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Is the US Exit Tax Constitutional?

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ABSTRACT

The recent US Supreme Court decision in *Moore vs. United States* raised the possibility that the Court would declare that realization is required for a tax provision to be constitutional. The US exit tax on expatriations is the most likely vehicle for a post-Moore constitutional challenge to taxation without realization because (a) it involves individual taxpayers; (b) it does not involve attribution, because the tax is imposed directly on the expatriating taxpayer, and (c) it involves precisely the kind of tax that was the direct target of the Moore litigation, namely a mark to market tax on rich taxpayers (the kind that will happily fund such litigation). Such a case could force the Court to confront precisely the question it avoided in *Moore*, namely "whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states."

The recent US Supreme Court case of *Moore v. United States* raised for the first time in over a century the question whether realization is required for an income tax to be constitutional. Under the US constitution, "indirect" taxes can be levied in any way as long as they are uniform, but "direct" taxes must be apportioned among the states based on their population. That rule makes an income tax or wealth tax difficult to apply because rich people in smaller states must bear a much higher tax burden that similarly rich people in larger states.

The first US income tax was enacted in1861 to finance the civil war and was ruled to be an indirect excise tax and therefore constitutional. But this tax expired in 1872. In 1894, Congress revived it, but in 1895 the Supreme Court held in *Pollock*[1] that an income tax on income from property was equivalent to a tax on the property itself and was therefore an unconstitutional unapportioned direct tax. This led to a long political fight that culminated in the enactment of the Sixteenth Amendment in 1913, which reversed *Pollock* and stated that an "income" tax did not have to be apportioned. But this left open the question of what qualified as an "income" tax, and whether such a tax required realization. That was the issue raised in *Moore*, but the five Justice majority held that it did not need to be resolved because in that case the income was realized by a foreign corporation and could be attributed to the taxpayer.

In his majority opinion in *Moore*, Justice Kavanaugh warned against the consequences of holding that realization is required for taxing income as a matter of constitutional law:

> The Moores are obviously aware of those longstanding congressional practices and Supreme Court precedents, so they had two choices of how to deal with that stark reality in this Court. They could have argued that all of those taxes are unconstitutional and that all of those precedents should be overruled. Or in an effort to contain the blast radius of their legal theory, they could have tried to distinguish the MRT from those other taxes and argue that only the MRT is unconstitutional. They chose the latter approach.[2]

Justice Kavanaugh then proceeded to dismantle the distinctions drawn by the Moores between the Mandatory Repatriation Tax (MRT) and other provisions that could be affected by constitutionalizing realization. These include Subchapter K, Subchapter S, Subpart F, and other provisions that attribute the realized income of entities to their owners. The majority opinion held that these are protected by precedent holding that "Congress can choose either to tax the entity on its income or to tax the entity's shareholders or partners on their share of the entity's undistributed income" (the "Attribution Rule").[3] Justice Kavanaugh concluded by stating that—

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[1] Pollock v. Farmers Trust Co., [157 US 429 (1895)](157 US 429 (1895)).

[2] Moore v. United States, No. 22-800, slip op. at 16 (June 20, 2024).

[3] *Id*. at 13-14.

> In short, the Moores cannot meaningfully distinguish the MRT from similar taxes such as taxes on partnerships, on S corporations, and on subpart F income. The upshot is that the Moores' argument, taken to its logical conclusion, could render vast swaths of the Internal Revenue Code unconstitutional. See, *e.g.*, 26 U. S. C. §305(c) (deemed stock distributions); §§446, 448 (accrual accounting); §701 (partnership taxation); §§951–965 (subpart F); §951A (pass-through tax on global intangible low-taxed income); §1256(a) (certain futures contracts); §1272(a) (original- issue discount instruments); §§1361–1379 (S corporations); §§2501–2524 (gift taxes).
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> 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.[4]

This insight was presumably not obvious to the Justices when they granted certiorari in Moore in 2023, because nobody pointed out all the consequences of constitutionalizing realization other than the Government, and its discussion was very short.[5] There were many briefs urging reversal of the Ninth Circuit` s holding that realization is not required by the Sixteenth Amendment, and the Court followed those in granting certiorari.[6] Only after it did

