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The Forgotten Income-Attribution Power

ABSTRACT. Economic inequality stands at record levels, and constitutional law haunts egalitarian reform. In 2024, the Supreme Court decided the latest contest. *Moore v. United States* rebuffed an attempt to sharply limit the federal taxing power, as a razor-thin majority upheld Congress's attribution of foreign corporations' income to domestic shareholders. But four Justices criticized the reasoning of the majority, faulting its use of a fabricated doctrine.

This Feature provides a systematic account of Congress's income-attribution power. It excavates overlooked litigation materials and case law from the infancy of the current federal income tax. In the 1920s and 1930s, litigants attacked, on constitutional grounds, federal taxation of trusts, corporate profits, and marital units in community-property states. The Court rejected all such challenges. It crafted a robust attribution power that allowed Congress broad discretion to tax *A* on income realized by *B*, limited only by due process. This account defends the majority's approach and its application to factual predicates beyond those in *Moore*. Indeed, the attribution framework allows Congress to design structural tax reform by taxing corporate earnings to shareholders. The Feature thus provides doctrinal and policy insights in an age of increasing judicial intervention in federal taxation.

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FEATURE CONTENTS

INTRODUCTION

Economic inequality stands at record levels, and constitutional law haunts egalitarian reform.[1] At the center lies the specter of realization.[2] This doctrine predicates taxation of gain upon the sale or disposition of the underlying asset.[3] It allows taxpayers to defer—and upon death, to eliminate—tax liability as long as they hold onto the property during their lifetime.[4] For example, Elon Musk pays no tax on the gain of his Tesla stocks until he sells or otherwise exchanges them.[5] The realization requirement is a tax-planning technique available to all, but it is especially valuable to high-net-worth taxpayers because they derive a much larger portion of their income from capital appreciation rather than exertion of labor.[6] Such elective tax deferral and eventual forgiveness of capital income thus immunize the wealthiest Americans from Congress's main redistributive tool: the federal income tax.[7] Indeed, according to a recent leak of

1. *See, e.g.*, Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. Rev. 1421, 1423-24 (2018); Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. Econ. 553, 557-58 (2018).

2. William D. Andrews, a longtime faculty member of Harvard Law School, famously called the realization rule the "Achilles' heel" of the income tax. William D. Andrews, *The Achilles' Heel of the Comprehensive Income Tax*, *in* New Directions in Federal Tax Policy for the 1980s, at 278, 280 (Charls E. Walker & Mark A. Bloomfield eds., 1983); *see also* David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. Rev. 1549, 1551 (1998) (describing critics' views of the realization rule as "an intricate and unwieldy edifice," "the root of many tax evils," and "the most intractable problem in the income tax"); Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 Mich. L. Rev. 722, 738 (1990) (arguing that realization "is the source of the tax law's most serious abuses, inequities, and complications").

3. I.R.C. § 61(a)(3) (2024) (taxing "[g]ains derived from dealings in property"); *id.* § 1001(a) (defining gain with reference to "sale or other disposition of property").

4. *See id.* § 1014(a)(1) (providing that property acquired from a decedent shall have a basis equal to "the fair market value of the property at the date of the decedent's death," that is, a stepped-up basis for appreciated property).

5. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 566 (1991) (providing the doctrinal gloss on the content of statutory realization); *infra* Figure 1 (distinguishing statutory realization's two components—content and conditionality—from constitutional realization).

6. *See, e.g.*, Piketty et al., *supra* note 1, at 594-98.

7. Brian Galle, David Gamage & Darien Shanske, *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 Duke L.J. 1257, 1270 (2023) (explaining how realization enables tax deferral and "allows taxpayers to retain the time value of the money they would otherwise owe the government"); I.R.C. § 1014(a) (2024) (providing for stepped-up basis at death and therefore forgiving federal income-tax liability for gains accrued during the decedent's lifetime); *Distribution of Income by Source (2025 Income Levels)*, U.S. Dep't of Treas., (2024), https://home.treasury.gov/system/files/131/Distribution-of-Income-by-Source-2025.pdf [https://perma.cc/SEC6-S6P6] (showing the concentration of capital income at the top); Lily Batchelder & David Kamin, *Policy Options for Taxing the Rich*, *in* Maintaining the Strength of American Capitalism 200, 202 (Melissa S. Kearney & Amy Ganz eds., 2019)

ultrawealthy taxpayers' returns, realization helped Musk pay no federal income tax in 2018, and it diminished Jeff Bezos's reportable income so much that he claimed the child tax credit in 2011.[8]

The value of the realization doctrine has generated intense pressure to make it a *constitutional*, rather than merely statutory, mandate.[9] Such arguments proceed from a complex web of constitutional provisions and judicial interpretation. The 1787 Constitution granted the federal government broad powers to tax. But it required that "Duties, Imposts and Excises" be uniform, and "direct Taxes" be apportioned in accordance with each state's census population.[10] Congress enacted an unapportioned income tax during the Civil War, and the Supreme Court upheld it against a constitutional challenge in 1880.[11] But when Congress attempted to tax income during peacetime, the Court shifted course and struck

(describing the "tax-focused model of redistribution" in the United States). Scholars have long recognized the inequity of forgiving income-tax liability on gains transferred upon death. *See, e.g.*, Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1381-82 (1970); Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 363 (1993).

8. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files*, PROPUBLICA (June 8, 2021), 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/GU7T-YNCE]; Alex Zhang, *Fiscal Citizenship and Taxpayer Privacy*, 125 COLUM. L. REV. 235, 238-39 (2025) (describing the ProPublica leak); Lawrence A. Zelenak, *1924, 2021: Taxes of the Ultrarich, and Mark-to-Market Reforms*, TAX NOTES (July 26, 2021), https://www.taxnotes.com/featured-analysis/1924-2021-taxes-ultrarich-and-mark-market-reforms/2021/07/23/76vgy [https://perma.cc/JF35-JB88] (explaining the relatively low tax burden at the top with reference to realization and the ProPublica leak).

9. *E.g.*, Richard A. Epstein, *The Wealth Tax Is a Poor Idea*, HOOVER INST. (Jan. 24, 2023), https://www.hoover.org/research/wealth-tax-poor-idea [https://perma.cc/6JCG-QBHP]; Brief of West Virginia and 16 Other States as Amici Curiae in Support of Petitioners at 1-4, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800). Other policymakers (e.g., Elizabeth Warren and Kamala Harris) have proposed abolishing the realization requirement. *See* Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2019, at 437, 438 (discussing wealth-tax proposals); Billionaire Minimum Income Tax Act, H.R. 8558, 117th Cong. § 1481(a), (c) (2022) (imposing a 20% minimum tax on the "net unrealized gain" of taxpayers whose net worth exceeds $100 million).

10. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 8, cl. 1.

11. Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281 (taxing income at progressive, graduated rates to fund the war effort); Springer v. United States, 102 U.S. 586, 602 (1880) (upholding the Civil War income tax against the charge that it was an unapportioned direct tax in violation of Article I of the Constitution). The Revenue Act of 1864 also taxed undistributed corporate earnings to the shareholders—a provision structured like the mandatory repatriation tax at the center of the *Moore* litigation, and which the Supreme Court upheld in 1870. *See* Revenue Act of 1864, § 117, 13 Stat. at 282 (including as income "the gains and profits of all companies . . . [to which the taxpayer was] entitled[,] whether divided or otherwise"); Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 18 (1870) (upholding the tax); *infra* notes 458-469 and accompanying text (discussing the relationship between *Hubbard* and *Moore*).

down the federal income tax as an unapportioned direct tax.[12] This led to the Sixteenth Amendment. Ratified in 1913, the amendment permitted Congress to tax income, "from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[13]

The latest efforts to constitutionalize realization culminated in *Moore v. United States*, perhaps the most important tax case to reach the Supreme Court in a century.[14] There, petitioners asked the Court to hold that the Sixteenth Amendment does not authorize Congress to tax unrealized gains.[15] With this ruling—the strategy goes—proposals to tax wealth or accrued appreciation will have to be apportioned under the Direct Tax Clauses of the Constitution.[16] In its most straightforward form, apportionment is unfair and politically infeasible.[17]

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12. Wilson-Gorman Tariff Act, ch. 349, § 27, 28 Stat. 509, 553 (1894); Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 586 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

13. U.S. CONST. amend. XVI.

14. 602 U.S. 572 (2024); *see also* John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1, 23 (2024) (discussing opposition to taxing wealth or unrealized gains); Michael J. Graetz, *To Avoid the* Moore *Morass, the Court Should DIG It—But It Probably Won't*, 181 TAX NOTES FED. 1253, 1261 (2023) ("Any holding by the Court that realization is a constitutional requirement . . . would undermine a century of income tax decisions and amendments to the tax law.").

15. Petition for Writ of Certiorari at 2, *Moore*, 602 U.S. 572 (No. 22-800).

16. However, as Justice Jackson explains in her concurrence, this reasoning is incomplete. Even if the Sixteenth Amendment authorizes Congress to tax *realized* income only, the *Moore* petitioners would still need to make the additional showing that a tax on unrealized gains is a "direct tax" (e.g., as opposed to an excise) within the meaning of the Constitution. *Moore*, 602 U.S. at 602-03 (Jackson, J., concurring); *see also* 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."); John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 149-50 (2022) (conceptualizing proposed federal wealth taxation as an excise); Alex Zhang, *Rethinking* Eisner v. Macomber*, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 187 (2024) (explaining that prevailing on the Sixteenth Amendment question is only a first step for the *Moore* petitioners). In addition, wealth and accrual taxation may confront distinct modes of constitutional scrutiny. Wealth taxation imposes ad valorem burdens and is a form of property taxation. Accrual taxation imposes burdens on unrealized income—for example, rises in the value of appreciated stocks. As a result, Congress may have the power to tax accrual under the Sixteenth Amendment. But it is unlikely that Congress has the power to impose a tax on property value (i.e., wealth) under the Sixteenth Amendment unless it is designed at least in the form of an income tax.

17. This is because Article I requires apportionment by each state's census population. Due to the uneven distribution of income and wealth, residents in wealthier states would face a much *lower* tax burden than those in poorer states. Scholars have suggested interstate and fiscal-equalization mechanisms to ameliorate the unfairness of apportionment but recognize that they are "cumbersome." Brooks & Gamage, *supra* note 16, at 81-82, 156.

Five votes on the Court thus would have doomed structural tax legislation key to ameliorating inequality.[18]

For now, the Court declined such invitation. Dodging the question presented (whether taxpayers must *realize* income for federal taxation), a razor-thin majority upheld Congress's decision to *attribute* income earned by foreign corporations to their domestic shareholders.[19] Writing for the Court, Justice Kavanaugh emphasized the narrow scope of *Moore*'s holding, saving the battle over the federal taxing power for another day.[20] Four Justices—in dissent and concurrence—faulted the majority for inventing an attribution doctrine from thin air.[21] They would have constitutionalized the realization requirement as asked, preempting proposed federal wealth and accrual taxes, but fell one vote short.

Moore thus featured a stunning turn,[22] raising foundational questions about the unfamiliar framework of attribution.[23] For example, beyond the narrow context of *Moore* itself, to what extent can Congress attribute to one taxpayer income realized by another?[24] Can Congress tax Musk based on income earned by Tesla?

This Feature reconstructs Congress's income-attribution power. It argues that Congress has broad, independent power to tax individuals and entities on income realized by others. The Feature excavates overlooked litigation materials and case law from the infancy of the current federal income tax. During the 1920s and the 1930s, litigants attacked the constitutionality of federal taxation of trusts,

18. *See generally* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999) (contending that social justice, not the Court's constitutional jurisprudence, should guide future tax policy).

19. *Moore*, 602 U.S. at 577.

20. *Id.* at 599; *see infra* Section I.A (analyzing the opinions in *Moore*).

21. *Moore*, 602 U.S. at 615-17 (Barrett, J., joined by Alito, J., concurring in the judgment); *id.* at 645 (Thomas, J., joined by Gorsuch, J., dissenting).

22. Before the briefing on the merits, few expected the Court to resolve *Moore* on the basis of income attribution. *See* Petition for Writ of Certiorari, *supra* note 15, at 2 (petitioning for a writ of certiorari based on realization rather than attribution). *Compare* Brief for the United States in Opposition at 2, *Moore*, 602 U.S. 572 (No. 22-800) (opposing certiorari primarily on the ground that the Constitution imposes no realization requirement), *with* Brief for the United States at 29, 44, *Moore*, 602 U.S. 572 (No. 22-800) (arguing on the merits that Congress can attribute realized entity income to shareholders), *and* Brief for the American Tax Policy Institute as Amicus Curiae in Support of Respondent at 5, *Moore*, 602 U.S. 572 (No. 22-800) (emphasizing that the *Moore* dispute does not turn on realization but attribution). Justice Gorsuch found the turn to attribution as a litigation strategy so unexpected that he suggested that the government had waived the argument by not raising it before. Transcript of Oral Argument at 79-81, 106, *Moore*, 602 U.S. 572 (No. 22-800).

23. *See infra* Section I.B (noting the dearth of scholarship on constitutional income attribution).

24. The precise facts in *Moore* concerned the mandatory repatriation tax, which Section I.A explains in greater detail. For the mandatory repatriation tax, see Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 14103, 131 Stat. 2054, 2195 (2017) (codified at I.R.C. § 965).

excess corporate profits, and marital units in community-property states.[25] Litigants relied on the Direct Tax Clauses to contend, before the Supreme Court and lower courts, that Congress could not tax them unless these taxpayers received, controlled, or owned the taxable income.[26] The Court rejected all such arguments. It crafted a robust federal attribution power, limited only by the Due Process Clause. If *someone* has realized an income stream, Congress can tax *anyone* whose relationship with such income is not arbitrary.[27] Armed with this principle, the Hughes Court combatted—with partial success—high-income groups' tax-avoidance techniques at another time beset by economic inequality.[28] Importantly, all these cases, spanning areas of corporate, trust, and marital taxation, contain implicit Sixteenth Amendment holdings.

This vision of Congress's attribution power thus cabins realization as an obstacle to structural tax reform.[29] Attribution allows Congress wider latitude to select the bearer of the tax burden. It would, for example, permit the federal government to tax individuals on their shares of corporate earnings.[30] A broad reading of the case law may even allow Congress to design the tax to replicate the economic effects of existing proposals of accrual and wealth taxation.[31] Such doctrinal moves are not revolutionary. Indeed, this Feature shows that using definitional glosses on "income" (e.g., as "realized" income only) to limit the federal taxing power is as old as the Sixteenth Amendment itself. It is beyond the scope of this Feature whether "income" for purposes of the Sixteenth Amendment requires realization.[32] But it is worth noting that the Supreme Court has rejected

25. *E.g.*, Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925); Corliss v. Bowers, 281 U.S. 376 (1930); Reinecke v. Smith, 289 U.S. 172 (1933); Poe v. Seaborn, 282 U.S. 101 (1930); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

26. *Infra* Section II.B.

27. *E.g.*, Burnet v. Wells, 289 U.S. 670, 677 (1933).

28. Piketty et al., *supra* note 1, at 587 (charting high levels of economic inequality during the 1920s and 1930s).

29. That is, a constitutional realization rule—assuming it exists—does not require that the income taxed bear any relationship (e.g., receipt, ownership, or control) *with the taxpayer*. Several scholars have discussed the content of realization and attribution. *See generally, e.g.*, Ari Glogower, *Taxing Capital Appreciation*, 70 TAX L. REV. 111 (2016) (realization); David J. Shakow, *Taxation Without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111 (1986) (same); Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 TAX L. REV. 355 (2004) (same); W. Lewis Roberts, *Recent Decisions Involving Attribution of Income for Tax Purposes*, 25 N.Y.U. L. REV. 810 (1950) (attribution and assignment of income); Stanley S. Surrey, *Assignments of Income and Related Devices: Choice of the Taxable Person*, 33 COLUM. L. REV. 791 (1933) (same); *infra* note 33 (collecting additional scholarship).

30. *See infra* notes 472-475 and accompanying text.

31. *See infra* Part III.

32. *See infra* notes 42-44 and accompanying text; *infra* Section II.A.

efforts to make realization a constitutional mandate in the past. After all, the Sixteenth Amendment is a grant of power to Congress. Today, the Roberts Court should likewise dismiss invitations to cabin Congress's power to close key tax loopholes.

The Feature thus makes two main contributions. It provides the first study of the constitutional attribution doctrine in a law review since *Moore*, and one of the only in the past few decades.[33] The Feature defends the majority's approach. It provides the historical and conceptual foundations for extending the use of the attribution doctrine to factual predicates beyond *Moore* itself. That is, Congress's income-attribution power is far broader than the "narrow" framing of the majority opinion.[34]

Second, this analysis yields insights about how to design structural tax reform in an age of growing judicial intervention. The stakes here are high. Rising inequality threatens our democracy and constitutionalism.[35] Federal courts have shown increasing confidence—unseen in decades—in asserting a judicial role in crafting tax law.[36] *Moore* itself has generated confusion: while Senator Elizabeth

33. Most scholarship on the relationship between realization and *constitutional* income attribution (i.e., rather than statutory assignment of income) comes from the 1950s. *See, e.g.*, L. Hart Wright, *The Effect of the Source of Realized Benefits upon the Supreme Court's Concept of Taxable Receipts: A Chronological Study*, 8 STAN. L. REV. 164 (1956); Lloyd George Soll, *Intra-Family Assignments: Attribution and Realization of Income (First Installment)*, 6 TAX L. REV. 435 (1951); Lloyd George Soll, *Intra-Family Assignments: Attribution and Realization of Income (Second Installment)*, 7 TAX L. REV. 61 (1951). One recent contribution, Brant J. Hellwig, *The Supreme Court's Casual Use of the Assignment of Income Doctrine*, 2006 U. ILL. L. REV. 751, focuses on the relationship between realization and statutory assignment of income rather than constitutional tax law. The *Moore* case has started generating more general commentary on the federal taxing power. *See, e.g.*, Ari Glogower, *The Constitutional Limits to the Taxing Power*, 93 FORDHAM L. REV. 781, 785-90 (2024). *See generally infra* Section I.B (surveying the existing literature).

34. Moore v. United States, 602 U.S. 572, 598 (2024).

35. Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 371-74 (2018); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1292-93 (2016).

36. The Supreme Court has not struck down a federal income-tax provision as unconstitutional for more than a century, since *Eisner v. Macomber*, 252 U.S. 189, 219 (1920). Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on* Eisner v. Macomber *(1920)*, 16 DUKE J. CONST. L. & PUB. POL'Y 65, 67 (2021). The Court has invalidated non-income-tax federal revenue laws. *E.g.*, United States v. IBM Corp., 517 U.S. 843, 863 (1996) (holding that the Export Clause, U.S. CONST. art I, § 9, cl. 5, prohibits Congress from imposing a nondiscriminatory tax on premiums paid to foreign insurers on exports).

Warren welcomed the decision as encouraging the "fight . . . to tax the rich,"[37] the Heritage Foundation declared federal wealth taxes "mostly dead."[38] To be sure, structural tax reform may not be on the table this year. Congress's 2025 tax legislation was not revolutionary.[39] Instead, its most important provisions consisted in extensions of tax cuts introduced in the 2017 tax reform.[40] But it is critical that when political momentum returns, the debate proceeds on our democracy's sense of distributive justice rather than attempts to read limits on the federal taxing power into the Constitution.[41] All this necessitates a better understanding of the attribution doctrine.

Three caveats. First, this Feature concerns the attribution power, taking as granted that someone, even if not the taxpayer, has realized income. It is beyond the scope of this Feature whether the Constitution in fact bans or allows the uniform taxation of *unrealized* income. In a future case, the Supreme Court could, of course, hold that Congress is free to tax unrealized gains or wealth, as scholars and courts have argued.[42] However, that possibility is remote given the current composition of the Court. *Moore* has revealed four votes in favor of a

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37. Abbie VanSickle & Jim Tankersley, *Supreme Court Upholds Trump-Era Tax Provision*, N.Y. TIMES (June 20, 2024), https://www.nytimes.com/2024/06/20/us/politics/supreme-court-tax-case-trump.html [https://perma.cc/J4N8-ZZZU].

38. GianCarlo Canaparo, *After* Moore v. U.S.*, Wealth Taxes Are Only Mostly Dead*, HERITAGE FOUND. (July 17, 2024), https://www.heritage.org/courts/commentary/after-moore-v-us-wealth-taxes-are-only-mostly-dead [https://perma.cc/S67P-DR8B].

39. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025).

40. *Id.* § 70101, 139 Stat. at 158.

41. And political momentum may return in unexpected ways: let us not forget that Donald Trump (prior to his presidency) had proposed in 1999 a 14.25% wealth tax to raise $5.7 trillion to repay the national debt. *See* Brandon Lecoq, *The Time Donald Trump Proposed a $5.7 Trillion Wealth Tax*, TAX FOUND. (June 18, 2015), https://taxfoundation.org/blog/donald-trump-wealth-tax [https://perma.cc/7GF3-7NM7].

42. *E.g.*, Brooks & Gamage, *supra* note 14, at 6 (arguing that the Sixteenth Amendment was designed to restore Congress's plenary taxing power to its status before Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895)); Brooks & Gamage, *supra* note 16, at 84, 156 (categorizing properly designed federal taxes on wealth and unrealized gains as "excises" which the Constitution permits at uniform rates); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 720-23 (2020) (contending that the Supreme Court should uphold a traditional wealth tax because Congress can use wealth-integration methods to achieve similar effects); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 137 (2018) ("The wealth tax debate should proceed on its merits, unencumbered by a pernicious legacy of constitutional missteps."). For different views, see, for example, Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 GA. L. REV. 249, 297-310 (2023); David M. Schizer & Steven Gow Calabresi, *Wealth Taxes Under the Constitution: An Originalist Analysis*, 77 FLA. L. REV. 1401, 1406-14 (2025); and Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 489-92 (2015).

constitutional realization requirement.[43] A fifth vote may not be hard to find through persuasion or shifts in judicial personnel. This Feature thus operates in a "second-best" world, while its arguments bolster the virtues of a "first-best" world.[44]

Second, this Feature concerns the constitutional, not statutory, doctrine of attribution. It goes to Congress's power to tax, not the construction of what statutory language entails. Statutory assignment of income is the subject of a separate case law, as Part II will clarify.[45]

Third, this Feature does not take a *substantive* position on distributive justice. Instead, the intent and the effect of the attribution power are to strengthen the role of democracy in tax policymaking. That is, the Feature does not necessarily endorse a federal wealth or accrual tax, or even recommend that Congress tax corporate earnings at uniform rates to shareholders. Those decisions fall within the realm of democratic judgment, channeled through a political process that reasonably reflects the will of the people as informed by robust discursive infrastructure and constrained by their commitment to foundational norms. But the Feature does contend that the Constitution does not unduly bind our hands in making such decisions. Should Congress decide to ameliorate income and wealth inequality by attributing corporate earnings to shareholders, existing doctrine poses no obstacle.

The remainder of this Feature proceeds as follows. Part I introduces the doctrinal and scholarly background. It analyzes the Justices' opinions in *Moore* and the existing literature. Part II defines key terms. It examines litigants' constitutional arguments in trust, excess-profits, and marriage-taxation cases in the 1920s and the 1930s. In all these cases, taxpayers faulted federal revenue provisions for taxing income that the taxpayers themselves did not realize. The Supreme Court used the attribution doctrine to dismiss these contentions. The Court also subjected federal income attribution to the limits of due process, most prominently a rationality mandate. Part III discusses policy implications. It shows that under the Fifth Amendment, Congress has wide latitude to design a tax system in accordance with our democracy's vision of distributive justice.

43. *See* Moore v. United States, 602 U.S. 572, 607-08 (2024) (Barrett, J., joined by Alito, J., concurring in the judgment) (concluding that the Sixteenth Amendment does not authorize Congress to tax unrealized gains); *id.* at 620 (Thomas, J., joined by Gorsuch, J., dissenting) (same).

44. *See infra* Section III.B (arguing that courts should disfavor limits on Congress's taxing power as to policies which it can constitutionally enact in other—substantively similar but administratively cumbersome—ways).

45. *See infra* Section II.A.

I. THE CONSTITUTIONAL CONTEST OVER THE FEDERAL TAXING POWER

This Part presents the constitutional contest over the federal taxing power. It focuses on recent efforts to use the realization requirement—long recognized as a statutory regime grounded in administrative convenience—to prevent Congress from enacting structural tax reform.[46] Section I.A examines *Moore v. United States*. In this case, taxpayers attacked a technical aspect of the 2017 international-tax reform to advance a farther-reaching goal: depriving Congress of the authority to tax unrealized gain. A five-Justice majority rejected this challenge, and Section I.A analyzes its use of an unfamiliar attribution doctrine to punt on the question presented. On the other hand, four Justices favored a constitutional realization requirement. Section I.B surveys the existing scholarly literature. Despite robust commentary on realization and on *Moore*, Section I.B shows the need for serious scholarly engagement with the attribution doctrine itself.

A. Moore v. United States

Because scholars and commentators have examined *Moore* elsewhere,[47] this Section limits its analysis to the *Moore* majority's attribution inquiry, and how it

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46. That is, long recognized as a statutory mandate *until* the Supreme Court granted the petition for a writ of certiorari in *Moore*. *See, e.g.*, MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS 80 (2018) ("It is important to remind oneself at the outset that realization is strictly an administrative rule and not a constitutional, much less an economic, requirement of 'income.'"). Early case law like *Eisner v. Macomber*, 252 U.S. 189 (1920)—decided before the full-fledged development of the attribution doctrine by the Hughes Court—had suggested, but by no means dictated, that realization was indeed a gloss on the Sixteenth Amendment's text, and therefore went to Congress's constitutional power rather than statutory construction. The current movement to constitutionalize realization thus bears an eerie resemblance to the failed efforts in the infancy of the current federal income tax. The Hughes Court cabined the effects of *Macomber* through the attribution inquiry, and the Roberts Court—even if in a splintered decision—has declined the invitation to revive *Macomber* through *Moore*'s own turn to attribution. *See* Zhang, *supra* note 16, at 197-207 (analyzing constitutional realization as one, but hardly the exclusive, interpretation of *Eisner v. Macomber*); *Moore*, 602 U.S. at 588 ("The Moores' reliance on *Eisner v. Macomber* with respect to the attribution issue is misplaced.").

47. *See, e.g.*, Brooks & Gamage, *supra* note 14, at 22-27 (describing the *Moore* litigation as a movement to revive *Eisner v. Macomber* and constitutionalize the realization requirement); Lawrence Zelenak, *The Income Tax, the Constitution, and the Unrealized Importance of* Helvering v. Griffiths, 43 VA. TAX REV. 257, 259-61 (2023) (describing the procedural and legislative background of *Moore*); Glogower, *supra* note 33, at 815-16, 824, 836-37 (analyzing the *Moore* case); Daniel J. Hemel, *The High and Low Stakes of* Moore, 180 TAX NOTES FED. 563, 564 (2023) (same).

allowed the Court to obviate a constitutional challenge to Congress's taxing power under the Sixteenth Amendment. This discussion paves the path for Part II, which shows the broad scope of Congress's attribution power under case law developed primarily by the Hughes Court.[48]

The *Moore* petitioners were individuals who held shares in a small controlled foreign corporation selling farm tools in India.[49] Because the Indian company retained its earnings without repatriation, the petitioners paid and later challenged the constitutionality of the mandatory repatriation tax (MRT), a one-time levy.[50]

In 2017, Congress enacted a series of international-tax reforms as part of the Tax Cuts and Jobs Act (TCJA), a signature piece of legislation of the first Trump Administration.[51] Before the TCJA, Congress did not tax the active business income of foreign corporations controlled by U.S. shareholders on a regular basis. Instead, it only taxed such income when repatriated to U.S. shareholders as dividends.[52] Under prior law, U.S. multinational corporations accumulated earnings in foreign subsidiaries, deferring domestic taxation.[53] The TCJA then imposed a one-time tax, at preferential rates to U.S. shareholders, on unrepatriated income accumulated in those foreign corporations since 1986.[54]

Represented by the Competitive Enterprise Institute, the *Moore* petitioners raised two main arguments.[55] First, they contended that the MRT was an unapportioned direct tax on unrealized income because only the company, not the

48. *See infra* Section II.B.

