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Billionaire Taxes and the Constitution

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Billionaire Taxes and the Constitution

Cover Page Footnote
Orville L. and Ermina D. Dykstra Professor in Income Tax Law, University of Iowa.

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BILLIONAIRE TAXES AND THE CONSTITUTION

Amandeep S. Grewal[*]

The United States now has ten times as many billionaires as it had just a few decades ago. This ever-growing class has sparked congressional interest in "billionaire tax" proposals. These proposals would generally require that billionaires recognize income when their asset values increase, even if they have not sold their assets.

Under existing doctrine, billionaire taxes likely violate the realization requirement embedded in the Sixteenth Amendment of the Constitution. However, this Article argues that existing Sixteenth Amendment doctrine suffers from deep infirmities and theoretical inconsistencies. With the conceptually sound interpretive approach advanced in this Article, a billionaire tax could pass constitutional muster.

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I. INTRODUCTION

Many of the world's richest persons have long made their homes in the United States. This country has treated them well, especially over recent decades. For example, in 1989, the wealthiest 1% of the population controlled about $4.8 trillion of assets.[1] But by the end of 2021, that same group controlled nearly ten times as much (around $46 trillion).[2] In the past few decades, the number of American billionaires has increased by around tenfold, if not more.[3]

Massive wealth comes with obvious benefits but also a potential liability: federal taxes. Under the Internal Revenue Code (the tax code),[4] Congress imposes various wealth transfer taxes that purportedly ensure that the richest pay their fair share.[5] For example, property passed under the will of a rich person faces taxation.[6] Thus, it seems, a taxpayer cannot accumulate massive wealth without contributing meaningfully to the public fisc.

Nonetheless, the wealth transfer system hardly ensures that massive wealth faces federal taxation.[7] For example, a wealth transfer tax might nominally apply to the entire amount that a billionaire passes to others under her will. But under the tax code,

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[1] *Distribution of Household Wealth in the U.S. Since 1989*, FED. RSRV., https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/ [https://perma.cc/RS75-J4EW].

[2] *Id.*

[3] *See Number of Billionaires in the United States from 1990 to 2020*, STATISTA (Mar. 7, 2012), https://www.statista.com/statistics/220093/number-of-billionaires-in-the-united-states/ [https://perma.cc/YD9Q-PN7T] (estimating that there were 66 billionaires in America in 1990 and 614 in 2020); Willy Staley, *How Many Billionaires Are There, Anyway?*, N.Y. TIMES MAG. (June 15, 2023), https://www.nytimes.com/2022/04/07/magazine/billionaires.html [https://perma.cc/NA2S-4E5X] (noting an estimate of between 735 and 927 billionaires currently in America).

[4] Unless the context indicates otherwise, Section references in this Article are to the tax code, as in effect for the taxable year at issue.

[5] For an overview of the wealth transfer tax system, see J. COMM. ON TAX'N, JCX-52-15, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM (2015), https://www.jct.gov/CMSPages/GetFile.aspx?guid=ab7cca94-69c3-4023-9f78-d4bc31b2c5f9 [https://perma.cc/2GDF-3RSM].

[6] *See* I.R.C. § 2001(a) (imposing a tax on "the transfer of the taxable estate of every decedent").

[7] For reform proposals, see, for example, Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020).

the billionaire escapes wealth transfer taxes for amounts she passes to her spouse.[8] Thus, even if a billionaire dies with, say, $10 billion of assets, the federal government might not collect taxes on her death. Also, even if the billionaire does not pass wealth to her spouse, she might escape taxation through creative planning.[9]

In an ideal world, any deficiencies in the wealth transfer tax regime would lead to corrections in that regime. But whether because of political divides or principled disagreements, major reforms to the wealth transfer tax system have proven difficult.[10] Scholars and legislators have thus recently turned to the income tax system to address massive wealth.[11] Their proposals, referred to colloquially as "billionaire taxes,"[12] typically depart from income tax realization principles.[13] A proposal by Senator Wyden, for example, would add Section 491 to the tax code and require that the ultrawealthy include asset appreciation in their income, even if they have not sold their assets.[14]

The billionaire tax proposals have sparked constitutional concerns. Though the Sixteenth Amendment makes it relatively

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[8] I.R.C. § 2056(a).

[9] *See* James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 851 (2001) ("[T]here are many loopholes in the current [wealth transfer] tax regime that allow taxpayers to reduce their tax liability.").

[10] *See, e.g.*, MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 3–11 (2005) (introducing political challenges associated with wealth tax reform).

[11] *See* Lee A. Sheppard, *Biden's Disguised Wealth Tax*, 178 TAX NOTES FED. 1859, 1863 (2023) ("The point of the Biden proposal is to reach wealth by means of an income tax. That may be unconstitutional."). Recently, more than two hundred economists and law professors signed a joint letter claiming that the Supreme Court's decision in *Eisner v. Macomber*, 252 U.S. 189 (1920), "has been fundamentally rejected," and they urged Congress to immediately tax the ultrawealthy on their unrealized gains. Letter from 219 Economists & Law Professors, to Chuck Schumer, S. Majority Leader & Ron Wyden, S. Fin. Comm. Chairman (Dec. 9, 2021), https://americansfortaxfairness.org/wp-content/uploads/Academics-BIT-Sign-On-Letter-219-signers.pdf [https://perma.cc/Q83J-LHX3].

[12] Despite their names, the proposals establish special taxation rules for the ultrawealthy, but not necessarily those with wealth of at least $1 billion. Nonetheless, the "billionaire" label has caught on through the title of the proposals and in popular discussion. *See infra* Part IV.

[13] Under the income tax law, gain or loss usually arises only after a realization event, like the "sale or other disposition of property." I.R.C. § 1001(a).

[14] *Wyden Unveils Billionaires Income Tax*, U.S. SENATE COMM. ON FIN. (Oct. 27, 2021), https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax [https://perma.cc/26NR-CQ3B]

easy for Congress to impose "taxes on incomes,"[15] these proposals may only nominally reach income.[16] By sidestepping realization, the proposals may establish "direct taxes"[17] unrelated to income. Under the Constitution, a direct tax such as a tax on property itself[18] faces a strict apportionment requirement.[19] The billionaire tax proposals do not follow this requirement. Critics thus contend that the proposals would violate the Constitution if enacted.[20] The proposals, they say, are unapportioned direct taxes that are merely dressed up as income taxes.[21]

The constitutional debates over billionaire taxes, and over the taxing power generally, typically employ a *piecemeal* approach to the issues. That is, commentators focus on a specific tax code section that would define an item of income,[22] such as the proposed Section

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[15] *See* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

[16] *See infra* Part IV.

[17] *See* U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

[18] *See infra* note 33 and accompanying text.

[19] For a discussion of how the apportionment requirement may restrict taxation, see *infra* Part II.

[20] *See, e.g.*, Richard Rubin, *Billionaire Tax Faces Likely Constitutional Challenge*, WALL ST. J. (Oct. 26, 2021, 11:06 AM), https://www.wsj.com/articles/democrats-billionaire-tax-constitution-11635258358 [https://perma.cc/PU3J-N4N8] ("Unrealized gains are not income by any stretch of imagination" (quoting David Rivkin)); *see also* Erik M. Jensen, *Wealth Taxes Can't Satisfy Constitutional Requirements*, BLOOMBERG TAX: DAILY TAX REP. (July 27, 2021, 4:01 AM), https://news.bloombergtax.com/daily-tax-report/wealth-taxes-cant-satisfy-constitutional-requirements [https://perma.cc/J5M5-YM5D] ("[I]t has long been recognized that, as a matter of constitutional law, Congress can't treat unrealized appreciation as taxable income."). For political doubts over billionaire taxes, see, for example, Doug Sword, *Ways and Means Dems Concerned and Skeptical About Billionaire's Tax*, TAX NOTES (Oct. 27, 2021), https://www.taxnotes.com/tax-notes-today-federal/legislation-and-lawmaking/ways-and-means-dems-concerned-and-skeptical-about-billionaires-tax/2021/10/27/7cjww [https://perma.cc/V6TB-GV5V] (discussing hesitations around the tax from members of the House Committee on Ways and Means).

[21] *See* Jensen, *supra* note 20 ("A tax on property's increase in value is a tax on the property itself. And a tax on property is a direct tax under the Constitution.").

[22] *See, e.g.*, Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution,* Macomber*, and Mark to Market*, 13 VA. TAX REV. 1, 71–86 (1993) (examining constitutionality of I.R.C. § 1256); Mark E. Berg, *Bar the Exit (Tax)! Section 877A, the Constitutional Prohibition Against Unapportioned Direct Taxes and the Realization Requirement*, 65 TAX

491. If that section follows income principles, that section will be upheld. If not, the provision must be struck down as an unapportioned direct tax. Part II acknowledges that this piecemeal approach follows from various judicial authorities.

Part III argues for a new interpretive approach to determine whether Congress has enacted a direct tax or an income tax.[23] Scholars and courts should use a *holistic* approach. That is, the threshold question is not whether Congress has violated the Constitution through a specific definitional tax code section, like one that defines "income" to reach unrealized appreciation in a billionaire's assets. Instead, the question is whether Congress has, through the operative tax provision, violated realization principles. For the individual income tax, Section 1 provides the relevant operative provision because it imposes a tax on "taxable income," as defined under Section 63. Under the holistic approach, Congress will have satisfied the Sixteenth Amendment so long as the taxable income subject to Section 1 *primarily* includes realized income.[24]

The distinction between the piecemeal approach and the holistic approach might seem subtle, but it has profound consequences. Under the piecemeal approach, every provision within the income tax laws must satisfy constitutional realization principles. The holistic approach, by contrast, allows Congress to add unrealized items to the income tax base. These items will not raise a constitutional problem unless they dominate that base.

The holistic approach might face objections because it allows the Sixteenth Amendment to support laws that do not reach only

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LAW. 181, 205–15 (2012) (examining constitutionality of I.R.C. § 877A); *see also* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. (forthcoming 2023) (concluding that the provision at issue in *Eisner v. Macomber*, 252 U.S. 189 (1920), which included pro rata dividends in gross income, should have been characterized as "an excise, that is, a tax on the *act* of declaring a stock dividend"); *cf.* Douglas A. Kahn, *The Constitutionality of Taxing Compensatory Damages for Mental Distress When There Was No Accompanying Physical Injury*, 4 FLA. TAX REV. 128 (1999) (analyzing constitutionality of reaching specific income item through I.R.C. § 61).

[23] As discussed in Part II, an income tax may qualify as a direct tax when it reaches income from property. However, for ease of exposition, this Article will use "direct taxes" or "property taxes" to refer to taxes that are not income taxes.

[24] For a tax to come within the Sixteenth Amendment, requirements beyond "realization" may apply. *See infra* section III.A.2 (discussing cost recovery deductions). However, given the context of the billionaire tax proposals, this Article will focus principally on realization when speaking about the Sixteenth Amendment's requirements.

income. But these objections should fall apart—unless someone believes that nearly every income tax law has violated the Constitution. After all, Congress does not actually tax income. The income tax laws routinely deviate from income principles because Congress uses the tax system to pursue numerous policy goals.[25] Thus, taxable income does neatly correlate to economic income. For example, the income tax laws contain various exclusions for realized gains.[26] Also, though the concept of income requires cost recovery deductions only for income-producing activities, Congress has established deductions for expenditures that have nothing to do with those activities.[27] Our income tax laws are motivated by income principles but do not perfectly conform to them.[28]

The piecemeal approach thus rests on a shaky foundation. That approach demands perfect conformity with income principles in individual sections even though the entire system does not conform to those principles. The piecemeal approach thus creates several anomalies within the income tax laws. As Part III will show, only the holistic approach can resolve those anomalies.

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[25] *See* Beverly I. Moran, *Stargazing: The Alternative Minimum Tax for Individuals and Future Tax Reform*, 69 OR. L. REV. 223, 242 (1990) ("The road from economic income to taxable income leads us past an assortment of exclusions, deductions, and credits. These serve a variety of functions in the income tax agenda."); Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 288 (1990) ("The exclusion from taxable income of virtually all imputed and psychic income, even more than the realization principle or the mechanics of cost recovery, drives taxable income apart from economic income.").

[26] For a survey of numerous exclusion, deduction, credit and similar provisions (i.e., tax expenditures) that serve goals other than the measurement of income, see JOINT COMM. ON TAX'N, JCX-22-22, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2022-2026, at 10–22 (2022), https://www.jct.gov/publications/2022/jcx-22-22/ [https://perma.cc/G7DX-VDAR].

[27] *Id.*

[28] There is no universally agreed-upon meaning of income. Instead, one can find legal definitions, such as in Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (explaining that income typically arises when there are "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"). Or one can find economic definitions, such as the Haig-Simons definition. *See* Christopher H. Hanna, *Tax Theories and Tax Reform*, 59 SMU L. REV. 435, 437 (2006) (discussing the evolution of the Haig-Simons definition, which treats income as the "sum of consumption and accumulation"). But the complex patchwork of rules enacted by Congress will not conform to any definition except Congress's. *See generally* BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 3.1 (2023) (surveying distinctions between economic income and statutory income).

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If a piecemeal approach applies to the billionaire tax proposals, those proposals will be dead on arrival. They add definitional sections to the code that plainly violate the realization requirement. However, Part IV discusses three billionaire tax proposals under the holistic approach and explains how they may satisfy the Constitution.

II. THE PIECEMEAL APPROACH

This Part explains how the Court has used the piecemeal approach to analyze the constitutionality of income tax laws. Section II.A first describes Congress's power to tax under the Constitution and the limits that the document imposes on the tax power. Then, it shows how the Court in the *Income Tax Cases* used a piecemeal approach to conclude that Congress had enacted, without apportionment, a "direct tax" described in Article I of the Constitution.[29] Section II.B shows how the Court in *Eisner v. Macomber* applied the piecemeal approach to the realization requirement embedded in the Sixteenth Amendment's reference to "taxes on incomes."[30] Section II.C briefly summarizes different scholarly attitudes towards the realization requirement.

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[29] The *Income Tax Cases* refer to the two Court opinions that addressed the 1894 income tax act. *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *modified on reh'g*, 158 U.S. 601 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI. The first *Pollock* opinion was vacated after the Court set the case for re-argument. *See Pollock*, 158 U.S. 601 at 637 (vacating the opinion). However, the second opinion relied on the first opinion's reasoning and even expanded it. Thus, the first opinion remains helpful in understanding the Court's actions. *See id*. ("We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes. . . . We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.").

[30] *See* Eisner v. Macomber, 252 U.S. 189, 207 (1920) (income refers to "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital . . . and *coming in*," and "[t]he same fundamental conception is clearly set forth in the Sixteenth Amendment" when it refers to "incomes, *from* whatever *source derived*"); *see also, e.g.*, Merchs.' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 519–20 (1921) (adhering to *Macomber*'s definition of income and finding that the taxpayer had recognized income through the disposition of property).

A. CONSTITUTIONAL AUTHORITY

Article I of the Constitution grants Congress various legislative powers. Those powers include the "Power To lay and collect Taxes, Duties, Imposts and Excises."[31] Legislative authority over "Taxes," however, faces an express limit. Under Article I, Section 9, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census."[32] This means that direct taxes must be apportioned among the states according to their populations.[33]

For duties, imposts, and excises,[34] Congress faces a different requirement. Those levies must be "uniform throughout the United

[31] U.S. CONST. art. I, § 8, cl. 1.

[32] *Id.* § 9, cl. 4. The direct tax limitation also appears in Article I, Section 2. *See id.* § 2, cl. 3 ("[D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."); *see also* Arthur C. Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 YALE L.J. 505, 515 (1910) ("The qualification of direct taxes is the only provision in the entire Constitution which appears twice in that instrument. This fact ought to teach us to hold it in still higher regard and to respect the more the earnestness and intent of the framers who placed it there."). For a discussion of why the Constitution might have repeated the direct tax limitation, see Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 366 & n.40 (2004).

[33] At one point in time, the Court strongly intimated that direct taxes include only capitation taxes and real estate taxes. *See* Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 571 (2012) (noting that in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175, 177, 183 (1796) (separate opinions of Chase, Paterson, and Iredell, JJ.), the Court was unanimous in reaching its result, and "those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes"). However, the Court later "expanded [its] interpretation to include taxes on personal property and income from personal property." *Id.* (citing Pollock v. Farmers' Loan & Tr. Co., 158 U. S. 601, 618 (1895)). Though the result of *Pollock* "was overturned by the Sixteenth Amendment," the Court has "continued to consider taxes on personal property to be direct taxes." *Id.* (citing Eisner v. Macomber, 252 U.S. 189, 218–19 (1920)); *cf.* Veazie Bank v. Fenno, 75 U.S. 533, 546 (1869) (saying that direct taxes include "perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States").

[34] Duties and imposts are "levies made by governments on the importation or exportation of commodities." Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911). Excises are levies made on "the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 680 (7th ed. 1903)).

States."[35] This clause contemplates geographical uniformity.[36] For example, suppose Congress imposes an excise on the production of a good. That excise must apply wherever production occurs, rather than only in specific states.

