



# Policy Paper

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## Is a Wealth Tax Constitutional?

Recent reports indicate that the Biden administration is [seriously considering a new and specific wealth tax](#) or mark-to-market tax as a component of the proposed budget reconciliation bill. Since Senator Elizabeth Warren (D-MA) made such a tax proposal a key plank of her presidential campaign platform, the idea has increasingly become part of serious discussions.

Though France canceled its wealth tax in 2018 after facing brain drain, capital flight, and revenue losses, and all but three European nations have repealed theirs after concluding it was a policy failure, the idea remains a priority for the American left. At various points, elected Democrats have put forward legislative proposals to eliminate the step-up in basis at death that heirs receive when they inherit assets, [an annual two or three percent wealth tax](#), and a [one-time wealth tax up to five percent](#).

But while NTUF has documented the [many administrative and economic issues](#) with a wealth tax in the past, perhaps the most important issue to resolve with such a tax is whether it is even constitutional. Understanding the shaky legal foundation on which a wealth tax stands, [Warren commissioned letters](#) back in March from 14 law professors who endorsed its constitutionality. Are they right?

### Key Facts:



**A wealth tax is an unapportioned direct tax - and unapportioned direct taxes are unconstitutional**



**The unconstitutionality of unapportioned direct taxes is held in a long line of Supreme Court cases, most notably 1895's *Pollock v. Farmers' Loan & Trust Co.***



**The federal income tax is an unapportioned direct tax, but is legal because the 16th Amendment modified the constitution to allow the federal income tax. A wealth tax would require a constitutional amendment, not merely a law.**

## The Constitution is Clear: Unapportioned Direct Taxes Are Unconstitutional

A wealth tax would be an unapportioned direct tax and therefore unconstitutional. The U.S. Constitution allows the Congress to “lay and collect Taxes, Duties, Imposts and Excises” with two explicit conditions relevant here. First, all duties, impost, and excises “shall be uniform throughout the United States.” Second, “Capitation, or other direct, Tax[es] shall be...in Proportion to the Census.” In short, all federal taxes must be geographically uniform but direct taxes must be apportioned.

Apportioned means that a tax is levied in proportion to each state’s population. If California constitutes 12 percent of the U.S. population, then Californians pay 12 percent of an apportioned tax. If Mississippi constitutes one percent of the U.S. population, then Mississippians pay one percent of an apportioned tax.

The early Congress imposed apportioned direct taxes in 1798, 1813, 1815, 1816, and 1861. For example, the 1813 tax (to fund the War of 1812) apportioned a total tax of \$3 million on every state and county, levied on the values of lands, houses, and slaves. States could assume responsibility for providing their quota of funds to Congress and avoid federal collection from their citizens, as seven of the eighteen states did.<sup>1</sup>

As for direct taxes, the Constitution states that a capitation, or head tax (a tax of a stated amount on each person) is a direct tax; the document originally required apportionment only for capitation taxes before delegate George Read successfully moved to add “or other direct tax” to the document.<sup>2</sup> Constitutional Convention delegate Rufus King asked for a precise definition and Madison wrote in his notes that “[n]o one answered,” but the Founders perhaps put it in “you know it when you see it” territory.<sup>3</sup> Madison and others observed that land and property taxes were direct taxes.<sup>4</sup>

In the ratification debates, while the power of the new central government to collect its own taxes was hotly debated, the definitions were somewhat circular: indirect taxes were the tax power conceded to Congress while direct taxes were the dangerous tax power that had to be restrained. Alexander Hamilton championed federal taxation power but reassured skeptics that “[t]he proportion of these taxes is not to be left to the discretion of the national Legislature but is to be determined by the numbers of each State as described in the second section of the first article.”<sup>5</sup> Elsewhere, Hamilton remarked that taxation of land and buildings were direct taxes but did not attempt to define the phrase further.<sup>6</sup>

The early Supreme Court in *Hylton v. United States (1796)* upheld Congress’s view that a tax on the carriages for the conveyance of persons (an early excise tax on consumption transactions) was an indirect tax.<sup>7</sup> There is the sense that direct taxes are those that Congress could extract from the

<sup>1</sup> The 1813 law, approved on August 2, 1813, provided a discount for states that assumed their quotas of 15 percent if paid before February 10, 1814, and 10 percent if paid before May 1, 1814. See Dunbar, Charles F. “The Direct Tax of 1861,” 3 *Quarterly Journal of Economics* 436-461, Jul. 1889, <https://www.jstor.org/stable/pdf/1879642.pdf>.

