



I set up a personal political website with the following argument in favor of a constitutional and enforceable wealth gains tax to be levied against the wealthiest citizens in America. Please review it for legal accuracy and legitimacy. If it is even close to being on the money, and I'm not missing something obvious, then I think it has the potential to be a huge deal. But I'm not an expert in constitutional law or tax law.

For individuals with a high net worth, annual changes in net worth shall be treated as realized income under the Haig-Simons definition of income — a framework consistent with the 16th Amendment and thus not subject to the apportionment requirement for direct taxes under Article I, Section 9 of the U.S. Constitution. We should let economists define what income is, not partisan Supreme Court justices who want to protect the unrealized wealth of the top 1% or a financially illiterate 5-4 court majority from over 100 years ago. If we simply decide to listen to the experts and legally define wealth gains as income, we can fight decades of wage stagnation to fund real tax cuts for millions of working people with tax hikes on the gluttonous unrealized wealth of the fascist corporate elites who are destroying our society for profit, and we can do such a tax maneuver with only a simple majority in the Senate.

Note: For whoever else in the Democratic Party stumbles upon this and has the instinct to progressively bracketize this, don't. Just make it a flat tax. Let's shift from a progressive income tax to a flat wealth gains tax. (Don't worry, the wealth distribution is already highly concentrated at the top.)

The extraordinarily wealthy want finance to feel complicated and inaccessible to ordinary people. But at the end of the day, it's just money moving around. We already track ordinary workers' incomes through W-4's for purposes of collecting income taxes. So any attempt for the wealthy to move their money around to avoid a wealth tax must have a clear paper trail — and if it doesn't, it starts looking less like tax avoidance and more like institutionalized money laundering.

But instead of attempting to start a multi-billion-dollar arms race between the billionaires and the IRS, it would be far easier, cheaper, and effective to find a Senate parliamentarian that would allow for the imposition of a 6-month prison sentence for those who avoid the wealth gains tax, as that would not only be copacetic with the purpose of a budget resolution, also directly increase revenues by reducing tax evasion. We should surely allow a bill that imposes new taxes to include mechanisms that can enforce the tax. Or in the case that this is adequately popular, we may be able to send this through regular order. Furthermore, this would place the onus on the Supreme Court if they wanted to make a ruling that would so obviously undermine the general welfare of the United States by revoking newfound economic freedom for millions of families to protect the unrealized wealth of a few billionaires.

To provide a precise legal assessment, could you clarify the following:

1. Is this website targeting a general public audience, lawmakers, or a legal/judicial audience?

2. Are you seeking a full constitutional and tax law analysis (e.g., Haig-Simons income definition, 16th Amendment implications, constitutionality of enforcement mechanisms)?
3. Would you like us to assess the feasibility under current legal precedent, or include speculative arguments for how precedent might evolve?
4. Should we also evaluate the political viability (e.g., reconciliation pathway, Senate parliamentary role) in addition to legal feasibility?

Once you clarify, I can begin the review immediately.



This website is targeting both the general public, but also lawmakers who have the ability to weigh in with more expertise. I am seeking a full constitutional analysis, although from a legal perspective, I almost know for certain it would be in contradiction with the *Eisner v. Macomber* decision in 1920. But as someone who is considering running for office, I'm looking at this from a political perspective. If it has a strong enough constitutional argument in favor that's good enough for lawmakers and the general public, and the legislature manages to pass a law imposing the wealth gains tax, then effectively, it could be politically unviable for the Supreme Court to challenge it even though it is in violation of *Eisner v. Macomber*.

Understood. I will conduct a comprehensive constitutional analysis of your proposed wealth gains tax framework — including how it aligns with or conflicts with the 16th Amendment, the Haig-Simons definition of income, and relevant precedent such as *Eisner v. Macomber*. I will also assess whether there is a legally plausible argument strong enough to make the proposal politically and legislatively viable, even if judicial precedent technically conflicts.

I'll provide a structured, professional report that covers constitutional, statutory, and enforcement considerations. I'll let you know as soon as the analysis is ready.



Constitutional Viability of a Wealth Gains Tax Framed as Income

## Taxing Unrealized Gains as Income: A Constitutional and Legal Analysis

### Introduction

A recent political proposal suggests **treating annual changes in net worth of high-net-worth individuals as realized income** for tax purposes. In effect, it adopts the *Haig-Simons* definition of income (consumption plus change in net worth) to tax unrealized capital gains each year. Proponents argue this approach fits within Congress's power under the Sixteenth Amendment to tax "**incomes, from whatever source derived**" without apportionment. Critics contend it would amount to a direct wealth tax in disguise, violating the apportionment requirement of Article I, Section 9. This report provides a comprehensive legal and constitutional analysis of the proposal. It examines the definition of "income" under the Sixteenth Amendment, relevant Supreme Court precedents (from *Eisner v. Macomber* (1920) onward), procedural issues in enacting such a tax

(including budget reconciliation and enforcement), the prospects of judicial review, and other pertinent legal doctrines. The goal is an accessible but thorough review for both lawmakers and the general public.

## The Sixteenth Amendment and the Definition of Income

The Sixteenth Amendment, ratified in 1913, was a response to *Pollock v. Farmers' Loan & Trust Co.* (1895), which had invalidated an unapportioned federal tax on income from property as an unconstitutional direct tax. The Amendment empowered Congress to “**lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States**” [verdict.justia.com/congress.gov](https://www.verdict.justia.com/congress.gov). Notably, the text does *not* define “income.” At the time of enactment, “income” was generally understood to mean **gain or increase in wealth** – but whether that required actual receipt (realization) was not explicitly settled [supremecourt.gov](https://www.supremecourt.gov). Economists Robert Haig and Henry Simons later defined income broadly as the **sum of consumption and the change in net worth** over a period [hoover.org](https://www.hoover.org). Under this Haig–Simons view, an increase in the value of assets (even if unsold) counts as income. The proposal in question adopts this economic definition, asserting that **unrealized gains are income** and thus taxable under the Sixteenth Amendment’s authority.

Legally, however, the Supreme Court’s interpretation of “income” has evolved. In the early 20th century, the Court often took a narrower view that **emphasized realization**. For example, *Eisner v. Macomber* (1920) — a case involving a stock dividend — famously stated: “*Income may be defined as the gain **derived** from capital, from labor, or from both combined, including profit gained through sale or conversion of capital*” [supreme.justia.com](https://www.supreme.justia.com). The Court in *Macomber* held that a pro-rata stock dividend was not taxable income to the shareholder because it merely represented an **increase in the value of an investment** that had not been separated from the capital. In words that have echoed for a century, the *Macomber* majority declared: “*Mere growth or increment of value in a capital investment is not income; income is essentially a gain, **severed** from capital, received or drawn by the taxpayer for his **separate use, benefit and disposal***” [supreme.justia.com](https://www.supreme.justia.com). Because the stock dividend took nothing from the corporation’s property and gave the shareholder nothing *new* (no cash or disposed asset) [supreme.justia.com](https://www.supreme.justia.com), the Court viewed the tax on it as effectively a tax on the underlying property/value itself – a direct tax requiring apportionment [supreme.justia.com](https://www.supreme.justia.com). In short, **unrealized appreciation** was not “income” as the *Macomber* Court defined it.

