taxnotes federal
Volume 185, Number 5 ■ November 4, 2024

Counsel in *Moore* Analyzes Supreme Court's Decision

by Jeffrey H. Paravano

Reprinted from *Tax Notes Federal*, November 4, 2024, p. 953

Counsel in *Moore* Analyzes Supreme Court's Decision

by Jeffrey H. Paravano

Jeffrey H. Paravano is firmwide chair of Baker & Hostetler LLP's tax group and managing partner of the firm's Washington office. He previously served as senior adviser to the Treasury assistant secretary for tax policy and was tax counsel of record for the taxpayers in *Moore*.

In this article, Paravano explains the key takeaways from the Supreme Court's majority opinion in *Moore* — beyond the validity of the mandatory repatriation tax — and explores implications for the definition of income under the 16th Amendment and deference to Congress for finding realized income.

Andrew M. Grossman, the co-leader of Baker & Hostetler's appellate and major motions team, argued for the Moores before the Supreme Court.

I. Introduction

The Supreme Court in June handed down an opinion on the validity of the mandatory repatriation tax (MRT) that also addresses several important issues regarding federal taxing powers under the 16th Amendment. In *Moore*,[1] the Court upheld the MRT in a narrow ruling, stating that it taxes realized income — income earned by the offshore corporation — and attributes that corporate income to shareholders and taxes the shareholders on their portions of that income.

Our clients, Charles and Kathleen Moore, argued that income must be realized to be taxed without apportionment under the 16th Amendment and that the MRT imposed on them as shareholders an impermissible unapportioned tax on property. How could income earned 30 years ago by a foreign corporation and reinvested abroad by that corporation in property and equipment be income to a U.S. shareholder in 2017, asked the Moores.

The MRT was added to the code by the Tax Cuts and Jobs Act, which also expanded subpart F to include global intangible low-taxed income. The MRT deems a controlled foreign corporation's earnings and profits reinvested abroad going back to 1986 to be subpart F income in 2017 and thus taxable to the corporation's U.S. shareholders in 2017 in proportion to their ownership stakes at that time.[2] Under the MRT, the shareholders are taxed on that deemed "income" — a deemed property distribution that, by definition, has not been distributed to them — at a rate based on how the corporation held the retained earnings in 2017: 15.5 percent for earnings held in cash or cash equivalents and 8 percent otherwise.[3] The MRT taxes shareholders regardless of whether they owned shares at the time the corporation made the earnings on which they're being taxed. All that matters is that a given shareholder owned the requisite number of shares on a certain date in 2017.[4] The Moores noted that if an actual distribution of stock to all shareholders is not income under *Macomber*,[5] an actual distribution of nothing (not even a piece of paper) also is not income. As a factual matter, there was never any serious dispute from the government or any court

[1] *Moore v. United States*, 144 S. Ct. 1680 (2024), *aff'g* 36 F.4th 930 (9th Cir. 2022).

[2] Section 965(a).

[3] *Id.* and section 965(c); *see also* section 951(a).

[4] Sections 965(a) and 951(a).

[5] *Eisner v. Macomber*, 252 U.S. 189 (1920).

regarding the incontrovertible fact that the Moores realized nothing.[6]

In the proceedings below, the Ninth Circuit held that an income tax does not require that a taxpayer have realized income under the 16th Amendment.[7] The Supreme Court in *Moore* recognized that its precedent states that realization is required for taxation of income without apportionment, but it held that income realized by a corporation operating abroad and not taxed by the United States at the entity level may be attributed by Congress to its U.S. owners. Specifically, in the majority opinion, written by Justice Brett Kavanaugh and joined by Chief Justice John G. Roberts Jr., and Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson, the Court held that the 16th Amendment authorizes Congress to attribute income realized by an entity to its owners in certain circumstances:

> We emphasize 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.[8]

Although the five-justice majority determined that it need not resolve the issue of realization in *Moore*, it also noted that the Supreme Court in *Macomber* "stated that income requires realization."[9] Further, Justice Amy Coney Barrett's concurrence in the judgment, joined by Justice Samuel A. Alito, states that "Realization may take many forms, but our precedent uniformly holds that it is required before the Government may tax financial gain without apportionment."[10] Justice Clarence Thomas's dissent, joined by Justice Neil M. Gorsuch, states that "'Income' in the Sixteenth Amendment refers only to income realized by the taxpayer."[11] Thus, the majority opinion explicitly recognizes that prior Supreme Court precedent states that realization is required (with a reservation only by Jackson, in a separate concurrence), and four justices in *Moore* recognize that realization is a requirement for the federal taxation of income without apportionment. The opinion notes that nothing in it should be read to suggest that Congress could tax both an entity and its owners on the same income and that the due process clause "proscribes arbitrary attribution"[12] — which gives tax practitioners food for thought on whether any current taxes might violate that holding.