49. Moore v. United States, 602 U.S. 572, 580 (2024).

50. *Id.*

51. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of I.R.C.). *See generally* Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 YALE L.J.F. 339 (2018) (describing and assessing the international-tax reforms).

52. *See* Susan C. Morse, *International Cooperation and the 2017 Tax Act*, 128 YALE L.J.F. 362, 363-66 (2018) (describing the pre-TCJA framework of U.S. international taxation); Thomas J. Brennan, *What Happens After a Holiday?: Long-Term Effects of the Repatriation Provision of the AJCA*, 5 NW. J.L. & SOC. POL'Y 1, 3-4 (2010).

53. Michael J. Graetz, *Foreword—The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, 128 YALE L.J.F. 315, 329 (2018) ("Congress also imposed a one-time transition tax on the more than $2.5 trillion in unrepatriated earnings held offshore by U.S. multinationals . . . .").

54. Tax Cuts and Jobs Act, § 14103, 131 Stat. at 2195 (codified at I.R.C. § 965).

55. Lawrence A. Zelenak, *Reading the Taxpayers' Brief in* Moore, TAX NOTES (Oct. 2, 2023), https://www.taxnotes.com/featured-analysis/reading-taxpayers-brief-moore/2023/09/29/7hd59 [https://perma.cc/R3FR-FYJ3] (referring to the "deep involvement of the conservative Competitive Enterprise Institute in the *Moore* litigation").

taxpayer-shareholders, received the earnings.[56] It was thus beyond Congress's income-tax powers. Second, they attacked the MRT's retroactivity as to income earned since 1986 on due-process grounds.[57] The district court squarely rejected both arguments, and the Ninth Circuit affirmed, denying rehearing en banc over the dissent of four judges.[58] When the petitioners sought certiorari, they dropped their due-process argument related to retroactivity.[59] As a result, the Supreme Court granted certiorari on one question: "Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states."[60]

Opponents to federal wealth and accrual taxation thus cheered the grant of certiorari on a case curated from the beginning to limit Congress's taxing power.[61] By contrast, scholars—whether ardent supporters of structural tax reform or not—cautioned against a constitutional realization requirement.[62] After all, swaths of the existing Internal Revenue Code already tax without regard to

56. Complaint at 6-7, Moore v. United States, No. C19-1539 (W.D. Wash. Nov. 19, 2020) (arguing that the mandatory repatriation tax (MRT) is an unconstitutional direct tax which does not fall within the Sixteenth Amendment's definition of income); Opening Brief of Appellants at 13-26, Moore v. United States, 36 F.4th 930 (9th Cir. 2022) (No. 20-36122) (same).

57. Complaint, *supra* note 57, at 7-8 (arguing that the MRT imposes a retroactive tax liability in violation of the Due Process Clause); Opening Brief of Appellants at 27-41, *Moore*, 36 F.4th 930 (No. 20-36122) (same).

58. Moore v. United States, No. C19-1539, 2020 WL 6799022, at *3 (W.D. Wash. Nov. 19, 2020) (concluding that the MRT is an income tax authorized by the Sixteenth Amendment); *id.* at *5 (citing United States v. Carlton, 512 U.S. 26, 30-31 (1994)) (concluding that the MRT's retroactivity does not violate due process because it is supported by a legitimate legislative purpose and furthered by rational means); *Moore*, 36 F.4th at 935-36, 938 (concluding, like the district court, that the MRT is a constitutional income tax, and that its retroactivity does not violate due process); Moore v. United States, 53 F.4th 507, 507 (9th Cir. 2022) (Bumatay, J., joined by Ikuta, Callahan & VanDyke, JJ., dissenting from the denial of rehearing en banc).

59. Petition for Writ of Certiorari, *supra* note 15, at i.

60. *Id.*; Moore v. United States, 143 S. Ct. 2656, 2656 (2023) (mem.) (granting petition).

61. Case Comment, *Sixteenth Amendment—Taxation—Conceptions of the Corporation—*Moore v. United States, 138 HARV. L. REV. 395, 395 (2024) ("When conservative interest groups cheered on Charles and Kathleen Moore's suit against the government over a tax bill, they sought to 'permanently . . . put . . . to rest' calls by progressive American legislators for a wealth tax." (footnotes omitted)).

62. *Compare* Brief of Amicus Curiae Amandeep S. Grewal in Support of Respondent at 3, 21, Moore v. United States, 602 U.S. 572 (2024) (No. 22-800) (urging the Court to affirm the Ninth Circuit on the ground that individual tax provisions could "deviate from realization principles" without affecting the overall character of the tax as on realized income), *with* Grewal, *supra* note 42, at 299, 303 (contending that Warren's proposed wealth tax and the Biden Administration's proposed unrealized-gains tax violate the Constitution).

realization by the taxpayer.[63] If the Court reversed the Ninth Circuit on substantive grounds, decades of federal law on the taxation of partnerships, debt instruments, futures contracts, and renunciation of U.S. citizenship could all fall. By the time of oral argument, the Supreme Court became keenly aware of *Moore*'s blast radius. As commentators observed, the Court was searching for "an off-ramp."[64]

An off-ramp the majority indeed found—in the income-attribution doctrine which the Court had developed almost a century ago.[65] Writing for the majority, Justice Kavanaugh opened with a choice-of-entity framing. Longstanding practice has left Congress free to choose whether to tax corporate vehicles themselves or to attribute corporate income to shareholders in a pass-through scheme.[66] According to Kavanaugh, the MRT taxes *realized* income, that is, realized by foreign corporations.[67] The MRT merely imposes the tax liability on shareholders who control such corporations.[68] The dispute thus had nothing to do with realization.[69] Even assuming, arguendo, that the Sixteenth Amendment requires realization, and that an income tax is otherwise a direct tax which must be apportioned, the MRT met this requirement. Instead, the "precise and narrow question" before the Supreme Court was whether Congress could attribute the corporate income to the shareholders.[70]

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63. Brief of Amici Curiae Reuven Avi-Yonah, Clinton G. Wallace & Bret Wells in Support of Respondent at 6-10, 14-16, *Moore*, 602 U.S. 572 (No. 22-800); *see* I.R.C. § 1272 (2024) (original-issue-discount rules for debt instruments); I.R.C. § 1256 (futures contracts); I.R.C. § 877A (renunciation of citizenship); I.R.C. §§ 701-761 (pass-through taxation).

64. Howard Gleckman, *The Supreme Court's Search for an Off-Ramp in the* Moore *Case*, TAX POL'Y CTR. (Dec. 6, 2023), https://taxpolicycenter.org/taxvox/supreme-courts-search-ramp-moore-case [https://perma.cc/A5VE-6M4H].

65. Curiously, the petitioners in *Moore* also heavily relied on case law from the infancy of the current income tax to bolster their claim for a constitutional realization requirement. *See* Brief for Petitioners at 1-2, 40-44, *Moore*, 602 U.S. 572 (No. 22-800) (contending that *Eisner v. Macomber* held realization an integral component of constitutional "income"); *see also* Zhang, *supra* note 16, at 186, 243 (contending that *Macomber* turns not on realization but on the absence of any economic income); *infra* Section I.B (discussing scholarly treatment).

66. *Moore*, 602 U.S. at 577. A note on nomenclature: this Feature refers to "shareholders" for ease in discussing *Moore*'s holding that Congress can attribute business-entity income to individuals who own the entity. That holding, of course, applies whether the individuals are shareholders of corporations, partners in partnerships, or members in limited liability companies.

67. *Id.* at 584 ("Critically, however, the MRT does tax realized income—namely, income realized by the corporation, KisanKraft.").

68. *Id.* ("The MRT attributes the income of the corporation to the shareholders, and then taxes the shareholders (including the Moores) on their share of that undistributed corporate income.").

69. *Id.* at 599 (concluding that the Court "need not resolve th[e] disagreement over realization").

70. *Id.* at 584.

The majority thus punted on the question presented—a decision the dissenters criticized.[71] It transformed the realization question (centering the *nature of income*) into an attribution question (centering the *choice of taxpayer*). Applying the attribution doctrine, Justice Kavanaugh found precedents clearly authorizing Congress to tax shareholders on income realized by the corporation.[72] He identified four key cases:

(1) *Burk-Waggoner Oil Ass'n v. Hopkins*, which "articulated th[e] fundamental principle" that Congress can treat business entities on a pass-through basis and tax business income to shareholders;[73]
(2) *Burnet v. Leininger*, which concluded that Congress could tax the net income of "the partnership directly . . . or upon the 'individuals carrying on business in partnership'";[74]
(3) *Heiner v. Mellon*, which upheld taxation on partners of undistributed partnership income;[75] and
(4) *Helvering v. National Grocery Co.*, which stated that Congress could tax shareholders on the corporations' undistributed income.[76]

For the majority, this case law "established a clear rule" that "Congress can attribute the undistributed income of an entity to the entity's shareholders."[77] That rule was enough to uphold the MRT. At the same time, Justice Kavanaugh emphasized that the holding was narrow.[78] He specifically reserved the question

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71. *See id.* at 621 (Thomas, J., dissenting) ("Today, the Court upholds the MRT only by ignoring the question presented.").

72. *Id.* at 585-87 (majority opinion).

73. *Id.* at 585 (citing Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925)); *see infra* Section II.B.1 (discussing the *Burk-Waggoner* case).

74. *Id.* at 585-86 (citing Burnet v. Leininger, 285 U.S. 136 (1932)). The principal issue in *Leininger* concerned statutory assignment of income—whether a contract assigning half of the husband's partnership interest to his wife makes the wife taxable on half of the income. *Leininger*, 285 U.S. at 138.

75. *Moore*, 602 U.S. at 586 (citing Heiner v. Mellon, 304 U.S. 271 (1938)). The principal issue in *Mellon* was whether profits made by partnerships formed to liquidate other businesses were taxable. *Mellon*, 304 U.S. at 274-75.

76. *Moore*, 602 U.S. at 586 (citing Helvering v. Nat'l Grocery Co., 304 U.S. 282 (1938)).

77. *Id.* at 586-57.

78. However, the majority's approach is broader than that of Justices Barrett and Alito, who tried to distinguish the MRT from taxing shareholders of a *widely held* or *domestic* corporation. *See id.* at 604 (Barrett, J., joined by Alito, J., concurring in the judgment); *id.* at 598 n.8 (majority opinion).

of whether Congress could tax both the entity and the shareholders on the same stream of realized income.[79]

Justice Jackson joined the majority opinion in full.[80] She wrote separately to highlight two conclusions that the Court must reach to strike down any uniform unrealized-gains tax. First, the Court would have to read the term "income" in the Sixteenth Amendment to refer to realized income alone, even though the constitutional text contains no such requirement.[81] The key case on which petitioners relied—*Eisner v. Macomber*—has been limited to its facts, and is, in any event, difficult to parse, let alone clearly erecting a constitutional realization mandate.[82] Second, in addition to the Sixteenth Amendment holding, the Court would have to conclude that a tax on unrealized income is a "direct tax" triggering apportionment specified in Article I.[83] Such reasoning would run counter to Congress's plenary power over taxation.[84] It would give federal courts decisive roles in fashioning tax policy, which the failure of *Pollock v. Farmers' Loan & Trust Co.* cautioned.[85] All this pointed to entrusting tax law to the democratic process rather than judicial exegesis.[86]

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79. *Id.* at 599 & n.9. As this Feature will argue, there are strong constitutional arguments that Congress can tax both the business and the shareholders on the same stream of realized corporate income. This is in part because the Supreme Court had upheld the corporate income tax as an excise before the ratification of the Sixteenth Amendment. *See infra* notes 503-504 and accompanying text; Flint v. Stone Tracy Co., 220 U.S. 107, 152, 167 (1911). Further, the mere existence of the corporate income tax itself—which taxes the same stream of distributed corporate earnings to both the entity and the shareholders—implies that double taxation of undistributed corporate earnings is constitutionally permissible under the attribution framework. *See infra* notes 505-508 and accompanying text.

80. *Moore*, 602 U.S. at 603 (Jackson, J., concurring).

81. *Id.* at 601 (citing Brief of John R. Brooks & David Gamage as Amici Curiae in Support of Respondent at 14-21, *Moore*, 602 U.S. 572 (No. 22-800), for the proposition that the Sixteenth Amendment's phrase "from whatever source derived" served only to overrule *Pollock v. Farmers' Loan & Trust Co.*); *see also id.* ("Th[e] alleged [realization] requirement appears nowhere in the text of the Sixteenth Amendment.").

82. *Id.* at 601-02 & 602 n.2 (citing Brief of Alex Zhang as Amicus Curiae in Support of Respondent at 26, *Moore*, 602 U.S. 572 (No. 22-800), for the proposition that under *Macomber*, Congress can tax anything generative of increased economic value); *see also id.* ("[W]e 'limited' *Macomber*'s realization requirement 'to the kind of dividend there dealt with . . . .'" (quoting Helvering v. Griffiths, 318 U.S. 371, 375 (1943))).

83. *Id.* at 602-03; U.S. CONST. art. I, § 9, cl. 4.

84. *Moore*, 602 U.S. at 600 (quoting Brushaber v. Union Pac. R.R., 240 U.S. 1, 13 (1916)).

85. *Id.* at 603 (quoting Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 680 (1895) (Harlan, J., dissenting)).

86. *Id.* Daniel Hemel has characterized Justice Jackson's approach as nonfunctionalist, that is, seeking to construe certain constitutional provisions to achieve as little as possible, on the ground that such provisions serve no legitimate purpose. Daniel Hemel, *Formalism, Functionalism, and Nonfunctionalism in the Constitutional Law of Tax*, 2024 SUP. CT. REV. 327, 332-33.

Justices Barrett and Alito concurred in the Court's judgment. Unlike Justice Jackson's, this concurrence is in name only. First, Barrett resolved the question that the majority reserved. Relying on the word "derived" in the Sixteenth Amendment, dictionary definitions, and case law, she concluded that the Constitution required realization before Congress could tax income at uniform rates.[87]

Second, Justice Barrett challenged the doctrinal foundations of the majority's reasoning as to attribution. She read the Court's precedents to allow Congress to disregard the corporate vehicle only where taxpayer-shareholders "received income *in substance*, if not in form."[88] For her, each of the four main cases cited by the majority stood for far narrower propositions: *Burk-Waggoner* only allowed Congress to tax partnerships like corporations, not vice versa; *Burnet v. Leininger* only affirmed Congress's power to tax income to the earner; *Heiner v. Mellon* only concerned partners', not shareholders', liability on entity-level income; and in *National Grocery*, the entity-level income was really the sole shareholder's.[89] Underlying these specific complaints was Barrett's first-order instinct of a strong realization requirement. In her words, "the question is not whether *some* taxable person or entity has realized income at *some* point."[90] Courts could not simply substitute the attribution inquiry if realization has happened *somewhere* in the income stream. The key issue was whether the taxpayer had realized income in substance. All this led her to uphold the MRT only on petitioners' concession of the constitutionality of Subpart F.[91] (Subpart F, the majority opinion noted and Barrett agreed, "attribut[ed] undistributed income of foreign corporations to their American shareholders, and then tax[ed] the American shareholders on their pro rata shares of the income," like the MRT.[92]) For Barrett, petitioners could not meaningfully distinguish the MRT from Subpart F, which similarly attributed corporate income to shareholders.[93]

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87. *Moore*, 602 U.S. at 604-07 (Barrett, J., concurring in the judgment) (citing, inter alia, U.S. CONST. amend. XVI; WEBSTER'S NEW INTERNATIONAL DICTIONARY 1089 (1909); and Cullinan v. Walker, 262 U.S. 134, 138 (1923)).

88. *Id.* at 612.

89. *Id.* at 615-17 (first citing Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925); then citing Burnet v. Leininger, 285 U.S. 136 (1932); then citing Heiner v. Mellon, 304 U.S. 271 (1938); and then citing Helvering v. Nat'l Grocery Co., 304 U.S. 282 (1938)).

90. *Id.* at 612.

91. *Id.* at 619-20; *see* Transcript of Oral Argument, *supra* note 22, at 9 (statement by the petitioners' counsel that "the defect with the MRT doesn't really apply to Subpart F . . . . [T]he Court has never considered the constitutionality of Subpart F, but, as we take it, we don't think that there's a constitutional issue there.").

92. *Moore*, 602 U.S. at 587 (majority opinion).

93. *Id.* at 619-20 (Barrett, J., concurring in the judgment).

Justices Thomas and Gorsuch dissented. Drawing extensively on Founding Era history, Thomas contended that the constitutional apportionment requirement for direct taxes fulfilled a critical federalism function.[94] As part of the 1787 Constitution, states surrendered their power to tax interstate and foreign commerce and shared the authority to levy direct taxes with the federal government, but with the caveat that Congress could not impose direct taxes at uniform rates.[95] Thomas saw the Sixteenth Amendment as a gloss on this compromise of fiscal federalism: the Amendment carved out a narrow exception for realized income from the apportionment requirement.[96] But the Direct Tax Clauses continued to protect the states' property-tax base.[97] Thus, in his view, Congress had no power to enact the MRT.[98]

Further, Justice Thomas criticized the majority for "invent[ing] an 'attribution'" inquiry from thin air.[99] For him, the majority "pluck[ed] superficially supportive phrases from an eclectic selection of tax cases" to ground a made-up doctrine.[100] Like Justice Barrett, he found the precedents cited by the majority unpersuasive: *Burk-Waggoner* only blessed federal taxation of a de facto corporation on its own income; *Leininger*—at least the part cited by the majority—had nothing to do with the Sixteenth Amendment; *Mellon* turned on *statutory* interpretation; and the shareholder in *National Grocery* "used the corporation as a tax-

94. *Id.* at 623-34 (Thomas, J., dissenting) (citing, inter alia, THE FEDERALIST NO. 21, at 116 (Alexander Hamilton) (E. Scott ed., 1898); 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1157 (G. Hunt ed., 1910); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18-19 (M. Farrand ed., 1911); and Hylton v. United States, 3 U.S. (3 Dall.) 171, 171-72 (1796)). For Justice Thomas, the text of the 1787 Constitution was "the natural starting point" because the "Sixteenth Amendment modified the Constitution's original regulations of Congress's taxing power" and made "clear that taxes on income are not subject to the limitations imposed on direct taxes." *Id.* at 622-23.

95. *Id.* at 629-31.

96. *Id.* at 640 ("[B]ecause Sixteenth Amendment 'income' must be distinguished from its source, the Amendment includes a realization requirement.").

97. Justice Thomas thus put forth a vision of the values served by the Direct Tax Clauses which other Justices did not. *See* Hemel, *supra* note 86, at 353-54 (characterizing Thomas's approach as functionalist and criticizing this federalism, base-protection rationale as "tenuous at best").

98. *Moore*, 602 U.S. at 620 (Thomas, J., dissenting) ("Because the Moores never actually received any of their investment gains, those unrealized gains could not be taxed as 'income' under the Sixteenth Amendment.").

99. *Id.* at 644.

100. *Id.* at 645.

free account to hold what was really his income."[101] None held that Congress could tax shareholders on undistributed corporate income.[102]

Moore generated two patterns of divergent reactions from the Justices. First, as to realization, the majority narrowly avoided a substantive holding. Tellingly, we see four votes in favor of a constitutional realization requirement for income taxable under the Sixteenth Amendment. Justices Barrett and Alito in their concurrence, as well as Justices Thomas and Gorsuch in their dissent, all explicitly endorsed limiting Congress's income-tax power.[103] A straightforward application of their principle would strike down many existing proposals to tax the wealthy on the accrued gains in their stocks and liquid property.[104] Because the majority punted on the question presented, Justice Jackson alone voiced support for federal power to tax economic gains without regard to realization.[105]

Second, the attribution doctrine has provoked fierce contest among the Justices. The majority characterized its conclusion as narrow, upholding only Congress's attribution of undistributed corporate income to shareholders when the federal government forgoes taxation of the corporate entity itself.[106] But even this narrow holding failed to satisfy Justices Barrett and Alito. For them, the majority's approach sat on unsound foundations, and in any event would not apply to a possible future tax on shareholders for undistributed income of publicly traded, domestic corporations.[107] The majority disavowed any such limit to its reasoning.[108]

Further, the Justices contested the use of the attribution doctrine. The four dissenting and judgment-concurring Justices denied that courts can deem realization satisfied if attribution is proper. For Justice Barrett, a realization event *somewhere* in the stream of income generation does not obviate the realization

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101. *Id.* at 645-48 (first citing Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925); then citing Burnet v. Leininger, 285 U.S. 136 (1932); then citing Heiner v. Mellon, 304 U.S. 271 (1938); and then citing Helvering v. Nat'l Grocery Co., 304 U.S. 282 (1938)).

102. *Id.* at 648 ("The cases cited by the majority . . . do not suggest that Congress may freely choose whether to impose an income tax on a corporation or on its shareholders.").

103. *Id.* at 612 (Barrett, J., concurring in the judgment); *id.* at 621-22 (Thomas, J., dissenting).

104. *Compare, e.g.*, *id.* at 604 (Barrett, J., concurring in the judgment) ("The question on which we granted review is '[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.' The answer is straightforward: No." (alteration in original)), *with* Billionaire Minimum Income Tax Act, H.R. 8558, 117th Cong. § 1481(a), (c) (2020) (imposing a 20% minimum tax on the "net unrealized gain" on taxpayers whose net worth exceeds $100 million).

105. *Moore*, 602 U.S. at 602 (Jackson, J., concurring).

106. *Id.* at 598 (majority opinion).

107. *Id.* at 604 (Barrett, J., concurring in the judgment) ("A different tax—for example, a tax on shareholders of a widely held or domestic corporation—would present a different case.").

108. *Id.* at 598 n.8 (majority opinion).

analysis as to the *actual taxpayer*. For example, the fact that a corporation has realized income does not render futile the argument that Congress cannot tax shareholders on such income because *they* have not realized any gains. The key for Barrett is whether taxpayers realized income in substance.[109] Likewise, Justice Thomas rejected the majority's use of attribution to circumvent what he sees as a core, structural provision of federalism.[110] Thus, for these four Justices, Congress has no power to attribute to (and tax) *A* on income realized by *B*.[111]

Finally, the Justices fought over the content of the attribution doctrine. The doctrine's constitutional source is fuzzy. Justice Thomas characterized it as a creation that the majority conjured up from the Sixteenth Amendment.[112] He criticized the majority's reliance on *Burnet v. Leininger*, in which the Court held ineffective, for income-tax purposes, a husband's attempt to assign half of his partnership interest to his wife to reduce their overall tax burdens.[113] According to Thomas, the part of *Leininger* which the majority cited dealt with due process.[114] Such a due-process holding surely could not "support[] the majority's *Sixteenth Amendment* attribution doctrine," he argued.[115] By contrast, the majority did not decisively say whether its attribution doctrine stems from the Fifth Amendment or the Sixteenth. It recognized that due process "proscribe[d] arbitrary attribution" but noted that the petitioners did not challenge attribution on due-process grounds before the Court.[116] Justice Barrett opined on the contours of nonarbitrary attribution: taxpayers' control over the income taxed, receipt of special privilege from the corporate vehicle that has earned the income, and

109. *Id.* at 612 (Barrett, J., concurring in the judgment) ("Rather, our cases allow Congress to disregard the corporate form to determine whether the shareholder received income *in substance*, if not in form.").

110. *See id.* at 640 (Thomas, J., dissenting) (describing how the Sixteenth Amendment preserved the federalism function inherent in the distinction between direct and indirect taxes).

111. That is, assuming that the income has not been realized by *A* as well.

112. *Moore*, 602 U.S. at 645 (Thomas, J., dissenting).

113. *Id.* at 646 (citing Burnet v. Leininger, 285 U.S. 136 (1932)).

114. *Id.*

115. *Id.* (emphasis added).

116. *Id.* at 599 (majority opinion); *see also id.* at 590 n.4 (acknowledging "that there are due process limits on attribution to ensure that the attribution is not arbitrary"). Of course, it would be hard for the petitioners to raise due-process arguments against the MRT's attribution of corporate income to shareholders. After all, few could have anticipated the Court's turn to the attribution doctrine to resolve the realization question on which it granted certiorari. *See supra* notes 22, 65-70 and accompanying text.

whether such a corporation is domestic or foreign could all factor in the analysis.[117]

* * *

As this Section shows, *Moore v. United States* featured a stunning turn to the attribution doctrine. Cautious about judicial intervention into tax policy—at least as to the MRT as a vehicle—the five-Justice majority held that Congress could properly attribute a corporation's realized, untaxed income to its shareholders. The other four Justices vigorously contested the majority's approach, criticizing the doctrinal foundations of the attribution inquiry and casting it as a made-up theory. They rejected the use of attribution to obviate a constitutional realization requirement and welcomed an active judicial role in tax legislation. For them, the Sixteenth Amendment requires that the *taxpayer* (not just anyone) realize—i.e., receive, own, or control—the income taxed.

Key questions remained unanswered.[118] Is attribution an invention contrived to uphold the MRT, or is it a legitimate doctrine? If it is legitimate, how should commentators theorize (and courts devise) its contours and uses in other contexts? And importantly, *when* can courts shift analysis of constitutional limits on the federal taxing power from the Sixteenth Amendment to the Fifth? Parts II and III of this Feature will begin to answer these questions.

B. Scholarly Approaches

This Section offers a brief survey of the three main categories of existing literature: (1) immediate responses to *Moore v. United States* itself; (2) an early strand of the scholarly discourse, more than half-a-century old, which discussed the Supreme Court's income-attribution doctrine and touched briefly on its relationship to realization; and (3) general commentary on realization, statutory assignment of income, and the federal taxing power.

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117. *Moore*, 602 U.S. at 619 (Barrett, J., concurring in the judgment) (first citing Comm'r v. Sunnen, 333 U.S. 591, 604 (1948); then citing Burnet v. Wells, 289 U.S. 670, 679 (1933); and then citing Ivan Allen Co. v. United States, 422 U.S. 617, 624 (1975)).

118. Of course, the Court also left unanswered the question presented: does the Sixteenth Amendment require realization, and are taxes on unrealized income otherwise direct taxes that must be apportioned? As discussed, this is beyond the scope of this Feature, and while scholars have put forth robust arguments that "income" within the meaning of the Sixteenth Amendment does not refer only to realized income, the possibility of such a holding from the current Supreme Court is unassured at best. *See* Petition for Writ of Certiorari, *supra* note 15, at 17-21; *see also supra* note 42-44 and accompanying text (collecting scholarship on the constitutionality of federal taxation of wealth and unrealized gains and discussing how this Feature operates in a "second-best" world).

