



## How Far Does Congress' Taxing Power Go?

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**[00:00:00] Jeffrey Rosen:** On December 4th, the Supreme Court heard oral arguments in Moore vs. the United States. The case concerns a challenge to the mandatory repatriation tax and it asks whether the constitution allows congress to tax American shareholders for the earnings of a foreign corporation.

**[00:00:16] Jeffrey Rosen:** Hello friends, I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center's a non-partisan, nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people.

**[00:00:34] Jeffrey Rosen:** In this episode we'll break down the arguments on both sides of the case, and we will learn together about the history of taxation in the founding era, the purpose of the 16th Amendment, and the meaning of the word taxation.

**[00:00:46] Jeffrey Rosen:** Joining me to answer these important questions are two scholars who've written about the history and meaning of the taxing clause of the 16th Amendment and who filed briefs on both sides of the case. Akhil Amar is Sterling Professor of Law and Political Science at Yale where he teaches constitutional law in both Yale College and Yale Law School.

**[00:01:05] Jeffrey Rosen:** He filed a brief in the case in support of the United States. Akhil, it is wonderful to welcome you back to We The People.

**[00:01:12] Akhil Amar:** Always great to be with you, Jeff. Thank you.

**[00:01:15] Jeffrey Rosen:** And Anastasia Boden is the Director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. Before joining Cato, she was a civil rights attorney at the Pacific Legal Foundation, where she led the equality and opportunity program. She co-created the wonderful podcast, Dissed, which tells the stories behind infamous Supreme Court dissents, and which I'm delighted to plug, and she filed a brief in the case in support of Moore. Anastasia, it's wonderful to welcome you back to We The People.

**[00:01:45] Anastasia Boden:** It's always a joy to be here, Jeff.

**[00:01:48] Jeffrey Rosen:** Let's begin with the text and original understanding of the taxing clauses. Akhil, there's no one better than you to help us understand them. What did the relevant taxing clauses say, and what did Alexander Hamilton understand them to mean?

**[00:02:05] Akhil Amar:** So, the longest section of the constitution is the first section. It's about the legislature. Congress is first among equals. The longest Article, the legislative Article. And the longest section of the longest Article is Congress's powers. It's Article One, Section Eight.

**[00:02:27] Akhil Amar:** The longest section of the first and longest Article. And here's what it says. There's lots of other language, but here's the key point. "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general wealth of the United States. But all duties, imposts and excises, shall be uniform throughout the United States."

**[00:02:58] Akhil Amar:** One thing that we're learning just from that language alone is this important. It's the beginning of the longest section of the first and longest Article and it's echoing the preamble. It's mentioning common defense and general welfare, and it's giving us all sorts of different words for the idea that we're gonna be taxed up and down and sideways and we're gonna like it, 'cause we're represented, you see?

**[00:03:27] Akhil Amar:** That's the earlier art of Article One. The key theme of the American Revolution is not no taxation! There's no taxation without representation. Now since we have representation, which we didn't have in Parliament, we can have taxation and that we don't miss the point: Congress has the power to lay and collect taxes, duties, imposts and excises.

**[00:03:57] Akhil Amar:** Four different ways of telling you, you're gonna be taxed up and down and sideways, and it tells you why. Often law doesn't tell you why, but this tells you why. It's to provide for a common defense and general welfare. Now, there's gonna be a certain special set of rules about a certain subset of taxes, but it mentions taxes, duties, imposts and excises, and then says, "Duties, imposts and excises shall be uniform throughout the United States."

**[00:04:23] Akhil Amar:** They all have to be uniform. Oh, but maybe not taxes, and it indeed it turns out that some taxes not only don't have to be uniform, they can't be uniform, and those are direct taxes. And I'm gonna talk about and so Article One, Section Nine says about that, "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

**[00:04:55] Akhil Amar:** Okay. So, there's gonna be some special rules about direct taxation and those rules are also hinted at or actually more than hinted at um, in yet another provision of the constitution. Notice that we've got to read a whole bunch of clauses together here, but there's one more clause you need to know, and it's even earlier in the constitution, and it's about apportionment rules, not just for house representation, but also for a certain kind of thing called direct taxes.

**[00:05:25] Akhil Amar:** It's Article One, Section Two "Representatives and direct taxes shall be apportioned among the several states, which may be included within the union,

according to their respective numbers, which shall be determined by adding to the whole number of three persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."

**[00:05:51] Akhil Amar:** So, that was a lot of language and it doesn't all apply today. In a nutshell, imposts, duties, excises, they all have to be uniform. Indirect taxes apparently have to be uniform, but direct taxes actually can't be uniform, they have to be apportioned in connection with how many seats each state has in the House of Representatives, which in turn was connected with the stinky three fifths clause.

**[00:06:20] Akhil Amar:** And if that was hard to follow, that was by design 'cause they were embarrassed by the stinky three fifths clause. They don't use the word slave. So, now the question is what's a direct tax that has to be apportioned and what's not a direct tax which doesn't have to be apportioned? And that's what we're gonna be talking about today. And Alexander Hamilton, since you asked me about him in particular, here's his take.

**[00:06:50] Akhil Amar:** He cares a lot about taxes. Why? 'Cause he cares a lot about national security, 'cause he was there at Valley Forge with General Washington. You need an army and a navy, otherwise you're dead. And you're not independent at all, you're under King George III. What do you need for an army and a navy? You need money. That's why it says, "This is for the common defense and general welfare," these taxes.

