determining tax consequences of a stock redemption); *see also* Tessa R. Davis, *Mapping the Families of the Internal Revenue Code*, 22 VA. J. SOC. POL'Y & L. 179, 199 (2015) (using status and contract to illustrate how family relationships are deployed by the Code).

[223] Executory contracts and amendments to partnership agreements also raise realization questions. For example, the substitution of counterparties (or an assignment by a counterparty) may result in realization for the other party to a derivative contract or other ongoing obligation. Alternatively, a change in how partners share income may affect the value of their respective interests. Although difficult to distinguish conceptually from debt modifications, these types of contractual changes

tax purposes, and, individually or cumulatively, modifications to that property can yield a new debt instrument. This *de facto* exchange of old property for new property constitutes a realization event. The facts and circumstances that yield realization, however, are relatively difficult to discern on any kind of principled basis. [224]

Under current law, arcane Treasury Regulations govern the realization threshold for modifications of debt instruments.[225] These regulations define an exchange to occur when there is a "significant modification" of a debt instrument[226]—two elements that do not emerge from either statutory law or court opinions and which have no clear constitutional tether.[227] The regulations define "significant" and "modification" in technical, quantitative, and rule-bound ways. For this purpose, modifications reach broadly: any change in legal rights or obligations, unless they occur by the terms of the debt instrument.[228] Certain major alterations—substitution of obligors, changes in the recourse or nonrecourse nature of the debt instrument, conversions of debt into equity for tax purposes, and the exercise of certain options—are modifications even if pursuant to contractual operations.[229] By contrast, significance arises from any of a long list of conditions, including changes in yield over numeric hurdles,[230] material deferral in the timing of payments,[231] and adjustments to structural features of debt instruments, such as obligors, security, and priority.[232] In addition, any "economically significant" modification, based on the facts and circumstances, is significant.[233] The

typically are not treated as realization events. *See, e.g.*, I.R.C. § 761(c) (allowing modifications to a partnership's allocation provisions after year-end but before the unextended due date for the partnership's return); James M. Peaslee, *Modifications of Nondebt Financial Instruments as Deemed Exchanges*, 95 TAX NOTES 737 *passim* (Apr. 30, 2002) (discussing realization questions involving a range of derivative contracts in the context of *Cottage Savings Assn. v. Comm'r*, 499 U.S. 554 (1991)).

[224] *See* Richard L. Bacon et al., *supra* note 13, at 1002 ("The special difficulty in dealing with debt modifications lies in the fact that these transactions are among a variety of 'ambiguous transactions' which have no self-evident points that clearly indicate when, or whether, the holder has 'sold or exchanged' the unmodified debt instrument.").

[225] For modifications of debt instruments, these regulations represent the exclusive test for realization. *See* Treas. Reg. § 1.1001-3(b).

[226] *Id*.

[227] *See* Bacon et al., *supra* note 224, at 1003 ("[M]any of the proposed distinctions in the proposed regulation are the kind that cannot be derived from existing section 1001 or from any judicial definition of when a sale or exchange is a 'realization event.'").

[228] Treas. Reg. § 1.1001-3(c)(1).

[229] Treas. Reg. § 1.1001-3(c)(2). Debt is recourse if the lender can look to all of the borrower's assets for repayment rather than just the specified security. For purposes of Treas. Reg. § 1.001-3 (and unlike other areas of tax law), recourse and nonrecourse status are determined by reference to state law. *See* I.R.S. P.LR. 2023-37-007 (Sept. 15, 2023) (stating that a conversion from an LLC to a corporation does not change the recourse nature of the debt when the lenders' state-law rights under the debt instrument do not change).

[230] Treas. Reg. § 1.1001-3(e)(2).

[231] Treas. Reg. § 1.1001-3(e)(3).

[232] Treas. Reg. § 1.1001-3(e)(4).

[233] Treas. Reg. § 1.1001-3(e)(1). *See also* Rev. Rul. 90-109, 1990-2 C.B. 191 (finding realization "if there is a sufficiently fundamental or material change that the substance of the original contract is altered").

Regulations also specify various rules of application.[234]

The debt modification regulations do not reflect any high theory of realization,[235] and their mechanical application sometimes meshes poorly with on-the-ground facts and circumstances. These features of the rule-bound regulations reveal the underlying standard-like analysis fundamental to realization.[236] Consider state-law conversions of legal entities from limited liability companies (LLCs) to corporations, and vice versa.[237] If the LLC is a disregarded entity for tax purposes and the obligor on a debt instrument, then these conversions cause a change in obligor from the LLC's owner to the corporation (or vice versa).[238] The IRS, however, has ruled privately that such conversions are not realization events, either because they are not modifications or not significant—the precise reasoning is unclear.[239] In these rulings, the IRS relies on the text of state statutes to find that the conversions have no effect on the parties' legal rights and obligations. These rulings do not consider the effects of state corporate and LLC law (which differ in terms of managers' fiduciary duties, the availability of distributions, and the ability of creditors to pierce owners' limited liability protections) or any specific terms in the corporate charters or LLC operating agreements. Even if irrelevant under current regulations, these additional facts might bear on any constitutional realization requirement.[240]

Indeed, under a constitutional realization requirement, each of the rule-bound pieces of the debt modification regulations is subject to constitutional

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[234] Treas. Reg. § 1.1001-3(f). *See also* Richard L. Bacon & Harold L. Adrion, *Taxable Events: The Aftermath of* Cottage Savings *(Part II)*, 59 TAX NOTES 1386, 1386-91 (June 7, 1993) (describing the proposed debt modification regulations).

[235] *See* Richard L. Bacon & Harold L. Adrion, *Taxable Events: The Aftermath of* Cottage Savings *(Part I)*, 59 TAX NOTES 1228 *passim* (May 31, 1993) (critiquing the proposed debt modification regulations as unprincipled).

[236] *See* Schlag, *supra* note 2, at 422-24 (1985) (questioning the role of polycentrism in determining when to use rules and standards).

[237] Similar changes can result from check-the-box elections. *See, e.g.*, Treas. Reg. § 301.7701-3(a), (c) (providing that an eligible business entity may elect to change its classification by filing Form 8832).

[238] *See* Treas. Reg. § 301.7701-3(a), (b)(1)-(2).

[239] *Compare* I.R.S. P.L.R. 2023-37-007 (Sept. 15, 2023) (finding that a proposed state-law conversion of an LLC into a corporation would not result in a modification of debt), *and* I.R.S. P.L.R. 2003-15-001 (Apr. 11, 2003) (same), *with* I.R.S. P.L.R. 2006-30-002 (July 28, 2006) (ruling that "[t]he conversion of Parent [corporation] into [an] LLC as part of [a] restructuring does not result in a significant modification of the [d]ebt" under Treas. Reg. § 1.1001-3(e)), I.R.S. P.L.R. 2007-09-013 (Mar. 2, 2007) (ruling that the change in classification from corporation to disregarded entity will not result in a significant modification of debt), *and* I.R.S. P.L.R. 2010-10-015 (Mar. 12, 2010) (finding that the conversion of a corporate subsidiary into an LLC does not result in a significant modification of debt). *See also* C.C.A. 2011-003 (Aug. 26, 2011) (concluding that the check-the-box conversion of an insolvent foreign subsidiary of a domestic corporation into a partnership under Treas. Reg. § 301.7701-3(c)(1)(i) is not a significant modification of debt).

