

# VIRGINIA LAW REVIEW ONLINE

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VOLUME 111

JANUARY 2025

14–26

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## *COMMENT*

*MOORE v. UNITED STATES:*  
AVOIDING THE TOUGH QUESTIONS

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### INTRODUCTION

Charles and Kathleen Moore owed less than \$15,000 due to the Mandatory Repatriation Tax (“MRT”),<sup>1</sup> a tax enacted as part of the 2017 Tax Cuts and Jobs Act. While the economic consequences of the tax were relatively inconsequential for the Moores, they hoped to convince the Supreme Court to make highly consequential changes to tax law more generally by challenging the MRT.<sup>2</sup> The challenge put large portions of the Internal Revenue Code—provisions providing trillions in tax revenue—at risk.<sup>3</sup> The case was also highly relevant to the constitutionality of wealth taxes, a topic of rising interest among scholars

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\* J.D., University of Virginia School of Law, expected 2025. Thank you to the members of the *Virginia Law Review* for their thoughtful feedback.

<sup>1</sup> I.R.C. § 965.

<sup>2</sup> See Brief for Petitioners at 12–13, *Moore v. United States*, 144 S. Ct. 1680 (2024) (No. 22-800).

<sup>3</sup> See *infra* notes 17, 91–92.

and politicians.<sup>4</sup> In *Moore v. United States*,<sup>5</sup> the Court upheld the MRT and related tax provisions while strategically trying to avoid providing explicit guidance on other hot-button issues.

The basic facts of the case are simple. The Moores bought 13% of an Indian company, KisanKraft, in 2006 for \$40,000.<sup>6</sup> While profitable, KisanKraft never distributed any income to the Moores or any American shareholders.<sup>7</sup> Even so, the MRT subjected the Moores to a tax on 13% of KisanKraft's accumulated income from 2006 to 2017, resulting in the Moores owing \$14,729 in taxes.<sup>8</sup> They challenged the constitutionality of the MRT, but the district court dismissed the challenge, and the U.S. Court of Appeals for the Ninth Circuit affirmed.<sup>9</sup>

The first Part of this Comment provides high-level background on the MRT,<sup>10</sup> general tax principles, and taxation provisions in the Constitution. The second Part outlines the various opinions in *Moore*. Finally, the third Part takes a critical look at the opinions and argues that the Court's decision is broader than it appears. Further, it argues that in the Court's effort to defend long-standing precedent against the Moores' challenge, the Court failed to adequately justify its decision. Additionally, the third Part provides thoughts on what *Moore* means for the constitutionality of a wealth tax.

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<sup>4</sup> See, e.g., Thomas Kaplan, Bernie Sanders Proposes a Wealth Tax: "I Don't Think That Billionaires Should Exist," N.Y. Times (July 16, 2020), <https://www.nytimes.com/2019/09/24/us/politics/bernie-sanders-wealth-tax.html> [<https://perma.cc/SRB9-MNES>]; Jonathan Curry, UC Berkeley Economists Chosen as Tax Notes Federal's Persons of the Year, Tax Notes (Dec. 16, 2019), <https://www.taxnotes.com/special-reports/tax-policy/uc-berkeley-economists-chosen-tax-notes-federals-persons-year/2019/12/13/2b617> [<https://perma.cc/P622-YW95>].

<sup>5</sup> 144 S. Ct. 1680 (2024).

<sup>6</sup> *Id.* at 1686.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> The MRT is an "extraordinarily complicated" tax, so a detailed explanation is outside the scope of this Comment. Sean P. McElroy, The Mandatory Repatriation Tax Is Unconstitutional, 36 Yale J. on Regul. Bull. 69, 76 (2018).

