CON OR CONSTITUTIONAL: AN ANALYSIS OF THE "NET WORTH" WEALTH TAX

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ABSTRACT

This Article is an in-depth analysis of the wealth tax proposals presented by former presidential candidates Bernie Sanders and Elizabeth Warren to determine if their proposals could be considered constitutional. As both plans propose a wealth tax based on "net worth," this Article attempts to determine how a court or the tax code would most likely define this essential term for tax purposes. The proposals are then compared, in the context of United States legal history, to historically constitutional and unconstitutional federal taxes. Although the tax code is free to define any term as it sees fit, a court would most likely find that a "net worth" wealth tax is more comparable to a "property tax," i.e., a direct tax, and is, therefore, unconstitutional as proposed by the former presidential candidates.

I. INTRODUCTION

During the 2020 election season, there were quite a few proposals on how to narrow the gap between the ultra-rich and middle- to lower-class citizens. One such proposal focuses not on changing the tax to income, but on taxing wealth. The "Ultra-Millionaire Tax" proposed by former Democratic presidential candidate Senator Elizabeth Warren is one such plan where she proposes to tax "the wealth of the richest Americans."[1] Former Democratic presidential candidate Senator Bernie Sanders has a similar plan for taxing "extreme wealth," which he has creatively named his "Tax on Extreme Wealth" proposal.[2] The idea of taxing wealth has become a popular one, but would a tax on wealth based on a household's or person's net worth pass constitutional requirements? Perhaps. The constitutionality of a wealth tax would depend on how a court construes the term "net worth." But in general, a wealth tax would probably not be constitutional.

II. THE PROPOSALS

The "Ultra-Millionaire Tax," proposed by former Democratic presidential candidate Elizabeth Warren, is one of the more popular wealth tax proposals. On her website she urges a tax on "the wealth of the richest Americans."[3] The website indicates this would apply "only to households with a net worth of $50 million or more—roughly the wealthiest 75,000 households, or the top 0.1%."[4] Under Warren's plan, these "[h]ouseholds would pay an annual 2% tax on every dollar of net worth above $50 million and a 6% tax on every dollar of net worth above $1 billion."[5]

Former Democratic presidential candidate Bernie Sanders's plan for taxing "extreme wealth" is similar. His plan, titled the "Tax on Extreme Wealth," proposes:

> a 1% tax on net worth above $32 million for a married couple. That means a married couple with $32.5 million would pay a wealth tax of just $5,000. The tax rate would increase to 2 percent on net worth from $50 to $250 million, 3 percent from $250 to $500 million, 4 percent from $500 million to $1 billion, 5 percent from $1 to $2.5 billion, 6 percent from $2.5 to $5 billion, 7 percent from $5 to $10 billion, and 8 percent on wealth over $10 billion. These brackets are halved for singles.[6]

Obviously, both former presidential candidates believe a wealth tax would be constitutional. On Senator Warren's website, she states that "[l]egal experts have submitted two separate letters in support of

1. *Ultra-Millionaire Tax*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/ultra-millionaire-tax (last visited Oct. 15, 2020) (noting that the "plan was originally released during Senator Elizabeth Warren's presidential campaign").

2. *Tax on Extreme Wealth*, BERNIE, https://berniesanders.com/issues/tax-extreme-wealth (last visited Oct. 15, 2020).

3. *Ultra-Millionaire Tax*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Tax on Extreme Wealth*, *supra* note 2.

the constitutionality of this proposal."[7] However, it does not seem that these letters have been published as no trace of them could be found. Senator Sanders, on the other hand, has released an analysis of why he thinks a wealth tax would be constitutional. Senator Sanders states:

> Since 1916, we have taxed the inherited wealth of the richest people in this country through the estate tax. For more than 100 years, we have taxed investment income from capital gains and dividends. In order to reduce extreme inequality, we must also establish a tax on the net worth on the top 0.1 percent.
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> . . . .
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> ". . . [Article I, Section 9, Clause 4 of the Constitution] was part of a compromise with the slave-holding South, and its intention was to prevent the North from imposing a "head tax" on slaves because this could not be apportioned equally among the population of all the states.
>
> "Given its origins, this provision has consistently been construed very narrowly by the Supreme Court, which has found only head taxes and real estate levies to be within its scope[.] Given this history, it is extremely unlikely that the justices will cite the founders' original compromise with slavery to bar a tax that would serve the cause of economic equality and democratic legitimacy. The Roberts court may be conservative, but it is not quite as reactionary as all that."[8]

Senator Sanders is correct in some aspects. An estate tax and an income tax have both been upheld as constitutional taxes.[9] He is also correct that real estate taxes have been construed as direct taxes.[10] However, his analysis is only partially correct.

A "head tax"—also known as a capitation, "per capita tax, or polltax[—]is '[a] fixed tax levied on each person within a jurisdiction,' regardless of income or worth."[11] Historically it did have ties to slavery.[12] But, as will be explained further, a wealth tax is not a head tax and therefore has no historical ties to slavery. A wealth tax is more

7. *Ultra-Millionaire Tax*, *supra* note 1.

