test for determining whether taxable income had been received by these stockholders.[24] The Court viewed the shareholders as essentially exchanging a stock in the old corporation for stock in the new corporation. By contrast, the Court held that no taxable income resulted from the mere receipt by a stockholder of rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to be in excess of the issuing price. The right to subscribe was declared to be analogous to a stock dividend, and "only so much of the proceeds obtained upon the sale of such rights as represents a realized profit over cost" to the stockholders was deemed to be taxable income.[25] Similarly, on grounds of consistency with *Eisner v. Macomber*, the Court has ruled that a dividend in common stock paid to holders of preferred stock,[26] and a dividend in preferred stock paid to holders of common stock,[27] because they gave the stockholders an interest different from that represented by their prior holdings, constituted income taxable under the Sixteenth Amendment.

Corporate Earnings: When Taxable.—On at least two occasions the Court has rejected as untenable the contention that a tax on undistributed corporate profits is essentially a penalty rather than a tax or that it is a direct tax on capital and hence is not exempt from the requirement of apportionment. Because the exaction was permissible as a tax, its validity was held not to be impaired by its penal objective, which was "to force corporations to distribute earnings in order to create a basis for taxation against the stockholders." As to the added contention that, because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders, the tax was a direct tax on a state of mind, the Court replied that while "the existence of the defined purpose was a con-

[24] United States v. Phellis, 257 U.S. 156 (1921); Rockefeller v. United States, 257 U.S. 176 (1921). *See also* Cullinan v. Walker, 262 U.S. 134 (1923). In Marr v. United States, 268 U.S. 536 (1925), the Court held that the increased market value of stock issued by a new corporation in exchange for stock of an older corporation, the assets of which it was organized to absorb, was subject to taxation as income to the holder, notwithstanding that the income represented profits of the older corporation and that the capital remained invested in the same general enterprise. The Court likened Weiss v. Stearn, 265 U.S. 242 (1924), to Eisner v. Macomber, and distinguished it from the aforementioned cases on the ground of preservation of corporate identity. Although the "new corporation had . . . been organized to take over the assets and business of the old . . . [,] the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued. By reason of these facts, the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same . . . ." *Marr*, 268 U.S. at 541.

[25] Miles v. Safe Deposit Co., 259 U.S. 247 (1922).

[26] Koshland v. Helvering, 298 U.S. 441 (1936).

[27] Helvering v. Gowran, 302 U.S. 238 (1937).