<sup>2</sup> See, e.g., U.S. Const. art. I, § 9, cl. 4 (“Capitation, or other direct, Tax”).

<sup>3</sup> New York delegate Gouverneur Morris had moved the addition of the language “taxation shall be in proportion to representation,” which was amended to add the word “direct” and to take the current form. The term “direct taxation” was later modified slightly to “direct taxes.” A motion to strike the phrase entirely was defeated shortly before the Convention adjourned.

<sup>4</sup> Debates in the Virginia Ratification Convention (Jun. 11, 1788), in *The Papers of James Madison*, vol. 11, <https://founders.archives.gov/documents/Madison/01-11-02-0074>.

<sup>5</sup> The *Federalist* No. 36 (1788).

<sup>6</sup> The *Federalist* No. 21 (1788).

<sup>7</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (seriatim). Interestingly, Madison voted against the tax as a member of the U.S. House, arguing it was unconstitutional. Each justice wrote separate opinions in *Hylton* because it was before the Supreme Court adopted the practice of issuing one majority opinion.

person paying it, while indirect taxes were taxes where an intermediary was required and the tax shiftable to others.<sup>8</sup> Subsequent cases reference *Hylton* for the proposition that capitation and land taxes are direct taxes, and excise taxes are indirect taxes. As the Court later explained: “[W]hether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise.”<sup>9</sup> Alexander Hamilton’s brief in *Hylton v. United States* (he argued the case for the government in a three-hour address, characteristically arguing for extensive federal power) states: “The following are presumed to be the only direct taxes. Capitation or poll taxes. Taxes on land and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes.”<sup>10</sup>

One justice approvingly cited Adam Smith’s *The Wealth of Nations*, where Smith wrote that due to it being difficult “to tax directly and proportionably the revenue of its subjects,” governments choose “to tax it indirectly, by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue . . . . Consumable commodities...may be taxed in two different ways; the consumer may either pay an annual sum on account of him using or consuming goods of a certain kind, or the goods may be taxed while they remain at the hands of the dealer.”<sup>11</sup> Constitutional scholar Thomas Cooley, writing in 1876, observed that direct taxes are “those which are assessed upon the property, person, business, income, etc. of those who are to pay them; and Indirect [are] those which are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity.”<sup>12</sup>

The 1895 case of *Pollock v. Farmers’ Loan & Trust Co.* — never overruled and still cited today — directly held that an income tax is a direct tax.<sup>13</sup> Congress in 1894 had enacted a 2 percent federal income tax on income over \$4,000 (about \$120,000 today), in a hard-fought political compromise that also sharply reduced tariffs.<sup>14</sup> Charles Pollock, a stockholder in the Farmers’ Loan & Trust,

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<sup>8</sup> *Id.* at 174 (Chase, J., seriatim) (“It seems to me, that a tax on expence is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expence of the owner.”); *Id.* at 180 (Paterson, J., seriatim) (“Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself.”). See also *Annals of Congress, House of Representatives, 3rd Congress, 1st Session at 729-30 (May 1794) (statement of Rep. Fisher Ames) (“The [carriage] duty falls not on the possession, but the use....”); id. at 646 (statement of Rep. Samuel Dexter) (“[A]ll taxes are direct which are paid by the citizen without being recompensed by the consumer”); Hamilton, The Federalist No. 35 (1788) (“The maxim that the consumer is the payer is so much oftener true than the reverse of the proposition”).*

<sup>9</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 574 (1895).