**[00:07:21] Akhil Amar:** He wants to make it easy to raise taxes, but legitimate. Congress is doing it. And he writes no fewer than seven Federalist Papers all about the taxing power. Those papers are 85 op-eds, mainly written by Hamilton and Madison, a few by John Jay so let's just say, just make it easy, that Hamilton writes 40 of them. Seven of those 40 are all about taxes, 'cause that's what he cares passionately about.

**[00:07:50] Akhil Amar:** He devises a Secretary of Treasury, a tax system, Congress passes it, Washington signs it into law. There are people who say it's unconstitutional, including James Madison. Okay? But he thinks it is constitutional and George Washington thinks it's constitutional and there's a court case all about this. It's called the Hylton case, and he's now in retirement when this arises in the 1790s, and George Washington says, "Alexander, will you please come out of retirement to defend this tax that you've crafted. It's the tax on carriages, on today it'd be we call it tax on Rolls-Royce's or on Jaguars or luxury vehicles of a certain sort.

**[00:08:33] Akhil Amar:** He comes out of retirement for the first and only time his life, he actually argues a Supreme Court case. He wins it unanimously. People play hooky from Congress just to watch him argue this case. He wins it unanimously and he wins it on a theory saying we should have a very narrow definition of direct tax, 'cause the challenge is, "Oh, this is a direct tax and it's not properly apportioned."

**[00:08:58] Akhil Amar:** And he says, "No, it's an indirect tax and it's perfectly fine and we should have a- a broad tax power and a narrow, very narrow definition of what's a direct tax that requires apportionment, 'cause that's a very difficult thing to do." and he wins this unanimously, and I'm 100% with him. And my friend on the other side in this debate is not, alas.

**[00:09:26] Jeffrey Rosen:** Thank you so much for that wonderful history lesson. Anastasia, Akhil argues, as you heard, that Alexander Hamilton thought that direct taxes were limited to capitation or head taxes and land taxes, and those are the only taxes that have to be apportioned, according to Hamilton, and I think Akhil is gonna go on to argue that the Supreme Court got it wrong in the Pollock case when it struck down an income tax on the grounds that direct taxes should be defined more broadly.

**[00:09:56] Jeffrey Rosen:** Tell us if you think that Akhil is right about Hamilton and the original understanding or not.

**[00:10:04] Anastasia Boden:** Yes. Well, I wouldn't dare challenge Professor Amar too much on the history but I'll just press back a little bit to say that it's important when thinking about the taxing power and how it's limited, to think about why the founders made these distinctions about apportionment and direct and indirect taxes.

**[00:10:22] Anastasia Boden:** And for sure, absolutely I agree that there's a lot of time spent on defining the taxing power and the founders were very concerned about it. And that's on the one hand because they wanted to cure the defects in the Articles of Confederation and make sure that the federal government could raise money.

**[00:10:37] Anastasia Boden:** But on the other hand, they were obviously very wary of a strong taxing power, given their experience with Britain, which had just taxed them without representation, but had nearly taxed them to death. And so I think they wanted to get that balance quite right. And so when we're talking about direct taxes and indirect taxes and why direct taxes must be apportioned, why must they be apportioned?

**[00:11:00] Anastasia Boden:** I think that's because the framers were very wary of taxation at the federal level. They disfavored taxation at the federal level compared to the state level. And they wanted to make sure that the states didn't freeload off each other, or that factions didn't target certain states and tried to tax one state to death for the benefit of all the rest.

**[00:11:21] Anastasia Boden:** And so why did they make this distinction when they're talking about apportionment between direct and indirect taxes? It's because direct taxes are impossible to escape. They're essentially taxes that you're subject to just for existing. You know, head taxes, property taxes, they're more permanent. You don't really have a choice over being subject to them.

**[00:11:39] Anastasia Boden:** And indirect taxes are things like use taxes or consumption taxes and they're things that you have a little bit more control over in your life. And so they make it very hard, the Founders made it very hard to impose direct taxes, because apportionment is very hard, and that was for good reason.

**[00:11:55] Anastasia Boden:** Now in terms of whether one was meant to be more narrow than the other, and especially if we're gonna talk about the carriage case in particular, I don't know. where this is going down, of course, is whether the carriage case can be analogized to the tax that's at issue in the Moore case.

**[00:12:18] Anastasia Boden:** And ultimately I think it's better to characterize the carriage tax as a use tax, because indeed it did have an exemption for certain carriages that were of certain uses. And I think that's an easy way to dispose of that tax. That's why it was a tax that didn't need to be apportioned it's a thing that makes it completely different from the tax at issue in the Moore case, which is more clearly a direct tax.

**[00:12:42] Anastasia Boden:** And in fact, is more clearly attempting to be a direct income tax. I'll note that this, you know, this idea that the tax at issue in the Moore case is an indirect tax, didn't really come up all that much. And I think in the briefing at least, it was really sort of a second thought for the government.

**[00:13:01] Anastasia Boden:** I think it's really a credit to Professor Amar that it did in fact come up at oral argument. We might have a justice write on it. But, it wasn't briefed so much, because I think almost everybody assumed that this was supposed to be that Moore at least, it was supposed to be an income tax and that's what the real debate is about.

**[00:13:18] Jeffrey Rosen:** Anastasia, thank you so much for helping us understand the argument that the carriage taxes might be upheld as use taxes, rather than on the grounds that they're not head taxes or land taxes. Akhil, the Supreme Court ignored Hamilton's narrow understanding of direct taxes in the Pollock case when it struck down the federal income tax and Pollock, of course, was overturned by the 16th Amendment.