[240] Other examples of standard-like applications of the rule-bound debt modification regulations include the transition away from LIBOR as a benchmark in floating-rate debt, *see* T.D. 9961, 2022-3 I.R.B. 352 (Jan. 4, 2022) (finalizing regulations that generally provide for nonrealization across an array of financial products), government forbearance programs involving home mortgage loans due to the COVID-19 pandemic, *see* Rev. Proc. 2020-26, 2020-26 I.R.B. 984; Rev. Proc. 2020-51, 2020-50 I.R.B. 1599, and lending arrangements with multiple borrowers or parties that provide credit support, *see* Luís C. Calderón Gómez, *Whose Debt Is It Anyway?*, 76 TAX L. REV. 159 (2022).

challenge. There is, for example, no clear reason why a 25-basis-point change in yield would have constitutional significance.[241] Similarly, the regulations generally aggregate multiple changes over time to a single contractual term but disaggregate simultaneous changes to different contractual terms.[242] Again, a constitutional realization requirement may look more (or less) holistically. Finally, taxpayers will not always favor nonrealization over realization for contractual modifications, and the different parties to a debt instrument may have different interests.[243] These divergent interests provide ample opportunities for constitutional challenges to the current debt modification regulations. What would remain after these piecemeal, idiosyncratic challenges is virtually impossible to predict.

4. Conclusion

As a concept, realization is contextual, based on the facts and circumstances specific to the taxpayers and transactions at issue. Constructive sales illustrate that establishing the inquiry's scope is crucial. Gift loans demonstrate how facts that trigger realization intersect with determinations of the timing and amount of any resultant income. Debt modifications show how ostensibly rule-bound regimes bleed into standard-like questions and create uncertainty under a potential constitutional realization requirement. These examples emphasize the primacy of *ex post* determinations to realization—the essential feature of a legal standard. As discussed in the following Section, these factual determinations interplay with uncertainty about the proper doctrinal elements for realization.

B. Realization's Doctrinal Elements

Realization addresses three distinct questions: when is income taken into account, how much income is taken into account, and who is taxable on this income? To a significant extent, these questions' answers are interdependent. Under realization, a touchstone—a "definite event"—fixes the answers to these questions as of a given moment in time.[244] The doctrinal elements that implicate realization are not transparent, however, especially in the constitutional context. For this reason, realization is simultaneously fact-intensive and ambiguous in terms of those facts' doctrinal import.

Doctrinally, realization may be different in different contexts, and perhaps also different for different purposes.[245] As a concept, realization may be shaped by notions of abuse and antiabuse,[246] as well as the distinction between legal and

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[241] *See* Treas. Reg. § 1.1001-3(e)(2)(ii)(A).

[242] *See* Treas. Reg. § 1.1001-3(f)(3)-(4); *see also* I.R.S. P.L.R. 2010-10-015 (Mar. 12, 2010) (examining separately changes in yield, deferral of payments, and substitution of obligors).

[243] For example, realization may allow holders to claim a loss or impose cancellation of indebtedness income on obligors. *See* I.R.C. §§ 1001; 108.

[244] *See* Bittker et al., *supra* note 6, at § 28:2.

[245] Several Justices alluded to this uncontroversial idea during oral arguments. *See, e.g.*, Transcript of Oral Argument at 17-18, Moore v. United States, 144 S. Ct. 1680 (No. 22-800). *See also* Zelinsky, *supra* note 102, at 873 ("[T]he judiciary has grappled with the contours of the realization principle.").

[246] *See* Mindy Herzfeld, Moore *and the History of the Realization Requirement*, 180 TAX NOTES

economic understandings of ownership.[247] For this reason, the doctrinal elements of realization are uncertain in scope and content—a problem compounded in constitutional analysis by a lack of meaningful legal development since the 1950s. This Section explores the contextual nature of realization through Supreme Court doctrine after *Macomber*, then discusses antiabuse exceptions to realization and the importance of legal relationships to realization.

1. Context and Realization

The contextual nature of realization is apparent in one of *Macomber*'s doctrinal mainstays, the idea that realization occurs when a taxpayer receives something with respect to capital for the taxpayer's "separate use and benefit."[248] In *Macomber*, a stock-on-stock dividend yielded nothing from the company itself: "every dollar" of the taxpayer's "original investment" remained "the property of the company, and subject to business risks."[249] Property severed from capital—sometimes framed using a fruit-tree metaphor—fixed the timing, amount, and recipient of income.[250] *Macomber* left underspecified whether severance was either necessary or sufficient for realization in different contexts.

Subsequent judicial decisions provide little clarity on separation's doctrinal function. As Surrey and others read *Macomber* out of an evolving tax jurisprudence,[251] *Macomber*'s "separation" requirement also fell from prominence. In *Bruun*, the Court found income when a landlord acquired tenant improvements after retaking possession of leased property.[252] *Bruun* rejected *Macomber*'s "separation" requirement, describing it as "not controlling." The taxpayer had income, notwithstanding that the tenant improvements had no value separate from the leased land and that the combined land and improvements almost certainly reflected an overall loss for the taxpayer. Although Congress reversed *Bruun*'s result through legislation,[253] the case demonstrates that one of realization's doctrinal elements—separation—is not necessary (but perhaps remains relevant) for evaluating whether a transaction results in income.[254]

Then, in *Woodsam Associates*,[255] the Second Circuit held that a cash-out nonrecourse borrowing in excess of basis, secured by real property, did not result

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FED. 1754, 1754 (Sept. 11, 2023) (noting that Congress and courts "have regularly acknowledged the validity of antiabuse provisions" in the realization context).

[247] *See* Raskolnikov, *supra* note 174, at 514-16 ("[T]he law of tax ownership is vast, remarkably fragmented, and thoroughly confused."); Thompson & Weisbach, *supra* note 176, at 249 ("Ownership apparently has nothing to do with whether you are exposed to an economic position.").

[248] Eisner v. Macomber, 252 U.S. 189, 211 (1920).

[249] *Id.*

[250] Indeed, the Barrett and Thomas opinions in *Moore* rely heavily on the language of separation to discuss realization's boundaries. *See* Moore v. United States, 144 S. Ct. 1680 (2024) (Barrett, J., concurring; Thomas, J., dissenting).

[251] *See supra* Part II.A.

[252] Helvering v. Bruun, 309 U.S. 461 (1940).

[253] *See* I.R.C. § 109.

[254] Similarly, the *Moore* majority opinion does little to abrogate the "separate use and benefit" requirement across all contexts. When attributing income from an entity, however, separation clearly is not required. *See* Batchelder et al., *supra* note 118, at 1511.

[255] Woodsam Assocs. v. Comm'r of Internal Revenue, 198 F.2d 357 (2d Cir. 1952).

in income to the taxpayer. The loan held the taxpayer responsible for repayment to the extent of the property's value and not for any excess. Essentially, the taxpayer received cash with respect to real property whose value was reduced by that amount—a potential separation of liquid cash from illiquid property, in the language of *Macomber*. Under the Code, these facts did not constitute realization.[256] One commentator argues that *Woodsam Associates* shows "the ambiguous nature of the realization requirement" and "could about as easily have gone for the taxpayer as for the Treasury."[257] Not only is separation not necessary for realization, but the element also is not sufficient to trigger income.[258]

Although separation is neither necessary nor sufficient for realization, the element retains significant staying power—and figured significantly into the Barrett and Thomas opinions in *Moore*, as well as portions of oral arguments.[259] Many conventional realization events, including sales for cash and payments under a lease or loan, involve the separation of returns from capital. Separation may have relevance in some contexts and not in others. Once a decisionmaker specifies the factual predicate in which realization may occur, slotting those facts into an analytic framework presents another doctrinal challenge: how to array the facts in a framework that provides a path to either realization or nonrealization. These challenges, in part, justify courts' shift in the 1940s and 1950s towards deference to Congress on issues of realization. Statutory law is a convenient vehicle for crafting complex (and rule-bound) frameworks. Less certain is whether these statutory frameworks would survive constitutional scrutiny, in whole or in part.

