# *Moore* and the Limits of the Taxing Power

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Tax cases are not the bread and butter of the U.S. Supreme Court. The Court's "sporadic omnipotence in a field beset by invisible boomerangs"[1] in the tax law has become, indeed, sporadic. The labyrinth of the U.S. tax code is usually the territory of a handful of tax specialists and presidential campaigns—not the Supreme Court. So it is quite rare that a tax case receives the significant public attention that *Moore v. United States*[2] commanded. *The Wall Street Journal* ran two separate editorials on the case.[3] *The New York Times* said the case "could rewrite the Tax Code."[4] Editorials and commentary abounded.

On its face, *Moore* involves a highly technical provision of international tax law—what the parties refer to as the Mandatory Repatriation Tax (MRT). The MRT was passed in 2017 as part of the

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[1] Arrowsmith v. Comm'r, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting).

[2] 144 S. Ct. 1680 (2024).

[3] Editorial, *The Supreme Court and a Wealth Tax*, Wall St. J. (Dec. 5, 2023, 6:46 PM), https://www.wsj.com/articles/moore-v-u-s-supreme-court-wealth-tax-elizabeth-prelogar-34f7814f; Editorial, *A Supreme Court Mistake on Wealth Taxes*, Wall St. J. (June 20, 2024, 5:39 PM), https://www.wsj.com/articles/moore-v-u-s-supreme-court-mandatory-repatriation-tax-brett-kavanaugh-amy-coney-barrett-23d99510.

[4] Andrew Ross Sorkin et al., *The Supreme Court Battle That Could Rewrite the Tax Code*, N.Y. Times (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/business/dealbook/supreme-court-income-tax-code.html.

bill known as the Tax Cuts and Jobs Act (TCJA).[5] Specifically, *Moore* considered the application of the MRT to Charles and Kathleen Moore, U.S. citizens who were individual shareholders of an Indian corporation. As a result of the MRT, the Moores owed $14,729 in federal tax (based on a calculation of $132,512 in income). They paid the tax and then sued for a refund.

But the MRT had a much larger impact than the Moores' approximately $15,000 in federal tax. Despite its being a one-time tax, U.S. corporations (along with some individuals) paid a *lot* of tax under the MRT. Per one study, the MRT resulted in the payment of approximately $45 to $50 *billion* in U.S. tax from 2017 to 2020.[6] Finding the MRT unconstitutional could have led to refunds of unprecedented proportions to individuals and to U.S. multinationals.

But perhaps even more important, what the Court said about taxes in the context of the MRT could have had enormous ramifications for tax law yet to be enacted, including taxes on wealth and unrealized capital gains. And some argued that finding the MRT unconstitutional would have had ramifications for other taxes already on the books. They warned of a parade of horribles whereby *Moore* would give rise to challenges to broad swaths of the tax code currently in effect. As this article will discuss, the concern that *Moore* could have led to this parade of horribles was fundamentally misguided.

The nuances and technical details of the MRT are important to *Moore*. But more important, through *Moore* the Court revisited a crucial question: What, precisely, are the limits of Congress's taxing power? Specifically, how do those limits fit into the design of the U.S.

[5] The TCJA was passed through the budget reconciliation process (to avoid a potential filibuster in the Senate), not through the normal legislative process. The bill's full name is "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018." In a truly arcane ruling on Senate procedure, the Senate Parliamentarian ruled that because a short title for a bill has no impact on the budget, a budget reconciliation bill is not allowed to have a short title. *See* Naiomi Jagoda, *Senate Parliamentarian Rules against GOP Tax Bill's Name*, The Hill (Dec. 19, 2017), https://thehill.com/policy/finance/365691-senate-parliamentarian-rules-against-gop-tax-bills-name/. This article will, nevertheless, refer to the bill as the Tax Cuts and Jobs Act or TCJA.

[6] Alex Arnon & Mariko Paulson, *Did Tax Cuts and Jobs Act of 2017 Increase Revenue on US Corporations' Foreign Income?*, Budget Model – Penn Wharton (Oct. 12, 2023), https://budgetmodel.wharton.upenn.edu/issues/2023/10/12/did-tcja-increase-revenue-on-us-corporation-foreign-income.

international tax system? And although the Court ruled in *Moore* that the MRT was constitutional, the limits to Congress's taxing power remain unclear. Each of the four opinions in the case answered the question in different ways. And the majority opinion's analysis—even where misguided—raises key questions that any future drafters of tax legislation or litigants challenging a tax must consider.

The first part of this article provides a very high-level overview of the U.S. international tax system and how the MRT fits into that global system. The second part briefly provides background on the constitutional issues raised by the MRT. And the third part provides a critical discussion of the *Moore* decision itself.

## I. U.S. International Tax Law and the MRT

In general, the United States taxes the international activities of U.S. persons in two ways. As used in this article, the term "U.S. persons" is a term of art in the tax code that includes U.S. citizens, residents, and domestic corporations.[7]

U.S. persons are generally taxed on *their* worldwide income (albeit with a large array of credits and deductions). Accordingly, if a U.S. citizen earns income in a foreign country, the U.S. citizen is subject to U.S. tax on that income. Likewise, if a domestic corporation earns income by operating in a foreign country, that domestic corporation is still subject to U.S. tax on that income. To prevent double taxation, the tax code provides foreign tax credits, and these credits may lower the U.S. tax owed to zero in certain cases when combined with other deductions. But even with these credits, the United States still fundamentally imposes tax on the individual or the corporation. And while the TCJA made various changes to the rules for crediting taxes, it did not change the United States' fundamental worldwide structure of taxation, which was in place both before and after the TCJA became law (albeit with various significant changes).[8]

But what happens when a U.S. person (either an individual or a corporation) owns a foreign corporation that itself earns foreign income? Here, the foreign corporation *itself* is not subject to U.S. tax

[7] Partnerships, although usually included in this term, are a special case—one addressed in more detail within.

