The Mandatory Repatriation Tax Is Unconstitutional

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In late 2017, Congress passed the first major tax reform in over three decades. This Essay considers the constitutional concerns raised by Section 965 (the "Mandatory Repatriation Tax"), a central provision of the new tax law that imposes a one-time tax on U.S.-based multinationals' accumulated foreign earnings.

First, this Essay argues that Congress lacks the power to directly tax wealth without apportionment among the states. Congress's power to tax is expressly granted, and constrained, by the Constitution. While the passage of the Sixteenth Amendment mooted many constitutional questions by expressly allowing Congress to tax income from whatever source derived, this Essay argues the Mandatory Repatriation Tax is a wealth tax, rather than an income tax, and is therefore unconstitutional.

Second, even if the Mandatory Repatriation Tax is found to be an income tax (or, alternatively, an excise tax), the tax is nevertheless unconstitutionally retroactive. While the Supreme Court has generally upheld retroactive taxes at both the state and federal level over the past few decades, the unprecedented retroactivity of the Mandatory Repatriation Tax—and its potential for taxing earnings nearly three decades after the fact—raises unprecedented Fifth Amendment due process concerns.

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Introduction:

In December 2017, President Trump signed H.R. 1, originally introduced as the Tax Cuts and Jobs Act of 2017 (the "TCJA").[1] The TCJA is the most wide-ranging change in federal tax law since the Tax Reform Act of 1986, a bipartisan rewrite of the Code signed into law by President Reagan.[2] The TCJA's many changes to the Code[3] include: a reworking of the individual tax brackets,[4] the near doubling of the standard deduction[5] and the elimination of the personal exemption,[6] the doubling of the estate tax exemption,[7] the cutting of the corporate tax rate from thirty-five percent to twenty-one percent (along with the elimination of the corporate AMT),[8] and the imposition of a new excise tax on universities.[9]

Notably, the TCJA transforms the United States' system of international taxation. In the corporate realm, the TCJA moves the United States away from something akin to a worldwide system of taxation, and into a quasi-territorial

1. An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115–97, 131 Stat. 2054 (2017) [hereinafter "TCJA"].

2. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

3. All references to "Code" refer to the Internal Revenue Code of 1986, as amended. References to "old" Code sections refer to the Code prior to amendment by the TCJA, while "new" Code sections refer to those as amended by the TCJA.

4. *See* TCJA § 11001 (to be codified at I.R.C. § 1).

5. *See* TCJA § 11021 (to be codified at I.R.C. § 63).

6. *See* TCJA § 11041.

7. *See* TCJA § 11061.

8. *See* TCJA § 13001–02 (to be codified at I.R.C. §§ 11, 243, 245) (lowering the corporate tax rate); TCJA §§ 12001-02 (to be codified at I.R.C. §§ 53, 55) (repealing the corporate AMT).

9. TCJA § 13701 (to be codified at I.RC. § 4968).

system of taxation.[10] Under the U.S. international tax regime before the passage of the TCJA, many large U.S.-based multinationals[11] accumulated considerable earnings overseas, deferring perhaps $2.5 trillion in earnings from U.S. taxation.[12] While multinational entities' overseas earnings have generally been subject to tax in the source jurisdiction—that is, taxed in the jurisdiction where the income is deemed to have been earned or attributable—accumulated overseas earnings have never been subject to tax in the United States.[13] In the past, Congress has incentivized corporations to repatriate cash by providing a substantial deduction for such dividends, which lowered the effective U.S. rate on that overseas income.[14]

However, the TCJA goes beyond offering an optional deduction to incentivize repatriation. The TCJA imposes a tax on *all* post-1986 accumulated foreign earnings.[15] Speaking generally, this "Mandatory Repatriation Tax"[16] in the new Section 965 applies to certain United States shareholders of foreign corporations that have accumulated deferred foreign income.[17]

This tax is imposed on accumulated earnings whether or not such earnings are held in liquid or illiquid assets. There is a difference in rate between earnings held in liquid and in illiquid assets: all earnings held in cash or cash

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10. Generally speaking, a true territorial system of international corporate tax would tax only an entity's profits sourced in that country. Likewise, a true worldwide system would tax an entity's worldwide income, irrespective of where that income was paid.

Of course, the United States did not have a true worldwide system to begin with, given the complex interplay of foreign tax credits and other forms of offsets against double taxation. One commentator critical of the U.S. international tax system has argued: "U.S. tax rules do not operate as a worldwide system, but rather as an ersatz variant on territorial systems, with hidden benefits and costs when compared with standard territorial regimes." Edward D. Kleinbard, *Through a Latte Darkly: Starbucks's Stateless Income Planning*, 139 TAX NOTES 1515, 1515 (2013).

11. Throughout this Article, the term "multinational entity" refers to corporate entities with subsidiaries in multiple jurisdictions.

12. Tatyana Shumsky, *Tax Overhaul Could End Record Pileup of Offshore Cash*, WALL ST. J. (Nov. 20, 2017), https://blogs.wsj.com/cfo/2017/11/20/tax-overhaul-could-end-record-pileup-of-offshore-cash/ [https://perma.cc/NM84-2ZAN].

13. *See* J. Clifton Fleming Jr. et al., *Getting from Here to There: The Transition Tax Issue*, 154 TAX NOTES 69, 69 (2017). *But see* Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 701-06 (2011) (criticizing the generation of what Kleinbard describes as "stateless income," income derived by a multinational group from "business activities in a country other than the domicile (however defined) of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is not the location of the customers or the factors of production through which the income was derived, and is not the domicile of the group's parent company"). *See generally* PAUL R. MCDANIEL ET AL., INTRODUCTION TO UNITED STATES INTERNATIONAL TAXATION 69-74 (2014) (discussing the system of U.S. international corporate taxation prior to the passage of H.R. 1).

14. *See* I.R.C. § 965 (2012) (allowing taxpayers to elect, in either the taxable year before or the taxable year after the enactment of the law in 2005, to take an eighty-five percent deduction on extraordinary dividends repatriated into the United States). To avoid gaming this system by taking on debt in order to repatriate cash in advance, the old Section 965 contained an anti-abuse rule which prevented parties from taking on additional debt in order to finance an extraordinary dividend. *See* I.R.C. § 965(b)(3) (2012). This law is discussed in Section II.B, *infra*.

