

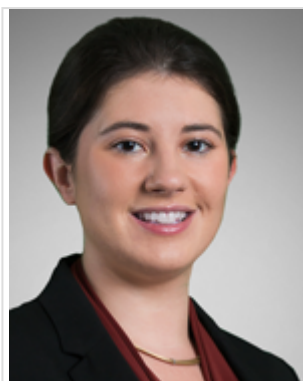
The Uncertain Precedential Status of *Moore II* and Similar Opinions

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In this article, Jayasinghe and King explore some implications of treating cases that have been affirmed on other grounds as binding precedent, and they offer factors to consider when evaluating the precedential status of those cases.



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I. Introduction

The Supreme Court's decision in *Moore (Moore III)* confirmed the constitutionality of [section 965's](#) mandatory repatriation tax (MRT).¹ However, the Court did not resolve whether realization is required to tax income under the 16th Amendment, which was the basis for the Ninth Circuit's opinion (*Moore II*) and the question on which the Court granted certiorari.² The Court affirmed *Moore II*, but it did so using a theory that the Ninth Circuit did not address.

Although a reviewing court may decide a case on a basis different than that of the lower court, there is a surprising lack of authority on the precedential status of those reviewing court opinions. (For brevity, we refer to the holdings of lower court opinions affirmed on other grounds as "alternative holdings.") The Supreme Court's avoidance of the realization issue thus raises an interesting question: Does *Moore II's* alternative holding — that "realization of income is not a constitutional requirement" — constitute binding precedent in the Ninth Circuit?

How that question is resolved and whether trial courts that follow Ninth Circuit precedent must apply *Moore II* is bound to have far-ranging effects. Below are some of the potential implications of treating alternative holdings as binding, including the alternative holding in *Moore II*, which could affect the concept of gross income itself.

There are compelling arguments for and against treating alternative holdings as precedential in their respective circuits. Guidance is lacking on the issue, but there are valid considerations on both sides and ways that practitioners might think about how to evaluate the precedential status of an alternative holding.

II. Moore Background

In 2005 Charles and Kathleen Moore invested \$40,000 in an Indian start-up company called KisanKraft, giving them an ownership interest of about 13 percent in the company. That interest appreciated significantly by 2017, but because the company had not made any distributions to the Moores or any other U.S. shareholder, the company's earnings had never been subject to U.S. tax. In 2018 under the MRT, the Moores were required to pay about \$15,000 in U.S. income tax on their share of the accumulated income of KisanKraft, even though they had not received a distribution.

After paying their MRT, the Moores filed a complaint with the district court seeking to recover the tax paid, arguing that [section 965](#) is unconstitutional.³ Their primary argument was that the MRT is not a permissible tax on income under the 16th Amendment because it is imposed on *unrealized* gain. The Moores argued that the 16th Amendment authorizes the taxation of realized income only. In the alternative, the Moores argued that [section 965](#) violates the due process clause because it applies retroactively by subjecting previous years' income to taxation.

The district court rejected both of those arguments and held that [section 965](#) is constitutional (*Moore*). Although the court recognized that *Eisner v. Macomber*,⁴ a seminal Supreme Court case the Moores relied on, suggests that the 16th Amendment requires realization, it explained that "subsequent decisions dealing with foreign income have routinely departed from *Macomber's* realization standard." Relying on case law upholding the constitutionality of subpart F and other regimes "that require the current taxation of unrealized income," the court held that the MRT is a permissible income tax and thus is not required to be apportioned as a direct tax under the apportionment clause. Likewise, the district court held that [section 965](#) does not violate the due process clause because it is supported by a legitimate legislative purpose and furthered by rational means.

The Moores appealed the district court's decision, again arguing that [section 965](#) violated the 16th Amendment and the due process clause.⁵ Regarding the 16th Amendment, the Moores argued that *Macomber* and *Glenshaw Glass*⁶ define "income" for purposes of the 16th Amendment and, specifically, that this definition requires income to be realized before it may be taxed.⁷ The Ninth Circuit said that "whether the taxpayer has realized income does not determine whether a tax is constitutional" under the 16th Amendment, explaining that both *Macomber* and *Glenshaw Glass* have been interpreted narrowly, including by Supreme Court precedent that "made clear that [these cases] do not provide a universal definition of income." The court quoted the Supreme Court, stating that "the concept of realization is founded on administrative convenience,"⁸ and relied on other case law upholding the validity of subpart F and partnership taxation.