**[00:13:41] Jeffrey Rosen:** Tell us why you think Pollock got it wrong, and why we should resurrect Hamilton's narrow original understanding.

**[00:13:49] Akhil Amar:** Not just Hamilton's original understanding. So, my friend said some things that are not true, okay? And I'm gonna use every ounce of my authority as Sterling Professor of Constitutional Law and as an historian whose written many books and as the co-founder of the National Constitution Center, we've got to get our history right and our law right.

**[00:14:11] Akhil Amar:** So, let me take a step back. You can have all sorts of theories, but you can't actually just assert facts that aren't so. So, here's Hamilton's position. He says at Philadelphia in the very building just right across the mall from the National Constitution Center, it actually has a plan, and when you look at that plan he says land taxes and head taxes are the only things that will require apportionment.

**[00:14:41] Akhil Amar:** That's very clear. And that's exactly what he says in the Federalist Number 36. He wrote seven Federalist Papers, he says, "Only land taxes and only head taxes." Nothing about use or anything like that. And that's basically what he says in his oral argument in the Hylton case.

**[00:15:00] Akhil Amar:** There's a little bit of wrinkle that I won't go into, and that is what actually the justices say. They don't say anything about use. That's not true. The justices say that only land taxes and head taxes are subject to this apportionment rule as a general proposition. And they say why, because they buy Hamilton's argument, that we shouldn't have a broad definition of direct tax, because direct taxes actually are very difficult to administer.

**[00:15:33] Akhil Amar:** And the whole point of his new regime is actually to make it much easier to tax. Nor is it true that Americans were actually heavily taxed in the revolutionary era. They were not, in fact. I assert, as a historian whose written many books on this topic, the tax was illegitimate, but not high.

**[00:15:57] Akhil Amar:** The tax system under the British, because actually it wasn't based on representation. And the new model is you can be taxed up and down and sideways very heavily, as long as it comes from congress. And if you don't like that, you have to vote against congress. And we didn't have that under the Brits, because you can't vote against Parliaments.

**[00:16:19] Akhil Amar:** You don't have a vote for Parliament. You can't vote against the King because you didn't have a vote for or against the King. The American Revolution, to repeat, is not heavy taxation, is an exclamation point. It is not no taxation! It is no taxation without representation, and that's in the Declaration of Independence that was also drafted in Independence Hall right across from the National Constitution Center.

**[00:16:46] Akhil Amar:** So, we have to get our historical facts right. You can argue about whether Hylton is correct or not. You can argue about whether Hamilton was correct or not. But I promise you, Hamilton and Hylton make this a very, very easy case if it were only about that than other later cases that we're gonna have to talk about.

**[00:17:10] Akhil Amar:** You asked about Pollock, but Hamilton says direct taxes are land taxes and head taxes and nothing else. And if we wanna go into the details, it's all about slavery and the three fifths clause. And actually one justice says that openly, Justice Patterson, another sign of the constitution, Abraham Baldwin says that very openly in the first Congress.

**[00:17:31] Akhil Amar:** So but it's not actually about use versus this, versus that. It's just head taxes and land taxes are direct taxes, and nothing else. That's Hamilton's position in Philadelphia, that's Hamilton's position in the Federalist Papers. That's Hamilton's position in his oral argument. That's the position of the justices of the Supreme Court in the Hylton case.

**[00:17:55] Akhil Amar:** Now, stuff happens afterwards, but we have to get it straight, if this is actually gonna be decided on the basis of Hamilton and Hylton, oh my God, this is easy. You can tax carriages, and it wasn't a tax on the use of a carriage. You were taxed just by having a carriage, whether you used it or not.

**[00:18:11] Akhil Amar:** If you used it once, if you used it zero times, if you used it a gazillion times, you were just taxed because you own a carriage. And now, there's new cases about basically you're taxed because you own certain wealth. And in fact, Hamilton says it's a fair tax 'cause it's a luxury tax.

**[00:18:28] Akhil Amar:** That's actually Hylton and Hamilton. So, we have to get our facts straight. And if I've said anything that's incorrect, I would be grateful for my colleague to actually correct me, 'cause I'm pretty darn sure everything I said is historically and legally accurate.

**[00:18:45] Jeffrey Rosen:** Thank you so much for that. Anastasia, any further thoughts on Hamilton and Hylton? But then let's go up to Pollock and the post-Pollock cases, which reject this narrow definition of direct taxes, interpret income much more broadly, are overturned by the 16th Amendment, and take us into the 20th Century where you argue that taxes are defined much differently.

**[00:19:10] Anastasia Boden:** Well, I'm certainly happy to move on, Jeff, but I think I would just respond by saying I think we're talking a little bit past each other here. I don't actually deny exactly any of the history that you refer to, Professor Amar, except to say that I don't think that the Founders wanted only the strong ability for taxation.

**[00:19:32] Anastasia Boden:** I think there was obviously a fear of government that came along with the Revolution, and there are strong protections for individual liberty in the constitution exactly because there is this skepticism of government, including restrictions on the power to tax. I mean that's exactly why there's this distinction between direct and indirect and apportionment and non-apportionment taxes.

**[00:19:52] Anastasia Boden:** So I don't think we can just say that that distinction is irrelevant or wasn't intended to, it didn't come from a fear of taxation, because it did. On the one hand, yes, they wanted to cure the defects in the Articles of Confederation, but on the other hand they wanted to make sure that they weren't giving the federal government a blank check to tax the people, which everyone knows, the power to tax is the power to destroy.