It is important to note, however, that the *Macomber* decision was **controversial from the start** and was narrowly decided (5–4) [verdict.justia.com](https://www.verdict.justia.com). Even at the time, distinguished jurists dissented. Justice Holmes, for instance, protested that the law should not read in a “realization” requirement that the text of the Sixteenth Amendment did not contain. Over the following decades, the Supreme Court **limited and criticized Macomber’s reasoning**, although it never formally overturned the case. Subsequent rulings and Congressional actions established that many forms of unrealized or imputed gains *could* be taxed as income in various circumstances. The legal understanding of “income” broadened to align more closely with economic reality (at least in specific contexts), even as Congress generally retained the *policy* choice of not taxing most unrealized gains annually.

## Supreme Court Precedents on Unrealized Gains and “Income”

### *Eisner v. Macomber* (1920) – Realization as a Constitutional Principle?

*Macomber* is the key precedent cited by opponents of taxing unrealized gains. In that case, a stockholder received additional shares (a stock dividend) but no cash. The Court held this was not taxable income under the Sixteenth Amendment. In doing so, it articulated a *realization-based* definition of income (gain **derived** and **severed** from capital)[supreme.justia.com](https://supreme.justia.com). The decision suggested that **a mere paper gain or change in value, without a transaction yielding cash or other property to the taxpayer, is not “income”**. The Court reasoned that to tax a stock dividend was effectively to tax an **undistributed increase in corporate value** – akin to a tax on property or capital itself, which the Constitution would require to be apportioned[supreme.justia.com](https://supreme.justia.com). Moreover, the Court famously cautioned that *“what is or is not income, within the meaning of the Amendment, must be determined **according to truth and substance, without regard to form**”*[supreme.justia.com](https://supreme.justia.com). In other words, calling something “income” does not make it so if in substance it is a tax on property. Opponents of the current proposal would undoubtedly invoke this language, arguing that a tax on unrealized asset gains is in truth a tax on wealth or property, not on “income” as originally understood[supremecourt.gov](https://supremecourt.gov).

However, *Macomber*’s authority has eroded over time. Almost immediately, academics like Robert Murray Haig criticized the decision, noting that nothing in economic theory or the Amendment’s text demands a realization event[hoover.org](https://hoover.org). Over the next two decades, the Supreme Court **cabined *Macomber*** to its facts and **upheld taxes on forms of gain that had not been actually received by the taxpayer**. For example, in *Helvering v. Bruun* (1940), a landlord repossessed property after a lease, along with a building the tenant had built on it. The Court held that the **increase in value from the new building was taxable income to the landlord in that year**, even though the landlord had not “sold” anything to receive cash[supreme.justia.com](https://supreme.justia.com). Similarly, in *Helvering v. Horst* (1940), a father who detached interest coupons from bonds and gave them to his son was taxed on that interest. The Court in *Horst* reasoned that by giving away the coupon (which was later cashed), the father had effectively realized the interest income for his own benefit (by directing it to his son) – preventing him from avoiding tax by a maneuver[hoover.org](https://hoover.org)[hoover.org](https://hoover.org). In *Horst*, the Supreme Court explicitly stated that **the rule that income is not taxable until realized is merely a product of administrative convenience, not a constitutional command**[rsmus.com](https://rsmus.com). The concept of “realization” was described as *“founded on administrative convenience and does not mean that a taxpayer can escape taxation because he did not actually receive the money”*[rsmus.com](https://rsmus.com). In short, by 1940 the Court was signaling that *Macomber*’s strict realization requirement was not a hard constitutional limitation, but rather a general rule Congress adopted for practicality.

In 1955, the Court offered a **broad definition of income** in *Commissioner v. Glenshaw Glass Co.*. In that case, dealing with whether punitive damage awards counted as taxable income, the Court defined “gross income” as *“accessions to wealth, clearly realized, and over which the taxpayer has complete dominion.”*[rsmus.com](https://rsmus.com). This **Glenshaw Glass test** highlighted that virtually any **undeniable increase in wealth** under a taxpayer’s control is income, whether it comes from labor, capital, windfall, or even legal windfalls like punitive damages. Notably, the definition includes the word “realized,” reflecting that in *Glenshaw Glass* (as in most tax cases), the taxpayer had actually received the money. But nothing in the decision held that realization was an absolute constitutional necessity; rather, it focused on confirming that even **windfall gains** (clearly realized) are taxable income.

Through the mid-20th century, **lower courts and the IRS gained comfort with certain limited forms of taxing unrealized gains**, especially where valuation was straightforward or avoidance concerns were acute. Congress enacted *mark-to-market* taxation for specific situations – for instance,

Section 1256 of the tax code requires annual market valuation of certain financial contracts, and Section 475 does the same for securities dealers' inventories [law.nyu.edu](http://law.nyu.edu). These were generally upheld. One notable case, *Murphy v. United States* (9th Cir. 1993), upheld the Section 1256 mark-to-market rule for futures contracts, though the court reasoned that the taxpayer effectively had **daily access to profits** (constructive receipt) due to how those financial instruments work [law.nyu.edu](http://law.nyu.edu). Importantly, the Ninth Circuit *explicitly declined* to decide the broader question of whether Congress **could tax other unrealized gains** in advance of actual receipt [law.nyu.edu](http://law.nyu.edu). In other words, while narrow exceptions to the realization principle have been deemed constitutional, a **sweeping annual tax on all unrealized appreciation** has never been directly tested at the Supreme Court.

## ***Modern Developments: The Moore Case and Current Judicial Views***

The most relevant recent case is *Moore v. United States*, decided by the Supreme Court in June 2024. *Moore* involved a one-time Mandatory Repatriation Tax (MRT) on U.S. shareholders of foreign corporations, enacted in 2017. The MRT taxed shareholders on profits that foreign corporations had accumulated over past years, even though those earnings were never distributed to the shareholders. The taxpayers (the Moores) argued this was an unconstitutional tax on **"unrealized" income**, claiming the Sixteenth Amendment requires income to be **received or realized** by the taxpayer [congress.gov](http://congress.gov). The government countered that nothing in the Sixteenth Amendment's text imposes a realization requirement and that many longstanding tax provisions (like the tax on partnership income or Subpart F rules for controlled foreign corporations) depend on taxing undistributed income [congress.gov](http://congress.gov) [rsmus.com](http://rsmus.com).