Finally, the Ninth Circuit held that [section 965](#) does not violate the due process clause. Again affirming the district court, the Ninth Circuit found that “the retroactive application [of [section 965](#)] serves a legitimate purpose by rational means,”⁹ emphasizing that, although “there is a presumption against retroactive laws, retroactive tax legislation is often constitutional.” Thus, the Ninth Circuit held that [section 965](#) is constitutional.

After the Ninth Circuit denied rehearing the case en banc — an opportunity four of the circuit judges would have taken to *overturn* the Ninth Circuit’s original holding that realization is not a constitutional requirement¹⁰ — the Moores petitioned for, and the Supreme Court granted, certiorari. The issue on which the Supreme Court granted cert is whether the 16th Amendment “authorizes Congress to tax unrealized sums without apportionment among the states.”¹¹

But the Supreme Court avoided that question. In *Moore III*, the Supreme Court held that [section 965](#) is constitutional using a different theory than the district and circuit courts had. The Court based its holding on an attribution theory, explaining that [section 965](#) “does tax realized income — namely, income realized by the corporation.”¹² Because the majority did not consider it necessary to resolve whether realization is required under the 16th Amendment, it declined to address the issue.¹³ Instead, the Court focused on “whether Congress may attribute an entity’s realized and undistributed income to its shareholders or partners, and then tax the shareholders or partners on their portions of that income.”¹⁴ On that narrower question, the Court concluded that Congress has that authority and that [section 965](#) is a valid exercise of it.¹⁵

The Court provided an overview of a long line of Supreme Court precedent and long-standing congressional practice, both of which it found to support the authority of Congress to tax the realized income of an entity by taxing *either* the entity itself *or* the owners on their share of the entity’s income.¹⁶ The Court dismissed the Moores’ reliance on *Macomber* as misplaced because it “does not proscribe attribution and thus has no bearing on the attribution issue in this case,”¹⁷ and rejected their attempts to distinguish [section 965](#) from other regimes that treat entities as passthroughs.¹⁸

After finding [section 965](#) constitutional based on an analysis of “the attribution question,” the Court reiterated that it was not addressing realization and emphasized the narrowness of its holding, which applies only to “(i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income.”¹⁹

Thus, although the Court affirmed *Moore II*, its holding was premised on an issue that the Ninth Circuit did not consider, and was silent on the issue that the Ninth Circuit did consider. That puts *Moore II* in a unique procedural posture that leaves its precedential status uncertain.

III. A Surprising Silence

Appellate courts, including the Supreme Court, “review judgments, not opinions.”²⁰ This means that a reviewing court may decide a case based on different reasoning than that of the lower court. Lower

court opinions can be vacated, overturned, or affirmed on “other grounds.” Indeed, appellate courts may affirm a lower court’s decision for any reason supported by the record, “even if the issue was not pleaded, tried or otherwise referred to in the proceedings below.”²¹ Therefore, although in *Moore* the Supreme Court granted certiorari on the realization issue, it was free to (and did) decide the case on a different theory, explicitly declining to opine on realization.

For the number of cases decided “on other grounds” on appeal, there is a surprising lack of consensus — or even discussion — regarding the precedential effect of those opinions.²² It seems initially intuitive that cases that have been reversed or vacated — even on other grounds than those on which they were decided — would lose binding force. Yet, this is not a universal view: While there seems to be general agreement that vacated opinions are not precedential,²³ at least some consider the alternative holdings of opinions *reversed* on other grounds to remain binding law within a circuit.²⁴

Discussion of the status of lower court opinions *affirmed* on other grounds is even more sparse, but the question is important. For example, if the Supreme Court had not taken the case, *Moore II* indisputably would be binding precedent in the Ninth Circuit. Now that *Moore II* was affirmed but on different grounds, its precedential value is debatable. The next time a realization question arises in that circuit, is the lower court bound to follow *Moore II* and hold that realization is not required? Or, given that the Supreme Court sidestepped the realization question, is the district court free to independently weigh in?

There are cases that circumambulate this issue, but they don’t provide a definitive answer. In the issue preclusion space, parties are not bound by a lower court’s reasoning that was affirmed on different grounds — but that rule applies only to the parties of that case.²⁵ In some circuits, a rehearing en banc automatically vacates the appellate panel’s opinion,²⁶ removing any doubt about the panel opinion’s precedential value, but that is not the case in all circuits. Some state courts have announced their own rules about how to treat lower court opinions affirmed on other grounds, but they are inconsistent.²⁷ More relevant but even less definitive, some federal courts appear to treat opinions affirmed on other grounds as binding precedent without any discussion of what they are doing or why that is appropriate.²⁸

IV. The Importance of Precedential Status

A. Effect on Future Cases

The effect of treating alternative holdings as precedential depends on the court that issued the alternative holding and the status of that opinion (that is, whether the opinion is published). While alternative holdings issued by district courts or in unpublished opinions are likely not affected by this issue, circuit court opinions and published Tax Court opinions are.