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[4] *Id*. at 21-22 (footnotes omitted). It is striking how consequentialist this statement is. The majority does not show any trace of the originalism evidenced by the dissent or the textualism of the Barrett concurrence. Lucas Carvalho has argued that "though the concerns about a healthy national budget and reducing wealth inequality should be critical for any democratically elected government, they should never bend the analysis of a statute or even of an amendment in relation to the constitutional text." Lucas Carvalho, The Challenges of Importing Moore, 115 Tax Notes Int`l 1037 (Aug. 12, 2024). But as the majority explained, constitutionalizing realization would have led to a fiscal calamity in 2024 because every taxpayer whose return would possibly be impacted, like every partner in a partnership or S corporation, would have taken the position that she has substantial authority not to pay the tax. Is it really legitimate for a court not to take this into consideration in an election year? This was clearly the reason the 7-2 majority refused to constitutionalize realization, and any other outcome would have been illegitimate. A Supreme Court should not have the power to bankrupt the government.

[5] *See* Brief for The United States in Opposition, *Moore v. United States*, 602 U.S. ___ (2024); but *see* Reuven Avi-Yonah, *If Moore is Reversed,* 110 TAX NOTES INT'L 1725 (June 26, 2023). Certiorari was granted on that day. I did not believe the Court would grant certiorari, otherwise I would have written earlier, and presumably others would have as well.

[6] *See* Brief for The Cato Institute as Amicus Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Landmark Legal Foundation as Amicus Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The Manhattan Institute for Policy Research, et al. as Amici Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Southeastern Legal Foundation as Amicus Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The Buckeye Institute as Amicus Curiae Supporting Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The Pacific Research Institute, et al. as Amici Curiae Supporting

so, there were many briefs on the other side pointing out the dire consequences, and that presumably influenced the five Justices who avoided constitutionalizing realization.[7] The majority explicitly avoided taking a position on whether realization is required as a constitutional matter. Justice Kavanaugh wrote that

> Our analysis today does not address the distinct issues that would be raised by (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… Those are potential issues for another day, and we do not address or resolve any of those issues here.[8]

The problem is that there are four Justices who would constitutionalize realization. Justices Barrett and Alito wrote, "[t]he question on which we granted review is 'whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.' The answer is straightforward: No."[9] Justices Thomas and Gorsuch stated that the "Sixteenth Amendment 'incomes' include only income realized by the taxpayer. The text and history of the Amendment make clear that it requires a distinction

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Petitioners, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Americans for Tax Reform as Amicus Curiae Supporting Petition for Certiorari, *Moore v. United States*, 602 U.S. ___ (2024).

[7] *See* Brief for Calvin H. Johnson as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Theodore P. Seto as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for L.E. Simmons as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Reuven Avi-Yonah, Clinton G. Wallace, & Bret Wellsas Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The American Tax Policy Institute as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Tax Professors Donald B. Tobin and Ellen P. April as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Professors Bruce Ackerman, Joseph Fishkin, and William E. Forbath as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for John R. Brooks and David Gamage as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for John R. Brooks and David Gamage as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Amandeep S. Grewal as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for George A. Callas and Mindy Herzfeld as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for The American College of Tax Counsel as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Tax Economists as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Main Street Alliance, et al. as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Professors Akhil Reed Amar and Vikram David Amar as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Professors Akhil Reed Amar, et al. as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Tax Law Center at NYU Law, et al. as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Professors of Tax Law, Legal History, and Computational Science as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Alex Zhang as Amicus Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024); Brief for Arizona, et al. as Amici Curiae Supporting Respondent, *Moore v. United States*, 602 U.S. ___ (2024).

[8] *Moore*, slip op. at 8, n. 2, 24.

[9] *Id.* at 2 (Barrett, J., concurring) (internal citation omitted).

between 'income' and the 'source' from which that income is 'derived.' And, the only way to draw such a distinction is with a realization requirement."[10]

Given this situation, it is very likely that the same interests that created *Moore*[11] would try again, and they may be able to persuade a fifth Justice to join them in constitutionalizing realization. Only Justice Jackson is firmly committed to the position that realization is not a constitutional requirement.[12]

Before we discuss the constitutional issue as applied to the exit tax, it is useful to examine the tax itself.

The Exit Tax[13]

The exit was (section 877A of the Internal Revenue Code) was enacted in 2008 to for the first time impose a significant price on US citizens who expatriate by taxing them on the unrealized appreciation in their assets. But this tax has not deterred expatriations. The quarterly data on expatriations (based on the list of expatriates published in the Federal Register since 1998) show an increasing trend since 2013. The average number of expatriates before 2013 was 532 per year, while the average since 2013 is 3,439 per year.