## I. BACKGROUND ON TAX CONCEPTS

To start with, the MRT only taxes “United States shareholders”<sup>11</sup> of certain foreign corporations.<sup>12</sup> The amount of tax the MRT imposes starts with the foreign corporation’s “earnings and profits.”<sup>13</sup> The MRT takes the earnings and profits, applies certain deductions, and subjects United States shareholders to a 15.5% or 8% tax on this reduced amount.<sup>14</sup> Critically, the foreign corporation’s earnings and profits are reduced so that only the foreign corporation’s income not previously subject to U.S. taxation is taxed by the MRT.<sup>15</sup> Putting this together, the MRT taxes United States shareholders of certain foreign corporations on the previously untaxed earnings and profits even if the shareholders do not receive any distributions of cash or property.

At the core of *Moore* is the fact that the MRT treats foreign corporations as “pass-through” entities, meaning that the MRT attributes the income of certain corporations to its shareholders and taxes shareholders on that income “even if the entity has not distributed any money or property to them.”<sup>16</sup> While there are several similar pass-through taxes throughout the Internal Revenue Code,<sup>17</sup> not all entities are taxed on such a basis. Shareholders of “C corporations” are generally not taxed on the income of the corporation until the corporation distributes money or other property to the shareholder or the shareholder sells their stock in the corporation.<sup>18</sup> The Moores’ challenge to the MRT focused on whether the pass-through treatment of entities is constitutional.

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<sup>11</sup> “United States shareholders” is a defined term in the Internal Revenue Code with special meaning. I.R.C. § 951(b).

<sup>12</sup> Section 965 “collects” the taxes by increasing the subpart F income of certain foreign corporations. Id. § 965(a). Only “United States shareholders” are taxed on a corporation’s subpart F income. Id. § 951(a)(1).

<sup>13</sup> Id. § 965(d)(2).

<sup>14</sup> Id. (providing the amount included in the foreign corporation’s subpart F income); id. § 965(c).

<sup>15</sup> Id. § 965(d)(2)(A)–(B); Patrick J. McCormick, Effects of the Deemed Repatriation Provisions of the Tax Cuts and Jobs Act, 89 Tax Notes Int’l 607, 608 (2018).

<sup>16</sup> *Moore v. United States*, 144 S. Ct. 1680, 1685 (2024).

<sup>17</sup> See, e.g., I.R.C. § 701 (taxation of partnerships); id. § 951 (taxation of subpart F income); id. § 951A (taxation of global intangible low-taxed income); id. § 1363 (taxation of S corporations).

<sup>18</sup> See id. § 301 (providing rules for the taxation of distributions to shareholders).

The starting point for constitutional tax provisions is Article I, Section 8, Clause 1, which gives Congress the power to tax.<sup>19</sup> The Direct Tax Clause limits Congress's power by requiring "direct taxes" to "be apportioned among the States according to each State's population."<sup>20</sup> Apportionment means that "if one state has twice the population of another, twice the amount of direct tax must be collected from within the more populous state."<sup>21</sup> But there are "obvious" problems with apportioning a direct tax—problems so great that "Congress has not enacted an apportioned tax since the Civil War."<sup>22</sup>

Thankfully for the government, Congress is not limited to enacting direct taxes. Congress can also enact "indirect taxes," which "are the familiar federal taxes" and include income taxes.<sup>23</sup> The constitutional limitation on these taxes is far less onerous than the apportionment requirement, as indirect taxes only need to "be uniform throughout the United States."<sup>24</sup> Unapportioned income taxes thus appeared to be constitutional, but the 1895 Supreme Court case *Pollock v. Farmers' Loan & Trust Co.*<sup>25</sup> complicated this picture and cast doubt on the constitutionality of income taxes.<sup>26</sup>

In response, the Sixteenth Amendment was ratified in 1913<sup>27</sup> to overturn *Pollock* and confirm that "[t]axes on income—including taxes on income from property—are indirect taxes that need not be apportioned."<sup>28</sup> This constitutional landscape means that the constitutionality of the MRT depends on whether it is a direct tax or an income tax, because the MRT is clearly not an apportioned tax.