The Supreme Court **upheld the tax** but in a **narrow ruling** [congress.gov](http://congress.gov). The majority opinion by Justice Kavanaugh **framed the MRT as a tax on the corporation's realized income, legitimately attributed to U.S. shareholders** – analogizing it to pass-through taxation of partnerships or S-corporations [congress.gov](http://congress.gov) [taxpolicycenter.org](http://taxpolicycenter.org). By characterizing the earnings as having been realized by the corporate entity (and only then passed through in theory to shareholders), the Court **avoided deciding whether an income tax must involve personal realization by the taxpayer**. The decision did *not* answer the broader constitutional question that many were watching: whether *any* tax on unrealized gains (for example, annual tax on stock appreciation that a person hasn't sold) is permitted under the Sixteenth Amendment [congress.gov](http://congress.gov) [taxpolicycenter.org](http://taxpolicycenter.org). The Court expressly noted that it was *not* addressing hypothetical taxes such as **a direct tax on an individual's wealth, on mere "holdings" or "appreciation"** in asset value [congress.gov](http://congress.gov) [taxpolicycenter.org](http://taxpolicycenter.org). Those questions remain open.

Significantly, the *Moore* case revealed a **split among the Justices** on the realization issue. All nine Justices agreed the MRT (a tax on undistributed corporate profits) could be upheld in some fashion, but they diverged in reasoning. Justice Jackson wrote a concurring opinion emphasizing **judicial restraint** in tax matters – she argued that just because a tax is novel or hits a narrow group does not make it unconstitutional, and courts should be cautious before striking down tax laws [congress.gov](http://congress.gov). She pointed out that the Sixteenth Amendment's text does not mention "realization," and historically "income" was understood broadly enough to encompass unrealized gains [supremecourt.gov](http://supremecourt.gov). In her view, *Macomber's* realization concept was a judicial invention that had been *"promptly and sharply criticized"* and largely abandoned by later decisions [supremecourt.gov](http://supremecourt.gov). Jackson flatly stated that **there is no constitutional requirement that income be realized** and that *Macomber's* limit is effectively "moribund" [supremecourt.gov](http://supremecourt.gov). On the other hand, four



conservative Justices – Justice Barrett (joined by Justice Alito) in a concurrence, and Justice Thomas (joined by Justice Gorsuch) in dissent – **took the opposite position**. They argued that *Macomber* was correctly decided and that the concept of “income” in the Sixteenth Amendment **does entail realization** in the hands of the taxpayer (absent a distribution or sale, a shareholder has no taxable income from mere appreciation)[taxpolicycenter.org](https://taxpolicycenter.org). Justice Barrett’s concurrence asserted that the word “derived” in the Amendment implies a completed transaction or gain separate from principal – essentially reviving the *Macomber* principle, though she agreed the MRT could be sustained on the narrower grounds of taxing already-realized corporate income. According to these four Justices, **taxing unrealized gains of individuals (such as unsold stock that has gone up in value) falls outside the Sixteenth Amendment** and thus would likely be a forbidden unapportioned direct tax [taxpolicycenter.org](https://taxpolicycenter.org).

The remaining four Justices (Chief Justice Roberts and Justices Kavanaugh, Sotomayor, and Kagan) **did not explicitly commit** to either theory in *Moore*. They joined the majority’s narrow opinion and left the broader issue for another day[taxpolicycenter.org](https://taxpolicycenter.org). Justice Kavanaugh’s opinion carefully distinguished the pass-through tax in *Moore* from a hypothetical tax on unrealized personal gains, even noting that the government itself acknowledged the distinction[taxpolicycenter.org](https://taxpolicycenter.org). Thus, after *Moore*, the question of a **mark-to-market tax on wealthy individuals’ unsold assets** remains unsettled at the Supreme Court level. There is a clear indication, however, that at least **four Justices would view such a tax as unconstitutional**, and only one (Justice Jackson) openly indicated support for the view that it is plainly permissible[taxpolicycenter.org](https://taxpolicycenter.org). This 4-1-4 split means the fate of an unrealized gains tax would likely depend on the reasoning of the swing votes (Roberts and Kavanaugh, and potentially others) and how the tax is structured and defended.

## Constitutional Legitimacy of Taxing Unrealized Gains under the Sixteenth Amendment

**Is an annual tax on unrealized asset appreciation constitutional?** The arguments can be framed on both sides:

- **Proponents’ View (Broad Reading of “Income”):** Supporters contend that the Sixteenth Amendment was intended to give Congress wide latitude to tax all forms of income from all sources[verdict.justia.com](https://verdict.justia.com)[verdict.justia.com](https://verdict.justia.com). They argue that an increase in net worth *is* an economic gain and thus fits naturally within the ordinary meaning of “income.” After all, the taxpayer is wealthier at the end of the year than at the beginning – that **accession to wealth** enhances their ability to pay tax[verdict.justia.com](https://verdict.justia.com)[verdict.justia.com](https://verdict.justia.com). Proponents note that nothing in the Amendment’s text says income must be received in cash or realized by sale [supremecourt.gov](https://supremecourt.gov). In fact, the phrase “from whatever source derived” was meant to *eliminate* distinctions and loopholes, responding to *Pollock* by ensuring all income could be reached [supremecourt.gov](https://supremecourt.gov). They also point to the trajectory of case law after *Macomber*, which, as discussed, **retreated from a strict realization requirement**. The Supreme Court itself acknowledged that the realization rule is one of **administrative convenience** and not a constitutional boundary[rsmus.com](https://rsmus.com). Congress has, in limited contexts, taxed unrealized gains (for example, the original *Subpart F* regime taxing certain undistributed foreign corporate earnings since 1962, or the mark-to-market of futures contracts), and courts upheld those measures[rsmus.com](https://rsmus.com)[rsmus.com](https://rsmus.com). Scholarly commentary overwhelmingly views *Macomber*’s constitutional analysis as outdated. In tax law casebooks and treatises, *Macomber* is described

as “discredited” [verdict.justia.com](#), and the near-universal academic consensus (across ideological lines) is that **the Sixteenth Amendment does not compel a realization requirement** [verdict.justia.com](#). Put simply, Congress *could* redefine income by statute to include annual unrealized gains – just as it could choose to tax or not tax any other form of economic income [verdict.justia.com](#). Advocates often cite the Haig–Simons definition to bolster the notion that taxing net-worth changes is conceptually sound and captures true economic income that currently escapes taxation. They emphasize the *purpose* of the Sixteenth Amendment: to tax *all* incomes without the apportionment straitjacket, especially income from property which wealthy individuals could otherwise stockpile untaxed [supremecourt.gov](#) [supremecourt.gov](#). In their view, a billionaires’ tax on unrealized gains would fulfill the Amendment’s intent and close a loophole that allows infinite deferral of tax on asset growth. As one prominent tax scholar put it, “*there is no theory available under which [this] proposal would fail to pass constitutional muster*” – short of the Supreme Court inventing a new doctrine to protect the ultra-rich [verdict.justia.com](#) [verdict.justia.com](#).