First, scholars have analyzed the Justices' opinions in *Moore*.[119] The fact that the Court punted on the question presented left some surprised and invited commentary on whether (and how) a future Court will constitutionalize realization.[120] Accordingly, scholars have debated how proposed taxes on wealth and accrued gains will fare: some have suggested that the four votes in favor of constitutional realization provide enough deterrence on Congress, while others have called for legislative innovation in designing billionaire taxes to pass constitutional muster.[121] They have evaluated the relationship between the Sixteenth

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119. *See, e.g.*, Brooks & Gamage, *supra* note 14, at 26-27; Glogower, *supra* note 33, at 815-16, 824, 836-37; Lily Batchelder et al., *The Moores Lost Their Claims and* Moore, 184 TAX NOTES FED. 1509, 1510-13 (2024). In the immediate aftermath of the *Moore* opinion, a series of scholarly op-eds captured some prevailing views in the academy. *See* Lawrence Zelenak, Moore *Thoughts*, TAXPROF BLOG (June 21, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/zelenak-moore.html [https://perma.cc/9536-QZ32]; Conor Clarke, *Four More Takeaways from* Moore, TAXPROF BLOG (June 22, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/clarke-four-more-takeaways-from-moore.html [https://perma.cc/3UQ2-6EHU]; Reuven S. Avi-Yonah, *Is a Mark to Market Tax Constitutional After* Moore?, TAXPROF BLOG (June 23, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/avi-yonah-is-a-mark-to-market-tax-constitutional-after-moore.html [https://perma.cc/QGM7-9KRJ]; John R. Brooks & David Gamage, Moore v. United States—*Initial Reactions*, TAXPROF BLOG (June 24, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/moore-v-united-states-initial-reactions.html [https://perma.cc/W2R2-HZ2S]; Brian D. Galle, *What's Next for Wealth and Mark-to-Market Taxes After* Moore?, TAXPROF BLOG (June 25, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/galle-whats-next-for-wealth-and-mark-to-market-taxes-after-moore.html [https://perma.cc/RWZ8-3ECF]; Andy Grewal, Moore *Decides Less*, TAXPROF BLOG (June 26, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/grewal-moore-decides-less.html [https://perma.cc/EDR7-PT96]; Michael Graetz, Moore v. United States—*Winning the Battle but the War Goes On*, TAXPROF BLOG (June 27, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/graetz-moore-v-united-states-winning-the-battle-but-the-war-goes-on.html [https://perma.cc/7PLY-7J4K]; Alex Zhang, Moore *and the Judicial Role in Tax Law*, TAXPROF BLOG (June 28, 2024), https://taxprof.typepad.com/taxprof_blog/2024/06/zhang-moore-and-the-judicial-role-in-tax-law.html [https://perma.cc/83Z4-W344].

120. *See, e.g.*, Zelenak, *supra* note 119 (noting that the Court surprisingly did not "affirm (in dictum) the holding of *Eisner v. Macomber* that the Sixteenth Amendment includes *some sort* of realization requirement").

121. *See, e.g.*, Graetz, *supra* note 119 (arguing that eight Justices and the Solicitor General "rule[d] out as unconstitutional a federal wealth tax unless apportioned to the states by population," and describing *Moore* as "a caution to Congress about what and how it can legislate" and "an invitation to more antitax litigation"); Avi-Yonah, *supra* note 119 (citing Galle et al., *supra* note 7) (favoring "[t]axing the super-rich" due to high economic inequality, and advocating careful legislation in light of constitutional limits)); Galle, *supra* note 119 (suggesting that "proponents of wealth and mark-to-market taxes . . . [could] build on the Billionaire Minimum Income Tax bill from Rep. Cohen, which implemented the Administration's Green Book proposal"); Brooks & Gamage, *supra* note 119 ("[W]ith four votes clearly in favor of a strong realization requirement, small shifts in the make-up of the Court could have big effects on future tax reform proposals.").

Amendment and two key strands of case law. In *Moore*, the Court criticized *Pollock v. Farmers' Loan & Trust Co.*, which struck down a previous federal income tax as a direct tax and triggered the Sixteenth Amendment.[122] Some have relied on such repudiation to suggest that any income tax, including on unrealized gains, was valid under the original 1787 Constitution.[123] Others have pointed to the *Moore* majority's ambivalent references to *Eisner v. Macomber* as interring any judicial attempt to constitutionalize realization.[124] Further, scholars commented on methodology and the judicial role in taxation. They noted a historical turn in the Court's jurisprudence, its relative lack of expertise in a complex field, and the diversity of the Justices' approaches: functionalist, formalist, and nonfunctionalist.[125] All these responses have grown out of renewed scholarly interest in the federal taxing power, triggered by legislative proposals to tax the ultrawealthy.

Conspicuously missing from the debate on *Moore* are serious assessments of the attribution doctrine itself. In fact, there has been little scholarly engagement with attribution as a constitutional framework in the past few decades. One of the only general, systematic analyses of the relationship between realization and attribution is a 1956 *Stanford Law Review* article.[126] In it, L. Hart Wright pointed out, inter alia, that proponents of a robust federal taxing power have favored a due-process rather than a Sixteenth Amendment analysis.[127] But the article primarily contained summaries of cases, with an outdated focus on statutory language that no longer exists.[128] Another important study, by the legendary

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122. *See Moore*, 602 U.S. at 583 (rejecting the key reasoning of *Pollock v. Farmers' Loan & Trust Co.*); AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 143-84 (2013).

123. *See* Zelenak, *supra* note 119; *cf.* Josh Blackman, *The Sixteenth Amendment Did Not "Overrule"* Pollock, REASON (June 21, 2024), https://reason.com/volokh/2024/06/21/the-sixteenth-amendment-did-not-overrule-pollock [https://perma.cc/E4FZ-QUUA] (contending that the Sixteenth Amendment did not overrule *Pollock* but "granted Congress new powers, which it could then exercise").

124. *See, e.g.*, Brooks & Gamage, *supra* note 119; *cf.* Grewal, *supra* note 119 (arguing *Moore* "confirmed that *Eisner v. Macomber* . . . is not dead").

125. Clarke, *supra* note 119 (contending that *Moore* "heralds a major turn to tax history"); Zhang, *supra* note 119 (arguing that the Court should "build institutional expertise in taxation" through statutory cases before turning to constitutional bombshells). Nonfunctionalist approaches proceed on the belief that some of the Constitution's fiscal provisions serve no purpose and should be read to accomplish as little as possible. Hemel, *supra* note 86, at 327-28.

126. *See* Wright, *supra* note 33.

127. *Id.* at 185-90.

128. *See id.* at 164-65, 201-02 (dividing cases into three stages—moving toward a permanent expansion of the concept of taxable receipts due to changes in judicial personnel, shifts in methodology away from formalism, and the rise of income as a social concept—and relying heavily on the statutory definition of income as "gains or profits and income derived from any source

scholar Stanley Surrey, came out in 1933.[129] It predated the federal taxation of family units, and thus emphasized Congress's power to curb tax avoidance through intrafamilial assignment of income by anticipatory contracts or trusts.[130] Most of the remaining literature on constitutional income attribution falls into these patterns: they address specific topics like attribution of income within family units[131] or provide contemporary exegesis as the Supreme Court decided its cases in the 1930s.[132]

The third bucket of existing literature consists of general commentary on realization, assignment of income, and the federal taxing power. It considers each doctrinal area independently, forming the broader scholarly backdrop of this Feature. Accordingly, scholars have debated the genesis of the realization requirement, whether statutory as a matter of administrative convenience left to

whatever" in the Internal Revenue Code of 1939); Act of Oct. 3, 1913, ch. 16, § II.B, 38 Stat. 114, 167 (codified as amended in section 22(a) of the Internal Revenue Code of 1939)).

129. *See* Surrey, *supra* note 29. For Surrey's influence, see generally A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY (Lawrence A. Zelenak & Ajay K. Mehrotra eds., 2022). *See also* Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. NW. U. 779, 784-87 (1941) (influentially reading an assignment-of-income case, *Helvering v. Horst*, as contributing to an end of the Court's attempt to constitutionalize realization).

130. *See* Surrey, *supra* note 29, at 793-800. More recent discussion about the federal taxation of marital units has touched on attribution issues. *E.g.*, Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 389-90 (1994); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 55-59 (1980).

131. *See, e.g.*, R.W. Vandemark, *Taxation of the Family Partnership*, 4 OHIO ST. U. L.J. 228, 228 (1938); Randolph E. Paul & Valentine B. Havens, *Husband and Wife Under the Income Tax*, 5 BROOK. L. REV. 241, 248-50 (1936); John W. Ervin, *Federal Taxes and the Family: A Plan for Optional Joint Returns for Husband and Wife with Equal Division of Their Combined Incomes for Federal Income Tax Purposes*, 20 S. CAL. L. REV. 243, 244-45 (1947); Franklin C. Latcham, *Invasions of the Community Property Income Tax Privileges*, 20 WASH. L. REV. & STATE BAR J. 44, 44 (1945); George E. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 CALIF. L. REV. 397, 399-400 (1942); Covey T. Oliver, *Community Property and the Taxation of Family Income*, 20 TEX. L. REV. 532, 534 (1942); *see also* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1459-63 (1975) (discussing income-attribution rules for transactions within the family).

132. *See, e.g.*, Harry B. Sutter & Anderson A. Owen, *Federal Taxation of Settlors of Trusts*, 33 MICH. L. REV. 1169, 1169 (1935); Joseph M. Jones, *Trusts: Instrumentalities for Avoiding Taxes*, 27 GEO. L.J. 18, 20 (1938); George E. Ray, *The Income Tax on Short Term and Revocable Trusts*, 53 HARV. L. REV. 1322, 1322 (1940); Lucius A. Buck, *Income Tax Evasion and Avoidance: The Deflection of Income*, 23 VA. L. REV. 107, 113-14 (1936). Taxpayers have often relied on due process to attack the retroactivity of tax legislation. That is a separate area of the doctrine beyond this Feature's scope. The *Moore* petitioners raised such retroactivity arguments in the lower court but abandoned them by the time they sought certiorari. *See supra* note 59 and accompanying text.

legislative discretion, or constitutional as a limit on Congress's power to tax.[133] This debate both arose from and shaped evaluations on the merits of a realization rule, with the scholarly consensus holding, at a minimum, strict adherence to realization undesirable and inconsistent with an effective income tax.[134] Further, scholars have assessed the statutory assignment-of-income doctrine, often in the context of intrafamilial transfers as described above.[135] One important recent contribution examines the Supreme Court's decision to hold plaintiffs taxable on the recovery retained by their attorneys as contingent fees.[136] The study contends that the Court should have analyzed the issue under realization as opposed to assignment of income, but examines the topic on statutory and not constitutional (i.e., due-process or Sixteenth Amendment) grounds.[137] Finally, scholars have assessed the constitutionality of recent proposals to tackle record economic inequality through tax reform, such as by taxing wealth and unrealized gains at uniform rates.[138]

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133. *See, e.g.*, Brooks & Gamage, *supra* note 14, at 8-9; Zhang, *supra* note 16, at 186-89; Sloan G. Speck, *The Realization Rule as a Legal Standard*, 16 COLUM. J. TAX L. 1, 6-9 (2024); Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution,* Macomber*, and Mark to Market*, 13 VA. TAX REV. 1, 5-7 (1993); Edward T. Roehner & Sheila M. Roehner, *Realization: Administrative Convenience or Constitutional Requirement*, 8 TAX L. REV. 173, 173-76 (1953); Philip Mullock, *The Constitutional Aspects of Realization*, 31 U. PITT. L. REV. 615, 615-17 (1970).

134. *See, e.g.*, Shakow, *supra* note 29, at 1116-17; Noël B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A "Revolutionary" Approach to Ownership*, 47 TAX L. REV. 725, 726-28 (1992); Mark L. Louie, *Realizing Appreciation Without Sale: Accrual Taxation of Capital Gains on Marketable Securities*, 34 STAN. L. REV. 857, 858 (1982); *see also* Schizer, *supra* note 2, at 1554 (concluding that realization has "a significant advantage as a subsidy"); Schenk, *supra* note 29, at 356 (arguing that the "realization rule threatens the very existence of our hybrid tax"); Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861, 862 (1997) (concluding that the "virtues of realization-based income taxation are attainable," while those of accrual taxation operate at the level of "theoretical promises" rather than practice).

135. *See supra* note 131 and accompanying text (collecting scholarship). *See generally* Ralph S. Rice, *Judicial Trends in Gratuitous Assignments to Avoid Federal Income Taxes*, 64 YALE L.J. 991 (1955) (analyzing judicial responses to income shifting to reduce income-tax liability and advocating broader application of the principle that taxes income to the earner).

136. Hellwig, *supra* note 33, at 756.

137. *Id.* at 753-54.

138. *See supra* note 104 (providing an example of a proposed billionaire tax); *supra* note 42 (analyzing and collecting scholarship on the federal taxing power). For earlier strands of this scholarship, see generally, for example, Ackerman, *supra* note 18, which condemns the Direct Tax Clauses as part of the 1787 Constitution's compromise over slavery and their use to bind Congress's hands in tax reform; and Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997), which contends that the Direct Tax Clauses create meaningful limits on Congress's taxing power.

As this Section shows, despite renewed interest in Congress's taxing power, few have paid serious attention to income attribution as a constitutional framework. The literature in *Moore*'s aftermath has focused on realization rather than attribution.[139] This is unsurprising: the *Moore* majority framed the attribution inquiry as narrow, leaving what appears to be a more important question about realization to future inquiry.[140] The attribution doctrine itself dates back roughly one century.[141] And most have written about it in the context of intrafamilial transfers or at a time when much of legal scholarship aimed to summarize cases.[142] This Feature fills this gap.

II. INCOME ATTRIBUTION

This Part reconstructs the attribution power. Section II.A offers definitions of key terms. Section II.B excavates litigation materials and case law from the 1920s and the 1930s in three main areas: federal taxation of corporate profits, trusts, and marital units in community-property states. It shows that the Supreme Court dismissed or gave no credence to, in each, constitutional challenges that the taxpayers themselves must own, receive, or control the income taxed. In the process, the Court crafted a robust attribution power for Congress. Section II.B's analysis thus defends the *Moore* majority's use of the attribution doctrine. It paves the path for Part III's discussion about how policymakers can design structural tax reform under the attribution framework. Section II.C synthesizes the findings and explores the logic of the Fifth Amendment as applied to income taxation. It locates the doctrine's conceptual foundations in nineteenth-century case law about due process.

A. Definitions

First, nomenclature. Scholarship and doctrine refer to key concepts in overlapping, imprecise ways. This Section defines those terms as used in this Feature for the sake of clarity. By "attribution," this Feature solely refers to the constitutional regime that governs and limits Congress's power to impose tax liability for an economic gain on a specific taxpayer. Suppose that taxpayers (individuals or entities) *A* and *B* each bear *some* relationship to income *Y*. One paradigmatic attribution question asks: does Congress have the power to tax *Y* to *A*, or *B*, or

139. *See supra* notes 119-125 and accompanying text.

140. *See supra* notes 106-108 and accompanying text.

141. *See infra* Sections II.B-C.

142. *See supra* notes 126-132 and accompanying text.

both *A* and *B*? As the Feature shows, the Due Process Clause of the Constitution provides the framework for answering this question.[143]

By contrast, by "assignment of income," this Feature solely refers to the *statutory* inquiry as to who bears tax liability for an economic gain. Again, suppose that taxpayers (individuals or entities) *A* and *B* each bear *some* relationship to an economic gain *Y*. A paradigmatic assignment-of-income question asks: under the statutory language, did Congress decide to tax *Y* to *A*, or *B*, or both *A* and *B*? The assignment-of-income doctrine thus assumes the constitutional validity of attribution. For example, if Congress has no power to tax *Y* to *A* or *B* under a due-process analysis, there is no reason to ask how the statute assigns tax liability for *Y*.[144] Under general assignment-of-income doctrine, labor income is taxed to the earner,[145] while property income is taxed to the owner of the property (with the gloss that only a transfer of the underlying property can shift tax burdens on property income from the donor to the recipient).[146]

Further, the term "realization" can refer to four distinct categories of analysis. Realization can be statutory or constitutional, and it can refer to a question as to conditionality (i.e., is realization required for taxability?) or content (i.e., what does it mean for income to be realized?). As to statutory conditionality, realization is, in general, a requirement for taxation on gains from property, as the Internal Revenue Code defines "[g]ains derived from dealings in property" with reference to "amount realized."[147] There are notable exceptions to this general rule: scholars warned that *Moore* put all such exceptions—and swaths of tax law—at risk of unconstitutionality.[148] As to statutory content, the Supreme

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143. U.S. CONST. amend. V; *see infra* Sections II.B.2-3; Burnet v. Wells, 289 U.S. 670, 677-78 (1933) (subjecting an income-tax-attribution question to due-process analysis); Moore v. United States, 602 U.S. 572, 599 (2024) ("[T]he Due Process Clause proscribes arbitrary attribution [of income].").

144. Of course, courts may resolve statutory ambiguities, if any, to avoid striking down the statute or even to avoid raising serious constitutional, including due-process, difficulties. *See* NFIB v. Sebelius, 567 U.S. 519, 563 (2012); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 319 (2016). But this is an interpretive technique distinct from the requirement that any statutory assignment of income conform to the strictures of constitutional attribution.

145. *E.g.*, Lucas v. Earl, 281 U.S. 111, 114-15 (1930) (taxing salary income to the earner-husband despite anticipatory contracts which assign half of such income to his wife); MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION § 8.05(1) (14th ed. 2018) ("Personal service income is taxable to the person who does the work, no matter whom he designates to receive the pay envelope.").

146. *E.g.*, Helvering v. Horst, 311 U.S. 112, 117 (1940) (taxing income from interest coupons to the donor who retained the underlying bond); CHIRELSTEIN & ZELENAK, *supra* note 145, § 8.05(2).

147. I.R.C. §§ 61(a)(3), 1001(a) (2024).

148. *See supra* notes 62-64 and accompanying text.

Court has articulated a standard for satisfying realization if required. In a case that featured an intra-executive battle between mortgage regulators and the Treasury Department, the Court glossed realization as the exchange of "legally distinct entitlements" – a low threshold to surmount.[149]

By contrast, constitutional realization engages distinct sources of law. Constitutional conditionality is a key area of debate.[150] Whether the Constitution permits taxation without realization triggers two nested questions. First, does the Sixteenth Amendment, by empowering Congress to tax "income" without apportionment, permit the taxation of unrealized gains?[151] If it does, then the Court may uphold any accrual-tax (and potentially wealth-tax) regime as a Sixteenth Amendment income tax.[152] If it does not, a second question arises: whether Congress's broad taxing power under the original 1787 Constitution encompasses taxation of unrealized income. That is, did *Pollock*, which struck down the 1894 income tax as an unconstitutional, unapportioned direct tax, get it right?[153] Or should courts regard it as an aberration, and put greater weight on liquidated meaning – both Founding Era case law and the Civil War income tax?[154] If *Pollock* was incorrect, then Article I may authorize taxation of income

149. Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 566 (1991) ("Under our interpretation of § 1001(a), an exchange of property gives rise to a realization event so long as . . . they embody legally distinct entitlements."). In *Cottage Savings*, the Treasury Department advocated a stronger view that an exchange of *economic* substitutes did not suffice for statutory realization. The Supreme Court rejected Treasury's position and instead adopted a low threshold of statutory realization. *Id.* at 560, 565. This outcome – even if correct as a matter of statutory interpretation – enables taxpayers to realize losses selectively for tax advantage and amplifies the inequity generated by the realization requirement.

150. *See supra* note 42 and accompanying text (describing the scholarly debate as to whether constitutional income incorporates a realization requirement).

151. U.S. CONST. amend. XVI (authorizing Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment"). Congress has taxed unrealized gains in the past. *See* Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 282 (including as income "the increased value of livestock, *whether sold or on hand*" (emphasis added)).

152. Scholars have proposed designing a wealth tax as a tax on imputed income. *See, e.g.*, Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 441-42, 446-48 (2000).

153. Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895). The majority in *Moore v. United States* criticized *Pollock*'s reasoning. 602 U.S. 572, 583-84 (2024).

154. *See, e.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171, 180-81 (1796) (opinion of Paterson, J.) (upholding unapportioned federal taxation of carriages); Revenue Act of 1862, ch. 119, §§ 89-93, 12 Stat. 432, 473-75 (levying an income tax); Springer v. United States, 102 U.S. 586, 602 (1880) (upholding the Civil War income tax as an excise or duty).

without realization—as a constitutional "excise" or "duty"—independently of the Sixteenth Amendment.[155]

As to constitutional content, the question is how realization is met if required. For answers, scholars have looked to *Eisner v. Macomber*.[156] While not exhaustive, key contenders for the constitutional content of realization include severability (i.e., receipt of an asset separate from the underlying property or initial capital investment), control (i.e., over the income taxed by Congress), and ownership (i.e., acquisition of a property entitlement to the income taxed).[157] Further, this inquiry is analytically posterior to conditionality (the determination of whether realization is constitutionally necessary for an exercise of the federal taxing power). That is, courts only opine on which transaction or event satisfies the realization requirement if it is indeed constitutionally required, or if the courts assume without deciding that realization is constitutionally required to dispose of a case because it is clearly satisfied. The *Moore* Court took the latter route.[158]

This taxonomy provides some clarity. The ordinary terms of attribution and realization in fact refer to six distinct concepts:

(1) constitutional attribution;
(2) statutory assignment of income;
(3) statutory conditionality of realization;
(4) statutory content of realization;
(5) constitutional conditionality of realization; and
(6) constitutional content of realization.

This Feature concerns Congress's constitutional attribution power (1), whose scope sets boundaries for the constitutional content of realization (6). The following figure illustrates this taxonomy.

155. U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to "lay and collect Taxes, Duties, Imposts and Excises").

156. 252 U.S. 189 (1920).

157. Zhang, *supra* note 16, at 197-207.

158. *Moore*, 602 U.S. at 579, 599.

FIGURE 1. DEFINITIONS

Attribution and Realization

Constitutional

Attribution of Income (1):
Does Congress have the power to attribute realized income to the taxpayer of its choice?

Conditionality of Realization (5):
Does Article I or the Sixteenth Amendment require economic gains be "realized" for taxation as duty or income, respectively?

Content of Realization (6):
What feature (e.g., receipt, control, or ownership) must economic gains have to satisfy constitutional realization?

Statutory

Assignment of Income (2):
Which party does the statutory language identify as the taxpayer for the income tax assessed?

Conditionality of Realization (3):
Does the statutory language require economic gains be realized for taxation?

Content of Realization (4):
Does the transaction involve an exchange of "legally distinct entitlements" under *Cottage Savings*?

B. Reconstructing the Attribution Power

This Section excavates and examines case law development. During the 1920s and the 1930s, wealthy taxpayers challenged, on constitutional grounds, federal taxation of corporate profits, trusts, and marital units in community-property states. In general, they contended that income taxes were "direct" taxes, that the Sixteenth Amendment only relieved Congress of Article I's apportionment requirement, and that "income" for purposes of the Sixteenth Amendment must be owned, received, or controlled by the taxpayers.

The Supreme Court rejected such arguments and forged a broad attribution power for Congress, with two main components. First, the Court clarified the threshold for applying the attribution analysis: if some individual or entity has realized income, Congress's decision to tax that income to any related party is presumptively valid. Neither Article I nor the Sixteenth Amendment requires that the taxpayers themselves own, receive, or control the income taxed. This (low) threshold polices attribution's boundary with realization. Second, the Court located the limit on Congress's attribution power in the Due Process Clause. Under the Fifth Amendment, taxpayers must bear a nonarbitrary relationship with—and hold some constituent of ownership over—the income taxed. Together, these two aspects of the attribution power afford Congress broad discretion over structural tax reform, which Part III discusses.

1. *Constructing the Threshold: (Excess) Corporate Profits*

First, in adjudicating disputes that arose from the federal taxation of corporate profits, the Court articulated the threshold of applicability of the attribution doctrine. The key case here is *Burk-Waggoner Oil Ass'n v. Hopkins*, in which the Court upheld Congress's taxation of income to a corporate entity that did not—and could not under state law—own such income.[159] The majority in *Moore* relied on this case to argue that Congress can tax business entities as either corporations (i.e., levying an entity-level tax) or pass-throughs (i.e., levying an individual-level tax on partners' share of entity income, but no entity-level tax).[160] As Justice Kavanaugh put it, *Burk-Waggoner Oil* articulated the "fundamental principle" that Congress can choose to "tax[] either the partnership or the partners on the partnership's undistributed income."[161] By contrast, the dissent and the concurrence in *Moore* saw the case more narrowly. Justice Barrett, for example, limited *Burk-Waggoner* to its facts: it only allowed Congress to tax partnerships like corporations, not vice versa.[162] Justice Thomas read it as a tax-avoidance case that rejected the use of state law to avoid the corporate income tax.[163]

The *Moore* Justices thus contested whether *Burk-Waggoner Oil* gives Congress a choice-of-entity power in taxation. But the taxpayer in *Burk-Waggoner Oil* made somewhat different arguments, relying explicitly on the Direct Tax Clauses. In the first case of a series, the Supreme Court found such contentions unpersuasive, and segregated attribution as an inquiry independent from realization and the nature of income.

The facts in *Burk-Waggoner Oil* were undisputed. In November 1918, six individuals executed a written agreement and created the Burk-Waggoner Oil Association, an "unincorporated joint stock association."[164] A board of trustees

159. 269 U.S. 110, 114 (1925).

160. *Moore*, 602 U.S. at 585 (citing *Burk-Waggoner Oil*, 269 U.S. at 114).

161. *Id.*

162. That is, she contended that *Burk-Waggoner Oil* authorizes Congress to levy the corporate income tax on a partnership that shares structural features of a corporation. But it does *not* authorize Congress to levy an individual income tax on shareholders for corporate earnings like the MRT challenged by the *Moore* petitioners. *Id.* at 615 (Barrett, J., concurring in the judgment) (citing *Burk-Waggoner Oil*, 269 U.S. at 110-14).

163. *Id.* at 646 (Thomas, J., dissenting) ("*Burk-Waggoner* thus shows that state law may not be used as a means of evading federal taxes—not that Congress may choose whether to attribute income to entities or individuals.").

164. Transcript of Record at 14-15, *Burk-Waggoner Oil*, 269 U.S. 110 (No. 67) [hereinafter *Burk-Waggoner Oil* Transcript of Record] (reprinting Stipulation re Agreed Statement of Facts, Burk-Waggoner Oil Ass'n v. Hopkins, 296 F. 492 (N.D. Tex. 1924) (No. 3301)).

managed the enterprise.[165] In April 1919, the association completed drilling a productive oil well in Texas, and ended up earning about $25,000 from oil production, in addition to an enormous profit of more than $1.8 million from the sale of the property.[166]

The Revenue Act of 1918 imposed an income tax on individuals and provided that "individuals carrying on business in partnership shall be liable for income tax *only* in their individual capacity."[167] By contrast, it imposed on corporations taxes on normal corporate income, as well as on war profits (i.e., from World War I) and excess profits.[168] The statute defined "corporation[s]" to include "associations" and "joint-stock companies," and the Treasury Department promulgated regulations to subject associations like Burk-Waggoner Oil to the excess-profits tax.[169] The association thus paid the first installment of the tax under protest, and sued the federal government for a refund.[170]

Throughout the litigation, the taxpayer contended that the Revenue Act of 1918 taxed unrealized income to Burk-Waggoner Oil in excess of Congress's powers under Article I and the Sixteenth Amendment.[171] In particular, it argued that the economic gain from petroleum production and the sale of the oil well was not constitutional "income" because the *taxpayer* (i.e., Burk-Waggoner Oil Association) did not—and could not under state law—own it.[172] It raised the

165. *Id.* at 17 (reprinting Articles of Association for the Burk-Waggoner Oil Association, Article VII).