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<sup>19</sup> U.S. Const. art. I, § 8, cl. 1; see also *Moore*, 144 S. Ct. at 1687–88 (discussing this provision of the Constitution).

<sup>20</sup> *Moore*, 144 S. Ct. at 1687.

<sup>21</sup> See, e.g., Calvin H. Johnson, Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution, 7 Wm. & Mary Bill Rts. J. 1, 3 (1998); *Moore*, 144 S. Ct. at 1687.

<sup>22</sup> *Moore*, 144 S. Ct. at 1687.

<sup>23</sup> *Id.* The terms "indirect tax" and "income tax" are used interchangeably by the majority because indirect taxes include "duties, imposts, and excise taxes, as well as income taxes." *Id.*

<sup>24</sup> U.S. Const. art. I, § 8, cl. 1. The General Welfare Clause is also a limitation on Congress's taxing power, but it is not relevant to *Moore*. See *Moore*, 144 S. Ct. at 1711 n.1 (Thomas, J., dissenting).

<sup>25</sup> 158 U.S. 601 (1895).

<sup>26</sup> *Id.* at 618; see also *Moore*, 144 S. Ct. at 1688 (discussing the "confusion and controversy" sparked by *Pollock*).

<sup>27</sup> U.S. Const. amend. XVI.

<sup>28</sup> *Moore*, 144 S. Ct. at 1688 (citing *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 15, 18 (1916)).

## II. THE OPINIONS

The majority opinion, authored by Justice Kavanaugh, began by providing a summary of the foregoing background.<sup>29</sup> But the Court quickly reached the hot-button issue: the Moores' argument that for a tax to be an income tax and not a direct tax, the tax must only be imposed on "realized" income.<sup>30</sup> The Moores argued that the MRT is not a tax on realized income, making it an unconstitutional unapportioned direct tax.<sup>31</sup> Critical to the Moores' argument is understanding what it means for a tax to be imposed on realized income.

While a precise definition of realization "may well be impossible,"<sup>32</sup> the Supreme Court in *Eisner v. Macomber* laid the foundations for this realization concept.<sup>33</sup> According to *Macomber*, realization requires that "something of exchangeable value" be "severed from the capital" and "received" by the taxpayer for their "separate use."<sup>34</sup> The Court, by emphasizing these words, tried to describe what people "meant when they spoke about income."<sup>35</sup> The realization concept explains that people do not have "income" merely when the value of stock they hold increases in value. Instead, people have "income" when they sell their stock—or, in *Macomber's* words, "receive" money "severed" from the stock for their "separate" use.

In *Moore*, the Court avoided deciding whether realization is a constitutional requirement for income taxes by simply saying that the "MRT *does* tax realized income."<sup>36</sup> The argument is succinct. The MRT taxes realized income because the MRT *attributes* income KisanKraft itself earns and realizes to its shareholders and then taxes the shareholders on that attributed income.<sup>37</sup> Therefore, the MRT is not like a property tax on appreciated KisanKraft stock. Instead, the pass-through nature of the MRT disregards the corporate form and treats the Moores as earning the income KisanKraft earns, meaning that the realization requirement is

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<sup>29</sup> Id. at 1684–88.

<sup>30</sup> Id. at 1688. The proposed requirement that income taxes must only be imposed on realized income will be referred to as the "realization requirement" throughout this Comment.

<sup>31</sup> Id.

<sup>32</sup> Patricia D. White, *Realization, Recognition, Reconciliation, Rationality and the Structure of the Federal Income Tax System*, 88 Mich. L. Rev. 2034, 2044 (1990).

<sup>33</sup> 252 U.S. 189, 207 (1920).

<sup>34</sup> Id.

<sup>35</sup> White, *supra* note 32, at 2046.

<sup>36</sup> *Moore*, 144 S. Ct. at 1688.

<sup>37</sup> Id.

satisfied so long as someone in the chain of attribution has realized income.