- Opponents’ View (Narrow Reading – Realization Required):** Critics maintain that taxing unrealized gains yearly is **constitutionally dubious**. They argue that the Founders and the drafters of the Sixteenth Amendment did not envision an unapportioned direct tax on wealth or property values [supremecourt.gov](#) [supremecourt.gov](#). In the historical debates, “income” was generally understood to mean a **gain that has been received by the taxpayer** – such as a profit, rent, dividend, or salary paid out. The *Macomber* decision, while old, is still valid precedent in their view and correctly interpreted “income” to exclude paper gains. Opponents stress that *Macomber* has never been overruled by the Supreme Court, and they see the potential for its revival. They point to language in more recent cases (including the concurring and dissenting opinions in *Moore*) that *affirm* the principle that **an individual must actually realize income before Congress can tax it without apportionment** [taxpolicycenter.org](#). For example, Justice Barrett’s concurrence in *Moore* asserted that “*the Sixteenth Amendment’s reference to ‘income’ derived from any source encompasses a requirement that income, to be taxed without apportionment, must be realized*” [taxpolicycenter.org](#). In this view, a tax on unrealized appreciation of assets is tantamount to a **property tax on the holding of the asset** – exactly the type of direct tax the Constitution requires to be apportioned by state population. The opponents bolster their position with originalist arguments: **none** of the framers or ratifiers of the Sixteenth Amendment publicly suggested they were authorizing a federal tax on wealth per se [supremecourt.gov](#). The Amendment was understood as overturning *Pollock* (which had invalidated taxes on income from property) **without otherwise altering the ban on unapportioned direct taxes** on property or capital [supremecourt.gov](#) [supremecourt.gov](#). In other words, it carved out an exception only for “income” as conventionally defined (i.e. realized gains, rents, etc.), and it did not give Congress a blank check to tax wealth or unrealized increases. Opponents also raise practical and fairness concerns: taxing people on gains they have not realized might force asset-rich but cash-poor taxpayers to sell assets or find liquidity, and it could lead to taxing phantom income if values fluctuate (with potential for refunds or carryover of losses in down years). While these are policy arguments, they underscore the *Macomber* Court’s instinct that “*incomes*” implies something severed and separate from the source, not just theoretical appreciation [supreme.justia.com](#). Lastly, critics note that if Congress tried to enact such a tax by simply declaring unrealized gains to be “income,” courts might invoke *Macomber*’s substance-over-form principle to look past the label [supreme.justia.com](#). **Substance matters:** If the Court sees the tax as fundamentally a levy on

property (the ownership of appreciated assets) rather than on income, the Sixteenth Amendment wouldn't save it. Opponents often cite the rule that *a direct tax on personal property or its increase in value must be apportioned*[supreme.justia.com](https://supreme.justia.com) – something effectively impossible for a nationwide wealth tax targeting only the richest (since apportionment would force absurd results where each state owes tax proportional to population rather than actual wealth distribution). In short, the opposition view is that **the Constitution still imposes limits on Congress's taxing power**: unless a gain has been realized by the taxpayer, a federal tax on it must be treated as a direct tax subject to apportionment (or else be structured as an *indirect* tax like an excise, which has its own challenges).

It bears mentioning that **Congress could, in theory, attempt to avoid the Sixteenth Amendment issue by invoking its broader Article I taxing power and apportioning a wealth tax** among the states by population. However, in practice this is considered nearly unworkable for a tax on individual net worth changes. Apportionment would mean the total revenue is fixed per state proportional to census figures, which could result in perverse outcomes (such as wealthy states owing no more total tax than poorer states). No serious proposals advocate an apportioned wealth tax; instead, the political and legal focus is on fitting the tax under the Sixteenth Amendment's income tax umbrella.

**General Welfare Clause considerations** do not provide a meaningful barrier in this context. The Constitution requires that taxes be imposed for the "general welfare" of the United States, but this is a very broad standard. So long as the revenue is used to fund government operations or public programs (as opposed to a purely private benefit), a tax on unrealized gains would clearly be in service of the general welfare. Since the New Deal era, courts have given Congress **wide leeway** to determine what taxes serve the general welfare, and they do not second-guess the policy wisdom of tax legislation in this regard. Thus, the general welfare clause would not be a point of conflict; the real constitutional battle is over the definition of "income" and the direct tax apportionment rule.

## Legislative Feasibility: Budget Reconciliation and Enforcement Issues

If Congress attempts to enact an annual unrealized gains tax on billionaires, one question is *how* it could pass the Senate. Such a proposal would likely face a filibuster if not included in a budget reconciliation bill. **Budget reconciliation** is a process that allows certain budget-related bills (those that directly change spending or revenues) to pass the Senate with a simple majority, bypassing the 60-vote filibuster threshold. A tax on high-net-worth individuals' unrealized gains would certainly affect revenues and thus could be included in a reconciliation bill. In fact, major tax legislation (for example, the 2017 Tax Cuts and Jobs Act) has been passed via reconciliation. **The advantage** of reconciliation is that it only requires majority support in each chamber – feasible if the majority party is united – and cannot be filibustered. Given the controversy of a wealth tax, reconciliation might be the only viable path.

However, reconciliation comes with a key limitation known as the **Byrd Rule** (Section 313 of the Congressional Budget Act). The Byrd Rule prohibits "extraneous" provisions in a reconciliation bill – i.e., provisions that are not primarily about budget changes. A provision is considered extraneous (and thus vulnerable to being stricken from the bill) if, among other tests, *"it does not produce a change in outlays or revenues or a change in the terms and conditions under which outlays are made or revenues are collected."*[gibsondunn.com](https://gibsondunn.com) In simpler terms, if a provision's impact on the budget is



merely incidental to some larger policy goal, it may not survive. A tax on unrealized gains itself **clearly produces a change in revenues** – it would raise potentially significant federal revenue – so the core tax provision should qualify under reconciliation rules (it is neither incidental nor negligible in budgetary terms).