8. *Tax on Extreme Wealth*, *supra* note 2 (quoting Bruce Ackerman & Anne Alstott, *Why (and how) to tax the super-rich*, L.A. TIMES (Sept. 20, 2011), https://www.latimes.com/archives/la-xpm-2011-sep-20-la-oe-ackerman-wealth-tax-20110920-story.html.

9. *See* Chase Nat'l Bank v. United States, 278 U.S. 327, 339 (1929) (upholding an estate tax); New York Trust Co. v. Eisner, 256 U.S. 345 (1921) (same); Springer v. United States, 102 U.S. 586 (1881) (upholding a federal income tax); *see also* U.S. CONST. amend. XVI.

10. *See generally* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

11. *Head Tax*, BLACK'S LAW DICTIONARY (9th ed. 2009).

12. Veazie Bank v. Fenno, 75 U.S. 533 (8 Wall.) 543 (1869).

similar to a property tax which "[the Founders] thought . . . dangerous, and . . . wanted to constrain Congress's power to use such taxes in ordinary circumstances."[13] Also further discussed, estate taxes and income taxes are not wealth taxes. The term direct tax has been construed narrowly, as stated by Senator Sanders, but a direct tax encompasses more than simply head taxes and real estate taxes.

III. WHAT IS A WEALTH TAX?

As already stated, the two most popular wealth tax proposals come from former presidential candidates Bernie Sanders and Elizabeth Warren. Both of these plans evaluate a person's or household's net worth and gauge it against a certain threshold. If the net worth is above that threshold, it is taxed at a certain set percentage.[14] A wealth tax, as has been proposed, is a taxation of net worth. Therefore, the characterization of a wealth tax as constitutional or unconstitutional hangs on the definition or interpretation of this essential term. Unfortunately, neither candidate has come forth with a definition for "net worth," nor does the tax code provide a definition for this term. There are, however, definitions from other sources that could be applied to a tax on net worth.

When determining the amount of a wealth tax, the most probable definition of "net worth" probably uses assets and liabilities. The United States Supreme Court defined net worth in a tax case involving the Division of Tax Appeals.[15] In *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*,[16] the Court had to use the plaintiff's net worth to determine a state tax levied on the plaintiff's personal property. Here the Court explained that net worth is found by "subtracting liabilities from the value of assets."[17] The Court seems to imply that the value of the assets used was the fair market value of the assets. However, this is not always the case.

The "net worth method" from tax law is a principle applied by the courts that uses a taxpayer's net worth to find his actual income.[18] This is only used when a taxpayer has been accused of tax evasion to

13. Erik M. Jensen, *Is a Tax on Wealth Constitutional?*, 36 J. TAX'N INV. 79, 3 (2019).

14. *See, e.g.*, *Tax on Extreme Wealth*, *supra* note 2 (providing a graduated tax rate of one percent "on net worth above $32 million for a married couple" up to eight percent "on wealth over $10 billion"); *Ultra-Millionaire Tax*, *supra* note 1 (providing a two percent "annual tax on household net worth between $50 million and $1 billion" and a four percent "annual Billionaire Surtax . . . on household net worth above $1 billion").

15. New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 673-74 (1950).

16. 338 U.S. 665 (1950).

17. *N.J. Realty*, 338 U.S. at 678 n.1 (Black, J., dissenting).

18. Holland v. United States, 348 U.S. 121, 126 (1954).

find discrepancies in his tax return.[19] When applying the net worth method, a court will look at a taxpayer's net worth at the beginning of the taxable year and again at the end of the taxable year to determine if his wealth increased more than was reported on his tax return.[20] In the net worth method, net worth is defined as the cost paid for all the assets minus the individual's liabilities.[21] This is because "the net worth method is a means of reconstructing income, [therefore] assets are generally listed at their cost rather than at their current market value."[22]

For purposes of this analysis, whether the first method, using the fair market value, or the second method, using the purchase price of the asset, is used to find a person's net worth, is not all that important. The generally accepted definition of net worth in law and accounting is the value of the assets, however that value is determined, minus liabilities.[23] Additionally, even though the presidential candidates themselves have not explicitly stated that net worth is found by subtracting liabilities from assets, many of their proponents do define net worth this way.[24] Why does this matter? Because net worth is found by a valuation of assets. Assets are property,[25] and a wealth tax levies a tax on these assets solely because of a household's possession of those assets. If a wealth tax is a tax on the valuation or the mere possession of property, then it stands to reason that a wealth tax is a tax levied on property.

It bears mentioning that if Congress were to pass a statute authorizing a wealth tax, Congress is free to define the term "net worth" however it pleases for tax purposes and it does not need to conform to the commonly understood definition of that term. For example, Merriam-Webster defines the word person as "human, individual—sometimes used in combination especially by those who prefer to avoid *man*

19. *Holland*, 348 U.S. at 126.

20. *Id*. at 125.

21. *See* Camien v. Comm'r, 420 F.2d 283, 285 (8th Cir. 1970) (considering cost, not market value, to determine net worth).

22. *Camien*, 420 F.2d at 285.