With the realization issue out of the way, the question the Court focused on is whether Congress can attribute the income of a corporation to its shareholders.<sup>38</sup> After surveying relevant case law,<sup>39</sup> the Court easily answered “yes” to that question.<sup>40</sup> By avoiding a discussion of how the realization requirement interacts with the constitutionality of pass-through taxes, *Moore* became an easy case. Apart from the clear line of cases the Court described, there is a “longstanding congressional practice” of taxing people on a pass-through basis.<sup>41</sup>

Faced with this precedent, the Moores did not argue that partnership taxation and other pass-through taxes are unconstitutional, but instead tried to differentiate those pass-through taxes from the MRT.<sup>42</sup> Arguing both that the MRT’s pass-through taxation is unconstitutional and that pass-through taxation in other provisions is constitutional put the Moores in a difficult position.

For the challenge to pass-through taxation, the Moores relied on dicta from *Macomber* where the Court stated that “what is called the stockholder’s share in the accumulated profits of the company is capital, not income.”<sup>43</sup> Separate from an argument based on a realization requirement, the Moores argued that this language indicates that attribution of “entity’s undistributed income to its shareholders or partners is not an income tax.”<sup>44</sup> For the Court, however, this passage could not support the Moores’ argument because *Macomber* did not address attribution at all.<sup>45</sup> Instead, *Macomber* dealt with a challenge to taxation of dividends paid to shareholders of a corporation, meaning that the tax did not treat the corporation’s income as being earned directly by its shareholders.<sup>46</sup> And most importantly, “longstanding precedents

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<sup>38</sup> Id. at 1688–89.

<sup>39</sup> Id. at 1688–90.

<sup>40</sup> Id. at 1690 (remarking that whether Congress can tax entities on a pass-through basis “has gone without serious question”).

<sup>41</sup> Id. at 1692–93 (discussing taxation of partnerships, S corporations, and subpart F income).

<sup>42</sup> Id. at 1693.

<sup>43</sup> Id. at 1691 (quoting *Eisner v. Macomber*, 252 U.S. 189, 219 (1920)).

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> *Macomber*, 252 U.S. at 190–92. Further casting doubt on the relevance of *Macomber* is that taxpayers there received dividends in the form of stock, and the dividends were paid in such a way that there was no economic gain or change in any shareholder’s proportional share

plainly” rejected their argument and clarified that attribution is constitutional.<sup>47</sup>

The Moores’ attempt to differentiate the MRT from other pass-through taxes did not fare better. The Court characterized the Moores’ attempt to distinguish such taxes as resting on a “set of ad hoc distinctions” that simply “fail on their own terms” and do not undermine the longstanding precedent confirming that attribution is constitutional.<sup>48</sup> In trying to distinguish the MRT from other taxes, the Moores raised the “constructive realization” doctrine, and the Court’s response potentially bears broad implications for the doctrine’s future.

As used by the Moores, “constructive realization” means that people can have taxable income “whether or not such income has actually been received in cash.”<sup>49</sup> When money is set aside for a taxpayer and the taxpayer can “draw upon” or bring the money into their possession without any substantial limitation, constructive realization treats that taxpayer as having income, even if they do not yet have the money in their possession.<sup>50</sup> According to the Moores, constructive realization explains why the taxation of subpart F income is constitutional while the MRT is not. First, taxpayers subject to tax under subpart F exercise a sufficient degree of control over the income to trigger constructive realization, because subpart F taxes people that shift income-producing assets abroad.<sup>51</sup> And second, subpart F targets “specific *events*,” namely the earning of certain categories of income by a foreign corporation while being controlled by United States shareholders.<sup>52</sup>

The Court responded by noting that taxpayers subject to tax under subpart F and the MRT exercise the same degree of “control” over

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of the corporation. See *Moore*, 144 S. Ct. at 1690 (summarizing the facts of *Macomber*). So, apart from whether income was attributed or realized, *Macomber* is possibly limited to situations where there is no income in the first place. See *id.* at 1691 n.3 (summarizing a similar argument made by the Government).