Most case law assumes that any government levy will fall within one of four categories: direct taxes, duties, imposts, or excises.[37] However, the text of the Taxing Clause implies that a government levy might qualify as an "indirect" tax. That is, there may be a government levy that falls outside of "direct taxes" but does not qualify as an excise, impost, or duty.[38] If that category exists,[39] then

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[35] U.S. CONST. art. I, § 8, cl. 1.

[36] *See* United States v. Ptasynski, 462 U.S. 74, 82 (1983) ("It was settled fairly early that the [Uniformity] Clause does not require Congress to devise a tax that falls equally or proportionately on each State. Rather . . . a 'tax is uniform when it operates with the same force and effect in every place where the subject of it is found.'" (quoting the *Head Money Cases*, 112 U.S. 580, 594 (1884))).

[37] *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 557 (1895) ("[A]lthough there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."); Thomas v. United States, 192 U.S. 363, 370 (1904) ("[T]axes so called, and 'duties, imposts and excises,' apparently embrace all forms of taxation contemplated by the Constitution."). *Pollock* may have denied the existence of a fifth category to buttress its conclusion that the 1894 income tax act was unconstitutional. *See infra* notes 53–56 and accompanying text.

[38] In *Hylton v. United States*, Justice Chase noted that the language of the Taxing Clause strongly implies a fifth category. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796) (opinion of Chase, J.) ("If the framers of the Constitution did not contemplate other taxes than direct taxes, and duties, imposts and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary." (emphasis omitted)). Justice Paterson also contemplated a fifth category. *See id.* at 176 (opinion of Paterson, J.) (noting a category of taxes "not within any of the classifications" expressly described in the Constitution); *see also* Union Elec. Co. v. United States, 363 F.3d 1292, 1297 n.6 (Fed. Cir. 2004) ("Supreme Court decisions have recognized . . . that there may be indirect taxes that are not excise taxes." (citing *Hylton*, 3 U.S. (3 Dall.) at 171)).

[39] *See* Jensen, *supra* note 32, at 360 n.17 (noting that there may be a levy described in the fifth category but "no one has figured out what such a levy would be"). Whether the fifth category exists may depend on how broadly or narrowly one reads the express text of the Taxing Clause. If one reads "Duties, Imposes, and Excises" broadly, then there would be less room for a government levy to come within the fifth category. But if one reads the text more narrowly, then it will be easier to posit a government levy that comes within the fifth

Congress might impose some levies that face neither a uniformity nor an apportionment requirement.[40]

The apportionment requirement, whose purpose remains largely inscrutable,[41] can create major fairness and feasibility concerns. On fairness, suppose that the United States consists of only two states, *A* and *B*, with equal populations. Suppose further that the real property in *A* is worth $20 billion and the real property in *B* is worth $1 billion. If Congress wants to impose a federal real property tax (a type of direct tax), it must follow apportionment requirements. This means that if Congress wants to raise $2 billion through a federal real property tax, it could not impose a single tax of around 10% on the nation's real property. Instead, because of the apportionment requirement, Congress must raise $1 billion from the residents of *A* and $1 billion from the residents of *B*.

Nearly absurd results would follow. To satisfy their $1 billion apportionment, residents of *A* would face a 5% tax on their $20 billion of real property. But to satisfy their apportionment, residents of *B* would face a 100% tax on their $1 billion of real property. These drastic rate differences would violate commonly accepted tax-fairness principles.[42]

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category. Ultimately, whether a fifth category exists generates some theoretical uncertainty but does not bear meaningfully on the issues discussed in this Article.

[40] *See Hylton*, 3 U.S. (3 Dall.) at 173 (opinion of Chase, J.) (noting that the fifth category would be subject to whatever "Congress shall think proper and reasonable," rather than subject to a uniformity or apportionment requirement). *But see* Veazie Bank v. Fenno, 75 U.S. 533, 546 (1869) (listing "taxes not direct" as a distinct category and stating that they "must be laid and collected by the rule of uniformity").

[41] The scope of direct taxes and the purpose of the apportionment requirement have long created uncertainty. *See* James Madison, Notes (Aug. 20, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340, 350 (Max Farrand ed., 1911) ("Mr. King asked what was the precise meaning of *direct* taxation? No one answ[ere]d."); BITTKER & LOKKEN, *supra* note 28, § 1.2.2, at 2 ("The purpose and scope of the apportionment requirement are veiled in obscurity."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 954 at 428 ("[T]he order of the subject would naturally lead us to the inquiry, why direct taxes are required to be governed by the rule of apportionment."); Jensen, *supra* note 32, at 371–74 (explaining how apportionment requirement may have been adopted to address fears of sectional taxation).

[42] Tax fairness usually contemplates "horizontal equity," that is, the idea that similarly situated persons should face similar tax liabilities. *See generally* Ira K. Lindsay, *Tax Fairness by Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79 (2016) (discussing horizontal equity).

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Aside from fairness issues, the apportionment requirement raises feasibility concerns. Suppose Congress wants to raise $50 billion through a direct wealth tax imposed only on billionaires. As in the prior example, the apportionment requirement would not allow for a uniform, nationwide tax on billionaires. Instead, Congress would need to raise the $50 billion through apportionment. As in the prior example, billionaires across the country would face different rates, depending on their states of residence.

But how would this work if a state had no billionaires? Currently, forty-two states have at least one billionaire resident, and eight states have none.[43] Under the apportionment requirement, those eight states *must* raise their congressionally specified amounts. Thus, if Congress were to pass this form of a billionaire tax, several states may find it impossible to comply.[44]

The fairness and feasibility challenges associated with direct taxes make them largely impractical and politically unpopular. Only in the early days of our nation has Congress implemented direct taxes.[45] Today, the apportionment requirement inhibits any broad direct tax measures.[46]

The apportionment requirement does not, however, apply to an income tax, even when that tax is considered direct.[47] Under the

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[43] *See* Jemima McEvoy, *The Richest Billionaire In Every State 2022,* FORBES (Apr. 5, 2022, 6:00 AM), https://www.forbes.com/sites/jemimamcevoy/2022/04/05/the-richest-billionaire-in-every-state-2022/? [https://perma.cc/2DMC-Q2JN] (noting that, while forty-two states have resident billionaires, "[e]ight states have no billionaire residents at all: Alabama, Alaska, Delaware, New Hampshire, New Mexico, North Dakota, Vermont and West Virginia. Another eight are home to just one billionaire").

[44] For a proposal to efficiently implement direct taxes using the tools of fiscal federalism to avoid such apportionment issues, see Brooks & Gamage, *supra* note 22.

[45] The last direct tax measure was enacted more than 150 years ago. Act of Aug. 5, 1861, ch. 45, § 8, 12 Stat. 292, 294–96.

[46] *See* Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799, 809 n.58 (2014) ("[A]pportionment was supposed to keep the craziness from happening. When apportionment would lead to absurd results, Congress should not enact the tax.").

[47] Under the *Income Tax Cases*, a tax that reached income from real or personal property would be considered a direct tax. *See* Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895) ("[T]axes on . . . the income of personal property are . . . direct taxes."). A tax that reached other types of income, like wages, would not so qualify. *See id.* (distinguishing "what was intended as a tax on capital" from "a tax on occupations and labor").

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Sixteenth Amendment, "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment."[48] Thus, even if an income tax relates to property, no apportionment requirement applies.

Congress proposed and the states ratified the Sixteenth Amendment in response to the *Income Tax Cases*.[49] Those cases involved a constitutional challenge to the 1894 income tax act.[50] Congress did not apportion that tax and instead imposed fixed income tax rates on taxpayers across the country.[51] The act reached many items of income, including income derived from real and personal property.[52]

In the *Income Tax Cases*, the Court declared the act unconstitutional. To reach its holding, the Court emphasized language from prior cases that real property taxes were direct taxes that faced the apportionment requirement.[53] In the *Income Tax Cases*, the Court believed that the 1894 act had established a real property tax. That is, by taxing income from real property, the Court concluded, Congress had taxed the property itself.[54] The Court also

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[48] U.S. CONST. amend. XVI.

[49] *See* Moore v. United States, 53 F.4t7 507, 510 (9th Cir. 2022) (Bumatay, J., dissenting) (providing a general history of the Sixteenth Amendment and stating that "[t]he Sixteenth Amendment arose in response to *Pollock*").

[50] *See* Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553 (1894) (imposing a 2% tax on income "over and above four thousand dollars"); *Pollock*, 158 U.S. at 637 (declaring the income tax provisions of the 1894 act unconstitutional). For a discussion of the heated political context surrounding the 1894 act, see Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX LAW. 295, 301–06 (2013).

[51] *See* § 27, 28 Stat. at 553 (imposing a 2% tax on income "over and above four thousand dollars").

[52] *See id.* (stating that "there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received . . . whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States").

[53] *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 579 (1895) ("[I]t is conceded in all these cases . . . that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land." (first citing Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); and then citing Springer v. United States, 102 U.S. 586 (1880)).

[54] *See* Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895) ("[T]axes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.").

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extended its holding to the tax on income from personal property.[55] Last, the Court held that the unconstitutional provisions related to income from real property and personal property were inseverable from the remainder of the act.[56] The entire 1894 act fell.[57]

The *Income Tax Cases* sparked passionate dissents and drew withering criticism.[58] The Court's interpretation of "direct tax" raised significant tensions with its prior precedents.[59] Additionally, the Court rejected a commonsense distinction between a tax on property and a tax on income from property. The country eventually overrode a key part of the *Income Tax Cases* through the Sixteenth Amendment.[60]

Nonetheless, the *Income Tax Cases* carry some force today. The Court's holding that a property tax qualifies as a direct tax remains good law.[61] The Sixteenth Amendment merely allows Congress to tax *income* from property. A tax on property, unrelated to income, remains subject to apportionment requirements.[62]

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[55] *See id.* ("We are of opinion that taxes on personal property, or on the income of personal property, are . . . direct taxes.").

[56] *See id.* ("The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.").

[57] *See id.* (invalidating the act).

[58] *Id.* at 638 (Harlan, J., dissenting); *id.* at 686 (Brown, J., dissenting); *id.* at 696 (Jackson, J., dissenting); *id.* at 706 (White, J., dissenting).

[59] In *Springer v. United States*, 102 U.S. 586, 602 (1880), the Court upheld an income tax, stating that it qualified as an "excise or duty" rather than a direct tax requiring apportionment. The Court had similarly upheld an insurance-related income tax. *See* Pac. Ins. Co. v. Soule, 74 U.S. 433, 446 (1868) (holding that the insurance-related tax of 1864 was "not a direct tax, but a duty or excise"); *see also* Veazie Bank v. Fenno, 75 U.S. 533, 547 (1869) (stating that "the tax on incomes of insurance companies" was not a direct tax).

[60] *See* U.S. CONST. amend. XVI (removing the apportionment requirement from income taxes). In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court also formally overruled the *Income Tax Cases* to the extent they gave federal tax immunity to state government bonds. The Court said that "[w]e thus confirm that subsequent case law has overruled the holding in *Pollock* that state bond interest is immune from a nondiscriminatory federal tax." *Id.* at 524.

[61] *See* Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 571 (2012) ("[*Pollock*] was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.").

[62] *See infra* note 276.

Determining whether Congress has taxed income or property[63] remains highly relevant to constitutional analysis. The next Section explains how the Court treats the realization principle as essential to an income tax. It also explains how the Court adopts a piecemeal approach to the realization principle.

B. REALIZATION UNDER A PIECEMEAL APPROACH

To understand the piecemeal approach to realization, one must first understand the basic structure of the tax code. The tax code includes many types of levies, including an individual income tax. Section 1 contains the key operative provision for that tax.[64] Through various detailed rate schedules, Section 1 imposes a tax on "taxable income."[65] "Gross income" provides the starting point for

[63] Under the *Income Tax Cases*, a tax on income from property is considered a tax on property itself. *See* Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895) ("[T]axes on personal property, or on the income of personal property, are . . . direct taxes."). Thus, there is not a neat line between income taxes and property taxes. Instead, the relevant line is between taxes on income derived from property and taxes on property unrelated to income. Nonetheless, for ease of exposition, this Article will state that property taxes face apportionment and income taxes do not.

[64] *See* I.R.C. § 1 (establishing the individual income tax). Other tax code sections provide the operative provisions for other taxes. The operative provision for the corporate tax is found in I.R.C. § 11(a). In 1975, Congress accidentally replaced Section 11(a)'s operative language and thereby repealed the corporate tax. *See* Revenue Adjustment Act of 1975, Pub. L. No. 94-164, § 4, 89 Stat. 970, 973–74 (1975) (replacing operative language of Section 11(a) with a rate schedule intended to replace Section 11(b)). The potentially major consequences of this seemingly minor change illustrate the significance of the operative provision of a tax regime. For the eventual fix, see Tax Reform Act of 1976, Pub. L. No. 94-455, § 901, 90 Stat. 1520, 1606–07 (1976) (providing a new Section 11, with proper operative language in Section 11(a)). For further discussion, see Tax Chats, *Remembering When the Corporate Tax Was Accidentally Cancelled. A Chat with Jim Wetzler*, (Mar. 4, 2023), https://www.audacy.com/podcast/tax-chats-ba0c2/episodes/remembering-when-the-corporate-tax-was-accidentally-cancelled-a-chat-with-jim-wetzler-58ea6.

[65] *See* I.R.C. § 1 (noting that the income tax only applies to taxable income).

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calculating taxable income.[66] The tax code defines gross income through one general section[67] and several other specific sections.[68]

Under a piecemeal approach, determining whether Congress has imposed an income tax under the Sixteenth Amendment turns largely on the specific definitional sections within the tax code. The question is not whether "taxable income" primarily includes income in the constitutional sense. Instead, the question is whether a specific section that describes an item of income complies with the Constitution.

Eisner v. Macomber nicely illustrates the piecemeal approach.[69] In *Macomber*, the Court addressed whether pro rata stock dividends paid by an oil company could constitutionally be included in gross income under the Revenue Act of 1916.[70] The taxpayer in *Macomber* argued that her stock dividends could not be so included.[71] Though her interests in the oil company may have appreciated in value, she had not realized any gain through the stock dividends.[72] She thus

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[66] *See* I.R.C. § 63(a) (using gross income as the starting point for computing taxable income); *id.* § 63(b) (using "adjusted gross income" as the starting point for computing taxable income); *id.* § 62(a) (defining adjusted gross income as gross income minus certain deductions).

[67] *Id.* § 61.

[68] *See, e.g.*, *id.* §§ 71–91 (including specific items in gross income); *id.* §§ 101–140 (excluding specific items from gross income). The tax code also contains numerous other special rules that relate to the definition of income, such as provisions relating to transactions with corporations. *Id.* § 351.

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

[70] *See* Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (1916) (including stock dividends within "dividends," which were themselves specifically included in the term "net income"); *see also id.* § 1(a), 39 Stat. at 756 (imposing a tax on "net income"); *Macomber,* 252 U.S. at 199–200 (explaining that the 1916 act "plainly evinces the purpose of Congress to tax stock dividends as income").

[71] *Macomber,* 252 U.S. at 201 ("[Macomber] contended that in imposing such a tax [on her dividends] the Revenue Act of 1916 violated Art. I, § 2, cl. 3, and Art. I, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the Sixteenth Amendment.").

[72] *See id.* at 202–03 ("A stock dividend really . . . adds nothing to the interests of the shareholders." (quoting Gibbons v. Mahon, 136 U.S. 549, 559, 560 (1888))). A simple example helps illustrate why pro rata stock dividends might not properly fall within the constitutional definition of income. Assume a corporation has 100 shareholders, each of whom owns one share of stock in that corporation. If the corporation issues an additional share of stock to

argued that by taxing pro rata stock dividends, Congress had imposed an unapportioned property tax.[73]

To decide the constitutional issue in *Macomber*, the Court adopted a piecemeal approach. Section 1(a), the operative provision of the 1916 act, imposed a broad tax on "net income."[74] The Court did *not* ask whether net income under Section 1(a) primarily reached "income" in the constitutional sense. Instead, the Court asked whether Section 2(a)'s inclusion of stock dividends in the income tax base complied with the Constitution.[75]

The Court concluded that the Section 2(a) inclusion violated the realization requirement contemplated by the Sixteenth Amendment.[76] Income could be "defined as the gain derived from capital, from labor, or from both."[77] Under that definition, a pro rata stock dividend could not give rise to income. A pro rata stock dividend gave the taxpayer nothing beyond additional paper certificates.[78] Through Section 2(a), Congress had imposed a property tax, not an income tax.[79]

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each of its shareholders, then the shareholders' relative interests have not changed. Each shareholder still holds one percent of the enterprise. Viewed this way, the taxpayer is no better off than she was prior to the dividend and consequently has not realized any income.

[73] *Id.* at 201.

[74] § 1(a), 39 Stat. at 756.

[75] *Macomber*, 252 U.S. at 199 (1920) ("This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.").

[76] *See id.* at 211 (holding that the taxpayer "has received nothing that answers the definition of income").