**Potential Byrd Rule Hurdles:** The question specifically asks about “associated enforcement mechanisms (e.g., prison penalties for tax evasion)” and whether those would be permitted under budget rules. Enforcement provisions, such as creating a new criminal penalty or increasing an existing one, often **do not have a direct budgetary effect** (or have only a minimal one). For example, adding or enhancing a prison sentence for willful tax evasion related to the new tax does not directly raise revenue (if anything, it could impose costs on the prison system). Under the Byrd Rule’s tests, such a provision could be deemed **extraneous** because it “*does not produce a change in outlays or revenues*” of significance<sup>[arnoldporter.com](https://www.arnoldporter.com)</sup>. In past reconciliation bills, purely regulatory or penalty provisions have been stripped out unless a budgetary impact was shown. For instance, during the passage of the 2010 Affordable Care Act via reconciliation, certain non-budgetary provisions were removed to comply with the Byrd Rule’s requirements. Similarly, if Congress included a section in the bill that, say, created a new felony offense for underreporting unrealized gains, a point of order could be raised in the Senate to strike that section as extraneous to the budget<sup>[congress.gov](https://www.congress.gov)</sup>. The Senate Parliamentarian would consider whether the enforcement measure’s budget impact is merely incidental relative to its policy impact. Given that criminal penalties mainly serve deterrence and punishment rather than revenue-raising, it is likely such a provision would **not** survive the Byrd Rule unless waived by 60 senators.

That said, Congress might not need to add many new enforcement provisions at all. **Existing tax law already makes tax evasion a crime.** High-net-worth individuals failing to report income (however income is defined in the Code) can be prosecuted under current statutes for tax evasion or fraud. The IRS and Department of Justice could enforce a mark-to-market tax using the same civil and criminal enforcement tools they use for any other income tax. Thus, the reconciliation bill could focus on the tax itself and perhaps civil penalty adjustments, without venturing into creating entirely new criminal laws. Civil penalty provisions (like increased accuracy-related penalties or underpayment interest adjustments) *do* have a budgetary effect (they bring in revenue from fines), but even those must be handled carefully to ensure they’re principally budgetary. If necessary, such enforcement tweaks could be justified as increasing revenue via improved compliance, which has been acceptable in prior reconciliation measures. For example, modest increases in IRS penalties or funding have been included in budget bills on the theory that they raise revenue through better enforcement (though even IRS funding can be tricky under the Byrd Rule).

In summary, **Congress could likely pass the unrealized gains tax itself through reconciliation**, provided it stays within the strict budgetary lines. The multi-billion dollar revenue impact of the tax would be its primary effect, satisfying the Byrd Rule’s core requirement. **Any non-budgetary “riders” – especially ones creating or enhancing criminal penalties – would be at risk of removal**<sup>[gibsondunn.com](https://www.gibsondunn.com)</sup>. Lawmakers would either avoid including such items or seek a waiver (which would require 60 votes, defeating the purpose of using reconciliation). The safer course would be to rely on existing tax enforcement provisions. There is precedent for this: major tax changes enacted via reconciliation (like the 2017 tax law) typically did not create new criminal laws; they used existing Title 26 penalty and enforcement frameworks.

Another consideration is the **scope of regulations** needed to implement the tax. Valuing assets annually, defining the tax base, and providing rules for losses, carryforwards, or deferral for illiquid

assets would all be complex. But these details can usually be handled administratively by Treasury regulations or by statutory language that, if carefully drafted, still directly relate to revenue and thus survive the Byrd Rule.

In conclusion, the reconciliation process is a **feasible vehicle** for enacting the tax, but drafters must be diligent to ensure every provision primarily affects revenues or outlays. The central taxing provision clearly would; any extraneous add-ons (especially around enforcement that don't raise revenue) may need to be omitted or passed separately. Political feasibility is a different matter – it would require near unanimity among the majority party and at least a majority in the House. But procedurally, reconciliation is the likely path forward if such a tax were pursued.

## Likelihood of Judicial Survival and Potential Arguments

If Congress enacts a tax treating unrealized gains as income, a legal challenge is inevitable. A wealthy taxpayer subject to the tax would have standing to sue for a refund after paying (or might seek an injunction before paying, though the Anti-Injunction Act generally bars preemptive tax lawsuits). The case would likely fast-track to the Supreme Court, given the constitutional question and the significant stakes.

**How would the current Supreme Court likely rule?** As discussed earlier, the Court's composition suggests a real possibility that the tax could be struck down. Four Justices (Thomas, Gorsuch, Barrett, Alito) have already signaled they view **realization as a constitutional requirement for income taxes**[taxpolicycenter.org](https://taxpolicycenter.org). It would only take one more Justice joining that view to form a majority. Chief Justice Roberts and Justice Kavanaugh, while not explicitly endorsing the realization requirement in *Moore*, have shown cautious, conservative approaches in similar contexts. Roberts, in particular, has sometimes favored narrow rulings and has an eye on institutional legitimacy; he might be hesitant to invalidate a major federal tax, but he also might be sympathetic to property-rights-based arguments. Justice Kavanaugh's opinion in *Moore* was careful not to approve taxes on unrealized personal gains, which could indicate hesitancy. On the other hand, the Court is aware that striking down such a tax would be momentous – the first time in decades (perhaps since *Schechter Poultry* in 1935 or earlier) that the Supreme Court invalidated a major federal economic measure on constitutional grounds of this kind. The liberal Justices (currently Jackson, Sotomayor, Kagan) would almost certainly uphold the tax, viewing it as within Congress's broad tax-and-spend powers and consistent with the Sixteenth Amendment's purposes[supremecourt.gov](https://supremecourt.gov). The deciding votes could be Roberts and Kavanaugh (and potentially Justice Amy Coney Barrett, if her concurrence in *Moore* was more about that case's framing than a hard conclusion on wealth taxes – though her language seems to favor requiring realization). The **outcome is uncertain**, but many observers believe there is a significant risk the Court would rule against the tax, perhaps by a 5–4 vote.

If the statute were challenged, what legal arguments would each side make in court?