15. *See* TCJA § 14103 (to be codified at I.R.C. § 965).

16. Throughout, I use the term "Mandatory Repatriation Tax" to refer to the tax imposed under the new Section 965.

17. *See* I.R.C. § 965(a) (West 2018); *id.* § 965(e)(1).

equivalents (as of late 2017) are to be taxed at a 15.5 percent rate, and earnings held in illiquid assets are to be taxed at an 8 percent rate.[18] Corporations may elect to pay this tax in installments over the course of eight years.[19]

The imposition of this new, mandatory tax raises a constitutional question.[20] The Mandatory Repatriation Tax appears to be a tax on wealth accumulated by a U.S. corporation's foreign subsidiaries. Such a tax is not, at least on its face, a tax on *income* as permitted under the Sixteenth Amendment.[21] Nor is it strictly a *repatriation* tax. Unlike past "repatriation holidays," this tax is imposed on accumulated foreign earnings whether or not the entity repatriates any of its foreign assets.[22]

This Essay discusses, and challenges, the constitutionality of this tax on two independent grounds. First, I will argue that the Mandatory Repatriation Tax is an unconstitutional direct tax. Second, even if the tax is considered to be an income tax, it is a retroactive tax on income, and it is therefore vulnerable to a challenge under the Due Process Clause of the Fifth Amendment.

I. The Mandatory Repatriation Tax

This Part is intended to provide a nontechnical discussion concerning the basics of the U.S. international tax system and to discuss how past and current repatriation taxes have altered and fit into that system.

A. International Taxation of U.S. Multinationals

Domestic corporations in the United States are taxed on their worldwide income, including any income that the corporation earned from the direct conduct of a foreign business.[23] This includes, for example, direct sales or the operation of a branch in a foreign jurisdiction.[24] In general, income that a domestic corporation earned indirectly from the foreign operation of its foreign corporate subsidiaries was not taxed until the income was distributed to the

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18. TCJA § 14103 (to be codified at I.R.C. § 965).

19. *See* TCJA § 14103 (to be codified at I.R.C. § 965).

20. The constitutional question surrounding a transition tax has been suggested before. *See* J. Clifton Fleming Jr. et al.¸ *supra* note 13, at 70 n.6 (raising the possibility of a constitutional challenge to a tax on accumulated overseas profits of a U.S. multinational). Fleming Jr. et al. argue that the primary basis for such a challenge would be a retroactivity argument, and that "the Supreme Court will just as likely find a way to uphold Congress's selection of a transition tax regime." *Id.*

21. U.S. CONST. amend. xvi.

22. *See supra* note 14 and accompanying text.

23. This is in line with how the United States taxes individuals—based on their citizenship, rather than their place of residence. *See* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 170-77 (2016).

24. *See* JOINT COMM. ON TAXATION, JCX-96-15, PRESENT LAW AND SELECTED PROPOSALS RELATED TO THE REPATRIATION OF FOREIGN EARNINGS 2 (2015) [hereinafter JCT REPATRIATION REPORT].

domestic parent corporation.[25] The U.S. tax on the earnings of foreign corporate subsidiaries can therefore be deferred until the multinational entity elects to repatriate the income by distributing it to its domestic parent corporation.[26]

A notable element of this tax system is the anti-deferral regime known as subpart F.[27] Under Section 951(a), a U.S. shareholder of a "controlled foreign corporations" (a "CFC"),[28] is required to include in gross income for the current taxable year its pro rata share of certain items that are attributable to the CFC.[29] These inclusions are commonly referred to as "subpart F income."[30]

Congress enacted subpart F as part of the Revenue Act of 1962.[31] Subpart F singles out a specific class of taxpayers—U.S. shareholders who have a substantial degree of control over a foreign corporation—and subjects them to immediate taxation on the grounds that they have the ability to treat the corporation's undistributed earnings as they see fit.[32] Thus, certain income of CFCs would be subject to immediate taxation.[33]

Subpart F income generally includes "passive income and other income that is readily movable from one taxing jurisdiction to another."[34] Subpart F income is comprised of: foreign base company income,[35] insurance income,[36] and certain other income relating to boycotts and other violations of public policy.[37] Foreign base company income includes: certain types of passive income (including certain dividends, interest, rents, and royalties),[38] certain

25. *See* Dave Fischbein Mfg. Co. v. Comm'r, 59 T.C. 338, 353 (1972); *see also* JCT REPATRIATION REPORT, *supra* note 24, at 2 (discussing the deferral of foreign source income earned by controlled foreign corporations).

26. *See* JCT REPATRIATION REPORT, *supra* note 24, at 2.

27. *See generally* I.R.C. §§ 951-965 (West 2018).

28. A "controlled foreign corporation" is defined in the Code as "any foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote is owned directly, indirectly, or constructively by U.S. shareholders on any day during the taxable year of such foreign corporation or more than 50% of the total value of the stock is owned directly, indirectly or constructively by U.S. shareholders on any day during the taxable year of the corporation." IRS I.R.M. 4.61.7.3(2); *see also* I.R.C. § 957(a) (West 2018) (defining "controlled foreign corporation").

29. *See* I.R.C. § 951(b) (West 2018); *id.* § 957*; id.* § 958; SIH Partners LLLP v. Comm'r, 150 T.C. No. 3, slip op. at 12; *see also* JCT REPATRIATION REPORT, *supra* note 24, at 2.

30. *See, e.g.*, JCT REPATRIATION REPORT, *supra* note 24, at 2.

31. Revenue Act of 1962, Pub. L. No. 87-834, § 12, 76 Stat. 960, 1006.

32. *See* Dougherty v. Comm'r, 60 T.C. 917, 928 (1973).

33. Subpart F has never been found unconstitutional, despite some challenges to its constitutionality being levied. *See, e.g.*, Richard J. Horwich, *The Constitutionality of Subpart F of the Internal Revenue Code*, 19 U. MIAMI L. REV. 400, 400-09 (1965).

34. JCT REPATRIATION REPORT, *supra* note 24, at 2.

35. *See* I.R.C. § 954 (West 2018).