166. *See id.* at 71 (reprinting Corporate Income and Profits Tax Return for Calendar Year 1919 for the Burk-Waggoner Oil Association).

167. Revenue Act of 1918, ch. 18, § 218(a), 40 Stat. 1057, 1070 (emphasis added).

168. *Id.* §§ 230, 301, 40 Stat. at 1075, 1088. Taxpayers challenged on constitutional grounds the excess-profits tax, but in vain. *See* La Belle Iron Works v. United States, 256 U.S. 377, 392-93 (1921) (upholding against a due-process challenge the excess-profits tax provisions of the Revenue Act of 1917, ch. 63, 40 Stat. 300); Arthur A. Ballantine, *Some Constitutional Aspects of the Excess Profits Tax*, 29 YALE L.J. 625, 642 (1920) (concluding that the courts were unlikely to strike down the excess-profits tax under the Fifth Amendment, even though the regime "penalize[d] efficiency"). Administration of the excess-profits tax proved difficult, as it required measuring corporate earnings in excess of expected returns to invested capital and the prewar profit baseline. HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: A HISTORICAL ANALYSIS 10 (2d ed. 2014); Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1097 n.304 (1997) (describing how, even in the eyes of an original supporter, "the complexity of the excess profits law exceeded the administrative capacity of the federal government").

169. Revenue Act of 1918, § 1, 40 Stat. at 1058; Article 1503 of Regulations 45, *reprinted in* Article 1503: Association Distinguished from Partnership, 1926-2 C.B. 128.

170. *Burk-Waggoner Oil* Transcript of Record, *supra* note 164, at 1-2.

171. *See id.* at 3; Brief for the Plaintiff in Error at 10-12, Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925) (No. 67) [hereinafter *Burk-Waggoner Oil* Brief for the Plaintiff in Error].

172. *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 52-90.

constitutional issues first in the district court. The operative complaint alleged that the collection of corporate-income and excess-profits taxes "from plaintiff is unconstitutional" because it is "contrary to the provisions of Article I . . . and also of the Sixteenth Amendment."[173] The district court rejected those arguments, and the taxpayer directly appealed to the Supreme Court on the ground that the case turned on constitutional construction, under the then-operative rules on direct writs of error.[174]

In the Supreme Court, the taxpayer doubled down on—and devoted most of its written briefing to—constitutional contentions.[175] Its opening brief started by demonstrating that under state law, the Burk-Waggoner Oil Association was a partnership with no capacity of property ownership.[176] Instead, "the property and profits [of the association] belong[ed] to the [individual] members," and the enterprise "cannot hold real property in Texas."[177] Federal law could not change this fact. That is, Congress had no independent power to endow a business organization with the capacity for property ownership.[178] If Texas statutes or common law assigned ownership of Burk-Waggoner Oil's property to the Association's individual members, that was the end of the matter. To hold otherwise would authorize Congress to invade "the state's exclusive right to regulate the ownership of property within its borders."[179] Therefore, the business

173. *Burk-Waggoner Oil* Transcript of Record, *supra* note 164, at 3.

174. Burk-Waggoner Oil Ass'n v. Hopkins, 296 F. 492, 499-500 (N.D. Tex. 1924); *Burk-Waggoner Oil* Transcript of Record, *supra* note 164, at 59 (reprinting Writ of Error, *Burk-Waggoner Oil Ass'n*, 269 U.S. 110 (No. 67)). In the Supreme Court, the government contended that the Court lacked jurisdiction because the constitutional question was insubstantial. *See* Brief for the Defendant in Error at 2, *Burk-Waggoner Oil Ass'n*, 269 U.S. 110 (No. 67) [hereinafter *Burk-Waggoner Oil* Brief for the Defendant in Error] (relying on Sugarman v. United States, 249 U.S. 182 (1919), to argue that a direct writ of error from the Supreme Court to the district court under § 238 of the then-operative Judicial Code was proper only if the constitutional question was substantial).

175. The taxpayer also argued that the Revenue Act of 1918 only taxed joint-stock associations as *partnerships*, and that the statute should be so construed to avoid constitutional difficulties. But the statutory arguments only served as a prelude to the constitutional attack, as the Supreme Court's direct jurisdiction was based on the latter. *See Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 31-52; *see also Burk-Waggoner Oil* Brief for the Defendant in Error, *supra* note 174, at 2 (explaining the government's objection to the Supreme Court's direct jurisdiction).

176. *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 25-31.

177. *Id.* at 25, 29, 57-62 (quoting Thompson v. Schmitt, 274 S.W. 554, 558 (Tex. 1925); Edwards v. Old Settlers' Ass'n, 166 S.W. 423, 426 (Tex. Civ. App. 1914); and Clark v. Brown, 108 S.W. 421, 433 (Tex. Civ. App. 1908)).

178. *Id.* at 74-80.

179. *Id.* at 74.

organization itself—the Burk-Waggoner Oil Association—"could not be the owner of income."[180]

Next, the Association argued that the Constitution authorized income taxation only if the *taxpayer*, not just anyone, acquired ownership of the economic gains.[181] It relied on *Pollock v. Farmers' Loan & Trust Co.* That case struck down provisions of the Revenue Act of 1894 on the ground that it taxed income without apportionment based on state population.[182] The Association contended that under *Pollock*, "an income tax is a direct tax," and that "Congress is relieved [only] by the Sixteenth Amendment from the necessity of apportioning it under Sections 2 and 9 of Article I of the Constitution."[183] And "[o]wnership is an essential element . . . of income" under the Sixteenth Amendment.[184] Without an ownership requirement for the taxation of economic gains, "the foundation of the definition [of income] and the resulting limitation upon the power of Congress is destroyed."[185] But under state law, the Burk-Waggoner Oil Association was a partnership that could not possibly "own" any property, including the income taxed under the Revenue Act of 1918.[186] As a result, those corporate-income and excess-profits taxes fell outside of the scope of the Sixteenth Amendment, and within Article I's requirement of apportionment. Of course, Congress did not apportion those taxes.[187] (The federal government has not attempted to levy an apportioned tax since 1861.[188]) Congress, therefore, taxed an entity that bore no ownership relationship with the economic gains, in excess of its constitutional powers.

The taxpayer thus cast constitutional "income" as requiring the specific relationship of ownership with the taxpayer. The structure of this argument proceeded as follows. First, the taxpayer articulated a state-law premise: Texas law

180. *Id.* at 62; *see also id.* at 65-66 (relying on Solicitor's Opinion No. 149, II-1 C.B. 20 (1923), to argue that "a common law joint-stock association is not a legal entity apart from its [individual] members").

181. *Id.* at 67-74.

182. *Id.* at 68 (citing Pollock v. Farmers Loan & Tr. Co., 157 U.S. 429, 583 (1895)).

183. *Id.* (first citing *Pollock*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895); then citing Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1915); and then citing Eisner v. Macomber, 252 U.S. 189 (1920)).

184. *Id.*

185. *Id.*

186. *Id.* at 25-31, 57-67; *see supra* notes 176-180 and accompanying text.

187. Revenue Act of 1918, ch. 18, §§ 230, 301, 40 Stat. 1057, 1075-76, 1088-90 (levying corporate-income and excess-profits taxes without regard to the state census population).

188. *See* Revenue Act of 1861, ch. 45, § 8, 12 Stat. 292, 294-96 (providing for a $20 million direct tax on land and apportioning revenue in accordance with state population); EDWIN R.A. SELIGMAN, THE INCOME TAX 435-36 (1911).

categorized the Burk-Waggoner Oil Association as a partnership with no capacity to own property. Second, the taxpayer deduced a constraint from federalism: Congress had no general power to grant business entities the capacity of property ownership if they lacked it under state law. Third, it put forth a constitutional tax principle: "income" under the Sixteenth Amendment needed to be realized by the taxpayer's acquisition of ownership rights over the economic gains taxed (and is otherwise a direct tax). The taxpayer thus concluded that any income tax imposed on the Burk-Waggoner Oil Association was a direct tax because the Association could not "own" the income taxed, thus failing to meet the constitutional tax principle above.[189] In response, the government contended that the taxpayer's constitutional arguments were so insubstantial as to defeat direct appellate jurisdiction of the Supreme Court over the district court.[190] But it would be a mistake to think that the taxpayer's arguments were frivolous. After all, two lawyers who would later serve as judges on the Tax Court crafted them.[191]

The Supreme Court rejected the taxpayer's arguments. It held instead that constitutional "income" required no specific ownership nexus between the economic gain and the taxpayer.[192] Justice Brandeis wrote a short, opaque opinion for the unanimous Court. He first concluded that as a matter of *statutory* interpretation, the Revenue Act of 1918 imposed corporate-income and excess-profits taxes on associations like the taxpayer.[193] He acknowledged the taxpayer's constitutional arguments, including the key point that "the income of an enterprise *when considered in its relation to all others than the owners* is not income within the purview of the Sixteenth Amendment."[194] The Court did not dismiss those arguments as insubstantial, as the government recommended. Instead, it addressed them head-on. Justice Brandeis found no need to apply constitutional avoidance: the language of the statute was clear.[195] Further, the Court held that the relevant provisions of the Revenue Act of 1918 complied with the

189. *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 52-80, 90.

190. *Burk-Waggoner Oil* Brief for the Defendant in Error, *supra* note 174, at 19-21.

191. Both John M. Sternhagen, who represented the taxpayer in the district court, and Arnold R. Baar, who represented the taxpayer in the Supreme Court, later served as Tax Court judges. *In Memoriam*, 8 BULL. A.B.A. SECTION TAX'N 2 (1954); *see also Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, title page (showing Arnold R. Baar as an attorney for the Plaintiff in Error); *Burk-Waggoner Oil* Transcript of Record, *supra* note 164, at 3 (showing John M. Sternhagen as an attorney for the plaintiff).

192. *See* Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925).

193. *Id.* at 111-12 (first citing Revenue Act of 1918, ch. 18, §§ 210, 211, 218(a), 224, 335(c), 40 Stat. 1057, 1062-1064, 1070, 1074, 1096; and then citing Hecht v. Malley, 265 U.S. 144 (1924)).

194. *Id.* at 112 (emphasis added).

195. *Id.* at 113.

Constitution.[196] To be sure, "Congress cannot make a thing income which is not so in fact."[197] But the federal taxing power "is not affected by the fact that, under the law of a particular state, the association[-taxpayer] cannot hold title to property," or "that it is not recognized as a legal entity."[198]

The *Burk-Waggoner* Court thus rejected constitutional "income" as incorporating ownership by the cost-bearer. To be sure, it recognized realization as asking a legitimate, ontological question about the nature of the object taxed.[199] But the answer to that question does not depend on the *taxpayer's* relationship to the economic gain. So, in *Burk-Waggoner*, the Association's inability to own the income taxed is irrelevant. No one questioned that *someone*—whether the Association or the individual members—owned that income. This was enough to put the corporate-income and excess-profits tax of 1918 within the ambit of the Sixteenth Amendment. Absent other constitutional constraints, Congress's decision to attribute oil-drilling income to the Association rather than the individual members was presumptively valid.

2. *Cementing the Threshold and Finding Limits: (Revocable) Trusts*

Next are cases in which the Supreme Court upheld federal taxation of revocable (and in the end, irrevocable) trusts. In these suits, taxpayers contended that Congress could only tax income received *by the taxpayer*. In rejecting such arguments, the Court cemented the threshold for applying the attribution inquiry. If *someone* (even if not the taxpayer) *received* the income, Congress could presumptively attribute such income to anyone. Further, the Court found limits to the federal attribution power, locating their source in the Due Process Clause. A divided decision held under the Fifth Amendment that Congress could tax any constituent of the taxpayer's ownership of the income.[200]

This case law arose from high-income households' use of trust law to shift income within the family and reduce overall tax burden. During World War I, Congress faced a fiscal crunch and taxed income as high as seventy-seven

196. *Id.* at 114.

197. *Id.*

198. *Id.*

199. Recognizing the existence of the ontological question is *not* holding that realization is constitutionally required. That is, the *Burk-Waggoner* Court merely acknowledged that there is a constitutional doctrinal inquiry about what "income" is for purposes of the Sixteenth Amendment. It did not give credence to realization as a necessary element of "income." *Id.* at 114.

200. Burnet v. Wells, 289 U.S. 670, 678-79 (1933); *see infra* notes 281-286 and accompanying text.

percent.[201] The 1920s saw retrenchment, but income-tax burdens stayed well above prewar levels, thus incentivizing innovative tax avoidance.[202] Under one common technique, taxpayers (usually husbands) set up trusts that distributed income from property to related parties (e.g., their wives and children).[203] They designed various trust instruments—some letting taxpayer-grantors retain control over the corpus (i.e., property transferred into the trust), others relinquishing all control over the corpus.[204] In all cases, taxpayers argued that the income distributed by the trust to their family members should be taxed to the family members, not to the taxpayer-grantors themselves. They put forth constitutional, not merely statutory, arguments and contended that the economic gain received by trust beneficiaries (but not the taxpayers) was not "income" under the Sixteenth Amendment.[205] During this period, Congress taxed individuals, not family units, with a progressive rate structure.[206] Shifting income to lower-income individuals—subject to a lower marginal tax rate—within one's family unit thus reduced overall tax liability.[207] As this Section will show, the Supreme Court rejected all such constitutional arguments.

First in the series of trust cases is *Corliss v. Bowers*, decided by the Supreme Court in 1930.[208] In *Corliss*, the taxpayer delivered corporate stocks and bonds to a trust in 1922.[209] The trust indenture directed the trustee, a company in New

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201. *See* Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062 (levying a top normal income-tax rate of twelve percent on income above $4,000); *id.* § 211(a), 40 Stat. at 1064 (levying a top surtax rate of sixty-five percent on income above $1 million).

202. *See* MEHROTRA, *supra* note 122, at 349-408 (examining the rise of the modern fiscal state and income taxation during the 1920s). In 1913, Congress imposed the first peacetime income tax pursuant to the Sixteenth Amendment, with a top rate of six percent. Revenue Act of 1913, ch. 16, § II.A, 38 Stat. 114, 166.

203. *See infra* notes 209-214, 242-253 and accompanying text (describing intrafamilial trusts).

204. *Compare* Corliss v. Bowers, 281 U.S. 376, 377 (1930) (concerning a trust revocable by the grantor), *with Burnet*, 289 U.S. at 673 (concerning an irrevocable trust).

205. *See infra* notes 224-234, 254-275 and accompanying text (excavating taxpayers' constitutional arguments from Supreme Court and lower-court briefings).

206. In 1930, the Supreme Court held that spouses in community-property states should each be taxed on half of the couple's community income. The decision led to a stampede of states attempting to introduce community property as a tax advantage to their residents. As a result, in 1948, Congress extended income splitting to all married couples. *See* Poe v. Seaborn, 282 U.S. 101, 118 (1930); Daniel J. Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 671 (2019); *see also infra* Section II.B.3 (discussing due-process case law developed from federal taxation of marital units).

207. Similar pressures exist today due to the progressive structure of marginal tax rates. *See, e.g.*, ANNE L. ALSTOTT, TAXATION IN SIX CONCEPTS § 106 (2018) (discussing income shifting).

208. *Corliss*, 281 U.S. 376.

209. Transcript of Record at 3-4, Corliss v. Bowers, 30 F.2d 135 (S.D.N.Y. 1929) (No. 344) [hereinafter *Corliss* Transcript of Record].

York, to pay income from the trust corpus to the taxpayer's wife in quarterly installments for the duration of her life.[210] The indenture authorized the taxpayer-grantor to "modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts."[211] That is, the taxpayer set up a revocable trust over whose corpus he retained significant control. In 1924, the trust property yielded dividends and interests totaling over $127,000 – about thirty-six times the average net income reported on individual tax returns at the time.[212] After accounting for taxes and fees, the trustee disbursed the income to the taxpayer's wife as beneficiary.[213] The taxpayer claimed an exemption for such income on his 1924 tax return.[214] The Treasury Department disagreed. It assessed an additional tax of about $45,000 on the trust income, and the taxpayer claimed a refund – in vain – after payment.[215]

In 1927, the taxpayer sued in the Southern District of New York and attacked the relevant Internal Revenue provisions on constitutional grounds.[216] Before 1924, the income-tax statute, in general, taxed beneficiaries on their distributable shares of trust income and the remainder (if any) to the trusts themselves.[217] In 1922, the Solicitor of Internal Revenue held in an administrative ruling that grantors of revocable trusts should not be taxed on trust income unless disbursed to them as beneficiaries[218] – that is, unless the grantors personally received the trust

210. *Id.* at 4.

211. *Id.* at 13.

212. *Id.* at 4 (showing dividend income of $123,521.25, corporate-bond interest of $2,415.15, and state- and local-bond interest of $1,725.31). The average net income per individual tax return was $3,481.26 in 1924. TREASURY DEP'T, U.S. INTERNAL REVENUE, STATISTICS OF INCOME FROM RETURNS OF NET INCOME FOR 1924: INCLUDING STATISTICS FROM CAPITAL STOCK TAX RETURNS, ESTATE TAX RETURNS, AND GIFT TAX RETURNS 2 (1926). The *Corliss* taxpayer was thus very wealthy for this time.

213. *Corliss* Transcript of Record, *supra* note 209, at 4 (showing disbursement of $124,325.97 to the taxpayer's wife).

214. *Id.* at 5-6.

215. *Id.* at 6-8.

216. *Id.* at 7-8.

217. *See* Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (defining generally the "net income of a taxable person"); Revenue Act of 1918, ch. 18, § 213(a), 40 Stat. 1057, 1065 (defining generally "gross income"). The precise statutory mechanism was for the trust to report all income on its own trust tax return and to take a deduction equal in amount to income distributable to the beneficiaries. *See* Revenue Act of 1921, ch. 136, § 219(a), (e), 42 Stat. 227, 246-47 (allowing "as an additional deduction in computing the net income of the estate or trust that part of its income . . . which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries"); Jacob Rabkin & Mark H. Johnson, *Trust and Beneficiary Under the Income Tax*, 1 TAX L. REV. 117, 119 (1946).

218. Solicitor of Internal Revenue Opinion, L.O. 1102, I-2 C.B. 50, 56 (1922) ("[T]he income of the trust funds established by A for the purpose of providing a system for the payment of income. The Solicitor based his opinion primarily on case law about trusts and the statutory regime.[219] But he also cited *Eisner v. Macomber* for the proposition that taxing grantors for income disbursed to trust beneficiaries "would impose an income tax upon income which was not received by the taxpayer."[220]

In 1924, Congress modified the statute. The Revenue Act of 1924 taxed trust income to grantors in two scenarios. First, section 219(g) taxed trust income to the grantor where he could "revest in himself title to any part of the corpus of the trust."[221] Second, section 219(h) did the same where any trust income could be "distributed to the grantor."[222] These two rules applied whether grantors acted "alone or in conjunction with any person not a beneficiary of the trust."[223]

The Revenue Act of 1924 thus taxed income from revocable trusts to the grantors, even if they did not personally receive any economic gain. As a result, the taxpayer in *Corliss* challenged the constitutionality of section 219(g) in the district court. He contended that section 219(g) "violate[d] the provisions of Article I" of the Constitution, which required apportionment of "direct" taxes.[224] He alleged that by taxing him on the trust income distributed to beneficiaries, Congress "did not impose a tax on income within the meaning of the provisions of the sixteenth amendment."[225] And such taxation in any event contravened the due-process guarantees of the Fifth Amendment.[226] The lower courts found these arguments unpersuasive. The district court granted the government's motion to dismiss and recognized the problem of income shifting that the statute

pensions to certain individuals designated by him was not taxable income to A . . . except such portion thereof as he received as a beneficiary."); *see also* Treas. Rul. I.T. 1589, II-1 C.B. 51, 51 (1923) (extending Solicitor of Internal Revenue Opinion L.O. 1102 to all revocable trusts).

219. *See* Solicitor of Internal Revenue Opinion, L.O. 1102, *supra* note 218, at 50, 52-53 (framing the opinion as an interpretation of the Revenue Acts of 1916 and 1918, and citing cases including Jones v. Clifton, 101 U.S. 225 (1879); Schreyer v. Schreyer, 91 N.Y.S. 1065 (App. Div. 1905); and Stone v. Hacket, 78 Mass. (12 Gray) 227 (1858)).

220. *Id.* at 55 (citing Eisner v. Macomber, 252 U.S. 189, 209 (1920)).

221. Revenue Act of 1924, ch. 234, § 219(g), 43 Stat. 253, 277 ("Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.").

222. *Id.* § 219(h), 43 Stat. at 277 ("Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, . . . such part of the income of the trust shall be included in computing the net income of the grantor.").

223. *Id.* § 219(g)-(h), 43 Stat. at 277.

224. *Corliss* Transcript of Record, *supra* note 209, at 7-8 (quoting U.S. CONST. art. I, § 2, cl. 3).

225. *Id.*

226. *Id.*

aimed to remedy.[227] The Second Circuit affirmed.[228] Four months later, the Supreme Court granted certiorari.[229]

At the Supreme Court, the taxpayer renewed his constitutional claims. Like the Burk-Waggoner Oil Association, he characterized the income tax as a "direct tax" that must be apportioned under Article I.[230] The Sixteenth Amendment authorized a uniform federal income tax and relieved Congress from the strictures of apportionment—but for "income" only.[231] Citing *Eisner v. Macomber*, the *Corliss* taxpayer contended that "Congress could not by any [statutory] definition declare to be income that which was in fact not."[232] This would permit Congress to override the Constitution. Instead, "income" for purposes of the Sixteenth Amendment includes only economic gains "received by the taxpayer."[233] The *Corliss* petitioner concluded, "[T]he power of Congress to impose an income tax as granted in the Sixteenth Amendment is limited to the power to tax the *recipient* of the income."[234]

The *Corliss* taxpayer thus defined constitutional "income" to require receipt by the cost-bearer—a quasi-realization argument. The Supreme Court rejected this challenge. In a pithy, two-page opinion, Justice Holmes held for the government with no noted dissent.[235] He emphasized the functional concerns of income taxation: "[A]ctual command over the property taxed," not "refinements of title," controlled in tax cases.[236] He gave no credence to the taxpayer's ontological arguments (that taxes on economic gains, without receipt by the cost-bearer, were somehow not "income" taxes). Instead, he crafted a broad vision of Congress's attribution power: "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed *to him as*

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227. Corliss v. Bowers, 30 F.2d 135, 136-37 (S.D.N.Y. 1929).

228. Corliss v. Bowers, 34 F.2d 656, 658 (2d Cir. 1929).

229. Corliss v. Bowers, 280 U.S. 543, 543 (1929).

230. Brief of Plaintiff-Appellant at 12, Corliss v. Bowers, 281 U.S. 376 (1930) (No. 344) [hereinafter *Corliss* Petitioner's Brief].

231. *Id.* at 14.

232. *Id.* at 15 (citing Eisner v. Macomber, 252 U.S. 189, 206 (1920)).

233. *Id.* at 16 (quoting Solicitor of Internal Revenue Opinion, L.O. 1102, *supra* note 218, at 55).

234. *Id.* at 18 (emphasis added). In addition to income-centric arguments, the taxpayer contended that section 219(g) violated the Fifth Amendment by retroactively taxing income from revocable trusts established before the Revenue Act of 1924. *Id.* at 20-22; *see also* Brief for Respondent at 21, *Corliss*, 281 U.S. 376 (No. 344) (arguing, in response, that past practices of income taxation "foreclose[d] the contention that retroactivity br[ought] an Act of Congress within the due process clause of the Fifth Amendment").

235. The Chief Justice did not take part in the *Corliss* decision. *Corliss*, 281 U.S. at 378.

236. *Id.*

his income, whether he sees fit to enjoy it or not."[237] Importantly, the attribution power is independent of and not incidental to Congress's authority to curb tax avoidance.[238]

Corliss thus refused to define income as requiring receipt by the cost-bearer. It widened the latitude for legislative judgment as to the relationship between the income taxed and the taxpayer. In retrospect, Justice Holmes's use of the phrase "*unfettered* command" proved unfortunate, even if necessary to garner the approval of all voting Justices.[239] As discussed, the Revenue Act of 1924 taxed trust income to grantors if they could, "either alone or in conjunction with any person not a beneficiary of the trust," revest in themselves the trust corpus.[240] Did *Corliss*—and Congress's attribution power—apply where the grantor did not have "unfettered" power to revoke the trust, and could do so only in conjunction with others? This question quickly arose in *Reinecke v. Smith*.[241]

The facts in *Smith* were similar. In 1922, the *Smith* taxpayer created five trusts for the benefit of his wife and children.[242] The trustees included the grantor, a son (a direct beneficiary of one trust and a contingent beneficiary of others), and a banking company.[243] All five trust indentures provided that in case of a trustee's death, the remaining trustees could appoint a successor trustee.[244] Importantly, the indentures required that "one trustee always . . . be a bank or trust company

237. *Id.* (emphasis added).

238. During this period, taxpayers often contended—as part of their constitutional challenges to income-tax provisions—that Congress could not have levied the tax in question pursuant to its powers to curb tax avoidance. *See, e.g.*, *Corliss* Petitioner's Brief, *supra* note 230, at 22 ("The taxation of the appellant upon the income of the trust beneficiary, cannot be justified as necessary to the enforcement of the admitted constitutional power to tax income."); Brief for Respondents at 23, Reinecke v. Smith, 289 U.S. 172 (1933) (No. 601) [hereinafter *Smith* Respondents' Brief] ("A Statutory Enactment Which Is Void Cannot Be Validated Because of an Alleged Purpose to Prevent Tax Evasion."). Affirming section 219(g) on the basis of Congress's power to curb tax avoidance would have shifted the locus of analysis to Article I and the Sixteenth Amendment. But as this Section will show, the Court turned to the Fifth Amendment to judge the propriety of income attribution.

239. *Corliss*, 281 U.S. at 378 (emphasis added).

240. Revenue Act of 1924, ch. 234, § 219(g)-(h), 43 Stat. 253, 277; *see supra* notes 221-222 and accompanying text.

241. 289 U.S. at 174.

242. Transcript of Record at 3-4, *Smith*, 289 U.S. 172 (No. 601) [hereinafter *Smith* Transcript of Record] (reprinting Declaration). In *Smith*, the district judge ruled in favor of the taxpayer without a formal opinion. *See id.* at 84; Petition for Writ of Certiorari at 1, *Smith*, 289 U.S. 172 (No. 601) [hereinafter *Smith* Certiorari Petition] ("The United States District Court for the Northern District of Illinois filed no opinion.").

243. *Smith* Transcript of Record, *supra* note 242, at 3-4.