<sup>10</sup> Brief for the United States, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). Hamilton’s brief also ridiculed the notion of economic incidence for producing a result that carriages used by the owner would be direct taxes while carriages hired out would be indirect taxes, although that position contradicts his other arguments and his own pre-ratification writings in the *Federalist Papers*. The *Hylton* case was somewhat contrived -- Hylton had “confessed” to owning 125 carriages for his personal use, with none hired out, to meet the \$2,000 minimum damages for a federal court case (125 carriages multiplied by the \$16 tax). See, e.g., Erik M. Jensen, “The Apportionment of ‘Direct Taxes’: Are Consumption Taxes Constitutional?,” 97 *Columbia Law Rev.* 8 (Dec. 1997).

<sup>11</sup> *Hylton*, 3 U.S. at 8 (Iredell, J., seriatim), citing Adam Smith, “The Wealth of Nations” (1776), vol. 3, p. 331.

<sup>12</sup> Cooley, Thomas M., “A Treatise on the Law of Taxation” (1876) at 5.

<sup>13</sup> *Id.* & *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895). See, e.g., *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) (“In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes.”).

<sup>14</sup> This was the first peacetime federal income tax. A previous income tax, 3 percent on income over \$800, was enacted in 1861 during the Civil War and repealed in 1872. The Supreme Court upheld the law in *Springer v. United States*, 102 U.S. 58 (1880), which the *Pollock* majority distinguished as Springer’s particular sources of income (attorney fees and United States bonds) could be constitutionally taxed through indirect means such as an excise tax or transactions tax. See *Pollock*, 157 U.S. at 578-79. Interestingly, in 1871 the Commissioner of Internal Revenue testified in favor of the income tax’s repeal: “I regard the tax as the one of all others most obnoxious to the genius of our people, being inquisitorial in its nature, and dragging into public view an exposition of the most private pecuniary affairs of the citizen. Such an unwilling exposition can only be compulsorily effected through a maintenance of the most expensive machinery; and both the nature of the tax and the means necessarily employed for its enforcement appear to be regarded by the

sued the company to stop it from providing the government with tax information. The U.S. Supreme Court, in an opinion by Chief Justice Melville Fuller, invalidated the taxation of dividends, interest, and income derived from real estate in a 5-4 vote on the grounds that it was an unapportioned direct tax:

Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.

Economists call this concept *incidence*: who pays the tax is not always the same as who bears the economic burden of a tax.<sup>15</sup> A corporate income tax, for example, may be paid by a corporate treasurer but the actual dollars of the tax are drawn (in some proportion) from shareholders in the form of profits lower than they otherwise would be, workers in the form of wages lower than they otherwise would be, or consumers in the form of prices higher than they otherwise would be.

That the concept of incidence is what the Founders were searching for comports with their remarks about taxation needing to go with representation: taxes where legal and economic incidence are the same (property taxes, income taxes) tend to be ones Americans perceive as personally paying; taxes where legal and economic incidence differ (business taxes, tariffs and custom duties, some excise taxes) tend to be taxes people perceive as “others” paying or consumption-related transactions.<sup>16</sup>

The *Pollock* decision invalidated the 1894 income tax as an unconstitutional unapportioned direct tax. After noting that taxes on real estate and property were uncontestedly direct taxes, the Court wrote that “[a]n annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.”<sup>17</sup>[10] Justice Stephen Field, who joined the Court’s decision but explained his reasoning further in a separate opinion, explained that “[d]irect taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement.”<sup>18</sup>

## **Adoption of the Sixteenth Amendment: Unapportioned Direct Taxes, Except Income Taxes, are Unconstitutional**

The Court’s *Pollock* decision came as a surprise, and was unpopular with some not because of its reasoning but because of the effect: absent a constitutional amendment, Congress could not impose a progressive income tax, or at least not the one they wanted to impose without regard to

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better class of citizens with more and more disfavor from year to year.” U.S. House Committee on Ways and Means, Jan. 20, 1871 (Testimony of A. Pleasanton, Commissioner of Internal Revenue), <https://files.taxfoundation.org/legacy/User-Files/Image/Blog/irs%20commissioner%20letter%20on%20income%20tax%201871.pdf>.