The opinion also makes clear that a tax on income is an indirect tax, not a direct tax, and it explains that federal taxes on real or personal property are direct taxes.[13] Thus, unapportioned federal taxes on appreciated property, such as shares of stock, are prohibited for two reasons. First, because realization has not yet occurred, there is no income to tax without apportionment under the 16th Amendment's definition of income set forth in *Macomber* (that is, there is no ability to apply the indirect income tax if there is no income). Second, because any federal tax on the value of shares (or part of the value of shares) would be a direct tax, apportionment is required under the 16th Amendment.

The Court's opinion is best read as generally preserving the status quo and as cautioning against novel federal proposals to tax wealth or mere asset appreciation.

[6] Certain prior versions of proposed repatriation taxes, including one proposed during my time serving at Treasury, were elective: Taxpayers could treat amounts as repatriated and pay tax at a low rate or wait until an actual or constructive distribution of cash or property and pay a higher tax rate at that later date. *See, e.g.*, American Jobs Creation Act, P.L. 108-357; *see also* H.R. Rep. No. 108-755, at 312 (2004) (Conf. Rep.). The mandatory nature of the MRT likely was scored as raising more federal revenue during the TCJA's budget window compared with versions of repatriation taxes that were elective.

[7] *Moore*, 36 F.4th at 935-937.

[8] *Moore*, 144 S. Ct. at 1696.

[9] *Id.* at 1691.

[10] *Id.* at 1704.

[11] *Id.* at 1710.

[12] *Id.* at 1697.

[13] *Id.* at 1687.

II. Majority Opinion Answers Four Questions

1. Is realization required for federal taxation of income without apportionment, and has realization been required for more than 100 years?

Yes, under current precedent. The *Moore* majority addresses two parts of the opinion in *Macomber*: (1) the part analyzing whether all the shareholders who received a ratable stock dividend realized income when none of the shareholders' percentage interests in the corporation changed as a result of the stock dividend; and (2) the part discussing whether reinvested corporate earnings are corporation capital and not shareholder income.

Regarding the part of *Macomber* analyzing whether realization occurred upon receipt of the stock dividend, the *Moore* opinion states: "[*Macomber*] stated that income requires realization."[14] Regarding the part of *Macomber* discussing whether reinvested corporate earnings might be attributed to shareholders that received a stock dividend, the *Moore* majority states: "Separate from [the realization] analysis, the Court [in *Macomber*] went on to say in dicta that 'what is called the stockholder's share in the accumulated profits of the company is capital, not income.'"[15] The *Moore* majority reasons that *Macomber* "did not purport to address attribution . . . because the tax at issue there did not attribute income of the corporation to shareholders."[16] Consider the following passages in *Moore* (emphasis added):

> The question in *Eisner* v. *Macomber* was whether the new stock was nonetheless taxable income for the shareholders. *Id.*, at 199, 40 S.Ct. 189. The Court said no. *Id.*, at 212, 40 S.Ct. 189. The Court reasoned that there was no change in the value of the shareholders' total stock holdings in the corporation before and after the stock distribution. *Id.*, at 210-211, 40 S.Ct. 189. So the new stock did not represent any kind of economic gain to the shareholders. *Ibid.* *And the Court further stated that income requires realization. Id.*, at 207, 211-212, 40 S.Ct. 189. Yet neither the corporation nor the shareholders had realized income from the corporation's creation and distribution of additional stock. *Id.*, at 210-213, 40 S.Ct. 189.
>
> . . .
>
> *Separate from that analysis, the Court went on to say in dicta that* "what is called the stockholder's share in the accumulated profits of the company is capital, not income." *Id.*, at 219, 40 S.Ct. 189.[17]