36. *See id.* § 953.

37. *See id.* § 952(a)(3)-(5); *see also* JCT REPATRIATION REPORT, *supra* note 24, at 3.

38. *See* I.R.C. § 954(c) (West 2018) (defining "foreign personal holding company income"). The definition of foreign personal holding company income includes myriad exceptions, a full discussion of which lies outside the scope of this Article. *See id.* § 954(c)(2) (discussing exceptions

foreign sales income,[39] certain foreign services income,[40] and—prior to the passage of H.R. 1—certain foreign oil-related income.[41] Subpart F operates as an anti-deferral regime, requiring the *immediate* inclusion of these limited types of income earned by controlled foreign corporations to major U.S. shareholders.

B. Past Attempts at Repatriation Taxes.

The most significant attempt to tax corporations' accumulated overseas earnings occurred with the passage of Section 965[42] in 2004 as part of the American Jobs Creation Act of 2004[43] (the "old Section 965"). The old Section 965 allowed CFCs to repatriate, at their election, accumulated foreign profits at a U.S. tax rate of 5.25 percent to the domestic corporate owners, rather than the standard 35 percent corporate rate.[44] Various limitations existed on this "tax holiday," including[45]: (1) a cap of $500 million in dividends applicable to most corporate taxpayers,[46] (2) requirements that any dividends paid be extraordinary,[47] and (3) a reduction in such benefit if the amount of indebtedness of the CFC to any related person increased as of the close of the taxable year for which the old Section 965 was in effect.[48] This tax was markedly different than the TCJA's Mandatory Repatriation Tax. Since the 2004 law offered an optional deduction, corporations could elect to benefit from the lower rate, but were not required to pay any tax if they chose to keep their profits permanently invested overseas.

Over the past decade, various individuals have suggested a tax holiday of some form as a way to generate revenue. In 2014, the Camp Plan—advanced by then Chairman of the House Ways and Means Committee Dave Camp—also proposed having a one-time tax on accumulated foreign earnings and profits (at an 8.75 percent rate).[49] A repatriation holiday was potentially an

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to subpart F). For example, rents and royalties derived in the active conduct of a trade or business are excluded from treatment as subpart F. *See id.* § 954(c)(2)(A).

39. *See id.* § 954(d) (defining foreign base company sales income).

40. *See id.* § 954(e) (defining foreign base company services income).

41. *See id.* § 954(g) (defining foreign base company oil related income), *repealed by* TCJA § 14211.

42. I.R.C. § 965 (West 2018).

43. American Jobs Creation Act, Pub. L. No. 108-357, 118 Stat. 1418.

44. *See* I.R.C. § 965(a) (West 2018).

45. These are some of the key limitations. A full review of the technical mechanics of the old Section 965 is outside the scope of this Article; this list should thus not be read as complete.

46. *See id.* § 965(b)(1).

47. *See id.* § 965(b)(2).

48. *See id.* § 965(b)(3); *see also* BMC Software, Inc. v. Comm'r, 780 F.3d 669 (5th Cir. 2015); Analog Devices, Inc. v. Comm'r, 147 T.C. No. 15 (2012).

49. *See* Tax Reform Act of 2014 Discussion Draft (as prepared by Rep. Dave Camp, Feb. 26, 2014), https://waysandmeans.house.gov/UploadedFiles/Statutory_Text_Tax_Reform_Act_of_2014_Discussion_Draft__022614.pdf [https://perma.cc/7U99-EKN4]; *see* also Kyle Pomerleau & Andrew Lundeen, *The*

integral part of bipartisan tax reform; even the Obama Administration suggested a one-time tax on overseas earnings as a potential revenue-raiser.[50]

The taxation of accumulated foreign profits would ultimately be a central component of the TCJA. The TCJA dramatically changed the tax treatment of foreign earnings with three new provisions: the foreign dividends received deduction, the deemed repatriation tax, and the tax on global intangible low-taxed income.

C. The TCJA and the New Quasi-Territorial Regime

The TCJA, the most substantial tax reform since the passage of the Tax Reform Act of 1986, transforms the world of international corporate tax. It drops the corporate rate from 35 percent to 21 percent[51] and it imposes several new and extraordinarily complex and acronym-heavy taxes on multinational corporations, including: a tax on multinationals' "global intangible low-taxed income" (their "GILTI"),[52] a deduction for Foreign-Derived Intangible Income ("FDII"),[53] and the base erosion and anti-abuse tax (the "BEAT tax").[54]

But, in transitioning from a worldwide system to this new quasi-territorial regime, a key policy question for Congress was what it would do about already-deferred foreign-source earnings of U.S. multinationals. Many U.S.-based multinationals had accumulated billions in foreign-sourced earnings of its subsidiaries that had never been subject to U.S. taxation.[55] Congress could have merely allowed for a full deduction on repatriation without any payment of tax, but given the need for revenues to fund the corporate tax rate cut, such an outcome seemed unlikely.[56] The TCJA provides that these accumulated earnings and profits are subject to a one-time tax, payable over eight years.[57]

Basics of Chairman Camp's Tax Reform Plan, TAX FOUNDATION (Feb. 26, 2014), https://taxfoundation.org/basics-chairman-camp-s-tax-reform-plan/ [https://perma.cc/63BG-BR3M].

50. *See* Nick Timiraos & John D. McKinnon, *Obama Proposes One-Time 14% Tax on Overseas Earnings*, WALL ST. J. (Feb. 2, 2015), http://www.wsj.com/articles/obama-proposes-one-time-14-tax-on-overseas-earnings-1422802103 [https://perma.cc/V5QN-2YB4].

51. TCJA § 13001 (to be codified at I.R.C. § 11).

52. TCJA § 14201 (to be codified at I.R.C. § 951A). The GILTI tax creates a new anti-deferral regime for CFCs, imposing a tax on the CFCs of a U.S.-parented multinational by looking to their overall foreign tax rate, and imposing an immediate U.S. tax on the income that isn't found to be sufficiently taxed under the complex GILTI statutory framework. *Id.*

53. TCJA § 14202 (to be codified at I.R.C. § 250).

54. *See* TCJA § 14401(a) (to be codified at I.R.C. § 59A) (imposing a tax on what is called the "base erosion minimum tax amount").