[8] Unlike the United States, most countries have a territorial system—where the country only taxes income earned in their country.

on its foreign income (because it is not a U.S. person).[9] Instead, Congress has imposed taxes at the *shareholder* level on the U.S. persons that own the stock. It was these shareholder-level taxes that were significantly modified through the TCJA and at issue in *Moore*.

Before the TCJA, there were generally two ways a U.S. shareholder could be subject to tax on the income of a foreign corporation that the shareholder owned. The first was when the foreign corporation paid a dividend to the U.S. person, in which case that dividend was includable as income. The second was through an anti-deferral regime known as Subpart F, which had been in place since 1962. Subpart F imposed a shareholder-level tax on U.S. persons who were deemed to have a substantial degree of control over a foreign corporation, as determined through an ownership test. A corporation that passed this ownership test was considered a controlled foreign corporation (CFC).[10] Substantial U.S. owners were persons who owned, directly or indirectly, 10 percent or more of a CFC. These substantial owners were, in turn, required to include certain forms of income (very generally, passive income) in their tax returns in the same year that the CFC earned the income.

The policy rationale behind Subpart F taxation is straightforward: Passive income could be moved offshore relatively easily, and the United States wanted to remove the incentives for multinationals to source certain types of passive income in offshore entities. Thus, Subpart F taxes U.S. shareholders on the foreign companies' passive income *in the year such income is earned*. This accords with the structure of the U.S. income tax more generally. Taxpayers are taxed on the income earned each year. When the tax laws change, they generally do so prospectively (as in, during the next taxable year after the law is enacted). In some limited cases (discussed within), courts have allowed tax provisions to be applied retroactively for a period of less than a year. But such allowances have generally been for small, technical changes to the law.[11]

The TCJA added a new tax on global intangible low-taxed income (GILTI) to the Subpart F regime. Under the GILTI provision, virtually all of a CFC's residual income that is not subject to Subpart F is

[9] The United States, like many countries, has a regime for taxing foreign corporations that earn income through a U.S. office or fixed place of business. Those rules are not relevant here.

[10] *See* I.R.C. § 957 (defining "controlled foreign corporation").

[11] *See* United States v. Carlton, 512 U.S. 26 (1994).

taxed to the U.S. shareholder in the same year that the CFC earns the income. U.S. corporations that are required to include GILTI income pay tax on such inclusions at half the regular corporate rate of 21 percent. In other words, GILTI income is currently taxed at a rate of 10.5 percent.

After the TCJA, a U.S. shareholder is subject to tax on its pro rata share of all of its CFC's earnings in the year earned. Because of this, the TCJA correspondingly eliminated the tax on dividends paid by the CFC to a U.S. shareholder. But this created a policy question. Many CFCs had accumulated profits (before the TCJA) that had never been paid as a dividend to their shareholders. Under the new regime, cash held by these foreign corporations could be repatriated (that is, brought back into the United States through a dividend) tax free. Such amounts would effectively escape the scope of the U.S. international tax regime.[12]

Congress instituted the MRT to tax the untaxed accumulated profits of those CFCs at this transitional moment. It imposed a one-time tax (at rates varying from 8 to 15.5 percent) on significant U.S. shareholders of CFCs on the accumulated profits of CFCs that had never been repatriated, calculated as of late 2017.[13] The tax is payable over eight years. It is imposed on the significant U.S. shareholders whether or not the CFC at issue ever decides to repatriate any cash or profits to the U.S. shareholder.

Interestingly, this was not the first time that Congress attempted to tax the accumulated earnings of foreign corporations. An old version of Section 965 of the tax code was part of the American Jobs Creation Act of 2004.[14] The old Section 965 allowed CFCs, *at their election*, to pay a dividend of accumulated foreign profits at a U.S. tax rate of 5.25 percent to the domestic corporate owners, rather than the then-standard 35 percent U.S. corporate tax rate.

The old version of Section 965 was markedly different than the MRT. The old version did not impose tax unless U.S. shareholders realized income (through a dividend paid at the election of the CFC).

[12] Even absent a tax on the dividend to the U.S. corporation, such amounts could still be subject to U.S. taxation if the U.S. shareholder were a domestic corporation (say, the parent of a large multinational) and if it paid those amounts out as a dividend to *its* U.S. shareholders.

[13] *See* I.R.C. § 965. For simplicity, I will omit certain technical details and explain a simplified version of the tax.

[14] American Jobs Creation Act, Pub. L. 108–357, 118 Stat. 1418–1660 (2004).

The very structure of the old Section 965 highlighted the need for an actual realization event (the payment of a dividend by the CFC) to trigger the tax liability. This point ties into a concept called "realization" which I will return to later. For now, the core point is this: Previous attempts to tax the accumulated earnings of foreign corporations avoided the unprecedented constitutional issues that the MRT raised.

## II. Constitutional Questions in the MRT

The Moores were married individuals who sued for a refund of the $14,729 in federal tax that they owed as a result of the imposition of the MRT on their ownership of an Indian corporation, KisanKraft. The Moores were U.S. citizens who owned approximately 13 percent of the corporation during 2017. KisanKraft had never distributed any income to its U.S. shareholders, including the Moores. Thus, until the MRT, neither KisanKraft nor the Moores had paid any U.S. tax on KisanKraft's income.