Some opinions are never precedential, and therefore alternative holdings would not be binding in any event. District court opinions are not binding,²⁹ so it may not matter much what happens to an

alternative holding in a district court opinion on appeal. Similarly, the Tax Court issues various nonprecedential opinions (for example, memorandum opinions). Regarding both district court and nonprecedential Tax Court cases, the next judge to consider the issue is free to accept or reject the previous opinion. Unpublished opinions, even at the circuit court level, are also not imbued with precedential weight.³⁰

The question becomes more significant when, like in *Moore*, the Supreme Court reviews a circuit court opinion because, unless they are unpublished, circuit court opinions are binding on the district courts in that circuit.³¹ The question also has a heightened importance in the tax context. The Tax Court regards “T.C.” opinions (that is, opinions published in the Tax Court reporter) and division opinions (that is, opinions considered by the entire bench) as binding on the Tax Court’s own future opinions.³² Thus, the precedential status of a holding in a T.C. or division opinion that was affirmed on other grounds by a circuit court is highly relevant. A review of other opinions demonstrates this is not an unheard of occurrence.³³

The question could also arise in IRS Appeals, which has the authority to make settlement offers based on hazards of litigation. An Appeals officer may consider the absence of a realization requirement in the Ninth Circuit as comparatively more supported relative to other circuits, and therefore the taxpayer’s venue options could affect the terms of a settlement offer. It’s conceivable that the question could even trickle down to the audit level, with Exam teams deciding whether to propose an adjustment based on the law of the relevant circuit.

The practical effect of the answer is sure to vary by issue and by court. In some situations, a district court or the Tax Court may evince a willingness to follow the alternative holding of a previous case regardless of whether it is technically binding. For example, a court may be unwilling to risk being overturned if it is already aware of how the circuit court views the issue, and therefore may follow an alternative holding even if it is not binding.

For controversial or especially impactful issues — like realization — the precedential status of an alternative holding could be highly consequential. A lower court may have sufficiently strong views on an issue that it decides not to follow an alternative holding without a clear indication it is bound by such holding. Or the issue could arise in a context so different that a judge finds compelling reasons not to follow the nonbinding views of the circuit court. (A topical example is whether a district court in the Ninth Circuit would feel compelled to uphold a wealth tax based on *Moore II*.)

Further, in cases like *Moore*, when several circuit court judges disagreed with the panel opinion in *Moore II*,³⁴ a district court in the Ninth Circuit (or the Tax Court with a case appealable there) may feel emboldened to depart from that holding if it is not precedential.

B. Effect on the Realization Question

Whether *Moore II* is binding precedent in the Ninth Circuit — such that there is no realization requirement in that circuit — is certain to have ripple effects when realization is a relevant question. A circuit split might not be far behind.

If trial courts that apply Ninth Circuit law are bound by *Moore II*, they are likely to feel compelled to hold that realization is not a requirement in other cases that implicate realization. Because realization is a foundational principle in the tax law, the consequences may be far-reaching. For example, if Congress were to pass a tax on asset appreciation (a type of wealth tax), the validity of that tax may very well depend on, at least in part,³⁵ whether realization is required under the 16th Amendment.

An amendment enacted by the [Tax Cuts and Jobs Act](#) offers another example. In addition to enacting [section 965](#) at the heart of the *Moore* case, the TCJA also amended [section 451\(b\)](#), requiring income recognition no later than the time an item of income is taken into account on a taxpayer's financial statement. Because some accounting standards require income to be reflected in financial statements before it is realized for tax purposes, there was concern regarding whether this amendment was imposing a tax on unrealized income. When the Joint Committee on Taxation blue book was released, it clarified:

The provision does not revise the rules regarding when an item is realized for Federal income tax purposes and, accordingly, does not require the recognition of income in situations where the Federal income tax realization event has not yet occurred.³⁶

If the binding law in the Ninth Circuit is that there is no realization requirement, taxpayers could be taxed on funds that are not realized but still show up on a financial statement under rules of accounting, contrary to the JCT's assertion.