Again, the Court calls only *Macomber*'s analysis regarding accumulated corporation profits dicta, and it specifically reasons that that part of the *Macomber* opinion is "separate" from *Macomber*'s income-requires-realization analysis and statement. The majority did not refer to the income-requires-realization statement in *Macomber* as dicta. Thus, realization is the law of the land in the United States, and all lower courts are bound by that unless and until the Supreme Court either decides to overrule *Macomber* by holding that realization is not required for federal taxation of income without apportionment or states that income does not require realization and that the statement in *Macomber* that income requires realization was dicta. The chances of that happening, of course, are remote at best given that (1) four justices in *Moore* would have reaffirmed that realization is a constitutional requirement, and (2) the majority, with a reservation expressed only by Jackson in her concurrence (not joined by any other justice), declined to uphold the MRT on that basis suggested by the Ninth Circuit — that realization is not required — and instead explicitly noted that existing precedent dating back more than 100 years states that realization is required.[18]

It also is meaningful given the procedural context of the case — that the Supreme Court in *Moore* affirmed the judgment of the Ninth Circuit — that the *Moore* Court explicitly recognized that *Macomber* "stated that income requires

[14] *Id.* at 1691.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

realization." That statement by the majority is best understood as implicitly correcting the Ninth Circuit's erroneous holding that the 16th Amendment does not require realization. And while it is true that the majority explicitly declines to decide the realization issue in *Moore*, by quoting the statement regarding realization in *Macomber* and explicitly pointing out that the other part of *Macomber* was dicta, the majority opinion provides indirect or implicit but unmistakable guidance to lower courts that the Ninth Circuit's holding regarding realization is not consistent with existing Supreme Court precedent. Of course, parties are free to make the technical argument that, because the Supreme Court affirmed the judgment of the Ninth Circuit, the statement by the Ninth Circuit that income does not require realization was not reversed and therefore is precedent in the Ninth Circuit. As a practical matter, such an argument has close to a zero chance of gaining traction with any judge who reads the *Moore* Supreme Court decision.[19]

To be clear, the majority opinion in *Moore* does not resolve the realization issue itself — that is, it does not endorse or reject *Macomber*'s holding but explicitly describes it. The *Moore* opinion states in footnote 2 that it is not addressing taxes on wealth or taxes on appreciation, and it explains in footnote 3 that because the MRT taxes realized income, the *Moore* opinion does not address the government's arguments that (1) "a gain need not be realized to constitute income" or (2) "*Macomber*'s discussion of realization was dicta because the stock dividend did not represent any kind of economic gain (realized or unrealized) for the shareholders." The opinion also states: "We do not decide [the realization] question today."[20] On the following page, it states: "We need not resolve that disagreement over realization" and adds that "those are potential issues for another day."[21] But because the majority opinion makes clear, with a reservation only by Jackson, that *Macomber* "stated that income requires realization,"[22] realization is the law of the land under that precedent.

The Supreme Court generally guards jealously its prerogative to revisit and overrule its precedent, as the Ninth Circuit learned when the Supreme Court granted certiorari in *Moore* to address whether the 16th Amendment requires realization of income after the Ninth Circuit stated in *Moore* that realization is not required for the federal taxation of income without apportionment.[23] Although the government in *Moore* argued that the realization holding of *Macomber* was dictum,[24] the *Macomber* Court's methodical analysis of all the facts and circumstances in that case in an effort to determine whether realization occurred makes that argument unconvincing. And in a case in which a majority of the Supreme Court decided to uphold the MRT, the easiest way to do so would have been to rule for the government and hold that realization is not required. Instead, the majority opinion explicitly recognizes that *Macomber* stated that income requires realization, and then the Court decided *Moore* in a manner generally not briefed by the parties — upholding the MRT by stating that Congress may attribute realized corporation income (in a case in which earnings were retained and reinvested by the corporation long ago) to shareholders in 2017.

Regarding the discussion of realization outside the majority opinion in *Moore*, as noted above, the four other justices — two in the concurrence in the judgment and two in the dissent — state with no hesitation or reservation that realization is necessary for income to be taxed as such without apportionment.

