VIEWPOINT

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The Supreme Court, Steve Jobs, And the Billionaire Income Tax

by Donald B. Susswein

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In this article, Susswein examines a key question for the Supreme Court's review in *Moore*: whether it is constitutional to systematically impose an income tax on transactions that generate no economic gain.

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Introduction

The Supreme Court may soon address whether the Constitution allows Congress to tax unrealized capital gains (and other forms of unrealized income).[1] That issue does not actually appear to be present with the mandatory repatriation tax (MRT) or with subpart F. As the government argues in *Moore*, the MRT only applies to income previously realized at the corporate level and imputed to certain shareholders, much as if they were partners in a partnership.

The Ninth Circuit went much further, however, and suggested that there was no realization requirement at all in the 16th Amendment. The government certainly would find that appealing. That may be why the Supreme Court decided to hear the case.

This article assumes, solely for the sake of discussion, that the Ninth Circuit's view on the 16th Amendment[2] may prevail. Even in that case, however, two other important constitutional issues would be raised by a tax on unrealized capital gains. That topic is not technically before the Court but it may have gotten the Court's attention.[3]

The first issue is the arguable unconstitutionality of systematically imposing an income tax on transactions that do not generate any economic gain at all — when an asset appreciates in one year (and is taxed because of that paper gain) and depreciates in a later year when the asset is actually sold. A system that generally treats each year as a separate and distinct tax year, does not allow the prior year's tax to be recomputed or adjusted when facts assumed in the earlier year are negated by later events,[4] does not allow for unlimited capital loss carrybacks or a similar mechanism to refund the

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[1]*Moore v. United States*, No. 2:19-cv-01539 (W.D. Wash. 2020), *aff'd*, 36 F.4th 930 (9th Cir. 2022), *reh'g den.*, 53 F.4th 507 (9th Cir. 2022), *cert. granted*, No. 22-800 (June 26, 2023).

[2]By its terms, *Eisner v. Macomber*, 252 U.S. 189 (1920), holds that there is a meaningful and very specific "realization" requirement in the 16th Amendment that precludes (at least in the case of a domestic corporation) imputing the corporation's income to the shareholders as if they were partners. *Macomber* holds that an actual distribution of corporate income (which a stock dividend is not) is required constitutionally to tax the shareholders on that (domestic) corporation's income. The Court's analysis evidently does not apply to shareholders in certain foreign corporations not subject to any U.S. corporate tax. Explaining this view of *Macomber* is not the purpose of this article, but those interested might review the conclusion of this article.

[3]*See* Donald B. Susswein and Kyle Brown, "Possible New Issue in Unrealized Gains Case," *Tax Notes Federal*, Aug. 28, 2023, p. 1487.

[4]*See Arrowsmith v. Commissioner*, 344 U.S. 6 (1952); *United States v. Lewis*, 340 U.S. 590 (1951).

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earlier year's tax, and does not even keep a prior year open for correction beyond three years, would not be taxing economic gain. Even if that were not a problem under the 16th Amendment or the direct tax clause, it would seem to be a problem under the Fifth Amendment. It would appear to be an arbitrary taking of the taxpayer's property. That is a taking of an amount — designated as a tax — equal to a specified percentage of the unrealized gain (when there was no actual economic gain from the overall transaction).

The second issue may not be familiar to some in the tax field. It is well known that a tax on unrealized capital gains could compel the taxpayer to sell his appreciated property, solely to pay the tax and avoid having the property seized for non-payment of taxes. That is one of the reasons Congress has avoided taxing unrealized capital gains. If that policy changed, the effect might be comparable to an explicit compulsion to sell using the power of eminent domain. That might be done with a state or city income tax as well as a federal tax. Even if just compensation were received because the property was sold to a private party at market value, it might be considered a violation of the Fifth Amendment's public-use clause. That is, a governmental rule, regulation, or tax that indirectly compels the sale of private property to another private party when the sale is not being compelled for any public use or public benefit related to the use (or method of ownership)[5] of the property itself. The Supreme Court in *Kelo*[6] suggested that merely generating more tax revenues might not qualify as a valid public purpose for a forced sale. In that way, these two issues may intersect.

