The Moores Lost Their Claim and *Moore*

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In this article, the authors analyze the logic of *Moore* and argue that in many important ways, the decision undercuts attempts to sharply limit Congress's taxing power.

In June the Supreme Court handed down its decision in *Moore*,[1] a potentially blockbuster tax case in which the petitioners asked the Court to impose novel limits on Congress's taxing power. The question presented was whether income must be "realized" to be taxed under the 16th Amendment,[2] which provides that "the Congress shall have power to lay and collect taxes on incomes, from whatever source derived."[3] We and other amici urged the court to rule narrowly; whatever the boundaries of the taxing power might be, the tax at issue in this case was well within those limits.[4] And during oral argument, the justices were skeptical of the petitioners' theories, which would call into question large swaths of the existing tax code.[5]

Now we know that the Moores lost. Heeding the calls for judicial restraint from tax experts across the political spectrum, the Court properly declined to answer the question presented and instead ruled on the actual issue before it: whether Congress can tax a shareholder or partner on their share of income realized at the entity level. As the majority answered, the "Court's longstanding precedents, reflected in and reinforced by Congress's longstanding practice, establish that the answer is yes."[6] In doing so, the majority soundly rejected the Moores' attempt to define a constitutional realization rule that would have upset that long-standing inter-branch understanding. Further, even as it focused on resolving this narrower issue, the majority articulated the general case for Congress's broad taxing power and expressed concern with arguments that would leave a "blast radius" (in the Court's words) of damage throughout the

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

[2] Petition for Writ of Certiorari at 2, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[3] U.S. Constitution Amendment XVI.

[4] *See* Brief for Amici Curiae Tax Law Center at NYU Law and Professors Ari Glogower, David Kamin, Rebecca Kysar, and Darien Shanske in Support of Respondent at 2, *Moore*, 144 S. Ct. 1680 (No. 22-800); Tax Law Center at NYU Law, "Guide to Amicus Briefs Filed in *Moore v. United States*" (2024).

[5] *See* Glogower et al., "*Moore v. United States*: Avoiding a Damaging Limiting Principle in the Sixteenth Amendment," Yale Journal on Regulation Notice & Comment (Jan. 12, 2024). Transcript of Oral Argument, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[6] *Moore*, 144 S. Ct. at 1689.

fiscal system.[7] As to whether there is any constitutional realization requirement, that question was expressly left for another day.[8]

The tax directly at issue in *Moore* was the mandatory repatriation tax (MRT), a one-time tax on certain shareholders on their portion of offshore profits held in a foreign corporation.[9] The MRT was enacted both to offset the cost of corporate tax cuts in the 2017 Tax Cuts and Jobs Act and to ensure that trillions in profits held by U.S. shareholders overseas would not permanently escape taxation.[10] The Moores owned enough shares in a foreign corporation to be subject to the MRT and challenged the law because, even though the corporation clearly realized income, the Moores themselves had not yet received the income through a distribution.

The case was closely watched not just for its potential to unsettle the existing tax code, which for decades has permitted passthrough taxation from entities to shareholders, but also its potential to hamstring Congress's ability to enact future wealth and mark-to-market income taxes (indeed, this was one of the stated goals of the Moores and their supporters).[11] With this status quo decision, the Supreme Court leaves Congress more or less in the same place it was before *Moore* when it comes to the constitutional viability of those taxes.

The five-vote majority was written by Justice Brett Kavanaugh and joined by Justices John G. Roberts, Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson (who also concurred but joined the majority in full). The four remaining justices would have ruled in favor of a constitutional realization requirement; Justice Amy Coney Barrett, joined by Justice Samuel Alito, concurred in the judgment only, and Justice Clarence Thomas, joined by Justice Neil M. Gorsuch, dissented.

Many others have already commented on potential future challenges to the scope of Congress's taxing power, noting that *Moore* may be just one battle in a larger war.[12] That may be true, as we now know for certain that four justices believe there is a realization requirement in the 16th Amendment and may not share the majority's concern with disrupting the existing tax system. But four is not five, and even the two justices joining the Barrett concurrence acknowledged that the concept of realization defies a clear definition.[13] The logic of the majority opinion joined in full by five members of the Court points in the direction of continuing, as the courts have been doing for decades,[14] to give Congress significant leeway in deciding how to measure and attribute income, including how to define "realization."[15]

I. Key Reasoning

1. The majority roundly rejected the Moores' legal arguments and further narrowed *Macomber*, contrary to claims by the Moores' counsel.