23. *See* Akhilesh Ganti, *Net Worth*, INVESTOPEDIA (Mar. 31, 2019), https://www.investopedia.com/terms/n/networth.asp ("Net worth is the value of the assets a person or corporation owns, minus the liabilities they owe."); *Net Worth*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/net%20worth (last visited Oct. 16, 2020) (defining "net worth" as "the excess of the value of assets over liabilities").

24. *See, e.g.*, Greg Leiserson, *Wealth Taxation: An Introduction to Net Worth Taxes and How One Might Work In The United States*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Jan. 23, 2019), https://equitablegrowth.org/wealth-taxation-an-introduction-to-net-worth-taxes-and-how-one-might-work-in-the-u-s (providing an example of an article that uses the terms "net worth" and wealth synonymously to say that a family's wealth is the total value of its assets less its debts).

25. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999).

in compounds applicable to both sexes."[26] But this is not the definition of person found in the Internal Revenue Code ("IRC"). The IRC states that "[t]he term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."[27] Therefore, if Congress were to use a definition of net worth that did not involve the valuation or ownership of assets, i.e., property, it would not be considered a tax on property.

IV. CONSTITUTIONAL COMPLIANCE

Although neither candidate has advocated for non-constitutional compliance, it would be prudent to include why all branches of the United States government would and should be constrained by the U.S. Constitution. The question is an obvious one: *does* the Constitution have the power to constrain the government? If the power to govern is derived from "We the People of the United States,"[28] then should not the power to govern come from those who are currently being governed? If the people want a wealth tax, should not the people simply be able to pass a wealth tax? It is true that the Constitution's framers are long gone, but this does not mean the Constitution should no longer constrain governmental powers. Robert H. Bork, in his book *The Tempting of America*, states:

> The dead, and unrepresentative, men who enacted our Bill of Rights and the . . . amendments did not thereby forbid us, the living, to add new freedoms. We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation, and the nation has done so frequently.[29]

Just because the rules were written by men that are no longer with us or may not have represented the population at large, does not mean the rules do not still apply. By preserving the Constitution as it has been for hundreds of years, the people implicitly ratify it through their inaction. If a provision of the Constitution is no longer applicable, the people have the power to supersede or discard that provision through the amendment process.[30] The U.S. has a long history of this implicit ratification. "We did not adopt the Constitution, and those who did are dead and gone . . . . [I]t is only through a history of continuing assent or acquiescence that the [Constitution] could become

26. *Person*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/person (last visited Oct. 15, 2020).
27. I.R.C. § 7701(a)(1) (2020).
28. U.S. CONST. pmbl.
29. ROBERT H. BORK, THE TEMPTING OF AMERICA 251-52 (1990).
30. U.S. CONST. art. V.

law."[31] Through the history of the U.S. the people have consistently turned to the Constitution as the "supreme law of the land [because it was] ordained and established by the people."[32] As the people continue to implicitly ratify the Constitution as the codification of the people's will, it therefore constrains and will continue to constrain the government.

V. THE CONSTITUTIONAL TAX

Article I, Section 8 of the Constitution gives the federal government the power to collect taxes for the general welfare of the United States.[33] However, this provision only allows "Duties, Imposts, and Excises.[34] Additionally, Section 2 and Section 9 of the same article prohibit direct taxes without being apportioned among the several states.[35] Therefore, without apportionment, a direct tax is not allowed by the Constitution.[36] But what is a direct tax? The most generally understood definition of a direct tax is a "tax paid directly by an individual or organization to the imposing entity."[37] Under this construction, a federal direct tax is a tax paid directly from a taxpayer to the federal government. But this is not the *legal* definition of "direct tax" as interpreted in the Constitution. The United States Supreme Court has held more than once that a direct tax is simply a property tax or an income tax.[38]

Today, the Sixteenth Amendment allows an income tax to be levied by the federal government free from the apportionment requirement despite the fact that it is still considered a direct tax.[39] Apportionment among the states is understood to mean that each state pays the same percentage of the tax due to the federal government as the percentage of the U.S. population that lives inside its state lines.[40]

> [E]nacting a workable direct tax is difficult. That was the founders' intention. They thought direct taxes were dangerous, and they wanted to constrain Congress's power to use

31. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).
32. United States v. Butler, 297 U.S. 1, 53 (1936).
33. U.S. CONST. art. I, § 8, cl. 1.
34. *Id*.
35. U.S. CONST. art. I, § 2, cl. 3; *Id.* § 9, cl. 4.
36. Jensen, *supra* note 13, at 5.
37. Julia Kagan, *Direct Tax*, INVESTOPEDIA (Mar. 27, 2019), https://www.investopedia.com/terms/d/directtax.asp.
38. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
39. U.S. CONST. amend. XVI.
40. Jensen, *supra* note 13, at 3.

> such taxes in ordinary circumstances. As a result, the Constitution requires apportioning a direct tax among the states on the basis of population. The taxpayers in a state having one-tenth of the national population must pay one-tenth of the total collected under a direct tax, a state with one-twentieth of the national population must pay one-twentieth of the total, and so on—regardless of how the tax base is distributed across the country. The apportionment requirement makes imposition of a direct tax often technically—and politically—impossible. That was the point.[41]

Therefore, a federal wealth tax must be a duty or impost, an income tax, or an excise and cannot be a property tax if it is to comply with the requirements of the Constitution.