What is the explanation for this increase, which is contrary to the intent behind the enactment of section 877A? The answer lies in the fact that the increase happened in 2013, not 2009, because at the end of 2012 the 2001 Bush tax cuts expired, so that the income tax rate went up to 39.6% and the estate tax rate went up from zero in 2010 to 40%. Most expatriations are tax motivated (except perhaps in 2020, when the pandemic may explain the all-time spike in expatriations, but this does not explain the increase before or after).

But the income and estate tax rates were also high before 2001 (39.6% for income tax and 55% for estate tax) and there was no rush for the exits then even though there was no exit tax. Why?

The answer lies in the difference between intrinsic and extrinsic motivations.[14] Before 2008, there was no exit tax, but expatriation was considered unpatriotic (and the names were

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[10] *Id.* at 1 (Thomas, J., dissenting).

[11] Like many cases before the Court, *Moore* is an artificial case, and the facts cited are very incomplete and misleading. *See* Mindy Herzfeld, *Moore, Part 4: The Moores' Mistakes, Misstatements, and Possible Misfiling*, TAX NOTES (Oct. 2, 2023), https://www.taxnotes.com/featured-analysis/moore-part-4-moores-mistakes-misstatements-and-possible-misfiling/2023/09/29/7hd9t?highlight=Moore.

[12] *Moore*, slip op. at 1 (Jackson, J., concurring).

[13] The following is based on Avi-Yonah, *Reforming the Exit Tax, 49 International Tax J. 41 (2023)*.

[14] The classic example is a kindergarten in Israel that imposed a fine on parents who were late in bringing in their kids in the morning, and the rate of tardiness increased because the parents could calculate whether it was worth their while to pay the fine.

published so that expatriates could not hide). But after 2008, there was a price set on expatriations in the form of the exit tax, which meant that rich people (who are the only ones subject to the exit tax[15]) could now justify expatriation by paying the price. For example, Eduardo Saverin, who gave Mark Zuckerberg (his college roommate) $1,000 to found Facebook, expatriated to Singapore in 2011 and paid the exit tax on a deemed sale of his 4% ($4 billion worth) of Facebook stock (although he did it a year before Facebook went public, so he could dispute the valuation).

Importantly, because the US taxes citizens living overseas, there is no exit tax on moving, like there is in other countries. Americans are free to live anywhere they like (and is it estimated there are over 9 million expatriates).[16] But if they are rich and give up their citizenship, they pay the exit tax.

Before we discuss the exit tax, it is necessary to say something about why the US taxes citizens living overseas to begin with. The origins of citizenship-based taxation go back to the Civil War, but that of course is no reason that the US should keep doing it. In fact, I have written that it is a historical anachronism that should be abolished. My two main arguments were that a US passport does not give US citizens living permanently overseas sufficient benefits to justify taxing them, and that the tax was unadministrable.[17]

I have changed my mind about this issue for three reasons.[18] First, most citizens living overseas used not to pay tax because of the earned income exclusion (IRC section 911) and the foreign tax credit, so the relevant population subject to tax was quite small. But this changed with the pandemic and the rise of remote work, so now it is quite easy for rich Americans earning more than the earned income exclusion (about $120,000) to live abroad, and many of them do not pay any tax in their new residence jurisdiction because of various incentive programs offered by many developed countries (e.g., Portugal, Italy, Austria). It is very nice for Americans to live in Lisbon for example where real estate prices are much lower, health care is much better, and they pay no Portuguese taxes on their remote labor income from the US. Under these circumstances, citizenship-based taxation is the only way they can be taxed.

Second, the enactment of the Foreign Account Tax Compliance Act (FATCA) in 2010 meant that citizenship-based taxation of the rich has become quite feasible. FATCA imposes a 30% tax on the US income of foreign financial institutions that do not report information on accounts held by US citizens, including citizens living outside the US. FATCA has loopholes, but it has significant teeth, and most foreign financial institutions enforce it. Thus, the IRS

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[15] To be subject to the exit tax the taxpayer must either have net assets of $2,000,000 or an average income tax liability of over $124,000 (adjusted for inflation) for the previous five years.
[16] US Department of State, Consular Affairs by the Numbers (2020). This estimate precedes the pandemic, so it is probably too low.
[17] Avi-Yonah, *The Case Against Taxing Citizens, 58 Tax Notes Int'l 389 (May 3, 2010).*
[18] For a longer statement of these views see Avi-Yonah, taxing Nomads, In Tsilly Dagan and Ruth Mason (eds), Taxing People (Cambridge Univ. Press, 2025), available on ssrn.

receives through the Intergovernmental Agreements negotiated by the Obama administration the information needed to tax rich American citizens living overseas.