<sup>15</sup> In *Knowlton v. Moore*, 178 U.S. 41, 82 (1900), a 7-1 decision, nearly all of the same justices who decided *Pollock* confronted an argument that *Pollock* stood for the proposition that a direct tax is one that “could not be shifted from the person upon whom they first fall.” The Court wrote that what matters is the “practical matter pertaining to the actual operation of the tax,” explaining that *Pollock*, “adverted to” “this disputable theory,” but rested its decision on the conclusion that “no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property” and “the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived.” *Id.*

<sup>16</sup> In *Veazie Bank v. Fenno* (1869), Chief Justice Samuel Chase also observed that those taxes identified by the Founders as direct taxes (capitation, land and improvements, valuation and assessment of personal property) were the taxes that states at the time depended upon. See *Veazie Bank v. Fenno*, 75 U.S. 533, 544 (1869).

<sup>17</sup> *Pollock*, 157 U.S. at 581.

<sup>18</sup> *Id.* at 588 (Field, J., concurring).



each state's population. An apportioned income tax would result in lower rates in high-income states and higher rates in lower-income states, which would defeat the redistributive goal of income tax proponents. Justice Edward White, at the time the most junior justice but a future Chief Justice himself, dissented, disparaging "the views of economists" as irrelevant and urged the Court to defer to Congress on its powers of taxation.<sup>19</sup> The Court [reissued its opinions](#) a month later adding that taxation of income from bonds and stocks was unconstitutional as well; the identical 5-4 result included Justice Henry Brown's dissent rejecting the notion that "the definitions of a direct tax given by the courts and writers upon political economy" should be binding on Congress and popular will, and accusing the majority of "surrender[ing] the taxing power to the moneyed class."<sup>20</sup>

Populists and Progressives wanted the federal tax burden to be on that "moneyed class" rather than consumption, and were galvanized to champion new federal taxes to achieve that result. This led to a federal inheritance tax (1898, and upheld as an indirect tax on the transfer of wealth in [Knowlton v. Moore](#), 1900), corporate income tax (1909, and upheld as an indirect tax on the privilege of doing business in the corporate form in [Flint v. Stone Tracy Co.](#), 1911), and ultimately, a new federal income tax (1913) authorized by the Sixteenth Amendment.<sup>21</sup> That amendment did not repeal the requirement that direct taxes be apportioned, but instead exempted income taxes from the requirement:

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.

As such, the Sixteenth Amendment concedes that income taxes are direct taxes, consistent with the *Pollock* decision, instead removing the barrier of apportionment. The new tax was broadly upheld against uniformity, apportionment, and Fifth Amendment challenges in [Brushaber v. Union Pacific Co.](#) (1916), although four years later the Court struck down an attempt to tax unrealized capital gains as beyond the power to tax income, in [Eisner v. Macomber](#) (1920) ("Enrichment through increase in value of capital investment is not income in any proper meaning of the term.").<sup>22</sup> In 1955, the Court summarized that taxable "gross income" encompasses "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."<sup>23</sup>

## **A Wealth Tax Would Be an Unapportioned Direct Non-Income Tax, and Consequently Unconstitutional**

A wealth tax, as proposed by Senator Warren and others, would be a tax not on accessions to wealth but wealth itself, and not at the time of realization but before it. Most court decisions and observers over the past two centuries have conceded that a tax on land and property would be a direct tax, and a wealth tax would encompass the unrealized gain in the value of land and property, such as homes, farms, and personal assets. Taxing wealth is not taxing income, as evidenced by the establishment of a separate tax regime that more resembles property tax assessment mechanisms, the lack of realization events, and that the legal and economic incidence of a wealth tax falls on the same person.