55. *See* Timiraos & McKinnon, *supra* note 50.

56. *See* Jim Tankersley et al., *Republican Plan Delivers Permanent Corporate Tax Cut*, N.Y. TIMES (Nov. 2, 2017), https://nyti.ms/2iV3TJI [https://perma.cc/U4T7-M5G2].

57. *See* TCJA § 14103 (to be codified at § 965).

1. New Section 965: The Mandatory Repatriation Tax.

The TCJA provides that certain deferred foreign-source earnings and profits, accumulated by U.S.-owned foreign corporations between 1986 and 2017, are now deemed to be repatriated and are thus subject to immediate taxation, albeit at a reduced rate.[58] Specifically, certain U.S. shareholders that own foreign corporations will now be taxed on such accumulated earnings at a rate of 15.5% for earnings held in cash or cash equivalents, and at a rate of 8% for all other earnings.[59] It is not the foreign corporations themselves paying the tax, but rather the U.S. shareholders who own at least a 10% stake in the foreign corporations. Moreover, the shareholders will be responsible for this tax whether or not they are able to cause the foreign corporation to pay dividends.[60]

The mechanics of this tax are extraordinarily complicated.[61] Put simply, all of a U.S.-parented multinational entity's deferred foreign earnings—deferred profits which have never been subject to U.S. tax—are now subject to a 15.5 percent tax if they are cash or cash equivalents, or an 8 percent tax if they are not. This tax occurs as if the profits accumulated in late 2017,[62] even though taxpayers may defer some of their payment of the tax to a later year.[63] Importantly, the Mandatory Repatriation Tax is imposed on U.S. shareholders whether or not a multinational entity elects to repatriate the cash.

II. Constitutional Challenges to the Mandatory Repatriation Tax

This Essay raises two independent arguments that the Mandatory Repatriation Tax is unconstitutional. First, the Mandatory Repatriation Tax is not a tax on income, but is instead an unconstitutional direct tax, since it taxes

58. *See* TCJA § 14103(a) (to be codified at § 965).

59. *See id.*

60. For instance, if a taxpayer is only a 10 percent shareholder of a CFC, it is quite plausible that they would not be able to cause such payment.

61. For a more technical overview of the Mandatory Repatriation Tax, see Patrick J. McCormick, *Effects of the Deemed Repatriation Provisions of the Tax Cuts and Jobs Act*, 89 TAX NOTES INT'L 607 (Feb. 12, 2018).

62. *See* I.R.C. § 965(a) (West 2018).

63. The Mandatory Repatriation Tax will take effect for the foreign corporation's last taxable year that begins before January 1, 2018. *Id.* § 965(a). Therefore, for a calendar-year taxpayer, the tax will occur in 2017. For other taxpayers, the tax liability will not arise until the calendar year of the taxpayer ends. Taxpayers may elect to pay the tax liability in installments over eight years. *Id.* § 965(h). Further, the taxpayer will have some ability to offset the tax with certain foreign tax credits. *See id.* § 965(g); *see also* Adam Halpern, *A Concise Summary of the New Tax Law*, FENWICK & WEST LLP (January 5, 2018), https://www.fenwick.com/publications/Pages/A-Concise-Summary-of-the-New-Tax-Law.aspx [https://perma.cc/RQB4-HTPU] ("Foreign tax credits can be used to reduce a corporate U.S. shareholder's U.S. tax liability, but credits are only allowed for foreign taxes on the taxable portion of the deemed repatriated earnings, based on the reduced rates. Individual U.S. shareholders can elect to be taxed as corporations to obtain the benefit of foreign tax credits.").

wealth.[64] Second, even if the tax is found to be an income tax, it should be considered to be a retroactive tax on income and is therefore unconstitutional under the Due Process Clause of the Fifth Amendment.

A. The Mandatory Repatriation Tax is an Unconstitutional Direct Tax on Accumulated Wealth.

1. The Mandatory Repatriation Tax is Not an Income Tax.

Our starting point is to ask whether the tax is an income tax, and therefore is permissible under the Sixteenth Amendment (but still subject to due process limitations).[65] If the tax is not an income tax, then the question turns to whether it is a "direct" tax (and therefore subject to apportionment[66]), or an "indirect" tax that is not subject to apportionment (*e.g.*, an excise tax, or an automobile tax).

a. Defining Income Tax.

The Sixteenth Amendment allows for the taxation of income "from whatever source derived."[67] But an income tax must tax income, and the Mandatory Repatriation Tax—levied against a U.S. shareholder of a controlled foreign corporation—ultimately fails to do so.

Merriam-Webster defines "income" as "a coming in" and as "a gain or recurrent benefit usually measured in money that derives from capital or labor; also: the amount of such gain received in a period of time."[68] Any definition of income implies some type of transfer of property during a specific timeframe. To illustrate, *Lucas v. Earl*[69]—known to any tax student as the seminal case for the assignment of income doctrine—makes a theoretical distinction between the fruit of the tree (the income) and the tree itself (the income-producing entity).[70]

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64. Berg and Feingold have discussed the first possibility for levying a constitutional challenge—they assert that Section 965 is an unapportioned direct tax on incomes. Mark E. Berg & Fred Feingold, *The Deemed Repatriation Tax – A Bridge Too Far*, 158 TAX NOTES 1345, at 1352-56 (2018). This Essay hopes to build upon their analysis as to whether Section 965 ought to be considered an income tax and presents new challenges as to the potential issues with the tax's retroactivity.

65. Some commentators—notably Berg and Feingold—have concluded that the Mandatory Repatriation Tax is an unconstitutional direct tax. *See* Berg & Feingold, *supra* note 64, at 1353.

66. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers . . . ."); 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.").

67. U.S. CONST. amend. xvi.

68. *Income*, MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/income [https://perma.cc/N3LA-T2G3] (last visited June 6, 2018).

69. 281 U.S. 111 (1930).