<sup>47</sup> *Moore*, 144 S. Ct. at 1691.

<sup>48</sup> *Id.* at 1693–94.

<sup>49</sup> Brief for Petitioners at 47–48, *Moore*, 144 S. Ct. 1680 (No. 22-800) (citing *Ross v. Comm’r*, 169 F.2d 483, 490 (1st Cir. 1948)).

<sup>50</sup> *Tres. Reg.* § 1.451-2(a) (as amended in 1979) (defining constructive receipt of income). The Moores refer to this doctrine as “constructive realization,” whereas Treasury regulations and case law generally describe this doctrine as “constructive receipt.” See *Moore*, 144 S. Ct. at 1695 (noting that “[t]he Moores have not pointed to any use of the term ‘constructive realization’ in Supreme Court caselaw or the Internal Revenue Code”).

<sup>51</sup> Brief for Petitioners, *supra* note 49, at 49–50.

<sup>52</sup> See *id.* at 50–51; see also *Moore*, 144 S. Ct. at 1695 (“[T]he Moores claim that constructive realization turns on a sufficient degree of control over the entity.”).

income, so the constructive realization doctrine would apply to both taxes.<sup>53</sup> Per the Internal Revenue Code, at least a 10% share of certain foreign corporations is enough “ownership” to subject taxpayers to *both* the MRT and subpart F taxation.<sup>54</sup> Notably, the majority did not address the Moores’ argument that subpart F taxation targets specific events.

The Court’s opinion is narrow. The Court considered only the MRT and explicitly declined to address other taxes, like wealth taxes.<sup>55</sup> The due process retroactivity argument raised in the lower courts by the Moores was not before the Court,<sup>56</sup> and most importantly, the Court refused to address whether there is a realization requirement for income taxes.<sup>57</sup>

Justice Ketanji Brown Jackson concurred but did not produce such a narrow opinion, as she concluded that there is no realization requirement for income taxes under the Sixteenth Amendment.<sup>58</sup> Separate from issues of realization, she argued that even if a tax is not an “income tax” under the Sixteenth Amendment, such a tax is not necessarily a direct tax.<sup>59</sup> Direct taxes may have originally encompassed “only land and head taxes,”<sup>60</sup> and apart from direct taxes and income taxes, the other categories of taxes described in Article I have been broadly interpreted.<sup>61</sup> So, Justice Jackson suggested that the constitutionality of the MRT does not rely on it being an income tax, because many other taxes are expressly excluded from the apportionment requirement.

The other concurring opinion came from Justice Barrett.<sup>62</sup> Justice Barrett concluded that income must be realized before it is taxed under the Sixteenth Amendment because the term “derived” in the Sixteenth Amendment is synonymous with the term “realized.”<sup>63</sup> In doing so, Justice Barrett looked at founding-era dictionaries, precedent of the

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<sup>53</sup> *Moore*, 144 S. Ct. at 1695.

<sup>54</sup> *Id.* Put more explicitly, the MRT provides that certain amounts of undistributed and untaxed income of foreign corporations will be treated as subpart F income. I.R.C. § 965(a). Therefore, the 10% ownership threshold applies to the MRT and subpart F income other than the MRT. See *id.* § 965(a)–(b).

<sup>55</sup> *Moore*, 144 S. Ct. at 1696 n.8.

<sup>56</sup> *Id.* at 1695 n.6.

<sup>57</sup> *Id.* at 1696.

<sup>58</sup> *Id.* at 1697–99 (Jackson, J., concurring).

<sup>59</sup> *Id.* at 1699.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Justice Barrett was joined by Justice Alito. *Id.* at 1699–700 (Barrett, J., concurring in the judgment, joined by Alito, J.).