2. Abuse and Antiabuse

Efforts to police tax abuse—perhaps keyed to taxpayers' intent or motivation to engage in a transaction—also figure into realization doctrine. Many statutory deviations from realization principles reflect efforts to curb tax gaming, which, in part, motivated amicus briefs on *Moore*'s potentially calamitous effects.[260] For example, section 1256 of the Code requires taxpayers to recognize income or loss annually with respect to certain derivative contracts.[261] For some commodities contracts, section 1256 aligns tax outcomes with market practices, in which these contracts clear gains and losses daily for traders.[262] Without this

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[256] Section 111(a) of the Code, as then in effect, required a "disposition," though this textual analysis simply begs the question of whether a separation of cash from property constitutes a disposition. *See infra* Part III.B.

[257] MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 365 (15th ed. 2023).

[258] Separation's insufficiency is evident in other contexts, such as the recovery of capital with respect to an investment. *See* Inaja Land Co. v. Comm'r, 9 T.C. 727, 735-36 (1947) (finding no income on a payment for an easement with respect to land); I.R.C. § 301(c)(2)-(3) (allowing shareholders to recover capital on the receipt of cash from the corporation before recognizing gain with respect to stock).

[259] *See*, *e.g.*, Transcript of Oral Argument at 36-37, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (concession by taxpayers' counsel that "the separation concept maybe doesn't necessarily apply in every circumstance").

[260] *See supra* note 31 (listing amicus briefs).

[261] I.R.C. § 1256(a)-(b).

[262] For this reason, § 1256 may not deviate from a constitutional realization standard, at least for

alignment, taxpayers could arbitrage the deferral granted by strict realization and the current cash consequences generated by market clearing mechanisms. For derivative contracts without periodic clearing, section 1256 opens arbitrage between deferred gains and accelerated losses on contracts with correlated economic risk.[263] Treasury has addressed such abuses of statutory antiabuse rules through regulations.[264] This example shows the nonlinear relationship between realization and antiabuse efforts, which depend on context rather than a one-way ratchet to move away from realization in some contexts.

Similarly, realization principles may produce collateral consequences that themselves lead to abuse. After *Macomber* declared stock dividends tax-free, some corporations took the position that those tax-free dividends also reduced earnings and profits, which allowed subsequent cash distributions to qualify as returns of capital or exempt distributions out of pre-1913 earnings and profits.[265] Although Congress closed this loophole by stipulating that tax-free stock dividends do not reduce earnings and profits,[266] realization as a principle facilitates these types of disjunctures. Because realization implicates the Code's fundamental plumbing, a constitutional challenge that expands or contracts realization's scope can have idiosyncratic collateral effects that facilitate abuse by taxpayers and their advisors. Doctrinally, the role of abuse and antiabuse remains underdeveloped in the realization context, since many realization-oriented antiabuse rules are statutory or regulatory. To the extent that the Constitution requires realization, the doctrinal role of abuse and antiabuse warrants greater specification.

3. Line-Drawing and Realization

Realization's murky contextual and purposive underpinnings place greater pressure on principled line-drawing with respect to the factual continuum between realization and nonrealization. An element-driven approach may prove uniquely unsuited to making these judgments.[267] As an alternative,[268] courts might consult broader values to give content to a constitutional realization principle. Potential candidates for these broader values include traditional tax policy norms such as equity, efficiency, and administrative ease. Setting aside equity (and its intrinsic normativity),[269] both efficiency and administrative ease provide prescriptions for giving content to a constitutional realization requirement. Under either set of

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derivatives traded on markets with similar clearing mechanisms.

[263] *See* Wright v. Comm'r, 809 F.3d 877 (6th Cir. 2016) (approving a listed transaction that used correlated options on foreign currency to generate current losses and future gains).

[264] *See* Prop. Treas. Reg. § 1.1256(g)-2(a) (reversing the outcome in *Wright* by eliminating mark-to-market taxation for certain options on foreign currency).

[265] George F. James, *The Present Status of Stock Dividends Under The Sixteenth Amendment*, 6 U. CHI. L. REV. 215, 231-32 (1939).

[266] I.R.C. § 312(d)(1)(B).

[267] *See* David A. Weisbach, *Line-Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1633-37 (1999).

[268] Courts' substantial repudiation of *Macomber*'s separation requirement indicates that adjudicators might take something other than an element-based approach to a constitutional realization requirement.

[269] For a brief consideration of equity in this context, see *infra* Part VI.

values, a constitutional approach to realization might look very different from current statutory law or judicial interpretation. For this reason, the availability of such values in constitutional analysis creates a greater range of *ex post* outcomes for taxpayer-initiated controversies about constitutional realization.[270]

In terms of efficiency, the classic approach is to delineate holding and disposing—a basic tenet of realization—so that economically similar transactions are taxed the same.[271] This approach is inconsistent with both existing law and historical interpretations of realization, which take a formalistic approach oriented towards legal entitlements.[272] Historically, realization has turned on changes in taxpayers' legal relationships to assets, not their economic relationships.[273] Economic relationships may have little to say on how realization works. For example, risk operates ambiguously in the realization context, both as a positive and normative matter.[274] Changes in the expected costs of risk do not have a conclusive connection to dispositions in any sense. Similarly, the nature of risk may change, but again, has little linkage to dispositions. Finally, risk-based rules may fail to specify which assets are subject to any change in risk. A constitutional realization requirement could incorporate these efficiency-oriented values in analyzing issues of holding and disposing. One explicit aim might be to minimize taxpayer game-playing across the line that triggers realization. Such an approach to constitutional realization would ameliorate many doctrinal ambiguities but simultaneously unsettle vast areas of current law.

In terms of administrative ease, the conventional legal wisdom since 1940 has hewed to the Supreme Court's dicta that realization is "founded on administrative convenience."[275] Realization might defer taxation until taxpayers have liquidity, though this rationale is contrary to current statutory and constitutional law. If no separation is required, then liquidity cannot always justify a realization requirement. Similarly, concerns about the practicalities of valuation say little about constitutional realization, which would have to be much narrower than current law to avoid valuation issues.[276] Finally, realization may reduce transaction costs in measuring income, since there already is a taxable event that incurs some overlapping costs, though the scope of taxable events is uncertain enough that this overlap may be immaterial.[277] More generally, administrative convenience introduces optionality to the doctrinal analysis of realization, which allows for departures from whatever substantive framework applies. This optionality adds further contingency to any constitutional realization analysis.

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[270] References to broader values also are consistent with this Article's characterization of a constitutional realization requirement as a taxpayer-initiated antiabuse doctrine. *See infra* Part III.C.

[271] *See* Weisbach, *supra* note 267, at 1631 (noting that distributional effects—that is, equity—also must be accounted for in line-drawing).

[272] *See* Deborah Paul, *Another Uneasy Compromise: The Treatment of Hedging in a Realization Income Tax*, 3 FLA. TAX REV. 1, 5 (1996) (describing this formalism as "inevitable").

