

# Supreme Court Declines to Decide Whether Sixteenth Amendment Requires “Realization” to Tax Income

June 27, 2024

On June 20, 2024, the Supreme Court [decided \*Moore v. United States\*](#), an appeal challenging a one-time “[Mandatory Repatriation Tax](#)” (MRT) on U.S. shareholders of a foreign corporation for accumulated, but undistributed, earnings of the corporation. The taxpayers [had asked](#) the Court to invalidate the MRT as a tax on “unrealized” income because the [Sixteenth Amendment](#), they argued, requires that the taxpayer must [receive or enjoy](#) an economic gain for earnings to qualify as income. The government [argued](#) that the Sixteenth Amendment contains no such realization requirement and that other taxes Congress has enacted would be invalidated should the Court agree with the taxpayers’ interpretation.

In a narrow ruling, the Supreme Court decided that the MRT was a valid exercise of Congress’s taxing power. The Court held that the MRT taxed realized income of the foreign corporation by permissibly attributing it to the corporation’s American shareholders. The Court did not, however, resolve the broader question of whether realization is a constitutional requirement for an income tax.

Justice Brett Kavanaugh authored the [controlling opinion](#), joined by four other Justices. Justices [Ketanji Brown Jackson](#) and [Amy Coney Barrett](#) each filed a concurring opinion. Justice Clarence Thomas, joined by Justice Neil Gorsuch, filed a [dissenting opinion](#). This Legal Sidebar discusses the opinions in the case.

*Moore* had attracted attention from Congress, tax law practitioners, and the general public over how a broad ruling from the Court might expand or constrain Congress’s power to tax income under the Sixteenth Amendment. For a discussion of those concerns, as well as an overview of the constitutional jurisprudence at issue in *Moore* and the specific facts and arguments raised in the case, please refer to this [previous Legal Sidebar](#) on the oral arguments before the Court.

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# The Court's Opinion

## Attribution vs. Realization

The Court's [holding](#) that the MRT is a tax on realized income—income of the corporation—was central to the Court's narrow ruling. Because the Court found that the MRT taxed realized income, the Court did not need to decide the broader question of whether the Sixteenth Amendment requires realization to tax income without apportionment among the states, so the Court [declined](#) to address it.

Instead, “the precise and [narrow question](#) that the Court [addressed] is whether Congress may attribute an entity's realized and undistributed income to the entity's shareholders or partners, and then tax the shareholders or partners on their portions of that income.” The Court held that the MRT permissibly attributed such income to the shareholders.

In reaching that conclusion, the Court relied on “Congress's [longstanding practice](#),” upheld by the Court's case law, of “[pass-through](#)” taxation—taxing the shareholders or partners of a business entity on the entity's undistributed income. The Court's opinion gives several [examples](#) of pass-through taxes Congress has levied. The Court specifically [emphasized subpart F](#), which, since 1962, “taxes American shareholders of American-controlled foreign corporations on several kinds of undistributed corporate income, mostly passive income.” Subpart F has routinely withstood [constitutional challenges](#). Comparing the MRT to subpart F, the Court explained that “[t]he MRT is [integrated](#) into subpart F's framework, and it has the same essential features as subpart F.” Accordingly, the Court rejected arguments by the Moores to [distinguish](#) the MRT from subpart F and other pass-through taxes.

## Judicial Restraint

The Court explained that “the Moores' argument, taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional,” and thus [stressed](#)

that our holding today is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income. In other words, our holding applies when Congress treats the entity as a pass-through.

The Court further explained that the ruling does not address some of the [hypothetical taxes](#) raised during arguments and by third parties concerned about the implications of a broader ruling, such as “(i) an attempt by Congress to tax both the entity and the shareholders or partners on the entity's undistributed income; (ii) taxes on holdings, wealth, or net worth; or (iii) taxes on appreciation.”

## Concurring Opinions

Justice Jackson joined the Court's opinion but wrote a separate [concurrence](#) in which she emphasized the need for judicial restraint in tax cases. She explained that, because taxes are inevitably unpopular with one group or another, the Court's role in tax disputes should be limited, and “the remedy for such abuses is to be found at the [ballot-box](#).”

Justice Barrett, joined by Justice Samuel Alito, [concurred](#) only in the Court's judgment upholding the MRT, but did not join the Court's opinion. Justice Barrett asserted that “[t]he Sixteenth Amendment's reference to income ‘derived’ from any source encompasses a requirement that income, to be taxed without apportionment, must be [realized](#).” Justice Barrett further concluded that the Moores had not realized income in this case because they had not received a dividend from the corporation, a “profit from selling their shares, or any other [pecuniary benefit](#) from their stock ownership.” Justice Barrett expressed

concern that the majority opinion was “[too quick](#) to bless the attribution of corporate income to shareholders,” and emphasized that the “Due Process Clause [cabins](#) that power by requiring income attributions not to be ‘arbitrary.’” As such, Congress’s power to attribute corporate income “depends on the [relationship](#) between the shareholder and the income.” Justice Barrett nonetheless concurred in the judgment of the Court because the Moores had “[conceded](#) that subpart F is constitutional,” and Justice Barrett “agree[d] with the Court that subpart F is not [meaningfully different](#) from the MRT in how it attributes corporate income to shareholders.” Justice Barrett thus [concluded](#) that the Moores had failed to carry their burden as taxpayers of showing that they were entitled to a refund.

## Justice Thomas’s Dissent

Justice Thomas, joined by Justice Gorsuch, dissented. Justice Thomas agreed with the Moores that the Sixteenth Amendment requires realization for income to be taxed. Justice Thomas asserted that, “[b]ecause the Moores [never actually received](#) any of their investment gains, those unrealized gains could not be taxed as ‘income’ under the Sixteenth Amendment.”

Analyzing the [history](#) and [text](#) of the [Sixteenth Amendment](#), Justice Thomas [argued](#) that there must be a distinction between “income” and the “source” from which that income is “derived,” and that a realization requirement draws that distinction. Justice Thomas also implied the importance of a realization requirement as a safeguard against [unconstitutional taxes](#).

Justice Thomas criticized the majority opinion as “[consequentialist](#),” because it “fashion[ed] an [emergency escape](#)” to avoid unpalatable results of a realization requirement. Justice Thomas called the majority’s “attribution” doctrine “an [unsupported invention](#)” created from [selectively](#) applying [dicta](#).

In her concurrence, Justice Jackson [disagreed](#) with the dissent’s contention that the Sixteenth Amendment requires realization, contesting the applicability of the authority on which the Moores relied as support for that argument. Justice Jackson also suggested that, even if the MRT violated the Sixteenth Amendment, it might still be constitutional as “an [excise tax](#) on the privilege of doing business through a controlled foreign corporation,” and therefore would not be a direct tax requiring apportionment.

## Considerations for Congress

The Court reaffirmed that, when dealing with an entity’s undistributed income, Congress may [either](#) tax the entity directly or tax its shareholders or partners on a pass-through basis. The Court also stated that either method taxes the entity’s [realized](#) income.

The Court [cautioned](#) that its opinion does not address any hypothetical congressional efforts to tax wealth or appreciation.

While the Court [declined](#) to address whether the Sixteenth Amendment requires realization to tax income, to avoid constitutional challenges based on this unresolved issue, Congress might consider amending existing tax provisions or write future tax legislation so that taxes are based on realization.

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