[S. 510](#), the Ultra-Millionaire Tax Act of 2021, encompasses Warren's wealth tax concept. Key provisions of the bill include:

<sup>19</sup> *Id.* at 618 (White, J., dissenting).

<sup>20</sup> *Paollock II*, 158 U.S. at 686, 695 (Brown, J., dissenting).

<sup>21</sup> *Knowlton v. Moore*, 178 U.S. 41 (1900); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). In 1913, the top federal income tax top rate was 7 percent on income over \$500,000, which is equivalent to approximately \$14 million today. The bottom 1 percent was imposed on taxable income over \$3,000, equivalent to \$83,000 today. The form and instructions that year were only 4 pages.

<sup>22</sup> *Brushaber v. Union Pacific Co.*, 240 U.S. 1 (1916); *Eisner v. Macomber*, 252 U.S. 189 (1920).

<sup>23</sup> *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

- Imposes a two percent annual tax on the net worth of households and trusts with more than \$50 million in value, with a further three percent rate on households and trusts with more than \$1 billion in value.
- Raises the rate to six percent if universal health care is enacted.
- Exempts the first \$50,000 in household personal property.
- Instructs the Treasury Department to develop valuation rules, “including formulaic approaches based on proxies for determining presumptive valuations, formulaic approaches based on prospective adjustments from purchase prices or other prior events, or formulaic approaches based on retrospectively adding deferral charges based on eventual sale prices or other specified later events indicative of valuation.”
- Levies the tax in proportion to the number of days into the year for people who die during the year.
- Directs the Treasury Department to require information reporting from taxpayers necessary to make valuations and collect the tax.
- Requires at least 30 percent of taxpayers be audited annually.
- Increase IRS funding by \$100 billion a year.
- Requires payment of a 40 percent “exit tax” on wealth above \$50 million by any American who permanently leaves the United States.

Warren and her House co-sponsors, Rep. Pramila Jayapal (D-WA) and Rep. Brendan Boyle (D-PA), estimate the tax would raise \$3 trillion over 10 years and apply to just 0.05 percent of American households.<sup>24</sup>

If one concedes that an unapportioned direct tax would be unconstitutional as the precedents suggest, and assuming that a tax on land and real estate would be a direct tax as every court that has ruled on the topic has acknowledged, the analysis comes down to two questions.

First, does Warren’s wealth tax apply to land and property? If it does, it is unquestionably a direct tax under current precedents and would be unconstitutional if unapportioned. While Warren’s proposal does not specify land or real estate as part of “wealth,” it does specify that “personal property” is included (since the first \$50,000 of personal property is exempted) and broadly taxes all “net assets” unless exempted. It is written broadly, and without any exemption for land or real property one must assume these are intended to be included.

Indeed, it would be hard to conceive of a tax on wealth without it applying to land and real estate owned by the taxpayer — both because those items represent a large share of most people’s wealth and because exempting such items would create a large loophole in the tax. Since every case opining on direct taxes has conceded that a tax on land or real estate would be a direct tax, that would apply to Warren’s proposal as well.

Second, would Warren’s wealth tax, or a wealth tax generally, be imposed in a way that resembles forbidden unapportioned taxes on capitation, land, or real estate? Wealth taxes clearly resemble those objects considered to be directly taxed more than those considered to be indirectly taxed. As observed above, a common feature of these subjects of taxation is the equivalence of legal and

<sup>24</sup> Saez, Emanuel & Zucman, Gabriel. Letter to: Sen. Elizabeth Warren. Feb. 24, 2021. <https://www.warren.senate.gov/imo/media/doc/Wealth%20Tax%20Revenue%20Estimates%20by%20Saez%20and%20Zucman%20-%20Feb%2024%202021.pdf>. The Senate version has been co-sponsored by Sens. Kirsten Gillibrand (D-NY), Mazie Hirono (D-HI), Ed Markey (D-MA), Jeff Merkley (D-OR), Bernie Sanders (I-VT), Brian Schatz (D-HI), and Sheldon Whitehouse (D-RI).

economic incidence: the taxpayer must pay it directly themselves and cannot pass the tax burden on via another transaction.