[77] *Id.* at 207 (first citing Stratton's Independence v. Howbert, 231 U.S. 399, 415 (1913); and then citing Doyle v. Mitchell Bros., 247 U.S. 179, 185 (1918)). Later, the Court offered a somewhat more expansive definition of income. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (explaining that income typically arises when there are "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

[78] *Macomber*, 252 U.S. at 213; *see also id.* at 203 (explaining that after a pro rata stock dividend, "the corporation is no poorer and the stockholder is no richer than they were before" (citing Logan County v. United States, 169 U.S. 255, 261 (1898))).

[79] *See id.* at 217 (noting that imposing a tax on pro rata stock dividends "would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution"). Whether the Court properly characterized the taxation of a stock dividend as a direct tax on property remains subject to debate. *See, e.g.*, BITTKER & LOKKEN, *supra* note 28, § 1.2.4, at 9 (stating that *Macomber* failed to justify its conclusion).

The Court acknowledged that Congress *could* impose a property tax if apportionment requirements were followed.[80] But the 1916 Act did not follow those requirements. It therefore violated the Constitution "in so far as it impose[d] a tax" on pro rata stock dividends.[81]

Macomber shows how the piecemeal approach leads to narrow analysis. Under the piecemeal approach, any given tax code provision that defines income must comport with the constitutional principles related to the definition of income. Those principles include the realization requirement.

Two relatively recent appellate court decisions show how the realization requirement has affected disputes over the modern income tax. In *Murphy v. United States*, the taxpayer owned futures contracts that increased in value by about $20,000 during the year.[82] Under Section 1256, the taxpayer had to "mark-to-market" those contracts.[83] That is, even though the taxpayer had not sold his contracts, Section 1256 required that he include in his gross income their $20,000 increase in value. The taxpayer argued that this mark-to-market regime reflected an unconstitutional attempt to tax unrealized gains.[84]

The Ninth Circuit used a piecemeal approach to reject the taxpayer's argument. The court focused on whether Section 1256 comported with constitutional principles.[85] The court did not ask whether Section 1 primarily reached realized income.

The court ultimately concluded that Section 1256 did not violate the realization requirement.[86] This conclusion rested on how futures markets worked. In those markets, each trader enjoys the

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[80] *See Macomber*, 252 U.S. at 217 ("[T]axation of property because of ownership . . . would require apportionment under the provisions of the Constitution . . . .").

[81] *Id.* at 219.

[82] Murphy v. United States, 992 F.2d 929, 930 (9th Cir. 1993).

[83] *See* I.R.C. § 1256(a)(1) ("[E]ach section 1256 contract held by the taxpayer at the close of the taxable year shall be treated as sold for its fair market value on the last business day of such taxable year (and any gain or loss shall be taken into account for the taxable year).").

[84] *See Murphy*, 992 F.2d at 930 ("Murphy contends that Congress exceeded its authority by taxing 'unrealized' gains.").

[85] *See id.* at 931 (analyzing whether Section 1256 "is a proper exercise of Congress' constitutional power to tax").

[86] *See id.* at 932 (affirming the district court's decision that Section 1256 was constitutional).

right, at the end of each day, to receive cash for the gains in his contracts.[87] Thus, to the court, the taxpayer's gains *were* realized. The court did not need to "decide the broader issue of whether Congress could tax the gains inherent in capital assets prior to realization."[88]

Recently, in *Moore v. United States*, the Ninth Circuit affirmatively held that Congress could tax unrealized gains.[89] That case involved a challenge to a complex international tax transition rule.[90] In highly simplified terms, Section 965 requires that a shareholder in a foreign corporation include in gross income his share of the foreign corporation's earned but undistributed profits.[91] The challengers in *Moore* argued that Section 965 violated the realization requirement.[92] They claimed that a shareholder realizes income from corporate profits only on their distribution, not before.

The court rejected that argument. The Ninth Circuit believed that the Supreme Court, after *Macomber*, had downgraded realization from a constitutional requirement to a principle "founded on administrative convenience."[93] The taxpayers then filed an en banc petition.[94] Several Ninth Circuit judges believed that the panel had improperly ignored the realization requirement.[95] However, they were in the minority. The taxpayers have found

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[87] *See id.* at 931 ("Although Murphy did not sell his futures contracts, his gains could be treated as realized because he was entitled to withdraw those gains daily. There were no restrictions, and his failure to receive cash was entirely due to his own volition.").

[88] *Id.* at 932 (emphasis omitted).

[89] *See* Moore v. United States, 36 F.4th 930, 935 (9th Cir. 2022) ("Whether the taxpayer has realized income does not determine whether a tax is constitutional.").

[90] *See* I.R.C. § 965(a) (providing for "[t]reatment of deferred foreign income"), *applied in Moore*, 36 F.4th at 933.

[91] *See Moore*, 36 F.4th at 933 (discussing the mechanics of Section 965).

[92] *See id.* at 937 ("[T]he Moores argue that [Section 965] is an unapportioned direct tax. Specifically, the Moores argue that *Macomber* and *Glenshaw Glass* require income to be realized before it can be taxed.").

[93] *Id.* (quoting Helvering v. Horst, 311 U.S. 112, 116 (1940)).

[94] *See* Moore v. United States, 53 F.4th 507, 507 (9th Cir. 2022) (denying rehearing en banc).

[95] *See id.* at 508 (Bumatay, J., dissenting) (arguing that "a hundred years of precedent establishes that only realized gains are taxable as 'income' under the Sixteenth Amendment").

potential success with the Supreme Court, which has agreed to hear *Moore*.[96]

C. SCHOLARLY APPROACHES TO REALIZATION

The scholarly commentary about income and the realization requirement does not reveal any consensus. Many commentators flatly dismiss the realization requirement.[97] They believe, like the Ninth Circuit, [98] that the Supreme Court has downgraded realization to a mere tool of administrative convenience.[99] Under this view, realization does not pose an obstacle to taxation, whether analyzed under a piecemeal or holistic approach. To them, *Macomber* no longer reflects good law.[100]

Some commentators, likely in the minority, continue to take the realization requirement seriously.[101] They point out that litigants have invited the Court to overrule *Macomber*, and that the Court has avoided doing so.[102] They acknowledge that the Court has, after

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[96] Moore v. United States, 36 F.4th 930 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 2656 (June 26, 2023) (No. 22-800). For a discussion of how the principles in this Article apply to the *Moore* case, see Brief for Professor Amandeep S. Grewal as Amicus Curiae, Moore v. United States, No. 22-800 (U.S. Oct. 23, 2023), https://www.supremecourt.gov/DocketPDF/22/22-800/285946/20231024130744657_44349%20pdf%20Grewal.pdf [https://perma.cc/N9T3-LA2J].

[97] *See, e.g.*, David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549, 1576 (1998) ("Commentators almost universally agree that realization is not constitutionally required.").

[98] *See Moore*, 36 F.4th at 937 (viewing realization as administrative convenience).

[99] *See, e.g.*, MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION ¶ 5.01 (12th ed. 2012) (viewing realization as "strictly an administrative rule and not a constitutional, much less an economic requirement, of 'income'").

[100] *See, e.g.*, David S. Miller, *Bartlett, Realization, and the Constitution*, TAXPROF BLOG (Jan. 17, 2014), https://taxprof.typepad.com/taxprof_blog/2014/01/miller-.html ("[T]here is no constitutional requirement that capital gains be realized to be taxed. The Supreme Court discredited the reasoning of *Macomber*. . . .").

[101] *See* Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 708–11 (1999) (discussing the continuing force of *Macomber*); Berg, *supra* note 22, at 194 (arguing that the cases in support for the majority opinion of the realization requirement "do not support the principle for which they are cited.").

[102] In *Helvering v. Griffiths*, 318 U.S. 371, 404 (1943), the government asked the Court to overrule *Macomber*. The Court ultimately resolved the dispute on statutory grounds, eliminating the need to reconsider *Macomber*. *See id.* ("We are unable to find that Congress intended to tax the dividends in question, and without Congressional authority we are

Macomber, described realization in less-than-lofty terms.[103] But the Court has never blessed the taxation of unrealized income.[104]

The holistic approach advanced in this Article substantially lowers the stakes over this scholarly debate. Under the holistic approach, Congress must observe a realization requirement when it establishes an income tax. However, individual provisions need not satisfy that requirement. Instead, Congress satisfies the realization requirement whenever the income tax primarily reaches realized income. The next Part explains why the Court should shift to this holistic approach.

III. THE HOLISTIC APPROACH

This Part argues that a holistic approach should apply when the Court examines whether Congress has properly exercised its Sixteenth Amendment authority to impose income taxes without apportionment. That is, courts should determine whether Congress has imposed an income tax by looking at whether the operative tax statute, Section 1 in this case, primarily reaches realized income. Under this approach, the Constitution would tolerate occasional deviations from realization principles within the tax base.

This approach does not comport with the Court's key precedents. In the *Income Tax Cases* and *Macomber*, the Court plainly applied a piecemeal approach.[105] Nonetheless, there are at least three significant reasons that courts and scholars should keep an open mind here.

First, the piecemeal approach has yielded substantial confusion. One might reasonably hesitate to disturb case law or interpretive methods that have produced sound, consistent results. But few

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powerless to do so. That being the case, we cannot reach the reconsideration of *Eisner v. Macomber* on the basis of the present legislation and Regulations.").

[103] *See, e.g.*, Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1142–46 (2001) (rejecting claims that *Macomber* has been put to rest). For an excellent discussion of why the cases that allegedly abandon *Macomber* do not in fact do so, see Berg, *supra* note 22, at 194–205.

[104] *See, e.g.*, Daniel Hemel, *Taxing Wealth in an Uncertain World*, 72 NAT'L TAX J. 755, 771 (2019) ("[T]he Supreme Court's refusal to repudiate *Eisner* in express terms allows some uncertainty about the constitutionality" of a tax code provision that violates the realization requirement).

[105] *See supra* sections II.A & II.B.

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would claim that the Court's Taxing Clause jurisprudence and its piecemeal approach have done so.[106] The *Income Tax Cases* raised tensions with the Court's own precedents.[107] And in *Flint v. Stone Tracy*[108] the Court twisted itself into knots to limit the *Income Tax Cases*.[109] Constitutional uncertainty thus lingers over various legislative proposals, including those related to billionaire taxes.[110] Courts and scholars should welcome a more stable doctrine.

The piecemeal approach may be abandoned for a second reason. Standing alone, it lacks precedential force. The precise holdings of the *Income Tax Cases* and *Macomber* may remain good law. That is, a direct tax continues to include a tax on the income from property.[111] And a pro rata stock dividend does not give rise to gross income.[112] But the interpretive approach used to reach those holdings does not bind the Court. Over and over again, the Court changes how it addresses constitutional questions. In the separation of powers context, for example, the Court has vacillated between formalist and functionalist methods.[113] In the Commerce Clause context, the Court has repeatedly changed the level of deference that it affords Congress.[114] In the Tenth Amendment

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[106] *See, e.g.*, Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) (acknowledging the "difficulty" that "has always been experienced by courts when called upon to determine" the meaning of the terms used in the Taxing Clause).

[107] *See supra* note 59.

[108] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[109] *See infra* notes 184–209.

[110] *See, e.g.*, Brad Dillon, *Wealth Taxation in America: Policy, Problems, and Perspective*, 132 J. TAXATION 7, 14 (2020) ("The only certainty is that any proposal for a wealth tax will face constitutional uncertainty and require resolution by either a favorable Supreme Court ruling or passage of a constitutional amendment making it possible.").

[111] *See supra* note 33 and accompanying text.

[112] *See supra* notes 69–81 and accompanying text.

[113] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation,* 124 HARV. L. REV. 1939, 1942–43 (2011) (explaining that in separation of powers cases, the Court takes either a functionalist approach or a formalist approach).

[114] *See* Gonzales v. Raich, 545 U.S. 1, 15–16 (2005) ("[O]ur understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."). *Compare* United States v. Lopez, 514 U.S. 549, 567 (1995) (declining to defer to Congress while noting that prior cases have given "great deference to congressional action"), *with* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (affording maximum deference to Congress and upholding Civil Rights Act as valid under Commerce Clause), *and Raich*, 545 U.S. at 21–22 (distinguishing *Lopez* and deferring to congressional findings in the Controlled Substances Act).

context, the Court has varied the weight it affords to state sovereignty.[115] And so on.

In an ideal world, the Court would adopt a single, consistent, and theoretically sound method to address all constitutional questions. But we do not live in an ideal world. The Court frequently shifts interpretive methods, and no single method binds it.[116] Thus, the Court can shift from a piecemeal approach to a holistic approach without violating *stare decisis*.

Third, changes in the statutory context justify a shift from the interpretive approach used in *Macomber*. The Court there addressed a relatively simple statute, unlike the one that the Court must address today. The Revenue Act of 1916 applied to a small percentage of Americans[117] and defined income across two statutory sections.[118] Today, the income tax laws apply widely.[119] And Congress defines income through a detailed general rule and countless specific rules.[120] For today's laws, a piecemeal approach would provide a cramped view of whether Congress has properly imposed "taxes on incomes" under the Sixteenth Amendment.

The remainder of this Part explains why the Court should shift to the holistic approach. Section III.A shows how Congress already relies on the holistic approach. Section III.B shows that the holistic approach finds analogous support through early congressional tax

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[115] *See* Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS 441, 443–44 (2016) (noting that the Rehnquist Court's reinvigoration of the Tenth Amendment's limits on the federal government in *Printz v. United States*, 521 U.S. 898 (1997), marked a significant shift from the lack of judicial enforcement of federalism in New Deal-era cases).

[116] *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 39 (noting in the context of constitutional amendments that "our history contains many examples of the Court changing its mind over time").

[117] *See* C. DONALD JOHNSON, THE WEALTH OF A NATION: THE HISTORY OF TRADE POLITICS IN AMERICA 171 (2018) (noting that the post-Sixteenth Amendment income tax acts applied to around five percent of Americans); *see also* Scott Hollenbeck & Maureen Keenan Kahr, *Ninety Years of Individual Income and Tax Statistics, 1916–2005*, STAT. INCOME BULL., Winter 2008, at 136, 144 tbl.1, https://www.irs.gov/pub/irs-soi/16-05intax.pdf [https://perma.cc/CV2Y-M9BZ] (showing fewer than 8,000,000 income tax returns filed from 1917–1924).

[118] Revenue Act of 1916, ch. 463, §§ 2, 4, 39 Stat. 756, 757–59 (1916).

[119] *See* IRS, INTERNAL REVENUE SERVICE DATA BOOK, 2022, at 6 (2022), https://www.irs.gov/pub/irs-pdf/p55b.pdf [https://perma.cc/6T4W-MMCR] (showing that the IRS received more than 160 million individual income tax returns in fiscal year 2022).

[120] *See supra* notes 67–68.

practices and through current methods to assess the constitutionality of statutory regimes. Section III.C shows how the holistic approach would help remedy the confusion that the *Income Tax Cases* injected into the scope of excises under the Taxing Clause. Section III.D addresses concerns that the holistic approach might prove manipulable or unworkable.

A. CONGRESSIONAL RELIANCE INTERESTS

Congressional reliance on the holistic approach may be seen on both the income and the deduction sides of taxable income. Thus, a judicial shift to the holistic approach would respect the legislature, not thwart it. As discussed below, major constitutional doubts will arise for several tax code provisions if courts continue to follow the piecemeal approach. The holistic approach resolves those doubts in favor of congressional authority.

1. Income Inclusions. Aside from the Section 61 catchall provision,[121] the tax code specifies numerous items that qualify as gross income.[122] For the most part, these provisions no longer raise any serious constitutional questions. The specified items easily constitute income under the expansive definition provided in *Commissioner v. Glenshaw Glass Co.*[123]

But in recent decades, Congress has enacted a few provisions that may go outside that definition. Section 475, for example, provides that securities dealers must "mark-to-market" their inventory.[124] This means that these dealers will recognize gain or

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[121] *See* I.R.C. § 61 (defining gross income broadly as "all income from whatever source derived" and listing various illustrative items).

[122] *See id.* §§ 71–91 (including specific items in gross income); *id.* §§ 101–140 (excluding specific items from gross income).

[123] Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (stating that income typically arises when there are "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

[124] *See* I.R.C. § 475(a)(1) ("Any security which is inventory in the hands of the dealer shall be included in inventory at its fair market value."); *see also* BITTKER & LOKKEN, *supra* note 28, § 107.8.4, at 3 (noting securities dealers "must include the security in inventory at its 'fair market value'").

loss each year when their inventory values fluctuate.[125] Another provision, Section 877A, similarly contemplates income recognition without any property transactions.[126] Under Section 877A, some taxpayers who renounce their U.S. citizenship will be treated as if they have immediately sold all their property.[127]

If the piecemeal approach applies, Sections 475 and 877A raise serious constitutional questions. After all, each demands income inclusions without any transactions. These provisions thus violate the realization requirement and should be deemed unconstitutional.