[273] *See generally* Thompson & Weisbach, *supra* note 176 (arguing "the concept of tax ownership of fungible securities and other financial products" does not "appear to be based on economics").

[274] *See* Paul, *supra* note 272, at 21.

[275] Helvering v. Horst, 311 U.S. 112, 116 (1940).

[276] For example, in-kind remuneration for services implicates realization for the party making the payment with noncash property. *See* Treas. Reg. § 1.61-2(d)(1).

[277] *See* Schenk, *supra* note 1, *passim* (discussing various rationales for the realization rule).

To the extent connected to broader values,[278] a constitutional realization requirement potentially complicates a traditional element-based approach, even if those elements are themselves contingent on context and taxpayers' intent. Any change in economic position, as well as any change in legal relationships, could affect a determination of realization or nonrealization. Doctrinally, legal relationships matter, and ideas of economic substance make economic relationships matter too. This type of layering—riskier in adjudication than administration—complicates any constitutional concept of realization.

4. Conclusion

From a doctrinal perspective, realization requires a broad factual inquiry with little non-statutory guidance on the elements required for realization. Limited authority exists on which elements are constitutionally necessary or sufficient in various contexts, and many elements, such as separation, may prove probative without being dispositive. The role of tax abuse and nondoctrinal values in this analysis is unclear. As a legal standard, realization has few doctrinal touchstones, and any constitutional realization requirement must grapple with these questions as controversies arise. The next Section explores the consequences of realization's standard-like nature in the enforcement context.

C. Realization as an Antiabuse Doctrine

The rule-bound Internal Revenue Code is backstopped by various overarching judicial and statutory standards.[279] Often denoted as "antiabuse" doctrines, these legal standards permit "the government (and only the government) to override the literal words of a statute or regulation" to reach a result consistent with broader values, such as systemic integrity or legislative purpose.[280] Well-known antiabuse doctrines, which each comprise open-ended tests reliant on a holistic evaluation of the facts and circumstances, include the common-law step transaction doctrine, the quasi-statutory economic substance doctrine, and regulatory interventions such as the general partnership antiabuse rule.[281] Although antiabuse doctrines operate at varying levels of specification,[282] these doctrines fundamentally rely on their standard-like characteristics to police taxpayer behavior.

A revitalized constitutional realization requirement would operate as an antiabuse doctrine with a unique—and uniquely destabilizing—characteristic: taxpayers, rather than the government, generally would have the "one-way" option to assert a constitutional realization requirement to vitiate the textual application of

[278] In *Moore*, Kavanaugh relies heavily on administrative (and revenue) continuity as a norm. *See* Moore v. United States, 144 S. Ct. 1680, 1696 (2024).
[279] *See* Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 205 (2020). For a perspective on how adjudicators should parse these facts and circumstances, see Hayashi, *supra* note 2.
[280] *See* Weisbach, *supra* note 2, at 860.
[281] *See* Cunningham & Repetti, *supra* note 26. The economic substance doctrine was partially codified in I.R.C. § 7701(o) and the partnership antiabuse rule is defined in Treas. Reg. § 1.701-2.
[282] *See* Choi, *supra* note 279, at 205.

statutory or regulatory rules.[283] In the conventional pantheon of antiabuse doctrines, courts have circumscribed taxpayers' use of antiabuse doctrines—most notably, the economic substance doctrine.[284] These courts hold taxpayers to the terms of their agreements, their choice of form, and their in-the-moment interpretations of applicable law.[285] If applied appropriately, conventional antiabuse doctrines operate against game-playing taxpayers and do not offer a tool to generate additional games.[286]

For constitutional limitations on Congress and Treasury, similar restrictions on taxpayers' claims do not—and cannot—apply. To the extent that the Constitution mandates realization, taxpayers have a choice. Taxpayers can follow the dictates of Congress and Treasury, or they can assert, before- or after-the-fact, that those dictates fail to meet the Constitution's requirements. These challenges flow directly from the constitutional nature of a *Macomber*-style realization requirement. These alternatives roughly parallel the government's choices under conventional government-initiated antiabuse doctrines, where government sets the rules then can disclaim their application in a specific situation. Under a constitutional realization requirement, taxpayers can arrange their affairs to minimize taxes, then can disavow their choice of form in favor of a better outcome under the Constitution.

Two important differences emerge when juxtaposing conventional antiabuse doctrines and this Article's characterization of a constitutional realization requirement as a taxpayer-initiated antiabuse doctrine. First, realization and nonrealization pervade current statutory law, which gives taxpayers many opportunities to challenge the current Code and Regulations as violating a constitutional realization requirement of uncertain scope and doctrinal content. Second, the optionality intrinsic in a constitutional realization requirement foments explicit or tacit challenges. Taxpayers (and not Congress or Treasury) can either accept or challenge the Code or Regulations' application of a constitutional realization requirement. Taxpayers generally will seek the better outcome for them, with a strong likelihood of targeted claims supported by interest groups. Not only is a constitutional realization requirement a one-way law in favor of taxpayers, but the existence of this taxpayer-initiated antiabuse doctrine also is likely to generate significant controversy and aggressive position-taking, which in turn have serious implications for the evolution of tax law.

IV. THE HOLLOWING-OUT OF TAX LAW

For more than a century, the Supreme Court left the Pandora's box of

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[283] *See* Weisbach, *supra* note 2, at 877-79.

[284] Sheldon I. Banoff & Richard M. Lipton, *IRS Will Not Allow Taxpayers to Self-Impose the Anti-Abuse Rules*, 110 J. TAX'N 380, 380-81 (2009).

[285] *See* Smith, *supra* note 27, at 146.

[286] For example, consider a taxpayer that chooses an ostensibly tax-advantaged form for a transaction. On audit, the IRS disallows the transaction's purported tax benefits, leveraging principles of realization or nonrealization to do so. Then, the taxpayer disavows the transaction's form in favor of a characterization that carries some, but not all, of the expected tax advantages. *See* William S. Blatt, *Lost on a One-Way Street: The Taxpayer's Ability to Disavow Form*, 70 OR. L. REV. 381 (1991).

constitutional realization largely closed. After *Macomber*, commentators read subsequent decisions to minimize the case's constitutional implications in favor of an administrative understanding of the realization requirement. Lawmakers, judges, and practitioners largely embraced this shift. Although *Moore* did not address a putative constitutional realization requirement directly, the case cracks the lid of Pandora's box. Opening the box fully would require backfilling the content of constitutional questions latent across decades of legislation, administrative interpretation, and judicial decisions. Ostensibly settled issues may acquire new life.

For this reason, even *Moore*'s whisper of a constitutional realization requirement risks a sort of "hollowing out" of federal income tax law. Although entire statutory schemes might fall,[287] this top-down abrogation only captures some of the systemic risk posed by a constitutional realization requirement. A constitutional realization requirement also would erode the tax system from the bottom up, as portions of the plumbing in the Code and Regulations run afoul of a reinvigorated constitutional realization requirement. Much of this plumbing relies on some statutory or regulatory concept of realization or nonrealization, which increases the number and variety of potential targets for invalidation under the Constitution. Because a constitutional realization requirement operates (uniquely) as a taxpayer-initiated antiabuse rule,[288] these targets face a greater number of potential challenges. Not every challenge will succeed, but even a limited number of bottom-up victories threatens tax law's systemic integrity.