In summary, all lower courts are bound by the statement in *Macomber* that income requires realization. The Supreme Court, of course, is always free to change its mind regarding the meaning of the 16th Amendment and open the door to federal taxation of property ownership. Until it does, lower courts are bound by that

[19] *Cf. id.* at 1703 (Barrett, J., concurring in the judgment): "The Ninth Circuit misread our cases. Contrary to its assertion, this Court has 'never abandoned the core requirement that income must be realized to be taxable without apportionment.' 53 F.4th 507, 508 (CA9 2022) (Bumatay, J., dissenting from denial of rehearing en banc). What we *have* done is reject efforts to narrow what it means to realize income."

[20] *Id.* at 1696.

[21] *Id.* at 1697.

[22] *Id.* at 1691.

[23] *Moore*, 36 F.4th 930.

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

statement in *Macomber* explicitly described in *Moore*.

2. If realization is required, is the sky falling?

No. After the majority opinion notes that *Macomber* stated realization is required for taxation of income without apportionment, it says:

> In short, the Moores cannot meaningfully distinguish the MRT from similar taxes such as taxes on partnerships, on S corporations, and on subpart F income. The upshot is that the Moores' argument [that the MRT is different from other code provisions], taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional.[25]

The *Moore* majority opinion then lists, as examples, several existing code provisions that could theoretically be at risk if the Court were to rule that the MRT — which, according to the majority opinion, attributes realized but untaxed "undistributed income of American-controlled foreign corporations to their American shareholders" — is invalid. The majority opinion goes on to state that elimination of those existing code provisions would deprive the U.S. government of trillions of dollars in revenue and that "the Constitution does not require that fiscal calamity." Earlier in the majority opinion, the Court notes: "In an effort to contain the blast radius of their legal theory, [the Moores] . . . tried to distinguish the MRT from . . . other taxes and argue[d] that only the MRT is unconstitutional."[26]

Thus, the majority opinion takes off the table the "parade of horribles" argument that the constitutional requirement of realization for taxation of income without apportionment puts at risk many other code provisions by (1) recognizing that *Macomber* stated that income requires realization (that is, that realization is, and has been for at least 100 years, the law of the land); (2) noting that the realization requirement does not invalidate the MRT, which attributes realized and untaxed income to the entity's owners; and (3) noting that if the *Moore* Court found that attribution of realized but untaxed corporate income to shareholders was unconstitutional, other code provisions also might be at risk.

Interestingly, after questions at oral argument seemed to focus on attribution, an issue generally not briefed by the parties, professor Erik Jensen published on January 4 an opinion letter in *The Wall Street Journal* noting:

> At oral argument, the Solicitor General suggested the case might be decided by holding that a corporation's realized income may be "attributed" to shareholders, but, as Justice Neil Gorsuch noted, none of the government's briefs in any forum ever made that point. I suspect the government didn't take that position in writing because it is inconsistent with the relevant statute. The so-called mandatory repatriation tax, or MRT, "deemed" a distribution of property from a controlled foreign corporation to certain shareholders. The statute says nothing, however, about attributing corporate income to shareholders. Although the MRT deemed a distribution of property valued by reference to the corporation's post-1986 accumulated earnings and profits — which might sound like income — that figure includes earnings that long ago became property of the corporation. Characterizing reinvested earnings and profits from 1987 as corporate income in 2017 is like calling a factory built by the corporation in 1987 as 2017 "income." That's crazy. The corporation itself had no income in 2017 from mere ownership of property, and if there is no income to the corporation, there's no income to attribute to shareholders. No other provisions in the tax code — including those governing partnerships, S corporations and Subpart F — purport to tax "income" to owners of an entity when the entity itself has no current income, absent an actual or constructive distribution of property to the owner. Congress's power to tax income doesn't permit calling reinvested capital — property — income.

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

[26] *Id.* at 1693.

Jensen's points are generally consistent with views expressed by the dissenting justices that the MRT is very different and easily distinguished from other code provisions.[27]

3. May Congress treat any entity with income as a passthrough, in whole or in part, subject only to a due process analysis?