<sup>63</sup> *Id.* at 1701.



Court, and a variety of other sources speaking to the understanding of the word “derived” around the time the Sixteenth Amendment was ratified.<sup>64</sup>

In a critical passage, Justice Barrett addressed the Ninth Circuit’s conclusion that two Supreme Court cases, *Helvering v. Bruun* and *Helvering v. Horst*, did away with the realization requirement.<sup>65</sup> In *Bruun*, the taxpayer repossessed land that now had a new and more valuable building on it.<sup>66</sup> *Bruun* held that the taxpayer had income notwithstanding the fact that he could not “sever the improvement begetting the gain from his original capital.”<sup>67</sup> For Justice Barrett, this does not mean the taxpayer had not realized income, but it instead explains “that profit (there, the building) is realized when received, even if it cannot be physically separated from the capital (there, the land).”<sup>68</sup> To account for cases like *Bruun*, Justice Barrett rejected a “rigid definition” of realization and instead concluded that “to realize income, one must receive something new and valuable beyond the property she already owns.”<sup>69</sup>

After concluding that there is a realization requirement for income taxes, Justice Barrett characterized the majority as holding that “Congress [can] disregard KisanKraft’s corporate form” and “attribute KisanKraft’s income to its shareholders” without restrictions.<sup>70</sup> Justice Barrett instead concluded that Congress can do so only when the shareholder receives “income *in substance*, if not in form,”<sup>71</sup> and they cannot do so arbitrarily.<sup>72</sup> Unlike the majority’s standard, the realization requirement is not satisfied just because someone in the chain of attribution realized income. Instead, the “substance over form” and non-arbitrariness standards limit Congress’s ability to attribute income to shareholders and thereby satisfy the realization requirement.<sup>73</sup> The contours of these standards “are uncertain,” but Justice Barrett suggested a few relevant considerations, such as whether the taxpayer “has ‘sufficient power and

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<sup>64</sup> Id. at 1701–02.

<sup>65</sup> Id. at 1703–04 (citing *Moore v. United States*, 36 F.4th 930, 935–36 (9th Cir. 2022)). For the sake of brevity, this Comment will only discuss *Bruun*.

<sup>66</sup> *Helvering v. Bruun*, 309 U.S. 461, 464–65 (1940).

<sup>67</sup> Id. at 469.

<sup>68</sup> *Moore*, 144 S. Ct. at 1703–04 (Barrett, J., concurring in the judgment).

<sup>69</sup> Id. at 1704.

<sup>70</sup> Id.

<sup>71</sup> Id. at 1705.

<sup>72</sup> Id. at 1708. The majority also suggested an arbitrariness limit for attribution but located the source of that limitation in the Due Process Clause, whereas Justice Barrett located it in the Sixteenth Amendment. Id. at 1697 (majority opinion).

<sup>73</sup> Id. at 1704–05, 1707–09 (Barrett, J., concurring in the judgment).

control over . . . the income.’”<sup>74</sup> Ultimately, Justice Barrett did not reach the attribution question because “the parties barely addressed it,” and instead concluded that the MRT is constitutional based on the similarities between it and subpart F taxation, which the Moores conceded is constitutional.<sup>75</sup>

Lastly, Justice Thomas authored a lengthy dissent largely focused on whether the Sixteenth Amendment includes a realization requirement.<sup>76</sup> Justice Thomas engaged in a careful interpretation of the history of the Sixteenth Amendment to conclude that it does include a realization requirement.<sup>77</sup> He also addressed the majority’s claim that Congress can freely attribute an entity’s income to its shareholders. Justice Thomas argued that the case law the majority looked at instead stands for, “[a]t most,” that Congress may attribute an entity’s income “when necessary to defeat attempts to evade tax liability.”<sup>78</sup> Because the tax evasion justification is not applicable to the MRT, Justice Thomas concluded that the MRT is unconstitutional because it taxes income not realized by shareholders.<sup>79</sup>