Unfortunately for those who are campaigning for a federal wealth tax, this type of tax most likely does not fall under any of the constitutionally approved categories for a federal tax and would most likely be characterized as a direct tax on property. As will be discussed in more detail below, a wealth tax would, almost certainly, not be characterized as a duty or impost because it has nothing to do with interstate or international trade.[42] It probably would not be upheld as an income tax because it does not tax the accession to wealth but merely the ownership or valuation of wealth.[43] Nor is it likely that a court would find a federal wealth tax to be an excise, such as an estate or gift tax, because a wealth tax does not tax the use or transfer of property but simply its possession.[44] A federal wealth tax based on the net worth of a person or household is most likely a tax on the ownership of property and is, therefore, a direct property tax.[45]

VI. THE UNCONSTITUTIONAL DIRECT TAX

Over the past 230 years since the Constitution was ratified, the meaning of "direct tax" has undergone some drastic changes. As stated before, the common layman understands a "direct tax" to be a tax levied directly on a person.[46] While this would make sense, this is not the definition that has ever been accepted by the United States Supreme Court. In 1796, just seven years after the Constitution was ratified, the Court found itself interpreting the meaning of the term

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41. *Id*. (emphasis omitted) (citations omitted).

42. *See infra* Section VII(C); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 637-38 (1997).

43. United States v. Burke, 504 U.S. 229, 233 (1992).

44. Chase Nat'l Bank v. United States, 278 U.S. 327, 339 (1929); Bromley v. McCaughn, 280 U.S. 124, 138 (1929); Fernandez v. Wiener, 326 U.S. 340, 352 (1945).

45. *Pollock*, 157 U.S. at 579-81.

46. Kagan, *supra* note 37.

"direct tax" as used in the context of Sections 2 and 9 from Article I of the Constitution.[47]

In *Hylton v. United States*,[48] the Court was asked to determine whether taxes on carriages would be considered a "direct tax," which would require the tax "to be laid according to the census, [as] directed by the constitution . . . ."[49] The *Hylton* Court found that a tax on carriages was an indirect tax. The Court reasoned that "a tax on expence is an indirect tax; and . . . an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumeable commodity; and such annual tax on it, is on the expence of the owner."[50] Because a carriage is a consumable commodity, the Court found that a tax on such a commodity was considered similar to a tax on an expense and was, therefore, an indirect tax. Furthermore, the Court stated that "the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstances; and a tax on LAND."[51] In other words, besides the capitation or poll tax, the Court only considered a tax on land as a direct tax.

The Court did not change this definition until 1895, nearly one hundred years later. In *Pollock v. Farmer's Loan & Trust Company*,[52] the plaintiff brought a suit seeking an injunction and alleging that taxes on rents and incomes of real estate and municipal bonds was an unconstitutional direct tax.[53] The Court found for Pollock stating that "under the state systems of taxation all taxes on real estate or personal property or the rents or income thereof [are] regarded as direct taxes. In support of the Court's finding, Chief Justice Fuller argued in the majority opinion, "that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it," and they understood a direct tax to mean a tax on real estate, personal property, rents, or income from such property.[54]

This definition of a direct tax has not changed much since the *Pollock* holding. A direct tax still means a tax on property or income. However, nearly fifteen years after the *Pollock* Court construed "direct tax" to include taxes on property or income, Congress partially superseded the *Pollock* holding through the Sixteenth Amendment to the

47. Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).
48. 3 U.S. (3 Dall.) 171 (1796).
49. *Hylton*, 3 U.S. at 172-73.
50. *Id*. at 175.
51. *Id*.
52. 157 U.S. 429 (1895).
53. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 555 (1895).
54. *Pollock*, 157 U.S. at 573-74.

Constitution.[55] The Sixteenth Amendment, which was passed in 1909 and ratified in 1913,[56] states that "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."[57] Although an income tax is still considered a direct tax, the Sixteenth Amendment gives Congress the power to bypass the apportionment requirement and collect taxes on incomes from whatever source derived.[58] This is a topic the Court discussed more recently in 2012.[59]

The Court in *National Federation of Independent Business v. Sebelius*,[60] following precedent, stated that now a direct tax is a tax on income and a property tax whether it be real or personal.[61] The court recounted the history stating that:

> In 1880, for example, [the United States Supreme Court] explained that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." In 1895, [the Court] expanded [its] 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 [the Court] continued to consider taxes on personal property to be direct taxes.[62]

The Court noted that between the *Pollock* holding and the Sixteenth Amendment's supersession of that holding, the only direct taxes that require apportionment under the Constitution are taxes on the ownership of land or personal property. Without apportionment, such a tax is still an unconstitutional exercise of the federal taxing power.[63] Therefore, a direct tax is a tax on the ownership of property[64] or a tax based on the valuation of property.[65]

55. *See* U.S. CONST. amend. XVI.