- **Government's Defense:** The United States (and supporting amici) would argue that the tax is a valid **"income tax"** under the Sixteenth Amendment, thereby exempt from apportionment. They would marshal historical evidence that "income" was always meant to be a broad concept capturing any increase in wealth[supremecourt.gov](https://supremecourt.gov). They would emphasize the *text* – that "from whatever source derived" was intended to prevent exactly the kind of loophole that excluding unrealized gains creates. The government could point to *Glenshaw Glass* and other cases to show the Court has never adopted a rigid rule that income must be in hand; instead,

the Court focuses on whether there is **dominion and control over an economic gain** [rsmus.com](https://www.rsmus.com). Here, the taxpayers' net worth increases give them greater economic power (they could borrow against their appreciated assets, for example, or otherwise benefit from the gain without selling) – thus they have an accession to wealth. The government might also cite the line of cases (Bruun, Horst, etc.) that undermine *Macomber*, as well as the fact that *Macomber* itself dealt with a scenario where arguably *no* gain was realized even by the corporation (a mere accounting transfer) [verdict.justia.com](https://www.verdict.justia.com). In other words, they would argue *Macomber* is limited to its peculiar facts and does not control the treatment of genuine increases in wealth. They could further contend that even if *Macomber* suggested a constitutional barrier, it has effectively been overturned by subsequent practice and the **“practical construction”** given by Congress over the years (Congress has taxed certain unrealized gains and the Court has not objected). The defense would also stress **policy and fairness**: that the ultra-wealthy can currently avoid tax indefinitely by not selling assets (the “buy, borrow, die” strategy, where they borrow against appreciating stock for living expenses and never realize gains in their lifetime). Taxing unrealized gains, they'd argue, **closes a loophole and treats all income forms equitably**, which is in the spirit of the Sixteenth Amendment. As a backup, the government might argue that even if the Sixteenth Amendment were deemed inapplicable, the tax could be sustained as an **“indirect tax”** (like an excise) rather than a direct tax on property. This would be a creative argument: for instance, frame the annual levy as an excise on the privilege of owning valuable assets or on the year-to-year enjoyment of wealth. The Court in past cases (like *Bromley v. McCaughn* (1929)) has sometimes upheld taxes as excises even when they looked like property taxes, if they could be viewed as taxes on a particular use or transfer of property. The government could try to analogize a mark-to-market tax to an excise on the **yearly accumulation of wealth**. It's an uncertain argument, but it could be invoked if necessary to avoid the direct tax classification. Finally, the government would likely urge judicial restraint: the notion that **tax policy is for Congress** to decide, and unless the law clearly violates the Constitution, the Court should defer. They might quote Justice Jackson's concurrence that the remedy for disagreement with tax policy is at the ballot box, not in constitutionalizing economic theories [congress.gov](https://www.congress.gov). Courts traditionally give broad deference to Congress in the exercise of the taxing power (recognizing it as a core legislative function), and the government would lean into that principle.

- **Challengers' Case:** The plaintiffs (likely wealthy taxpayers backed by advocacy groups) would frame the tax as an unapportioned **direct tax on property** – thus unconstitutional absent apportionment. They would lean heavily on *Macomber*, quoting its pronouncement that **“a tax on [a] stock dividend is a tax on capital increase, not on income”** and that the Sixteenth Amendment **“does not extend”** to gains that have not been realized by the taxpayer [supreme.justia.com](https://www.supreme.justia.com). They would argue that *Macomber* is still binding precedent on the definition of income under the Sixteenth Amendment, and point out that the Supreme Court has never explicitly overruled it [law.nyu.edu](https://www.law.nyu.edu). The challengers would bolster this with the contemporary statements of four Justices in *Moore* confirming that *Macomber* got it right [taxpolicycenter.org](https://www.taxpolicycenter.org). Expect heavy emphasis on the word “derived” in the Sixteenth Amendment – the idea that income must be “derived from” something implies an act of extraction or separation (like harvesting fruit from a tree). As Justice Thomas often cites, the Founding-era definitions of income and direct taxes might be brought in. They may cite historical materials and economists of the era to argue that unrealized asset appreciation would have been considered part of one's wealth or property, not “income” in the common

understanding. Additionally, the challengers would use **slippery slope arguments**: If Congress can tax unrealized gains as income, what stops it from taxing **any** form of wealth or property under the guise of “income from whatever source”? They might argue this would render the Article I, Section 9 apportionment rule a nullity, an absurd result given that the Founders put it in and the Sixteenth Amendment was meant to be a limited modification, not a full repeal of the direct tax clauses [supremecourt.gov](https://www.supremecourt.gov). Another line of argument could be the **administrative and valuation morass** that a mark-to-market system entails – while this is a policy argument, it could be used to illustrate that the Constitution couldn’t have intended such a sweeping power that leads to impractical outcomes. For example, valuing private businesses, artwork, or thinly traded assets annually is speculative; taxing phantom gains that might disappear in a downturn could raise due process issues (though typically tax amounts don’t implicate substantive due process unless truly confiscatory). They might raise a **Fifth Amendment** claim in the alternative, arguing that taking someone’s property (money) to pay a tax on a gain they never actually realized is fundamentally unfair – though courts historically have rejected substantive due process attacks on taxation except in extreme cases. Overall, the challengers’ core would remain the structural argument: This is a bridge too far under the Sixteenth Amendment, and the proper way to impose a wealth tax is to amend the Constitution (or to attempt apportionment).

Given these arguments, how would the public debate shape up? **Lawmakers defending the tax** would likely emphasize themes of **fairness and equality**: the richest Americans often pay little to no income tax relative to their true economic gains, and this loophole undermines faith in the tax system. They would argue that a billionaire’s wealth growing by \$10 billion in a year while paying essentially \$0 tax (if no sales occur) is unjust when middle-class workers pay tax on every paycheck. Legally, they would assure that the tax is on “income” in the broad sense – essentially, treating asset appreciation as income just as we treat, say, imputed interest or original issue discount as income even if not paid in cash [law.nyu.edu](https://www.law.nyu.edu). They might cite prominent constitutional law professors and economists who support the view that the tax is constitutional. In fact, multiple scholars have already written that a well-designed mark-to-market tax on ultra-wealthy individuals “*is clearly ‘income’ under the Sixteenth Amendment*” [hoover.org](https://www.hoover.org/verdict) [justia.com](https://www.justia.com) and would withstand challenge. Lawmakers would likely avoid framing it as a “wealth tax” – instead calling it a “**billionaire’s income tax**” or similar, to reinforce that it taxes income (just a more comprehensive measure of income) and to situate it in familiar territory (the income tax system). They would also point out that failure to tax these gains creates perverse incentives and economic distortions, and that the proposal can include provisions to allow deferral for truly hard-to-value assets or to spread payments, mitigating liquidity concerns.

**Lawmakers opposing the tax** would echo the constitutional arguments against it, warning that it is an abuse of power that violates property rights. They would likely use rhetoric about the “American Dream” – that this tax would punish success, discourage investment, and could eventually creep to affect those who are merely “millionaires” or even people with moderately appreciated homes, once the door is open. They might invoke the Constitution explicitly, saying “the Constitution does not allow Congress to simply declare anything it wants to tax as ‘income’ – a line must be drawn.” Some might raise the specter of farmers or small business owners being taxed on paper gains in land or equipment each year (even though current proposals have high wealth thresholds that would exclude such cases). The public argument would be a mix of slippery-slope and a defense of the status quo realization-based system as more stable and administrable.