If, however, the holistic approach applies, then Congress has acted consistently with the Constitution. Sections 475 and 877A individually deviate from the realization requirement. But the income tax law, on the whole, follows that requirement. The holistic approach, not the piecemeal approach, would save provisions like Sections 475 and 877A. And, given the presumption that Congress respects the Constitution when it legislates, we should presume that Congress relies on an approach that saves its laws rather than an approach that destroys them.

One could struggle valiantly to argue that Congress respected the piecemeal approach when it enacted Sections 475 and 877A. Through Section 475, the argument might go, Congress imposed an excise on securities dealers for the privilege of trading securities.[128] Viewed this way, Section 475 tells us nothing about the piecemeal approach or the holistic approach. Those approaches relate to the income tax, not excises. We thus should not draw any inferences from Section 475 about the proper approach to the realization requirement.

For Section 877A, an even more exotic argument might apply. A Joint Committee on Taxation report uses a piecemeal approach and posits that realization might occur through an individual's

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[125] See BITTKER & LOKKEN, *supra* note 28, § 107.8.4, at 3 ("[T]he [securities] dealer's gross income for a year includes any amount by which inventory securities have appreciated or depreciated.").

[126] For an overview of Section 877A and an argument that it violates the Constitution, see Berg, *supra* note 22, at 205–15.

[127] *See* I.R.C. § 877A(a)(1) ("All property of a covered expatriate shall be treated as sold on the day before the expatriation date for its fair market value.").

[128] *See* Gene Magidenko, *Is a Broadly Based Mark-to-Market Tax Unconstitutional?*, 143 TAX NOTES 952, 955–56 (2014) (considering an excise theory for Section 475 and concluding that it "might not be wrong" to find that the statute is constitutional).

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expatriation.[129] That is, when an individual renounces her U.S. citizenship, her "act of expatriation could be viewed as resulting in the transfer of assets . . . from a citizen who is subject to the U.S. tax systems to a person who is no longer a U.S. citizen."[130] Viewed this way, Congress believed that an individual realizes income when she transfers the property she owned as a U.S. citizen to her new self, a non-U.S. citizen. So, Congress *did* apply the piecemeal approach when it enacted Section 877A.

Each theory merits skepticism. Section 475 does not itself impose an excise or any other type of levy. The statute constitutes one part of an integrated regime that establishes and then taxes an individual's taxable income. Through this regime, a securities dealer could have income under Section 475 but offsetting losses under an unrelated code section.[131] Congress has imposed no specific excise on securities gains. If Congress meant to do so, Congress presumably would have separately measured those gains and excised them. But Congress integrated Section 475 with the larger income tax system.

The Joint Committee on Taxation's dual-personhood theory similarly fails to justify the piecemeal approach. The theory stretches the realization concept well past its breaking point. In *Cottage Savings Ass'n v. Commissioner*, the Supreme Court acknowledged that the realization principle, as formulated under Treasury regulations, establishes a low bar for taxation.[132] The taxpayer in that case successfully claimed that it realized a loss through a "disposition" when it exchanged some financial interests for others that were almost economically identical.[133] *Cottage Savings* thus involved a taxpayer's transaction with another party.

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[129] *See* JOINT COMM. ON TAX'N, JCS-17-95, ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 73 (1995) (characterizing expatriation as a "realization event").

[130] *Id.*

[131] Mark-to-market gains under Section 475(a)(2) will be treated as ordinary income and may be offset by ordinary losses. *See* I.R.C. § 475(d)(3)(A)(i) (defining the character of Section 475 gains and losses); *id.* § 64 (defining ordinary income); *id.* § 65 (defining ordinary loss).

[132] *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 556 (1991) (presenting the question of "whether a financial institution realizes tax-deductible losses" when exchanging substantially similar interests with another lender).

[133] *See id.* at 566 (holding that the taxpayer's "exchanged interests" allowed for loss recognition).

By contrast, the Joint Committee on Taxation's Section 877A theory divides a single human in two and claims that a property transfer arises when an individual changes her citizenship. One must wonder whether similar realization events occur when individuals move within the country and change their states of citizenship. In any event, it seems highly doubtful that Congress followed a dual-personhood theory when it enacted Section 877A.

Section 877A, like Section 475, shows that Congress relies on the holistic approach. If Congress believed that the piecemeal approach controls, why would Congress enact individual provisions that so flagrantly deviate from the realization requirement? The excise and dual-personhood theories provide answers, but strained ones. As the next section shows, Congress's reliance on the holistic approach becomes even clearer on the deduction side of taxable income.

2. Deduction Limitations. Under the Sixteenth Amendment, Congress avoids the apportionment requirement for "taxes on incomes."[134] As the Civil War income tax and other pre-ratification income taxes show, an income tax contemplates some measurement of a taxpayer's gross proceeds against his outlays.[135] That is, the

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[134] U.S. CONST. amend. XVI.

[135] The earliest income tax acts specified a few deductions that would not necessarily inhere in the definition of "income." *See, e.g.*, Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (allowing a deduction for federal and local taxes in computing income); Act of July 1, 1862, ch. 119, § 91, 12 Stat. 432, 473 (offering a similar deduction). Business deductions were likely inherent in the statutory word "income," and hence were not specifically laid out. During debates over the 1861 act, Senator James Simmons of Rhode Island was asked whether his reference to "income" in the proposed bill would reach gross income or instead net income (i.e., whether income would be computed with reference to deductions). CONG. GLOBE, 37th Cong., 1st Sess. 315 (1861). He responded that "income" meant "net profits" and "nobody can mistake" the word. *Id*. However Senator Simmons was hesitant to expressly include the word "net" in the statute, for fear that the bill would become too long or that taxpayers would aggressively fabricate deductions. *See id*. (arguing that the insertion "is the very thing that would cause trouble"). Thus, he used the generic word "income" to connote a net amount, with the Treasury to provide implementing details. *See id.* ("I could see so many ways of evading [the word 'net'] that I thought it better to let the Secretary of the Treasury prescribe his rules."). Later revenue acts would expressly allow for deductions related to the carrying on of a business. *See*, *e.g.,* Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 281–82 (providing rules for deductions from income when the taxpayer "rents buildings, lands, or other property, or hires labor to carry on land, or to conduct any other business from which such income is actually derived"); Act of Aug. 27, 1894, ch. 349, § 28, 28 Stat. 509, 553–54 (allowing taxpayers various deductions, including for "necessary expenses actually incurred in carrying on any

Sixteenth Amendment contemplates an income tax base that allows for cost recovery.

The income tax law, viewed holistically, observes these principles. It first establishes a broad base and reaches gains derived through endless activities or even non-activities.[136] Then, it allows for cost recovery through numerous methods.[137] In some cases, the income tax law disallows cost recovery, but these occasional deviations do not raise major constitutional questions—unless a piecemeal approach applies.

Section 280E illustrates the problem. Under that provision, Congress overrode a Tax Court decision that allowed cost recovery deductions for drug dealers.[138] Though Congress can of course penalize drug dealers, Section 280E does not impose penalties, fines, or criminal consequences. Instead, it alters taxable income computations.[139] Thus, its constitutionality should probably face scrutiny under provisions related to taxation rather than criminal punishment.[140]

If the piecemeal approach applies to Section 280E, the statute becomes constitutionally suspect. The Sixteenth Amendment contemplates taxation based on net income, not gross income. Yet Congress has eliminated deductions for drug dealers.

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business, occupation, or profession," "losses actually sustained during the year," and "debts ascertained to be worthless"); *see id.* § 32 (describing business deductions for corporate income tax).

[136] I.R.C. §§ 61, 71–140.

[137] *Id.* §§ 151–280H.

[138] *See* Edmondson v. Comm'r, 42 T.C.M. (CCH) 1533, 1534, 1536 (1981) (allowing business expense deductions for a taxpayer engaged in the selling of amphetamines, cocaine, and marijuana); Californians Helping to Alleviate Med. Probs., Inc. v. Comm'r, 128 T.C. 173, 181 (2007) ("Congress enacted section 280E as a direct reaction to the outcome of a case in which this Court allowed a taxpayer to deduct expenses incurred in an illegal drug trade." (citing S. REP. NO. 97-494 (Vol.1), at 309 (1982))).

[139] *See* I.R.C. § 280E (disallowing deductions and credits for expenses of drug trafficking businesses).

[140] Taxpayers have argued that Section 280E should be viewed as a "fine" under the Constitution. For further discussion of that issue, see N. California Small Bus. Assistants, Inc. v. Comm'r, 153 T.C. 65, 68–72 (2019). If one believes that Section 280E reflects a constitutional fine and should not face scrutiny as a tax measure, then the principles discussed in this section can instead be applied to any of the various other statutory limitations on core business deductions. *See, e.g.*, I.R.C. § 162(m) (denying deductions for some salaries paid to high-level corporate officers).

As they did with statutes that relate to income inclusion,[141] courts have stretched doctrine to protect the constitutionality of Section 280E. In *Alpenglow Botanicals, LLC v. United States*, the Tenth Circuit found a constitutional distinction between cost basis and expense deductions when it upheld Section 280E.[142] The court acknowledged that the definition of "income" requires that a taxpayer subtract the cost of his products from the amount he receives for them.[143] But the court concluded that deductions for business expenses were different. Congress could deny them entirely because they did not inhere in the definition of income. Instead, whether a taxpayer enjoys a deduction depends entirely on "legislative grace."[144]

The approach adopted by *Alpenglow Botanicals* leads to implausible results. If a taxpayer purchases a widget for $5, then Congress must allow him to recover that cost. That recovery, we are told, inheres in the constitutional definition of income. But if the same taxpayer spends $5 to ship the widget to his customer, the recovery for that cost depends entirely on legislative grace. The interpretive gyration used to establish that distinction fails to persuade.[145] The taxpayer must both purchase inventory and ship

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[141] *See supra* section III.A.*1*.

[142] *See* Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1200 (10th Cir. 2018) ("The cost of goods sold is a well-recognized *exclusion* from the calculation of gross income, while ordinary and necessary business expenses are *deductions*.").

[143] *See id.* ("[O]nly the cost of goods sold is mandatorily excluded by '[t]he very definition of "gross income" . . . even in the absence of specific statutory authority for such exclusion.'" (second alteration and omission in original) (quoting Max Sobel Wholesale Liquors v. Comm'r, 630 F.2d 670, 671 (9th Cir. 1980))).

[144] *Id.* at 1199–1200.

[145] Edwin R.A. Seligman, one of the most influential voices around the ratification of the Sixteenth Amendment, noted that "[i]ncome is, of course, to be distinguished from mere receipts or gross revenue" and that income always referred to "net income, as opposed to gross income." EDWIN R.A. SELIGMAN, THE INCOME TAX 19 (2d ed. 1914). For further discussion, see generally Erwin N. Griswold, *An Argument Against the Doctrine that Deductions Should be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943). *See also N. California Small Bus. Assistants*, 153 T.C. at 84 (Gustafson, J., concurring in part and dissenting in part) ("I would hold that [Section 280E's] wholesale disallowance of all deductions transforms the ostensible income tax into something that is not an income tax at all, but rather a tax on an amount greater than a taxpayer's 'income' within the meaning of the Sixteenth Amendment."); Erik M. Jensen, *Tax Issues Affecting Marijuana Businesses*, 67 S.D. L. REV. 465, 475 (2022) ("To say that Congress can deny or delay deductions for a

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it to generate profit. The cost associated with each transaction inheres in the definition of income.[146]

Maybe Congress relies on dubious distinctions like those embraced in *Alpenglow* when it limits deductions. But it seems far more likely that Congress relies on a holistic approach when it enacts the tax laws. Taxpayers may generally deduct business expenses when they compute taxable income, even if drug dealing expenses receive unfavorable treatment.[147] Constitutional attacks based on the definition of "income" should thus ordinarily fail under the holistic approach. And, in this way, a judicial shift to the holistic approach protects congressional reliance interests.

B. EARLY TAX PRACTICES

Congress today uses the holistic approach when it invokes its Article I authority to impose taxes and when it relies on the Sixteenth Amendment. This holistic approach to federal taxation does not reflect a modern innovation. Instead, Congress has long followed that approach.

In the 1790s, Congress anticipated a costly war with France and enacted its first direct taxation measure.[148] Under the 1798 Act, Congress imposed a $2 million tax that would be assessed and collected consistent with apportionment requirements.[149] That is, under the 1798 Act, Congress apportioned the $2 million tax to the states based on their populations.[150] Each state would raise its

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particular sort of expense is constitutionally unobjectionable. . . . But it is quite a leap from concluding that Congress must have some flexibility to concluding that, in an unapportioned income tax, Congress can deny *all* deductions . . . . That is not how the drafters and ratifiers of the Sixteenth Amendment conceived of 'incomes.'").

[146] Some courts recognize that business expenses inherently relate to the concept of income. *See, e.g.*, Davis v. United States, 87 F.2d 323, 324–25 (2d Cir. 1937) (stating that several kinds of deductions, including "ordinary and necessary expenses incurred in getting the so-called gross income," are "inherently necessary as a matter of computation to arrive at income," while others may depend on legislative grace).

[147] *See* I.R.C. § 162(a) (allowing business expense deductions).

[148] *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1320–24 (2021) (detailing how French seizures of American merchant vessels led to enacting a direct tax).

[149] Act of July 14, 1798, ch. 75, § 1, 1 Stat. 597, 597–98.

[150] *Id.*

apportioned amount through taxes imposed on specific types of property.[151]

If the 1798 Act were analyzed using holistic principles,[152] the law would meet constitutional requirements. The tax apportioned to each state was based on its relative population. But if, as the next paragraph explains, the Act were analyzed in piecemeal fashion, then Congress would have flouted the Constitution. This implies that Congress relied on holistic principles in the 1798 Act. We should not lightly presume that the early Congress saw a piecemeal approach under the Taxing Clause and then deliberately violated it.[153]

The 1798 Act imposed a tax on "dwelling-houses, lands and slaves."[154] (Under the ignominious laws of that time, enslaved persons were classified as a type of property.) However, the tax related to each item did not follow the Constitution's apportionment requirement.[155] That is, the tax imposed on dwelling houses was not apportioned to each state based on its population, nor was the tax imposed on slaves or on land. Instead, those who owned dwellings faced a tax assessment under a graduated rate structure.[156] Slave owners faced a tax of 50 cents per slave.[157] Land taxes would be collected under a residual method.[158]

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[151] *Id.* § 2, 1 Stat. at 598 (specifying taxable property).

[152] The "holistic approach" of this Article refers to analyzing the validity of laws styled as income tax measures. In this context, the holistic approach means aggregating the various items of income and deduction that form taxable income to determine whether Congress has imposed "taxes on incomes" under the Sixteenth Amendment. Direct taxes are structured differently and thus the phrase "holistic principles" is used. For direct taxes, holistic principles contemplate that Congress has apportioned the overall tax to a state according to its population. A piecemeal approach contemplates that the tax associated with each item in the direct tax base be apportioned to a state according to its population.

[153] *See infra* note 166.

[154] § 2, 1 Stat. at 598.

[155] *See* Brooks & Gamage, supra note 22, at 229 ("[S]een as three separate taxes—a tax on dwelling-houses, a tax on enslaved persons, and a tax on land—none [of the subjects of the 1798 tax] was apportioned based on population.").

[156] *See* § 2, 1 Stat. at 598 (increasing the tax with valuation).

[157] *Id.*

[158] *Id.*; *see also* Charles F. Dunbar, *The Direct Tax Act of 1861*, 3 Q.J. ECON. 436, 441–42 (1889) (stating that land and improvements would be taxed to the extent "the quota of any State . . . was not covered by the levy upon houses and slaves . . . at such rates as might be required to make up the deficiency").

If a piecemeal approach applied, this statutory regime would probably have sparked constitutional concerns. For example, under the piecemeal approach, the total tax on slave owners would require apportionment based on state populations. But that total tax was not so apportioned. Instead, under the act, a less populous state which had slaveowners would pay taxes while a more populous state that embraced freedom would pay none. Similar population-based discrepancies would arise for the total tax on dwelling-houses and lands.

The legislative record shows that whether to tax slave owners presented an especially controversial question.[159] The debate involved sharp claims of unfairness[160] and accusations of hidden motives.[161] But legislators apparently accepted that a tax on slave owners could be joined with a tax on land to establish a $2 million direct tax.[162] In other words, they adopted holistic principles.[163]

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[159] *See* 6 ANNALS OF CONG. 1933–42 (1797) (debating the question). The 1797 debates culminated in a vote, on principle, for a direct tax. *Id.* at 1941. The next year, Congress formally voted on the 1798 Act. 1 Stat. at 597–604. At that time, "[t]he debate was less about whether to impose the tax than how to structure it." Parrillo, *supra* note 148, at 1321; *see also id.* at 1318–26 (discussing history and political context around the 1798 Act); 8 ANNALS OF CONG. 1837–54 (1798) (debating the tax on houses).