70. *Id.*

In *Eisner v. Macomber*, the Supreme Court carefully considered the definition of income, as it applied to a pro rata dividend of stock that did not impact an individual's ownership of a corporation. In *Macomber,* the Court concluded that a pro rata stock dividend was not *income*. Rather, it was analogous to taxing the underlying earnings of the corporation rather than taxing a cash dividend. This analysis highlights how the Court conceptualized income. The Court held that "from every point of view, we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder."[71]

It appears to follow from the holding of *Macomber* that, *until actually distributed*, accumulated foreign earnings and profits of a controlled foreign corporation are not income to a U.S. shareholder of such controlled foreign corporation. While later cases challenged the holding of *Macomber* in the context of subpart F,[72] those cases all involved the current-year attribution of current earnings. They do not address the novel issue presented here, which is whether *past, accumulated* earnings are properly considered to be income to the 10-percent shareholders of a controlled foreign corporation without any dividend being paid.[73]

Some special cases need to be addressed. There are certain circumstances where a taxpayer could be taxed on "accumulated earnings" without the payment of a dividend to the U.S. parent corporation or to a U.S. shareholder. Under Section 956, an investment of current or accumulated earnings in certain U.S. property can trigger a subpart F inclusion.[74] The Tax Court has held that such investment into U.S. property can be seen as "manifesting the shareholder's exercise of control over the previous income of the corporation."[75] That is, even in the case of a subpart F inclusion triggered by investment in U.S. property, it is the *investment* in U.S. property that creates the event that is substantially equivalent to the payment of a dividend into the United States.[76]

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71. *Id.* at 219.

72. *See* Garlock v. Comm'r, 58 T.C. 423, 438 (1972), *aff'd* 489 F.2d 197 (2d Cir. 1973); Estate of Whitlock v. Comm'r, 59 T.C. 490, 505-10 (1972), *aff'd* 494 F.2d 1297 (10th Cir. 1976); Dougherty v. Comm'r, 60 T.C. 917, 927-30 (1973); *see also Berg & Feingold*, *supra* note 64, at 1353-55 (discussing subpart F challenges). As Berg and Feingold note, *Dougherty* represents perhaps the "high water mark" in these cases, where the Tax Court found a rational basis for an inclusion of past earnings by looking to the combination of the CFC's investment in U.S. property in the current year under Section 956 and the U.S. shareholders' control over the CFC. Berg & Feingold, *supra* note 64, at 1353.

73. Berg and Feingold correctly point out that taxpayers might face an inclusion under Section 965 "even when the DFIC has neither current nor accumulated earnings" under certain circumstances. Berg & Feingold, *supra* note 64, at 1354.

74. *See* I.R.C. § 956 (West 2018).

75. *Dougherty*, 60 T.C. at 930.

76. *See id.*

In another case, a corporation may be subject to the "accumulated earnings tax," imposed on the undistributed current earnings and profits of the corporation's taxable year that are in excess of those retained by the corporation for its reasonable business needs.[77] This tax is not self-assessed; it is imposed only when the IRS issues a notice of deficiency requiring the payment of such tax. Importantly, the base of the accumulated earnings tax is the corporation's "accumulated taxable income."[78] A corporation's accumulated taxable income is a modification of its taxable income, allowing for certain deductions (including taxes paid and charitable contributions), but disallowing certain others (including a deduction for net operating losses). Despite its name, the accumulated earnings tax is nevertheless a further tax on the income of the corporation.

b. Section 965 does not tax income, nor does it tax current-year inclusions of deferred income.

The Mandatory Repatriation Tax uses as its base the accumulated foreign earnings of certain controlled foreign corporations.[79] The mechanism of the tax itself—as discussed above—is to include a taxpayer's earnings as subpart F income in their last taxable year beginning before January 1, 2018, along with a deduction (that, in effect, lowers the rate of tax owed on such income). But such an inclusion is not necessarily for *income* earned during the taxable year under which the Mandatory Repatriation Tax is imposed.[80] Calling something income does not make it so.

Importantly, there is no requirement under new Section 965 that cash or property be repatriated to a U.S. corporation in order for the U.S. shareholders to be liable for the taxes owed.[81] Further, there is no transfer, no disposition, and no recognition event which must occur to create *income*. This is how this tax can be distinguished from, say, the estate tax, which requires an event (death) which causes a transfer of assets. The tax is treating accumulated wealth as income to the taxpayer in the current year. It matters not if the taxpayer actually transfers the income into the United States.

Further, the Mandatory Repatriation Tax does not take into account whether the taxpayer has the actual ability to, at their election, repatriate foreign earnings. In this light, it is worth considering the mark-to-market

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77. *See* I.R.C. § 531 (West 2018); *id.* § 532. This tax is not applicable to certain corporations, including personal holding companies, certain corporations exempt from tax, and passive foreign investment companies. *Id.* § 532(b).

78. *See Id.* § 531; *id.* § 532.

79. *See Id.* § 965(a).

80. I say "not necessarily" because this argument would not apply to a taxpayer's earnings during the taxable year when the Section 965 tax is imposed. That would be income to the taxpayer and could be subject to taxation under the Sixteenth Amendment.

81. This differentiates it from the old Section 965, which provided an 85% tax break for whatever income a taxpayer repatriated. *See* I.R.C. § 965 (2006).

provisions of Sections 475 and 1256.[82] In the 1993 case *Murphy v. United States*, the Ninth Circuit rejected a constitutional challenge to Section 1256.[83] The Court found that the taxpayer was entitled to withdraw his profits at any time. Relying on the doctrine of constructive receipt, the Court found that a taxpayer who traded futures contracts received profits *as a matter of right* daily, and thus could be taxable on a mark-to-market basis due to "the unique accounting method governing futures contracts."[84]

A taxpayer subject to the Mandatory Repatriation Tax, however, is not necessarily receiving profits as a matter of right daily, or annually. A ten-percent shareholder in a controlled foreign corporation is not in control of that corporation; such a shareholder cannot unilaterally access the profits of the foreign corporation by forcing a dividend.[85] Thus, unlike the taxpayer in *Murphy*, the taxpayer subject to the Mandatory Repatriation Tax has not constructively received the profits of the controlled foreign corporation; the Ninth Circuit's reasoning should not apply.