In their original complaint and in the Ninth Circuit below, the Moores argued that the tax was unconstitutional for two separate reasons. First, they argued that the MRT violated the Direct Tax Clause of the Constitution. Second, they argued that the MRT violated the Due Process Clause of the Fifth Amendment. Although the Supreme Court in *Moore* considered only the first question, the framing of both constitutional challenges to the MRT are worth discussing.

### *A. The Direct Tax Clause*

Article I, Section 8 of the Constitution grants Congress the power to "lay and collect Taxes." Under the Constitution, taxes are classified in two classes: direct taxes and indirect taxes. Article I, Section 9 of the Constitution prohibits Congress from levying "direct" taxes without apportioning such taxes among the states based on the states' respective populations. The meaning of "direct" taxes is subject to considerable debate among scholars (and has been since the late 18th century), but the general definition used by the Supreme Court in *Moore* is "taxes imposed on persons or property."[15] Thus, a federal property tax on the value of a house would need to be

[15] *Moore*, 144 S. Ct. at 1687 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 529, 570–71 (2012)).

apportioned among the states. For such a hypothetical tax to be constitutional, the citizens of, say, Washington State would have to pay a collective share of the tax equal to Washington's proportional share of the total U.S. population—irrespective of the value of the property being taxed in Washington. On the other hand, indirect taxes are "the familiar federal taxes imposed on activities or transactions."[16] These taxes can be levied without apportionment among the states.

Income taxes are indirect taxes. But the 1895 case *Pollock v. Farmers' Loan & Trust Co.* held that a tax on certain income derived from property equated to a tax on the property itself and was thus a direct tax.[17] A controversial decision (to put it mildly), *Pollock*'s holding directly led to the passage of the Sixteenth Amendment. The Sixteenth Amendment provides that "Congress shall have the power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Thus, despite *Pollock*'s strange reasoning, the Sixteenth Amendment makes clear that income taxes are indirect taxes and not subject to apportionment.[18]

The question that the Court took up in *Moore* is whether the MRT is an income tax. The question could be framed this way: What is the distinguishing feature of a tax on income as opposed to a tax on property? That question turns on the definition of "income." *Merriam-Webster* defines "income" as "a coming in" and as "a gain or recurrent benefit usually measured in money that derives from capital or labor; also: the amount of such gain received in a period of time."[19] And in the landmark case *Commissioner v. Glenshaw Glass*, the Supreme Court crafted a three-part conjunctive test for income. The *Glenshaw Glass* test asks whether the taxpayers have received "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[20]

[16] *Id.*

[17] 158 U.S. 601 (1895).

[18] In *Moore*, the Court appeared to reject the underlying reasoning of *Pollock*, stating expressly that "income taxes are indirect taxes" under the "exhaustive" grant of Congress's taxing power and that they are thus permitted without apportionment. *Moore*, 144 S. Ct. at 1688.

[19] *Income*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/thesaurus/income (last visited Aug. 8, 2024).

[20] Comm'r v. Glenshaw Glass, 348 U.S. 426, 431 (1955).

Although the *Glenshaw Glass* definition is not universal, it has nevertheless been employed by the government in a wide variety of contexts to determine if there has been taxable income.[21] The *Glenshaw Glass* definition includes a requirement that income be realized, and much of the debate as to what constitutes income turns on whether realization is a necessary component of income from a constitutional perspective. The Supreme Court has consistently interpreted "income," as used in the Sixteenth Amendment, to require a realization event—that is, an event in which something of value is received by the taxpayer. For example, in *Eisner v. Macomber*,[22] the Supreme Court held that a transaction similar to a stock split did not result in "income" to stockholders. A corporation issued a prorated "stock dividend" to its shareholders, issuing each shareholder a number of newly created shares proportional to its shareholdings. Thus, each shareholder's total percentage ownership in the corporation did not change.

Not every possible definition of "income" requires realization. One definition of income is the Haig-Simons definition, favored by some economists. As the Joint Committee on Taxation has explained, "Haig-Simons income is defined as consumption plus changes in net worth."[23] This definition thus looks not to whether income is realized, but instead to whether an individual's overall wealth has increased, taking into account their consumption.

Thus, under the Haig-Simons definition, there is no "event" fixing an income, merely an accession to wealth that results in income. But this theoretical definition, however useful in making economic determinations, has never been embraced by courts and has never been a tax base under the tax code. Neither the Constitution, the tax code, nor courts interpreting either source of tax law have ever conceptualized income in such a way. Treating income this way would run amok over any concept of gains and losses embedded within the code. And this definition cannot be squared with the language of the Constitution, which says income *must* be derived

[21] These include, for example, IRS guidance on the taxation of digital assets and cryptocurrencies. *See, e.g.*, I.R.S. Rev. Rul. 2023-14 (citing *Glenshaw Glass*, 348 U.S. 426).

[22] 252 U.S. 189 (1920).

[23] Staff of the Joint Comm. on Tax'n, 112th Cong., Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analyses 3 (2012).

from a source. This concept is intrinsic to the text of the Sixteenth Amendment, which states, "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*."[24] Simply put, the Haig-Simons definition of "income" is not the definition that the Constitution uses, and it is not the meaning of "income" that has been understood to be part of any income tax.

Crucially, the *Macomber* Court instead looked to the plain meaning of the word "income" and concluded that a mere increase in the value of any particular asset is not income because such mere increase has not been realized. The argument for requiring a realization event is thus that without a realization event, nothing has "come in" to a taxpayer, no money has been derived from capital, and nothing has been received. Anyone who has bought a share of stock (or any asset), refrained from selling it when its price climbed, and then watched its company go bankrupt understands this fundamental concept. The Supreme Court has upheld this principle in numerous cases, each of which has looked fundamentally to a fixed event that resulted in a "coming in" to the taxpayer in order to constitute income.[25]

However, the Ninth Circuit, in deciding the *Moore* case below, squarely rejected this requirement, holding that whether "the taxpayer has realized income does not determine whether a tax is constitutional."[26] This ruling set the stage for the dispute that would eventually reach the Supreme Court. The Moores asserted that the MRT was *not* an income tax and rather a direct tax on property. The government asserted that the MRT *was* an income tax and thus an indirect tax. And given the reasoning of the Ninth Circuit, much of the parties' arguments turned on whether realization was a necessary component of income.