[160] For different views, *compare* 6 ANNALS OF CONG. 1935 (1797) (statement of Rep. Jeremiah Smith) (expressing concern that by apportioning a tax on land and slaves, "would not the land-holders in the Southern States pay less than the land-holders in parts of the Union where no slaves were kept?"), *with id.* at 2711 (statement of Treasury Secretary Oliver Wolcott) (recommending taxation of slave ownership because it would be unwise "[t]o exempt a species of property which enhances the proportions of several States, and thus to relieve one class of landed proprietors at the immediate expense of another").

[161] *See id.* at 1939–41 (statement of Rep. Richard Brent) (expressing confusion that representatives of Northern states opposed the tax on slaves, while the Southern states supported it and "believing that the real object of gentlemen had not been avowed. It was something hidden and unseen").

[162] Representative John Page of Virginia expressed that "he did doubt" the constitutionality of the direct tax measure, "but he had agreed to it." *Id.* at 1939. The grounds for Rep. Page's concerns are not further detailed. In any event, it is the enactment of the statute that establishes the presumption that Congress believed in its constitutionality. *See* United States v. Munoz-Flores, 495 U.S. 385, 391 (1990) ("Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional."). That presumption does not yield if some individual legislators harbor constitutional concerns.

[163] *Cf.* 6 ANNALS OF CONG. 1934 (1797) ("Mr. HARPER said, though he was entirely opposed to the tax proposed by the resolution, and should vote against the whole, yet he thought it

The 1798 act, upon passage, did not generate constitutional challenges.[164] Congress subsequently enacted similar direct tax measures, again without challenges.[165] This early history implies that Congress and the public accepted holistic principles for taxation.[166]

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right that a tax on slaves should be introduced with a tax on land . . . one mode was more convenient for the Northern, another for the Southern, and another for the Eastern—no injury was done by this to any other State.").

[164] *See* Springer v. United States, 102 U.S. 586, 599 (1881) ("We are not aware that the question of the validity of such a tax was ever presented for adjudication.").

[165] *See* Act of July 22, 1813, ch. 16, § 5, 3 Stat. 22, 26 ("[W]henever a direct tax shall be laid by the authority of the United States, the same shall be assessed and laid on the value of all lands, lots of ground with their improvements, dwelling houses and slaves . . . ."); Act of Aug. 2, 1813, ch. 37, §§ 1–4, 4, 3 Stat. 53, 53–71, 71 (imposing a $3 million apportioned direct tax but failing to require each enumerated taxable article in the Act of July 22, 1813 to be apportioned according to the states' population); Act of Jan. 9, 1815, ch. 21, §§ 1, 5, 3 Stat. 164, 164, 166 (imposing a $6 million apportioned direct tax but failing to require assessments on "lands and lots of ground with their improvements, dwelling houses, and slaves" to each be apportioned according to the states' population); Act of Mar. 5, 1816, ch. 24, § 2, 3 Stat. 255, 255 (imposing a $3 million apportioned direct tax and incorporating the same assessment structure as the Act of Jan. 9, 1815); *see also* J.H. Riddle, *The Supreme Court's Theory of a Direct Tax,* 15 MICH. L. REV. 566, 568 n.13 (1917) (noting that in the early era, Congress "had levied direct taxes under the rule of apportionment in 1798, 1813, 1815, 1816, and 1861"). Under the later measures, a slave's value would be determined by an assessor, rather than assigned a 50-cent tax. The later measures might be understood as a single tax on real estate. *See* Veazie Bank v. Fenno, 75 U.S. 533, 543–44 (1869) (viewing the tax on slaves under the 1798 tax as a capitation tax and the tax that applied in later acts as a real estate tax, because "as property [slaves] were, by the laws of some, if not most of the States, classed as real property, descendible to heirs"). However, even if the later measures were viewed as a single tax on real estate, their constitutionality depends on a holistic approach. Viewed in piecemeal fashion, the tax that applied on one statutorily prescribed category of real estate (slaves) was not apportioned among all the states. Instead, only persons in states that supported slave ownership would pay the tax.

[166] Admittedly, when dealing with laws passed in the early days of our nation, one cannot easily draw major inferences from the absence of judicial challenges. Americans did not seek redress in federal courts with the same frequency that they do now. Additionally, the direct tax acts were relatively short-lived and they appeased various interests. Thus, judicial challenges may have been unlikely. *See Springer*, 102 U.S. at 599 (discussing absence of challenges to the direct taxes and potential reasons for those absences). Still, there may be sound reasons to draw inferences here. Before the 1798 Act was passed, a constitutional challenge had already arisen to a federal tax law. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (deciding whether a tax on carriages was a direct tax). So, taxpayers were apparently motivated to challenge tax laws. Additionally, in *Hylton*, two Justices scoffed at the prospect that Congress could use holistic principles. *See id.* at 179 (opinion of Paterson,

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Looking outside of the federal income tax area, the holistic approach probably[167] fits better with general constitutional interpretive principles than does the piecemeal approach. In *Trinova Corp. v. Michigan Department of Treasury*, for example, the Court emphasized holistic principles when it construed Michigan's business activity tax (a type of value-added tax).[168] The taxpayer presented a Commerce Clause challenge to that tax and wanted to "dissect the tax base as if [the business activity tax] were three separate and independent taxes."[169] That is, the taxpayer wanted Commerce Clause requirements to apply separately to each component of the business activity tax.[170] But the Court rejected the taxpayer's analytical approach. The business activity tax was "not three separate and independent taxes."[171] Instead, its three components were inseparable parts of a "broader tax base."[172] Thus, the Court applied the Commerce Clause to the business activity tax

J.) (rejecting as "novel" and "fanciful" the claim "that Congress may select in the different states different articles or objects from whence to raise the apportioned sum," or that "several of these be thrown together"); *id.* at 182 (opinion of Iredell, J.) (rejecting the possibility that a direct tax could be imposed by "selecting different articles in different states"). Congress was thus presumably aware about the risks associated with holistic principles. That Congress nonetheless adopted those principles, and that the public apparently accepted that adoption, suggests a considered dismissal of the Justices' concerns.

[167] The earlier disclaimers about the Court's interpretive methods apply here. *See supra* notes 113–116 and accompanying text.

[168] Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358 (1991).

[169] *Id.* at 374. The Michigan business activity tax base included "a tax on compensation, a tax on depreciation, and a tax on income." *Id.*

[170] *See id.* at 374–75 (describing the taxpayer's argument). Trinova argued that the "fair apportionment" requirements of the Commerce Clause meant that no income could be included in the base of its Michigan business activity tax, because Trinova had no overall income. *Id.* at 375; *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (outlining the "fair apportionment" requirement of the Commerce Clause). Trinova also argued that the statute improperly inflated the amount of compensation and depreciation included in Trinova's tax base. *See Trinova*, 498 U.S. at 374 (arguing that statutory apportionment method should be rejected, and Trinova's actual Michigan compensation and depreciation should determine its tax base).

[171] *Trinova*, 498 U.S. at 375.

[172] *Id.* at 378 (citing Amerada Hess Corp. v. Dir., Div. of Tax'n, N.J. Dep't of Treasury, 490 U.S. 66 (1989)); *see also id.* at 376 ("In a unitary enterprise, compensation, depreciation, and profit are not independent variables to be adjusted without reference to each other.").

as a whole and found that it satisfied constitutional requirements.[173]

The Court has, outside the tax context, similarly warned against judging constitutional issues in piecemeal fashion.[174] *Gonzales v. Raich* involved a Commerce Clause challenge to the classification of marijuana as a Schedule I drug under the Controlled Substances Act.[175] The plaintiffs argued that the Schedule I classification exceeded congressional authority.[176] Notably, the plaintiffs did not claim that the CSA itself violated the Constitution.[177] Nor did the plaintiffs try to set aside the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which the CSA was a part. They had made an isolated challenge.[178]

The Court declined to examine marijuana's Schedule I classification in isolation. That classification "was merely one of many essential parts of a larger regulation of economic activity," and "the regulatory scheme could be undercut" if it faced isolated analysis.[179] *Raich* thus differed from a prior case, *Lopez v. United States*, where the Court struck down a gun statute that was *not* an "essential part of a larger regulation of economic activity."[180] With these principles in mind, the Court in *Raich* upheld marijuana's Schedule I classification.[181]

One may fairly draw substantive distinctions between the federal income tax laws and the laws at issue in *Trinova*, *Raich*, and *Lopez*. But the holistic principles applied in the three cases translate comfortably to the federal income tax context. Federal tax statutes that define specific items of income or deduction do not operate alone. They form part of an integrated regime that establishes taxable income, generally guided by an ability-to-pay

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[173] *Id.* at 387.

[174] *See* Gonzales v. Raich, 545 U.S. 1, 32–33 (2005) (opting to determine the case on general commerce grounds rather than on the specific question of drug classification).

[175] *Id.* at 14–15. Schedule I classification carries significant consequences. *See id.* at 14. ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense . . . .").

[176] *Id.* at 15.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 24–25 (cleaned up).

[180] *Id.* (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

[181] *Id.* at 33.

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principle.[182] Thus, the holistic approach, not the piecemeal approach, provides the best way to evaluate whether Congress has established an income tax under the Sixteenth Amendment.

C. EXCISES

Under the Taxing Clause, Congress can "lay and collect Taxes, Duties, Imposts and Excises."[183] As shown in Part II, when the Court analyzes whether a federal statute imposes "Taxes," the Court adopts a piecemeal approach. That approach has had unfortunate spillover effects within the Taxing Clause. Specifically, the piecemeal approach to "Taxes" has led to convoluted doctrine over Congress's power to impose "Excises." A shift to the holistic approach would help remedy this.

The Court's muddled decision in *Flint v. Stone Tracy* illustrates the problem.[184] In *Stone Tracy*, the Court addressed whether the unapportioned 1909 corporate income tax law complied with the Taxing Clause.[185] Under the 1909 law, a corporation faced "a special excise . . . with respect to the carrying on or doing business by such corporation" equal to 1% of its "entire net income."[186] The challengers in *Stone Tracy* argued that Congress should have apportioned this tax.[187] The *Income Tax Cases* had held that a tax on income from property was a direct tax.[188] The broad 1909 law reached income from property as well as other types of income.[189]

The Court rejected the challengers' claim. The 1909 law, the Court concluded, did not impose an income tax on property.[190] Instead, it imposed an excise on "the particular privilege of doing

[182] *See, e.g.*, District of Columbia v. Murphy, 314 U.S. 441, 454 (1941) (noting "the usual philosophy of income tax as one based on ability to pay").

[183] U.S. CONST. art. I, § 8, cl. 1.

[184] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[185] *See* Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112 (taxing corporate income).

[186] *Id.*

[187] *Stone Tracy*, 220 U.S. at 147.

[188] *See id.* at 148 (summarizing the Court's holding in the *Income Tax Cases*).

[189] *See id.* at 144 (reporting the tax would reach a corporation's income "from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed" (quoting § 38, 36 Stat. at 112–13)).

[190] *Id.* at 150.

business in a corporate capacity."[191] Thus, no apportionment requirement applied. As an excise, the 1909 law faced only the uniformity requirement.

The challengers nonetheless maintained that the 1909 law impermissibly reached a corporation's "entire net income."[192] That broad language meant that the law reached, among other things, income from investment securities and municipal bonds.[193] And, under the *Income Tax Cases*, the challengers argued, Congress could not tax the income from those items.[194] Any income tax on investment securities faced the apportionment requirement, and any income tax on municipal bonds violated federalism principles.[195]

The Court found no problem with the breadth of the 1909 law. Congress enjoyed "the most ample authority . . . to select some and omit other possible subjects of taxation."[196] The Court acknowledged that under the *Income Tax Cases*, Congress could not subject investment securities to an unapportioned income tax.[197] Also, the Court acknowledged that under federalism principles, Congress could not tax municipal bonds.[198] But the Court found that the challengers confused the issues.[199] The 1909 law did not impose an income tax on investment securities and municipal bonds. Instead, it imposed an excise on using the corporate form.[200] Congress had

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[191] *Id.* at 151.

[192] *Id.* at 144.

[193] *See id.* at 162 (discussing the types of income impacted by the 1909 law).

[194] *See id.* at 162 (noting contention that "some of the corporations, notably insurance companies, have large investments in municipal bonds and other non-taxable securities, and in real estate and personal property not used in the business," such that "the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation").

[195] In *South Carolina v. Baker*, 485 U.S. 505, 524 (1988), the Court expressly overrode *Pollock*'s conclusion that federal taxation of interest on municipal bonds would violate state sovereign immunity principles.

[196] *Stone Tracy*, 220 U.S. at 158.

[197] *Id.* at 162.

[198] *See id.* (discussing companies investing in "municipal bonds and other non-taxable securities").

[199] *Id.*

[200] *See id.* (explaining that the 1909 act is a "tax upon the privilege" of using the corporate form).

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simply used income as the *measure* of the excise.[201] Thus, Congress had enacted a valid, uniform excise rather than an invalid, unapportioned tax.

One should pause here and consider whether *Stone Tracy* makes sense.[202] The 1909 law expressly reached the taxpayer's "entire net income."[203] Thus, the law unquestionably reached income from property. Under the *Income Tax Cases*, the law seemingly required apportionment. Yet the Court upheld the law because the corporation's income merely reflected the "measure" of a valid excise.[204] This reasoning, if casually extended, could have strange consequences. Congress could impose an unapportioned tax on corporate property just by calling it an excise on the privilege of incorporation. Or Congress could impose an unapportioned head tax[205] by calling it an excise upon the privileges of U.S. citizenship or residency.[206] A broad theory of "excise" eviscerates the direct tax limitation.

[201] *See id.* ("[The challengers'] argument confuses the measure of the tax upon the privilege, with direct taxation of the state or thing taxed."). In enforcing the 1909 law, the Treasury Department had sought to treat unrealized gains as part of a taxpayer's net income, where the taxpayer reported those gains on its books. *See* Baldwin Locomotive Works v. McCoach, 221 F. 59, 60 (3d Cir. 1915) (rejecting the Treasury Department's position and concluding that appreciation shown on internal books "can hardly be said to be income, or even gain, in any proper sense").

[202] *See* Charles L.B. Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation*, 47 HARV. L. REV. 628, 647 (1934) ("The rigorous conceptualism of the *Pollock* case was somewhat relaxed in *Flint v. Stone Tracy Co*., where a spurious conception—the distinction between the subject and measure of taxation—was relied upon to overcome the conception of the income tax as a direct tax.").

[203] Act of Aug. 5, 1909, ch. 6, §38, 36 Stat. 11, 112.

[204] *Stone Tracy*, 220 U.S. at 162.

[205] If a capitation tax applied to all persons, then the apportionment requirement would be meaningless. That is, the tax owed from people in each state would correspond to the state's share of the population. However, a capitation might be imposed on a class of persons different from those counted in the census. In those circumstances, the apportionment requirement would impose a meaningful limitation. For example, the apportionment requirement would apply to a capitation tax on all adults, because the census-based apportionment formula would include both adults and children. For a discussion of policy issues raised by capitation taxes, see generally Jeremy Bearer-Friend, *Race-Based Tax Weapons*, 14 U.C. IRVINE L. REV. (forthcoming 2023).

[206] *But cf.* Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925) ("Congress cannot make a thing income which is not so in fact.").

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These strange implications could have been avoided if the *Income Tax Cases* had used the holistic approach to uphold the 1894 law. Then, the Court in *Stone Tracy* would not have needed to stretch the excise power.[207] Even if the Court in *Stone Tracy* believed that Congress could not tax municipal bonds, the 1909 law, under a holistic approach, would not establish a municipal bond tax. The 1909 law established a broad base, reaching a corporation's "entire net income." [208] Viewed holistically, the 1909 law imposed an indirect tax, not an unapportioned and thus unconstitutional direct tax.[209]

Of course, one can understand why the Court in *Stone Tracy* held the way it did. The *Income Tax Cases* plainly adopted a piecemeal approach to whether Congress had imposed a direct tax. If the Court in *Stone Tracy* had been faithful to the *Income Tax Cases*, the 1909 law would have been struck down as an unapportioned direct tax.[210] But by calling the law an excise rather than a tax, the Court avoided that precedent.

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[207] *Stone Tracy* would be entirely defensible if the Court demanded a firm link between the nature of the activity excised and the measure of the tax. However, *Stone Tracy* does not contain any strict language, instead providing considerable deference to Congress in determining the measure of the tax. *See* 220 U.S. at 167 ("We must not forget that the right to select the measure and objects of taxation devolves upon the Congress and not upon the courts . . . ."). In a more recent case, the Court indicated that the base of a tax should determine its characterization. *See* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." (quoting Erby Jenkins, *State Taxation of Interstate Commerce*, 27 TENN. L. REV. 239, 242 (1960))).

[208] *See supra* note 185–186 and accompanying text.

[209] This conclusion rests on the existence of an "indirect tax" category under the Taxing Clause. *See supra* notes 37–40 and accompanying text. The Court has not formally identified that category, instead relying on broad interpretations of "excise" or "duty." *See supra* note 59. If the fifth "indirect tax" category does not exist, then the levies at issue in the *Income Tax Cases* and *Stone Tracy* could reasonably be classified as direct taxes. *See* Jensen *supra* note 46, at 813 ("In *Pollock*, we have a Supreme Court decision to the effect that a tax on income from property is a tax on the property itself, and thus a direct tax—a defensible result.").