Further, if *Moore II* is the law of the land in the Ninth Circuit, the chances of a circuit split seem high. One does not need to look far to find proponents of realization.³⁷ Even the JCT, in the blue book accompanying the TCJA, posited that realization is a threshold requirement to have income, stating: "Gross income generally includes all items that are clearly realized accessions to wealth in any form. . . . Realization generally occurs when a taxpayer takes the last step by which the economic gain comes to fruition."³⁸ The possibility that every circuit would decide the realization question the way the Ninth Circuit did seems unlikely. And a circuit split on an issue as foundational as realization could quickly lead to upheaval, with the very concept of gross income depending on which circuit's laws applies to a specific taxpayer.

V. The Competing Interests

There are compelling points on each side of the precedent question. Arguments for and against treating alternative holdings as precedential are discussed below, followed by suggestions for how practitioners can evaluate the precedential status of an alternative holding.

A. The 'For'

On the one hand, treating opinions affirmed on other grounds as precedential in their respective circuits makes good sense. When an opinion is affirmed on other grounds, the reviewing court did

not disturb that specific holding. Therefore, that alternative holding should be given as much weight as it would have if the opinion had not been appealed at all.³⁹

Regarding *Moore*, if the Supreme Court had not granted cert, the Ninth Circuit's opinion on realization would stand, and lower courts in that circuit would be bound to follow it. That outcome should not necessarily change just because the Supreme Court opined on a different issue. At that point, it's almost like the Supreme Court decided a different case. Especially in cases like *Moore*, when the appellate court specifically avoided opining on the lower court's holding, the alternative holding is the pronouncement of the highest court that considered the question.

There is also the matter of judicial economy. The district courts located in the Ninth Circuit are bound by the circuit court's precedent. After *Moore II*, these lower courts are aware of the Ninth Circuit's view on the realization issue. To issue an opinion contrary to *Moore II* could be a recipe for a quick reversal, resulting in a waste of judicial resources. That is the premise underlying the Tax Court's well-known *Golson* rule: Although the Tax Court is not officially bound by the circuit courts' opinions, it will still follow a circuit court's opinions in a case appealable to that circuit because of judicial economy.⁴⁰ Treating opinions affirmed on other grounds as precedential would fulfill the same goal. Similarly, the Tax Court could choose to follow *Moore II* on this basis as well.

Also, as discussed above, at least some courts have taken the view that holdings in opinions that have been reversed on other grounds maintain their binding status. In that case, certainly those that have been affirmed on other grounds should remain precedential.

B. The 'Against'

On the other hand, there are reasonable arguments for concluding that such holdings are not precedential. Perhaps the better approach is that when a case is on appeal or certiorari has been granted, the slate is wiped clean. Some circuits already take this approach, as mentioned above.

It would be clearer if only the opinion of the highest reviewing court had the power to bind. Future litigants would not need to try to discern what "counts" as an alternative holding — which is not always as clear as it is in *Moore*. Practitioners, parties, and the public would not have to scour multiple opinions in one case to ascertain the law. In that case, unaddressed lower court holdings would be dicta and insightful — but not binding — guides for future cases. That position is consistent with the fact that our judicial system is grounded on "cases and controversies." Once a reviewing court has spoken to how the law applies to the facts of a case, that settles the question, with future courts to advance the jurisprudence once the next case arises.

This approach also avoids the otherwise inevitable disagreements about whether all, or just some, alternative holdings should be given binding weight. It would be relatively straightforward to give precedential authority to an alternative holding when the appellate court declined to opine on that holding — like the Supreme Court and the realization issue. Sometimes, however, the reviewing court analyzes and explicitly rejects a specific holding but nevertheless affirms the judgment.⁴¹

Although in the latter scenario we know the reviewing court's opinion on the alternative holding, that portion of the appellate opinion is dicta and perhaps should not vitiate the lower court holding's power to bind. It's also easy to imagine gradations on this theme, with an appellate court questioning or otherwise casting doubt on a holding without outright rejecting it, or — like the Moores' due process argument — when the appealing party abandons one of its positions on appeal. Relegating all alternative holdings to dicta would sidestep this thorny issue.

C. Evaluating Precedential Status

There is no easy or obvious answer to the question about the precedential status of alternative holdings, especially factoring in the different scenarios that can arise when a case is affirmed on other grounds. Given the variations, there is likely not a one-size-fits-all approach.