### *B. The Due Process Challenge*

The MRT taxes, in large part, amounts that were income in *prior* years. A second potential constitutional issue with the MRT is thus whether the fundamentally "backward-looking" MRT (as the *Moore* majority opinion describes it) is permissible under the Due Process

[24] U.S. Const. amend. XVI (emphasis added).

[25] *See, e.g.*, Helvering v. Horst, 311 U.S. 112 (1940).

[26] Moore v. United States, 36 F.4th. 930, 935 (9th Cir. 2022).

Clause of the Fifth Amendment. This argument concedes the question of whether the MRT is an income (or other indirect) tax. It instead argues that even if the MRT is characterized as an income tax, it is best characterized as an income tax on *prior* years' income.[27] Under this line of reasoning, the MRT can thus be distinguished from other taxes including Subpart F and GILTI, which tax amounts that were income only during the *current* year. And under this argument, those differences are constitutionally relevant to the permissibility of the tax.

The Fifth Amendment, which provides that no person shall be "deprived of life, liberty or property without due process of law" has been applied in previous cases that addressed Congress's ability to levy a retroactive tax. The most recent Supreme Court case to address this issue was *United States v. Carlton*.[28] *Carlton* considered a provision of the federal estate tax, specifically an amendment to a new rule allowing for a deduction. Congress had provided that the new provision would apply retroactively, taking effect one year *before* it was enacted into law. Thus, the Court considered whether the retroactive application of the amendment to the estate tax violated the Due Process Clause of the Fifth Amendment.

The Court concluded that the retroactive amendment did meet the requirements of due process and was thus constitutional. The Court applied the standard that is applicable to any retroactive economic legislation, asking whether the retroactivity provided a "legitimate legislative purpose furthered by rational means."[29] The Court noted that the law was adopted as a curative measure and that Congress did not contemplate the breadth of the new deduction when originally implementing it (absent the amendment). The amendment was, in effect, a technical correction that brought the text of the law in line with congressional intent. The Court also observed that "Congress acted promptly and established only a modest period of retroactivity"[30]—less than a year. Noting all of these factors,

[27] *See* Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 37 Yale J. Reg. Bull. 69 (2018).

[28] 512 U.S. 26 (1994).

[29] *Id.* at 30–31 (quoting Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)).

[30] *Id.* at 31.

the *Carlton* Court held that the amendment permissibly afforded due process.

But the Supreme Court has never applied *Carlton* to the question whether a retroactive tax on income extending much longer than a year would be constitutional. Because the MRT extends much farther back than the amendment in *Carlton*, the Moores argued in their initial complaint and in the Ninth Circuit that the MRT was unconstitutional on these grounds.[31]

However, the Moores did not raise the due process argument at the Supreme Court. They sought certiorari on only the question of whether the MRT was authorized under the Sixteenth Amendment, and the Court, accordingly, did not consider the due process argument.[32] That said, for reasons discussed shortly, due process was likely the stronger of the two arguments against the constitutionality of the MRT. And the Court's analysis strongly implies that it may have found retroactivity to be an important way of distinguishing the MRT from other (constitutional) exercises of Congress's taxing power, had the Moores raised the argument.

## III. The Court's Ruling

The majority opinion was written by Justice Brett Kavanaugh and joined by Chief Justice John Roberts as well as Justices Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson. As the majority put it, the Court was tasked with deciding whether the MRT "exceeds Congress's constitutional authority."[33] Ultimately, seven Justices concluded that the MRT did *not* exceed Congress's authority. That is, seven Justices agreed that the MRT was an indirect tax not subject to apportionment under the Constitution. But much can be gleaned from the Court's analysis, however "narrow" the majority insisted it was.[34]

### *A. Comparing the MRT to Three (Constitutional) Taxes*

The majority's analysis spent considerable time comparing the MRT to three existing (and, to the majority, presumptively constitutional)

[31] Moore v. United States, No. C19-1539-JCC, 2020 U.S. Dist. LEXIS 216771 (W.D. Wash. Nov. 19, 2020); Moore v. United States, 36 F.4th. 930 (9th Cir. 2022).

[32] *Moore*, 144 S. Ct. at 1697 n.6.

[33] *Id.* at 1687.

[34] *Id.* at 1696.

income taxes: taxes on partnerships, S corporations, and Subpart F income. The Court's majority's analysis can perhaps be summarized by the following logical steps:

(1) Taxes on partnerships, S corporations, and Subpart F income are constitutional income taxes. [Premise].
(2) There is no meaningful constitutional distinction between the MRT and taxes on partnerships, S corporations, and Subpart F Income [Premise].
(3) The MRT is a constitutional income tax [Follows from 1 and 2].