The majority thoroughly dismantled the theories behind the Moores' "array of ad hoc distinctions" that attempted to distinguish the MRT from other existing taxes that the petitioners themselves acknowledged are constitutional.[16] The Court rejected, for example, the Moores' theory of constructive realization, which would permit passthrough taxation only when the shareholder has some degree of control over the entity, as not only lacking in precedent but being unable to "distinguish the MRT from subpart F and other pass-through taxes," which do not always require that control.[17]

In particular, the majority resoundingly rejected the outsized role the Moores tried to give

[7] *Id.* at 1693.

[8] *Id.* at 1691 n.3.

[9] *See* Kamin, Thalia Spinrad, and Chye-Ching Huang, "New Supreme Court Case Could Unsettle Large, Longstanding, Parts of the Tax Code Built on a Bipartisan Basis Over Decades and Give a Windfall to Multinational Corporations," Tax Law Center at NYU Law Medium, June 26, 2024.

[10] *See* Christopher H. Hanna, "*Moore*, the Sixteenth Amendment, and the Underpinnings of the TCJA's Deemed Repatriation Provision," 76 *SMU L. Rev. F.* 156 (2023); Brief of George A. Callas and Mindy Herzfeld as Amici Curiae in Support of Respondent, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[11] *See, e.g.*, Editorial Board, "Is a U.S. Wealth Tax Constitutional?" *The Wall Street Journal*, June 14, 2023.

[12] *See generally* Paul Caron, "More *Moore* Commentary," TaxProf Blog, June 27, 2024.

[13] *Moore*, 144 S. Ct. at 1704 (Barrett, J., concurring).

[14] *See* Brief of Tax Law Center at NYU Law, *supra* note 4, at 4-18.

[15] *See Moore*, 144 S. Ct. at 1695-1696.

[16] *Id.* at 1693-1696.

[17] *Id.* at 1695.

to *Eisner v. Macomber*, a 1920 case in which the Court held that Congress could not tax a shareholder upon the receipt of a corporate stock dividend because it did not represent a change in the shareholder's economic interest in the corporation.[18] The *Moore* majority noted that *Macomber* was not about whether corporate income could be attributed to a shareholder and that, unlike the present case, neither the entity nor the shareholder in *Macomber* realized anything.[19] Because the Moores' reliance on *Macomber* was "misplaced," there was no need for the Court to rule on whether *Macomber*'s discussion of realization was dicta or whether later cases abrogated *Macomber*, as the Court explained in footnote 3.[20]

The majority also narrowed *Macomber* in two key ways. First, it expressly held that language in *Macomber* suggesting that a stockholder's share of accumulated corporate profits could not be income was merely dicta. Second, in affirming the constitutionality of passthrough taxation, the majority rejected *Macomber*'s definition of realization, which required income be available to the taxpayer for their "separate use and benefit."[21]

Still, the Moores' counsel, in post-decision interviews, have claimed that the majority opinion somehow reaffirms *Macomber* and endorses a realization requirement.[22] This spin appears to be based solely on the majority's description of *Macomber* including the sentence "And the Court further stated that income requires realization."[23]

This is a strained reading of the tea leaves, to say the least. The majority goes on to say in the following sentence and footnote: "Yet neither the corporation nor the shareholders [in *Macomber*] had realized income from the corporation's creation of and distribution of additional stock. . . . We do not address the Government's argument that a gain need not be realized to constitute income under the Constitution."[24] Thus, while the majority did not overrule *Macomber* outright, it certainly did not affirm any realization requirement and, like many majorities before it,[25] further narrowed *Macomber* to its specific facts.[26] Moreover, while not deciding whether there is *any* constitutional realization requirement,[27] the Court rejected the definition of a constitutional realization requirement offered in *Macomber* on which the Moores relied,[28] making it more difficult for future litigants to rely on *Macomber* on this critical issue.

2. The majority emphasized the importance of the tax system and the potential dire consequences of curtailing Congress's taxing power under the Moores' theories.