An additional argument against this position might assert that Section 965 goes no further than does subpart F, which taxes U.S. shareholders on certain earnings of controlled foreign corporations in the United States immediately—in the year that the income was earned—despite the fact that the income may not be brought into the United States. The rationale behind subpart F, and its requirement that U.S. shareholders immediately include certain forms of passive income as U.S. gross income, is that certain U.S. persons with some substantial degree of control over a foreign entity (a controlled foreign corporation must have at least 50 percent of its shareholders be 10 percent U.S. shareholders)[86] should be required to include easily moveable passive income as their own income.[87]

As discussed above, a taxpayer may have a subpart F inclusion where a taxpayer invests accumulated earnings in U.S. property. The Tax Court found that the act of *investing* in U.S. property was an event that was substantially similar to the payment of a dividend. And the accumulated earnings tax under Sections 531 and 532 imposes a tax on the *current* earnings and profits of a corporation. And further, the accumulated earnings tax is levied at the level of the corporation, not at the level of the shareholder.

With the Mandatory Repatriation Tax, there is no such event that creates a rational basis for Congress to attribute *income* to a taxpayer.[88] And unlike older repatriation holidays, there is no requirement that taxpayers elect to repatriate

82. *See* I.R.C. § 475 (2012); *id.* § 1256.

83. 992 F.2d 929, 931-32 (9th Cir. 1993).

84. *Id.* at 931 (emphasis added).

85. It is worth noting that a controlled foreign corporation is "controlled" insofar as more than 50 percent of the total combined voting power is owned by 10 percent U.S. shareholders.

86. *See* I.R.C. § 954 (West 2018).

87. *See supra* notes 34-41 and accompanying text.

88. *See* Berg & Feingold, *supra* note 64, at 1355-56.

cash or other property. Absent such a clear recognition event (or the constructive receipt of income), there is no income to be taxed, and the constitutional basis for the tax is not established under the Sixteenth Amendment.

All that said, *even if* a court finds that the Mandatory Repatriation Tax is properly characterized as an income tax, there are still potential constitutional challenges to the tax on due process grounds, discussed below in Section II.B.

2. The Mandatory Repatriation Tax is Best Characterized as Direct Tax on Wealth.

If the Sixteenth Amendment does not provide for the constitutionality of an income tax, we must turn to the taxation provisions of Article I. In particular, Section 9, Clause 4 of Article I of the Constitution provides that no "Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[89] It is somewhat unclear what the Constitution and the framers meant when they used the term "direct tax." To Justice Chase, writing in 1796, only capitation taxes and taxes on real property ought to be considered direct taxes. In *Fernandez v. Wiener*,[90] the Court held that a "tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner *merely because he is owner, regardless of his use or disposition of the property*."[91]

Scholars have also weighed in as to what it means for a tax to be properly considered a "direct tax." For instance, Erik Jensen believes a "direct tax" is any tax that cannot be shifted, a definition that should encompass any tax on the economic attributes of persons—including a consumption tax.[92] Joseph Dodge has taken what he calls a "middle of the road position"[93] arguing that apportionment "should be required of taxes on real and personal tangible property only, excluding taxes on intangible property."[94] Dodge further asserts that personal wealth taxes are "unconstitutional at least to the extent that the value of real estate and tangible property is included in the tax base."[95]

There has also been a notable scholarly challenge to the validity of the apportionment requirement itself. Bruce Ackerman argues that, after the Reconstruction Amendments were passed, the apportionment clauses were

89. U.S. CONST. Art. 1, § 9, cl. 4.

90. 326 U.S. 340 (1945).

91. *Id.* at 362 (emphasis added).

92. Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes*," 33 ARIZ. ST. L.J. 1057, 1091-1107 (2001).

93. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution*, 11 U. PA. J. CONST. L. 839, 842 (2009).

94. *Id.* at 932. He further notes that taxes on tangible personal property can easily be structured as excises, and therefore their characterization as direct taxes is inconsequential. *Id.*

95. *Id.* at 933.

effectively repealed, since those clauses have a tainted history due to their invention during the Constitutional Convention as a compromise regarding slavery.[96]

Notwithstanding Ackerman's objection, a scholarly consensus appears to be that the taxation of *some* forms of personal wealth is unconstitutional under the apportionment provisions of Article I.[97] The Mandatory Repatriation Tax is best characterized as a direct tax on wealth because it is levied on the taxpayer not because some recognition event is occurring—like the repatriation of cash into the United States under the old Section 965, the investment in U.S. property under Section 956, or even the death of an individual with respect to the estate tax—but rather is levied solely because the U.S. shareholder is the owner of an asset that, as of an arbitrary date,[98] has accumulated foreign earnings. That is, to apply the Court's framing in *Fernandez v. Weiner*, the tax is being levied upon the owner of stock in a foreign CFC merely because of the fact that owner is the owner.[99]

Of course, the Mandatory Repatriation Tax is not apportioned among the states. This means that, if classified as a direct tax, it should be an unconstitutional exercise of Congress's limited taxing powers.[100] That said, even if the tax is characterized as an income tax, it presents unprecedented due process concerns, as discussed in the next Section.

B. If the Mandatory Repatriation Tax Is an Income Tax, it is Unconstitutionally Retroactive

Even if a court finds that the Mandatory Repatriation Tax is an income tax,[101] it nevertheless should consider constitutional challenges to the tax on due process grounds under the Fifth Amendment. The Supreme Court has considered similar challenges to other, less problematic, tax laws. While courts have often found retroactivity constitutionally permissible, the reasoning that courts have provided suggests that the Mandatory Repatriation Tax raises unprecedented due process concerns.

96. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 28, 58 (1999) ("Given the Reconstructionist Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power.").

97. If Ackerman is correct, his conclusion effectively limits the reach of the apportionment provision so as to render any argument about direct taxation requiring apportionment to be invalid.

98. Specifically, as of two arbitrary dates. *See* I.R.C. § 965(a) (West 2018).

99. 326 U.S. 340 (1945). This conclusion aligns with the conclusion drawn by Berg and Feingold, that the Mandatory Repatriation Tax is a direct Tax under the Constitution. *See* Berg & Feingold, *supra* note 64, at 1352.

100. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012).

101. As discussed in Section III.B, supra, this Article argues that treating the Mandatory Repatriation Tax as an income tax is incorrect.