56. Joseph R. Fishkin, et al., *Common Interpretation: The Sixteenth Amendment*, INTERACTIVE CONSTITUTION, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvi/interps/139 (last visited Oct. 22, 2020).

57. U.S. CONST. amend. XVI.

58. *Id.*

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

60. 567 U.S. 519 (2012).

61. *Sebelius*, 567 U.S. at 571.

62. *Id*. (citations omitted).

63. *Id*. at 570.

64. *Id.* at 571.

65. *Pollock*, 157 U.S. at 573.

VII. THE CONSTITUTIONAL INDIRECT TAXES

The United States Supreme Court undeniably established that the definition of a direct tax is a tax on the ownership or valuation of property. However, there are many things that seem to be taxes on the valuation or ownership of property but do not fall under the Court's narrow construction of Article I, Section 9 of the Constitution. The Court has upheld seemingly direct taxes in the past, such as gift taxes and estate taxes, characterizing them as excises and not property taxes.[66] A wealth tax, however, is probably not an excise and can be distinguished from these cases. A wealth tax may also be hard to distinguish from an income tax because *income* is essentially an evaluation of a household's *annual* wealth.[67] But a wealth tax and an income tax are different, as will be discussed. Finally, duties and imposts are simple to distinguish from a wealth tax, but it still bears consideration if nothing else than to cover all the bases, that a wealth tax is not a duty or an impost.

A. Excise Tax

There are two types of excises. The first is technically a tax on property but it is a tax on the specific *use* or *exercise* of ownership over property. The second is tax on a corporation for the *privilege* of doing business in the United States. If a tax is levied on these two circumstances, then it is considered an excise.

1. The Tax on Use

As mentioned before, an excise and a property tax can be hard to distinguish. In actuality an excise is a tax on property but it is not a "property tax" as this is a term of art used in tax law. "Excise" originally meant a levy on tangible property or on the owners based on activity. This was levied on activities such as movement, manufacture, sale in commerce, or sale for consumption.[68] Therefore, the "direct tax" and the "excise" were originally property taxes differentiated by activity. The "direct tax" was levied regardless of its activity or inactivity, and the "excise" was levied because of its activity.

66. Chase Nat'l Bank v. United States, 278 U.S. 327, 339 (1929); New York Trust Co. v. Eisner, 256 U.S. 345, 348-49 (1921); Bromley v. McCaughn, 280 U.S. 124, 138 (1929).

67. United States v. Burke, 504 U.S. 229, 233 (1992).

68. Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) (quoting THOMAS M. COOLEY, CONST. LIM. 680 (7th ed.)) ("Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.'").

From its inception, constitutional interpretation has based the distinction between a direct tax and an "excise" on the *use* of the property. In *Hylton v. United States,*[69] the United States Supreme Court made this distinction when it stated that an annual tax on a carriage would be an indirect tax because a carriage is a consumable commodity and, most importantly, because a carriage is for the conveyance of persons.[70] The Court reasoned that Congress was taxing the actions of the carriages and not the possession or valuation of the carriages.

In 1928, the Court used this distinction between property taxes and excises in regards to the estate tax and applied the same reasoning to the gift tax.[71] In *Chase National Bank v. United States,*[72] the Court was asked to rule on whether a tax on the proceeds from life insurance policies would be considered a property tax on the insurance policies themselves, and therefore an unconstitutional direct tax.[73] The *Chase* Court applied the same reasoning to the policy proceeds as it had eight years earlier to the estate tax. The Court found that the tax on the proceeds of the insurance policies was a tax on the transfer of property, not on the life insurance policies themselves.[74] The Court reasoned that because the policy holder still had control and could direct the policy up to the point of his death, the beneficiary was not entitled to the proceeds until the decedent's death. The proceeds were not transferred until the death of the decedent, therefore, the tax on the proceeds was a tax on transfer of property and not a direct tax on the ownership of the property.[75] The court further stated that:

> [T]he power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that *shifting of the*

69. 3 U.S. (3 Dall.) 171 (1796).

70. Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796).

71. Chase Nat'l Bank v. United States, 278 U.S. 327, 334 (1929); Bromley v. McCaughn, 280 U.S. 124, 136 (1929).

72. 278 U.S. 327 (1929).

73. *Chase Nat'l Bank,* 278 U.S. at 333-34.

74. *Id.* at 338.

75. *Id*. at 334-35. The plaintiff argued that the decedent had not transferred the proceeds to him upon death but that he was a beneficiary of the life insurance proceeds before death and the proceeds were more like a distribution from a trust. *Id*.

> *economic benefits of property which is the real subject of the tax*, just as effectively as would its exercise.[76]

As the tax was applied, the tax was on the redemption of the insurance policies, i.e., the *transfer* of the property, and therefore not a direct tax requiring apportionment.[77]

The Court has used this same reasoning in regards to the gift tax.[78] The Court in *Bromely v. McCaughn*[79] was asked to decide whether a tax on a gift made by the plaintiff was an unconstitutional exercise of Congress's taxing power when the tax was collected without taking into account the apportionment requirement.[80] Again, the Court held that this was not a property tax levied on the ownership or value of the gift and, therefore, it was not a direct tax.[81] The Court found that:

> While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, . . . [the United States Supreme Court] has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned.[82]

Just like an estate tax, where a tax is levied on the value of the property at transfer, a tax on the presentment of a gift is a tax on the activity concerning the property, not on the actual property itself. Although an excise and a direct tax are technically a tax on property, only a direct tax is considered a "property tax," and is, therefore, unconstitutional if levied without the apportionment requirement.