The majority noted that the Moores' theory of realization would leave a "blast radius" throughout the tax code,[29] listing various provisions of the code that could be rendered unconstitutional:

> In short, the Moores cannot meaningfully distinguish the MRT from similar taxes such as taxes on partnerships, on S corporations, and on subpart F income. The upshot is that the Moores' argument, taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional. See, *e.g.*, 26 U.S.C. section 305(c) (deemed stock distributions); sections 446, 448 (accrual accounting); section 701(partnership taxation); sections 951-965 (subpart F); section 951A (pass-through tax on global intangible low-taxed income); section 1256(a) (certain futures contracts); section 1272(a) (original issue discount instruments); sections 1361-1379 (S corporations); sections 2501-2524 (gift taxes).[30] [Footnotes omitted.]

[18] *Id.* at 1691 (discussing *Eisner v. Macomber*, 252 U.S. 189 (1920)).

[19] *Id.*

[20] *Id.* at 1690-1691 n.3.

[21] *Id.* at 1690-1691; *Macomber*, 252 U.S. at 194-195.

[22] *See, e.g.*, Tim Shaw, "*Moore* Attorney: Supreme Court 'Validated' Income Realization Arguments," Thomson Reuters, July 5, 2024; Kamin's (@davidckamin) post on social media platform X (Jul. 9, 2024).

[23] *See id.*; *Moore*, 144 S. Ct. at 1691.

[24] *Moore*, 144 S. Ct. at 1691 and n.3.

[25] *See* Brief of Tax Law Center at NYU Law, *supra* note 4, at 5-12.

[26] *Moore*, 144 S. Ct. at 1691.

[27] *Id.* at 1691 n.3.

[28] *Id.* at 1691.

[29] *Id.* at 1693.

[30] *Id.* at 1695-1696.

The majority went on to emphasize the fiscal consequences of upending the code, suggesting that, whatever the constitutional limits on the taxing power, those limits cannot mean disrupting the long-standing order:

> And those tax provisions, if suddenly eliminated, would deprive the U.S. Government and the American people of trillions in lost tax revenue. The logical implications of the Moores' theory would therefore require Congress to either drastically cut critical national programs or significantly increase taxes on the remaining sources available to it — including, of course, on ordinary Americans. The Constitution does not require that fiscal calamity.[31] [Footnotes omitted.]

Notably, the majority's examples of threatened tax provisions include not just forms of passthrough taxation but also accrual accounting for business income and original issue discount (accrual taxation for bonds). By including this broad range of provisions, the Court implied that, if it remains consistent in its reasoning, it may uphold these and similar accrual taxes in a future case, even though they implicate questions of realization that the Court declined to answer in *Moore*.

3. Even if there were a constitutional realization requirement, the Moores' positions and the Barrett concurrence logically suggest a broad definition of realization and, therefore, of income.

It is also worth pausing to emphasize the incoherence of the Moores' position and the ambiguity of Barrett's concurrence about what provisions could be deemed unconstitutional if there is a constitutional realization requirement. The Moores argued that accrual accounting and original issue discount were constitutional because they "affect not the need for realization, but its timing."[32] But then why wouldn't other accrual taxes, such as the minimum income tax on wealthy filers proposed by President Biden,[33] similarly be constitutional (which the Moores' supporters claim it isn't)?[34] Specifically, Biden's proposal is a mark-to-market tax that would require the wealthiest taxpayers prepay some portion of their future capital gains taxes, and once the gains (or losses) are realized, those prepayments would be credited against the tax due on the actual realized gain or loss.[35] It would also allow those wealthy taxpayers to delay any payments until the gains (or losses) are realized if they faced liquidity challenges, at which point it would effectively apply a rate that varies with the holding period.[36] So, there is still realization in the Biden minimum tax, but the timing of income recognition is changed, much like in the provisions that the Moores said were constitutional.

The bottom line is that the Moores failed to offer a workable constitutional realization rule, and it is unclear if there is one. After all, Barrett's concurrence, joined by Alito, acknowledges that "realization is a question of substance, not form. . . . Our cases describe many ways income might be realized; a rigid definition does not capture them all."[37] Potential litigants bringing constitutional challenges to any current or future tax provisions will face similar difficulties in articulating a workable theory that doesn't leave a blast radius throughout the existing tax code.