**[00:20:15] Anastasia Boden:** So, I don't think we actually have differences, or that I'm denying any of your history, so much as I don't wanna take a overly reductionist view of history and say that some of these things an only be chalked up to say the three fifths clause and slavery. I think there was a lot going on, including a fear of government largely, which informs this distinction.

**[00:20:36] Anastasia Boden:** On the use tax thing, I don't think I denied your history, I was only trying to intimate that is one explanation of that case that would allow the court to rule in Moore the way that I think it should, while not upsetting any previous cases.

**[00:20:49] Akhil Amar:** I promise, Jeff, we're gonna talk about Pollock and what happens after the Civil War and the 16th Amendment, but we have to get the founding straight. It's very important. So, here's my claim. The constitution is all about national security. You have to join or die, and that's gonna require all the states to get onboard and to be able to find an army and a navy, 'cause otherwise we're dead.

**[00:21:19] Akhil Amar:** Now in order to get all the states onboard, you have to get South Carolina onboard and North Carolina and slave states. And here's what they're worried about. They're worried about a tax on slaves, that in effect would be emancipation. So, they insist that head taxes are special, okay, because they're worried about a tax on the heads of slaves.

**[00:21:47] Akhil Amar:** You could tax slaves \$5 a head, you could tax slaves at \$50 a head, you could slaves at \$500 a head and tax it out of existence. That's why they have special rules saying you can't do head taxes the way we tax heads of cattle, the way we tax hogsheads of tobacco, or heads of lettuce. There's a special rule and it's about slavery and nothing else.

**[00:22:16] Akhil Amar:** And Patterson, who was at Philadelphia, says that in the Hylton case. He's a justice. And Baldwin, who went to Yale but actually is a Georgian, says that in the First of Second Congress and they say nothing else. That's what it's all about, and nothing but that.

**[00:22:35] Jeffrey Rosen:** Akhil, thank you for that account of the history. Anastasia the court case of course is operating in a world after the 16th Amendment was passed. There's been a lot of precedent since then. What is the central issue in the case, and how do you think the court should rule?

**[00:22:52] Anastasia Boden:** So, I think maybe it's best to start with the facts. In 2005, Charles and Kathleen Moore invested \$40,000 into their friend's new business, KisanKraft, which provides tools to small farmers in India to essentially help them earn a living and to better their lives.

**[00:23:08] Anastasia Boden:** And the Moore's were really inspired by this, and so they invested 40 grand, which was a substantial amount of money for them. And in return they received about a 13% share. So, of course this corporation was immediately successful and profitable, but it never distributed any of those profits to the Moore's.

**[00:23:27] Anastasia Boden:** Instead it kept reinvesting those profits and growing. In fact, it has grown and expanded its impact in India. So, as a result the Moore's haven't received a penny from their investment and they really don't expect to. Nor could they force the corporation to give it any dividends, because they're minority stakeholders.

**[00:23:45] Anastasia Boden:** They invested because they were moved by the founder's vision. Nevertheless, in 2017, Congress separately passed the Tax Cuts and Jobs Act and that was intended to sort of restructure the way that foreign corporations are taxed in the US.

**[00:24:02] Anastasia Boden:** And as part of that, it imposed the Mandatory Repatriation Tax. So, what that is, it's a one time tax on shareholders who own more than 10% of a majority American held foreign corporation, and the tax is based on the foreign corporation's accumulated income since 1986. So, it's kind of amazing when you hear what goes on here, because regardless of whether that corporation has distributed a penny to the shareholder, based on the shareholder's pro-rata share now all of the corporation's accumulated earnings from 1986 on are now considered their taxable income for the year 2017.

**[00:24:47] Anastasia Boden:** So, the upshot of all of this is that the MRT created a \$15,000 tax bill for the Moore's despite that they had never received a penny of this profit and now they're being taxed on it. So, they paid the tax and they sued, and they're arguing that the Mandatory Repatriation Tax is unconstitutional because it's not in the income tax. And they argue that because it's not in the income tax, which is income taxes are of course exempt from apportionment, it's a tax that should be apportioned.

**[00:25:16] Anastasia Boden:** They're saying this is a direct tax, it's required to be apportioned. It's not. And so we shouldn't have had to pay, and they're seeking a refund of their money.



**[00:25:24] Jeffrey Rosen:** Thank you for summing up the argument so very clearly and so well. Akhil, your argument, I think, is that the Mandatory Repatriation Tax is not a head tax, or a land tax, and therefore it doesn't have to be apportioned. Is that right?

**[00:25:42] Akhil Amar:** It is. I will argue, or I'm happy to argue that it's also an income tax, but my friend stated the facts beautifully and you might think that there's a great unfairness here and if you do, you should vote against Congress.

**[00:25:58] Akhil Amar:** And it's not the only kind of income tax frankly that applies even if no monies are received. And we can talk about that. There are other parts of the code, mark-to-market. If I own a house and its value is appreciated, under some tax systems, state and federal I might have to pay on that unrealized unrecognized gain.

**[00:26:22] Akhil Amar:** And I can borrow money against that typically, and if I bought my house or something else has appreciated in value, don't feel too badly for me, 'cause I can often borrow against it. But you might feel for the Moore's. And if you do, you should absolutely vote against the Congress that passed that MRT.

**[00:26:41] Akhil Amar:** But I do wanna just go back to the founding for just a minute and then, Jeff you're right, we're gonna need to talk about the Pollock case and what happened after the Civil War, because my colleague, my friend does have some cases that are very important on each side of the thing. But this is all in Hylton.