This argument begs the question.[35] It assumes that the MRT is an income tax and then says that there are no meaningful distinctions between different types of income taxes. But as will be discussed in more detail, the partnership and S corporation regimes are elective; taxpayers can decide whether to structure their businesses to fall within these regimes. The MRT, by contrast, is not elective; it is a *mandatory* tax on all U.S. shareholders of CFCs. In any event, the constitutionality of the MRT should be determined not by looking to whether it is somehow distinct from existing (presumably constitutional) laws, but to its own merits. Specifically, the constitutionality of the tax ought to be determined by asking whether the MRT is some type of indirect tax, such as an income tax. The Court's reasoning in this passage thus misses the point entirely:

> Critically, however, the MRT *does* tax realized income—namely, income realized by the corporation, KisanKraft. The MRT attributes the income of the corporation to the shareholders, and then taxes the shareholders (including the Moores) on their share of that undistributed corporate income.[36]

The MRT was levied in 2017 on amounts that a CFC may have accumulated as far back as 1987, and not the year the income was generated. Yet the Court apparently assumed that once an amount

[35] To "beg the question," in philosophical terms, is for an argument to be circular and to presuppose the very thing in question. For a discussion on the misuse of this term, see Scott R. Sehon, Socialism: A Logical Introduction 16–17 (2024).

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

was income realized by an entity, that entity can be subject to tax on such income *at any time*.

Consider the following hypothetical tax: Congress decides in 2025 that foreign corporations controlled by U.S. shareholders (CFCs) should pay a higher tax rate on their income from 2017–2020. Thus, Congress mandates that U.S. shareholders of that corporation should pay tax on that past income immediately in 2025 because they hold stock on that corporation in 2025. Such a tax would be the epitome of a tax on property (stock ownership) rather than a tax on the transaction itself.

That is effectively what the MRT does. The significant retroactivity and due process concerns aside, there is a significant disjoint between a controlling ownership of a foreign corporation today and income that the corporation earned in the past. All of the other attribution cases discussed in this article dealt with taxes on income *in the year it is generated*.

In any event, the Moores explicitly conceded Premise (1).[37] Thus, the majority opinion spends considerable time addressing whether there is a meaningful distinction between the MRT and these three types of taxation. The majority opinion characterizes the Moores' arguments as "an array of ad hoc distinctions to try to explain why those longstanding taxes are constitutional" but the MRT is not. The Court's tax-by-tax comparative analysis thus misses the key point, which provides the answer to Premise (2). Each of the three taxes are, unequivocally, income taxes (and thus constitutional). But the MRT cannot be accurately characterized as an "income" tax—at least not without running into serious retroactivity concerns.

*1. Partnerships*

The majority opinion rejects the distinction that the Moores offered between the MRT and partnership taxation: that partnerships were not seen as separate entities from their partners at the time of the Sixteenth Amendment's passage. To the majority, Congress has the right to choose whether to tax the owners of a partnership or the partnership itself, just as it does with any other business entity.

[37] *Id.* at 1693 ("The Moores explicitly concede that partnership taxes, S-corporation taxes, and subpart F taxes are income taxes that are constitutional and need not be apportioned.").

But analogies to partnerships are tricky, because partnerships occupy a special place in the tax code.[38] Congress explicitly decided to enact a separate taxing regime for partnerships, and the majority's discussion of partnerships in *Moore* gives short shrift to U.S. law's treatment of partnerships for tax purposes. Subchapter K (the part of the tax code that governs partnerships) does not simply wave a wand to tax all the owners of partnerships on their partnerships' income. Rather, Subchapter K represents a delicate balance between the competing treatment of partnerships as entities on the one hand and simple aggregations of partners on the other.[39]

A word on the concept of "pass-throughs" is warranted here. A pass-through is an entity whose income is taxed at the shareholder level rather than at the entity level. The choice of whether taxation is levied at the entity level or at the shareholder level for a domestic business entity is in many ways elective, and it has been for the entire modern history of tax law. Taxpayers have always been free to set up their business operations in whichever manner they decided was most appropriate, provided that they were willing to accept the tax consequences of their choices.[40] Nowadays, taxpayers can frequently make the choice outright.

Consider, for example, an extraordinarily common form of business entity: a limited liability company (LLC). An LLC defaults to tax as a partnership. But an LLC can elect to be taxable as a corporation by filing a very simple election with the government.[41] And going back even prior to the implementation of the check-the-box rule, taxpayers have been free to choose whatever type of business entity they wish to be. Foreign corporations (with some limited exceptions) may also elect to be taxed as pass-throughs or as separate entities.

This choice does not affect whether the income is subject to tax at all; it is merely an election as to who will pay the tax. Nobody seriously contests that partnerships have income, and nobody denies that Congress, within the limits of due process, has the right to tax income at either the shareholder or the entity level. The question

[38] *See* Subchapter K, I.R.C. §§ 701–77.

[39] *See* William S. McKee, William F. Nelson & Robert L. Whitmire, Federal Taxation of Partnerships and Partners, § 1.02 (4th ed. 2007).

[40] *See* Moline Properties v. Comm'r, 319 U.S. 436 (1943).

[41] *See* 26 C.F.R. § 301.7701-1. This type of election is known to tax professionals as a "check-the-box election," since it's literally as simple as checking a box on a form.

with the MRT is whether there is *income* that may be constitutionally subject to tax. And that is the question assumed away by the Court.

*2. S corporation taxes*

An S corporation (also known as a small business corporation) is a domestic corporation that elects to pass corporate income, losses, deductions, and credits through to its shareholders for federal tax purposes. There are various limitations on which corporations can make this election. Among other limitations, there can be no more than 100 shareholders, and the shareholders must all be individuals, trusts, or estates.

The government argued that if the MRT were found unconstitutional, then it would also be unconstitutional to tax S corporation shareholders on their income. The Moores argued that S corporations are distinguishable because their shareholders *consented* to the tax, rendering it constitutional. The *Moore* majority rejected the Moores' reasoning.

In fact, the question of consent was a red herring. Taxing the shareholders of an S corporation is constitutional for the same reason that the partnership tax is constitutional: It is fundamentally a tax on current-year income.