The Example of Steve Jobs and Apple Computer

To understand the constitutional issues, it may be helpful to focus on a relatively simple case adapted from the well-known history of Apple Computer Inc. and Steve Jobs. When Apple went public in 1980 the initial public offering raised $100 million. That demonstrated a market capitalization of approximately $1.8 billion. As a result, Jobs and a few of his co-founders or early-stage investors became instant megamillionaires. If we assume that Jobs was holding roughly 30 percent of the company's shares (with a zero basis), his net worth (on paper) jumped to $500 million. That's only because Apple had a market capitalization (on paper) of $1.8 billion after raising $100 million for the company (not for Jobs individually). Because Jobs's publicly traded shares were worth $500 million (on paper), he had $500 million of unrealized capital gains.

If Jobs did not sell his shares but was taxed on his unrealized capital gains on publicly traded property, he would have a tax bill (at a 20 percent rate) of $100 million. His co-founder (if he also owned roughly 30 percent of the company's shares) would also have a tax bill of $100 million. Obviously, they would have no way of paying those taxes. According to the story, those two fellows had been struggling for cash a few years earlier, selling a used Volkswagen van and a second-hand HP scientific calculator to raise a few thousand dollars to buy computer chips for their prototypes.

In the real world, they would have to sell their Apple shares (or a portion of them) just to pay their $100 million tax bills. As a result, in the real world, it is unclear whether the company could have raised money in the capital markets if investors knew that the founders were going to sell their holdings (to pay taxes). With that seemingly punitive system of taxation, it is also unclear whether those two brilliant entrepreneurs would have even considered starting a company at all.

The same issues would arise, say, for an angel investor who infused $100,000 into the company for a 10 percent share that was suddenly worth $18 million. Having to pay capital gains taxes, and potentially sell all or a portion of an asset that was doing well, just to pay that tax, would be a serious crimp on the attractions of equity investing. Simply put, a callable bond is not the same thing as a non-callable bond. The investors who paid $100 million for Apple stock issued in the IPO evidently thought it was worth more than $100 million. They didn't want $100 million in cash —

[5] In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), a public purpose was found in transferring property from the oligopolistic control of a small group of historical owners to a more conventional, modern system allowing property rights to be owned and freely transferred.

[6] *Kelo v. City of New London*, 545 U.S. 469 (2005).

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they wanted Apple stock. Just because the market price says they have the same value today does not mean that they are the same thing, or actually have the same value. Markets exist because buyers and sellers disagree on what is likely to happen in the future. Buyers think the asset will go up, and sellers think the asset will go down. The market price is just the average of those beliefs. As explained below, the Fifth Amendment public-use clause suggests that there is a constitutional right to buy and hold property, not just to get its fair market value whenever the government decides it wants to buy you out.

Notably, the proposal by Senate Finance Committee Chair Ron Wyden, D-Ore., to tax unrealized gains seems to acknowledge that the tax would compel the sale of the taxpayer's appreciated property, just to pay the tax. The senator's bill would allow an election to defer the tax, and pay an interest charge instead, on up to $1 billion of stock in a single corporation. The bill's description explains that this, "will ensure that the proposal does not affect the ability of an individual who founds a successful company to maintain their controlling interest."[7] Apparently, the drafters and supporters of the bill acknowledge that without that statutory exception, the compulsion to sell would exist. The bill only provides this election for the first time the new rules take effect. In addition, any actual legislation might not provide that relief. Thus, the constitutional issue of whether the acknowledged, indirect, compulsion to sell property can be imposed solely to raise taxes would be presented. The Fifth Amendment public-use clause does not apply only to real estate.

Even if Jobs could have borrowed the money to pay $100 million in tax for 1980, Apple itself later ran into difficulties and in 1997 almost went bankrupt. If Jobs's shares (stepped up to a basis of $500 million in 1980) were later sold for nothing, or abandoned, in 1997 Jobs's $500 million capital loss could not be carried back to offset his 1980 tax. The 1980 tax would not be refunded. That is because the tax code, as a fundamental and seemingly intractable structural feature, is based on an annual tax year, with each year's income and tax computed separately. In addition, past tax years cannot be reopened under any circumstances after more than three years. It is hard to imagine a viable tax system without a statute of limitations on refund claims. But Jobs's loss likely occurred 17 years later.

With no reopening of the past year and no statutory carryback, the tax of $100 million on Jobs's 1980 paper gain (that disappeared 17 years later) would not be a tax on economic gain in any rational sense of the word. It would not even qualify as a tax on wealth. It would be an artifact of luck (bad luck in that case) or the vagaries of the annual accounting period.