1. *Carlton* and Retroactive Taxes.

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law."[102] In the tax caselaw that developed under the Fifth Amendment, two distinct bodies of law are relevant to the Mandatory Repatriation Tax: (1) the doctrine concerning the constitutionality of retroactive taxation, and (2) the doctrine concerning the lack of notice.

The last Supreme Court case to consider a due process challenge to a retroactive tax law was *United States v. Carlton* in 1994.[103] In *Carlton*, the Supreme Court considered a provision of the federal estate tax statute that limited the availability of a recently added deduction for certain employee stock-ownership plans.[104] Congress provided that this deduction would apply retroactively, taking effect roughly one year before it was passed.[105] The Court considered "whether the retroactive application of the [amendment to the estate tax law] violates the Due Process Clause of the Fifth Amendment."[106]

The Court concluded that the 1987 amendment's retroactive application met "the requirements of due process."[107] The Court applied rational basis review in evaluating whether the law in issue violated substantive due process.[108] More specifically, the Court applied the same standard that is generally applicable to retroactive economic legislation: a "legitimate legislative purpose furthered by rational means."[109]

First, the Court noted that "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary."[110] The law itself was "adopted as a curative measure," as the Court found that Congress "did not contemplate" that the deduction—without amendment—would have such broad applicability.[111] The Court saw the law as a technical correction, making the law work the way Congress had clearly intended for it to work. This justified Congress's choice to make the amendment retroactive back to the date of the law's original passage.

In addition, the Court concluded that "Congress acted promptly and established only a modest period of retroactivity."[112] In *Carlton*, the period of retroactivity was slightly longer than a year. The Court at least suggests that a

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102. U.S. CONST. amend. v.
103. 512 U.S. 26 (1994).
104. *Id* at 27.
105. *Id.*
106. *Id.*
107. *Id.* at 32.
108. *Id.* at 30-31.
109. *Id.* (quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)).
110. *Id.*
111. *Id.* at 31.
112. *Id.*

much longer period of retroactivity should present greater constitutional concern. Noting all of these factors, the Court nevertheless held that the 1987 amendment's limited retroactive application ultimately met the constitutional requirements of due process.[113]

The Supreme Court has recently had multiple opportunities to reconsider its holding in *Carlton* in the context of a retroactive state tax law, but has so far declined to do so.[114] It is possible that the Supreme Court will expand the notion of what constitutes an acceptable retroactivity when it considers such a case. But no such case has been granted certiorari. Given the unprecedented retroactivity of the Mandatory Repatriation Tax, a court that considered it to be an income tax should still seriously grapple with the Fifth Amendment concerns the law raises.

2. The Mandatory Repatriation Tax has an Unconstitutionally Extended Period of Retroactivity.

In *Carlton* and in related cases, courts have held taxes constitutional where there has been a modest period of retroactivity (in *Carlton*, the period was slightly over a year).[115] In *Carlton*, the curative nature of the law (it merely corrected what seemed a good faith oversight by Congress in the drafting of the bill) made retroactivity back to the main law's date seem sensible.[116] Congress quickly acted, and the error was resolved with new legislation (with retroactive effect).

However, quite unlike the law at issue in *Carlton*, The Mandatory Repatriation Tax has a period of retroactivity back to 1986—over three decades prior to the imposition of the tax. Almost certainly there exist multinationals who will be able to demonstrate that they are being effectively subject to a new income tax on their overseas earnings from over thirty years ago. Unlike the cases considered in *Carlton*, this is not a mere readjustment of an earlier law, or a minor change to an existing regime. Rather, this is the imposition of a new tax with a retroactive effect lasting over three decades.

A counterargument to this point—a position it seems likely the government will take if and when the retroactivity of Section 965 is litigated — is that Section 965 is not a retroactive tax, but merely an acceleration of an already imposed income tax. To put it another way, the government could

113. *Id.* at 32.

114. The cases denied for certiorari were: Sonoco Products Co. v. Mich. Dep't of Treasury, 137 S. Ct. 2157 (2017); Skadden, Arps, Slate, Meager, & Flom LLP v. Mich. Dep't of Treasury, 137 S. Ct. 2157 (2017); Gillette Comm. Operations v. Mich. Dep't of Treasury, 137 S. Ct. 2157 (2017); IBM Corp. v. Mich. Dep't of Treasury, 137 S. Ct. 2180 (2017); Goodyear, et al. v. Mich. Dep't of Treasury, 137 S. Ct. 2157 (2017); DirecTV Grp. Hldgs. v. Mich. Dep't of Treasury, 137 S. Ct. 2158 (2017).

115. *See* United States v. Carlton, 512 U.S. 26, 32 (1994); United States v. Darusmont, 449 U.S. 292, 299-300 (1981).

116. *Carlton*, 512 U.S. at 32.

argue that the realization event occurred when the income was earned, and the deferral of the tax was merely a timing issue. Thus, the government has the right to accelerate the timing—since that income was always to be subject to tax—and has done so through the imposition of Section 965. The tax is merely a lower rate on deferred incomes.

This argument has multiple flaws: its assumption that the earnings of CFCs would eventually have been subject to U.S. tax, and its characterization of all transactions in which a CFC earns income as realization events for U.S. tax purposes. Under the pre-TCJA U.S. tax regime, CFC income that was not subpart F income was generally not subject to U.S. tax as long as it was not repatriated.[117] In general, U.S. multinationals took the position that it would never be repatriated, and by taking that position they were able to avoid accruing the U.S. tax as a deferred liability on their financial statements.[118]

Furthermore, the pre-TCJA system of international tax did not impose a tax on foreign income that fell outside the net of the subpart F anti-deferral regime. It imposed a tax on the act of repatriation. The act of bringing the dividend into the United States was the recognition event, except in the case of subpart F income (which Congress and the government asserted was stripped from domestic income), which was immediately recognized as U.S. gross income. This is not a timing issue. Rather, it is the imposing of a new income tax retroactively on income that was not subject to taxation in the past year.