This is distinct from taxes on businesses or retail transactions, which may be collected by the taxpayer but the economic burden is ultimately borne by others, or from a transactions tax or a customs duty, where a taxpayer can adjust his or her tax burden by adjusting his or her activity. Is it a tax on a person for being who they are or what they own, or is it a tax on activity or that can be passed on to others by the one collecting it? Wealth taxes are on what people own and, as Warren and other proponents intend, are not meant to be passed on to others.

Under current precedents, Warren’s proposal (and essentially any proposal for a wealth tax) would be an unapportioned direct tax, and therefore unconstitutional. Imposing mark-to-market valuation on unrealized gains and subjecting them to immediate tax would face similar constitutional challenges, to the extent the tax is unapportioned and the mark-to-market valuation is mandatory.

## **Letters Produced by Warren Are At Odds with the Historical Record and Court Precedents**

Earlier this year, Warren produced two letters by constitutional law experts attesting to the tax’s constitutionality.

The first letter, signed by nine law professors, argues that the “the Court could rule that a tax on an individual’s total net wealth is qualitatively and constitutionally different from a tax on land alone, or that a tax on large wealth holdings is a tax on the activity of accumulating and maintaining concentrated wealth.”<sup>25</sup> In other words, their analysis was not a review of the law and relevant precedents to reach a conclusion as a judge might do, but starting from a desired outcome and suggesting the most plausible argument, as an advocate would do.

The signers did not explain what a court might rule or should rule, but rather what a future government’s best argument might be. Twice they say the Framers did not intend the apportionment power to be “a major impediment” or “a major barrier” to Congress’s taxing power, which is demonstrably false:

- North Carolina’s delegates reassured their Governor in a letter dated September 18, 1787 that while “the chief thing we had to fear from such a [central] Government was the Risque of unequal or heavy Taxation..., the Southern States in general and North Carolina in particular are well secured by the proposed system,” in the next sentence referencing the apportionment requirement.
- Maryland delegate James McHenry to his state’s House of Delegates on November 29, 1787: “Convention have also provided against any direct or Capitation Tax but according to an equal proportion among the respective States: This was thought a necessary precaution though it was thought of everyone that government would seldom have recourse to direct Taxation...”
- Alexander Hamilton in Federalist No. 36: “Let it be recollected, that the proportion of these taxes is not to be left to the discretion of the national Legislature: but is to

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<sup>25</sup> Glogower, Ari, et al. Letter to: Sen. Elizabeth Warren. Feb. 25, 2021, <https://taxprof.typepad.com/files/wealth-tax-constitutionality-letter--glogower-et-al.pdf>. One of the signers, Professor David Gamage, co-wrote a 2020 article explaining that a wealth tax could be made constitutional by levying the tax with apportionment but then the federal government using its spending power to refund collections to certain states to produce the desired redistributive effects. See Brooks, John R. & Gamage, David. “Why a Wealth Tax is Definitely Constitutional,” Jan. 9, 2020, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3245&context=facpub>. Obviously such a mechanism would be unnecessary if a wealth tax by itself was constitutional.

be determined by the numbers of each State as described... The abuse of this power of taxation seems to have been provided against with guarded circumspection.”

- Thomas Davies, arguing in favor of ratification in the Massachusetts ratifying convention on January 18, 1788: “Some gentlemen have said, that Congress may draw their revenue wholly by direct taxes; but they cannot be induced so to do; it is easier for them to have resort to the impost and excise...”
- George Mason, an opponent of strong central government and arguing against ratification in the Virginia convention, warned the provision was not enough of a barrier: “[G]entlemen might think themselves secured by the restriction in the fourth clause, that no capitation or other direct tax should be laid but in proportion to the census before directed to be taken. But that when maturely considered it would be found to be no security whatsoever.”
- Rep. Hugh Williamson in House of Representatives debate, February 3, 1792; Williamson was a North Carolina delegate at the Constitutional Convention: “The clear and obvious intention of the articles mentioned was, that Congress might not have the power of imposing unequal burdens... to impose unequal taxes, or to relieve their constituents at the expense of other people. To prevent the possibility of such a combination, the articles that I have mentioned were inserted into the Constitution.
- Chief Justice John Marshall, in *Loughborough v. Blake*, 5 Wheat. 317 (1820): “If it be said that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes.”
- In *Pollock*, after summarizing the historical record, the Court observed: “It is apparent...[t]hat the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies...”<sup>26</sup>