244. *Id.* at 7.

of the City of Chicago."[245] As a result, at least one trustee at any time would be a nonbeneficiary of the trust.[246] Further, the indentures permitted modifications and revocations of the trust "by an instrument in writing signed by [the *Smith* taxpayer] and either one of the other two trustees or their successor."[247] The *Smith* taxpayer thus retained control over the trusts in conjunction with one other trustee. And the appointment rules for successor trustees meant that he could always revoke the trusts in conjunction with a nonbeneficiary.[248]

As discussed, income from revocable trusts was not taxed to grantors until the Revenue Act of 1924.[249] In 1924, the five trusts set up by the *Smith* taxpayer earned net taxable income totaling $159,240.61 – again, an immense sum for the time.[250] Section 219(g) squarely applied. Under the statute, Congress taxed trust income to grantors who could "revest in himself" the trust corpus, "either alone or in conjunction with" a nonbeneficiary – a right conferred by the trust indentures in *Smith*.[251] As a result, the *Smith* taxpayer reported this gain on his individual income-tax returns for 1924 under protest and sued for a refund.[252] Note that the facts in *Smith* differed from *Corliss* in one key respect: the *Smith* taxpayer had *joint* rather than sole power to revoke the trust.[253]

In the district court, the *Smith* taxpayer challenged the constitutionality of section 219(g). Like the *Corliss* taxpayer, he contended that Congress had no power to tax trust income to grantors who have not personally received the economic gain. Section 219(g) "lev[ied] a direct tax" on him which was "not apportioned among the several states" as required by the Direct Tax Clauses of the Constitution.[254] To the extent the government defended section 219(g) as an "income tax[]," Congress "exceed[ed] the power and authority conferred on [it] by the Sixteenth Amendment."[255] Section 219(g) was thus "ultra vires and

245. *Id.* at 25.

246. As noted, the trust beneficiaries were the *Smith* taxpayer's family. *See supra* note 242 and accompanying text.

247. *Smith* Transcript of Record, *supra* note 242, at 7 (quoting indentures).

248. *Id.*

249. *See supra* notes 218-223 and accompanying text (discussing taxation of income from revocable trusts before and pursuant to the Revenue Act of 1924).

250. *Smith* Transcript of Record, *supra* note 242, at 8; *see* TREASURY DEP'T, *supra* note 212, at 2.

251. Revenue Act of 1924, ch. 234, § 219(g), 43 Stat. 253, 277.

252. *Smith* Transcript of Record, *supra* note 242, at 8-9, 54.

253. *Compare Corliss* Transcript of Record, *supra* note 209, at 12-13 (describing a trust revocable by the grantor), *with Smith* Transcript of Record, *supra* note 242, at 7 (describing a trust revocable by the grantor with the consent of a nonbeneficiary).

254. *Smith* Transcript of Record, *supra* note 242, at 12-13.

255. *Id.*

exceeded the limitations" on Congress's taxing authority articulated by Article I.[256] Further, it deprived the taxpayer "of his property without due process of law in violation of the provisions of the Fifth Amendment."[257]

Without issuing a formal opinion, the Northern District of Illinois ruled in favor of the taxpayer.[258] The Seventh Circuit affirmed the next year, under a narrow rationale.[259] Its holding applied only to trusts established before the Revenue Act of 1924 and over which the grantors did not have full control. The court observed that the *Smith* taxpayer could not act "alone," as "consent of the trustee was essential to revocation."[260] And the "grantor was not taxable on the income of trusts" at the time of their settlement in 1922.[261] The court recognized that Congress had "broad" power to tax "income of trusts which are under the unfettered control of the grantor or which may be created in the future."[262] It also noted that Congress could enact "[a]ll measures reasonably necessary to prevent" tax avoidance.[263] But both retroactivity and the taxpayer's lack of exclusive dominion over the trust corpus made *Smith* a different case. The Seventh Circuit thus struck down section 219(g) as applied. It concluded that the provision "offends the Fifth Amendment."[264] But it also acknowledged the taxpayer's realization-based arguments: "[T]hat which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income."[265]

The lower courts thus held section 219(g) unconstitutional in response to the taxpayer's arguments under the Fifth and Sixteenth Amendments. The government sought certiorari.[266] It asked for a "prompt settlement of the constitutional question . . . in the public interest," and argued that *Corliss* did not limit Congress's attribution power to only where the taxpayer had unconstrained power over the trust property.[267] The Supreme Court granted the petition.[268]

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256. *Id.* at 13.

257. *Id.*

258. *Id.* at 84; *Smith* Certiorari Petition, *supra* note 242, at 1.

259. Reinecke v. Smith, 61 F.2d 324, 325 (7th Cir. 1932), *rev'd*, 289 U.S. 172 (1933).

260. *Id.*

261. *Id.*

262. *Id.* (citing Corliss v. Bowers, 281 U.S. 376 (1930), among other authorities).

263. *Id.*

264. *Id.* (first citing Nichols v. Coolidge, 274 U.S. 531, 542 (1927); and then citing Heiner v. Donnan, 285 U.S. 312, 326, 327 (1932)).

265. *Id.*

266. *See Smith* Certiorari Petition, *supra* note 242.

267. *Id.* at 4-6.

268. Reinecke v. Smith, 288 U.S. 596, 596 (1933) (mem.).

At the Supreme Court, the taxpayer renewed his contentions, which persuaded the lower courts. Like the *Corliss* petitioner, he emphasized the receipt of economic gain by the taxpayer as essential to constitutional "income": Congress taxed him "on the income of the trusts which he did not receive, and could not have received."[269] But the written briefing wavered between the Fifth and the Sixteenth Amendments as the constitutional source of its arguments. On the one hand, the taxpayer's brief framed the question presented as, "[M]ay a person be subjected to a *direct tax* measured by the income of another?"[270] Relying on *Pollock*, it contended that income taxes "are direct taxes" and that "[t]he Sixteenth Amendment removed the necessity for apportionment."[271] Congress's power to "impose such a direct tax, measured by income" is therefore predicated on "the income of the person sought to be taxed," that is, "the owners and recipients [of the income]."[272] These arguments obviously gestured toward the Sixteenth Amendment and its concept of "income" as central to the dispute. On the other hand, the taxpayer contended extensively that section 219(g) deprived the trust grantor of property without due process.[273] To "tax one person upon the income of another" contravened the Fifth Amendment.[274] This equivocation is perhaps understandable: the taxpayer tried to build on the reasoning of the Seventh Circuit.[275]

The Supreme Court reversed. It dismissed—and practically ignored—the contentions based on realization and the Direct Tax Clauses, while upholding expressly under the Fifth Amendment Congress's attribution of trust income to the grantor.[276] Writing for a unanimous Court, Justice Roberts saw the gist of the taxpayer's position as a "den[ial of] due process."[277] Under this view, Congress violated the Fifth Amendment by exacting a tax "based, not on the settlor's income or on income from his property, but on that which accrued to other

269. *Smith* Respondents' Brief, *supra* note 238, at 2; *accord* Brief for Respondents in Opposition at 2, Reinecke v. Smith, 289 U.S. 172 (1933) (No. 601) (opposing the government's petition for a writ of certiorari by emphasizing that the taxpayer "did not receive, and could not have received" the "income of the trusts").

270. *Smith* Respondents' Brief, *supra* note 238, at 2 (emphasis added).

271. *Id.* at 8 (citing Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601 (1895)).

272. *Id.*

273. *Id.* at 17-23.

274. *Id.* at 17.

275. *See* Reinecke v. Smith, 61 F.2d 324, 325 (7th Cir. 1932); *supra* notes 264-265 and accompanying text (discussing the constitutional source of the Seventh Circuit's holding).

276. Reinecke v. Smith, 289 U.S. 172, 178 (1933); *see* Charles L.B. Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation*, 47 HARV. L. REV. 628, 650-51 (1934).

277. *Smith*, 289 U.S. at 175.

persons."[278] The Court rebuffed such limits on Congress's power. Under the Fifth Amendment, section 219(g) is not "so arbitrary and capricious as to amount to a deprivation of property without due process of law."[279] Congress could thus attribute to grantors trust income which they have not personally received, and over which they do not have, in *Corliss*'s words, "unfettered command."[280]

This saga culminated in *Burnet v. Wells*. In *Wells*, the taxpayer-grantor established *irrevocable* trusts and thus retained no control over the corpus. The trust income would pay for his life-insurance policies, with insurance proceeds and excess income invested and disbursed for the benefit of his daughter, wife, and extended family.[281]

No longer unanimous, the Supreme Court upheld the attribution of income from irrevocable trusts to the taxpayer-grantor in a 5-4 vote.[282] Writing for the majority, Justice Cardozo clarified just how broad the attribution power is: to prevail on due-process grounds, the taxpayer "must show that in attributing to him the ownership of the income of the trusts, . . . the lawmakers have done a *wholly arbitrary* thing."[283] Warning against formalist distinctions, Cardozo held that the Constitution did not require Congress to tax the party with the closest relationship to the income.[284] Instead, Congress could tax "any right or privilege that is a constituent of ownership."[285] Four Justices dissented. Their gripe was clear: "Congress may not tax the property of A as the property of B, or the income of A as the income of B."[286]

This history from *Corliss* to *Wells* fleshes out the attribution framework. First, it cements the threshold drawn in *Burk-Waggoner Oil*. In both *Corliss* and *Smith*, taxpayers contended that the absence of a specific relationship between the taxpayer and the economic gains taxed removed the latter from the scope of "income" under the Sixteenth Amendment. The Supreme Court rejected these arguments: when someone has realized income through receipt, the attribution inquiry

278. *Id.*

279. *Id.* at 177.

280. Corliss v. Bowers, 281 U.S. 376, 378 (1930).

281. Burnet v. Wells, 289 U.S. 670, 673-74 (1933).

282. *Id.* at 683.

283. *Id.* at 679 (emphasis added) (first citing Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912); and then citing Hebe Co. v. Shaw, 248 U.S. 297, 303 (1919)).

284. *Id.* at 677-78 ("Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place." (first citing *Corliss*, 281 U.S. at 378; and then citing *Smith*, 289 U.S. 172)).

285. *Id.* at 678 (first citing Nash., Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 268 (1933); and then citing Bromley v. McCaughn, 280 U.S. 124, 136 (1929)).

286. *Id.* at 683 (Sutherland, J., joined by Van Devanter, McReynolds & Butler, JJ., dissenting).

governs whom Congress could tax for that income. Second, in *Wells*, the Court located limits on Congress's attribution power in the Due Process Clause. Under the Fifth Amendment, the taxpayer must bear a nonarbitrary relationship with the income taxed.

3. *Confirming the Threshold and Experimenting with Limits: Marriage*

The third body of case law arose from federal taxation of marital units in community-property states. In these cases, litigants again challenged federal-revenue law on the ground that they did not realize or own the income taxed, and the Supreme Court gave little credence to their arguments grounded in the Direct Tax Clauses and the Sixteenth Amendment. The Court's dismissal of the arguments grounded in the Direct Tax Clauses confirmed the threshold of the attribution doctrine, which it had articulated and applied in the corporate-profits and the trust cases. Further, the Court experimented with the due-process limits on the attribution doctrine: in a curious case about *state*, not federal, taxing power, the Court cast doubt on the government's authority to determine *A*'s tax liability based on *B*'s income.[287] But such experimentation was short-lived, as the Court fleshed out in *Wells*—a later, *federal* case—the nonarbitrariness standard implicated by due process.[288]

As discussed, Congress during this period taxed income at progressive marginal rates to individuals rather than family units.[289] Single-earner households could therefore reduce their liability by splitting taxable income between the husband and the wife.[290] Relying on Attorney General opinions, the Treasury Department allowed households in community-property states to do precisely that,[291] since under community-property law, spouses jointly owned marital

287. Hoeper v. Tax Comm'n, 284 U.S. 206, 215 (1931) ("We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment.").

288. *Wells*, 289 U.S. at 678.

289. *See supra* note 206 and accompanying text.

290. Placing the entire income into one taxable unit (for example, the husband) could push the taxpayer into a higher bracket. *See, e.g.*, Revenue Act of 1924, ch. 234, §§ 210(a), 211(a), 43 Stat. 253, 264-67 (imposing graduated-normal and surtax rates that resulted in more than 40 income-tax brackets).

291. T.D. 3071, 1920-3 C.B. 221 (allowing each spouse domiciled in Texas to report one half of the marital unit's total earnings on separate returns); T.D. 3138, 1921-4 C.B. 238 (allowing the same for residents in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada); *see* Income Tax—Community Property, 32 Op. Att'ys Gen. 298, 308 (1920) (concluding that the "earnings of husband and wife domiciled in Texas are community income" and should be taxed at one-half to each).

property. But the Treasury Department denied income splitting to California taxpayers on the ground that, under California law, wives had only an expectancy—rather than a vested—interest in marital property, contingent on their husbands' death.[292] Executors of a California taxpayer sued, and in 1926, the Supreme Court, in *United States v. Robbins*, held for the federal government.[293] In another pithy opinion, Justice Holmes agreed on the state-law point of expectancy interests.[294] But he resolved the dispute on a broader ground: Congress had the power to—and did, pursuant to the Revenue Act of 1919—tax the individual within the marital unit who actually controlled the income.[295]

The Supreme Court's broad reasoning in *Robbins* reverberated through the executive branch. In response, the Department of Justice reversed its position: it withdrew prior Attorney General opinions advising Treasury to tax each spouse in community-property states (other than California) on half of the marital income, and concluded that neither administrative action nor congressional enactment could resolve the uncertainties.[296] The Justice Department thus recommended that Treasury "arrange for test cases" to allow courts to determine how marital units in community-property states should be taxed.[297]

Following this advice, Treasury quickly brought test cases in several community-property states. *Poe v. Seaborn* arose out of Washington.[298] In *Seaborn*, the taxpayer and his wife had gross income from bonds, stocks, disposition of property, and the husband's salary, totaling about $53,000.[299] They each filed separate returns reporting half of the marital community's income.[300] The Commissioner of Internal Revenue, however, held all income taxable to the husband,

292. *See* Community Property—Income and Estate Taxes, 32 Op. Att'ys Gen. 435, 456, 458 (1921) (finding that wives in community-property jurisdictions had "vested" interests in marital property, except California, where wives held only "expectancy" interests); United States v. Robbins, 269 U.S. 315, 326 (1926) (stating that the Treasury Department disallowed California taxpayers' efforts to split their marital income).

293. *Robbins*, 269 U.S. at 327-28.

294. *Id.* at 327 (citing Roberts v. Wehmeyer, 218 P. 22, 25-27 (Cal. 1923)).

295. *Id.* at 327-28 (upholding Congress's power and intent to tax income to the husband in California, "[e]ven if [the Court was] wrong as to the law of California").

296. Withdrawal of Opinions Relating to the Wife's Interest in the Community Income, 35 Op. Att'ys Gen. 265, 268-69 (1927) (concluding that administrative resolution of the uncertainty created by *Robbins* "would produce the utmost confusion," and that Congress could not change state property law by enactment of revenue statutes).

297. *Id.* at 269.

298. Poe v. Seaborn, 282 U.S. 101 (1930).

299. Transcript of Record at 2, *Seaborn*, 282 U.S. 101 (No. 15).

300. *See id.* at 25-31.

who sued for a refund after paying the tax under protest.[301] As in earlier cases involving corporate profits and revocable trusts, the taxpayer raised constitutional arguments. He contended that the Revenue Act of 1926, if construed to tax *him* on the entire income of the marital community, would (1) "lev[y] a direct tax . . . not upon income as the term is used in the sixteenth amendment . . . and not apportioned among the several States," and (2) deprive him of property "without due process of law."[302]

The district court held for the taxpayer on statutory grounds. While noting his constitutional arguments, the court concluded that the wife's vested interest made her taxable on half of the community income, thereby reducing the marital unit's overall tax burden.[303] The government appealed, and the Ninth Circuit certified the question to the Supreme Court.[304] Three other test cases also reached the Court, but *Seaborn* became the lead case addressing the common federal questions.[305]

The Supreme Court thus read two sets of taxpayer briefs: one on behalf of the husband in *Seaborn*, and a joint supplemental brief on behalf of taxpayers in all four cases (covering Arizona, Texas, and Louisiana in addition to Washington) on shared questions.[306] Both raised constitutional challenges in addition to statutory arguments.[307] Taxpayers again argued that Article I required Congress to apportion income taxes, and that the Sixteenth Amendment only eliminated that requirement for income actually owned by and vested in the taxpayer.[308] Under state property law, however, half of the marital community's income vested in

301. *Id.* at 2-5.

302. *Id.* at 3, 5.

303. Seaborn v. Poe, 32 F.2d 916, 920 (W.D. Wash. 1929).

304. *Seaborn*, 282 U.S. at 101, 109.

305. *Id.* at 113; Goodell v. Koch, 282 U.S. 118, 120 (1930) (allowing each spouse in Arizona to report half of community property on separate returns); Hopkins v. Bacon, 282 U.S. 122, 125, 127 (1930) (same for Texas); Bender v. Pfaff, 282 U.S. 127, 131 (1930) (same for Louisiana).

306. *See* Brief of H.G. Seaborn, *Seaborn*, 282 U.S. 101 (No. 15) [hereinafter *Seaborn* Respondent's Brief]; Joint and Supplemental Brief for Taxpayers on Certain Questions Common to All of the Above Cases, *Seaborn*, 282 U.S. 101 (No. 15) [hereinafter *Seaborn* Joint Taxpayer Brief].

307. As to the statute, the taxpayers emphasized that under state law, each spouse had an equal, vested interest in community property, that federalism constrained Congress from modifying local law, that the marital community was akin to a tax partnership, and that longstanding executive construction favored the taxpayers' position. *Seaborn* Joint Taxpayer Brief, *supra* note 306, at 15-16, 26; *Seaborn* Respondent's Brief, *supra* note 306, at 19-20, 64.

308. *See Seaborn* Joint Taxpayer Brief, *supra* note 306, at 69, 71 (citing Eisner v. Macomber, 252 U.S. 189 (1920); Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 432 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 3 (1916); and *Seaborn* Respondent's Brief, *supra* note 306, at 79-81).

each spouse.[309] And federalism constrained Congress from changing state property law by edicts of taxation. The federal government, therefore, lacked authority to impose a uniform tax on *one* spouse based on *both* spouses' income.[310] Such a tax would not qualify as "income" under the Sixteenth Amendment and would amount to an unapportioned direct tax.[311] Taxpayers thus urged the Court to strike down Treasury's approach: denying income splitting in community-property states amounted to imposing "a direct tax, not based on income and not apportioned."[312] At a minimum, therefore, the Court should construe the statute against Treasury to avoid constitutional concerns.[313]

This time, the Court held for the taxpayers, but on statutory grounds. Writing for a unanimous Court, Justice Roberts focused on the statutory text: the Revenue Act of 1926 levied a tax on "the net income *of* every individual," and the genitive preposition "of" incorporated the idea of ownership under state property law.[314] He agreed with the taxpayers' view of Washington law: each spouse had a vested right in community property, and the husband's agency powers on behalf of the marital community did not negate the wife's property interest.[315] The statute, therefore, permitted spouses in Washington to split community income on separate returns.[316]

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309. *See, e.g.*, *Seaborn* Respondent's Brief, *supra* note 306, at 21-51 (discussing community-property law in Washington and emphasizing state sovereignty).

310. *See Seaborn* Joint Taxpayer Brief, *supra* note 306, at 65.

311. *See id.* at 69; *Seaborn* Respondent's Brief, *supra* note 306, at 77, 79.

312. *Seaborn* Joint Taxpayer Brief, *supra* note 306, at 66; *accord* Poe v. Seaborn, 282 U.S. 101, 107 (1930) (summarizing the respondent-taxpayer's arguments).

313. *See Seaborn* Respondent's Brief, *supra* note 306, at 76 (arguing that the Supreme Court has a "duty" to read a statute "to preserve its constitutionality" and "to avoid any construction that would create grave doubt of its constitutionality"); *see also* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1282 (2016) (discussing the distinction between traditional and modern avoidance).

314. *Seaborn*, 282 U.S. at 109 (emphasis added); *see* Revenue Act of 1926, ch. 27, § 210(a), 44 Stat. 9, 21.

315. *Seaborn*, 282 U.S. at 110-11 (first citing Marston v. Rue, 159 P. 111, 112-13 (Wash. 1916); and then citing Mabie v. Whittaker, 39 P. 172, 175 (Wash. 1895)).

316. Of course, the Revenue Acts of 1918 and 1924 used similar language. But they did not impose an ownership nexus on the taxation of corporate profits or trust income because of specific statutory direction as to how they should be taxed. *Compare* Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062 (levying a tax "upon the net income *of* every individual" (emphasis added)), *and id.* §§ 230, 301, 40 Stat. at 1075-76, 1088-89 (levying corporate, excess-profit, and war-profit taxes), *with* Revenue Act of 1924, ch. 234, § 210(a), 43 Stat. 253, 264 (levying a tax "upon the net income *of* every individual" (emphasis added)), *and* Revenue Act of 1924, § 219(g), 43 Stat. at 277 (taxing income from revocable trusts to grantors rather than beneficiaries).

The Court gave no credence to the taxpayers' arguments based on the Direct Tax Clauses and the Sixteenth Amendment—not even as a basis for constitutional avoidance. Justice Roberts only addressed the contentions under the Uniformity Clause.[317] On that point, he concluded that the Court would not read differences in state law (e.g., common-law vs. community-property regimes) into tax statutes so as to create violations of the constitutional uniformity requirement.[318] But Roberts felt compelled to address the litigants' arguments grounded in prior executive-branch interpretation, using them to reinforce his reading of the Revenue Act of 1926.[319] Thus, even though the Court ultimately held for the taxpayer, it declined to constitutionalize the dispute. It signaled reluctance to entertain broader attacks on the income tax—or on statutory assignment of income to specific taxpayers—based on Article I or the Sixteenth Amendment.

As in the context of trusts, such attribution questions properly fell under due process. Within a year, *Hoeper* provided an occasion to say so explicitly.[320] There, the taxpayer challenged Wisconsin's taxation of spouses on the basis of their combined earnings, and the Wisconsin Supreme Court upheld the scheme.[321] The Supreme Court reversed, over three dissenters, reasoning that the state's attempt "to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law."[322] That is, Wisconsin violated the Fourteenth Amendment by determining the husband's tax liability with reference to his wife's income, which she owned as her separate property.[323]

But *Hoeper*'s experimentation with defining the limits of attribution was short-lived. As discussed, *Reinecke v. Smith* reached the Court in 1933, two years after *Hoeper*, and upheld Congress's attribution of income from revocable trusts to grantors on due-process grounds.[324] The taxpayer in *Smith* explicitly relied on *Hoeper* in his briefing, contending that Congress had no power under the Fifth Amendment to tax *him* on income realized by the *trust*.[325] The unanimous *Smith*

317. The Uniformity Clause requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

318. *Seaborn*, 282 U.S. at 117-18 (citing Florida v. Mellon, 273 U.S. 12 (1927)).

319. *Id.* at 113-15.

320. Hoeper v. Tax Comm'n, 284 U.S. 206, 213-14 (1931).

321. *Id.* at 212-13; *In re* Hoeper, 233 N.W. 100, 102 (Wis. 1930).

322. *Hoeper*, 284 U.S. at 215.

323. *Id.*

324. Reinecke v. Smith, 289 U.S. 172, 177 (1933); *see supra* notes 241-279 and accompanying text.

325. *Smith* Respondents' Brief, *supra* note 238, at 5 ("Unless . . . construed [in favor of the taxpayer], Section 219 (g) is unconstitutional in that it taxes one person upon the income of

Court rejected such reliance, calling *Hoeper* "plainly distinguishable," since the taxpayer there "never had title to or control over either the property or the income."[326] And *Wells* clarified the degree of control required under the due-process analysis of attribution: any "right or privilege that is a constituent of ownership" sufficed.[327] Scholars have suggested that *Hoeper* is unlikely good law today.[328] It certainly is not, at least as applied to the federal government after *Smith* and *Wells*.

C. *Income Taxation and the Logic of Due Process*

This Part has reconstructed the federal attribution power through three areas of constitutional tax litigation, decided primarily by the Hughes Court.[329] During this period, high-income groups devised inventive schemes to avoid federal taxation. Before the Supreme Court and the lower courts, they raised constitutional challenges to federal tax rules on excess-corporate profits, revocable trusts, and the marital unit—all grounded in the Sixteenth Amendment and the Direct Tax Clauses.[330] They argued that constitutional "income" must be owned by, received by, controlled by, or vested in the taxpayer identified by Congress. In their view, the absence of such a relationship between the economic gains and the taxpayer triggered Article I's apportionment requirement for direct taxes. They relied on state law to show that the taxpayer could not have owned, received, or otherwise realized the income in question. Further, they argued that federalism prevented Congress from altering state corporate, property, or trust law through the income tax.

The Supreme Court rejected all such constitutional challenges, thereby crafting a robust power for Congress to attribute income—realized by whichever party—to a taxpayer of its choice. This doctrine has two main components. First, as to the *threshold* of its application, the Court confirmed that the taxpayer need

another, contrary to the decisions in *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 . . . ."); *accord id.* at 17.

326. *Smith*, 289 U.S. at 178.

327. Burnet v. Wells, 289 U.S. 670, 678 (1933) (first citing Nash., Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 268 (1933); and then citing Bromley v. McCaughn, 280 U.S. 124, 136 (1929)).

328. *See, e.g.*, Zelenak, *supra* note 130, at 389-90; Gann, *supra* note 130, at 56-58.

329. The one exception is *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110 (1925), decided by the Taft Court.

330. The Hughes Court thus took a quasi-nonfunctionalist approach to the Direct Tax Clauses. It dismissed litigants' extensively briefed arguments based on the apportionment requirement and appeared to construe those clauses to further no legitimate purpose in the factual predicates it confronted. *See generally* Hemel, *supra* note 86 (articulating nonfunctionalism as an approach to adjudicating constitutional tax provisions).

not stand in any particular relationship with the economic gains for Congress to tax them as "income." Even *assuming* that the Constitution required receipt, ownership, or control to transform raw economic gains into "income," that requirement could be satisfied by any entity. Second, as to its limits, the Court located the constraint in the Due Process Clause. Under the Fifth Amendment, the taxpayer must bear a nonarbitrary relationship with the income taxed. Case law glossed such a relationship to require that the taxpayer enjoy any right or privilege constitutive of ownership. In short, the Hughes Court shifted the constitutional locus of analyzing the federal taxing power from the Sixteenth Amendment to the Fifth.

But why the Fifth Amendment? That is, why did the Hughes Court subject Congress's income-attribution power to due-process constraints rather than elaborate further on "income" in the Sixteenth Amendment or "direct taxes" in Article I?[331] The Court was likely wary of additional intrusion into federal tax policymaking. Its prior intervention—through ontological inquiries into the nature of "income" or "direct taxes"—had failed. *Eisner v. Macomber* struck down a provision of the Revenue Act of 1916 that taxed stock dividends to shareholders,[332] expressly relying on the Sixteenth Amendment's concept of "income."[333] *Pollock v. Farmers' Loan & Trust* struck down the first peacetime income tax, holding that taxes on income from real and personal property were "direct taxes" under Article I.[334] Neither decision was well received. Most scholars consider *Macomber* wrongly decided.[335] President and later Chief Justice Taft denounced *Pollock* in strong terms: "Nothing has ever injured the prestige of the Supreme Court more."[336] The majority in *Moore* itself criticized *Pollock*.[337] And its decision

331. *Compare* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . ."), *and id.* 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."), *with id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

332. 252 U.S. 189, 201 (1920); Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (providing that "stock dividend shall be considered income, to the amount of its cash value").

333. *Macomber*, 252 U.S. at 207 ("'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets . . . ." (quoting Stratton's Indep. v. Howbert, 231 U.S. 399, 415 (1913))).

334. 158 U.S. 601, 637 (1895).

335. Zhang, *supra* note 16, at 187 n.48 ("[T]he majority view is that the Court got it wrong [in *Macomber*].").

336. 1 ARCHIE BUTT, TAFT AND ROOSEVELT 134 (1930).