In evaluating whether a court may consider an alternative holding to be precedential, practitioners can evaluate several factors. What, if anything, the reviewing court has said about the alternative holding might tip the balance in favor of treating an alternative holding as precedential. The case for precedential status may be stronger if the reviewing court addressed the alternative holding in a positive light, while a negative discussion would likely cut against this position. Throughout the spectrum are various degrees of approval or doubt that a reviewing court can express, and the clarity and strength of those expressions are considerations to be analyzed. In cases like *Moore* when the reviewing court explicitly declines to address an alternative holding, or is simply silent on the issue, according precedential status to the alternative holding — as the highest reviewing court's opinion in that circuit — might make good sense.

The procedural posture of the case could be pertinent. If the reviewing court's opinion is unanimous or en banc, its assessment of an alternative holding (whether positive or negative) may have a stronger effect on whether the alternative holding should be considered binding. Similarly, the posture of the lower court's opinion that contains the alternative holding should be evaluated. At least four Ninth Circuit judges disagreed with the panel's opinion in *Moore II*. In this type of situation, or when the alternative holding is otherwise not unanimous, such as if it is accompanied by a dissent, a court may not find precedential status to be warranted.

The similarity between the issue addressed in the alternative holding and the issue of the practitioner's client is another component of the analysis. *Moore II*'s holding on realization could affect a breathtaking range of tax issues that have nothing to do with the MRT. A court may be more inclined to treat *Moore II* as precedential for issues at least tangentially related to the MRT, such as subpart F or global intangible low-taxed income, as opposed to a disparate issue like a wealth tax.

Until the judiciary addresses the issue of precedential status, those considerations can aid in evaluating how to treat an alternative holding.

VI. Conclusion

Considering how pervasive the concept of realization is in the income tax, the *Moore* trio is sure to generate additional litigation, including in the Ninth Circuit. The outcome of those cases — at least at

the trial court level — may very well depend on whether the trial court considers itself bound to follow the *Moore II* holding that realization is not a threshold requirement for the income tax. The lack of guidance concerning the precedential value of alternative holdings is likely to be front and center.

FOOTNOTES

¹ *Moore v. United States*, [144 S. Ct. 1680](#) (2024).

² *Moore v. United States*, [36 F.4th 930](#) (9th Cir. 2022), *affd*, 144 S. Ct. 1680.

³ *Moore v. United States*, [No. 2:19-cv-01539](#) (W.D. Wash. Nov. 19, 2020), *affd*, 36 F.4th 930.

⁴ *Eisner v. Macomber*, [252 U.S. 189](#) (1920).

⁵ *Moore II*, 36 F.4th at 934.

⁶ *Commissioner v. Glenshaw Glass Co.*, [348 U.S. 426](#) (1955).

⁷ *Moore II*, 36 F.4th at 937.

⁸ *Id.* at 936-937 (citing *Helvering v. Horst*, [311 U.S. 112](#), 116 (1940), and *Cottage Savings Association v. Commissioner*, [499 U.S. 554](#), 559 (1991)).

⁹ *Id.* at 938 (citing *Quarty v. United States*, [170 F.3d 961](#), 965 (9th Cir. 1999)).

¹⁰ See *Moore v. United States*, [53 F.4th 507](#), 508 (9th Cir. 2022) (Bumatay, J., dissenting).

¹¹ [Petition for Writ of Certiorari](#), *Moore*, 144 S. Ct. 1680 (No. 22-800). The Moores did not raise their due process clause argument on appeal of the Ninth Circuit's decision, so the Supreme Court did not address it.

¹² *Moore III*, 144 S. Ct. at 1688.

¹³ *Id.* at 1696-1697.

¹⁴ *Id.* at 1688-1689.

¹⁵ *Id.* at 1689, 1696.

¹⁶ *Id.* at 1689-1690, 1692-1693.

¹⁷ *Id.* at 1691.

¹⁸ *Id.* at 1693-1696.

¹⁹ *Id.* at 1696.

²⁰ See *CASA de Maryland Inc. v. Trump*, 971 F.3d 220, 240 (4th Cir. 2020) (internal quotation omitted).

²¹ *Baybank-Middlesex v. Ralar Distributors Inc.*, 69 F.3d 1200, 1202 (1st Cir. 1995); see also Jeffrey Anderson, "Right for Any Reason," 44 *Cardozo L. Rev.* 1015, 1020-1021 (2023) (citing cases).

²² This article uses the term "precedential" to mean binding on other courts (rather than merely persuasive analysis). See Charles Sullivan, "On Vacation," 43 *Houston L. Rev.* 1143, 1146 (2006) (discussing the two definitions).