It's worth noting that, politically, **public opinion on taxing the ultra-rich** tends to be favorable in the abstract. Proponents would likely cite polls and the popular appeal of making billionaires pay their "fair share." Opponents would try to muddy the waters by suggesting it could eventually hit regular people or that it gives the IRS intrusive valuation powers. But those political considerations aside, in court the decision will come down to nine Justices parsing constitutional text, history, and precedent.

In evaluating the **likelihood of the tax surviving**, one must consider the current judicial climate. The Supreme Court in recent years has not been shy about striking down long-established precedents or economic regulations when a majority believes a constitutional principle is at stake (e.g., the Court's refreshing of the nondelegation doctrine or robust readings of the First and Second Amendments). Protecting property and adhering to the Framers' conception of taxes could appeal to the conservative majority's originalist leanings. On the other hand, the Court is also sensitive to accusations of favoritism toward the wealthy and powerful. Striking down a tax that applies only to a few hundred billionaires – especially if done 5–4 – could be controversial and feed a perception of the Court as politically aligned with plutocratic interests. Justices like Roberts or Kavanaugh might prefer to uphold the law if a plausible narrow rationale exists, to avoid that blow to the Court's legitimacy. They could, for example, uphold a mark-to-market tax by saying **"even if realization is generally required, the presence of provisions allowing payment over time or borrowing against assets means the tax is within practical limits"** or by reclassifying the tax in a creative way. It is also possible the Court could uphold the tax but impose some limiting principle, or strike only particular applications (for instance, perhaps taxing unsold **liquid** assets like publicly traded stock is okay, but not illiquid hard-to-value assets – though drawing such a line in constitutional terms is challenging).

In any event, if one assumes the tax passes, the **prudent expectation** is that its fate in the courts is uncertain. There is a real chance of invalidation, but also a path to survival if the Court either defers to Congress or is persuaded that the Constitution's original meaning of "income" was not limited to realized gain. Lawmakers should be prepared for legal challenges and perhaps include a fallback: for example, a provision that if a court finds the tax unconstitutional as an income tax, certain backup taxes (maybe an increase to capital gains rates or an estate tax surcharge) kick in to capture some of the revenue in other ways. While such contingent legislation is unusual, it shows the need to plan for a scenario where the primary mechanism is struck down.

## Other Relevant Doctrines and Considerations

- **Economic Substance and Substance-over-Form:** Courts often look beyond the form of a tax or transaction to its substance. Here, if Congress labels the annual unrealized gain tax as an "income tax," a court will examine whether in substance it operates as one. As noted, *Macomber* admonished that substance governs in determining what is "income" [supreme.justia.com](https://supreme.justia.com). Proponents would argue the substance is indeed to tax income (economic gain), just on an annual mark-to-market basis. Opponents claim the substance is a wealth tax. The economic-substance doctrine in tax typically is applied to taxpayer transactions (to deny tax benefits for sham transactions), but a similar spirit could guide the Court's view of the law: Does this law target a **transaction or accession to wealth** (which would be income) or does it target mere ownership of property? The design of the statute could influence this. For instance, if the tax was structured with *realization-like features* (such as allowing taxpayers to elect to defer payment until disposition for certain assets, perhaps with interest), it might look



more like an extension of the income tax system (just accelerating it) rather than a pure property tax. A law that simply said “2% of the value of all assets over \$1 billion will be collected annually” would look more like a classic wealth tax. But a law that says “unrealized gains on assets will be included in gross income and taxed at the applicable rate, with losses deductible, etc.” is framed as part of the income tax. Courts could be influenced by such distinctions. In essence, the more the law can be analogized to existing income tax provisions (like how we already tax certain gains without sale, or tax partners on undistributed income), the more it appears to have “economic substance” as an income tax rather than a subterfuge.

- Doctrine of Judicial Restraint:** As Justice Jackson highlighted, there is a tradition of judicial deference in tax matters [congress.gov](https://www.congress.gov). The famous quote from Justice Oliver Wendell Holmes is often cited: “*The power to tax is not the power to destroy while this Court sits.*” The judiciary historically intervened against taxing power primarily in the *Pollock* era, which was later regarded as an anomaly corrected by amendment. Modern courts have more frequently said **tax policy should be decided by the political branches**; unless a tax blatantly violates a clear constitutional provision, judges should not interfere simply because the tax is novel or unwise. This principle could sway some Justices to uphold the law to let the political process play out. The Court might say, as it did in *NFIB v. Sebelius* (2012) with regard to the Affordable Care Act’s tax penalty, that if a plausible reading of the statute makes it constitutional, the Court should adopt that reading. In *Sebelius*, Chief Justice Roberts famously construed the “penalty” for not having health insurance as a “tax” in part to save it from invalidation [supremecourt.gov](https://www.supremecourt.gov). Similarly, a Justice inclined to restraint might construe “income” flexibly enough to include unrealized gains rather than rule the Amendment has a rigid unwritten limitation. On the flip side, the current Court’s conservative majority has not uniformly embraced restraint – in some instances, they have been quite willing to strike down laws (e.g., on separation of powers or First Amendment grounds) despite political controversy. So it is uncertain how far restraint alone will carry, but it’s certainly an argument the government and supporters will press: that this is a policy experiment in Congress’s core area of competency (the tax system), and the Court’s role is not to second-guess economic policy unless clearly required by the Constitution.
- Apportionment and the Direct Tax Clause:** It’s important to clarify that if the unrealized gains tax is *not* considered a tax on “incomes” under the Sixteenth Amendment, then it would be a direct tax. The Constitution’s Article I, Section 9, clause 4 requires “*No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration*”. The definition of “direct tax” has been debated since the 18th century. The Supreme Court in *Hylton v. United States* (1796) took a narrow view (limited to capitation taxes and taxes on land), but *Pollock* (1895) took a broader view that included taxes on personal property or income therefrom. The Sixteenth Amendment removed the apportionment requirement for “taxes on incomes.” If a court found the wealth tax was not a tax on incomes, it would almost certainly deem it a direct tax on property (since it’s not easily characterized as an indirect tax like a duty, impost, or excise). Without apportionment, that would violate the Constitution. Thus, **the stakes are all-or-nothing**: either the tax is considered an income tax (and is valid without apportionment), or it is a direct tax (and invalid without apportionment, since apportionment for it is practically impossible). There is no middle ground of just striking a part of it – the basic structure would fail. That binary outcome likely focuses the Court’s mind: they have to either accept it fully under the Sixteenth Amendment or not at all. There is one more nuance: could the tax be an “**excise**” (a type of indirect tax) not requiring apportionment even if not an income tax? Some academics like Professor Bruce Ackerman have floated the idea that a wealth tax could be

framed as an excise on the privilege of holding wealth above a certain amount [hoover.org](https://www.hoover.org). However, this is largely untested and would be a stretching of the traditional understanding of excises (which typically apply to activities or transactions, not mere ownership). The safer harbor is the Sixteenth Amendment, which is why the proposal emphasizes that definition of income.