337. Moore v. United States, 602 U.S. 572, 583 (2024) ("The *Pollock* decision sparked significant confusion and controversy throughout the United States.").

to uphold federal taxation of shareholders on undistributed corporate income calls into question—if not outright overrules—the logic of *Macomber*.

These practical considerations, however, mask a deeper affinity between income attribution and the Fifth Amendment. Two doctrinal strands dominate today's due-process discourse. One delineates the procedures government must follow before depriving someone of a cognizable liberty or property interest,[338] generally by balancing three factors: the private interest at stake, the risk of erroneous deprivation, and the administrative cost of providing more robust procedures.[339] More controversial is substantive due process.[340] On two principal occasions, the Court has invoked it to protect fundamental rights. Before 1937, it struck down economic regulation—such as working-condition or minimum-wage laws—to defend the economic right to freedom of contract.[341] In the second half of the twentieth century, the Court invoked substantive due process to protect individuals' privacy and autonomy interests, most prominently in *Roe v. Wade* in 1970, later overruled by the Roberts Court in 2022.[342]

The attribution cases do not fit neatly into either category. They devoted little attention to the procedures Congress must establish—and the federal courts or the then-Bureau of Internal Revenue must follow—before depriving taxpayers of property interests. In the corporate and trust contexts, the Court upheld Congress's taxation of the corporate vehicles and trust grantors on substantive grounds.[343] In *Hoeper*, Wisconsin's method of measuring tax liability by spousal income would not have survived the due-process analysis merely by adding

338. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 260-67 (1970); Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 871 (2016) (characterizing "procedural due process" as asking "whether the government has followed adequate procedures in taking away a person's life, liberty or property").

339. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

340. *See, e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411 (2010) (cataloging textualist and democracy-based criticisms of the substantive-due-process doctrine).

341. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 58 (1905) (invalidating a New York statute that limited bakers to working at most sixty hours per week); Adkins v. Child.'s Hosp., 261 U.S. 525, 561-62 (1923) (striking down a D.C. statute mandating a minimum wage for women and children on the ground that it interfered with the right to freedom of contract protected by the Due Process Clause), *overruled by*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

342. 410 U.S. 113, 164 (1970), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

343. *See* Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 113-14 (1925); Corliss v. Bowers, 281 U.S. 376, 377-78 (1930); Reinecke v. Smith, 289 U.S. 172, 177 (1933); Burnet v. Wells, 289 U.S. 670, 678-79 (1933).

procedural safeguards.[344] Nor did the attribution case law suggest the protection of fundamental rights. To the extent it implicated economic liberty, the Court did not shield it from federal taxation. Nor was the doctrine's aim to justify government action through a compelling-interest analysis. To be sure, tax-avoidance concerns lurked in the background,[345] but Congress's interest in curbing avoidance—or enforcing taxation indisputably within its constitutional power—did not decide the cases.[346] Instead, the doctrine presumed attribution's validity wherever the taxpayer bore a nonarbitrary relationship to the income taxed.[347] This approach, if anything, contrasts with substantive due process: protecting fundamental rights assumes official action is invalid absent a compelling interest, whereas attribution assumes validity unless the relationship was arbitrary.[348] Indeed, treating entitlement to pretax income as a form of fundamental economic right subject to the protection of substantive due process would run counter to the entire point of a robust attribution power.

Yet the attribution case law is not a stranger wandering in the land of the Fifth Amendment. Instead, it hearkens back to an older strand of due process that retained vitality in the early years of the current federal income tax. Scholars have shown that in the Founding Era and much of the nineteenth century, separation-of-powers logic dominated the legal profession's understanding of "due process" and the related concept of "law of the land."[349] They have traced this understanding to early English constitutional history, which divided lawmaking, interpretation, and enforcement to constrain the Crown through the common

344. Hoeper v. Tax Comm'n, 284 U.S. 206, 215 (1931) (striking down the relevant Wisconsin tax provision because the state's attempt "to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment").

345. *See supra* Section II.B (describing taxpayers' attempts to avoid corporate-profit taxes through creative uses of business organizations under state law and to reduce individual income-tax liabilities by assigning income through intrafamilial trusts or by splitting income within marital units).

346. *See supra* note 238.

347. *See, e.g.*, *Wells*, 289 U.S. at 678-79 (holding that a statute imposing liability based on attributed ownership of trust income was valid unless the taxpayer showed the attribution was "wholly arbitrary"); *supra* notes 281-286 and accompanying text (explaining the standard adopted by *Wells*).

348. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.1 (7th ed. 2023) ("[F]or almost all of the [fundamental] rights, the Supreme Court has indicated that strict scrutiny should be used, which means that the government must justify its interference by proving that its action is necessary to achieve a compelling government purpose.").

349. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

law.[350] The Founding generation relied on such institutional division to limit the federal legislative power.[351] The Constitution expressly articulated some of those limits. For example, Article I denies Congress the exercise of "quasi-judicial power" in the form of "Bill[s] of Attainder," "ex post facto Law[s]," or suspension of habeas corpus.[352] But the Due Process Clause went further.[353] Early case law glossed it to bar legislative deprivations of liberty or property directed at specific individuals, or enactments operating retroactively.[354] In short, due process was violated when the legislature adjudicated rather than enacted general, prospective law. One category of such *nongenerality* consisted of laws that took property from *A* and gave it to *B*.[355]

The attribution doctrine thus shares two features with this strand of due process. First is the accidental aspect of retroactivity. Recall that in the trust cases, the Revenue Act of 1924 taxed trust income to grantors rather than the beneficiaries in two scenarios: (1) where the grantor retained power, either alone or in conjunction with a nonbeneficiary, to revest in himself title to trust corpus; and (2) where the grantor retained power, either alone or in conjunction with a nonbeneficiary, to distribute trust income to himself or to pay for certain life-insurance premiums.[356] The statute applied regardless of when the taxpayer established the trust. That is, it operated retroactively as to trusts established before the enactment of the Revenue Act of 1924 itself. In *Reinecke v. Smith*, the Seventh Circuit relied on the element of retroactivity to strike down section 219(g) as to trusts created before the passage of the Act, before the Supreme Court intervened

350. *Id.* at 1681-92 (relying, inter alia, on MAGNA CARTA ch. 29; EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London, J. & W.T. Clarke 1823) (1628); and Petition of Right 1628, 3 Car. 1 c. 1, §§ III, IV (Eng.), to argue that seventeenth-century English lawyers "required the Crown to coordinate governance involving deprivations of rights with Parliament and the common law courts").

351. *Id.* at 1717; *see also* Alex Zhang, *Separation of Structures*, 110 VA. L. REV. 599, 628-30 (2024) (describing the ancient Greek roots of "structural separation" or the "mixed regime," and the theory's popularity in the Founding Era).

352. U.S. CONST. art. I, § 9, cl. 2, 3; *see* Chapman & McConnell, *supra* note 349, at 1717.

353. *See* Chapman & McConnell, *supra* note 349, at 1718 (arguing against applying "the interpretive canon against superfluous language" to due process, because "there is substantial redundancy" between the Fifth Amendment's general guarantee and specific provisions elsewhere in the Constitution); *see also* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 298 (1867) (linking due process to those specific prohibitions found elsewhere in the Constitution).

354. *See* Chapman & McConnell, *supra* note 349, at 1719; *see, e.g.*, Sadler v. Langham, 34 Ala. 311, 330 (1859); Bd. of Cnty. Comm'rs v. Carter, 2 Kan. 115, 120-21 (1863).

355. *See* Chapman & McConnell, *supra* note 349, at 1727 ("In the first few decades after the adoption of the Bill of Rights, state and federal courts invalidated a number of legislative acts for depriving specific persons of rights without due process of law. The classic example was an act that took a vested property right from *A* and gave it to *B*.").

356. Revenue Act of 1924, ch. 234, § 219(g)-(h), 43 Stat. 253, 277.

to uphold the provision.[357] Of course, the *Moore* petitioners themselves attacked the MRT on retroactivity grounds. In the lower courts (but not the Supreme Court), they contended that the 2017 tax provision, on its face, violated due process by retroactively taxing their shares of the foreign company's income back to 1986.[358]

But this kind of retroactivity is not an intrinsic feature of the attribution inquiry.[359] The Revenue Act of 1924 could have taxed trust income to grantors only where they created the trust after 1924. Litigants still would—and could—have brought due-process challenges against the statute for impermissibly attributing trust beneficiaries' income to grantors. Likewise, Congress could have designed an alternative MRT regime and limited its operation to income earned by foreign companies after 2017, or even to foreign companies established after 2017.[360] The petitioners in *Moore* still could have brought due-process challenges against the provision for impermissibly attributing the foreign companies' income to domestic shareholders. Today, federal courts apply a separate and well-developed test to claims of retroactivity. Under *United States v. Carlton*, courts uphold retroactive tax legislation upon "a legitimate legislative purpose furthered by rational means."[361]

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357. Reinecke v. Smith, 61 F.2d 324, 325 (7th Cir. 1932) (holding that an attempt to apply section 219(g) "to *past* lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act . . . amounts to confiscation, and offends the Fifth Amendment" (emphasis added)), *rev'd*, 289 U.S. 172 (1933).

358. Moore v. United States, No. C19-1539, 2020 WL 6799022, at *2 (W.D. Wash. Nov. 19, 2020) ("Plaintiffs argue that the MRT is a retroactive application of a new tax, violating the Fifth Amendment's Due Process Clause." (citing Complaint, *supra* note 57, at 7-8)); Moore v. United States, 36 F.4th 930, 934 (9th Cir. 2022).

359. Another kind of retroactivity focuses on the government's deprivation of previously vested property rights and their transfer to a different party. *See infra* notes 366-374 and accompanying text (describing the prohibition of legislative transfers of property from *A* to *B* in early due-process doctrine).

360. Of course, Congress did not take this route. *See* I.R.C. § 245A (2024).

361. 512 U.S. 26, 30-31 (1994) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984)). The Hughes Court also encountered retroactivity challenges to provisions of the federal income tax and theorized them as sounding in due process. *See, e.g.*, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 20 (1916) (rejecting a due-process challenge to a statute with a short period of retroactivity); Lynch v. Hornby, 247 U.S. 339, 343 (1918) (permitting retroactive application of a statute under *Brushaber*); Cooper v. United States, 280 U.S. 409, 411-12 (1930) (upholding against a due-process challenge the Revenue Act of 1921's provision of carryover basis for property acquired by gift after December 31, 1920 (rather than a fair-market-value basis for property acquired before such date), when carryover basis resulted in additional tax burdens on the taxpayer's disposition of a gift acquired in November 1921, prior to the passage of the Revenue Act of 1921); Milliken v. United States, 283 U.S. 15, 21 (1931) ("[A] tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the

By contrast, the attribution case law shares affinity with challenges to legislative nongenerality. This earlier strand of due process limits Congress's authority to adjudicate—that is, deprive specific people of liberty or property interests rather than make policy to advance *general* welfare.[362] As discussed, a core category of such violations of due process is laws that transfer property from *A* to *B*.[363] Accordingly, early courts struck down later-in-time, conflicting land grants by colonial legislatures that would have transferred land vested in one to another.[364] In another case, the court invalidated, on due-process grounds, an enactment that made property previously granted to the University of North Carolina revert to the state.[365]

But the doctrinal logic goes beyond prohibiting transfers of property between *specific* or named individuals. Instead, legislatures could violate due process by enacting *insufficiently general* laws, including deprivations of property rights of specific *groups* of individuals.

Two cases illustrate this point. The first is *Hoke v. Henderson*.[366] In 1832, the North Carolina legislature enacted a statute providing for the election of county- and superior-court clerks.[367] In effect, the law displaced previously appointed clerks and transferred their positions to the winners of the new elections.[368] At common law, however, the offices held by appointed clerks constituted "property."[369] The state supreme court, therefore, faced the question of whether the statute deprived a previously appointed clerk of his property interest in office

particular circumstances disclosed and considered by the court."); United States v. Hudson, 299 U.S. 498, 500 (1937) ("As respects income tax statutes, it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution." (citing Stockdale v. Atl. Ins. Co., 87 U.S. (20 Wall.) 323, 331, 332, 341 (1873))).

362. *See* Chapman & McConnell, *supra* note 349, at 1727; *supra* notes 352-355 and accompanying text.

363. *See supra* note 355 and accompanying text.

364. *See* Chapman & McConnell, *supra* note 349, at 1755; Bowman v. Middleton, 1 S.C.L. (1 Bay) 252, 252-53 (1792).

365. Treasurers of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 74, 88-89 (1805).

366. 15 N.C. (4 Dev.) 1 (1833).

367. *Id.* at 2 (reproducing the text of the 1832 statute, requiring election officials to "open a poll and receive votes given for county and superior court clerks" and to "declare the person or persons having the highest number of votes, duly elected clerk of the county or superior court").

368. *Id.* at 5 ("The act transfers the office of clerk from one of these parties to the other . . . .").

369. *Id.* at 10 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *36 to characterize offices as "incorporeal hereditaments," and concluding that "an office is deemed the subject of property and valuable property to the officer").

without due process.[370] The court invalidated the statute.[371] In so ruling, the court reasoned that legislation which "deprives one person of a right and vests it in another" contravened the law of the land.[372] That is, statutory transfers of property from *A* to *B* were invalid because they assumed a judicial rather than legislative function. The tricky part of *Hoke* lay in the statute's generalized form: it did not single out a particular individual but transferred property from a class of individuals (i.e., appointed clerks) to another (i.e., elected clerks). However, this made no difference in the due-process analysis. To be sure, the court acknowledged that the due-process violation would be more obvious if the statute transferred one *individual's* property to another.[373] But "the generality of [the statute's] terms" did not affect its character as a judicial act, or its effect that an office "is taken, and merely taken from one man and given to another."[374] This taking of a vested property interest from *A* and its conferral on *B* violated due process, even if framed in nonspecific language.

Hoke's concern with insufficiently general statutes resurfaced in an 1843 case, *Taylor v. Porter*.[375] There, a New York statute provided mechanisms for constructing private roads through others' property.[376] In particular, it required commissioners of highways to transfer land from an existing property owner to an applicant for a private road if twelve freeholders certified the necessity of such a road.[377] The state supreme court thus confronted a question similar to *Hoke*: "The property of A is taken, without his permission, and transferred to B. Can

370. *Id.* at 7-8 (citing N.C. CONST. of 1776, Declaration of Rights § 12). Similar language has survived in the North Carolina Constitution today. *See* N.C. CONST. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.").

371. *Hoke*, 15 N.C. (4 Dev.) at 16.

372. *Id.* at 9. Note that in early jurisprudence, the law of the land is a concept closely related to—and often coextensive in its separation-of-powers logic with—due process. *See, e.g.*, Treasurers of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 74 (1805) ("This was what was then and is now meant by the term law of the land. Sir Edward Coke . . . expounds this sentence to mean due process of law." (citation omitted)); Taylor v. Porter, 4 Hill 140, 146 (N.Y. Sup. Ct. 1843) ("Lord Coke in his commentary upon this statute says, that these words, 'by the law of the land,' mean 'by the due course and process of law' . . . ." (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 46 (London, E. & R. Brooke 1797))).

373. *Hoke*, 15 N.C. (4 Dev.) at 8.

374. *Id.* at 8-9.

375. 4 Hill at 140.

376. *Id.*

377. *Id.* at 141-42. The applicant for the private road would compensate the property owner at an amount to which the parties agreed, or as assessed by a jury of six freeholders of another town absent such agreement. *Id.* at 142.

such a thing be rightfully done?"[378] As in *Hoke*, the majority in *Taylor* struck down the statute as a violation of due process. The court distinguished the private-road regulation from a taking of property for *public* purposes. The latter was an inherent attribute of sovereignty, but the statute in question conferred ownership of and title to the road on the *private* applicant.[379] The law was thus ineffective, because the court found no "delegation of power to the legislature to take the property of A and give it to B."[380] Again, the statutory transfer of property from one to another violated due process, even if phrased in generalized language about groups of individuals (e.g., applicants for private roads).

Early due-process doctrine thus prohibited the legislature from taking property from *A* and conferring it on *B*, with the variables taking the form of individuals or insufficiently general groups of people. The attribution case law shares key features with this doctrinal logic. Recall that in the 1920s and the 1930s, taxpayers attacked federal taxation of corporate profits, trust income, and marital units with tripartite arguments. In general, they relied on:

(1) *the constitutional principle* that the Sixteenth Amendment relieved Congress of the need to apportion taxes on income, and constitutional "income" must be realized (i.e., received, controlled, or owned) by the taxpayers;[381]
(2) *the federalism constraint* that Congress had no power to change the state law governing trusts, business organizations, and community property through federal revenue measures (for example, to transfer property owned by individual shareholders to the corporation, or to transfer property received by trust beneficiaries to trust grantors);[382] and

378. *Id.* at 143.

379. *Id.*

380. *Id.* at 144.

381. *See, e.g.*, *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 68 (citing Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916); and Eisner v. Macomber, 252 U.S. 189 (1920)); *Corliss* Petitioner's Brief, *supra* note 230, at 14; *Smith* Respondents' Brief, *supra* note 238, at 2; *Seaborn* Joint Taxpayer Brief, *supra* note 306, at 69, 71 (citing *Macomber*, 252 U.S. at 207; *Pollock*, 157 U.S. at 429; and *Brushaber*, 240 U.S. at 1).

382. *See, e.g.*, *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 76 ("Certainly Congress has no legislative authority whatsoever over the ownership of property within a state. This is peculiarly one of the powers reserved to the states and the people under the Tenth Amendment to the Constitution."); *Corliss* Petitioner's Brief, *supra* note 230, at 13-18; *see also Seaborn* Respondent's Brief, *supra* note 306, at 85 (arguing that the Sixteenth Amendment's concept of income rests on state property law, that the Amendment did not "arrogate to the Federal Government any of the states' fundamental power" to devise and "legislate on

(3) *the state-law premise* that under relevant state law, the taxpayers did not receive, acquire control over, or own the income taxed by Congress.[383]

These three premises allowed the litigants to argue—even though the Court eventually rejected the argument—that Congress could not tax income realized by *A* to *B* without apportionment.[384]

Such contentions share two key features with early due-process doctrine. First, broadly conceived, the upshot of such arguments is to accuse the federal government of impermissibly transferring income-tax liabilities from *A* to *B*.[385] That is, if *A* has realized income by receiving or acquiring control or ownership over economic gain *Y*, and if *A* rightly holds a property entitlement to *Y* under state law, then the tax liability for *Y* has accrued to *A*. Congress's decision to tax *Y* to *B* rather than *A* therefore takes a liability from *A* and gives it to *B*. In effect, Congress has transferred property from *B* to *A* by requiring *B* to pay for liabilities that *A* has incurred. For example, if Congress taxes grantors of revocable trusts on income received by trust beneficiaries, the statute in practice transfers liabilities from one group (trust beneficiaries) to another group (trust settlors). Likewise, if Congress taxes husbands on income owned by their wives, the statute in practice transfers liabilities from one group (wives) to another group (husbands). Both have the effect of taking the property of one group (trust settlors or husbands) for the benefit of another group (trust beneficiaries or wives). This, as we have seen in *Hoke* and *Taylor*, violates due process because it is not properly legislation but adjudication.[386] That is so even if the statute uses generalized language rather than naming specific individuals.[387]

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all questions of property," and that the "federal system cannot survive unless the rights of the states in this regard are respected and upheld").

383. *See, e.g.*, *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 25-31 (Texas business-organization law); *Corliss* Petitioner's Brief, *supra* note 230, at 6-13 (New York trust law); *Smith* Respondents' Brief, *supra* note 238, at 6 (Illinois trust law); *Seaborn* Respondent's Brief, *supra* note 306, at 14-27 (Washington community-property law).

384. *See supra* Section II.B (analyzing constitutional arguments made by the litigants).

385. In some cases, taxpayers framed their arguments in those precise terms. *See infra* notes 389-390 and accompanying text (describing the argument that federal attribution impermissibly transfers property entitlements from *A* to *B*).

386. *See* Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 15 (1833) ("Creating a right or conferring it on one, when not already vested in another, is legislation[, but a] legislative act which deprives one person of a right and vests it in another, is not a 'law of the land' within the meaning of the Bill of Rights."); Taylor v. Porter, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843) ("If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation."); Chapman & McConnell, *supra* note 349, at 1727.

387. *See supra* notes 366-380 and accompanying text.

Second, and more specifically, these contentions might focus on the federalism constraint—that is, the second of the litigants' tripartite argument. Suppose again that *A* has realized income by receiving or acquiring control or ownership over economic gain *Y*, and that *A* rightly holds a property entitlement to *Y* under state law. Congress's decision to tax *Y* to *B* rather than *A*, in effect, transfers *Y* itself from *A* to *B*, at least for federal tax purposes.[388] For example, if Congress taxes grantors of revocable trusts on income received by trust beneficiaries, the statute in effect transfers trust income from beneficiaries to grantors, at least for federal tax purposes. Likewise, if Congress taxes husbands on income owned by their wives, the statute in effect transfers half of the income of the marital unit from wives to their husbands, at least for federal tax purposes. Income—whether derived from a trust corpus or a marital unit's exertion of labor—is quintessential property. As a result, the argument goes, Congress has transferred property interests from one group (trust settlors or husbands) to another group (trust beneficiaries or wives), at least for federal tax purposes. This again violates due process. And in *Corliss*, the taxpayer put this point explicitly: "[T]he effect of the instant statute, baldly stated, is to declare that income of 'A' shall be considered the income of 'B.'"[389] Likewise, the dissenters in *Wells* said bluntly: "So long as the Fifth Amendment remains unrepealed and is permitted to control, Congress may not tax the property of A as the property of B, or the income of A as the income of B."[390]

But this specific version of the due-process argument suffers from a key weakness. The attribution frameworks merely shifted the tax burden on income *Y* from *A*, who realized the income, to a related party, *B*. Congress did not, in fact, alter the state law of business organizations, trust, or community property. In *Burk-Waggoner Oil*, Congress taxed corporate income to the association;[391] it did not transfer ownership of that income from the partners to the entity. In *Corliss*, *Smith*, and *Wells*, Congress taxed trust income to the grantors;[392] it did not transfer the beneficiaries' entitlements to such income to the grantors. Likewise, in *Poe v. Seaborn*, the Treasury's proposed approach would have taxed

388. Of course, Congress did not actually transfer the underlying property entitlement from one party to another. *See infra* notes 391-393 and accompanying text.

389. *Corliss* Petitioner's Brief, *supra* note 230, at 13.

390. Burnet v. Wells, 289 U.S. 670, 683 (1933) (Sutherland, J., dissenting).

391. *See* Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 111 (1925) ("Under the Revenue Act of 1918, [the joint-stock company] was assessed as a corporation the sum of $561,279.20 for income and excess profits taxes for the year 1919." (citation omitted)).

392. *See* Corliss v. Bowers, 281 U.S. 376, 377 (1930); Reinecke v. Smith, 289 U.S. 172, 174 (1933); *Burnet*, 289 U.S. at 674.

husbands on the marital unit's income.[393] It did not declare that wives were no longer entitled to half of the property acquired during marriage. Thus, the claim that Congress has transferred *Y* from *A* to *B* is rhetorical rather than substantive. Conceptually, it collapses into the broader contention that Congress cannot, consistent with due process, shift tax *liabilities* from *A* to *B*—for such a shift, as a corollary, would transfer part of *B*'s property in the form of pretax income to *A*.

As the previous Section has shown, the Supreme Court rejected all such challenges to federal taxation.[394] It located the constitutional limits on the attribution power in the Due Process Clause, given the doctrinal affinities already discussed.[395] But it found Congress's exercises of that power to fall within the Fifth Amendment's bounds. At least three considerations help explain the Hughes Court's decisions.

First, unlike litigants in early due-process cases, taxpayers lack vested property entitlements to their pretax income. The thrust of a due-process attack in the attribution context is that Congress has impermissibly transferred tax liabilities—and by implication, property entitlements to pretax income—from one party to another. But this claim cannot stand without qualification. It would prove too much and fault the whole regime of federal taxation as unconstitutional. Every revenue measure is redistributive in some way.[396] Congress currently taxes the marginal ordinary income of high earners at 37% and that of others at lower rates.[397] Surely no one would argue that the progressive rate structure violates due process on the ground that it transfers tax liabilities from the middle class to high earners (and by implication, transfers high earners' property interests in pretax income to the middle class). After all, the progressive income tax has stood constitutionally secure since 1913.[398] To use a more recent example, Congress capped the deduction for state and local taxes as part of the

393. *See* Poe v. Seaborn, 282 U.S. 101, 109 (1930); *see also* Goodell v. Koch, 282 U.S. 118, 120 (1930) (same for Arizona); Hopkins v. Bacon, 282 U.S. 122, 125 (1930) (same for Texas); Bender v. Pfaff, 282 U.S. 127, 130 (1930) (same for Louisiana).

394. *See supra* Section II.B.

395. *See supra* notes 362-389 and accompanying text.

396. That is, absent broad agreement on a normative baseline, every revenue measure reflects a democratic or at least congressional judgment about redistribution. By contrast, if there is a correct baseline as to the federal tax burdens that each person should bear, then each may have a stronger claim to vested property interests in post-(normative)-tax income. Of course, there is no such agreement on the baseline.

397. *See* I.R.C. § 1 (2024).

398. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 25 (1916) (rejecting litigants' argument that the "progressive feature" of the income tax imposed by the Revenue Act of 1913 was unconstitutional, with reference to progressive income taxes levied in the nineteenth century and Knowlton v. Moore, 178 U.S. 41 (1900)).

2017 tax reform.[399] In effect, the cap raised taxes on residents of high-tax, liberal-leaning jurisdictions to pay for a tax cut for residents of lower-tax, conservative-leaning jurisdictions under the budget-reconciliation process.[400] There is no plausible argument that this violates due process by transferring property entitlements to pretax income from the former to the latter group. As doctrine makes clear, only legislative transfers of *vested* property rights from *A* to *B* violate due process.[401] One might hold such vested property rights in official employment or a piece of real property.[402] By contrast, no one has vested rights in any portion of pretax income (i.e., as opposed to the underlying income-producing property) so as to defeat federal taxation.[403] This point is also apparent from the Takings Clause of the Fifth Amendment. Congress cannot acquire private property (e.g., a piece of land) without paying its owner fair market value.[404] But Congress clearly can take away a specific taxpayer's pretax income without just compensation (e.g., in the form of providing public services commensurate with one's tax burdens).[405]

Second, as a related matter, the attribution cases did not involve a direct transfer of property from *A* to *B*. Instead, the federal government acted as an intermediary. Early case law had struck down, as violations of due process, statutes that transferred property directly between two groups of private

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399. I.R.C. § 164(b)(6) (2024) (limiting the state-and-local tax deduction to $10,000, with a marriage penalty built in).

400. *See, e.g.*, Alex Zhang, *The State and Local Tax Deduction and Fiscal Federalism*, 168 TAX NOTES 2429, 2447-48 (2020) (showing the disparate impact of the cap on the state-and-local tax deduction on liberal- and conservative-leaning jurisdictions); Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS. 61, 61 (2018) (describing the 2017 tax legislation's passage under the budget-reconciliation procedure).

401. *E.g.*, Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 14 (1833); *see* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1024-25 (2006).

402. *See, e.g.*, *Hoke*, 15 N.C. (4 Dev.) at 19 (concluding that the "office is deemed the subject of property"); Taylor v. Porter, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843).