4. The majority partly overruled *Pollock*, the case that led to the 16th Amendment.

In 1895 the Supreme Court in *Pollock* held that a tax on income derived from property was a direct tax that required apportionment.[38] The 16th Amendment, which allowed Congress to tax income "from whatever source derived," was enacted to overturn *Pollock* to the extent it

[31] *Id.* at 1696.

[32] Brief for Petitioner at 21, *Moore*, 144 S. Ct. 1680 (No. 22-800).

[33] *See* Treasury, "General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals," at 83-85 (Mar. 11, 2024).

[34] *See* Editorial Board, "Biden's Big Wealth Tax? Unconstitutional," *The Wall Street Journal*, Mar. 10, 2023.

[35] *See* Treasury, *supra* note 33, at 83-85.

[36] *Id.* at 84-85.

[37] *Moore*, 144 S. Ct. at 1704 (Barrett, J., concurring).

[38] *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895).

prohibited income taxation without apportionment.[39] The *Moore* majority states plainly that, despite *Pollock*, income taxes have always been indirect taxes under the Constitution, regardless of the source, and that the 16th Amendment corrected the *Pollock* court's mistake:

> Because income taxes are indirect taxes, they are permitted under Article I, section 8 without apportionment. . . . Ratified in 1913, the Sixteenth Amendment rejected *Pollock*'s conflation of (i) income from property and (ii) the property itself. . . . Therefore, the Sixteenth Amendment expressly confirmed what had been the understanding of the Constitution before *Pollock*: Taxes on income — including taxes on income from property — are indirect taxes that need not be apportioned.[40]

The *Moore* majority therefore overruled *Pollock* to the extent it held that an income tax could be a direct tax. In doing so, the *Moore* majority implied the 16th Amendment would have been unnecessary if the *Pollock* court had interpreted the Article I taxing power correctly.

Thus, at the very least, any future arguments about a realization requirement for income taxes will need to contend with the scope of the taxing power under both the 16th Amendment and Article I.[41] That is, even if there is a realization requirement under the 16th Amendment, taxes on unrealized income may still be indirect taxes under Article I. Moreover, both the *Pollock* and *Macomber* decisions are outliers amidst a sea of case law in which courts have generally deferred to Congress on defining income, which the majority clearly recognized in walking back from those cases.

II. Conclusion

The Moores' counsel and some of their amici are urging that the opinion be read to tacitly rule out wealth taxes, mark-to-market taxes, and perhaps even impose a constitutional realization requirement, despite the fact the opinion explicitly disclaims doing any of those things. After all, that would turn their loss into a win. But the Court expressly declined to decide these questions.[42]

Indeed, the logic of the majority opinion suggests the opposite — that a future Court should continue to exercise restraint in examining any proposed limits on Congress's taxing power. Future litigants are likely to face the same challenges as the Moores if the Court continues to follow the majority's logic.[43] If and when the Court reaches the question of realization, the *Moore* opinion suggests that *Macomber* does not offer a workable definition of a constitutional realization rule and that any workable rule — if it exists — must avoid a blast radius within the tax system, a test the Moores' proposed rule failed.

Sound tax policy requires that policymakers have the flexibility to address avoidance or abuse, tax new types of income, ensure certain income doesn't escape taxation entirely, and raise revenue. Lawmakers have done just that in enacting many parts of the existing tax code, even as there is ample room for improvement. The *Moore* majority recognizes the importance of that flexibility as fundamental to Congress's taxing power. ■

[39] U.S. Constitution Amendment XVI; *see also Pollock*, 158 U.S. at 618 ("determin[ing] to which of the two great classes a tax upon a person's entire income — *whether derived from* rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property — belongs") (emphasis added).

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

[41] *See* Lawrence Zelenak, "*Moore* Thoughts," TaxProf Blog, June 21, 2024.

[42] *Moore*, 144 S. Ct. at 1689-1690 and nn.2-3, 1696-1697.

[43] *See id.* at 1696; *see also*, *e.g.*, letter from Joint Committee on Taxation Chief of Staff Thomas A. Barthold to House Ways and Means Committee Chair Richard E. Neal, D-Mass. (Oct. 3, 2023).