Yes. That is the new and narrow holding of *Moore*. When Congress attributes entity income to an owner in order to tax the owner, rather than the entity, on that income, "the tax remains a tax on income — and thus an indirect tax that need not be apportioned."[28] This does not mean that the IRS has the authority to attribute corporate income to owners, including holding companies. *Moline Properties*[29] continues to protect taxpayers from arbitrary allocations or attributions or assignments of income by the IRS. Any new IRS regulations purporting to attribute income would be subject to *de novo* review and no deference in accordance with the recent Supreme Court decision in *Loper Bright*.[30] Any future IRS regulations attempting to attribute income absent clear statutory authority also could be subject to challenge under the major questions doctrine under the Supreme Court's decision in *West Virginia v. EPA*.[31]

4. Are taxes on wealth and mark-to-market taxes on appreciated property off the table?

Yes. Taxes on real or personal property are direct taxes, and direct taxes must, under the 16th Amendment, be apportioned among the states. A tax on so-called wealth has long been considered a direct tax on property. The *Moore* majority opinion, citing *NFIB v. Sebelius*,[32] which cites *Macomber*, makes clear that direct taxes include taxes on ownership of personal property.[33] Specifically, the *Moore* majority opinion states: "Direct taxes are those taxes imposed on persons or property,"[34] and indirect taxes are those imposed "on activities or transactions" and include "duties, imposts and excise taxes, as well as income taxes."[35]

While the *Moore* majority opinion states that an income tax is not a direct tax but an "indirect tax . . . permitted under Article I, Section 8 [of the Constitution] without apportionment,"[36] it also makes clear, because of the statement in *Macomber* that "income requires realization," that income exists under *Macomber* only if amounts have been realized. Thus, any tax on the value of property owned by a taxpayer, including real property or shares of stock that have appreciated in value, is a tax on property and not a tax on income because any potential income regarding that ownership has not been realized. The government's argument that asset appreciation "that occurs between two points in time" may somehow be separated from the asset itself and treated as income seems unserious and was not accepted by the majority in *Moore*. A simple example shows why.

Example: Assume that Taxpayer A purchased shares of stock one year ago for $100 and that the appreciated value of the stock is now $103. Assume further that the federal government would like to impose a tax on wealth annually equal to 1 percent of the value of stock held by individuals. For Taxpayer A's property, the tax would be $1.03 this year. Because the 16th Amendment prohibits federal taxation of property without apportionment, Congress decides to tax property based on the change in value between one year ago and today at a rate of

[27] *Id*. at 1725-1727. "The MRT is undeniably novel when compared to older income taxes, and many of those differences are constitutionally relevant. Because the MRT is imposed merely based on ownership of shares in a corporation, it does not operate as a tax on income."

[28] *Id*. at 1689.

[29] *Moline Properties Inc. v. Commissioner*, 319 U.S. 436 (1943).

[30] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

[31] *West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022).

[32] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570-571 (2012).

[33] *Moore*, 144 S. Ct. at 1687, citing *NFIB*, 567 U.S. at 570-571 (stating that after the result in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), was overturned by the 16th Amendment, "we continued to consider taxes on personal property to be direct taxes," citing *Macomber*, 252 U.S. at 218-219).

[34] *Moore*, 144 S. Ct. at 1687. This statement by the majority also functions as an implicit rejection of the government's alternative argument that the MRT, as it applied to the Moores regarding taxing them as individual shareholders, was an excise tax and therefore an indirect tax not requiring apportionment.

[35] *Id*.

[36] *Id*. at 1688.

35 percent. For Taxpayer A's property, the tax would be 35 percent of $3, or $1.05.

What becomes obvious by this example is that if Congress may tax the appreciated value of property without apportionment, it may tax property without apportionment. If the Constitution precludes the former, it also precludes the latter. After all, as professor Andy Grewal often points out, "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."[37] The property's appreciation is not separate property and, in any case, remains part of the property. As a factual matter, any tax on appreciation of property is a tax on property and is not a tax on realized income.

Note further that if the appreciated value of real or personal property owned by a taxpayer constituted realized income (or if realization is not required for taxation of income without apportionment by the 16th Amendment), that appreciation would already be subject to tax under section 61. The Supreme Court has held, as long ago as 1940, that section 61 fully implements the 16th Amendment and encompasses "the full measure" of Congress's taxing power.[38] The IRS has never attempted to impose taxes on mere asset appreciation, including appreciated shares of publicly traded stock owned and controlled entirely by one individual that could be liquidated and turned into cash in seconds. The reason is not misadministration of the tax law by the IRS; it is because (1) realization is, and always has been, a requirement for taxation of income without apportionment under the 16th Amendment, and (2) mere asset appreciation is not, as a factual matter, realized income.