403. Indeed, Congress has often taxed the highest marginal income at almost confiscatory rates—more than 90%—without serious constitutional challenges. *See, e.g.*, Individual Income Tax Act of 1944, ch. 210, §§ 3-4, 58 Stat. 231, 231-32 (imposing a normal income tax of 3% and an additional surtax of 91% on income exceeding $200,000).

404. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979) (holding that the Fifth Amendment requires compensating private owners for the fair market value, not the replacement cost, of their property). For a debate on whether government should pay fair market or economic value to property owners, see, for example, Yun-chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?*, 20 SUP. CT. ECON. REV. 35, 36 n.3 (2012), which surveys the scholarship.

405. *See, e.g.*, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 21, 24 (1916) (rejecting the argument that federal taxation is an unconstitutional "taking of . . . property without compensation").

individuals.[406] In *Taylor*, for example, the New York law took land from the existing owner and conferred title to a private individual for the construction of a road.[407] In holding the law contrary to due process, the court emphasized that the "public has no title to, nor interest in [the new road]."[408] It therefore distinguished the New York law from the government's exercise of "[t]he right to take private property for *public* purposes," which it affirmed was an "inherent attribute[] of sovereignty."[409] By contrast, in the attribution cases, the federal government took title to the property surrendered by the litigants in the form of taxes.[410] As a formal matter, Congress never transferred the trust grantors' property (e.g., the *Corliss* grantor's $45,000) to the beneficiaries.[411] Instead, title passed to the public—that is, to the Treasury—even if the government chose to forgo taxation of the party that first realized the income.

In any event, the progressivity of marginal tax rates meant that under the attribution regimes, Congress could rarely transfer entitlement to the same property from *A* to *B*. The trust beneficiaries, for example, had lower income and faced lower tax rates.[412] The elimination of tax burdens for the *Corliss* beneficiaries likely amounted to substantially less than the $45,000 that the grantors had to pay.[413]

Third, the attribution cases generally involved two nonadverse parties. This is a simple but important point. The early due-process case law blamed state legislatures for depriving *A*'s property and conferring it on *B*. In all those cases, *A* and *B* held adverse interests. In *Hoke*, the previously appointed clerk of the superior court sued the elected clerk for taking his official employment.[414] In *Taylor*, the existing property owner sued the applicants for the private road for

406. Chapman & McConnell, *supra* note 349, at 1755-59.

407. *Taylor*, 4 Hill at 141-42.

408. *Id.* at 142.

409. *Id.* at 143.

410. *E.g.*, Revenue Act of 1924, ch. 234, § 219(g), 43 Stat. 253, 277 (trust); Revenue Act of 1918, ch. 18, §§ 230, 301, 40 Stat. 1057, 1075, 1088 (corporate-income, excess-profit, and war-profit taxes).

411. *See supra* note 392 and accompanying text.

412. After all, the point of establishing these revocable trusts was to shift income from an individual in a higher marginal-tax bracket (e.g., trust grantors) to an individual in a lower marginal-tax bracket (e.g., trust beneficiaries).

413. *See* Corliss v. Bowers, 34 F.2d 656, 658 (2d Cir. 1929) (describing § 219(g) of the Revenue Act of 1924 as designed to "defeat tax evasion, at least [of] the higher surtax" borne by trust grantors); *Corliss* Transcript of Record, *supra* note 209, at 6 (alleging that the Commissioner of Internal Revenue assessed a deficiency of $44,687.43 to the plaintiff-taxpayer).

414. Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 3 (1833).

trespass.[415] Each party wanted the other to bear the costs. By contrast, the attribution case law involved nonadverse parties. In *Burk-Waggoner Oil*, the joint-stock association and the individual partners agreed that the individual partners should own and bear the tax burdens for corporate income.[416] In *Corliss*, *Smith*, and *Wells*, the trust grantors and beneficiaries—usually the grantors' families—agreed that the beneficiaries should receive and bear the tax burdens for trust income.[417] In the marriage cases, the husband and wife agreed that the wife should control and bear the tax burdens for half of the marital unit's income.[418] None of them contested entitlements over the underlying property or assignment of the tax liabilities. Under the parties' agreements, the combined tax burdens for the two parties would decrease. After all, that was the point of the tax-avoidance schemes. But as a result, their due-process claims were weaker—barely cognizable. It made little sense to argue that Congress improperly transferred property from *A* to *B* when *A* and *B* were related parties and aligned in their legal interests.

This analysis yields two additional insights. On a basic level, we see why the Hughes Court chose the Due Process Clause as the locus of judicial inquiries into the federal attribution power. The attribution case law shares key conceptual affinities with early due-process doctrine, which prohibited legislative transfers of property entitlements from *A* to *B*. At the same time, it clarifies why the Taft and Hughes Courts ultimately rejected such challenges: the government intermediary, the nonadverse relationship between the private parties, and the absence of vested property rights in pretax income together made the parallel with early due-process doctrine imprecise.

Further, this analysis illustrates the contours of Congress's attribution power. The case law presumes the validity of attribution unless it is wholly arbitrary, thereby granting the federal government broad discretion to determine the bearer of the tax burden. Yet the attribution power is not without limits. Both the existing doctrine and its underlying logic suggest three principal constraints on federal income attribution:

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415. Taylor v. Porter, 4 Hill 140, 140 (N.Y. Sup. Ct. 1843).

416. *Burk-Waggoner Oil* Transcript of Record, *supra* note 164, at 2 (alleging that the joint-stock company and its partners should be taxed under partnership-tax rules, not corporate-tax rules, and that the company paid the corporate taxes only under protest).

417. *Corliss* Transcript of Record, *supra* note 209, at 5-6; *Smith* Transcript of Record, *supra* note 242, at 8-9; Burnet v. Wells, 289 U.S. 670, 674 (1933).

418. *See, e.g.*, Poe v. Seaborn, 282 U.S. 101, 109 (1930) ("[Seaborn] and his wife each returned one-half the total community income as gross income and each deducted one-half of the community expenses to arrive at the net income returned.").

(1) *Rationality*: The taxpayer must stand in a nonarbitrary relationship to the income taxed. This requirement is *universal* and *dispositive* in all federal attribution decisions. But as *Wells* reasoned, it is not *stringent*. Instead, Congress violates rationality only where the revenue measure is "wholly arbitrary,"[419] such that the taxpayer enjoys no "right or privilege that is a constituent of ownership."[420] The effect is to preclude only completely unjustifiable or capricious attributions.[421] For example, Congress would violate due process by taxing me on Elon Musk's shares of Tesla earnings.

(2) *Nonadverse Interests*: When Congress taxes income realized by *A* to *B*, due process may require that *A* and *B* not stand in directly adverse relation as to the underlying property interests. If *B* sues *A* and each contends the other should bear the tax, they hold adverse interests more akin to litigants in early due-process case law. Note that this is a *nonuniversal* and *defeasible* requirement. It is not universal because Congress can tax both parties on the same income stream.[422] If so, the government action does not involve the *transfer* of property from one private party to another, thus removing the due-process concern. The requirement is defeasible because even if Congress taxes one adverse party on the income stream, other factual predicates may save the attribution.[423] The statutory regime could be sufficiently general;[424] the role of the government as an intermediary could be sufficiently robust;[425] the litigants' property

419. *Wells*, 289 U.S. at 679 (first citing Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912); then citing Hebe Co. v. Shaw, 248 U.S. 297, 303 (1919); and then citing Milliken v. United States, 283 U.S. 15, 24, 25 (1931)).

420. *Id.* at 678 (first citing Nash., Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 268 (1933); and then citing Bromley v. McCaughn, 280 U.S. 124, 136 (1929)).

421. *See also* Corliss v. Bowers, 34 F.2d 656, 657 (2d Cir. 1929) (noting that "arbitrary or capricious" revenue measures violate the Fifth Amendment).

422. *See infra* notes 498-513 and accompanying text (describing and rejecting constitutional objections to federal taxation of corporations and their owners on the same stream of corporate earnings).

423. Indeed, the Internal Revenue Code currently contains attribution rules that may implicate adverse interests but face little constitutional difficulty. *See, e.g.*, I.R.C. § 318 (2024) (attribution rules for constructive ownership of stock); *id.* § 672(e)(1) (attribution rules for trust grantors with spouses).

424. *See supra* notes 366-380 and accompanying text (discussing violations of due process by insufficiently general statutes).

425. *See supra* notes 406-411 and accompanying text (discussing the government's role as an intermediary). One factual predicate that could diminish the government's role as an intermediary is earmarking—that is, if the statute sets aside a particular revenue stream for expenditures on

interests in pretax income could be insufficiently vested;[426] or the parties may have engineered adverse interests to evade federal taxation.

(3) *Proportionality*: Due process may also require attribution to bear some rough proportionality to the taxpayer's ownership interest in the underlying property, particularly where multiple parties hold such interests and the taxpayer has never exerted de facto control.[427] For example, Congress may not, consistent with due process, attribute 50% of a joint-stock company's earnings to a partner whose ownership interest never exceeded 2%. This limit flows directly from the rationality mandate: the 2% shareholder does not enjoy any "right or privilege that is a constituent of ownership" of the other 48% of the income taxed.[428] This principle does not require Congress to tax all owners of the underlying property. It merely requires that Congress attribute proportionally as to the parties it chooses to tax, so that the attribution is not wholly arbitrary.

Due process thus imposes three key limits on federal attribution: rationality, nonadverse interests, and proportionality.

To be sure, other elements are present in the attribution cases. Many fact patterns involved closely related family members, as well as tax-avoidance motives. But these were incidental rather than intrinsic features. Take the trust context. The Revenue Act of 1924 taxed trust income to grantors rather than beneficiaries.[429] The trust grantors, in general, had higher income and therefore confronted higher marginal tax rates than the beneficiaries.[430] As a result, the trust regime was designed to achieve—and the federal statute designed to prevent—a reduction in overall tax burdens within the unit of individuals involved in the trust. But suppose that the grantors faced lower marginal tax rates than

a specific group of people. Such earmarked taxes resemble more—even if they still fall short of—legislative transfers of property from *A* to *B*. They may trigger heightened due-process concerns, but only in combination with other relevant factual predicates (e.g., adverseness, insufficient generality, or nondual taxation).

426. *See supra* notes 396-405 and accompanying text (discussing the weakness of vested property interests in individual pretax income).

427. In the trust cases, for example, taxpayers often had no ownership interest in the underlying income-producing property (i.e., the trust corpus) or the income itself. But the Court still upheld federal attribution because the taxpayer-grantors had maintained de facto control of the property before transferring it into the trust. *See, e.g.*, Burnet v. Wells, 289 U.S. 670, 677-78 (1933); *supra* notes 281-286 and accompanying text.

428. *Wells*, 289 U.S. at 678 (first citing Nash., Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 268 (1933); and then citing Bromley v. McCaughn, 280 U.S. 124, 136 (1929)).

429. *See* Revenue Act of 1924, ch. 234, § 219(g)-(h), 43 Stat. 253, 277.

430. *See supra* notes 209-210, 410-411 and accompanying text.

the beneficiaries and established trusts for reasons other than tax avoidance. That would not render section 219(g) unconstitutional because the taxpayers would still bear a nonarbitrary relationship with the income taxed. That is, Congress still could have taxed trust income to the grantors—and received *less* in collected taxes—in the absence of any tax-avoidance motive.[431] The same point holds for intrafamilial transfers. They were not intrinsic to the attribution cases. *Burk-Waggoner Oil* involved a joint-stock company and its shareholders, not closely related family members.[432] And section 219(g) attributed trust income to grantors not only when they were related to the beneficiaries but also whenever they retained meaningful control over the trust corpus.[433]

III. IMPLICATIONS

This Part of the Feature articulates the implications of Part II's account. Section III.A examines immediate doctrinal implications as to *Moore*. Section III.B argues that Congress retains broad discretion to tax corporate earnings to shareholders while preserving the entity-level tax. A broad reading of the case law could even allow Congress to implement existing proposals of accrual- or wealth-tax regimes through its attribution power—that is, regardless of whether the movement to constitutionalize the realization requirement succeeds.[434]

A. Robust Attribution as a Doctrinal Counterweight to Realization

The immediate doctrinal implication is that the majority in *Moore* reached the correct result, though by a circuitous rationale. Justice Kavanaugh upheld the MRT on the ground that the corporation realized the income taxed and that Congress had authority to attribute such income to the shareholders.[435] But he framed this attribution power in choice-of-entity terms, permitting Congress to treat business organizations as corporations (taxed at the entity level) or as partnerships (whose income passes through to their members).[436]

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431. *See supra* note 238 and accompanying text (noting that the Taft and Hughes Courts did not decide the attribution cases under Congress's authority to curb tax avoidance, which is incidental to its taxing power).

432. Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 110-11 (1925).

433. Revenue Act of 1924, § 219(g), 43 Stat. at 277.

434. *See infra* Figure 2 (designing accrual and wealth taxation through the attribution power); *infra* notes 483-501 and accompanying text (analyzing the constitutional arguments against designing accrual and wealth taxes through attribution and arguing that the persuasiveness of such arguments may depend on the adjudicator's method of interpretation).

435. Moore v. United States, 602 U.S. 572, 599-600 (2024).

436. *Id.* at 585; *see supra* notes 66-70 and accompanying text.

Such framing is unnecessary. As Part II has shown, Congress possesses an attribution power robust enough to reach any taxpayer who bears a nonarbitrary relationship with the income. The *Moore* petitioners, as shareholders, clearly held some constituent of ownership over their company and its income.[437] They had no adverse relationship with the company as to the underlying tax burden, and Congress attributed the tax on a pro rata basis.[438] The MRT thus satisfied the requirements of rationality, nonadverseness, and proportionality for federal attribution.[439] Further, the posture in *Moore* echoes the Hughes Court's case law: taxpayers there raised direct-tax challenges, only for the Court to uphold the statutes through attribution.[440] The majority in *Moore* did the same, though it could have done so with cleaner reasoning.

By contrast, the four Justices who concurred in the judgment or dissented misunderstood two key points. First, Justices Barrett (concurring) and Thomas (dissenting) concluded that, absent apportionment, Congress may tax only income *realized* (e.g., received or controlled) by the taxpayer. Justice Barrett emphasized that "the question is not whether *some* taxable person or entity has realized income at *some* point"[441] but whether the taxpayer herself realized it.

These views contrast with doctrine. Constitutional realization, as discussed, has two components: conditionality and content.[442] It is beyond the scope of this Feature whether the Constitution in fact mandates realization.[443] But even if required, the content of realization does not encompass the relationship between the income taxed and the *taxpayer*. As Part II has shown, taxpayers in the 1920s and the 1930s repeatedly argued before the Supreme Court that the absence of receipt, ownership, or control by the *taxpayer* triggered the apportionment requirement of Article I. The Court consistently dismissed all such arguments to uphold the respective federal tax statutes. The refrain is clear: realization can be met by any party, and the inquiry into the taxpayer's relationship with the taxable income sounds in due process, not in the Direct Tax Clauses.[444]

437. *Moore*, 602 U.S. at 580-81.

438. *Id.* at 580.

439. *See supra* notes 419-428 and accompanying text (describing the three requirements).

440. *See supra* Section II.B (describing the constitutional arguments made by litigants and dismissed by the Court in *Burk-Waggoner Oil*, *Corliss*, *Smith*, and *Seaborn*).

441. *Moore*, 602 U.S. at 612 (Barrett, J., concurring in the judgment).

442. *See supra* Figure 1.

443. *See supra* notes 42-44 and accompanying text.

444. *See also* Hemel, *supra* note 86, at 351-52 (criticizing Justice Thomas's functionalist reading of the Direct Tax Clauses as designed to protect the states' property-tax base, and pointing out that the reading inadequately explains why the Constitution allows apportioned direct taxation).

In particular, Justice Barrett wrote, "[O]ur cases allow Congress to disregard the corporate form to determine whether the shareholder received income *in substance*, if not in form."[445] This concept of substantive receipt as a requirement of attribution runs contrary to the trust cases. There, the taxpayer-grantors received no income at all—neither in substance nor in form. In fact, the indentures ensured that they would never receive any trust income, which vested in the trust beneficiaries.[446] The only way to reconcile the substantive-receipt requirement with precedent is to deem such a requirement satisfied whenever the taxpayer receives enjoyment solely from the fact that a nonarbitrary party has received income.[447] But under this view, the substantive-receipt requirement simply collapses into the rationality mandate. Congress may attribute income realized by *A* to *B* as long as they are not completely unrelated.

Further, Justices Barrett and Thomas criticized the majority for inventing an attribution doctrine out of thin air.[448] They read narrowly the four cases on which the majority relied and contended that the cases only stood for specific propositions like Congress's power to curb tax avoidance or to classify an association as a corporation for tax purposes.[449] This criticism, broadly conceived, is misplaced. The Hughes Court indeed crafted a robust federal attribution power and used it to uphold tax statutes against precisely the same kind of constitutional challenges the *Moore* petitioners raised. The *Moore* majority's use of attribution is therefore deeply rooted in precedents decided in the aftermath of the Sixteenth Amendment's ratification, which are strong evidence of its historical meaning.[450] And despite litigants' explicit arguments in the briefing for these precedents, the Court did not rest attribution on the crux of Congress's tax-

445. *Moore*, 602 U.S. at 612 (Barrett, J., concurring in the judgment); *see also id.* at 650 (Thomas, J., dissenting) (arguing that taxpayers may not have constructively received any income taxed by the MRT).

446. *See, e.g.*, *Corliss* Transcript of Record, *supra* note 209, at 4; *Smith* Transcript of Record, *supra* note 242, at 3-4; Burnet v. Wells, 289 U.S. 670, 673 (1933).

447. This is similar to—but an even more relaxed requirement than—*Helvering v. Horst*, 311 U.S. 112 (1940). In *Horst*, the Court upheld Congress's taxation of the donor on income received by the donee derived from detachable interest coupons on a bearer bond. The Court reasoned that the donor realized "economic benefit" by procuring "non-material satisfactions" in the form of a gift to his son. *Id.* at 117, 119-20.

448. *Moore*, 602 U.S. at 612-17 (Barrett, J., concurring in the judgment); *id.* at 644-48 (Thomas, J., dissenting).

449. *See supra* notes 88-93, 99-102 and accompanying text (discussing Justices Thomas's and Barrett's criticisms of the majority's invocation of attribution).

450. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 37-39 (2019) (discussing the role of precedent in constitutional analysis from the Founding Era to the nineteenth century).

avoidance power.[451] Indeed, a broad attribution power might cohere with Barrett's and Thomas's interpretive methodology. In *Moore*, they relied on the word "derived" in the Sixteenth Amendment to favor a constitutional realization requirement. But that very phrase, "from *whatever* source derived,"[452] also suggests a wide latitude for Congress to choose whom to bear the income-tax burden, perhaps even superseding preexisting due-process constraints.

But the criticism of the majority's reliance on the four specific cases is well taken. Indeed, none of the Justices pointed to arguably the best support for the attribution power from case law: *Corliss*, *Smith*, and *Wells*, in which the Hughes Court rejected realization-based constitutional challenges to federal taxation of trust income and expressly located the limits of the attribution power in the Due Process Clause.[453]

Such omission is understandable. The Court has rarely intervened in federal tax policy in the past few decades, and the lack of practice diminishes its subject-matter expertise.[454] Tax law today is heavily statutory, and few pay attention to old case law.[455] Perhaps more important are shifts in judicial styles: constitutional tax opinions from a century ago—as Part II has observed—tended to be pithy and somewhat obscure.[456] Without digging into the briefing and litigation history, the cases' upshots and the Court's reasoning are hard to decipher.[457] This Feature's aim is to excavate these overlooked materials, which show the extent of Congress's attribution powers.

Finally, this understanding of attribution ties up a doctrinal puzzle. Congress enacted the first federal income tax in 1861 to fund the Civil War.[458] Section 117 of the Revenue Act of 1864 taxed individual owners on their shares of corporate profits, "whether divided or otherwise"—that is, whether realized by the

451. *See supra* note 238 and accompanying text.

452. U.S. CONST. amend. XVI (emphasis added).

453. To be sure, litigants did not flag those cases for the Court. *See, e.g.*, Brief for Petitioners, *supra* note 65, at v-ix (containing only passing references to *Corliss*, which in fact undermines the petitioners' arguments, and no reference to *Smith* or *Wells*); Brief for the United States, *supra* note 22, at IV-VII (containing one reference to *Wells*, and no reference to *Corliss* or *Smith*).

454. In 1941, a prominent scholar counted tax as the largest subject matter on the Supreme Court's docket. Surrey, *supra* note 129, at 779. That is obviously not the case today. The Court hears one or two tax cases a year—if that—often dealing with tax procedure and federal jurisdiction rather than substance. *E.g.*, Boechler P.C. v. Comm'r, 596 U.S. 199, 199-201 (2022).

455. *See* James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 248 (2015).

456. *See supra* notes 235, 294 and accompanying text.

457. Indeed, this is why the United States Reports for Supreme Court opinions used to summarize counsel's arguments. Until 1941, the Reporter of the Court "haunt[ed] the Courtroom to take careful notes on opinions and arguments." Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 16 (2001).

458. Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309.

taxpayer or not.[459] In *Collector v. Hubbard*, the taxpayer held ownership interests in manufacturing companies and challenged the Commissioner of Internal Revenue's assessment of taxes for his shares of the undistributed earnings of those companies.[460] After the taxpayer prevailed in state court, the Supreme Court reversed. It held, inter alia, that Congress had unquestionable authority to tax shareholders on undistributed corporate income.[461]

Fast forward fifty years to *Eisner v. Macomber*.[462] In the interim, the Supreme Court had been busy with constitutional tax doctrine. It broadly upheld the Civil War income tax in *Springer v. United States* in 1880, before reversing course just fifteen years later to strike down the 1894 income tax in *Pollock*.[463] The nation finally implemented a federal income tax in 1913: *Macomber* was a challenge to Congress's taxation of pro rata stock dividends, which generated zero economic income to the stockholder.[464] In ruling for the taxpayer, the majority in *Macomber* tried to curtail *Hubbard*'s precedential force: Justice Pitney opined that *Pollock* must have overruled *Hubbard* and that the Sixteenth Amendment did not resurrect *Hubbard*, at least under the facts of *Macomber*.[465]

Part II's reconstruction shows a more nuanced picture: *Hubbard* and *Macomber* reflect distinct doctrinal inquiries. *Hubbard* upheld federal taxation of shareholders on their shares of corporate earnings.[466] The constitutional challenge there concerned attribution: could the Civil War Congress attribute income realized by the corporation at the entity level to the individual shareholders? As Part II has shown, such inquiry centers on due process and the Fifth Amendment.[467] By contrast, *Macomber* concerned not attribution but the nature of income: did the taxpayer receive any gain that constituted "income" under the

459. Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 282.

460. 79 U.S. (12 Wall.) 1, 2 (1870).

461. *Id.* at 18 ("Congress possesses the power to lay and collect taxes, duties, imposts, and excises, and it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards . . . .").

462. 252 U.S. 189 (1920).

463. Springer v. United States, 102 U.S. 586, 602 (1880); Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 583 (1895), *aff'd on reh'g*, 158 U.S. 601, 637 (1895).

464. *Macomber*, 252 U.S. at 199; *see also* Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (taxing stockholder dividends).

465. *Macomber*, 252 U.S. at 218-19.

466. *Hubbard*, 79 U.S. (12 Wall.) at 18.

467. *See, e.g.*, Comm'r v. Wells, 289 U.S. 670, 678-79 (1933); Hoeper v. Tax Comm'n, 284 U.S. 206, 218 (1931); *supra* notes 281-286, 320-328 and accompanying text (discussing the attribution analysis under due process).

Sixteenth Amendment?[468] The absence of such gain meant that there was no income to attribute, not that Congress lacked attribution power. *Macomber*, therefore, overstated *Hubbard*'s demise, especially given *Moore*'s criticism of *Pollock*.[469] *Hubbard* itself remains strong evidence of Congress's constitutional power to attribute corporate income to shareholders.

B. Structural Tax Reform Through the Attribution Power

This Section articulates the policy implications of Part II's argument (that Congress has robust power to tax income realized by *A* to *B*). It contends that the attribution power independently allows Congress to enact structural tax reforms proposed to ameliorate economic inequality: for example, taxing corporate earnings to shareholders. Statutory mechanisms enabled by the attribution power are imperfect but provide an ultimately effective avenue of legislation should the Supreme Court constitutionalize the realization requirement. This Section first describes the reform proposals before fleshing out how Congress can design such tax regimes through its attribution power. Further, it addresses two objections: (1) some of these regimes are economically equivalent to accrual and wealth taxes and should be constitutionally analyzed as such; and (2) Congress cannot both tax corporate income and attribute such income to the shareholders.

One preliminary note: scholars have addressed proposals to tax unrealized gains and wealth on normative (e.g., distribution or efficiency) grounds.[470] This Feature does not directly engage with this strand of the literature. But Part II's reconstruction of the attribution power ensures that this robust scholarly and

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468. This question could center on either economic income (i.e., did the taxpayer receive any economic gains at all?) or realization (i.e., did the taxpayer receive property separate from her initial capital investment?). In *Macomber*, the corporation distributed pro rata stock dividends to the individual taxpayer-shareholder without changing her proportionate ownership interest in the company. This meant that she received additional stocks but zero economic income. *Macomber*, 252 U.S. at 200-01; *see also* Zhang, *supra* note 16, at 198-200 (discussing the income reading of *Macomber*). To be sure, *Macomber* rejected the government's argument under *Hubbard* that the tax on stock dividend was really a tax on the shareholders' entitlement to the undistributed profits of the corporation. But as I have previously argued, this part of *Macomber* is best read as an advisory opinion. Zhang, *supra* note 16, at 205.

469. *See* Moore v. United States, 602 U.S. 572, 583 (2024) (stating that the Sixteenth Amendment vitiated the reasoning of *Pollock*).

470. *See, e.g.*, Saez & Zucman, *supra* note 9, at 437 (presenting a case for a modern wealth tax in the United States). *See generally* David Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499 (1999) (advocating for consideration of a flat-rate wealth tax); Batchelder & Kamin, *supra* note 7 (discussing proposals for an accrued-gains tax and a wealth tax); *supra* note 29 (providing examples of scholarship on the realization doctrine, including proposals for its (partial) abolition).

policy conversation continues and that such policy decisions are made on substantive democratic grounds rather than the Court's views as to Sixteenth Amendment "income." This coheres with the thrust of Justice Jackson's concurrence in *Moore*, where she noted that the Court's past tax-policy intervention had failed.[471]

First, there are several options on the table. In the aftermath of *Moore*, scholars have proposed taxing undistributed corporate earnings directly to shareholders, especially those with substantial or controlling stakes in the company.[472] Such proposals fall squarely within the attribution doctrine. They tax shareholders on key constituents of ownership—their pro rata shares of income earned by a nonadverse corporate vehicle—thus satisfying the mandates of rationality, nonadverseness, and proportionality. *Moore* itself permitted Congress to tax corporate income to shareholders owning at least ten percent of the company.[473] There is no reason why Congress cannot tax the same income stream to both the corporation and its shareholders.[474] And these straightforward attribution regimes can diminish the incongruence between wealth and federal income-tax burdens today.[475]

Lawmakers have proposed two additional categories of reform. They have suggested taxing gains as they accrue rather than upon disposition: one proposal targets only households with more than $100 million of wealth, and imposes a minimum 20% tax on their economic income, including unrealized appreciation in assets.[476] They have also suggested taxing wealth itself: one proposal targets households with more than $50 million of wealth, and imposes a 2-6% tax on net worth above the threshold.[477]

Both wealth and accrual taxation aim to close the loopholes created by the realization requirement and the stepped-up basis at death.[478] These two rules defer taxation (until sale of the underlying asset, which might never occur) and

471. *See Moore*, 602 U.S. at 601-02 (Jackson, J., concurring); *infra* note 525 and accompanying text.