Finally, I believe that in the deglobalizing world of the 21st century, the benefits offered by US citizenship (primarily the right to enter the US at any time) have become more significant and justify taxation. In addition, ability to pay based taxation for distributive goals justifies taxation of all members of the political community that vote on their desired level of progressivity, and that includes Americans living overseas.[19]

These considerations apply primarily to the rich who typically expatriate after leaving the US. The exit tax does not apply to citizens who are not rich and who may be living abroad for other reasons. In general, the earned income exclusion and the foreign tax credit protect non-rich Americans living overseas from taxation.[20]

Section 877A has clearly not been sufficient to deter expatriations. Once enacted, however, it took away the shaming element in expatriating, and there is no going back. The key issue therefore becomes the level of the exit tax, which is too low.

The exit tax is levied on a deemed sale of assets, so it only applies to any unrealized appreciation in the taxpayer`s assets. But while this may prevent the richest Americans who are founders of corporate giants (e.g., Messrs. Bezos, Musk, and Zuckerberg) and who have billions in unrealized appreciation from expatriating, it would not apply to citizens whose main source of income is labor, or to citizens that anticipate future increases in the value of their stock (e.g., Mr. Saverin, whose 4% of Meta are now worth $28 billion, compared to the $4 billion he paid exit tax on in 2011). A relevant issue is not just the income tax but the estate tax on Americans worth more than $24 million since that is avoided on any appreciation after expatriation.

One suggestion in the past was to abolish citizenship-based taxation but levy a one-time exit tax on all US expatriates rich enough to be subject to section 877A. But it turned out that this proposal was never considered by Congress because it was a massive revenue loser over the ten-year budget window, because the exit tax amount was far lower than the present value of the future income and estate tax liabilities that would be lost of the proposal was enacted.

The solution is to revise Section 877A to apply not to unrealized appreciation but rather to the present value of the future income and estate tax liability of the expatriating citizen. The revenue estimate mentioned above shows that this is feasible by extrapolating from the

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[20] There are current proposals to abolish “double taxation” on US citizens living overseas, but in fact there is almost no double taxation. See Avi-Yonah, Should the United States Abandon Citizenship-Based Taxation?, International Tax Journal (2025).

taxpayer`s current income and assets and life expectancy. This could still be too low if the future income (realized or in the form of unrealized appreciation subject to the estate tax) turns out to be higher than the extrapolated values, but it is a good place to start. If the amount of the exit tax still turns out to be too low, perhaps section 877 (which is still in the Code as well as in the tax treaties) could also apply to collect tax on the income of the former Americans for the first decade after expatriation.

The way the revenue estimate can be done is as follows. Imagine the expatriating person is 55. For future labor income, choose an expected retirement age (e.g., 67, but perhaps older for some occupations), and then predict future earnings at the level of wage growth for that person (The Bureau of Labor Statistics has disaggregated industry level versions, but the calculation is more accurate when done specifically for that person since growth will be higher for CEOs.) Then you have 12 years of expected earnings, which you can discount by the chosen discount rate, e.g., the 10-year Treasury bond rate.

For the estate tax, take existing assets, and assume they grow over time by the average return of the stock market and bond market, e.g., 5%. Then take life expectancy at 55 (which might by something like 30 years; it is higher than average life expectancy since the person has already made it to 55), and discount those total assets (after they've grown) to get the estate tax base.

The other parameter is additions to savings from labor income, which would increase the estate tax base for the rich without reducing the income tax base and would depend on the savings pattern of that person. If they are paying the estate tax at all, they are likely to save a high fraction of their income, so that should be added to the estate tax base, which you could do for each year they are saving.

The combined present value of the income and estate tax savings from expatriating would then be taxed at the applicable income and estate tax rates as of the date of expatriation.

Importantly, this is different from a typical revenue estimate of legislative changes like the abolition of citizenship taxation (which tends to be less accurate) since it is identical to the calculation each potential expatriate does, so the age and existing income and assets are known for that person.

But this assumes that the exit tax is constitutional after *Moore,* because neither the existing tax nor the proposed tax apply to realized income. Is it?