2. *The Corporate Privilege*

One particular type of excise has to do with corporations. In 1910 the United States Supreme Court was asked to rule on a statute passed by Congress which required corporations to pay a one percent tax on income above five thousand dollars.[83] The Sixteenth Amendment, which allows Congress to tax incomes without apportionment, was not ratified until 1913, and as such, Congress did not yet have a

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76. *Id.* at 338 (emphasis added).
77. *Id.* at 334.
78. *Bromley*, 280 U.S. at 139.
79. 280 U.S. 124 (1929).
80. *Id*. at 134-35.
81. *Id*. at 139.
82. *Id*. at 136.
83. Flint v. Stone Tracy Co., 220 U.S. 107, 144 (1911).

blanket authority to tax income.[84] However, the Court upheld this income tax on corporations as an excise.[85]

In *Flint v. Stone Tracy Co.*,[86] the Court stated that "[e]xcises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.'"[87] The Court reasoned that an income tax on corporations is simply an "excise . . . imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[88] Furthermore, the tax on a corporation's income "may be described as an excise upon the particular privilege of doing business in a corporate capacity, i.e., with the advantages which arise from . . . corporate organization."[89] In other words, Congress can levy a tax on corporations for the privilege of doing business in the United States without apportionment because this is an excise and not a direct tax.

3. The Wealth Tax Is Not an Excise

As stated before, an excise is technically a tax on property, but it is not a "property tax." A wealth tax on a household's net worth, however, appears to be a classic example of a "property tax." The current proposals for the wealth tax are based on a percentage of a taxpayer's net worth.[90] A net worth, if the legal or accounting definition is used, is found by valuing a taxpayer's assets and subtracting the liabilities. The wealth tax is calculated by valuing those assets and levying a tax based on the value of those assets merely because the taxpayer possesses them.[91] It does not tax the transfer of the assets, nor does it tax a specific use of the assets which is the basic function of an excise.

Furthermore, a wealth tax as proposed, probably does not fall under the corporate exception for a direct tax. The proposals from both presidential candidates do not tax corporations but households. Bernie Sanders even goes farther describing the consequences for married couples and singles.[92] Additionally, "household" is a term of art unique to tax law that means a home which constitutes the princi-

84. U.S. Const. amend. XVI.
85. *Flint*, 220 U.S. at 177.
86. 220 U.S. 107 (1911).
87. *Flint*, 220 U.S. at 151 (quoting Thomas M. Cooley, Const. Lim. 680 (7th ed.).
88. *Id.* at 151 (quoting Thomas v. United States, 192 U.S. 363 (1904)).
89. *Id*.
90. *Tax on Extreme Wealth*, *supra* note 2; *Ultra-Millionaire Tax*, *supra* note 1.
91. New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 678 n.1 (1950) (Black, J., dissenting); Holland v. United States, 348 U.S. 121, 132 (1954).
92. *Tax on Extreme Wealth*, *supra* note 2.

pal place of abode for the taxpayer during the taxable year.[93] The proposals seem pretty clear that the wealth tax would tax humans and not corporations. The wealth tax would not fall under the corporate exception for an excise because it is not a tax on a corporation for the privilege of doing business in the United States. Therefore, a wealth tax based on a human's net worth is most likely a "property tax," not an excise on activity or the privilege of doing business in the United States.

B. Income Tax

Like distinguishing a wealth tax from an excise, distinguishing a wealth tax from an income tax can also be difficult. As mentioned above, an income tax is essentially a measurement of wealth. However, the distinguishment comes by the means used to measure the wealth. As explained previously, the current proposals would implement a wealth tax based on a taxpayer's net worth.[94] In contrast, an income tax technically levies a wealth tax on a taxpayer based on income.[95]

In *Pollock v. Farmers' Loan & Trust Co.*,[96] the United States Supreme Court ruled that a tax levied on the income from rents and other property is a direct tax that requires apportionment between the states.[97] However, in 1909, Congress passed the Sixteenth Amendment to the Constitution and the amendment was ratified later in 1913. The Sixteenth Amendment gives Congress, i.e., the federal government, the power to "collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[98] In other words, the Sixteenth Amendment superseded the *Pollock* decision by allowing Congress to bypass the apportionment requirement and collect taxes on incomes regardless of whether the income was from rents on or other income from personal or real property. Therefore, even though this type of tax is still considered a direct tax, it is now constitutional for Congress to collect taxes on incomes.[99]

Like many legal terms, "income" is a term of art with a specific meaning unique to tax law. An income tax begins with a taxpayer's

93. *See* I.R.C. § 2(a)(1)(B) (2020) (defining "surviving spouse" as a taxpayer "who maintains as his home a household which constitutes for the taxable year the principal place of abode . . . of a dependent").
94. *Ultra-Millionaire Tax*, *supra* note 1; *Tax on Extreme Wealth*, *supra* note 2.
95. I.R.C. § 1 (2020).
96. 157 U.S. 429 (1895).
97. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 580 (1895).
98. U.S. Const. amend. XVI.
99. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012).