The S corporation election is not about *whether* the tax can be levied; everyone agrees that the S corporation has realized income that can be taxed. Instead, the election is about *who* will be responsible for paying the tax. In the normal case, the corporation pays tax on the income and then individuals pay tax on the dividends of profits. The S corporation election allows shareholders to instead pay the tax directly on the income. As with partnerships, there is no doubt that there is income, in that year, that can be constitutionally taxed by the federal government.

*3. Subpart F*

Third, the majority compared the MRT to the now six-decade-old tax on Subpart F income. As already noted, Subpart F imposes a shareholder-level tax on U.S. persons who are deemed to have a substantial degree of control over a foreign corporation through an ownership test. That tax applies to passive income, but the GILTI tax enacted by the TCJA expands this same form of tax to all income (albeit at a lower rate for the "active" income covered by GILTI).

How can Subpart F be distinguished from the MRT? The Moores gave two answers, neither of which the Court found persuasive. Once again, both of the Moores' arguments missed the fundamental distinction between two questions: whether there *is* income and who pays tax on that income. The Moores' first argument to distinguish Subpart F hinged on a concept called "constructive realization." This is a new concept—one that has not appeared before in the tax code or in Supreme Court precedent. The doctrine of constructive realization "treats as taxable income" that "which is unqualifiedly subject to the demand of a taxpayer . . ., whether or not such income has actually been received in cash."[42] That is, the income received must be subject to the control of the taxpayer. The Moores argued that Subpart F taxes constructively realized income but the MRT does not. However, the Court's majority squarely rejected this idea, reasoning that the standard of control is the same under Subpart F as it is under the MRT (which is accurate).

The Moores' second attempted distinction was that the taxation of "movable income" renders the MRT constitutionally distinct.[43] Once again, this seems to be constitutionally irrelevant to the question of whether the MRT is an income tax. Movable income is, to put it simply, still income.

But the policy point that the majority made in rejecting this reasoning is illustrative of the point that the majority missed. Justice Kavanaugh wrote that "like subpart F, the MRT responds to concerns that owners of American-controlled foreign corporations keep money offshore to defer taxation."[44] But the difference is that the MRT is about past earnings, while Subpart F is a tax on current-year income. To illustrate, Subpart F can only reach income in the taxable year upon which it is imposed. Thus, for 2017, the Subpart F tax looks to the income of CFCs in that year, and it taxes shareholders on that income. But the MRT looks to past income (say, earnings from 2011 which had never been paid as a dividend) and subjects that past income to a tax in 2017.

[42] Brief for Petitioners at 48, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (quoting Ross v. Comm'r, 169 F.2d 483, 490 (1st Cir. 1948)).

[43] This argument, however, would not work for the go-forward taxation of GILTI, something which is not substantially addressed anywhere in the majority's opinion.

[44] *Moore*, 144 S. Ct. at 1695.

As a side note, the Court did not consider the GILTI tax in its reasoning, except in listing the parade of horribles of taxes that might fall with the MRT. This despite GILTI being the most broadly applicable shareholder-level tax on foreign income. A constitutional analysis of the GILTI tax would have been the clearest illustration of the difference between the MRT and other constitutional taxes.

The majority treated *Moore* as a case about whether the MRT's attribution of a CFC's income to its shareholders was permissible. If there is a constitutional limit on such attribution, the MRT did not exceed that limit. Perhaps there is such a constitutional limit on attribution. And perhaps that would prevent the attribution of income to shareholders in extremely attenuated ways. Should an owner of a single share of Google stock be subject to (a presumptively small amount of) tax on Google's earnings? Justice Amy Coney Barrett's concurrence in the judgment spent much ink addressing this concern. And although Justice Barrett agreed with the majority that there is no meaningful constitutional distinction between Subpart F and the MRT,[45] she retained concern that the majority was "too quick to bless the attribution of corporate income to shareholders. . . ."[46]

But this all misses the point. The far more interesting and impactful question that both the majority and Justice Barrett failed to consider is whether the MRT is an *income* tax. Justice Clarence Thomas raised this point in dissent. His dissent correctly points out that the constitutional question turns on the novel nature of how the MRT operates: as a tax on the shares of the corporation, not as a tax on the income of that corporation.[47] He got this point absolutely right. The MRT does not tax income; it taxes the ownership of stock based on past income that the corporation earned and that was not previously subject to tax. During the year at issue, there was neither income nor a realization event that caused there to be income *in that year* (in marked contrast to the payment of a dividend under the old Section 965). And as to attribution, Justice Thomas argued that "Subpart F includes some minimal requirements to ensure that taxable 'income' belongs to the shareholder in some way; the MRT abandons that effort entirely."[48]

[45] *Id.* at 1709 (Barrett, J., concurring in the judgment).

[46] *Id.* at 1708.

[47] *Id.* at 1726 (Thomas, J., dissenting).

[48] *Id.*

A critic of this position could correctly point out that there *was* income—at some point in the past. In other words, there was income in some past year (however many years ago), and Congress could have taxed that income in that year. And, this argument would go, there is nothing wrong with Congress finally taxing that income now. But this reasoning leads inextricably to the question of whether that is functionally and fundamentally a retroactive income tax. Thus, perhaps the question of whether the MRT is an income tax misses the point. Especially given Justice Kavanaugh's assumption that the MRT taxes income, this case would have been best framed and thought of as a retroactivity issue all along. The retroactivity question raises none of the Court's parade of horribles concerns, and it better suits the strange function of the MRT.

It is a shame the Court did not consider the due process concerns raised by the MRT.