### III. SHORTFALLS AND POTENTIAL CONSEQUENCES OF THE DECISION

While the Court purportedly did not address the realization requirement, the Court’s discussion of attribution did address the realization requirement, and the opinion did not fully justify these consequences.<sup>80</sup> An important assumption made by the majority—and Justice Barrett’s concurrence, to an extent<sup>81</sup>—is that the realization question can be asked at the entity level. According to the Court, the *taxpayer* themselves does not need to realize income.<sup>82</sup> Instead, the first question to ask is whether some entity has realized income. If the answer

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<sup>74</sup> Id. at 1708–09 (quoting *Comm’r v. Sunnen*, 333 U.S. 591, 604 (1948)).

<sup>75</sup> Id. at 1709.

<sup>76</sup> Justice Thomas was joined in full by Justice Gorsuch. Id. (Thomas, J., dissenting, joined by Gorsuch, J.).

<sup>77</sup> Id. at 1709–23.

<sup>78</sup> Id. at 1725. Despite Justice Thomas’s careful constitutional analysis, he provided little to support that his reading of this case law is consistent with the Constitution.

<sup>79</sup> Id. at 1726.

<sup>80</sup> At oral argument, Justice Gorsuch argued that attribution and realization are the same. Transcript of Oral Argument at 116–17, *Moore*, 144 S. Ct. 1680 (No. 22-800).

<sup>81</sup> Justice Barrett largely agreed with the majority on attribution, differing only about *when* Congress can attribute income to shareholders.

<sup>82</sup> *Moore*, 144 S. Ct. at 1688–89.

is yes, then the realization requirement is satisfied if Congress attributes that entity's income to its shareholders. By asking the question this way, the Court is implicitly defining "realization" at a higher level of generality than it may commonly be understood at.<sup>83</sup>

The first issue with this approach is that neither the majority nor the concurrence by Justice Barrett identified any language in the Sixteenth Amendment supporting their reading of the realization requirement at this level of generality. If the realization requirement comes from the word "derived" in the Sixteenth Amendment, there may no longer be textual support if realization is viewed at such a high level of generality.<sup>84</sup> Justice Barrett comes close to accounting for this issue by emphasizing that "[r]ealization is a question of substance, not form."<sup>85</sup> But a realization requirement may be a purely formal requirement.<sup>86</sup> In support of realization being a rule-like requirement, Justice Thomas argued that realization is meant to "distinguish between income and source,"<sup>87</sup> and applying the requirement at varying levels of generality may make it difficult to distinguish between income and source.

The issues posed by the level of generality problem are not merely theoretical, but instead conflict with the Court's decision in *Cottage Savings Ass'n v. Commissioner*.<sup>88</sup> There, the Court argued that realization is "founded on administrative convenience."<sup>89</sup> Instead of valuing assets on an annual basis to determine tax liability—a cumbersome task—the realization requirement facilitates the administration of taxes because "[a] change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer."<sup>90</sup> But treating KisanKraft's realization of income as sufficient to satisfy the Sixteenth Amendment's

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<sup>83</sup> See supra note 34 and accompanying text (asking whether the *taxpayer* has income for the separate use).

<sup>84</sup> See supra note 63.

<sup>85</sup> *Moore*, 144 S. Ct. at 1704 (Barrett, J., concurring in the judgment).

<sup>86</sup> Many constitutional provisions are largely formal or procedural requirements. See, e.g., John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 404 (2010) (emphasizing, generally, that certain constitutional provisions prescribe "the means of implementing" constitutional values); William M. Wiecek, The Debut of Modern Constitutional Procedure, 26 Rev. Litig. 641, 643 (2007) (describing different jurists' statements "on the centrality of procedure" in the Constitution).

<sup>87</sup> *Moore*, 144 S. Ct. at 1721 (Thomas, J., dissenting).