**[00:26:59] Akhil Amar:** Remember, he's one of the signers of the constitution, the author of the New Jersey Plan, and he's actually pulling the curtain back as a justice saying, "Here's what it was really all about." Okay. The provision was made in favor of the southern states that possessed a large number of slaves.

**[00:27:19] Akhil Amar:** And then he says, "And therefore we should be very narrow." The rule of apportionment is radically wrong. It cannot be supported by any solid reasoning. Why should slaves who are a species of property, be represented more than any other property? The rule therefore ought not to be extended by construction."

**[00:27:37] Akhil Amar:** So, he's being really honest here. It's all about slavery. Let me read you one other sentence from the founding, it's from Abraham Baldwin, he went to Yale, which is a Connecticut school, but he actually then moves down to Georgia, and here's what he says when Ben Franklin, who also was there at Philadelphia and is in Signers' Hall, introduces a petition.

**[00:27:59] Akhil Amar:** The petition is to actually encourage Congress to try to minimize slavery. It's on February 12th, 1790, here's what Abraham Baldwin says. He says, "If we examine the constitution, we shall find the expressions relative to this subject cautiously expressed and more punctiliously guarded than any other part."

**[00:28:25] Akhil Amar:** It is declared in the same section, "That no capitation or direct tax shall be laid, unless and proportion to the census." This was intended to prevent congress

from laying any special tax upon Negro slaves, as they might in this way so burden the possessors of them as to induce a general emancipation.

**[00:28:50] Akhil Amar:** So, Baldwin is telling us very openly in early Congress, 1790, Patterson is telling us very openly in the Hylton case, all these rules about direct taxes, they're just about slavery, we should read them very narrowly. They're about head taxes and land taxes. Now, I haven't told you what makes land taxes slightly different, and here's where my friend actually has a point.

**[00:29:11] Akhil Amar:** One of the reasons they were worried about land taxes was a certain fairness concern, similar in a way to what she said about the Moore's. The concern is suppose you actually had some land, you inherit it from your father. You're land rich, but you don't have the money to pay the tax man. And it seems unfair that you have to pay the tax man when you don't have any money.

**[00:29:32] Akhil Amar:** And she's actually saying the Moore's are kind of in that situation. So, that's actually an argument that you could make that is not technically this MRT, a land tax, but you might think is like a land tax for certain reasons. But anyway, that's all the founding vision. And my plane is gonna be on that it's not a head tax, it's not a land tax, it's therefore not a direct tax at all. So it's perfectly okay if you don't like it, vote against Congress.

**[00:30:03] Akhil Amar:** It might be unfair, but that's why your vote is really important. But I think her best argument is in part even if it's not technically a land tax, it seems to raise some of the same fairness concerns. 'cause I told you all about head taxes, that's all about slavery and nothing but. And I didn't really tell you about land taxes.

**[00:30:23] Jeffrey Rosen:** Thanks for that. Anastasia, at the oral argument, the lawyer for the Moore's argued that the government had misinterpreted the meaning of the word income in the 16th Amendment, and a court ruling that adopted the government's definition would make a hash out of current law. The Moore's say their income means only gains made through the payment to a taxpayer, not an increase in the value of the property. Tell us about that argument and how it fared before the Supreme Court.

**[00:30:49] Anastasia Boden:** Yes, absolutely. As you said, Jeff, the thrust of this case really is about the 16th Amendment, and while, as I said earlier, I really do think it's a credit to Professor Amar for his brief which brought up this argument that in fact the MRT can be justified as an indirect tax, the point remains that the entire point of the Supreme Court case is that this is assumed to be an income tax, a direct tax that's an income tax.

**[00:31:14] Anastasia Boden:** And the question then is whether income taxes have a realization requirement. Does the money actually have to be realized before it can be considered income that can be taxed under the 16th Amendment. So, perhaps there is an argument that it's an indirect tax, but it really didn't take center stage at the Supreme Court, it's not part of the question presented.

**[00:31:36] Anastasia Boden:** And so the attorneys for the Moore's come to the Supreme Court in an oral argument, they based their arguments mainly on text in history and they say

that the 16th Amendment talks about income derived from certain sources. And derive must mean something, and I think it is commonly meant, and was commonly meant realized. And the same thing goes for the word income.

**[00:31:59] Anastasia Boden:** They point to a lot of historical sources, which seem to indicate that income was always used to mean income that had actually been received, not just speculative income or income that's sort of on the books you know, not just an appreciation in value that you haven't actually gotten any use from. And so they rely on this text in history argument, and originalist argument, and they also say that rally the government's argument would eviscerate the distinction between direct and indirect taxes altogether, because under the government's definition of income, really anything now can be considered income.

**[00:32:33] Anastasia Boden:** All sorts of wealth taxes and whatnot would be considered income, which would free them for apportionment, and in reality the Founders had meant those taxes to be apportioned and difficult to impose. I think it was a difficult argument for Moore's attorney but on the other hand some of the justices had very difficult questions for Solicitor General, Elizabeth Prelogar.

**[00:32:54] Anastasia Boden:** Justices on both sides were very concerned about the implications. On the one hand some justices were concerned that if the Moore's are successful, there are all sorts of taxes that sort of rely on constructive realization. It's not a full-on realization and they're worried about imperiling the constitutionality of those taxes. On the other hand, some of the justices were worried that the government's argument would mean that anything can be considered income now and that there's really no limits on it anymore and just how unfair that would be.