*B. The Majority Opinion's Tax Consequentialism*

One final note on the majority opinion bears discussion. After concluding that the MRT is no different from other (constitutional) taxes, Justice Kavanaugh then wrote that the "upshot is that the Moores' argument, taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional."[49] Justice Kavanaugh then cited several areas of taxes, without further analysis. The majority opinion continues:

> 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.[50]

This passage is remarkable. It focuses on the (alleged) practical consequences of striking down the MRT and other taxes, without making a case for why this should be relevant to the legal question

[49] *Id.* at 1696 (majority opinion).

[50] *Id.*

at issue. The implications of keeping or eliminating a tax should generally be removed from any question as to its constitutionality. If there is a limitation to Congress's power to tax, the fiscal impact is not a relevant factor.

One might call the majority's reasoning a form of tax consequentialism. "Consequentialism" is a term from academic philosophy, but its usage is helpful here. The *Stanford Encyclopedia of Philosophy* describes consequentialism as "the view that normative properties depend only on consequences."[51] Put simply, consequentialism looks to the consequences of something (e.g., an action) as a means of determining if that thing is good or bad, or right or wrong.

Why was the Court in *Moore* particularly concerned with the possible consequences of constraining the federal taxing power? Recall that the Court has invoked the breadth of the congressional power to tax before: as the basis to uphold the constitutionality of the individual mandate in the Patient Protection and Affordable Care Act. In *National Federation of Independent Business v. Sebelius*,[52] the Supreme Court (in an opinion written by Chief Justice Roberts) broadly interpreted the taxing power to uphold the individual mandate portion of the Act. Although the mandate was not a valid exercise of congressional power under the Commerce Clause, the Chief Justice's decisive opinion held that it was a valid exercise of Congress's taxing power. In effect, the Court interpreted the Taxing Clause as the broad power that it needed to justify Congress's law.

In *Moore*, the consequences of overturning the tax were clearly important to the Court's analysis. The Court was concerned with both the potential fiscal effect and the perceived, if misguided, notion that such a ruling would jumpstart a parade of horribles. In light of these concerns, Justice Thomas responded to the majority that "if Congress invites calamity by building the tax base on constitutional quicksand, the judicial Power afforded to this Court does not include the power to fashion an emergency escape."[53]

He's right. Insofar as you agree with the premise that there are constitutional limitations on Congress's taxing power, the fact that

[51] Walter Sinnott-Armstrong, *Consequentialism*, Stan. Encyclopedia of Phil. (Oct. 4, 2023), https://plato.stanford.edu/entries/consequentialism/.

[52] 567 U.S. 519 (2012).

[53] *Moore*, 144 S. Ct. at 1726 (Thomas, J., dissenting) (cleaned up).

overturning a tax would have fiscal consequences cannot be a proper rationale for upholding an unconstitutional tax. Otherwise, an *actual* constitutional parade of horrors could conceivably follow. Any exercise of power by Congress, however much in excess of the power provided for under the Constitution, could be justified under the taxing power so long as invalidating the action would have significant fiscal consequences. This would be a failure of the core function of judicial review: to review and to provide a check on Congress's exercise of its own power.

In any event, the Moores were very clear that they conceded the constitutionality of those other income taxes—which was never really in question. There was no need to fear a parade of horribles whereby every tax would be held unconstitutional on a new attribution theory or a complicated constitutional analysis about the nature of the tax. The question before the Court was simple: Does the MRT tax income? If the answer is yes, then the MRT is constitutional (subject to due process limitations). The devil, of course, is in the details as to what is "income." But all sides agreed that partnership income, S corporation income, and Subpart F income are, in fact, income. And if the MRT had been held unconstitutional on the ground that there was not a realizable event at the time the tax was levied on the taxpayer, such a ruling would have done absolutely nothing to change the clearly constitutional nature of these other taxes.

### *C. The Question of "Realization"*

Left outstanding after *Moore* is the question of whether realization is a constitutional requirement for an income tax. The Court could have—and should have—addressed this question. And it would have if it had reached the real issue in the case: whether the MRT is an income tax. But by assuming away that question, the Court was also able to punt on the question of whether it is fundamental to the nature of an income tax that the income be realized.

So what does it mean for a tax (like the MRT) to be an *income* tax? Does an income tax require realization? And could Congress impose a tax putatively called an "income" tax that taxed Americans' accumulated wealth, whether or not the amounts being taxed were "earned" in a given year?

As previously noted, the concept of realization is fundamental to the definition of "income," particularly in the context of a tax

on income. The standard dictionary definition of "income" requires "a coming in" and defines income as "a gain or recurrent benefit usually measured in money that derives from capital or labor; also: the amount of such gain received in a period of time."[54] And as Justice Barrett accurately noted in her concurrence, when we say "realization," we effectively mean the same thing as "derived."[55] For instance, traders realize income from a sale when they derive gains from that sale, and workers realize income from their labor when they derive a wage from that labor. In both instances, the tax regime separates taxing the *income* of something from taxing the thing itself. This has always been how the taxation of income has been understood in a legal sense, from *Macomber* to the present day.

And while some might try to obscure what is "income" by asserting that income ought to be measured through consumption and the net worth of the assets (i.e., the definition of Haig-Simons income), this argument is without constitutional import. The Haig-Simons definition, however useful as a measure of change in wealth, has never been a legal understanding of the base of an income tax. When the Constitution, the tax code, and the courts use the term "income," they are all using a definition of "income" that intrinsically includes a realization requirement. To redefine income along the lines of the Haig-Simons definition would mandate an entirely different constitutional analysis.[56]

Although the majority opinion in *Moore* is silent as to whether realization is a constitutional requirement, the concurrences and dissent bring this issue to the forefront. Justice Barrett's concurrence makes a helpful point: The Moores have not realized the income from their shares in KisanKraft. Justice Barrett expressly noted that there is no difference between the concept of realization and the concept of derivation. As her concurrence explains, the Sixteenth Amendment's "reference to 'derived' income presupposes that the income belongs to the taxpayer. . . . Otherwise the taxpayer's property . . . could be taxed

[54] *Supra* note 19.