<sup>88</sup> 499 U.S. 554 (1991). Justice Ketanji Brown Jackson cites the rule from *Cottage Savings* to cast doubt on *Macomber*. *Moore*, 144 S. Ct. at 1698 (Jackson, J., concurring).

<sup>89</sup> *Cottage Savings*, 499 U.S. at 559 (quoting *Helvering v. Horst*, 311 U.S. 112, 116 (1940)).

<sup>90</sup> *Id.* (quoting Roswell Magill, *Taxable Income* 79 (rev. ed. 1945)).

realization requirement does not facilitate these goals. By ignoring the corporate form and attributing income to the Moores, the MRT does not tax the Moores upon “a change in the form or extent of an investment” because the Moores’ investment has not changed.

Separate from the level of generality problem, the majority opinion included language making the scope of the attribution doctrine uncertain. The Court was concerned with the Moores’ theory being “taken to its logical conclusion” and invalidating provisions like the taxation of original issue discount instruments.<sup>91</sup> These taxes are like the MRT in that they impose a tax before cash or property is received by the taxpayer. But they differ in that there is no entity that has realized income to attribute to a shareholder. The attribution doctrine, unless viewed extremely broadly, simply will not save those taxes. Perhaps the references to these provisions were used for rhetorical effect. Or this passage may indicate that in situations outside of the scope of attribution, *Macomber*’s requirement that income be severed from capital to be taxed is no longer a strict requirement. And while Justices Barrett and Thomas rely on constructive realization at times,<sup>92</sup> using constructive realization to justify these taxes would greatly relax and effectively eliminate the realization requirement.

The Court’s failure to consider these broader issues is understandable in light of the primary issue driving its decision: the consequences of the Moores’ position. Instead of engaging in a rigorous discussion of the constitutional tax provisions, the majority emphasized *stare decisis* and what they believed to be the disastrous consequences of finding for the Moores.<sup>93</sup> The Court repeatedly emphasized the longstanding acceptance of the attribution doctrine and the constitutionality of taxes like the MRT.<sup>94</sup> Strategically, this allowed the Court to avoid wading into whether the Sixteenth Amendment includes a realization requirement while upholding large portions of the Internal Revenue Code.

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<sup>91</sup> *Moore*, 144 S. Ct. at 1696; I.R.C. § 1272 (taxation of original issue discount instruments).

<sup>92</sup> *Moore*, 144 S. Ct. at 1707 n.5 (Barrett, J., concurring in the judgment); *id.* at 1726 (Thomas, J., dissenting).

<sup>93</sup> The Court described “[t]he logical implications of the Moores’ theory” as resulting in “fiscal calamity.” *Id.* at 1695–96 (majority opinion).

<sup>94</sup> See, e.g., *id.* at 1684–85, 1689, 1693. The Court’s attention to *stare decisis* seems out of place from the Roberts Court’s general stance on *stare decisis*. See, e.g., Melissa Murray, *Stare Decisis and Remedy*, 73 *Duke L.J.* 1501, 1503–04 (2024) (summarizing commentary on the Roberts Court’s willingness to overrule or substantially limit precedents).

The Court's reasoning also provides little to support the constitutionality of a potential wealth tax.<sup>95</sup> Wealth taxes provide that people are taxed on the value of certain assets they hold, as opposed to taxing only people's income.<sup>96</sup> But attribution would likely be inapplicable to many assets taxed under a wealth tax, such as real estate. Further, the Court's reliance on instrumentalist concerns and stare decisis would be inapplicable to a yet-to-be-enacted wealth tax.

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<sup>95</sup> The Court also explicitly declined to address the constitutionality of a wealth tax. See *supra* note 55.

<sup>96</sup> See, e.g., Ari Glogower, A Constitutional Wealth Tax, 118 *Mich. L. Rev.* 717, 746 (2020). There are, however, many ways to formulate a wealth tax. See *id.* at 744–47.