472. *E.g.*, Reuven Avi-Yonah, *Should Congress Reform the Accumulated Earnings Tax?*, 118 TAX NOTES INT'L 1193, 1196-97 (2025); Daniel Hemel (@DanielJHemel), X (June 20, 2024, 7:59 PM), https://x.com/DanielJHemel/status/1803940809894486058 [https://perma.cc/6U7U-MZ5M] ("Progressive tax policy wonks should start thinking through the mechanics of a shareholder-level tax on the undistributed earnings of C corporations.").

473. *Moore*, 602 U.S. at 596-97.

474. *See infra* notes 502-512 and accompanying text.

475. *See, e.g.*, Zelenak, *supra* note 8 (showing that the ultrawealthy in the 1920s had enough dividend income to have to bear politically acceptable tax burdens).

476. Billionaire Minimum Income Tax Act, H.R. 8558, 117th Cong. § 1481(a), (c) (2022).

477. Saez & Zucman, *supra* note 9, at 438.

478. I.R.C. §§ 1001, 1014(a) (2023).

forgive accrued income-tax liabilities at death, respectively.[479] As discussed, they enable immense tax avoidance at the top: according to a recent report, between 2014 and 2018, the combined assets of Elon Musk, Jeff Bezos, and Warren Buffett generated more than $137 billion of economic income.[480] But due to their decisions to hold onto such assets, the tax system only recognized the three as having $5.7 billion of realized tax income.[481] Thus, most of their economic power is untaxed. Wealth- and accrual-tax regimes ignore elective deferral: they tax gains and net worth regardless of whether the taxpayer has realized income.[482]

This is why *Moore* was a crucial contest. It not only challenged the MRT and the 2017 international-tax regime. It was also designed to preempt any future attempt at wealth or accrual taxation. Even if lawmakers could garner the democratic support for egalitarian reform, opponents could mobilize the Court and the Constitution to stop it.

But Congress can redesign the proposed wealth and accrual taxes under its robust attribution power uncovered by Part II of the Feature. That is, instead of levying a 20% tax on *unrealized* gains or a 2% tax on wealth regardless of whether the taxpayer has realized income, Congress can attribute corporations' realized income to their shareholders. Congress can then impose variable tax rates on such attributed income to replicate the economic effects of a wealth or accrual tax. Such adjustments in rates should depend on the ratio between the appreciation (realized or not) or property value, on the one hand, and the corporate earnings properly attributed to the shareholders, on the other hand. The following figure illustrates how to arrive at the adjustable tax rates on attributed corporate income for (1) an accrual tax and (2) a wealth tax:

479. *See supra* notes 2-7 and accompanying text (discussing realization and stepped-up basis as weaknesses of the federal income tax).

480. Edward Fox & Zachary Liscow, *The Role of Unrealized Gains and Borrowing in the Taxation of the Rich*, 252 J. PUB. ECON. art. no. 105518, at 1 (2025).

481. *Id.*

482. Accrual and wealth taxation thus present administrability issues like valuation and liquidity: publicly traded stocks are easy to value and sell to pay for tax bills; other assets are not. However, scholars have proposed solutions to such problems. *See* Galle et al., *supra* note 7, at 1264-65 (proposing that the government take a notional equity interest—a percentage stake without management rights—in the taxed asset).

FIGURE 2. ACCRUAL AND WEALTH TAXATION THROUGH ATTRIBUTION

(1) Accrual Taxation Through Attribution

$$\text{Tax Rate on Attributed Corporate Income} = \frac{\text{Appreciation (Realized or Unrealized)}}{\text{Attributed Corporate Income}} \times \text{Desired Accrual Tax Rate}$$

(2) Wealth Taxation Through Attribution

$$\text{Tax Rate on Attributed Corporate Income} = \frac{\text{Value of the Underlying Property}}{\text{Attributed Corporate Income}} \times \text{Desired Wealth Tax Rate}$$

The basic mechanics of such redesign is not complex. For example, suppose that Congress wants to levy a 20% accrual tax on all asset appreciation or a 2% wealth tax on property value. Further, suppose that shareholder *A* owns corporation *C*, which has earned an income of 10, has increased in value by 20 during the year, and is worth 100 at the end of the year (or at the relevant point of taxation). Under current rules, *A* has no income-tax liability attributable to *C*. A 20% accrual regime would tax *A* on the appreciation of 20, resulting in a tax of 4. A 2% net-worth regime would tax *A* on the property value of 100, resulting in a tax of 2. As Figure 2 illustrates, to replicate the economic effects of the 20% accrual-tax regime, Congress can attribute the corporate income of 10 to *A* and tax such attributed income at 40%. Likewise, to replicate the economic effects of the 2% wealth-tax regime, Congress can attribute the corporate income of 10 to *A* and tax such attributed income at 20%. The redesigned regime will acquire greater complexity as taxpayers dispose of their assets in the middle of the taxable year. But such complexity tracks the administrative difficulties of accrual or wealth taxation itself.

To be sure, the constitutionality of redesigning accrual and wealth taxes through attribution is not guaranteed. Opponents might raise two types of objections—some existing doctrine tends to dismiss, while others have more bite. First, scholars have suggested designing wealth taxes as taxes on imputed income from property, and the worry is that the Court may see such legislation as wealth rather than income taxes anyway.[483] One might make a similar argument about Congress's use of its attribution power: the tax is on realized corporate income, attributed to shareholders, but the tax *rate* depends on the ratio between either appreciation (for an accrual tax) or property value (for a wealth tax) and the attributed corporate income. This raises the key question: assuming Congress cannot tax unrealized appreciation or property value at uniform rates due to the Direct Tax Clauses, can it adjust tax rates on realized income with reference to unrealized appreciation or property value? That is, can Congress vary the tax

483. *See, e.g.*, Schenk, *supra* note 152, at 446-47.

rates on a constitutionally permissible tax base with reference to a metric that it might not be able to tax directly, at uniform rates?[484]

Existing doctrine says yes. In general, tax rates are a matter of legislative discretion.[485] But even more on point, the *Burk-Waggoner Oil* taxpayer made the same kind of argument in 1925, which the Supreme Court did not find persuasive. Recall that the main constitutional argument there alleged that Congress could not impose corporate-income and excess-profits taxes on a Texas association with no capacity to "own" income under state law.[486] That incapacity, the taxpayer contended, meant that the association could not realize the income in any meaningful sense, thus rendering any tax on its income a direct tax subject to apportionment.[487]

At the end of its opening brief before the Court, the taxpayer added a separate argument. It addressed the possibility of construing the corporate-profits tax as a tax on the income of *individual* members who own the corporate vehicle.[488] Even so, the taxpayer contended, the tax remained a direct tax.[489] This is because individuals would be subject to tax rates that varied on the basis not only of their income (a constitutionally permissible base for uniform taxation) but also by "the joint gains of an enterprise [i.e., the Burk-Waggoner Association]" (a constitutionally impermissible base for uniform taxation).[490] In other words, by attributing liability for excess-profits taxes to the shareholders, Congress taxed them at rates "wholly at variance" from those imposed by the federal individual income tax.[491] The taxpayer thus argued that any determination of tax rates with reference to an impermissible tax base rendered the tax on a permissible tax base a "direct" tax. As Part II has shown, the Supreme Court gave no credence to all these constitutional arguments in *Burk-Waggoner Oil*.[492]

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484. Note that this differs from the problem raised by *Hoeper*: in that case, the Court appeared to suggest that the Due Process Clause, at least as applied to the states, could bar the determination of one person's tax rate based on another's income. Scholars have argued that *Hoeper* is no longer good law. In any event, *Wells* vitiated, if not fully repudiated, *Hoeper*'s logic as applied to the federal government. *See* Zelenak, *supra* note 130, at 389; Gann, *supra* note 130, at 56-58; *supra* notes 320-327 and accompanying text.

485. *See generally* Glogower, *supra* note 42 (arguing that Congress can constitutionally vary the applicable tax rates based on taxpayers' wealth to mimic the economic effects of a wealth tax).

486. *See supra* notes 171-192 and accompanying text.

487. *Burk-Waggoner Oil* Brief for the Plaintiff in Error, *supra* note 171, at 67-74.

488. *Id.* at 81 (considering the corporate-excess-profits tax "as a tax imposed upon the members individually, but collected from the group").

489. *Id.*

490. *Id.* at 82.

491. *Id.* at 84.

492. *See supra* Section II.B.1.

However, opponents could frame the objection in broader, substance-over-form terms. That is, they may argue that an attributed tax on corporate income with adjustable rates based on unrealized appreciation or wealth, in substance, is an accrual or wealth tax. Given its current composition, the Court could find such arguments convincing, especially in cases featuring a substantial divergence between earnings, on the one hand, and unrealized appreciation or wealth, as relevant, on the other hand.[493] In particular, many companies may not have much realized income within a taxable period.[494] They might be start-ups whose profitability has not materialized, or larger enterprises that have struggled with new competition. In those cases, redesigning an accrual or wealth tax through the attribution power could result in tax rates exceeding 100%. Congress, of course, has taxed marginal income at rates close to 100% in the past.[495] But income-tax rates exceeding 100% could raise more serious constitutional questions—at least to the current Supreme Court and future Justices who take a more active approach to shaping federal tax policy. Taxpayers might draw a dichotomy, casting the tax as either one on income or one on unrealized gains or wealth. To the extent the tax is substantively on unrealized gains or wealth, its constitutionality rests on the Court's judgment about the constitutional conditionality of realization. To the extent the tax is on corporate, realized income, litigants may argue that it is confiscatory based on the tax rates that exceed 100%.[496] To be sure, the Court has been unsympathetic to characterizing income taxes as takings.[497] The attributed corporate earning is likely only part of the taxpayer's overall accretion to wealth in the taxable period, thus keeping the effective tax rate below 100%. And low underlying accrual- or wealth-tax rates might make claims of confiscation an exaggeration. But the attribution case law does not squarely foreclose the taxpayer's arguments in those contexts.

493. *See* Schizer & Calabresi, *supra* note 42, at 1515 (arguing that the constitutionality of a hybrid income-wealth tax depends on "the significance of the wealth-based features" and concluding that "a tax that in substance really is a wealth tax is not covered by the Sixteenth Amendment, regardless of what Congress calls it").

494. Congress can mitigate—but cannot eliminate—this problem by expanding the attributed tax base for shareholders and denying them some of the deductions otherwise available to the corporation. It has enacted similar regimes in the past—for example, the alternative minimum tax. *See* I.R.C. §§ 55-56 (2024).

495. *See, e.g.*, Individual Income Tax Act of 1944, ch. 210, §§ 3-4, 58 Stat. 231, 231-32 (imposing a normal tax of 3% and an additional surtax of 91% on surtax net income above $200,000); Revenue Act of 1951, ch. 521, § 101, 65 Stat. 452, 460 (imposing a surtax of 89% on net income above $200,000, in addition to the normal tax of 3%).

496. *See* U.S. CONST. amend. V; Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 104-05 (1996).

497. *See, e.g.*, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 21, 24-25 (1916).

Doctrinal penumbra can invite a contest of values and interpretive methodologies. The discussions in Part II and this Section suggest that the Constitution imposes a lower hurdle to attributing corporate income to shareholders than directly taxing those shareholders on the unrealized appreciation or the value of the same underlying corporation. Of course, this is not to say that the latter is impermissible. But what values might justify this differential in scrutiny?

At least part of the answer lies in history. Every income tax requires two decisions: (1) identification of the economic gain to be taxed, and (2) imposition of the burden on a taxpayer. Both implicate values that one might reasonably expect the Constitution to protect: individual liberty or property against undue or arbitrary intrusion by the government.[498] As to the first, the economic gain can be uncertain or its value hard to determine, creating a risk of confiscation or at least an arbitrary distribution of tax burdens. For example, the government taxes purported fiscal power where none exists. As to the second, taxpayers' relationship with the economic gain can be so attenuated that they derive no benefit from it, again creating a risk of arbitrary deprivation. Taxing shareholders on realized corporate income produces the second but not the first type of risk. The economic gain is certain and realized; the only question is whether the choice of the cost-bearer is permissible. By contrast, taxing unrealized appreciation or value produces both types of risk. The economic gain might be uncertain, and the choice of the cost-bearer may or may not be proper.

This distinction may seem trivial today: Nasdaq publishes the market value of NVIDIA stock by the second.[499] But that was not the case in 1787 or 1913. Before the rise of developed stock markets, much unrealized appreciation and wealth held by Americans took the form of assets the values of which were hard to determine.[500] As a result, when the relevant constitutional provisions were drafted and ratified, taxing unrealized appreciation or wealth heightened the risk of undue, arbitrary deprivation of liberty and property. By contrast, attribution of realized corporate income to related parties did not then involve such risks. It only required assessing the relationship between clear economic gains and the taxpayer. Such inquiry into the taxpayer's relationship with the economic gains

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498. *See, e.g.*, U.S. CONST. amends. V, XIV.

499. *See NVIDIA Corporation Common Stock (NVDA)*, NASDAQ, https://www.nasdaq.com/market-activity/stocks/nvda [https://perma.cc/4TMW-6XX6].

500. This would include unrealized appreciation in ownership interests in all but the most liquid and frequently traded stocks, or in the value of livestock taxed by Congress during the Civil War. *See* Revenue Act of 1864, ch. 173, § 117, 13 Stat. 223, 282. *See generally* Mary O'Sullivan, *The Expansion of the U.S. Stock Market, 1885–1930: Historical Facts and Theoretical Fashions*, 8 ENTER. & SOC'Y 489 (2007) (showing that the United States had no broad-based stock market even in the 1910s); Zhang, *supra* note 16, at 203 & n.157 (collecting scholarship on the lack of a broad-based stock market in the 1910s).

(as opposed to the value of the underlying asset) has always been more amenable to judicial resolution—and consequently, protection by the courts in addition to the political process.

Of course, we do have developed stock markets today. Their emergence has mitigated the risk of undue deprivation from valuation, thus forcing a convergence between the (low) perils of attribution and those of directly taxing unrealized gains or wealth stored in publicly traded stocks. Should this create lower doctrinal hurdles for taxing unrealized gains and wealth today? Should the mandates of realization and due process converge? The answer depends on one's methodology of constitutional interpretation. Those who favor furtherance of the values that animated the constitutional provisions in the first place—even as a matter of originalism—would say yes.[501] Others committed to the text alone may hesitate. Such debate about norms and methods will shape the outer boundaries of the attribution power, for example, in its use to redesign accrual and wealth taxes, where the realized corporate earnings are minuscule.

Further, one might object that the attribution power only allows the federal government to tax *either* the shareholders *or* the corporation. That is, Congress can attribute corporate earnings to the owners or the entity, but not both. Justice Kavanaugh explicitly left this question open in the majority opinion in *Moore*.[502] After all, *Moore* did not implicate that question.

Existing law suggests that an attributed earnings tax can coexist with entity-level taxation. As a doctrinal matter, attributing corporate earnings to shareholders creates an income tax under the Sixteenth Amendment. By contrast, in *Flint v. Stone Tracy Co.*, the Supreme Court upheld the corporate income tax as an excise on the privilege of conducting business with the corporate form.[503] More precisely, the proper question is thus whether Congress can impose an income tax and use the same base to determine the excise-tax liability of another party. The answer is clearly yes: many such instances of dual income-excise taxation exist unchallenged as to their constitutionality.[504]

To be sure, the characterization of the corporate income tax as an excise may have been a legal fiction. Reuven S. Avi-Yonah, for example, has argued that the

501. For an originalist focus on constitutional values, see generally JACK M. BALKIN, LIVING ORIGINALISM (2014), which outlines a method of reading constitutional text in line with both its underlying principles and original meaning.

502. Moore v. United States, 602 U.S. 572, 599 (2024) ("And nothing in this opinion should be read to authorize any hypothetical congressional effort to tax both an entity and its shareholders or partners on the same undistributed income realized by the entity.").

503. 220 U.S. 107, 171 (1911).

504. For example, domestic airfare is subject to a 7.5% excise tax. I.R.C. § 4261(a) (2024). The same airfare constitutes part of the corporate income tax base for the airline conducting the flight.

corporate tax was designed from the very beginning to tax the income of all corporations—both to burden shareholders and to exert federal control over large monopolies.[505] Proponents only labeled the tax an excise to shield it from a constitutional attack. After all, Congress enacted the corporate tax during the interregnum between 1895 (the year of *Pollock*, before which the Court saw uniform income taxes as duties or otherwise undoubtedly within Congress's broad taxing power under Article I) and 1913 (after which Congress could levy income taxes pursuant to the ratified Sixteenth Amendment).[506] In addition, levying a federal tax on the privilege of using the corporate vehicle—which derives from state law—has been an uneasy justification.[507] The Supreme Court could thus overrule *Stone Tracy* and rid the corporate income tax of its excise-tax "subterfuge."[508]

It is beyond the scope of this Feature to predict whether the Supreme Court will overrule *Stone Tracy*. But even if it does, that is not the end of the matter. What is the constitutional foundation for prohibiting Congress from attributing corporate income to shareholders and taxing such income at the entity level? It certainly does not come from the text of the Sixteenth Amendment. That Amendment empowers Congress "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."[509] It says nothing about taxing

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505. Reuven S. Avi-Yonah, *Effects from* Moore*: Does the Corporate Tax Require Realization?*, 182 Tax Notes Fed. 661, 662 (2024) [hereinafter Avi-Yonah, *Effects from* Moore]; Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 Va. L. Rev. 1193, 1195 (2004). *See generally* Ajay K. Mehrotra, *The Public Control of Corporate Power: Revisiting the 1909 U.S. Corporate Tax from a Comparative Perspective*, 11 Theoretical Inquiries L. 491 (2010) (examining the motivations for corporate taxation through a comparative and historical lens).

506. Springer v. United States, 102 U.S. 586, 602 (1880) (upholding the 1864 income tax as an excise or duty); Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 637 (1895) (affirming the Court's striking down of the 1894 income tax); U.S. Const. amend. XVI (authorizing Congress to tax income, in response to *Pollock*); Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 112-13 (levying "annually a special excise tax with respect to the carrying on or doing business by such [specified] corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year").

507. *See* Avi-Yonah, *Effects from* Moore, *supra* note 505, at 662-63. There was some congressional debate about this precise question of whether the federal government could tax as an excise a business-organization privilege grounded in state law. *See, e.g.*, 44 Cong. Rec. 3977 (1909) (statement of Sen. Albert B. Cummins) ("Is there anyone here who asserts that the Congress of the United States can levy an excise tax upon the right to exist, the right to do business, of a corporation created by the States?").

508. *See* Avi-Yonah, *Effects from* Moore, *supra* note 505, at 666 (suggesting that *Stone Tracy* could be overruled because "the corporate tax was not an excise tax and calling it an excise tax was a subterfuge designed to shield it from *Pollock*").

509. U.S. Const. amend. XVI.

such income twice or to distinct taxpayers, let alone prohibiting such practices. Likewise, Article I authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises."[510] Again, it contains no ban on imposing excises or duties on the same tax base twice.

In fact, the very existence of the corporate income tax itself shows that double taxation is permissible as a constitutional matter. The United States has a classical, two-layer system that taxes corporate income first as earned at the entity level, and second when distributed to shareholders as, for example, dividends.[511] Distributed corporate income is thus doubly taxed—to both corporations and shareholders. This double taxation of distributed corporate income has no serious constitutional defects: after all, the corporate-level tax and the individual income tax have coexisted for more than a century.[512] What would make the taxation of distributed corporate income to both entities and shareholders constitutionally permissible but the taxation of undistributed corporate income to both entities and shareholders constitutionally impermissible? The only difference between the two is that the shareholders have realized income by receiving the distributed corporate income in the former. By contrast, in the latter, the shareholders have not themselves realized the income—only the corporation has. One would then argue that the absence of realization in the latter scenario prohibits Congress from taxing shareholders on the undistributed corporate income. But these are the same type of arguments—relying on realization and the Direct Tax Clauses—made by litigants in the 1920s and 1930s.[513] These arguments return us to the precise point of this Feature. As Part II has shown, Congress has broad power to attribute income realized by another entity (e.g., the corporation) to anyone who bears a nonarbitrary relationship with it (e.g., the corporation's shareholders). The argument for non-double-taxation of undistributed corporate income thus collapses into an argument about Congress's attribution power. And as long as the chosen taxpayer enjoys some constituent of ownership—which shareholders do of the corporations whose shares they own—attribution of undistributed corporate income is within bounds of due process.

To be sure, the attribution mechanisms are imperfect. The key limit is that the property must, in fact, produce income. For example, corporations may appreciate in value but sustain losses during the taxable period. If so, Congress will not be able to attribute any corporate earnings to the shareholders and vary the

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510. U.S. CONST. art. I, § 8, cl. 1.

511. I.R.C. § 11 (2024) (imposing a tax on corporate income); *id.* § 61(a)(7) (including dividends in gross income).

512. *See* Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 112-13 (corporate tax); Revenue Act of 1913, ch. 16, § 2(a)-(b), 38 Stat. 114, 166-68 (income tax).

513. *See supra* Section II.B.

tax rates to replicate an accrual or wealth tax, at least during that year. This is a common feature of start-ups, including wildly successful ones. Uber, for example, sustained losses for years before turning a full-year profit for the first time in 2023 as a public company.[514] To be sure, Congress can enact provisions to capture previously accrued gains or past wealth-tax liabilities—even with interest to account for the value of tax deferral—in future years when the corporation does turn a profit.[515] But such provisions will increase the complexity of the attribution regimes. They will also expose the public fisc to the risk that taxpayers will lobby to repeal such taxes before liabilities materialize.[516]

Further, the property must also produce the type of income that Congress can undoubtedly tax. This point is both an additional limit on the attribution regime and a potential remedy to the first. Take the examples of wine and art—two sets of property held disproportionately by high-income groups. Ownership of such property ordinarily generates no cash income for Congress to attribute to its owners.

However, one might argue—powerfully, in my view—that such property always generates noncash accretion to owners' wealth. Display of art is a form of economic value. After all, there is a market for art rentals.[517] The opportunity of opening a vintage Bordeaux, on unexpected occasions worthy of celebration, is another form of economic value. Even mere ownership of stocks in companies that lose money generates—often substantial—value of diversification: it allows investors to balance their risks and make investment decisions that they otherwise might not in the absence of such stock ownership.[518] Can Congress constitutionally tax such income, and vary the tax rates to replicate the economic effects

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514. Preetika Rana, *Uber Posts First Annual Profit Since Its IPO*, WALL ST. J. (Feb. 7, 2024, 4:12 PM ET), https://www.wsj.com/business/earnings/uber-q4-earnings-report-2023-4e0d59f6? [https://perma.cc/96Q4-D2HV].

515. *See, e.g.*, Galle et al., *supra* note 7, at 1283-88 (describing retroactive taxation regimes, which maintain the realization doctrine but impose additional taxes (i.e., interest) for the value of tax deferral).

516. *See* David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 495 (2022) (describing the political-optionality benefit of tax deferral and arguing that "deferring the point at which the law imposes tax gives taxpayers time and opportunity to wait for the law to weaken or change—and even to lobby for such a change").

517. *See, e.g.*, Shane Hickey, *Renting Art: How to Bring Great Pictures into Your Home at a Fraction of Their Cost*, GUARDIAN (Oct. 13, 2024, 3:00 AM EDT), https://www.theguardian.com/artanddesign/2024/oct/13/renting-art-pictures-home-cost [https://perma.cc/KA7B-2W52].

518. *See* Loïc Berger & Louis Eeckhoudt, *Risk, Ambiguity, and the Value of Diversification*, 67 MGMT. SCI. 1639, 1639-40 (2021) (explaining the values of portfolio diversification in investment); *Diversifying Your Portfolio*, VANGUARD, https://investor.vanguard.com/investor-resources-education/portfolio-management/diversifying-your-portfolio [https://perma.cc/RUS8-VYEE] (same).

of accrual and wealth taxation? That is an open question. It fits less well within the attribution doctrine analyzed in Part II. In the cases confronted by the Taft and Hughes Courts, the corporate and trust vehicles whose income Congress taxed to individual owners and grantors all generated tangible profits during the taxable period.

Nonetheless, the attribution doctrine provides Congress with effective mechanisms to reach the core income of the wealthy which the current tax system misses. The main economic power that goes untaxed today stems from ownership of appreciated equities, not wine or art.[519] Even straightforward attribution regimes (i.e., taxing corporate earnings to shareholders at uniform rather than adjustable rates) might significantly improve the perceived and intrinsic fairness of the income tax.[520] Attributing corporate earnings to shareholders has the additional advantage of cohering with ordinary people's intuitions about taxing capital income.[521] Further, the Supreme Court should be careful about limiting Congress's power to enact a straightforward revenue regime when it unquestionably can achieve the same objective through slightly more cumbersome means.[522] If Congress can more or less tax accrual and wealth through attribution, why constitutionalize realization?

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All this brings us back to the beginning. In concurring with the majority in *Moore*, Justice Jackson emphasized the failure of past judicial intervention in federal revenue laws.[523] As she put it, "[The Supreme] Court's role in [tax-policy] disputes should be limited."[524] Citing Justice Harlan's dissent in *Pollock*, she argued that the "remedy" for bad tax legislation—whether unfair, inefficient, or impossible to administer—"is to be found at the ballot-box, and in a wholesome public opinion which the representatives of the people will not long, if at all, disregard, and not in the disregard by the judiciary of powers that have been committed to another branch of the government."[525]

519. *See, e.g.*, Eisinger et al., *supra* note 8.

520. *See supra* notes 1-8 and accompanying text.

521. *See* Edward Fox & Zachary Liscow, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule*, 213 J. PUB. ECON. art. 104714, at 22 (2022) (exploring public attitudes toward taxing unsold gains).

522. *See, e.g.*, Glogower, *supra* note 33, at 783-84, 787-88 (arguing that if the Court struck down a traditional wealth tax, Congress would still be free to tax wealth through other methods).

523. Moore v. United States, 602 U.S. 572, 600 (2024) (Jackson, J., concurring).

524. *Id.* at 603.

525. *Id.* (quoting Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601, 680 (1895) (Harlan, J., dissenting)).

This Feature bolsters such views. It shows that the constitutional law of taxation—crafted by past Supreme Courts in the aftermath of the Sixteenth Amendment—reserves primary discretion over tax policy to Congress. Structural tax reform may not occur immediately, but when it does, debates over tax and distributive justice should unfold through the democratic process rather than judicial exegesis. That is not only an aspiration of popular sovereignty but also a mandate of existing doctrine.

CONCLUSION

This Feature has reconstructed Congress's income-attribution power. During the 1920s and the 1930s, taxpayers challenged, on direct-tax grounds, federal taxation of excess corporate profits, revocable trusts, and the marital unit in community-property states. The Supreme Court rejected these arguments, thereby crafting a robust federal attribution power limited only by due process. Today, that power independently enables Congress to design structural tax reforms whose constitutionality might otherwise be in doubt, as exemplified in *Moore v. United States*.