[210] *See* Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do with It?*, 39 SW. L.J. 869, 917 n.288 (1985) ("Professor Bickel is in accord with many contemporary writers who saw no difference between the corporate tax upheld in *Stone Tracy* and the income tax act held unconstitutional in *Pollock*." (citing Alexander Bickel, *The Judiciary and Responsible Government 1910-21*, *Part One*, *in* 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 247 (1984))).

If not for the Sixteenth Amendment, *Stone Tracy*'s approach might have led Congress to press or exceed its excise power. But because of that amendment, Congress did not need to do so. Rather than stretch the excise power, the government could rely on its power to tax incomes without apportionment. In this sense, the piecemeal approach imposed only limited damage on "excise" jurisprudence.

Nonetheless, a relatively recent case shows how the piecemeal approach continues to create confusion over the excise power. In *Murphy v. IRS*, the taxpayer received a damages award for emotional distress that she had suffered.[211] Though Section 104(a)(2) of the tax code excludes damages received for physical distress, no provision expressly excludes damages received for emotional distress.[212] The taxpayer nonetheless maintained that her damages award should not face taxation.[213] She claimed that by taxing her award, Congress had gone beyond the "taxes on incomes" described by the Sixteenth Amendment.[214]

Initially, the D.C. Circuit agreed with that claim.[215] The court adopted a piecemeal approach and asked whether the taxpayer's award fit within general definitions of income.[216] The court concluded that the award did not. The award substituted for emotional well-being, and emotional well-being itself was not income.[217] Thus, an award received in lieu of emotional well-being could not so qualify. In other words, Congress could not "make a thing income which is not so in fact."[218] The Sixteenth Amendment did not permit the tax here, and the court struck down Section

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[211] Murphy v. IRS (*Murphy I*), 460 F.3d 79, 80 (D.C. Cir. 2006), *rev'd on reh'g*, 493 F.3d 170 (D.C. Cir. 2007).

[212] *See* I.R.C. § 104(a) (listing types of recoveries excluded from gross income).

[213] *See Murphy I*, 460 F.3d at 80–81 (summarizing the plaintiff's arguments for why her damages award is not income).

[214] Murphy v. IRS (*Murphy II*), 493 F.3d 170, 172 (D.C. Cir. 2007).

[215] *See Murphy I*, 460 F.3d at 81 ("We agree . . . that § 104(a)(2) is unconstitutional as applied to her award because compensation for a non-physical personal injury is not income under the Sixteenth Amendment if, as here, it is unrelated to lost wages or earnings.").

[216] *See id.* at 88 ("[T]he question is whether the compensation she received for her injuries is income.").

[217] *See id.* ("The emotional well-being and good reputation she enjoyed before they were diminished by her former employer were not taxable as income.").

[218] *Id.* at 87 (quoting Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925)).

104(a)(2) for its failure to exclude damages received for emotional distress.[219]

Murphy prompted fierce backlash.[220] Commentators believed that the case severely threatened congressional authority to tax.[221] If awards for emotional distress could not face taxation, then many other items might enjoy similar constitutional immunity. Also, commentators pointed out, the court had wrongly believed that Section 104(a)(2) included emotional distress awards in income.[222] That provision lists items *excluded* from income. Given these problems, the D.C. Circuit sua sponte vacated its judgment and reheard the case.[223]

In its new opinion, the D.C. Circuit rejected the taxpayer's constitutional challenge.[224] To find for the government, the court looked to the tax code's catchall provision, Section 61. The court concluded that this statute's reference to "income" need not follow Sixteenth Amendment principles.[225] That is, an emotional distress award could be income under Section 61, even if it were not income under the Sixteenth Amendment. Congress's ability to tax the award did not necessarily depend on that amendment.[226]

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[219] *See id.* at 92 ("[W]e hold § 104(a)(2) unconstitutional insofar as it permits the taxation of an award of damages for mental distress and loss of reputation.").

[220] *See* Erik M. Jensen, Murphy v. Internal Revenue Service*, the Meaning of "Income," and Sky-Is-Falling Tax Commentary*, 60 CASE W. RSRV. L. REV. 751, 753–55 (2010) (describing various negative reactions to the *Murphy* decision).

[221] *See id.* at 753 ("If an emotional distress recovery were not income then logically, it was argued, wages were not either. Remove compensation for services from the income-tax base, and the base would be gutted.").

[222] *See, e.g.*, Joseph M. Dodge, Murphy *and the Sixteenth Amendment in Relation to the Taxation of Non-Excludable Personal Injury Awards*, 8 FLA. TAX REV. 369, 373 (2007) ("Section 104(a)(2) . . . merely excludes specified recoveries from gross income. The panel seemed to believe that the failure of the exclusion to apply to the facts automatically resulted in inclusion.").

[223] *See* Murphy v. IRS, No. 05-5139, 2006 WL 4005276, at *1 (vacating the previous judgment and scheduling the case for further oral argument).

[224] *See Murphy II*, 493 F.3d 170, 171 (2007) ("We reject Murphy's argument in all aspects.").

[225] *See id.* at 178–79 ("Although Murphy and the Government focus primarily upon whether Murphy's award falls within the definition of income first used in *Glenshaw Glass*, coming within that definition is not the only way in which § 61(a) could be held to encompass her award.").

[226] *See id.* at 179 ("[Congress] can *label* a thing income and tax it, so long as it acts within its constitutional authority, which includes not only the Sixteenth Amendment but also Article I, Sections 8 and 9.").

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The court concluded that the excise power authorized the tax on Murphy's award.[227] Excises were properly imposed on the "use of property, a privilege, an activity, or a transaction."[228] In *Nicol v. Ames*, the Supreme Court had upheld a tax imposed on the sale of grain through a commodities exchange,[229] and the D.C. Circuit believed that that case applied here.[230] Like the taxpayer in *Nicol*, Murphy had enjoyed a "privilege"; she had used "the legal system" to secure her award.[231] While *Nicol* dealt with commercial exchanges rather than courts, "that hardly seem[ed] a significant distinction."[232] Thus, the court held for the government.

As with *Stone Tracy*, one should pause and ask whether the D.C. Circuit opinion makes sense. The Supreme Court had previously described the income tax as an exercise of Congress's authority under the Sixteenth Amendment.[233] Yet the D.C. Circuit concluded that Section 61 went beyond the "taxes on incomes" described by that amendment.[234] Then, the D.C. Circuit found that Section 61 established an Excise under the Taxing Clause.[235] And, in reaching that conclusion, the D.C. Circuit stated that Congress had imposed an excise upon the "privilege" of using the legal system to obtain damages awards.[236]

The D.C. Circuit's excise theory suffers from serious problems. If one searched for evidence that Congress wanted to excise the use of courts, she would search in vain. Additionally, the D.C. Circuit's excise theory becomes largely implausible when one considers the

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[227] *See id.* at 186 ("[T]he tax upon the award is an excise and not a direct tax subject to the apportionment requirement of Article I, Section 9 of the Constitution.").

[228] *Id.* at 184.

[229] *See* Nicol v. Ames, 173 U.S. 509, 524 (1899) (refusing to invalidate the tax).

[230] *See Murphy II*, 493 F.3d at 186 (highlighting similarities between the case at hand and the tax discussed in *Nicol*).

[231] *Id.*

[232] *Id.*

[233] *See* Eisner v. Macomber, 252 U.S. 189, 203 (1920) (finding that if a dividend was not income under the income tax laws, it could not be "brought within the meaning of 'incomes' in the Sixteenth Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the amendment").

[234] *See Murphy II*, 493 F.3d at 173 (concluding that award is within congressional power to tax but falls outside "income" as contemplated in the Sixteenth Amendment).

[235] *See id.* at 186 ("The tax upon the award is an excise and not a direct tax subject to the apportionment requirement of Article I, Section 9 of the Constitution.").

[236] *Id.*

structure of the statutory income tax. Under that tax, the taxpayer aggregates numerous items to determine gross income.[237] Then, the taxpayer applies deductions against her gross income.[238] From there, Section 1 taxes the result (taxable income).[239] This structure shows that Congress has not imposed an excise on any specific activity or transaction. An item of income, whether it relates to litigation awards or something else, faces no tax on its own. A taxpayer pays tax only if her aggregated income items exceed her deductions.[240] Thus, a taxpayer with a $100,000 damages award will pay no taxes if she has deductions that exceed that amount. Given this regime, it makes far more sense to say that Congress established a single income tax rather than an income tax joined with endless, separate excises on different items.

If the D.C. Circuit applied a holistic approach, it could have easily avoided its awkward, hybrid analysis. An emotional distress award, by itself, might or might not qualify as income. Yet through the income tax regime, Congress has not specifically taxed emotional distress awards. It has, through Section 1, taxed a broad base.[241] That broad base, "taxable income," primarily reaches items that follow income principles, even if a few specific components deviate from those principles.[242]

Of course, given cases like *Macomber* and *Stone Tracy*, one can understand why the D.C. Circuit adopted a piecemeal approach and examined the damages award in a vacuum.[243] The fault here lies with the Supreme Court, not with the lower courts. But going forward, the Supreme Court should recognize the judicial contortions that have followed from its piecemeal approach. A shift to a holistic approach would help ensure sound doctrinal developments within the tax law.

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[237] *See* I.R.C. § 61(a) (defining income); *id.* §§ 71–140 (defining items specifically included in or excluded from gross income).

[238] *See id.* §§ 63(a)–(b) (providing formula for calculating deductions).

[239] *See id.* § 63(a) (defining "taxable income" as gross income minus deductions).

[240] *Id.*

[241] *Id.* § 1.

[242] *See supra* sections III.A.*1–2*.

[243] *See Murphy II*, 493 F.3d at 181–86 (using a piecemeal analysis).

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D. MANIPULABILITY AND WORKABILITY

The holistic approach renders Sixteenth Amendment challenges to the income tax fairly weak. To defend against a challenge, the government would only need to show that the income tax primarily reaches realized income. A claim that an isolated provision violated the realization requirement would not establish a constitutional violation.

This substantial congressional authority may raise concerns over manipulability and workability. The remainder of this section addresses those concerns.

1. Congressional Manipulability. If Congress faces a low bar for compliance with the Sixteenth Amendment, then maybe the legislature can manipulate the tax laws for dubious ends. A standalone tax that violated the realization requirement might survive if it were instead integrated into the income tax system.[244] The holistic approach, the concern might go, allows the tax code to sanitize dubious policies.

Suppose, for example, a new code provision says that taxpayers will not recognize income when the values of their homes increase. Suppose further that the provision creates an exception: taxpayers of a specified race must recognize gross income for those increases. Under the holistic approach, a Sixteenth Amendment challenge here would likely fail. Even with the execrable inclusion rule, Section 1 would primarily reach realized income.

The holistic approach thus seems to allow for abuse. But luckily, other constitutional provisions can offer protections that the Sixteenth Amendment does not. If a minority taxpayer faces a tax increase under the hypothetical provision above, she would have an easy claim that Congress violated the Equal Protection Clause.[245]

[244] If Congress enacted a separate tax that reached only unrealized gains, then that tax would go beyond the Sixteenth Amendment under the holistic approach. The holistic approach examines what the base of a tax is and asks if it primarily reaches realized or unrealized income. Here, by assumption, the entire base would relate to unrealized gains, and the Sixteenth Amendment could not support the tax. Support for the tax, if any, would have to come from the Taxing Clause.

[245] *See* U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall . . . deny to any person . . . the equal protection of the laws"). Through the Due Process Clause, the equal protection principles of the Fourteenth Amendment have been incorporated against the federal government. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

The holistic approach relates to the threshold questions about congressional taxation authority under Article I and the Sixteenth Amendment. It does not demand holistic analysis under the individual rights provisions of the Constitution.[246] Those provisions, by focusing on the rights of individuals, contemplate analysis different from whether Congress has generally imposed "taxes on incomes."[247]

For example, the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[248] It thus contemplates an inquiry into how a law affects a specific person. By contrast, Article I and the Sixteenth Amendment do not speak in piecemeal fashion. They do *not* announce that "a person shall face direct taxation only if the tax relates to his own income." Thus, while the holistic approach to the taxing power permits great congressional latitude, that latitude will not extend to the individual rights context.

Also, the holistic approach contemplates some inherent limits on Congress's authority to sanitize an execrable provision by placing it next to unobjectionable ones. The holistic approach requires that a court examine each government levy on a standalone basis. The tax code encompasses numerous levies aside from the income tax, such

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[246] A narrow approach may also be justified when applying other constitutional principles. In *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), the Court applied federalism principles to the 1864 income tax law and its successors. That law's relevant catchall provision described various items of income subject to taxation, including income from "any profession, trade, employment or vocation." Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281. The Court did not ask whether the catchall provision, or even just the quoted language about professions, generally violated federalism principles. Instead, it examined whether federalism principles prevented income taxation of the plaintiff, a state judicial officer. The Court concluded that they did. *See Day*, 78 U.S. (11 Wall.) at 127–28 (holding that state "reserved powers" invalidated the tax). In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the Court largely undermined *Day*, though not by questioning its surgical approach to federalism questions. Instead, it distinguished *Day* on its facts and otherwise found that federalism principles allowed for federal income taxation of state employees. *Id.* at 424.

[247] For example, the hypothetical provision posed here would still be subject to strict scrutiny under Equal Protection Clause analysis. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever . . . government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.").

[248] U.S. CONST. amend. V.

as the stock buyback tax,[249] the gun transfer tax,[250] the air transportation tax,[251] and so on. When constitutional questions arise for these, each separate levy must be traced to its constitutional authority and analyzed appropriately.[252] Congress cannot defend a new tax by casually claiming that the tax code, on the whole, complies with the Constitution. The holistic approach contemplates analysis for each *tax*, not for the entire tax *code*.

Of course, these protections will not prevent all bad tax laws. But that should be understandable. Congress enjoys wide authority to pass many laws, including bad ones.[253] The political process remains the key protection against dubious enactments.[254] The holistic approach advanced here relates to the narrow circumstances when an income tax statute raises tensions with the Constitution. In that context, the holistic approach will not lend itself to manipulation when courts respect all constitutional protections and separately analyze each government levy.

2. Workability. The holistic approach calls for courts to examine whether the income tax primarily reaches realized income. This may seem like a relatively difficult task. The piecemeal approach merely requires one-provision analysis. Maybe courts should stick with that approach for workability reasons.

Doing so would be a mistake. The holistic approach will sometimes present complex questions, but that is nothing new. In

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[249] I.R.C. § 4501.

[250] *Id.* § 5811(a).

[251] *Id.* § 4261.

[252] In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 563–64 (2012), the Court properly analyzed Section 5000A on a standalone basis. That provision, as it then existed, established a tax obligation under a specifically prescribed schedule. *See id.* at 561–64 (describing the tax). The Section 5000A tax—denominated a "penalty" for statutory purposes—is not integrated with income tax provisions in such a way that would call for it to be analyzed with regard to those provisions.

[253] *See* THE FEDERALIST NO. 73, at 361 (Alexander Hamilton) (Lawrence Goldman, ed., 2008) (discussing the President's veto power to "prevent[] bad laws" passed by Congress); *see also* Jennifer Senior, *In Conversation: Antonin Scalia*, New York (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/ [https://perma.cc/46ND-RA2L] ("A lot of stuff that's stupid is not unconstitutional." (quoting Justice Scalia)).

[254] *See, e.g.*, THE FEDERALIST NO. 73, supra note 253, at 360 (Alexander Hamilton) (promoting interbranch checks as "security against the enaction of improper laws").

many contexts, courts must examine statutory regimes and determine whether they fit within the constitutional structure.[255]

Some might nonetheless believe that questions over "income" present unique constitutional difficulties. Those concerns can be addressed by seeing how analogous questions have been addressed in the international tax context. The authorities in that area show that a holistic approach can easily apply to income determinations.

Under Section 901, Congress provides taxpayers with tax credits for income taxes paid to a foreign country.[256] This foreign income tax credit prevents double taxation.[257] If the United States and a foreign country each fully taxed a taxpayer's income, she might have only a few dollars left. Section 901 helps prevent this untoward result.

Because Section 901 concerns itself with double taxation, the statute grants a tax credit for only foreign *income* taxes.[258] After all, if a taxpayer pays income taxes to the United States but real property taxes to another country, she has not faced double taxation. Instead, two different countries have taxed two different things.

To determine whether a taxpayer has paid a foreign income tax, the Supreme Court has applied a holistic approach. That is, whether a taxpayer has paid an income tax to a foreign country does not turn on an item-by-item analysis. Instead, the foreign government levy must be evaluated for its "predominant character."[259] As Treasury

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[255] For a table of all laws declared unconstitutional, see *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/resources/unconstitutional-laws/ [https://perma.cc/3X3B-2RUB].

[256] *See* I.R.C. § 901 (crediting the amount of any income, war profits, and excess profits taxes paid or accrued to any foreign country).