- **“General Welfare” and Taxing Power Scope:** As mentioned, as long as the revenue is used generally, the tax would meet the general welfare requirement. The tax could be accompanied by legislative findings about income inequality, the need for revenue for social programs, etc., tying it to general welfare objectives. Courts since *United States v. Butler* (1936) and *Helvering v. Davis* (1937) have held that it is for Congress to decide what expenditures serve the general welfare, and the courts won’t micromanage that [supremecourt.gov](https://www.supremecourt.gov). So this doctrine does not pose an independent obstacle to the tax, but it does provide supportive context that Congress is exercising its taxing power for broadly applicable public purposes (e.g., funding infrastructure, healthcare, or reducing deficits).
- **Potential for Partial Measures:** Lawmakers also consider alternatives that might be more defensible. For example, **taxing unrealized gains at death** (treating death as a realization event) or **imposing a surtax on extremely wealthy persons’ income** (which could indirectly recoup some tax on unrealized gains when they eventually are realized). These measures, while significant, generally avoid the constitutional thicket because they operate within the traditional realization paradigm or at least at a clearly defined event (death). The political proposal at issue, however, is explicitly annual and mark-to-market, so it directly raises the constitutional question rather than deferring it. Still, it’s relevant in the conversation that there are incremental approaches which might achieve some similar goals with less legal risk.

In weighing everything, if such a law were passed, its **judicial survival** would likely depend on persuading at least one or two of the cautious conservative justices that: (1) the law can reasonably be seen as consistent with the Sixteenth Amendment’s meaning of income (perhaps given modern financial realities), and (2) striking it down would resurrect a long-discarded doctrine (*Macomber* formalism) and have negative implications (e.g., calling into question other parts of the tax code, or appearing to protect only the super-rich). The government would likely underscore that a decision invalidating the tax could also threaten other provisions – for instance, could it imperil the taxation of original issue discount, imputed interest, or even the inclusion of reinvested dividends? (Probably not, but slippery slope arguments could go both ways.) The challengers, of course, would say those other things are distinguishable or already realized in some constructive way.

**Bottom Line:** The statute’s fate is uncertain, but many experts believe it would face an uphill battle in the Supreme Court as currently composed [law.nyu.edu](https://www.law.nyu.edu). Some have even referred to the prospect of this Court striking down a billionaire tax as **“bringing Macomber’s corpse back to life”** – a feat that, while doctrinally difficult, is not impossible given the expressed views of several Justices [law.nyu.edu](https://www.law.nyu.edu). Lawmakers and analysts should be prepared that, if enacted, the tax could be tied up in litigation for years and might ultimately require either a Supreme Court change-of-heart or even a constitutional amendment if the Court shuts the door.

## Conclusion

Treating annual unrealized gains as taxable income for the ultra-wealthy is a bold attempt to align the tax system with economic reality and equity concerns. **Constitutionally, the question boils**

**down to what “income” means under the Sixteenth Amendment.** The historical record and case law provide support for both a broad interpretation (encompassing unrealized accretions to wealth) and a narrow one (limited to realized gains). The 1920 *Eisner v. Macomber* decision remains a touchstone for the latter view, asserting a realization-based definition of income [supreme.justia.com](https://supreme.justia.com/supreme.justia.com). Yet in the century since, the Supreme Court and Congress have moved in a direction that undercuts a strict realization requirement – taxing various forms of unrealized income and implying that realization is often about **administrative convenience** rather than constitutional necessity [rsmus.com](https://rsmus.com).

The current Supreme Court, as evidenced by the *Moore* case, is **closely divided** on this issue [taxpolicycenter.org](https://taxpolicycenter.org). The constitutional legitimacy of an unrealized gains tax would likely hinge on one or two swing votes and the specific framing of the tax in statute. If passed, such a law would confront the justices with a momentous decision: either reaffirm the broad taxing power under the Sixteenth Amendment in light of modern financial realities, or revive an older doctrine protecting wealth from annual taxation absent realization. The outcome is uncertain, and the **stakes are high** – not just for the billionaires immediately affected, but for the government’s revenue powers and the future flexibility of the U.S. tax system.

From a legislative process standpoint, Congress *could* enact the tax through budget reconciliation (avoiding a Senate filibuster), but it must carefully draft the bill to survive the Byrd Rule’s constraints on non-budgetary provisions [gibsondunn.com](https://gibsondunn.com). The tax’s revenue impact would qualify it for reconciliation, while extraneous enforcement provisions would likely have to be left out or handled separately. Existing criminal tax evasion statutes would still apply to the new tax, so enforcement would not necessarily be handicapped even if new penalties couldn’t be added in the same bill.

In public discourse, **supporters will argue** that the tax restores fairness and strengthens the integrity of the income tax system, ensuring that wealthy individuals pay tax on the true economic gains they enjoy. They will claim solid legal ground, citing the Sixteenth Amendment’s broad language and the evolution of case law [supremecourt.gov/verdict.justia.com](https://supremecourt.gov/verdict.justia.com). **Opponents will invoke** the specter of constitutional limits, property rights, and unintended consequences, positioning themselves as defenders of the Constitution’s original tax design and warning of a slide toward broader wealth taxation contrary to the Founders’ intent [supremecourt.gov](https://supremecourt.gov). Both sides can find supporting voices in the academy and judiciary, underscoring that this is a genuinely debatable issue at the intersection of law and tax policy.

In the end, the proposal to tax unrealized gains as income represents a test of how far the Sixteenth Amendment can be stretched to meet 21st-century conceptions of income and equality. It forces a reconciliation (no pun intended) between **economic substance** and **legal form**: if the substance is an increase in wealth, can the law treat it as income even without a sale? The constitutional text “incomes, from whatever source derived” [verdict.justia.com](https://verdict.justia.com) suggests flexibility and breadth, and there is strong precedent and scholarly support for upholding such a tax. Nevertheless, one cannot ignore the clear signals from several Justices that they view the realization principle as a constitutional safeguard, not merely a policy choice [taxpolicycenter.org](https://taxpolicycenter.org). Until the Supreme Court squarely confronts a tax like this, the constitutional legitimacy of taxing unrealized gains will remain a topic of spirited legal debate. Lawmakers proceeding with this proposal should do so with a keen awareness of these uncertainties, crafting the law as robustly as possible and preparing to defend it on both **textual and pragmatic grounds**. Only then might the judiciary be convinced to uphold what would be a historic expansion of the income tax – one aimed at the heart of inequality, yet rooted in a century-old amendment whose interpretation continues to evolve.

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