Is the Exit Tax Constitutional?

The exit tax on expatriations of section 877A is the most likely vehicle for a post-*Moore* constitutional challenge to taxation without realization because (a) it involves individual taxpayers; (b) it does not involve the Attribution Rule because the tax is imposed directly on the expatriating taxpayer, and (c) it involves precisely the kind of tax that was the direct target of the *Moore* litigation, namely a mark to market tax on rich taxpayers (the kind that will happily fund such litigation).[21] Such a case could force the Court to confront precisely the question it avoided in *Moore*, namely "whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states."[22]

Interestingly, Justice Kavanaugh did not mention section 877A in his list of sections that would be affected by constitutionalizing realization, even though it is exactly the type of mark to market tax that was the real target of Moore. Perhaps that was because he was aware that it was not covered by the Attribution Rule and was not about timing, and he did not cover all the sections that could plausibly be described as an excise tax.

If there is such a constitutional challenge to the exit tax, it can be defended in two ways, but neither is without difficulty: as an excise tax on expatriation, or as a tax on a deemed realization event.

i. The Excise Tax Argument.

The first option is to argue that the exit tax is an excise tax on expatriation, but this argument is fraught with difficulty due to the substantial amounts involved. In high-profile cases, the exit tax can easily be perceived as tantamount to a denial of the right to expatriate.

Consider, for instance, if individuals such as Mark Zuckerberg, Jeff Bezos, or Elon Musk, all of whom are among the wealthiest U.S. citizens and derive most of their wealth from unrealized appreciation in the shares of the corporations they control, chose to expatriate. The exit tax on the unrealized appreciation would amount to many billions of dollars, which could be construed as an effective barrier to their right to renounce citizenship. At such levels of taxation, the burden imposed may cross from regulation into prohibition, raising serious questions about whether the tax constitutes a de facto ban on expatriation rather than a simple excise on the act of expatriation.

This issue touches upon fundamental principles of international law. The right to leave one's country and expatriate is protected under public international law, including in Article 12 of the International Covenant on Civil and Political Rights (ICCPR). This provision recognizes the individual's right to liberty of movement, including the right to depart from any country, including one's own. A tax that effectively prevents expatriation could be seen as infringing on this internationally recognized right, bringing the legality of the exit tax under further scrutiny.

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[21] For one possible vehicle see Avi-Yonah, *Crypto and the Exit Tax,* 115 Tax Notes Int`l 1683 (September 9, 2024).

[22] *See* Avi-Yonah, *What is the Best Candidate for a Post-Moore Constitutional Challenge?*, TAX NOTES INT'L 17 (2024), https://www.taxnotes.com/featured-analysis/what-best-candidate-post-moore-constitutional-challenge/2023/12/29/7hprx.

The ICCPR states that--

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.[23]

Similarly, the Universal Declaration of Human Rights ("Universal Declaration"), adopted by the United Nations General Assembly on December 10, 1948, recognizes both a right to physically leave, so-called "emigration," and a right to relinquish citizenship, so-called "expatriation." Article 13(2) of the Universal Declaration provides: "Everyone has the right to leave any country, including his own, and to return to his country." Article 15(2) of the Universal Declaration provides: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

According to the State Department, the United States officially recognizes both the right to emigrate and the right to expatriate.[24] However, the State Department took the position in 1995 that the proposed exit tax was not a violation of these rights because the taxes would have been due in any case as either income or estate taxes if the expatriation had not taken place.[25] This defense seems doubtful given the existence of IRC section 1014, which prevents unrealized appreciation from being taxed under the income tax upon death, and the numerous ways to avoid the estate tax. In addition, the estate tax would not apply to many expatriates whose assets and income exceed the section 877A threshold (assets of $2 million or average annual income of $124,000) but are below the estate tax threshold ($24 million for a joint return).

In addition, the right to expatriate was recognized by the authors of the US Constitution, whose views resonate with originalists. In *Afroyim v. Rusk*, the Supreme Court held that the government cannot take away US citizenship involuntarily, and in that context stated that—

And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that, under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship. On three occasions, in

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[23] Adopted December 16, 1966, entered into force March 23, 1976, 999 U.N.T.S. 171. The International Covenant was adopted unanimously by the General Assembly. The US ratified the Covenant in 1992.