Hence, Congress did not act to correct some technical failure in a tax law. There was no defect—unless the defect is the entire structure of the U.S. international tax regime. Congress is, in effect, attempting to raise the income tax rate on corporations over the past thirty years by retroactively subjecting their international earnings to an additional tax. This is not a mere timing issue, unless the very nature of the pre-TCJA system of international taxation is overlooked.

And considering the Court's balancing of interests in *Carlton*, a court might consider whether the retroactivity of the Mandatory Repatriation Tax is a rational means to further a legitimate legislative purpose. The government could argue that as a matter of fairness, imposing some type of mandatory repatriation tax was necessary to avoid rewarding those who had never repatriated their overseas earnings. But this would ignore the fact that many companies had permanently reinvested overseas income, as reflected on their financial statements.

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117. However, certain types of income, including effectively connected income, fixed, determinable, annual or periodical income from sources within the U.S. that are not effectively connected with a trade or business, and FIRPTA income earned by a CFC, could all be subject to U.S. tax prior to repatriation.

118. ACCOUNTING PRINCIPLES BOARD, APB OPINION NO. 23, ACCOUNTING FOR INCOME TAXES—SPECIAL AREAS (1972). (allowing such treatment of so-called "permanently invested earnings" where "sufficient evidence shows that the subsidiary has invested or will invest the undistributed earnings indefinitely").

Ultimately, the Mandatory Repatriation Tax—if characterized as an income tax—should not stand up to a court's rational basis review due to its retroactive imposition on taxpayers. Congress has violated the substantive due process of U.S. persons by subjecting them to a retroactive income tax in the form of Section 965.

3. The Mandatory Repatriation Tax Might Be Unconstitutional Because Taxpayers Lacked Notice.

Taxpayers could raise an additional procedural argument; they could argue that they lacked notice of the Mandatory Repatriation Tax. That said, when Congress changes the law, taxpayers don't have any inherent right to rely on past provisions.[119]

The Revenue Act of 1924[120] enacted a gift tax in June 1924, retroactive back to all gifts made after January 1, 1924. Two cases, *Blodgett v. Holden*[121] and *Untermyer v. Anderson*,[122] held that the retroactive application of the tax was unconstitutional.[123] Congress had created a totally new tax and imposed it upon taxpayers who had no notice that their gifts could be subject to federal taxation.

In *Carlton*, the Supreme Court distinguished *Blodgett* and *Untermyer*. First, the Court noted that *Blodgett* and *Untermyer* "were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'"[124] That caveat aside, the Court continued to discuss the merits of the case. The Court believed that *Blodgett* and *Untermyer* "do not control" when considering the retroactivity of a 1987 amendment to the 1986 tax law.[125] The gift tax cases had involved the creation of a "wholly new tax," not an amendment to an existing tax law—as was the case in *Carlton*.[126]

These cases suggest a limited possibility that a taxpayer may have its due process rights violated because it lacked notice of a wholly new tax.[127] However, in 1937—roughly a decade after *Blodgett* and *Untermyer*—the

119. Notice arguments are difficult in the tax context—and none have been successful at the Supreme Court since the 1920s. *See* Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927).

120. Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253.

121. 275 U.S. 142 (1928).

122. 276 U.S. 440 (1928).

123. *See Blodgett*, 275 U.S. at 147; *Untermyer*, 276 U.S. at 445-46.

124. *Carlton*, 512 U.S. at 34 (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

125. *Id.*

126. *Id.* (noting that the gift tax cases' authority is "of limited value in assessing the constitutionality of subsequent amendments that bring about certain changes in operation of the tax laws" (quoting United States v. Hemme, 476 U.S. 558, 568 (1986)).

127. *See* ERIKA LUNDER ET AL., CONG. RESEARCH SERV., R42791, CONSTITUTIONALITY OF RETROACTIVE TAX LEGISLATION 4 (2012).

Supreme Court held in *United States v. Hudson*[128] that a totally new tax—a tax on silver passed as part of the Silver Purchase Act of 1934—was constitutional even though it was retroactive.[129] The Court did not explicitly discuss *notice* as mandated by the Fifth Amendment, but the Court noted that "[f]or some months prior to this period there was strong pressure for legislation requiring increased acquisition and use of silver by the Government, and several bills providing therefor were presented in the Senate and House of Representatives."[130]

With respect to the Mandatory Repatriation Tax, it is at least possible that a court might consider and apply the reasoning in *Blodgett* and consider that it is wholly unreasonable for a taxpayer to expect that her ten percent stake in a foreign corporation would subject her to a tax on that corporation's accumulated earnings all the way back to 1986, regardless of whether the corporation had repatriated cash.[131]

To put it bluntly, the Mandatory Repatriation Tax is not an adjustment to a bill, a change in rate, or technical correction of the law. This is a dramatic altering of the U.S. system of international tax that fundamentally shifts the economics for individuals who hold investments in a foreign corporation in 2017. It is certainly reasonable for a taxpayer to plausibly argue that they should have had notice that their investments could be subject to further taxation.

Conclusion

This Essay has sketched out some arguments that could underlie a constitutional challenge to Section 965. Such a challenge will present the courts with a fundamental question that will forever define Congress's power to tax, what Alexander Hamilton called one of the most fundamental powers interwoven into the framework of the federal government.[132] Holding Section 965 constitutional would render the constitutional language on direct taxation all but meaningless. And a tax on, say, the earnings of an individual twenty years prior—payable in the year the bill passed—would appear constitutionally permissible if Section 965 is held to be a constitutional income tax.

These outcomes might seem extreme, but they highlight the importance of courts considering constitutional limitations carefully. Even amid the field of "invisible boomerangs"[133] that is the federal tax code, Section 965 (whether a retroactive tax or a wealth tax) is inapposite to the defined constitutional powers granted to Congress. The Framers—including Hamilton himself—

128. 299 U.S. 498 (1937).
129. *Id.* at 501.
130. *Id.*
131. Blodgett v. Holden, 275 U.S. 142, 147 (1927).
132. THE FEDERALIST NO. 30 (Alexander Hamilton).
133. Arrowsmith v. Comm'r, 344 U.S. 6, 12 (1952) (Jackson, J. concurring).

clearly intended some limitation on the federal government's power to tax. Courts should not be afraid to consider these constitutional questions, and to enforce the limitations on the taxing power imposed by the text of the Constitution.