Whatever the viewpoint about taxes by these left-leaning law professors in 2021, the Founders clearly understood direct taxation by the federal government to be a necessary evil at best, with the apportionment requirement designed to restrain its exercise.

The second letter, authored by five law professors including Professor Laurence H. Tribe, contrasts *Pollock* with *Knowlton v. Moore*, the later (1900) decision that upheld the federal inheritance tax.<sup>27</sup> The letter explains that *Knowlton* upheld a progressive tax on inherited property against a challenge that it violated the Constitution, and [i]t follows that your wealth tax proposal is plainly constitutional.”

The letter does not explain an important fact about the Court’s *Knowlton* decision: while the federal inheritance tax is progressive, the tax was held to be indirect because it is on the *transfer* of property, not on the property itself.<sup>28</sup> The Court observed that an inheritance tax (or as the

<sup>26</sup> *Pollock*, 157 U.S. 574.

<sup>27</sup> Ackerman, Bruce, et al. Letter to: Sen. Elizabeth Warren. Mar. 1, 2021, <https://www.warren.senate.gov/imo/media/doc/Wealth%20Tax%20Constitutionality%20Letter%20-%20Ackerman%20Et%20Al..pdf>. The letter is nearly identical to a 2019 letter to Warren by the same authors. Ackerman, Bruce, et al. Letter to: Sen. Elizabeth Warren. Jan. 24, 2019, <https://www.warren.senate.gov/imo/media/doc/Constitutionality%20Letters.pdf>.

<sup>28</sup> *Knowlton*, 178 U.S. at 55-56 (“Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them,—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from



Court observed, a duty or transaction tax) has “at all times been considered the antithesis of such a tax [direct tax] – that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.”<sup>29</sup> What matters, the *Knowlton* Court wrote, is a tax’s “actual, practical results,” and an inheritance tax “as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect.”<sup>30</sup> Even arch-libertarian Justice David Brewer, while dissenting, wrote that he only disagreed with “so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurs.”<sup>31</sup>

Unlike inheritance taxes, wealth taxes involve no transaction. Warren’s proposal envisions an *annual* tax, much like income and property taxes, on what a person owns. Inheritance taxes are levied only on the instance of inheritance, usually death of another person, and after the legal process to facilitate the transfer of the property in question. As *Knowlton* stands for the proposition that taxes on *transaction* rather than “ownership or possession” are indirect taxes, and because Warren’s proposal is not even attempted to be characterized as an indirect tax, it would not be constitutional under that precedent.<sup>32</sup>

Another article, by Professor Calvin Johnson, argues that “Warren’s wealth tax is constitutional under the standards laid down by the Founders.”<sup>33</sup> His source for that assertion is three quotations from supporters of strong central government:

- The first is by Oliver Ellsworth, a Connecticut delegate to the Constitutional Convention, who warned that a government that could “only command but half its resources is like a man with but one arm to defend himself.” Even if Ellsworth meant these words to support unrestrained federal taxation, it was obviously a minority view among the Founders.
- The second quotation is by Hamilton at his most strident, writing that no constitution can set bounds, either to “resources” or to “imagination.” This observation is either flowery gazing into the future or a claim that no government can be bound by a constitutional limitation, an alarming assertion with troubling implications far beyond the federal taxing power.
- The third is by one John Choate at the Massachusetts ratification convention, who is quoted as saying that the federal government must have “no other than an unlimited power of taxation, if that defence requires it.” Again, even if this was a statement of interpretation rather than desire, the view that the new federal government should have unlimited power of anything was obviously not a consensus view.