Two of the leading academics who helped to develop and promote the undoubtedly well-intentioned concept of a mark-to-market tax on unrealized capital gains have publicly acknowledged, as a policy matter, that this is a serious practical problem.[8] Indeed, the infeasibility of an unlimited capital loss carryback may be one of the reasons the highly respected tax experts at the Joint Committee on Taxation and at Treasury, and many of the nation's foremost tax experts, tax professors, and scholars, have long considered a tax on unrealized capital gains to be infeasible in any practical income tax.[9]

In the case of an income-producing asset (such as land where oil is suddenly discovered, or a company's brand or intellectual property that suddenly becomes more valuable) it is almost inevitable that there will be a tax imposed on

[7] *See* Senate Finance Committee release announcing billionaires income tax (Oct. 27, 2021).

[8] *See* Reuven S. Avi-Yonah and David Gamage, "Billionaire Mark-to-Market Reforms: Response to Susswein and Brown," *Tax Notes Federal*, July 25, 2022, p. 555 ("All serious BIT reforms have mechanisms for refunding losses, at least to the extent of prior recognized gains."). *See also* Susswein and Brown, "Mark-to-Market Mechanism: MIA? A Response to Avi-Yonah and Gamage," *Tax Notes Federal*, Oct. 3, 2022, p. 79. ("Unfortunately, the mechanism the professors describe, and say is needed to prevent double taxation, does not appear to exist in the leading proposal in this area."); Susswein and Brown, "Is It Time to Tax Disney's Unrealized Capital Gains From 1965?" *Tax Notes Federal*, June 13, 2022, p. 1717.

[9] Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, para. 3.6 (2023) (The "normative model [of an income tax], like present law, excludes unrealized gains and losses in a taxpayer's assets and imputed income of all forms, because these items, although part of Haig-Simons income, are generally thought to be beyond the reach of a practical income tax system."). The treatise cites the explanation by staff of the JCT that unrealized gains are excluded from the normative model for reasons of "administrative feasibility." That evidently is more than just the difficulty of valuing an asset, but also includes the need for an unlimited loss carryback or negative income tax, and the impracticality of forcing taxpayers to sell their assets just to pay the tax.

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amounts not representing economic gain. That is because, instead of an ordinary amortization deduction under sections 167 or 197, a tax on unrealized gain will presumably generate a stepped-up basis that will be recovered, it appears, only as capital losses (as the oil is gradually sold and the land value declines or the company's goodwill gradually declines in value, as the tax law assumes it will over 15 years). Wyden's bill would allow an unprecedented three-year capital loss carryback. But that would not help for assets whose values declined over much longer periods. And, again, there is a three-year statute of limitations on refunds, even if based on an actual mistake in the prior year's return, not just a subsequent event or inconsistent fact.

But do these serious practical or policy problems raise any constitutional issues? Quite apart from the realization rule (which the government and the Ninth Circuit majority claim does not even exist as part of the 16th Amendment), these policy problems may also be constitutional problems.

Is There Real Economic Gain?

The income tax is fundamentally (and irrevocably, as a practical matter) designed around the concept of an annual tax year, in which income is computed and taxes are computed generally on an annual basis without regard to events in other years. Thus, a tax on unrealized capital gains (determined by subtracting the original purchase price of an asset from its momentary, quoted market price or estimated market value as of the end of a given year, without regard to the actual price or value at which it may actually be disposed of in a later year) would systematically tax amounts that do not reflect the taxpayer's economic gain (within the meaning of *Glenshaw Glass*[10] and other cases). In addition, the tax would tend to be arbitrary and not rationally related to anything — not even wealth. Thus it might fail the minimal constitutional standard of rationality required for economic legislation of any kind. It might be viewed as an arbitrary confiscation of property, sometimes at random. That might violate the Fifth Amendment.

Looking at publicly traded stocks or securities, in some cases it would be a fluke whether a tax was imposed at all. A share of stock might be purchased for $100 on November 25, 2023 (Thanksgiving), and sold for $100 on February 14, 2024 (Valentine's Day). There would obviously be no economic gain. If the publicly quoted market price had spiked to $150 on New Year's Eve and dropped back to $100 on the first trading day of the new year (January 2) a 20 percent tax on unrealized capital gains (as of the end of 2023) would impose an income tax on $10 for 2023. That $10 tax would not be refunded, offset, or reduced in 2024 because of a theoretical $50 loss in 2024 when the stock was actually sold for only $100. The tax law, generally, has never allowed and does not today allow capital losses to be carried back to offset prior-year taxes.