Under a constitutional realization requirement, the hollowing out of tax law would occur through the targeted elimination of statutory and regulatory mechanics, as well as shifts in taxpayer-government dynamics that result from a constitutional realization requirement. This Part elaborates three specific mechanisms that facilitate this hollowing out. Then, this Part develops examples of how this hollowing out might unfold in partnership and corporate taxation.

A. Bottom-Up Challenges to the Tax System

Taxpayers can deploy a constitutional realization requirement to assert bottom-up challenges to the tax system through three distinct mechanisms that leverage the public-private nature of tax administration, as well as risk-aversion by legislators and regulators. These mechanisms involve private interpretations of tax law in structuring transactions or taking positions on tax filings, litigation against the public enforcement of the Code and Regulations, and government actors' reticence to challenge constitutional boundaries when crafting new laws or rules. The effect is piecemeal erosion of tax law's internal integrity through public and private actions and inaction.

Most transparently, taxpayers may litigate to invalidate provisions in the Code or Regulations under constitutional arguments. In the context of a constitutional realization requirement, this litigation would occur on a case-by-case basis, and some provisions may survive, while others fall. Because realization

[287] *See supra* note 31 (listing specific statutory provisions threatened by a constitutional realization requirement).
[288] *See supra* Part III.C.

operates as a legal standard (and is relatively underdeveloped),[289] specific outcomes may prove difficult to predict or conceptually inconsistent.[290] Human preferences and fallibility introduce some uncertainty to judicial decision-making, and not all outcomes are high-quality. The structure of U.S. federal courts amplifies these concerns. Even if the Supreme Court avoids future cases about constitutional realization, Circuit and District Courts are likely to face the issue. As idiosyncratic lower-court outcomes proliferate, any structural coherence in the U.S. tax system erodes.[291] To the extent that the U.S. tax system relies on coherence, the negative implications of litigation compound over time.

In addition to litigation, taxpayers' private tax positions may undermine the tax system's fundamental structure. On returns or other filings, taxpayers may assert a constitutional realization requirement to avoid the literal application of the Code or Regulations.[292] Overwhelmingly, these private tax positions do not enter the formal controversy process, so they are not vetted to finality in a traditional sense.[293] For this reason, these private tax positions may stand without government scrutiny. Furthermore, these private tax positions may become known among, and spread through, professional and business communities.[294] Aggressive or outlier positions may persuade new adherents and shift community norms over time. Through these private routes, a constitutional realization requirement may gain purchase—and acquire *de facto* legal content through the unchallenged advice and opinions of taxpayers' advisors.[295] Outside of the conventional controversy process, a constitutional realization requirement still threatens the integrity of the existing Code and Regulations.

Finally, a constitutional realization requirement would dampen legislative and regulatory reform efforts. These effects extend beyond the category of wealth taxes or mark-to-market taxes for high-income or wealthy taxpayers.[296] Technical reform proposals may—and typically will—implicate issues of realization and

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[289] *Id*.

[290] *Cf*. Kaplow, *supra* note 2, at 611-16 (discussing predictability in the development of legal standards).

[291] Because tax cases may proceed in District Court, Tax Court, or the Court of Federal Claims, the potential for disparate outcomes is greater in tax law.

[292] These challenges could be technical. For example, realization might require accelerated depreciation, which would unsettle businesses' basic calculations of income and loss. *See* Douglas A. Kahn, *A Proposed Replacement of the Tax Expenditure Concept and a Different Perspective on Accelerated Depreciation*, 41 FLA. ST. U. L. REV. 143, 151-56 (2013).

[293] Although audit rates vary substantially by income level and type of filer, they generally average under 1%. *See Briefing Book: What Is the Audit Rate?*, TAX POL'Y CTR. (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-audit-rate [https://perma.cc/E535-B36T]; *see also* Elkins, *supra* note 2, at 50 ("[A]s long as audit rates are low, standard-based [antiabuse doctrines] can have little effect on the practical tax base and unfairly discriminate against those whose returns happen to be audited.").

[294] *See* Sloan G. Speck, *Tax Planning and Policy Drift,* 69 TAX L. REV. 549, 559-63 (2016) (describing public-private "policy communities").

[295] *See id*. at 563-66. (describing how private actors have a "first-mover advantage" in interpreting tax law); *see also* Assaf Likhovski, *The Duke and the Lady:* Helvering v. Gregory *and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 968-71 (2004) (describing "cycles of statutory interpretation").

[296] *See* Reuven S. Avi-Yonah, *Can* Moore *Be Limited?*, 112 TAX NOTES INT'L 963, 963 (2023) (noting that *Moore* was brought to forestall wealth and mark-to-market taxes).

nonrealization.[297] For example, several recent partnership tax reform proposals touted by Sen. Wyden rely on nonrealization principles to shift income among partners in tax partnerships.[298] These proposals include mandating revaluations for partnership property under section 704(b), which would affect partners' current and future net income from the partnership without requiring a partnership-level realization event,[299] and requiring taxpayers to use the remedial method for section 704(c), which creates notional (and offsetting) items of income and loss for partners with respect to all property contributed to the partnership. Both of these changes ostensibly prevent abuses of optionality under current law. Because these reforms bear an uneasy relationship to conventional realization, a constitutional realization requirement might give lawmakers an additional reason to reject Wyden's proposals.[300] In this way, a constitutional realization requirement could shape Treasury's enforcement strategies and limit Congress's options for legislative reform.[301] As a constitutional realization requirement gains content through adjudication and private-sector interpretation, such a constraint also forestalls reforms that might prevent the tax-system's erosion from the bottom up.

One issue that runs through these concerns involves taxpayer elections into a nonrealization regime. Writing for the Court in *Moore*, Justice Kavanaugh expressed skepticism that "shareholder consent" could overcome a constitutional realization requirement "and allow Congress to enact an otherwise unconstitutional tax."[302] Some *Moore amici* also argued that such electivity is unconstitutional,[303] while petitioner's counsel relied heavily on elections to argue that existing law would survive a constitutional realization requirement.[304] If elections out of realization are unconstitutional, then a number of legal regimes would stand on uncertain ground, at least for some taxpayers making the elections. These regimes range from elective mark-to-market regimes, which apply to dealers in securities,[305] to the check-the-box rules for entity classification, which allow entities to elect corporate or partnership treatment.[306] If elections are constitutional, two issues

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[297] *See* George K. Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 LAW & CONTEMP. PROBS. 241, 270-75 (2018) (describing structural and nonstructural reforms over time in various areas of business taxation).

[298] *See* Monte A. Jackel, *New Wyden Partnership Tax Proposals Deserve Consideration*, 173 TAX NOTES FED. 1709 (2021); *see also* Walter D. Schwidetzky, *The Wyden Proposals on Partnership Debt: Step Forward or Back?*, 76 TAX LAW. 389, 412 (2023) (discussing § 752).

[299] *See* Schwidetzky, *supra* note 298, at 410.

[300] Concerns about constitutionality have affected prior reform efforts, most notably efforts in the late 1960s to treat death as a realization event. *See supra* note 168 (discussing the legislative history of the Tax Reform Act of 1969).

[301] *See* Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. REV. 131, 141-43 (2001) (discussing abuses involving elective regimes in partnership taxation).

[302] Moore v. United States, 144 S. Ct. 1680, 1695 (2024). *See also* Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOU. L. REV. 1021 (2023) (suggesting a framework for determining whether and how individuals may waive constitutional rights).