[24] *See* DEP'T OF STATE, SECTION 201 OF THE TAX COMPLIANCE ACT OF 1995: CONSISTENCY WITH INTERNATIONAL HUMAN RIGHTS LAW (1995); JOINT COMMITTEE ON TAXATION, ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION, JCS-17-95 (1995).

[25] Dep't. of State Memorandum, supra.

1794, 1797, and 1818, Congress considered and rejected proposals to enact laws which would describe certain conduct as resulting in expatriation. On each occasion Congress was considering bills that were concerned with recognizing the right of voluntary expatriation and with providing some means of exercising that right. In 1794 and 1797, many members of Congress still adhered to the English doctrine of perpetual allegiance and doubted whether a citizen could even voluntarily renounce his citizenship. By 1818, however, almost no one doubted the existence of the right of voluntary expatriation…[26]

Although these are dicta, they suggest that even if the Court accepted that the exit tax is an excise tax, it would consider it an unconstitutional ban on expatriation.

ii. The Deemed Realization Argument.

In 1995, the Congressional Joint Committee on Taxation issued a report on “Issues Presented by Proposals to Modify the Tax Treatment of Expatriation.”[27] The JCT argued that expatriation should be considered as a deemed realization event even though it does not involve the receipt of money or property. It stated that--

> The question follows whether the expatriation tax proposals nonetheless pass constitutional muster on the ground that the "realization" requirement is satisfied when property effectively is transferred to a new legal situs that alters the taxpayer's, and the Government's, legal relationship to the property. (See the Supreme Court's decision in Cottage Savings, where an exchange of similar assets of identical economic value but with new legal attributes was held to be a realization event for purposes of section 1001.) Under such a view, it is not the act of expatriation per se that triggers tax under the proposals -- thus, not all property of an expatriate is subject to tax on built-in gain -- but the theoretical transfer of property to a new legal situs for tax purposes. A taxpayer's act of expatriation could be characterized as a realization event with respect to only that property of the taxpayer (i.e., property other than real property and interests in domestic qualified retirement plans) that is effectively being removed from the jurisdiction of the U.S. tax systems. The legal conversion of a person's status from citizen to noncitizen is accompanied by a conversion of jurisdictional attributes of certain property for tax purposes. In essence, the act of expatriation could be viewed as resulting in the transfer of assets other than real property from a citizen who is subject to the U.S. tax systems to a person who is no longer a U.S. citizen and is, thus, generally outside the jurisdiction of the U.S. tax systems. Even those few supporters of the continued vitality of the Macomber ruling acknowledge that "realization" may require no more than a change in the taxpayer's relationship to property (and not necessarily a voluntary sale or transfer of property to a third party) and that there is an established exception to the general realization notion in situations involving offshore property

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[26] *Afroyim v. Rusk*, 387 U.S. 253 (1967).

[27] JCT Report, supra.

> and potential tax evasion. Consequently, even assuming that the particular holding of Macomber continues to express a valid principle of constitutional law, it is possible to characterize expatriation as being accompanied by a "realization" with respect to certain assets in view of the change of the legal attributes of such assets, so that Government's inchoate interest in its receiving its share of any increase in value need not be extinguished...
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> Thus, it could be argued that the expatriation tax proposals are constitutionally valid because a deemed sale is provided for only when the taxpayer's (and Government's) relationship to property is altered due to a change in the jurisdictional attributes of the property for tax purposes and because the deemed sale rule would prevent tax evasion.[28]

This is a more plausible defense of the exit tax. Under *Cottage Savin*gs, which was not repudiated by the Supreme Court in *Moore*, the Court held that--

Under our interpretation of § 1001(a), an exchange of property gives rise to a realization event so long as the exchanged properties are "materially different" -- that is, so long as they embody legally distinct entitlements.[29]

In analyzing the legal relationship between a U.S. citizen taxpayer and the federal government pre- and post-expatriation, it becomes clear that expatriation fundamentally alters the taxpayer's status in a number of significant ways. Prior to expatriation, the taxpayer is part of the U.S. political body, enjoying both the privileges and the responsibilities that membership entails. Among these is the obligation to pay tax on worldwide income, regardless of physical residence. Following expatriation, however, the individual becomes a non-resident alien, stripped of rights such as voting, unrestricted entry into the U.S., and entitlement to U.S. diplomatic protection. Correspondingly, they are no longer subject to U.S. tax on their global income.