[257] *See* JOINT COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 at 861 (Comm. Print 1986) ("The purpose of the foreign tax credit is to reduce international double taxation.").

[258] I.R.C. § 901.

[259] *See* PPL Corp. v. Comm'r, 569 U.S. 329, 334 (2013) (noting that under then-existing Treasury regulations, a foreign tax could be an income tax if "[t]he predominant character of that tax is that of an income tax in the U.S. sense," and that the regulatory language "codifies longstanding doctrine dating back to *Biddle v. Commissioner*, 302 U.S. 573, 578–79 (1938)" (citing 26 C.F.R. § 1.901-2(a)(1) (1992))). Recently, the Treasury Department withdrew the "predominant character" test from the Section 901 regulations, originally promulgated in

Regulations clarify, just as U.S. income tax laws start with "gross income," the foreign government levy must start with "gross receipts."[260] Just as the U.S. income tax system allows for cost recovery, the foreign government levy must allow for cost recovery.[261] And the foreign government levy must generally apply to realization events, just as the U.S. income tax law does.[262]

Notably, a foreign government levy may qualify as an income tax even if it does not perfectly satisfy these requirements. For example, income might arise under the foreign government levy even without a realization event.[263] Treasury regulations state that the foreign government levy may still qualify as an income tax if *most* income arises from realization events.[264] So, for example, if a foreign government levy included pro rata stock dividends in gross income, like those protected from taxation in *Macomber*, that deviation from

1983. T.D. 9959, 2022-3 I.R.B. 328, 346–48 (Jan. 18, 2022); *see also* BITTKER & LOKKEN, *supra* note 28, § 72.4.1, at 2 ("The Treasury substantially amended the 1983 regulations in 2022, dropping the terms 'predominant character' and 'U.S. sense' but retaining the essence of the 1983 regulations."). The validity and implications of that withdrawal remain to be determined. This Article uses the Section 901 regulations to show that a holistic approach to income is workable, and the analysis here thus does not turn on debates over changes to those regulations. For further discussion, see Bret Wells, *The Foreign Tax Credit Redux*, 26 CHAPMAN L. REV. 159 (2022).

[260] *See* Treas. Reg. § 1.901-2(a)(3) (as amended in 2022) ("A foreign tax is a net income tax only if the foreign tax meets the net gain requirement. . . ."); *id.* § 1.901-2(b)(1) ("A foreign tax satisfies the net gain requirement only if the tax satisfies the realization, gross receipts, cost recovery, and attribution requirements . . . ."); *id.* § 1.901-2(b)(3)(i) ("A foreign tax satisfies the gross receipts requirements if it is imposed on the basis of the amounts [including] actual gross receipts.").

[261] *See id.* § 1.901-2(b)(4)(i)(A) ("A foreign tax satisfies the cost recovery requirement if the base of the tax is computed by reducing gross receipts . . . to permit recovery of the significant costs and expenses . . . .").

[262] *See id.* § 1.901-2(b)(2)(i)(A) ("The foreign tax is imposed upon or after the occurrence of events ('realization events') that result in the realization of income under the income tax provisions of the Internal Revenue Code.").

[263] *See id.* § 1.901-2(b)(2)(i) ("A foreign tax satisfies the realization requirement if it is imposed upon [realization events or pre-realization events] . . . except with respect to one or more specific and defined classes of nonrealization events (such as . . . imputed rental income from a personal residence used by the owner) . . . .").

[264] *See id.* ("[If] the incidence and amounts of gross receipts attributable to . . . nonrealization events is insignificant relative to the incidence and amounts . . . attributable to [realization] events . . . then the foreign tax is treated as meeting the realization requirement . . . .").

U.S. principles would not be fatal. The foreign government levy may still qualify as an income tax under a holistic approach.

The Section 901 regime contemplates analysis similar to the one advanced in this Article. Whether a foreign legislature has established an income tax depends on the entire base, not an item-by-item analysis. And the Section 901 regime has proven largely workable. If U.S. lawyers, courts, and agency officials can determine whether a foreign government levy establishes an income tax within the U.S. sense, then they can determine whether a U.S. law establishes an income tax within the U.S. sense.

They can also determine the tax to which the holistic approach applies. Generally, whenever a law identifies a specific class of taxpayers *and* a specific tax base, a separate tax has arisen. So, Sections 1 and 5000B impose separate taxes because they reach two separate bases (income and indoor tanning services, respectively). And Sections 1 and 11 impose separate taxes because, though they each apply to income, they reach separate classes of taxpayers (individuals and corporations).

This "separate tax" framework should prove workable. After all, this framework already applies under Section 901.[265] If we can determine who and what countless foreign jurisdictions have taxed, we can determine who and what Congress has taxed.

IV. BILLIONAIRE INCOME TAX PROPOSALS

This Part examines how the holistic approach would apply to three different billionaire tax proposals: Senator Elizabeth Warren's "Ultra-Millionaire Tax Act," the Biden Administration's "Billionaire Minimum Income Tax," and Senator Ron Wyden's "Billionaire Income Tax." The Warren proposal does not rely on the income tax system and thus raises interpretive issues different from the other two. However, the Warren proposal likely motivated the income-based proposals and thus merits brief discussion.[266]

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[265] *See* Treas. Reg. § 1.901-2(d)(1) (as amended in 2022) (establishing separate levy method for assessment of a foreign tax system).

[266] *See* Reuven S. Avi-Yonah & David Gamage, *Billionaire Mark-to-Market Reforms: Response to Susswein and Brown*, 176 TAX NOTES FED. 555, 555 n.1 (2022) ("The recent rise in prominence of mark-to-market income tax reforms targeted at billionaires and

This Part concludes that only Senator Wyden's plan would pass constitutional muster. Though the other two plans should fail, this hardly implies an unduly restrictive view of legislative power. Nothing about the holistic approach or even the piecemeal approach meaningfully limits Congress's power to tax the ultrawealthy.[267] Congress can buttress the wealth transfer tax system by imposing higher rates;[268] withdrawing generous wealth transfer tax deductions; imposing higher rates in the income tax system; eliminating the stepped-up basis rules;[269] or eliminating capital gains preferences. These approaches plainly satisfy the Constitution and do not present realization concerns. The billionaire tax proposals discussed below probably exist because Congress lacks the fortitude to adopt the most straightforward measures to tax the ultrawealthy.

A. WARREN'S ULTRA-MILLIONAIRE TAX ACT

Under Senator Warren's proposal,[270] a 2% annual tax would apply on a taxpayer's wealth over $50 million.[271] A 6% tax would

megamillionaires comes in part because these are often seen as less politically or constitutionally ambitious compared with extreme wealth tax reform proposals, such as those offered by Sens. Elizabeth Warren, D-Mass., and Bernie Sanders, I-Vt.").

[267] *See* Daniel Hemel, *A Wealth Tax is a Good Idea—If We Had a Different Supreme Court*, WASH. POST (Oct. 26, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/10/26/wealth-taxconstitution-supreme-court/ [https://perma.cc/J2K5-BULK] (stating that, instead of a wealth tax, legislators can "choose from a menu of constitutionally secure options, including raising rates on high-income earners and corporations, ending tax-free stepped-up basis at death and closing loopholes in the partnership and trust tax laws").

[268] The wealth transfer tax system qualifies as an excise under the Constitution. The excise is paid for the privilege of transferring one's property. Thus, it is not a tax *on* property subject to the apportionment requirement. *See* Scholey v. Rew, 90 U.S. (23 Wall.) 331, 346 (1875) (holding that a succession tax on devised real estate is not a direct tax but an excise which is constitutionally permissible).

[269] Under Section 1014, a taxpayer receives property from a decedent with a basis equal to its fair market value. I.R.C. § 1014. This means that any appreciation in the asset that occurred during the life of the decedent will escape income taxation. *See* Paul B. Stephan III, *A Comment on Transfer Tax Reform*, 72 VA. L. REV. 1471, 1483 (1986) (explaining that Section 1014 "amounts to a complete forgiveness of income tax on most asset appreciation held by persons wealthy enough to leave their capital untouched").

[270] Ultra-Millionaire Tax Act of 2021, S. 510, 117th Cong. (as introduced, Mar. 1, 2021).

[271] *Id.* § 2901(b)(1)(A).

apply on wealth over $1 billion.[272] These taxes would not reach income.[273] Instead, they would expressly apply to the taxpayer's property.[274]

Under existing doctrine, the Warren proposal would violate the Constitution.[275] In *National Federation of Independent Business v. Sebelius*, the Court explained that direct taxes include capitation taxes, real estate taxes, and personal property taxes.[276] Those taxes thus face the apportionment requirement. But the Warren proposal, which reaches both real and personal property, applies without apportionment. Absent a change in law, the Court would likely strike it down.[277]

The holistic approach of this Article does not affect that analysis. The Warren proposal does not incorporate the income tax system. Instead, the Warren proposal contemplates a new tax and therefore requires standalone examination. On its own, the Warren proposal establishes a property tax that violates the apportionment requirement.[278]

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[272] *Id.* § 2901(b)(2)(A)(ii).

[273] *See id.* § 2901(a) ("[A] tax is hereby imposed on the net value of all taxable assets of the taxpayer on the last day of any calendar year.").

[274] *See id.* ("'[N]et value of all taxable assets' means, as of any date, the value of all property of the taxpayer . . . real or personal, tangible or intangible . . . .").

[275] *See, e.g.*, Jensen, *supra* note 32, at 397 ("There's no doubt that a tax on wealth was originally understood to be a direct tax. If an unapportioned tax on wealth would be constitutional today, it has to be because of the Sixteenth Amendment." (footnote omitted)).

[276] *See* Nat'l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) (stating that direct taxes "include taxes on personal property and income from personal property").

[277] Scholars who propose unapportioned wealth taxes typically acknowledge that, for their proposals to survive, prior Court precedents must be undercut or at least severely limited. *See, e.g.*, Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 137 (2018) (arguing that existing social inequalities "strengthen the imperative today to remove *Pollock*'s remaining impediments," and that the "wealth tax debate should proceed on its merits, unencumbered by a pernicious legacy of constitutional missteps"); Ackerman, *supra* note 116, at 58 (arguing that the Court should "dispatch *Eisner v. Macomber*," and if it does so, it will have "built a rock solid foundation for a comprehensive tax on wealth.").

[278] For a contrary view, see Ari Glogower, David Gamage & Kitty Richards, Why a Federal Wealth Tax is Constitutional, ROOSEVELT INST. 17 (Feb. 21, 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/02/RI_Wealth-Tax-Constitutionality-Brief-202102-2.pdf [https://perma.cc/NDV8-CACQ] ("Congress can exercise its broad taxing power under the Constitution to implement an unapportioned federal wealth tax.").

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B. BIDEN'S BILLIONAIRE MINIMUM INCOME TAX

The Biden Administration has proposed a minimum tax on massive wealth.[279] The proposal, called the Billionaire Minimum Income Tax (BMIT), expands the tax base for ultrawealthy households.[280] Those households will face taxation on the unrealized appreciation in their assets.[281]

The Biden Administration has established broad principles for the BMIT.[282] Two congressmen have built on those principles and have introduced legislation that would implement the BMIT.[283] The BMIT proposal would add Section 1481 to the tax code. That section would impose, "in addition to any other tax,"[284] a tax that would ensure that the ultrawealthy face a 20% tax rate.[285] The BMIT would expressly include "net unrealized gain"[286] in its base. Under a piecemeal approach, that statute could not satisfy the Sixteenth Amendment. By its plain terms, Section 1481 abandons the realization requirement.

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[279] Press Release, White House, President's Budget Rewards Work, Not Wealth New Billionaire Minimum Income Tax, (Mar. 28, 2022), https://www.whitehouse.gov/omb/briefing-room/2022/03/28/presidents-budget-rewards-work-not-wealth-with-new-billionaire-minimum-income-tax/ [https://perma.cc/M89V-XUEF].

[280] *Id.*

[281] *Id.*

[282] *See* U.S. DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2023 REVENUE PROPOSALS 34–36 (2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf [https://perma.cc/2KVN-XGTG] (detailing the BMIT).

[283] *See* Press Release, Rep. Steve Cohen, Congressmen Cohen and Beyer Introduce Billionaire Minimum Income Tax Act (Jul. 28, 2022) https://cohen.house.gov/media-center/press-releases/congressmen-cohen-and-beyer-introduce-billionaire-minimum-income-tax-act [https://perma.cc/5WJ8-RA7L] (announcing the proposed legislation).

[284] Billionaire Minimum Income Tax Act, H.R. 8558, 117th Cong. § 1481(a).

[285] *Id*. More technically, the BMIT applies only to "applicable taxpayer[s]." *Id.* The term "applicable taxpayer" generally reaches those with a net worth of more than $100 million. *Id.*

[286] *See id.* § 1481(e) (defining net unrealized gain using a deemed sale approach). The proposal also establishes a complex regime under which tax payments on some unrealized gains may be deferred. *See id.* § 1481(f) (establishing "Unliquidated Tax Reserve Account rules"). An exploration of that regime is unnecessary to understand the constitutional issues presented in this Article. For the academic commentary that motivated the regime, see generally Brian Galle, David Gamage & Darien Shanske, *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 DUKE L.J. 1257 (2023).

To apply the holistic approach, one must address a threshold question about the BMIT's relationship to other laws. That is, if one views the BMIT as part of the general individual income tax laws, then the BMIT should withstand constitutional scrutiny. Those laws primarily reach income within the constitutional sense.

However, the BMIT merits analysis separate from Section 1. The BMIT establishes a separate tax base for a separate group of taxpayers. It thus carries the key attributes of a separate tax.[287] And the BMIT, separately viewed, unconstitutionally taxes unrealized appreciation rather than income.

Arguably, the BMIT would pass constitutional muster if it were drafted as a replacement to the income tax rather than as an addition to it. That is, Congress might establish the BMIT by applying a 20% rate on the "expanded taxable income" of the ultrawealthy.[288] The phrase "expanded taxable income" could be defined as the taxpayer's taxable income under the usual rules,[289] *plus* net unrealized gain. If the BMIT were drafted this way, the relevant question would be whether expanded taxable income reaches income in the constitutional sense.

If one simply counted potential items of income, she would answer "yes." This hypothetical BMIT would reach many items (wages, dividends, interest, and so on) that easily conform to conceptions of income. The addition of a nonconforming item, unrealized appreciation, should not change that result. That is the essence of the holistic approach.

Unfortunately, things are not so simple. The BMIT almost certainly will apply only to "the top one-one hundredth of one

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[287] Employing the same theme, the Section 901 regulations conclude that a foreign country's minimum income tax creates a tax separate from the country's regular income tax. Treas. Reg. § 1.901-2(d)(3)(vi)(B) (as amended in 2022) (providing an example under which a foreign country's minimum tax establishes a levy separate from its regular net income tax, because the base of the minimum tax "is separately computed and not combined as a single taxable base").

[288] A replacement income tax system for the ultrawealthy would probably be more complex than is suggested here. For example, the tax rate would need to be adjusted upwards for ordinary income. Otherwise, the ultrawealthy would face relatively low ordinary income rates. However, the "expanded taxable income" concept suggested here sufficiently illustrates the relevant constitutional issues.

[289] *See* I.R.C. § 63(a) (defining taxable income).

percent" of households.[290] For these taxpayers, unrealized appreciation represents their most significant income item.[291] That is why the BMIT was proposed—to reach the extraordinary amounts of unrealized, untaxed appreciation among the ultrawealthy.

A potential disjunction thus arises between the hypothetical statutory language and its substantive effects. If language alone controls the analysis, then the hypothetical BMIT may satisfy the Sixteenth Amendment, given the breadth of expanded taxable income. However, if substantive effects control the analysis, then even the hypothetical BMIT would fall outside the amendment. It principally reaches unrealized appreciation, not income.

The Court has provided sensible guidance to help address the tension between a tax law's language and its effects. In various cases, the Court has emphasized that when it "pass[es] on the constitutionality of a tax law," it is "concerned only with its practical operation," rather than "the precise form of descriptive words."[292] This "functional approach"[293] even applies in the international tax context.[294]

Under a functional approach, the hypothetical BMIT would probably violate the Constitution.[295] This BMIT might list

[290] Press Release, White House, *supra* note 279.

[291] Given ordinary market fluctuations, the ultrawealthy might, in the future, face substantial depreciation rather than appreciation in their assets. However, the BMIT would apply to built-in gains on property. That is, when the BMIT would go into effect, the ultrawealthy would almost certainly have massive gains to report, even if in later years they might have losses. Thus, one can view the BMIT as applying to unrealized appreciation. *See id*. (allowing a nine-year payment period for taxes on unrealized appreciation that would immediately be due).

[292] Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941) (quoting Lawrence v. State Tax Comm'n, 286 U.S. 276, 280 (1932)), *cited in* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565 (2012).

[293] *See Nat'l Fed'n Indep. Bus.*, 567 U.S. at 565 ("Our cases confirm this functional approach.").