"gross income," which is defined in the Internal Revenue Code ("IRC") as "income from whatever source derived . . . ."[100] Unfortunately, this is not a very helpful definition, but the Court in 1992 expounded on the IRC definition stating:

> The definition of gross income . . . sweeps broadly. [It] provides that "gross income means all income from whatever source derived," subject only to the exclusions specifically enumerated elsewhere in the Code. . . . Congress intended through [the IRC] . . . to exert "the full measure of its taxing power," and to bring within the definition of income "*any accessio[n] to wealth*."[101]

Therefore, income is any accession to wealth. Furthermore, the *United States v. Burke*[102] Court's definition of accession to wealth was recently clarified by the U.S. Tax Court in 2018. The tax court stated that an accession to wealth is a transaction that accords the taxpayer an economic benefit equivalent to income.[103] This seems very circular, but simply stated if a taxpayer receives an economic benefit that leaves him with more wealth than he previously possessed, then this is income. If a tax is levied on this *economic benefit* or *accession to wealth*, then it is an income tax which, thanks to the Sixteenth Amendment, does not require apportionment between the states though technically still a direct tax as defined in *Pollock*.

Technically, an income tax is a type of wealth tax.[104] In fact, the income tax was originally introduced as a way to make the wealthy pay their fair share of taxes and lessen the gap between poor and wealthy American citizens.[105] The real difference between an income tax and a wealth tax, as described in the presidential candidate proposals, is the mode of gauging the wealth. An income tax values the "gross income" of an individual and calculates a tax owed based on that valuation.[106] In contrast, the wealth tax values a household's net

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100. I.R.C. § 61 (2020).

101. United States v. Burke, 504 U.S. 229, 233 (1992) (alteration in original) (emphasis added) (first quoting I.R.C. § 61(a); then quoting Helvering v. Clifford, 309 U.S. 331, 334 (1940); and then quoting Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955)).

102. 504 U.S. 229 (1992).

103. French v. Comm'r, No. 14777-15S, 2018 Tax Ct. Summary LEXIS 38, at *1, *20 (T.C. July 12, 2018).

104. Jensen, *supra* note 13, at 2.

105. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1091 (2001) ("From the beginning, supporters of the modern income tax stressed that it was necessary to tie taxation to ability to pay—to ensure the wealthy who had benefitted from the American system would pay their fair share of the nation's tax liability. Ability to pay was also offered as a justification for graduating an income tax, of course—for taxing higher levels of income at higher rates.").

106. I.R.C. §§ 1, 61 (2020).

worth based on the value of assets.[107] In order to be an income tax, Congress would have to define net worth to include some sort of *accession to wealth* or some increased *economic benefit*.[108] The Constitution does not bar a wealth tax without apportionment, but it must tax some change in that wealth, not just the mere possession of it. Because the wealth tax as introduced would not tax any variations or changes in the wealth but merely the existence of wealth, this could not be considered an income tax immune from the apportionment requirements of the Constitution.

C. Duty or Impost

As mentioned above, the distinction between a wealth tax and duty or impost is a simple one to make. However, for the sake of thoroughness, it bears mentioning because it is the final constitutionally acceptable tax that bears discussion. Congress's power to lay duties and imposts comes from Article I, Section 8, the same constitutional provision that grants Congress the power to collect taxes.[109] The provision simply says that, "Congress shall have the Power To lay and collect . . . Duties, [and] Imposts . . . to pay the Debts and provide for the common Defence and general Welfare of the United States[.]"[110] As many other constitutional terms, "Duty or Impost" is not defined in the Constitution. The definition of "Duty or Impost" comes from case law. The United States Supreme Court was first asked to discuss the definition of a "duty" or "impost" in 1827 when a state congress passed an act laying duties on licenses to retailers of dry goods and for other purposes.[111] The question before the Court was whether a state could constitutionally require an importer to take out a license before permitting him to sell a bale or package that was imported.[112] The holding of the case is irrelevant to this paper but the definition of "duty" found by the court *is* relevant. The Court simply stated that "[a]n impost, or duty . . . is a custom or a tax levied on articles brought into a country[.]"[113] This definition was discussed more at length much later in 1976 when the Court was asked to rule on this question again.[114]

107. Camien v. Comm'r, 420 F.2d 283, 285 (1970); Ganti, *supra* note 23; *Net Worth*, *supra* note 23; Leiserson, *supra* note 24.

108. United States v. Burke, 504 U.S. 229, 233 (1992); French v. Comm'r, No. 14777-15S, 2018 Tax Ct. Summary LEXIS 38, at *20 (T.C. July 12, 2018).