[303] *See* Brief for Tax Law Center at NYU Law et al. as Amici Curiae Supporting Respondent, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[304] *See* Brief for Petitioner at 51-52, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[305] I.R.C. § 475.

[306] Treas. Reg. § 301.7701-3. For example, nonrealization principles in U.S. partnership taxation may preclude foreign entities from electing into such treatment, rather than being taxed as corporations under default rules.

arise: elections may be compelled, and elections may lack sufficient infrastructure to waive constitutional rights. Under current law, qualifying electing fund (QEF) elections for passive foreign investment companies (PFICs) are effectively compelled, since the default regime is (intentionally) punitive to taxpayers.[307] Similarly, consent dividends to preserve real estate investment trust (REIT) status are effectively compelled, since the consequences of lost status are typically catastrophic.[308] To the extent of taxpayer electivity, the three mechanisms outlined in this Section offer greater potential to sow chaos within current tax law.

B. Examples from Partnership Taxation

Although the *Moore* majority effectively blessed pass-through taxation as an alternative to entity-level taxation,[309] a constitutional realization requirement still poses bottom-up threats to pass-through regimes such as subchapter K, which governs tax partnerships.[310] The risk is less that any form of pass-through taxation will fall in its entirety, than that an explicit or implicit realization requirement will undermine the structure of these regimes over time. The mechanism for this systemic erosion need not be federal courts. Particularly in the context of partnership taxation, taxpayers may look to their legal and accounting specialists for advice that certain aspects of subchapter K violate a constitutional realization requirement.

The bottom-up erosion of subchapter K may occur in several areas. In certain circumstances, current regulations permit partnerships to revalue their property for book purposes but not tax purposes. These revaluations, or "book-ups," are mandatory on the exercise of noncompensatory options.[311] In other situations, revaluations maintain economic parity among partners within the Regulations' safe harbor regime for partnership allocations—an administrative advantage that may advantage some partners while disadvantaging others. This differential treatment of partners arises because revaluations create reverse 704(c) allocations, which shift income and loss among partners at variance to those partners' fundamental economic sharing arrangement, as embodied by the contractual agreement among the partners.[312] The events that enable revaluations—such as contributions by a partner, distributions to a partner, or the exercise of noncompensatory options—may not rise to the level of realization, or may not constitute realization for all partners or the partnership itself.[313] These events, however, operate to fix the

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[307] I.R.C. § 1295.

[308] *See* I.R.C. § 856(g)(3) (stating that the lock-out period for REIT status following termination or revocation is five years).

[309] *See Moore*, 144 S. Ct. at 1685 (stating the issue in *Moore* as one of attribution of realized income).

[310] *See* I.R.C. §§ 701-771.

[311] *See* Treas. Reg. § 1.704-1(b)(2)(iv)(f); *see generally* Daniel S. Goldberg, *Partnership Revaluations: Book-Ups Are Your Friends (Usually)—Planning with Revaluations and Their Interplay with Section 704(c)*, 74 TAX LAW. 345 (2021).

[312] *See* Treas. Reg. § 1.704-1(b)(2)(iv)(g). The partners agree on whether to revalue property, if elective, and generally agree to comply with subchapter K.

[313] Treas. Reg. § 1.704-1(b)(2)(iv)(f)(5). To the extent that partners' relative interests in the partnership change, "the principles of § 704(c)" may apply to determine the partners' prospective tax consequences. *See id*.

income tax consequences for all partners at the time of the revaluation. To the extent that revaluations affect partners' income without a corresponding realization event for that partner or the partnership, the revaluation regime may be infirm under a constitutional realization requirement.

Similarly, the statutory basis adjustments that flow from distributions of partnership property may not survive a constitutional realization requirement.[314] These adjustments are required at all points after an initial election,[315] as well as in contexts that potentially shift losses among partners.[316] By affecting the partnership's basis in different assets, these adjustments implicate the sharing of net income and loss among all current partners. In-kind distributions of partnership property, however, may not constitute a realization event, or may constitute a realization event only for the recipient partner. Similarly, any shifting of basis among assets may or may not have a constitutional tether that mandates a particular set of outcomes.[317] These mechanical and computational regimes stretch the idea of attribution in ways that implicate realization more generally.[318]

Furthermore, certain "disproportionate distributions" to partners implicate a complex regime of deemed exchanges that generally seek to maintain partners' relative shares of ordinary income and capital gain or loss.[319] These deemed exchanges can accelerate the recognition of income for all partners, even those not involved in an actual distribution of property. There is not clear realization event for these nonrecipient partners—or the partner that receives an in-kind distribution, if such distributions are not realization events.[320] As with partner and partnership basis adjustments, a court would need to determine whether these rules represent appropriate attribution of income or implicate realization principles. In either case, a constitutional judgment would apply.

Finally, changes in partners' shares of partnership debt may result in deemed distributions and yield partner-level income without an unambiguous realization event.[321] Changes in debt shares may follow from a new or modified contractual agreement, such as a guarantee of partnership debt by a partner, or they may result from a repayment of debt by the partnership. The legal question is whether these contractual arrangements (or their modification, or debt repayment) constitute a realization event. If realization exists, there remains a further question of whose income may be affected as a result of that realization. A constitutional realization requirement implicates the outcomes of both questions.

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[314] *See* I.R.C. § 734 (detailing statutory basis adjustments).
[315] I.R.C. § 754.
[316] These basis adjustments are mandatory when the partnership has a substantial basis reduction. I.R.C. § 734(a).
[317] *See* I.R.S. Notice 2024-54, 2024-28 I.R.B. 24; Rev. Rul. 2024-14, 2024-28 I.R.B. 18 (each discussing anti-basis shifting rules).
[318] More generally, subchapter K shifts income (or permits income shifts) among partners in a number of ways. *See* Andrea Monroe, *What We Talk About When We Talk About Tax Complexity*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 193, 204 (2016).
[319] *See* I.R.C. § 751(b). This regime is notoriously infirm. *See* William D. Andrews, *Inside Basis Adjustments and Hot Asset Exchanges in Partnership Distributions*, 47 TAX L. REV. 3 (1991); Karen C. Burke, *Hot Asset Exchanges: Integrating § 704(c), 734(b), and 751(b)*, 70 TAX LAW. 711 (2017).
[320] *See* Brief of Professor Theodore P. Seto as Amicus Curiae Supporting Respondent at 21-22, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800).
[321] *See* I.R.C. § 752.

These disparate regimes compose part of partnership tax's fundamental mechanics. Each regime attempts to ensure that partners' income properly reflects their relationship to the partnership, that subchapter K's single-level tax operates in a coordinated manner, and that taxpayers do not abuse subchapter K's flexibility. Each regime may survive under a permissive attribution of income doctrine, and each regime may fall under a constitutional realization requirement. To the extent that all or part of these regimes is unconstitutional, subchapter K's operation is impaired, even if pass-through taxation more generally survives. In this way, a constitutional realization requirement could eat away at subchapter K from the bottom up.

C. Examples from Corporate Taxation

Decades of judicial deference to Congress have left many fundamental questions of realization unresolved, and those issues' resolution against the government could unravel longstanding mechanics essential to the basic operation of tax law. In corporate taxation, the Tax Reform Act of 1986 firmly entrenched, as a statutory matter, the repeal of the *General Utilities* doctrine, which allowed corporate taxpayers to avoid recognizing corporate-level gain on certain distributions in-kind. Whether in-kind distributions themselves are realization events remains an open question.[322] To the extent that some or all in-kind distributions do not constitute a realization event under the Constitution, one of the fundamental antiabuse principles in corporate taxation would be seriously impaired.