²³ *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect."); *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.").

²⁴ See *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (explaining that a vacated panel opinion was not binding, but a second opinion "binds us because only the judgment was reversed on other grounds"); *Newdow v. Rio Linda Union School District*, 597 F.3d 1007, 1041 (9th Cir. 2010) ("Merits questions may be independent of each other; reversal on one merits ground may leave the decisions reached on other grounds intact."); see also Sullivan, *supra* note 22, at 1145-1146; Phillip DeRosier, "Decisions That Have Been Reversed or Vacated 'On Other Grounds': Do They Still Have Precedential Value?" 39 *Mich. Defense Q.* 14, 15-16 (2023).

²⁵ *Dow Chemical v. EPA*, 832 F.2d 319, 323 (5th Cir. 1987) ("The federal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.") (internal quotation omitted).

²⁶ See Fourth Circuit, Federal and Local Rules of Appellate Procedure, Local Rule 35(c); Sixth Circuit, Federal and Local Rules of Appellate Procedure, Local Rule 35(b).

²⁷ Compare California Rules of Court, Rule 8.1115(e) ("Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only."), with *State v. Brereton*, 337 Wis. 2d 145, 150 ("*Sveum I* was affirmed on other grounds in . . . (*Sveum II*), so it is binding."), *aff'd*, 345 Wis. 2d 563 (2013).

²⁸ See Will Baude, "[Further Thoughts on the Precedential Status of Decisions Affirmed on Alternate Grounds](#)," *The Volokh Conspiracy* (Dec. 3, 2013) (one of the rare pieces of commentary on this issue, citing cases).

²⁹ See John Harrison, "The Power of Congress Over the Rules of Precedent," 50 *Duke L.J.* 503, 518 (2000) ("For reasons that are hard to identify . . . the federal district courts regard their own precedents as persuasive authority only.").

³⁰ Alternative holdings nevertheless can result in forum shopping even in the absence of precedential force.

³¹ See, e.g., *United States v. AMC Entertainment Inc.*, 549 F.3d 760, 771 (9th Cir. 2008) ("When the Ninth Circuit or any of its coequal circuit courts issue an opinion, the pronouncements become the law of that geographical area.").

³² See *Santos v. Commissioner*, [T.C. Memo. 2016-100](#).

³³ See, e.g., *Miller v. Commissioner*, [114 T.C. 184](#) (2000), *aff'd on other grounds sub nom. Lovejoy v. Commissioner*, [293 F.3d 1208](#) (10th Cir. 2002).

³⁴ *Moore*, 53 F.4th at 515 (Bumatay, J., dissenting the denial of a rehearing en banc, joined by three other judges) ("Because our expansive gloss on the Sixteenth Amendment thwarts its design and defies longstanding Supreme Court and Ninth Circuit caselaw, I respectfully dissent from the denial of rehearing en banc.").

³⁵ There are other hurdles to a wealth tax besides realization. For example, the Supreme Court heavily implied that such a tax could be considered a direct tax on property and thus subject to apportionment. *Moore III*, 144 S. Ct. at 1697.

³⁶ JCT, "[General Explanation of Public Law 115-97](#)," JCS-1-18, at 165 (Dec. 2018) (discussing examples).

³⁷ See *Moore III*, 144 S. Ct. at 1710 (Thomas, J., dissenting); *Moore*, 53 F.4th at 515.

³⁸ JCT, *supra* note 36, at 148. This appears to be a departure from the committee's take on realization in previous blue books. See JCT, "[Issues Presented by Proposals to Modify the Tax Treatment of Expatriation](#)," JCS-17-95, at 72 (June 1, 1995) (querying whether "the general realization event requirement of the *Macomber* ruling continues to have some vitality as a matter of constitutional law").

³⁹ See *Saunders v. McDonald*, No. 15-0975 (Vet. App. May 25, 2016) ("The Court is aware of no rule stating that if the Federal Circuit affirms this Court under one of two alternative bases the Court gave for its decision, then the other basis for its decision is converted to dicta."), *rev'd sub nom. Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018).

⁴⁰ *Golsen v. Commissioner*, [54 T.C. 742](#), 757 (1970), *aff'd*, [445 F.2d 985](#) (10th Cir. 1971).

⁴¹ See, e.g., *Knight v. Commissioner*, [552 U.S. 181](#) (2008) (affirming the circuit court's opinion but disagreeing with its statutory interpretation).

END FOOTNOTES