**[00:33:26] Anastasia Boden:** Ultimately I think both sides face tough questions. Most vocal on against the Moore's was, in my opinion, Justice Sotomayor and perhaps Justice Jackson who seemed very poised to uphold the MRT. And on the other side we had Justice Alito and Justice Gorsuch asking very difficult questions of Solicitor General Prelogar. At one point Justice Gorsuch saying, "I'm searching for a limit here. Give me a limit. So far I see none at all." And so it was a heated argument, and for a tax case I think very interesting.

**[00:33:58] Jeffrey Rosen:** Thank you very much for introducing us to the argument. So, well, Akhil, you were at the argument in person. What did you hear from the justices on both sides as they debated the meaning of the 16th Amendment, which says that Congress shall have the power to lay and collect taxes on incomes from whatever sources derived without apportionment?

**[00:34:18] Akhil Amar:** I was there and I think my friend nicely described a lot of the issues and the argument. She's absolutely correct that there was next to no discussion, alas, of the founding vision. Hylton was mentioned maybe once or twice, Hamilton I think not at all. So, what I've been talking about before was not the main event at all.

**[00:34:46] Akhil Amar:** But I think it should be, but now let's talk about why we have a 16th Amendment. Oh, because if Akhil is actually right, our audience might say, why did you even need an income tax amendment if the only kind of direct taxes that require

apportionment are land taxes and head taxes. Well, then income tax isn't a land tax, and then income tax isn't a head tax, so why do we even need the 16th Amendment?

**[00:35:12] Akhil Amar:** And the answer is as follows, and that's 'cause Abraham Lincoln didn't think you did. He actually signed into law in the Civil War an income tax and it was a soak the rich tax. Just as the carriage tax in Hylton was a soak the rich tax. And the Supreme Court upheld the income tax under Abraham Lincoln. But another generation of fat cat railroad lawyers in the so called Lochner era arose, and in an 1890s case called Pollock, they invalidated an income tax.

**[00:35:44] Akhil Amar:** They went against Patterson and Hamilton and Washington and this early vision that was settled for 100 years. The only taxes that require apportionment are land and heads, and income tax isn't either of those, and the Springer case that and Lincoln thought that, but Pollock comes along and says, "Income tax doesn't require apportionment." And in the 1890s, there's a great 5-4 case, the main dissent, the leading dissent is by John Marshall Harlan, the same great dissenter in Plessy v. Ferguson, the same great dissenter in the Lochner cases, and he says, "This is another Dred Scott, this is gonna be a disaster."

**[00:36:27] Akhil Amar:** And he says too, "This clause was a direct tax was all about slavery. Why are we reading it broadly?" He says that, okay? And I believe he was right, the Pollock case was completely wrong on originalist grounds, but it's five four, it's the majority. So, the 16th Amendment comes along and we the people actually say we think the Pollock case was wrong. When three times in all of American history where the people smacked down the Supreme Court. One was a case called Schism at the founding, one was Dred Scott which led to the 14th Amendment saying everyone's a citizen, even black people. And this is the third one.

**[00:37:07] Akhil Amar:** So, I think Pollock was one of the lowest moments of the Supreme Court. I'm with John Marshall Harlan, and then we have this amendment. And my friend is absolutely right, that's what they were talking about. What is income under the 16th Amendment? Now I was there, I could hear the best arguments that it is income. In my view it doesn't have to be. It's not heads, it's not land, done. Hamilton, Hylton, Washington.

**[00:37:34] Akhil Amar:** But if you don't have that view, if you think, "Oh, it has to be an income tax," the 16th Amendment doesn't say realized income. Actually many early income taxes even under Lincoln and in states and thereafter, didn't have a realization trigger. Many other income taxes, other incomes tax provisions, not a few, many others don't have realization provisions.

**[00:37:59] Akhil Amar:** For example, I think of mark-to-market, okay? So, that's not a requirement. That's one argument. It doesn't have to be realized. Here's a second. The Irving Fisher definition of income is simply the increase in your wealth. Wealth is like the water in a bathtub income is basically kind of what comes into this thing. If the bathtub is rising, you know, you've got income.

**[00:38:22] Akhil Amar:** And Irving Fisher is a very great economist at Yale he actually writes an article in 1896 and says, "This is the definition of income." So the economist say income is income whether it's realized or not. Various income taxes at the state level even

before the 16th Amendment and thereafter and huge parts of the tax code don't have a realization requirement.

**[00:38:43] Akhil Amar:** Then there's a third argument. Even if there is a realization requirement, on the facts that this case money was realized. It was realized by a corporation and, yes, actually the Moore's don't control the whole of the corporation, but they control part of it. Money was realized by a corporation, and so the real question is just to whom do you attribute the money? Because this is a foreign corporation, it's hard for the US government to reach it, and so we actually tax the shareholders just like sometimes in a partnership, even if the money doesn't come into my pocket, I'm a partner, I get taxed on it.

**[00:39:16] Akhil Amar:** So, those were the analytic points back and forth. I think my friend stated them very well. On all those issues, I'm actually with the government. I don't think it has to be realized. I think it, in fact, was realized here. In any event final point on the nose counting, I think having being in the audience, I count the noses differently. This tax is going to be upheld, I predict.

**[00:39:44] Akhil Amar:** There will be at most, I predict, one justice on the other side, at most. Some justices may say we should just send it back because for all sorts of technical reasons. We shouldn't even decide it. If there's more than one justice who actually bottom line end of the day sides with the Moore's and to reverse the court below, I'll buy my friend lunch.