If the identical price spike to $150 had occurred on January 2, dropping back to $100 on February 14, when the stock was sold for $100, no tax would be imposed. It is only the arbitrary valuation date of December 31 (and the fluke that the price spike might have occurred on December 31 or January 2) that would determine whether the taxpayer was taxed. In neither event would there be any economic gain.

In theory, academics or moral philosophers might speculate that the income tax could be converted into a lifetime income tax instead of an annual income tax, or into a negative income tax providing government checks or refundable tax credits whenever the stock markets declined. That is almost unthinkable as a practical matter, particularly if those checks would mostly be going to wealthy taxpayers and not to working taxpayers. Certainly, that transformation cannot be assumed in any constitutional analysis. The fundamental problem with taxing unrealized gains is that it artificially divides a long-term transaction into three or more segments: purchase, appreciation on paper as of the last day of any year, and ultimate sale or disposition. In doing so, it systematically taxes, or tends to tax, amounts that have no rational relationship to economic gain, or to anything for that matter.

That tax would not even qualify as a wealth tax (even if Congress were permitted to tax

[10] *Commissioner v. Glenshaw Glass*, 348 U.S. 426 (1955).

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wealth). In many cases it might amount to a reverse lottery in which the property of various taxpayers (essentially chosen at random) would be seized to help fund government operations. That would not seem to be a constitutional exercise of congressional power, even under the forgiving standards generally applied to tax legislation or economic regulation.

As a policy matter, even the strongest and most distinguished academic advocates of mark-to-market taxation agree that a mechanism to refund prior-year taxes, based on a later realized loss on the same asset, is essential.[11] An example would be an unlimited ability to carry back capital losses against prior-year unrealized capital gains (ideally with interest on any refund generated). That mechanism does not exist under current law, it does not exist under the major Senate proposal in this area, and a negative income tax or lifetime income tax is practically and politically infeasible. That transformation of the income tax into something entirely different cannot be assumed (as a constitutional *deus ex machina*) as a way of solving this intractable constitutional limitation on taxing unrealized capital gains.

The Supreme Court has repeatedly noted this fundamental, intractable, and sometimes quite frustrating feature, and has improvised adjustments to deal, as best it could, with the otherwise irrational results that are sometimes created by the annual accounting system. The problem, from the government's perspective, is well explained in *Maines*,[12] in which the Tax Court explained:

> The world doesn't come to an end and then begin again on January 1 every year, so courts early on had to figure out what to do when a transaction looked one way at the end of a tax year but looked different in a later year.

Despite judicial adaptations such as the *Arrowsmith* doctrine[13] (determining the character of later-year events by reference to earlier years) or the tax-benefit rule (taxing amounts in a later year that are inconsistent with facts known or assumed in a prior year), there is no judicial tax refund equivalent of the tax-benefit rule. If a capital loss in a later year is unusable it cannot, by statute, be carried back to a prior year to generate a refund, and the courts will not otherwise reopen the prior year to adjust the tax and order the IRS to generate a refund check.

In this way, the arguable unconstitutionality of a tax on unrealized capital gains may simply be the flip side of the tax-benefit rule. Because the courts will not order a prior-year tax refund based on a later-year event that is fundamentally inconsistent with the prior year's tax, the prior year's tax may be inherently unconstitutional. Because the courts evidently cannot override a statutory disallowance of a capital loss carryback (and certainly cannot provide for interest to be paid on the resulting refund) that may only leave the possibility of concluding that it is not constitutional to tax the unrealized gain, given the overall income tax structure that Congress has created by statute. Indeed, even if one could reopen a prior, open year, the tax system is based on a three-year statute of limitations on refund claims. The notion that the system could tolerate going back to reopen or refund taxes paid five, 10, or 15 years before is almost unthinkable.

Viewed in that light, deferring the taxation of unrealized gains (whether by statute, custom, or as a rule of constitutional law) addresses that problem. It avoids the potential constitutional problem of a temporary price spike triggering a tax when there is no definitive determination that there will be any economic gain on the asset, and there is no capital loss carryback provided if the asset is actually sold after the price declines, and it is definitively determined that there was, in fact, no economic gain on the overall transaction.

If the gain is actually realized, and the cash proceeds are invested in a different asset that could decline in value, that is a different issue. The tax code need not, constitutionally, be converted

[11] *See* Avi-Yonah and Gamage, *supra* note 8. *See also* Susswein and Brown, "MIA," and "Disney," *supra* note 8.