[55] *Moore*, 144 S. Ct. at 1701 (Barrett, J., concurring in the judgment).

[56] Whether it would be constitutional to tax an individual using a base composed of that individual's Haig-Simons income lies outside the scope of this article. That said, it seems clear that this would not be an "income" tax as that term is used in the Constitution and in Supreme Court precedent. *See, e.g.*, Ivan Allen Co. v. United States, 422 U.S. 617, 621–25 (1975).

without apportionment just because it was once *somebody else's* income."[57] The Moores "have not 'derived' income from their shares because nothing has *come in*."[58] The remainder of Justice Barrett's concurrence considers whether the income of a CFC such as KisanKraft can be attributed to the Moores, an inquiry that (as discussed earlier) is beside the point.

On the other hand, Justice Jackson's sole concurrence (consistent with the Ninth Circuit's reasoning below) rejects the realization requirement altogether. To Justice Jackson, the realization requirement is nothing more than a "Court-created limit on Congress's power." But again, this fails to assess the basic point: The idea of realization is inextricable from the definition of "income" as it is used in the Constitution and the tax code. Justice Jackson believes that this issue is best left to the courts. Her concurrence concludes by directly quoting from Justice John Marshall Harlan's dissent in *Pollock*: "I have no doubt that future Congresses will pass, and future Presidents will sign, taxes that outrage one group or another. . . . However, *Pollock* teaches us that this Court's role in such disputes should be limited. '[T]he remedy for such abuses is to be found at the ballot-box. . . .'"[59]

Justice Thomas, as to be expected, was blunt in his reasoning that realization is necessary for there to be income. "Because the Sixteenth Amendment requires a way to distinguish between income and source, it includes a realization requirement."[60] Justice Thomas argued that the Sixteenth Amendment's enactment in direct response to *Pollock* is evidence in favor of this reading.[61] Justice Thomas's dissent clearly understands that the Court sidestepped the issue—the dissent suggests that it did so to avoid ruling on the realization doctrine. The result is the majority's focus (wrongly, in Justice Thomas's view) on the question of attribution. The majority opinion cites multiple cases about whether taxpayers can "sidestep" income in their attempts to evade tax liability. But Justice Thomas argued that these citations miss the point. He's right. And he's correct that

[57] *Moore*, 144 S. Ct. at 1708 (Barrett, J., concurring in the judgment).

[58] *Id.* at 1702.

[59] *Id.* at 1699 (Jackson, J., concurring) (quoting *Pollock*, 158 U.S. at 680 (Harlan, J., dissenting)).

[60] *Id.* at 1721 (Thomas, J., dissenting).

[61] *Id.* at 1722.

realization cannot be severed from the concept of income, at least insofar as that term has been used in Supreme Court case law, the tax code, and the Constitution.

As for Supreme Court doctrine, the question of realization is left for another day. But at least four Justices are clearly against a tax without realization, and only a single Justice appeared to write in favor of fully abolishing the realization requirement. Given the strong opinions signaled by many on the Court, it appears unlikely that the realization requirement will go away. This is absolutely the correct approach. Realization is an inextricable part of income as income has always been understood. And when the IRS is asked in a novel context (such as virtual currencies) to consider what is within the scope of income, it looks to a standard that expressly includes the notion of clear realization.[62] No sophistry or twisting of the definition can change its common, plain understanding. Such a change in definition would be the only way to bring taxes that clearly do not tax income (but instead tax property itself, such as a wealth tax) within the scope of Congress's taxing power. The Court should have considered this issue in the context of the MRT and set a clear standard for what taxes are permissible as income taxes under the Constitution. Unfortunately, the Court instead assumed the question away.

**Conclusion**

In 2011, the Supreme Court held that there was not a separate and unique standard of review for tax cases only.[63] That decision ended an era that scholars had called "tax exceptionalism," whereby the uniqueness of the tax field and a perception that tax was "different" or "special" resulted in the application of a different standard of administrative review for tax rules.[64] Under the principles of that 2011 ruling, courts were to review tax regulations like any other, using the same administrative law principles as in any other case.

But here, faced with a fundamental question about the nature of an income tax as applied to the MRT, the Court abandoned its typical

[62] *See, e.g.*, I.R.S. Rev. Rul. 2023-14 (citing *Glenshaw Glass*, 348 U.S. 426).

[63] Mayo Found. v. United States, 562 U.S. 44 (2011).

[64] *See, e.g.*, Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006).

careful constitutional analysis. The majority simply assumed away the underlying issue of whether the MRT was an income tax.

With *Moore* and Chief Justice Roberts's majority opinion in *Sebelius*, the Court has ushered in what we might call an era of tax consequentialism. Rather than analyzing the technical tax issues and making key determinations about income, the Court looked to the consequences of the tax. Specifically, the Court gave significant weight to the fear that constitutional limitations on the MRT would be too expensive to uphold. Chief Justice Roberts and Justice Kavanaugh seem to have no issues in using the perceived breadth of the taxing power as a means to justify congressional action, whether or not the action has anything to do with tax. The words of Justice Thomas thus offer a cautionary tale about reasoning to fiscal consequences: "[I]f the Court is not willing to uphold limitations on the taxing power in expensive cases, cheap dicta will make no difference."[65]

And sadly, the Court lacked the opportunity to clarify its position on retroactive taxation set forth in *Carlton*. Thus, the most interesting question about the constitutionality of the MRT wasn't even discussed in *Moore*.

[65] *Moore*, 144 S. Ct. 1727 (Thomas, J., dissenting).