III. Deference to Congress on Definition of Realization

Although realization is the law of the land and has been the law of the land for more than 100 years, the Supreme Court in *Moore* made clear that it does not view that requirement as problematic for the vast majority of existing code provisions because they comply with that requirement. As counsel for the Moores, we conceded the validity of every other code provision and argued that the MRT was different and distinguishable from other code provisions. We used the term "constructive realization" to describe that realization may be (and has been) found in many cases in which a taxpayer does not have cash in hand, and we pointed out that no code provision other than the MRT tries to tax "income" to owners of an entity when the entity itself has no current income, absent an actual or constructive distribution of property to the owner. The majority expressed concern "that the Moores' argument [about the MRT being different from subpart F and certain other provisions — *not* their argument that realization is required for taxation of income without apportionment], taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional," and then cited the following as examples: section 305(c) (deemed stock distributions); sections 446 and 448 (accrual accounting); section 701 (partnership taxation); sections 951-965 (subpart F); section 951A (passthrough tax on global intangible low-taxed income); section 1256(a) (certain futures contracts); section 1272(a) (original issue discount instruments); sections 1361-1379 (S corporations); and sections 2501-2524 (gift taxes).[39]

While the validity of certain of those code provisions may be justified by the "attribution of entity income" holding in *Moore* and certain cases cited by the majority, the list is much broader and includes code provisions in which Congress made reasonable determinations that statutory provisions were necessary to prevent taxpayers from avoiding tax on realized income or to prevent taxpayers from avoiding realization through gamesmanship. Thus, the majority opinion recognizes the importance of allowing Congress to make reasonable choices to help protect the federal fisc and is signaling to taxpayers that realization is not a black-and-white rule intended to severely limit congressional tax authority. Barrett, in her concurrence in the judgment, explains: (1) "Realization is a question

[37] *Trinova Corp. v. Michigan Department of Treasury*, 498 U.S. 358, 374 (1991).

[38] *United States v. Burke*, 504 U.S. 229, 233 (1992) (quoting *Helvering v. Clifford*, 309 U.S. 331, 334 (1940)).

[39] *Moore*, 144 S. Ct. at 1696.

of substance, not form," (2) "our cases describe many ways income might be realized; a rigid definition does not capture them all," and (3) "realization may take many forms, but our precedent uniformly holds that it is required before the Government may tax financial gain without apportionment."[40]

There was little risk before *Moore*, and there is little risk after *Moore*, that the Supreme Court would prevent Congress from finding realization with respect to (1) statutes aimed at preventing taxpayer income-avoidance schemes, (2) statutes implementing basic concepts of accrual accounting for tax purposes, or (3) statutes focused on the time value of money for the computation of interest income from debt instruments. Indeed, as just one example, the Supreme Court decided nearly 90 years ago that accrual accounting is about timing and is a permissible approach to finding realization.[41]

For those concerned about the 16th Amendment's prohibition on federal taxation without apportionment of mere asset appreciation, the enactment of such provisions would be highly unlikely even if the Constitution did not preclude their validity for the simple reason, as noted by Kavanaugh during oral arguments, that our political leaders are subject to periodic elections. Any law that forces taxpayers to sell property to pay taxes or otherwise imposes taxation on asset appreciation before the sale of property would likely cause significant economic disruption and depress asset values across the board. Such a law would be unlikely to stay on the books for very long because any senator or congressperson who voted to put it in place would be unlikely to retain their seat for very long. In any case, Congress has a host of choices for increasing federal tax revenue that are well within the bounds of the "delicate constitutional compromises"[42] and nonrigid guardrails imposed by the 16th Amendment. ■

[40] *Id.* at 1704.

[41] *See United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936).

[42] *Moore*, 144 S. Ct. at 1710. Thomas's dissenting opinion in *Moore*, joined by Gorsuch, explains in detail the history and compromises associated with development of the constitutional federal taxing powers, including the 16th Amendment.