For corporate-level tax, realization may not matter because the tax instrument itself is an excise not subject to the apportionment requirement.[323] In-kind distributions may not be excises, however, if they do not involve "doing business in a corporate capacity."[324] Furthermore, in-kind distributions generate current earnings and profits that may support dividend characterization at the shareholder level, or in-kind distributions may constitute a return of shareholders' capital before generating shareholder-level income.[325] In any of these cases, a constitutional realization requirement would threaten the basic mechanics of corporate taxation.

These concerns about the *General Utilities* doctrine are more than merely theoretical. In taxable REIT separations, there is a statutory requirement to expunge, or "blow out," the new REIT's earnings and profits (E&P).[326] If the integrated business's operations are distributed as assets (for example, to a partnership operations company), the question is whether any entity-level gain would increase E&P and thus the amount of income shareholders would recognize in the separation. Whether the E&P blow-out includes section 311(b) gain directly

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[322] *See* Don Leatherman, *The Scope of the* General Utilities *Repeal*, 91 TAXES 235 (2013).
[323] *See* John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH U. L. REV. (forthcoming 2024).
[324] Flint v. Stone Tracy Co., 220 U.S. 107, 146 (1911).
[325] Under current law, such distributions generate income first. *See* I.R.C. § 301(c).
[326] *See* I.R.C. § 857(a)(2)(B).

affects shareholders' income.[327] This type of gain may survive constitutional scrutiny as an excise tax, or it may fall as an unconstitutional violation of the realization requirement.

As in partnership taxation, a constitutional realization requirement threatens, or at least draws into question, the basic plumbing in corporate taxation, often in highly granular ways. Such a realization requirement would pressure tax law's integrity from the bottom up, as well as from the top down. For this reason, the current discourse about systemic concerns seriously understates the havoc that a constitutional realization requirement could wreak.

V. COMPLEXITY AND THE REALIZATION REQUIREMENT

A constitutional realization requirement introduces a novel tool in the iterative compliance game between the government and taxpayers. Such a requirement would operate as a taxpayer-initiated antiabuse doctrine and generate concomitant bottom-up threats to the tax system's coherence.[328] From this perspective, a constitutional realization requirement has additional implications for the tax system's complexity. This complexity flows from how Congress, Treasury, and taxpayers each respond to a constitutional realization requirement. The central insight is that all of these responses are likely to increase the tax system's complexity over time.

The model for these interactions is well-established.[329] In a rule-bound system designed to police common transactions (such as existing tax law), private planners have an incentive to seek esoteric structures for their clients that confer tax benefits. These structures are definitionally uncommon in the absence of tax benefits. But as taxpayers adopt these structures, they become increasingly common.[330] One solution is more rules that draw finer distinctions to appropriately tax these newly common transactions. These rules are (definitionally) more complex, since they increase law's granularity.[331] This phenomenon has a ratcheting effect in which rule-based complexity increases over time in response to iterative tax planning.

The conventional solution to this phenomenon is overarching legal standards—government-asserted antiabuse doctrines. These doctrines constrain rules-oriented planning by muddying the line between permissible and impermissible transactions. As long as these antiabuse doctrines are well-targeted, uncommon tax-advantageous transactions are deterred, do not become common,

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[327] *See* I.R.C. § 312.

[328] *See supra* Part IV.A.

[329] *See* Weisbach, *supra* note 2; *see also* Surrey, *supra* note 36, at 707 n.31 ("It is clear that [antiabuse doctrines] save the tax system from the far greater proliferation of detail that would be necessary if the tax avoider could succeed merely by bringing his scheme within the literal language of substantive provisions written to govern the everyday world.").

[330] This phenomenon is referred to as "the uncommon becoming common." *See* Weisbach, *supra* note 2, at 871.

[331] For an overview of the literature on tax complexity, see Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 IND. L.J. 1509, 1514-15 (2017) (identifying rule-based, computational, structural (or transactional), and compliance complexity). Tax complexity has both procedural and substantive elements. *See id.* at 1516-17.

and do not require rule-bound solutions. Tax law can remain less complex.[332]

A constitutional realization requirement flips this strategy on its head. As a taxpayer-initiated antiabuse doctrine, a constitutional realization requirement allows taxpayers, and generally not the government, to challenge the existing Code and Regulations, which rely deeply on concepts of realization and nonrealization. These bottom-up challenges may spur responses from the government and taxpayers, and these responses have implications—generally negative—for the tax system's complexity. This Part sketches these responses.

One additional question is whether a constitutional realization requirement might become more rule-like over time, as enforcement produces better delineation of the requirement's relevant facts and doctrinal elements.[333] Because the bulk of interpretation of any constitutional realization requirement will occur privately, enforcement probably will have limited effect in reducing a standard-driven analysis to a clear system of rules.[334] Indeed, an underdeveloped realization requirement may foment widely divergent private positions that never surface in a way that settles norms or practice with respect to the issue. For this reason, a constitutional realization requirement seems likely to retain its function as a taxpayer-initiated antiabuse doctrine for a substantial period of time.

A. Government Responses: Promulgation

Tax law has been described as a "paradigmatic system of rules."[335] These rules are written *ex ante* by government actors, principally Congress and Treasury, in the context of government-asserted antiabuse doctrines that backstop these rules. To the extent that taxpayers can initiate their own antiabuse doctrine by asserting a constitutional realization requirement, Congress and Treasury should adjust their rulemaking practices to reflect the risk that their rules violate the Constitution. Additionally, because a constitutional realization requirement operates as a (largely underdeveloped) legal standard, Congress and Treasury lack certainty as to whether their rules will survive taxpayers' challenges.

One possibility is that Congress and Treasury will issue fewer rules, leaving tax law's content underspecified relative to Congress and Treasury's preferences.[336] Some of this space could be filled with "symmetrical" standards that operate in a more neutral fashion relative to antiabuse doctrines.[337] Examples of symmetrical standards include the distinctions between debt and equity and between employees and independent contractors. Both of these examples impose notorious compliance

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[332] The essential insight is that the choice between rules and standards has implications for complexity in an iterative format where planning exists. *See also* Elkins, *supra* note 2, at 54-55 (discussing the implications of planning and audit in the context of antiabuse doctrines).

[333] *See supra* note 11 (discussing the evolution of standards into rules).

[334] This framing highlights the jurisprudential ambiguity in the analysis of rules and standards. *See* Schlag, supra note 2, at 424-25.

[335] Weisbach, *supra* note 2, at 860.

[336] Taxpayers may diverge on how much content they want Congress and Treasury to specify. For this reason, underspecification has distributional effects that are regressive if better-off taxpayers prefer underspecification compared to worse-off taxpayers.