Professor Johnson further argues that the *Pollock* decision was wrongly decided, quoting the dissenters, a speech by William Jennings Bryan, and the ratification of the Sixteenth Amendment. Another widely cited article supporting a wealth tax to combat “[e]conomic inequality

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which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.”).

<sup>29</sup> *Knowlton*, 178 U.S. at 81.

<sup>30</sup> *Id.* at 83.

<sup>31</sup> *Id.* at 110 (Brewer, J., dissenting).

<sup>32</sup> *Knowlton* also discusses whether a direct tax could be valid if it was cleverly mislabeled or mischaracterized as a transactions tax. The Court did not choose to reach this question, since it considered an inheritance tax an obvious indirect tax. Other courts, however, have concluded that the label used is less important than the purpose and operation of the tax: 28 states have directly adopted that rule with 19 others issuing decisions that imply its adoption. See generally Henchman, Joseph, “How Is the Money Used? Federal and State Cases Distinguishing Taxes and Fees.” 2013, <https://files.taxfoundation.org/20190103161206/TaxesandFeesBook.pdf>. The reason is obvious: if policymakers could avoid constitutional restrictions on their taxing power by mislabeling taxes, the constitutional restrictions would be meaningless.

<sup>33</sup> Johnson, Calvin H. “A Wealth Tax is Constitutional.” 38 ABA Tax Times 4, Aug. 2019, [https://www.americanbar.org/groups/taxation/publications/abataximes\\_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/](https://www.americanbar.org/groups/taxation/publications/abataximes_home/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/).

[that] threatens America’s constitutional democracy,” concludes that a wealth tax would be constitutional because *Pollock* was wrongly decided.<sup>34</sup>

But, as noted above, the Sixteenth Amendment did not overrule *Pollock*, but rather exempted income taxes from the apportionment requirement, in effect acknowledging *Pollock*’s interpretation of the Constitution to be accurate. *Pollock* remains valid precedent and indeed has been cited favorably by the U.S. Supreme Court as recently as the Affordable Care Act cases. While Johnson, like all constitutional law scholars, may believe that a past decision is incorrect, that he sees *Pollock*’s invalidity as key to a wealth tax’s constitutionality shows that if *Pollock* remains valid, a wealth tax is unconstitutional.

## Conclusion

Whether an idea is good or bad is independent from whether an idea is constitutional or unconstitutional. That latter inquiry can also be divided into whether something would likely be held constitutional or unconstitutional versus whether it *should* be held constitutional or unconstitutional. Much of the analysis of whether a potential wealth tax would be constitutional has been conducted by advocates who want the answer to be “yes” and therefore seek out quotes from the rare Founder who advocated unrestrained central government powers, or argue that because a never-overturned and still valid Supreme Court decision is inconvenient, it has to be wrong.

A dispassionate look at all the evidence, a review of all the precedents, and a straightforward understanding of how wealth taxes operate in practice leads to an inescapable conclusion: it is a direct tax within the meaning of the Constitution, and its enactment without apportionment would be unconstitutional. This obstacle was faced by the first attempts at a federal income tax, and overcome by the Sixteenth Amendment’s exemption of income taxes from this obstacle. The obstacle remains, and absent another amendment or a disservice to the language, intent, and meaning of the Constitution, a federal wealth tax along the lines envisioned by Senator Warren cannot be validly enacted.

## About the Author

*Joe Bishop-Henchman is the Vice President of Policy & Litigation for National Taxpayers Union Foundation, where he runs the organization’s Taxpayer Defense Center.*

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<sup>34</sup> See Johnsen, Dawn & Dellinger, Walter, “The Constitutionality of a National Wealth Tax,” 93 Indiana Law J. 111 (2018), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11279&context=ilj>. Johnson, Dellinger, and several others signed supportive letters for Warren in 2019 but did not in 2021.



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