**[00:40:07] Akhil Amar:** Okay? So I don't think actually this one is gonna be a close one, truthfully.

**[00:40:12] Jeffrey Rosen:** Great. Thank you for that. Anastasia, in your brief your amicus brief for petitioners, you argue that since the ratification of the 16th Amendment, the court has consistently interpreted income as referring to amounts that taxpayers realize in a particular accounting period, and that therefore the Ninth Circuit was wrong and contorted the definition of income beyond recognition. Tell us more about the core of your argument and why you think the court should adopt it.

**[00:40:42] Anastasia Boden:** Yes. Well, certainly there are Supreme Court cases explicitly interpreting the 16th Amendment as requiring realization. Now General Prelogar said that those cases can be distinguished for various reasons or that they've been undermined since then. And then she also pointed to many of the other taxes that Professor Amar referred to, which don't seem at first blush at least require realization.

**[00:41:07] Anastasia Boden:** But the attorney for the Moore's had many responses to that. So, if we look at things like partnerships, that's one thing where the partners can be taxed, even if they don't realize, so to speak, any of the income of the partnership. But as the attorney for the Moore's, Andrew Grossman, said you know, that's a very closely held organization. It's very different than something like a corporation where you only hold more than 10%.

**[00:41:31] Anastasia Boden:** In a partnership you're usually gonna have some control, or at least constructive control over what that income, what use it's put towards. And so it's reasonable for Congress to consider that, at least constructive realization, but still, there

should be a realization requirement, some form of it. Whereas the Moore's have had no realization at all. It's just unfair to call it constructive realization on their end.

**[00:41:54] Anastasia Boden:** The same thing goes for things like futures contracts, which again Professor Amar referred to. Those are settled each day, which creates sort of a constructive realization that you're opting into it each day, there's at least some form of consent there. It's very easy actually to say that all of the supposed taxes that don't require realization do in some form require at least constructive realization.

**[00:42:18] Anastasia Boden:** And while it's true that the 16th Amendment does not say realization, there were some great briefs, including a brief of corpus linguistic professors in support of neither party, who thought that both parties kind of had the methodology wrong, but at least agreed at the end of the day that the word income itself was always used to have an inherent realization requirement and I think the case law overall supports it.

**[00:42:44] Anastasia Boden:** That's a common thread through the case law leading up until now. It seems commonsensical to me that income would require realization. But in any event, I respect the argument that there was realization here. The corporation realized some income, and that came up a lot at oral argument, but the point is there was no realization as to the person who's actually paying the taxes.

**[00:43:07] Anastasia Boden:** There's no realization as to the Moore's. And so I think it's a problem to just point to realization by a third party, and some of the justices seem to indicate, well, maybe that's a due process problem. Maybe you should have brought a due process claim. And maybe that's true, although I'm very skeptical of due process, because I litigated due process cases and I know what it means to the rational basis test, you're almost never gonna win under the government.

**[00:43:29] Anastasia Boden:** But I think it also makes sense to consider the 16th Amendment problem, because the tax itself is not qualifying as an income tax. So, that would be the argument, I think, on the flip side of Professor Amar's.

**[00:43:41] Jeffrey Rosen:** Great. Thank you for putting the argument so very well. And Akhil, just one last beat about why you're with the government on the claim that, in your view, the 16th Amendment does not require realization.

**[00:43:56] Akhil Amar:** So, actually I have a question for my friend. It's not a gotcha question. Like if we're looking at the precedence honestly, how many Supreme Court cases, let's say in the last 90 years, have actually said that parts of the income tax code actually have to be struck down as not within Congress's power? I mean there might be other reasons why this violates a church and state because you're imposing a tax on a church or something like that.

**[00:44:23] Akhil Amar:** But what are the cases in which the Supreme Court, let's say since 1930 has said Congress passed an income tax and it goes so far beyond what the 16th Amendment and the rest of the constitution authorizes that it's just it's not constitutional unless it's apportioned by the states. What's the case?

**[00:44:45] Anastasia Boden:** I think my answer to that, of course, would be that we've seen an explosive growth in government beyond what I think the Founders intended since the 1930s. Yet despite that, I don't think Congress has ever gone so far to do something as absurd as this. And so the fact that a tax has never been struck down doesn't mean that the realization requirement doesn't exist.

**[00:45:08] Anastasia Boden:** It means that it's not yet been violated and that even those cases upholding other taxes they still mention, in many instances, some sort of realization. I don't think that just because the court hasn't had the opportunity to strike down taxes beyond Congress's power doesn't mean maybe it just hasn't had the opportunity, because truly, this is far beyond anything Congress has done.

**[00:45:34] Akhil Amar:** That's very helpful 'cause now we're actually kind of agreeing on the basic facts and then we can do the analysis. So, I think Jeff, I have three big responses. First, I'm saying I don't think that the text of the constitution I don't think my friend has that on her side. Anything about the founding, not Hamilton, not Washington, not Hylton, it's not land, it's not heads, done. Okay?

**[00:46:01] Akhil Amar:** So the Moore's loose. And if you don't like that, vote against Congress. Then there are the precedents. And I'm saying my friend doesn't actually have a single precedent that's remotely analogist to this one. Actually maybe four points. Then she says, well, it goes beyond the 16th Amendment and there's this corpus linguistics brief and it's an income really implicitly requires realization.

**[00:46:28] Akhil Amar:** My own view is the nice question of whether we look, 'cause it's a slightly technical word, a slightly technical definition. The leading economist is Irvin Fisher, and he writes a major piece on what capital is, what income is, what labor is. It's in 1896, and he says actually income is income whether realized or not, as long as the value of an asset has increased, even if it's a paper, okay, that's still income.