109. U.S. Const. art. I, § 8, cl. 1.

110. *Id.*

111. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 437-40 (1827).

112. *Brown*, 25 U.S. at 437-40.

113. *Id.* at 437.

114. *See generally* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

In *Michelin Tire Corp. v. Wages*,[115] the plaintiff challenged a tax on goods imported from France and Nova Scotia as unconstitutionally prohibited by Article I, Section 10 of the Constitution because the tax was a "duty or impost" and it was not absolutely necessary for executing the state's, in this case Georgia's, inspection laws.[116] The Court stated that the tax was a duty or impost because:

> [T]he words "imposts" and "duties" as used in 1787 had meanings well understood to be exactions upon imported goods as imports. "Imposts" were like customs duties, that is, charges levied on imports at the time and place of importation. "Duties" was a broader term embracing excises as well as customs duties, and probably only capitation, land, and general property exactions were known by the term "tax" rather than the term "duty." The characteristic common to both "imposts" and "duties" was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce and tax States situated less favorably geographically.[117]

The last time this subject was discussed was in 1997 where the Court simply stated that duty, impost, and import refer to interstate and international trade.[118] Therefore, a "duty or impost" as listed in the Constitution is a tax on imports or exports and if a wealth tax does not tax goods leaving or coming into the country, it cannot be a "duty or impost."

An analysis of a wealth tax as a duty or impost is not difficult. A wealth tax, as stated previously, is a tax based on a household's net worth.[119] Net worth would most likely be defined as a valuation of assets merely because of that household's possession of them. A duty or impost, like an excise, involves movement or action of property before it can be taxed. Unlike an excise, a duty or impost involves a specific movement of property, movement inside or outside of a state or the United States. In contrast, a wealth tax does not take movement into consideration when levying the tax, but taxes the mere possession of the property and not the movement. A wealth tax cannot be a duty or impost because net worth, as most likely defined, does not refer to imports or exports and therefore cannot be a duty or impost.

115. 423 U.S. 276 (1976).

116. U.S. CONST. art. I, § 10, cl. 2; *Michelin*, 423 U.S. at 278-81.

117. *Michelin*, 423 U.S. at 291-93 (citations omitted).

118. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 637-38 (1997).

119. *Tax on Extreme Wealth*, *supra* note 2; *Ultra-Millionaire Tax*, *supra* note 1.

VIII. CONCLUSION

Recently there has been a push for Congress to pass a wealth tax. The wealth tax, as proposed by two leading former Democratic presidential candidates, would tax wealthy or ultra-rich households based on their net worth. Whether a wealth tax is constitutional or not would depend on how Congress, when passing the statue, or the United States Supreme Court, when ruling on a case, would define the term "net worth." The current definition by the tax courts is the value of a household's assets, whether by fair market value or purchase price, minus that household's liabilities. Other legal and accounting definitions use a similar, if not the same, definition of net worth as a value of the household's assets minus the liabilities. The courts would likely be bound by precedent as to how to define net worth, but Congress is not bound by precedent and can define net worth however it would like.

If Congress were to pass a wealth tax, they would have to define "net worth" in a way that would not be a direct tax because the Constitution specifically states that a "direct tax" must be apportioned between the states by population; something that is virtually impossible in our modern political system. The definition of a direct tax, as has been decided by various Court holdings, is simply a property tax or a tax on income from property. However, the Court's decision that income taxes are direct taxes subject to the apportionment requirement was superseded by the Sixteenth Amendment of the Constitution. Therefore, the direct tax referred to in the Constitution is simply a property tax.

A property tax, simply stated, is a tax on the value of property merely because a person owns that property. To understand this, an analysis of the various "indirect taxes" is helpful. A wealth tax is not an excise. An excise is levied on the specific use of or the exercise of ownership over property. A wealth tax is a tax on the ownership of assets. For no other reason other than ownership, a wealth tax values those assets and calculates taxes owed. Because the wealth tax is a tax on property ownership, not the use of property, then it is not an excise. An excise can also be levied on corporations for the privilege of doing business in the United States. A wealth tax does not meet this requirement either. A wealth tax is placed on households or humans, not corporations. Therefore, a wealth tax cannot be an excise through use of property or through corporate privilege.

Neither is a wealth tax based on net worth likely classified as an income tax. An income tax is levied on an accession to wealth, i.e., an individual's change in wealth over the taxable year. In contrast, a wealth tax based on net worth, as commonly defined, does not tax the change in wealth but its possession. Therefore, the wealth tax proposed by the former presidential candidates, depending on how Congress defines "net worth," most likely could not be characterized as an income tax.

Finally, a wealth tax is not a duty or impost. Duties and imposts are taxes levied specifically on imports or exports, i.e., the movement of property across state or national borders. A wealth tax, regardless of how any vital terms would likely be defined, could not be a tax on imports or exports. Therefore, a wealth tax cannot be a duty or impost and would still be classified as a "property tax."

A wealth tax is not an excise, an income tax, or a duty or impost but a "property tax." As property tax is the only definition of "direct tax" still subject to the apportionment requirement, a wealth tax would likely require apportionment to be in conformity with constitutional constraints.