[12] *Maines v. Commissioner*, 144 T.C. 123 (2015).

[13] *See, e.g.*, *Arrowsmith*, 344 U.S. 6 (character, but not amount, of later item determined by reference to treatment of related, prior-year item).

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into a negative income tax, or a lifetime income tax. It is probably enough not to tax nonexistent income on an asset-by-asset basis. But taxing unrealized capital gains, without an offset or refund when the same asset turns out to be a loser rather than a winner, violates even that limited protection against what would otherwise be little more than an arbitrary seizure of the taxpayer's property.

The limitations on carrybacks have always been a critical structural part of the income tax. Capital loss carrybacks have essentially never been allowed (certainly not going back 17 years). And, of course, tax years are not even kept open for amended returns or refund claims for more than three years. There is a good reason for that. The tax system is not an academic exercise, it is a method of collecting tax revenue for necessary government services. From that perspective, the notion that Congress would begin sending million-dollar refund checks to wealthy investors whenever there was a bear market is implausible. That fundamental change to the tax system certainly could not be assumed in evaluating the constitutionality of a proposed tax on unrealized net capital gains determined on a year-by-year basis. Under those assumptions, the Constitution may preclude taxing what is essentially an uncompleted transaction in which the taxpayer buys, holds for appreciation, but has not yet sold an asset.

Does This Violate *Kelo?*

One of the historical reasons for the long-standing policy against taxing unrealized capital gains is that imposing a capital gains tax as if property were sold will often compel an actual sale of the property (or a significant part of it) to pay the capital gains taxes triggered by the deemed sale. The deemed sale may compel an actual sale.

That is obvious if the taxpayer does not have currency in a mattress, not needed for other purposes, to pay the capital gains tax. In all other cases, the taxpayer must either sell the appreciated property itself, sell other property held for long-term investment (appreciated, depreciated, or flat), or perhaps liquidate short-term assets. One way or another, the tax must be paid or the government will seize the property for unpaid taxes and sell it. This is such an obvious and unspoken assumption of the tax law that the realization requirement has long been considered to be fundamental and virtually unquestionable. Exceptions exist only in very limited situations when these concerns are not present.[14] Indeed, this is one of the reasons the tax experts at the JCT and Treasury consider the taxation of unrealized gains to be infeasible in a practical income tax.[15]

What is the connection between that and eminent domain? Under the Fifth Amendment, no government (federal, state, or local) can constitutionally seize a taxpayer's property, or compel its sale to the government or a private party, even if the sale occurs at current market prices, unless the property itself could be put to a public use or a public benefit. As the *Kelo* majority explained:

> It has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. [Emphasis in original.]

It is evidently not enough that the forced transfer helps the government by generating tax revenue that would otherwise be due only upon an actual transfer. The public must need the property itself to be serving a public use or public benefit. In other words, the government cannot churn private ownership, directly or indirectly, just to collect more taxes.

This was actually acknowledged as a potentially serious constitutional problem by the Court in *Kelo.* In that case, the majority approved a seizure or compelled sale under a comprehensive economic development plan. However, the Court noted that the ability to compel the sale or churning of private property under the banner of economic development was

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[14] Under section 475, mark-to-market rules apply to securities dealers, but apply only to ordinary income property held for sale to customers, not to assets held for investment. Under section 1256, a mark-to-market system applies to regulated futures contracts and similar assets that, even if they are capital gains assets, are generally not held for long investment periods. Both systems were enacted to curb perceived abuses with keeping track of different contracts or securities that were very similar, with the timing of sales often manipulated to create tax shelter opportunities, including sheltering unrelated income.

[15] *See* Bittker and Lokken, *supra* note 9.

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not unlimited. Although it did not decide the issue, it specifically noted, as a potentially valid concern, the argument that:

> nothing would stop a city from transferring citizen *A*'s property to citizen *B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes*. [Emphasis added.]

If the government directly and expressly mandated the sale by citizen A (just to collect more taxes) that would seemingly be a clear violation. The only question, then, is whether a forced or impelled transfer of property to another party, that is forced or impelled indirectly by a tax rule enforced by the IRS (under threat of seizure and sale by the IRS) is permissible — even though a forced or threatened sale compelled by the local sheriff would be impermissible under *Kelo.* (Of course, the Fifth Amendment does not only apply to real estate.)

When the taxpayer has only a single substantial asset or does not have a large hoard of currency that is not needed for other purposes that he can use to pay the tax without selling the property or selling other property, it is obvious. There is no way to pay any substantial income tax on a deemed sale without an actual sale.