**[00:46:57] Akhil Amar:** So, I don't think that actually the text of the 16th Amendment, truthfully, is on my friend's side. I don't think she has the founding, I don't think she has any modern precedents really. I don't think she has the text of the 16th Amendment as understood by the people of the time, and I actually think she says, "Well, this is just a weird provision." Paul Ryan and others have said one third of the tax code would be vulnerable if we actually adopted this position.

**[00:47:28] Akhil Amar:** At oral argument, they were talking about trillions, not billions, but trillions that are gonna be taken off the table. I was there in the room, I think that prospect really bothered even conservative justices like Sam Alito. So, again, I'm predicting that this is gonna be upheld pretty lopsidedly, truth be told. Or remand it maybe, just send it back down, address Amar's arguments about Hamilton and Hylton.

**[00:47:58] Akhil Amar:** And here's why we've been spending so much time Jeff, on what seems like a really technical issue, you know because the real debate about this case was really all about whether you can have a wealth tax in America. It's actually all about Elizabeth Warren and Bernie Sanders if they ever, have the majority at their backs, in both

House and Senate, and a like-minded President, could they impose a wealth tax on Americans?

**[00:48:27] Akhil Amar:** And on my friend's view on the Moore's view, they have a certain definition that would be a direct tax. That would be basically improper. On my view it's not land, it's not heads, it's every bit as permissible as a carriage tax, and if you don't like that, and you might not, I actually have some wealth myself truth be told, and if you don't like that, you have to vote against the Congress people who give it to you.

**[00:48:56] Akhil Amar:** And if you're for it, vote for them. That's actually what the American Revolution and the constitution were really all about. No taxation without representation and yes taxation with representation.

**[00:49:12] Jeffrey Rosen:** Thank you so much for that. The last word in this conversation is definitely to you, Anastasia, some up the argument in your brief, which is that the tax in this case was unprecedented in US law, that the 16th Amendment only grants Congress the power to tax income. That other laws will not be impacted by the court's decision here, and in fact, you say they're ruling against petitioners would overturn a century of this court's jurisprudence.

**[00:49:39] Anastasia Boden:** Yes, well, that's exactly right, Jeff. You know Professor Amar has said that my argument is that the 16th Amendment implicitly requires realization. But in fact it's, no, it's not just implicit, it's in the word derived. And also it is part and parcel of the meaning income. And yes, you can point to a source or two on the other side. I'm sure as all originalists know there are originalists who disagree about original meaning, right?

**[00:50:06] Anastasia Boden:** But I think that the evidence is quite lopsided in favor of finding that income is inherently at the time was understood to have a realization requirement. Also so yes, there's tons of case law directly on point. I mean it's not exactly directly on point, because I do think that this law is so far beyond what Congress has ever done before. But it is on point in the sense that the Supreme Court has consistently alluded to a realization component.

**[00:50:32] Anastasia Boden:** You know, the last thing I just wanted to say is I feel like I'm having a little bit of an out of body experience. I remember one of the first times that I became familiar with Professor Amar's work was during the whole Obama Care debate. I was a research assistant for Professor Barnett, so, this was a big part of my study. And of course the big broccoli hypothetical came up, right? Like if Congress can tax you for not having health insurance, then can it tax you for not eating broccoli and is it gonna have a broccoli mandate next?

**[00:50:59] Anastasia Boden:** And that can't possibly be right so that interpretation of the constitution of the commerce clause can't be right. And I remember seeing Professor Amar speak on a panel and he said, "Well, no, it can be right. They can do that, and if you don't like it, the answer isn't that it's unconstitutional, it's to vote the bastards out." And that really stuck with me, that phrase stuck with me, and I remember it so distinctly and it's kind of exactly what Professor Amar is saying here.



**[00:51:23] Anastasia Boden:** And that came up at oral argument, where Justice Gorsuch and Justice Alito said, "Hey, isn't this gonna lead to some pretty absurd taxes that the Founders would never have intended?" The Solicitor General said, "Well, no, because Congress is aware they wanna keep their seats. They're not gonna do something that's politically unpopular. Sort of trust us."

**[00:51:46] Anastasia Boden:** Justice Gorsuch on the other hand said, "Well, no, wouldn't you agree that where the court opens the door, Congress usually walks right on in." And I think in fact that the whole constitution was written exactly because we don't trust our elected representatives and we don't wanna give them a blank check to do things. And because we are distrustive of democracy and wanna place limits on democracy, because democracy is not the guiding light of our constitution, liberty is.

**[00:52:13] Anastasia Boden:** I think with that frame of mind I don't think that the only answer is vote the bastards out. I think the answer is that the constitution is limited for a reason, and that's because the Founders guiding principle was individual liberty above all. And I think that's probably, that disagreement is what's causing Professor Amar and I to have different opinions on the case. But, you know, I respectfully dissent.

**[00:52:38] Jeffrey Rosen:** I respectfully dissent is a wonderful ending to a vigorous, engaged and ultimately illuminating conversation. Thanks to both of you for educating us, as always, and it is wonderful to have you on We The People. Akhil Amar, Anastasia Boden, thank you.

**[00:52:59] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Please recommend this show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Signup for the newsletter, and remember always that the National Constitution Center's a private nonprofit. As the holidays approach, consider a donation of \$5, \$10 or more to support the mission and signal the importance of the podcast to your lifelong learning.

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