[337] *See* Alex Raskolnikov, *Relational Tax Planning Under Risk-Based Rules*, 156 U. PA. L. REV. 1181, 1193-94 (2008).

costs on taxpayers and adjudicators. Even to the extent that Congress and Treasury could promulgate the same legal content in a shift towards symmetrical standards, more high-frequency transactions would be governed by standards, which increase compliance costs relative to rules.[338]

Alternatively, Congress and Treasury could modify the structure of their proposed rules in ways more likely to comport with a constitutional realization requirement. For example, assume that Congress prefers Rule A, but Rule A arguably is infirm in a constitutional sense. Congress could reduce the odds of invalidation (or nonacceptance by taxpayers) through three mechanisms: Congress could enact Rules B and C, which together have the same effect as Rule A, wrap Rule A inside another policy that mitigates Rule A's infirmity, or move Rule A outside of the tax system.[339]

These workarounds impose costs when lawmakers cannot perfectly replicate the effect of Rule A. When attempting to replicate Rule A, there may be unavoidable policy changes. Similarly, workarounds risk legislative errors to the extent that they are more difficult to execute than Rule A alone. Moreover, workarounds may shift compliance costs to taxpayers and adjudicators, even if the underlying policy remains the same. For these reasons, workarounds motivated by a constitutional realization requirement are likely to be less effective and efficient than Congress and Treasury's preferred rules. Although Congress often deals with these types of workaround issues, a constitutional realization requirement would increase this type of legislative manipulation.[340]

Finally, Congress may adopt holistic strategies to address constitutional concerns about realization. For example, Congress may institute a greater number of elective regimes that explicitly do not rely on realization.[341] Setting aside concerns about compelled elections and the adequacy of any waivers of constitutional prerogatives, elective regimes increase transactional and procedural complexity. Unsophisticated taxpayers are at a disadvantage in such regimes, with adverse equity and distributional consequences. Sophisticated taxpayers tend to use elective regimes to their advantage, which can have unintended effects on other aspects of the tax system.[342]

B. Taxpayer Responses: Compliance

In general, a constitutional realization requirement is likely to encourage

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[338] Kaplow, *supra* note 2, at 577. Implicitly, Congress and Treasury also could rely more heavily on antiabuse doctrines, which is discussed below.

[339] For the reverse phenomenon, see NFIB v. Sebelius, 567 U.S. 519, 570 (2012) (holding the individual mandate for healthcare constitutional because it was a tax).

[340] This effect could be described as uncommon legislative strategies becoming common, with concomitant implications for complexity.

[341] For a discussion of elections under a constitutional realization requirement, see *supra* text accompanying notes 302-08. Another holistic strategy could be to increase substitute taxation of counterparties to nonrealization transactions or to disallow losses to curb abuse (which might be permissible, if a constitutional realization requirement is asymmetrical with respect to gain and loss).

[342] *See, e.g.*, Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 453-55 (2005); Heather M. Field, *Checking in on "Check-the-Box"*, 42 LOY. L.A. L. REV. 451, 481 (2009).

planned transactions. To the extent that these transactions become common, the government must enact rules to regulate these transactions or rely on government-asserted antiabuse doctrines to deter these transactions. If the government generates more rules, complexity increases, as do the costs of compliance for taxpayers that do not plan but still must learn about the law. If the government presses other antiabuse doctrines in enforcement, the costs of enforcement rise.[343] This dynamic relies on the fact that a constitutional realization requirement operates as a taxpayer-initiated antiabuse doctrine.

Taxpayers, in a sense, act as portfolio managers with respect to their tax compliance risk. For tax-planned transactions, a constitutional realization requirement gives taxpayers another tool to succeed against the government during enforcement proceedings. In addition, taxpayer antiabuse doctrines tend to smooth discontinuities in rules from taxpayers' perspectives only, which allows for favorable outcomes, even if taxpayers misjudge any arbitrage points in tax-planned transactions. For these reasons, a constitutional realization requirement reduces taxpayers' risk with respect to highly tax-planned transactions, and taxpayers will have an incentive to engage in more of these types of transactions.

Somewhat counterintuitively, a constitutional realization requirement also increases taxpayers' risk with respect to transactions that do not reflect tax planning. Although Treasury may not challenge these everyday transactions on audit, other taxpayers, through their use of a constitutional realization requirement, may cast doubt on the tax system's underlying infrastructural rules through the "hollowing out" process described in this Article. This manufactured doubt may reduce taxpayers' confidence in how everyday transactions are treated, or how the underlying mechanics of the Code and Regulations operate. In this way, a constitutional realization requirement rebalances risk across taxpayers' transactions: tax-planned transactions become relatively more attractive, while non-planned transactions become relatively less so.[344]

Overall, the use of constitutional realization as a taxpayer-initiated antiabuse doctrine leads to uncommon tax-planned transactions becoming more common. If Congress and Treasury respond with more rules, the tax system becomes more complex—the reverse effect that follows from government-initiated antiabuse doctrines. This process may repeat, with a ratcheting effect. One caveat is that unsophisticated taxpayers may benefit from a constitutional realization requirement, at least to the extent that realization comports with their (uninformed) expectations about the content of law. As an antiabuse doctrine, a constitutional realization requirement would tend to smooth discontinuities in rules, which could in turn alleviate transactional complexity by aligning outcomes with the expectations of unsophisticated (or uninformed) taxpayers.[345] This benefit, however, seems unlikely to outweigh (and perhaps should not normatively outweigh) any increased costs due to tax planning and this planning's ratcheting effect on systemic complexity.

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[343] *See infra* Part V.C. (discussing the government's enforcement responses).

[344] This shift has distributional effects.

[345] *See* Emily Cauble, *Unsophisticated Taxpayers, Rules Versus Standards, and Form Versus Subtance*, 52 LOY. U. CHI. L.J. 329, 337 (2021).

C. Government Responses: Enforcement

A constitutional realization requirement could encourage the government to increase and broaden its application of government-initiated antiabuse doctrines during the enforcement process. For example, if the constructive sale rules of section 1259 are constitutionally deficient because they abrogate a realization requirement, Treasury or courts may deploy the economic substance doctrine to argue that the taxpayer still has income, notwithstanding nonrealization. Similarly, if courts abrogate the gift loan rules in section 7872, the government may press for a substitute through other judicial doctrines, which themselves are subject to significant uncertainty in application. In both cases, the government deploys a completing antiabuse rule to combat realization as a taxpayer-initiated antiabuse rule.

In effect, a constitutional realization requirement encourages Congress and Treasury to substitute government-asserted antiabuse doctrines for rule-bound regimes in the Code and Regulations. This substitution has normative stakes, in that overreliance on antiabuse doctrines may impair the tax system's overall quality. The Code and Regulations stipulate rules for a reason. In addition, this substitution may lead to greater uncertainty about the quantitative and qualitative outcomes possible through adjudication. While not a direct driver of complexity, uncertainty imposes costs on the enforcement process. Dueling antiabuse doctrines may have adverse effects on the content of law—and those effects may closely mimic complexity.

VI. CONCLUSION

After eight decades of relative quiescence, a revitalized constitutional realization requirement would present serious threats to the current income tax system. To the extent that a constitutional realization requirement operates as a taxpayer-initiated antiabuse rule, such a requirement risks a hollowing out of everyday aspects of the current tax system. What fills these gaps likely will lead to increased complexity—a negative outcome on a grander scale than envisioned by commentators and the Court in *Moore*.

These mechanisms have further implications for inequity and distribution. Realization is notoriously associated with inequitable treatment of taxpayers in both a horizontal and vertical sense—the reason for many of the Code's deviations from the realization norm. A constitutional realization requirement would allow well-advised and well-resourced taxpayers to press further against Congress's efforts to combat realization-oriented abuse. Furthermore, the types of challenges these taxpayers bring may hollow out the tax law and lead to increased complexity. These emergent infirmities in the Code and Regulations will themselves have adverse distributional effects—likely disadvantaging less-savvy taxpayers. Neither of these outcomes is desirable.