If the taxpayer has the alternative of selling other assets (appreciated or not) it is arguably no better. The government is depriving him of his right to peacefully buy and hold property, a right the protection of which is the purpose of the public-use clause. Holding property that the government can force you to sell, at its whim, is not the same as holding property the government cannot force you to sell. Not all of the bundles or rights of property ownership exist if the government can call your property and compel you to sell it. A callable bond is not the same as a non-callable bond. The right to enjoy a pleasant view or location on property that has skyrocketed in value, even if someone else is willing to pay millions to buy your property, is part of what constitutes ownership. It is the right to say, "The property is not for sale."

Does that prove too much? Does the same argument mean that state and local property taxes are also unconstitutional? State and local real property taxes are arguably different, mostly because the tax rates are much lower, and also because those taxes have always been considered a normal, annual cost of property ownership. With the Constitution (and the tax law) the facts and circumstances matter. There is a well-recognized difference between a minor cost or regulatory burden imposed on a property owner, and a cost or burden (including a tax) that is substantial enough to compel a sale (or constitute a taking). At 1 or 2 percent, a more-or-less uniform state or local tax on real property values would probably not raise these issues. And at the other end of the spectrum, even without regard to the public-use issue, a 20 percent ad valorem real property tax might be unconstitutional on its face. Even if you had the cash to pay it, that would seem to be little more than a taking of your property (without compensation) spread over five years.

These are line-drawing problems. For example, some zoning restrictions are permissible, others are so severe they amount to a taking. Getting back to income taxes, a 20 or 40 percent capital gains tax imposed as if you had sold your property could easily be considered an unconstitutional compulsion to sell the property. At a minimum, each taxpayer's case would have to be considered to determine if the constitutional public-use requirement of the Fifth Amendment was being violated.

For those who opposed the result in *Kelo* (including many groups concerned with protecting low- and moderate-income citizens) or thought it a reasonable balance, the question is simply put: In any case in which the tax on unrealized capital gains is large enough to compel a sale of the property (or a sale of other property) just to pay the tax, would that be unconstitutional under the Fifth Amendment public-use clause (as interpreted in *Kelo*)? If not, cities and states that cannot get their urban renewal or economic development plans approved, but want to compel the owners of certain properties to sell them, might accomplish that by enacting a state or local unrecognized gain tax on real property. They might even be allowed to impose the tax only on certain neighborhoods, and make adjustments to other taxes. The Court has held that certain taxes may be used to encourage behaviors that Congress does not have the power to mandate

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directly.[16] Whether there are any limits on the use of taxes to compel activity that the Constitution specifically forbids the government from compelling (like compelling the sale of property not for a public use) would be an interesting question.

Conclusion

The Court may well decide this case on the narrowest possible grounds, and not address any constitutional issues at all. If it decides to address the constitutional questions, even in dicta, it should be fully aware of all of the potential issues presented. That is more than the 16th Amendment's arguable inclusion of a realization requirement. *Macomber* held that the 16th Amendment does not allow Congress, absent an actual distribution (which a stock dividend would not be), to impute the income of a corporation to its shareholders. That was the government's fallback argument. The Court explained that it cannot "treat the entire organization as unreal; look upon stockholders as partners." However, the corporation there was domestic, and the Court's rationale may not apply to a foreign corporation with foreign source income (the income typically reached by the MRT or subpart F). The domestic two-level corporate tax system, the Court explained, requires that the corporation and its shareholders be viewed as distinct taxable persons. Otherwise, the 16th Amendment would preclude taxing the same person once on income when it was realized (at the level of a partnership viewed as an agent or alter-ego) and again when the taxpayer distributed the same previously taxed income to himself, "any more than if one's money were to be removed from one pocket to another." That concern does not exist with the single-tier tax system applicable to the foreign source income of a foreign corporation. The shareholders, in effect, are already and automatically treated as if they were partners, tenants in common, or owners of a joint venture that is not subject to any entity-level tax.

The Court may wish to consider and address the arbitrary and irrational nature of a tax on unrealized gains (in a system that uses an annual accounting period and does not allow for a negative income tax or unlimited capital loss carrybacks). It may also wish to consider the *Kelo* issue of a disguised taking or forced sale other than for a public use or public benefit related to the use of the property. At a minimum, these issues should be carved out and reserved in any discussion of the constitutional limitations on taxing unrealized capital gains. ■

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[16] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

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