[294] *See* PPL Corp. v. Comm'r, 569 U.S. 329, 331 (2013) (explaining that when the Court examines whether a foreign jurisdiction has taxed income, it takes a "commonsense approach that considers the substantive effect of the tax").

[295] If a tax is not supported by the Sixteenth Amendment, then issues still arise over whether the tax can be supported by the Taxing Clause alone. *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), held that a tax on corporate income, at least, could be supported as an excise.

numerous items that fit within conceptions of income. But the Court would reject "magic words or labels."[296] The BMIT's substantive effects would show that it taxes property, not income.[297] Thus, it would go beyond the authority conferred by the Sixteenth Amendment.

C. WYDEN'S BILLIONAIRE INCOME TAX

Unlike the Warren and Biden proposals, the Billionaire Income Tax proposal would operate within the regular income tax system. That is, the proposal would affect the "taxable income" currently reached by Section 1. The proposal would do so through Section 491 of the tax code.[298] Under that proposed section, ultrawealthy taxpayers[299] would recognize income or loss from liquid assets upon a "taxable event." This rule *seems* to respect realization principles. However, Section 491 defines "taxable event" to include the mere holding of an asset.[300] Through this definition, Section 491 establishes income inclusions without realization.

However, as discussed in section III.C, the reasoning of *Stone Tracy* may be challenged. Additionally, the "excise" label most comfortably fits situations where the government imposes a levy on the exercise of a privilege or on the engagement in an activity. *See supra* note 34. It is doubtful that a taxpayer who simply holds appreciated assets has engaged in an activity subject to excise. Full analysis of that issue goes beyond the scope of this Article.

[296] Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) (quoting Ry. Express Agency, Inc. v. Virginia, 358 U.S. 434, 441 (1959)).

[297] *Cf.* United States v. Munoz-Flores, 495 U.S. 385, 397–400 (1990) (looking at amounts collected under a restitution statute to determine whether the statute should, for constitutional purposes, qualify as a revenue measure).

[298] *See Wyden Unveils Billionaires Income Tax*, U.S. SENATE COMM. ON FIN. (Oct. 27, 2021), https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax [https://perma.cc/26NR-CQ3B] (explaining the tax's function); *see also* U.S. SENATE COMM. ON FIN., ELIMINATION OF DEFERRAL § 491 (2021), https://www.finance.senate.gov/imo/media/doc/Billionaires%20Income%20Tax.pdf [https://perma.cc/6UBB-3F56] [hereinafter Wyden Billionaire Income Tax] (providing draft legislative text).

[299] More technically, the Billionaire Income Tax reaches "applicable taxpayers." The proposal establishes high asset and income thresholds for that classification. *See id.* (defining "applicable taxpayers").

[300] *See id.* § 491(b)(1) ("[T]he term 'taxable event' means . . . the holding of such asset as of the close of any taxable year."). The provision would also treat some nonrecognition events as taxable events. *Id.* § 491(b)(2).

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Challenges to Section 491 might plausibly arise under the Sixteenth Amendment or under nontax constitutional provisions. This section separately considers the two types of challenges.

1. Sixteenth Amendment. If the piecemeal approach applies, Section 491 would violate the Constitution. Section 491 states that income arises without realization. A court would likely dismiss the "taxable event" label as a misnomer. Congress would have established an unapportioned property tax and could not rely on the Sixteenth Amendment to save the statute.

Section 491 has a much stronger chance of survival under the holistic approach, given the statute's apparent integration with the regular income tax system. Section 491 adds a new item to the tax base but does not change or supersede the tax code's operative provision.[301] That is, the ultrawealthy would continue to face taxation under Section 1 just like ordinary taxpayers do. Given this structure, the relevant question would not be whether Section 491 itself violates the realization requirement. Instead, the relevant question would be whether Section 491 has transformed Section 1 into a property tax.

That transformation seems doubtful. Taxable income under Section 1 comprises a broad base and leads to around $2 trillion in tax collections.[302] Putting aside its transition period, the Billionaire Income Tax would lead to around $30 billion annually in tax collections.[303] Viewed holistically and with regard to substantive effects, Section 1 primarily reaches realized income. Thus, even if Section 491 were enacted, Section 1 would remain an income tax.

Nonetheless, there is reason for pause. One could plausibly argue that Section 491 establishes a separate tax, despite its placement

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[301] *See id.* § 491(a)(1)(A) (recognizing gain or loss on certain assets as though sold at market value).

[302] The IRS Data Book does not break down tax collections by code section. Instead, it refers to around $2.3 trillion collected through individual income taxes, whether by withholding or by taxpayer payments. *See* IRS, INTERNAL REVENUE SERVICE DATA BOOK, 2021, at 3 tbl.1 (2022). Presumably most of these collections come from the tax imposed under Section 1 rather than under other sections like Section 55, relating to the alternative minimum tax.

[303] *See*, John Ricco, *Senator Wyden's Billionaires Income Tax: Budgetary Effects*, PENN WHARTON: BUDGET MODEL (Nov. 8, 2021), https://budgetmodel.wharton.upenn.edu/issues/2021/11/8/senator-wyden-billionaire-income-tax-budget [https://perma.cc/TK3A-3PTZ] (estimating $164 billion in revenue raised in the five years after the tax's transition period).

within the existing income tax laws. Section 491, the argument might go, seems just like the BMIT. That is, Section 491 would apply to a separate class of taxpayers and would reach their unrealized appreciation. Section 491 would thus impose an unapportioned property tax, in violation of the Constitution.

This potential line of analysis should be rejected. The placement of Section 491 is not merely cosmetic. Instead, through its placement, Section 491 becomes substantively integrated with the regular income tax system. For example, ultrawealthy persons may offset their Section 491 income with deductions allowed under different tax code provisions.[304] Along the same lines, capital gains and losses that arise under Section 491 would be subject to the generally applicable tax code rules that apply to those items.[305] Most important, Section 491 might reach a specific class of persons, but it does not create a separate tax base. It *adds* an item to the broad base taxed by Section 1.

A mere addition to the tax base does not establish a separate tax, even if that addition applies narrowly. Otherwise, we would unwittingly have an endless number of separate taxes.[306] Section 90, for example, applies only to persons who receive illegal federal irrigation subsidies.[307] Section 107 applies only to ministers of the gospel who receive rental subsidies.[308] Section 139B applies only to volunteer firefighters who receive state benefits.[309] These various provisions do not create separate taxes but instead help form the single tax base reached by Section 1.

The "separate tax" argument *might* be viable for the Section 491 transitional rules. Section 491 will not apply only to future appreciation in liquid assets. Instead, the ultrawealthy must immediately recognize income for all their built-in gains.[310] This

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[304] *See* I.R.C. § 63(a) (specifying that gross income will be reduced by allowable deductions in calculating taxable income).

[305] *See* Wyden Billionaire Income Tax, *supra* note 298, § 491(a)(1)(B) (describing when capital gains or losses would arise from the forced realization rule).

[306] *Cf.* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 375–76 (1991) (concluding that the Michigan business activity tax established a single tax base rather than multiple individual taxes).

[307] I.R.C. § 90(a).

[308] *Id.* § 107.

[309] *Id.* § 139B(a).

[310] Wyden Billionaire Income Tax, *supra* note 298, § 491.

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income inclusion will lead to several hundred billion dollars in income tax liabilities.[311] To soften the transition, the ultrawealthy will have five years to pay those liabilities.[312]

Given these extraordinary liability amounts, one can plausibly argue that Section 491, to the extent it applies to built-in gains, establishes a standalone tax. When Section 491 goes into effect, the ultrawealthy might nominally determine their taxable income under all of the regular income tax rules. But for them, Section 491 will overwhelm those rules. The bulk of their tax liabilities will arise because of that statute.[313] Using the Court's "functional approach,"[314] Section 491 might establish a separate tax base. If so, Section 491 violates the realization requirement.

Whether a court could bifurcate Section 491 this way—between its application to built-in gains and its application to future gains—remains highly uncertain. If that bifurcation is possible, then Section 491 should be deemed unconstitutional only to the extent that it applies to built-in gains. If bifurcation is impossible then, under the holistic approach, the anomalies created by the transitional rules should not doom the statute. Odd things understandably happen when Congress implements a new statutory regime.[315] The transitional rules, though harsh, do not overwhelm the entire income tax code and transform it into an unapportioned property tax.

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[311] *See* Ricco, *supra* note 303 ("Most of the projected revenue, equal to $344 billion, is raised in the first five years, a result of the transition tax on tradable assets.").

[312] *See* Wyden Billionaire Income Tax, *supra* note 298, § 496(a)(1)(B) (allowing for first-year tax liability to be paid over five years).

[313] A leak of tax return information shows that income tax liabilities for the ultrawealthy reflect a relatively small percentage of their wealth. *See* Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021, 5:00 AM), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/Q2LL-XCRT] (comparing "how much in taxes the 25 richest Americans paid each year to how much *Forbes* estimated their wealth grew in that same period"). The Section 491 transition tax on that wealth would thus probably overwhelm those liabilities.

[314] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565 (2012).

[315] *See, e.g.*, Jonathan H. Adler, *Category Errors and Executive Power*, 11 FIU L. REV. 357, 361 (2016) (discussing challenges presented by implementation of the Affordable Care Act and the Treasury's asserted authority to unilaterally and temporarily suspend statutory rules).

2. Other Constitutional Limitations. Constitutional challenges to federal laws rarely succeed. Under the "rational basis" standard, courts adopt a deferential approach to laws passed under Congress's general legislative authority.[316] They will uphold a law whenever Congress pursues a legitimate interest and the law bears a reasonable relationship to that interest.[317] Few laws fail that standard.

Section 491 would not be among them. The Constitution allows Congress to impose taxes using any necessary and proper means. It is rational for Congress to demand high tax payments from those with the greatest ability to pay; citation is hardly needed for that proposition.

If taxpayers brought challenges to Section 491, they likely would not claim that Congress exceeded its general legislative authority. Instead, taxpayers would probably look to specific limits in the Constitution. The Equal Protection Clause[318] and the Bill of Attainder Clause[319] may be the most natural places to look. However, those sources should not pose much threat to Section 491.

The Equal Protection Clause typically provides heightened scrutiny for legislation that targets protected classes of persons.[320] Under Supreme Court case law, protected classes evolve with time.[321] However, no court has recognized the wealthy as a

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[316] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133 (2010) (upholding the Adam Walsh Protection and Safety Act under rational basis review); *see also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 559 ("[W]e have been very deferential to Congress's determination that a regulation is 'necessary.'"); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (upholding federal control over racial discrimination by restaurants under rational basis review).

[317] *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 602 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that the Court presumes the statute under review is constitutional when asking "(1) whether Congress had a 'rational basis' for concluding that that the regulated activity substantially affects interstate commerce, and (2) whether there is a 'reasonable connection between the regulatory means selected and the asserted ends.'" (quoting Hodel v. Indiana, 452 U.S. 314, 323–24 (1981))).

[318] U.S. CONST. amend. XIV, § 1; *see also supra* note 245 (explaining how equal protection applies to the federal government through the Fifth Amendment).

[319] *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[320] *See generally* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2 (2018) (discussing heightened scrutiny).

[321] *See generally* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017) (explaining how courts alter which classes are protected).

constitutionally protected class.[322] Thus, any Equal Protection challenge to Section 491 would proceed under the deferential rational basis test and would likely fail.

A constitutional challenge based on the Bill of Attainder Clause presents a more tantalizing possibility. That clause "prohibit[s] the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.'"[323] Punishment may arise through the loss of life or of property.[324] Also, a law "may be an attainder" if "past activity serves as 'a point of reference'" for punishment.[325]

Whether Section 491 reflects a bill of attainder depends on some open questions. For example, could mark-to-mark treatment qualify as the loss of property (i.e., punishment)? The Court, in the Due Process Clause context, has observed that deprivation of property may arise through "the exaction of a tax."[326] But it is far from clear that a tax which arises through an income inclusion would so qualify.

Additionally, it's unclear whether Section 491 would reach "past activity"[327] under bill of attainder analysis.[328] The built-in gains subject to the transition tax would have arisen prior to Section 491's enactment. In that sense, the statute seems retroactive. But these gains were never permanently exempt from tax. Instead, even under prior law, they would face taxation upon a realization event.

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[322] *See, e.g.*, Dhital v. Att'y Gen., 421 F. App'x 194, 197 (3d Cir. 2011) ("The wealthy are not a protected class.").

[323] Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 847 (1984) (quoting United States v. Brown, 381 U.S. 437, 447 (1965)).

[324] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

[325] *Minn. Pub. Int. Rsch. Grp.*, 468 U.S. at 847 (quoting Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961) (citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867)).

[326] McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36 (1990).

[327] *Minn. Pub. Int. Rsch. Grp.*, 468 U.S. at 847 (quoting Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961)).

[328] *See* ERIKA K. LUNDER, ROBERT MELTZ & KENNETH R. THOMAS, CONG. RSCH. SERV., R40466, RETROACTIVE TAXATION OF EXECUTIVE BONUSES: CONSTITUTIONALITY OF H.R. 1586 AND S. 651, at 9 (2009) ("[A] court's determination that a statute referencing a specific group of persons for past behavior may in some cases be treated as a *per se* violation of the specificity prong.").

In this sense, Section 491 does not impose retroactive punishment. It accelerates future tax consequences.[329]

Assuming that the ultrawealthy could establish that Section 491 reflected a form of punishment, they would still need to establish they were a protected group under the Bill of Attainder Clause. Doing so would likely require showing that Congress acted out of punitive intent rather than revenue-raising concerns.[330] Given the prodigious sums that Section 491 would help generate, that might be an impossible task.

To make their case, the ultrawealthy might rely on constitutional arguments floated during the last mortgage crisis. In 2009, Congress considered various retroactive taxes on insurance company executives.[331] These executives received lucrative bonuses even as their firms suffered. Because legislators had set their targets on a specific group of persons, bill of attainder concerns arose.[332]

The ultrawealthy might argue that those same concerns should apply to the Billionaire Income Tax. However, this argument would rely on speculation. Congress did not pass any insurance executive legislation and so no court passed on the bill of attainder concerns. Even if a court had done so, Section 491 could be distinguished from the insurance executive legislation. Section 491 would apply to a broader class of persons than would have the insurance executive legislation. Also, there was stronger evidence of congressional

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[329] Of course, future income taxation of built-in gains is not inevitable. The property might decline in value, for example. Or the property may be held by the taxpayer until death and pass to her heirs with a stepped-up basis. *See* I.R.C. § 1014(a)(1) (discussing basis in inherited property).

[330] *See* Consol. Edison Co. of N.Y. v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002) (explaining the Supreme Court's "three factors to guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive").

[331] For further discussion of these retroactive taxes, see generally LUNDER, MELTZ & THOMAS, *supra* note 328.

[332] *See* Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 383 (2009) ("There are further legal concerns with the pending bonus tax bill. Its narrow focus on particular companies and executives may raise a concern about whether it constitutes an unlawful bill of attainder."); Joseph Henchman, *Proposed Tax on AIG Bonuses Raises Constitutional and Policy Concerns*, TAX FOUND., Fiscal Fact No. 165 (Mar. 2009) ("Critics of the bill have raised policy concerns as well as suggestions that the bill may violate the constitutional prohibition on Bills of Attainder and other restrictions on legislation.").

maliciousness in that context.[333] And the insurance executive tax would have raised a relatively tiny sum of revenue. These factors make the insurance executive proposal materially different from Section 491.

Given the numerous uncertainties, the Bill of Attainder Clause likely presents no serious obstacle to Section 491. For it to do so, the Court would have to resolve several novel questions in favor of the ultrawealthy challengers. That seems unlikely.

V. CONCLUSION

The holistic approach advanced in this Article has everything going for it—except scholarly opinion and Supreme Court jurisprudence. However, the piecemeal approach embraced by scholars and the Court has led to incoherence, instability, and interpretive chaos. Few, if any, would look admirably at current Taxing Clause doctrine.

The piecemeal approach might have been tolerable in the early days of the income tax when Congress followed core income principles throughout the tax code. In that context, the distinction between a piecemeal approach and a holistic approach made little difference. Individual sections and the overall tax code each followed constitutional principles. But in recent decades, Congress has used the tax code more aggressively, often to pursue social policies beyond revenue collection.[334] Fierce clashes between individual tax code sections and constitutional limitations now seem inevitable.

The stakes over whether Congress has properly imposed "taxes on incomes" under the Sixteenth Amendment have thus never been higher.[335] A defective interpretive approach is no longer tolerable, if it ever was. A judicial shift to the holistic approach, and scholarly

[333] *See* LUNDER, MELTZ & THOMAS, *supra* note 328, at 16 ("[R]emarks were made that seemed to indicate that the basis for the application of these bills retrospectively was concern with the morality of having paid the bonuses in question, and a desire that the person receiving the bonuses not be able to enjoy their benefit.").

[334] *See* Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1722 (2014) (discussing various nontax policies pursued in the tax code).

[335] U.S. CONST. amend. XVI.

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acceptance of it, would contribute to sound development of the tax law.

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