The legal rationale for this shift is deeply rooted in principles enunciated by the Supreme Court in *Cook v. Tait*, where the Court emphasized the connection between citizenship rights and the duty to contribute to the state via taxation.[30] Even though a former citizen may still benefit from U.S. protections over U.S.-based property post-expatriation (e.g., protection from government seizure), their inability to influence this protection through political participation, such as voting, sufficiently alters their relationship to the property. This shift in influence, when examined through the lens of *Cottage Savings Assn. v. Commissioner*, could be construed as meeting the "hair-trigger" realization standard, as it represents a significant change in the taxpayer's legal relationship to the U.S. and their property therein.

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[28] JCT Report, supra.

[29] *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991).

[30] Cook v. Tait, 265 U.S. 47 (1924).

Moreover, expatriation alters the taxpayer's exposure to U.S. taxation on U.S.-situs property transactions. As a citizen, income from the sale of assets is subject to U.S. capital gains tax at a rate of 23.8%. However, upon expatriation, if the taxpayer sells these same shares as a non-resident alien, the gain is not subject to U.S. tax. This demonstrates a fundamental change in the taxpayer's legal relationship to U.S.-situs property, a change that occurs irrespective of whether an exit tax is imposed at expatriation. The consequences of this transformation in the taxpayer's obligations reflect a broader definition of realization that could potentially gain acceptance by the Court.

If the Court were to endorse this expanded notion of realization, encompassing changes in the taxpayer's legal relationship to property, a range of new tax structures could be constitutionally viable. For instance, the imposition of a tax on unrealized gains at death, distinct from the estate tax, could be defended. Whereas the estate tax is an excise tax on the transfer of property, a tax on unrealized appreciation would target the decedent's altered relationship to their property upon death—an event that irrevocably severs their control over that property.[31]

Both expatriation and death involve significant shifts in a taxpayer's connection to their property, shifts that may warrant a corresponding tax. In such cases, Congress might constitutionally impose a tax paired with an interest charge, akin to the approach used in the taxation of Passive Foreign Investment Companies (PFICs), where current taxation can be deferred, but with interest accruing.[32] Such a system effectively raises the overall tax burden without running afoul of constitutional requirements.[33] If upheld, this approach would diminish the tax advantages that wealthy individuals might derive from the constitutionalization of realization, thereby reinforcing the integrity of the tax system.

However, precisely because upholding the exit tax as a tax on a deemed realization event opens the door to imposing tax on the rich by taxing them at death or expatriation with an interest charge, it is possible that the Court would reject this defense of the exit tax as well by repudiating *Cottage Savings* and holding that realization requires the receipt of money or property in exchange for an asset. One indication that the majority may hold this view is that Justice Kavanaugh's list of IRC provisions that could be subject to a constitutional challenge if realization were a constitutional requirement for an income tax includes the gift tax.[34]

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[31] *See New York Trust Co. v. Eisner*, 256 U.S. 345 (1921); *Knowlton v. Moore*, 178 U.S. 41 (1900). The estate tax must be seen as an excise tax on the transfer rather than a tax on the estate to avoid being subject to apportionment.

[32] *See* Joel Slemrod and Xinyu Chen, Are Capital Gains the Achilles' Heel of Taxing the Rich? 39(3) *Oxford Rev. Econ. Pol'y* 592 (2023).

[33] *See* Brian Galle et al., Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth, 72 *Duke L. J.* 1257-1343 (2023).

[34] Moore, supra.

The gift tax can easily be defended as an excise tax on gifts, and as discussed above, there are other provisions included in the list that can be defended as excise taxes. But a gift also clearly changes the taxpayer`s legal relationship to the gifted article, and therefore would not have to be defended as an excise tax if the Court accepted the *Cottage Savings* definition of realization. Including the gift tax in the list suggests that the Court may have a narrower definition of realization in mind, and in that case, even a deemed realization defense of the exit tax may fail.

Overall, it seems very likely that there will be a constitutional challenge to the exit tax in the US, because the taxpayers subject to it are wealthy and easily able to fund such litigation. For example, one pending case that could result in such a challenge involves a criminal prosecution of a very wealthy individual for evading the exit tax by not declaring most of his crypto assets.[35] And if the Supreme Court were to take up such a case, it would be forced to decide the realization issue it avoided in *Moore*. If this happens, it is not clear that the exit tax can be successfully defended, with far reaching consequences for the US tax system.

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[35] See Reuven Avi-Yonah, *Crypto and the Exit Tax, supra*.