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Why a Federal Wealth Tax is Constitutional

Ari Glogower
The Ohio State University, glogower.2@osu.edu

David Gamage
Indiana University Maurer School of Law, dgamage@indiana.edu

Kitty Richards
Roosevelt Institute

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ISSUE BRIEF BY **ARI GLOGOWER, DAVID GAMAGE,** AND **KITTY RICHARDS**
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INTRODUCTION

The 2020 Democratic presidential primaries brought national attention to a new direction for the tax system: a federal wealth tax for the wealthiest taxpayers. During their campaigns, Senators Elizabeth Warren (D-MA) and Bernie Sanders (I-VT) both introduced proposals to tax the wealth of multimillionaires and billionaires, and to use the revenue for public investments, including in health care and education. These reforms generated broad public support—even among many Republicans[1]—and broadened the conversation over the future of progressive tax reform.

A well-designed, high-end wealth tax can level the playing field in an unequal society and promote shared economic prosperity.

Critics have argued, however, that a wealth tax would be unconstitutional because of the Constitution's apportionment rule, which requires certain taxes to be apportioned among the states according to their populations. These critics advance maximalist interpretations of the apportionment rule and reconstruct the rule as a significant limit on Congress's constitutional taxing power.

In response to these objections, this brief explains why these critics misinterpret the role of the apportionment rule, and why the Constitution grants Congress broad taxing powers that allow for a wealth tax, whether it is apportioned or not. The maximalist interpretations misapprehend the role of apportionment in the constitutional structure, and improperly elevate a peripheral rule into a major barrier to tax reform.

This brief explains why constitutional history and Supreme Court precedents instead support a measured interpretation of the apportionment rule. This measured interpretation preserves apportionment's role in the constitutional structure—and does not read the provision out of the Constitution—but also does not improperly inflate the

[1] *See, e.g.*, Howard Schneider & Chris Khan, Reuters, *Majority of Americans favor wealth tax on very rich* (Jan. 10, 2020), https://www.reuters.com/article/us-usa-election-inequality-poll/majority-of-americans-favor-wealth-tax-on-very-rich-reuters-ipsos-poll-idUSKBN1Z9141.

rule into a fundamental limitation to Congress's taxing power. Under this interpretation, the Constitution allows Congress to enact an unapportioned wealth tax but would still require apportionment for some other forms of taxes, such as a tax on real estate alone.

This brief offers a descriptive analysis of the constitutional provisions and consequently describes how any member of the Supreme Court should evaluate a federal wealth tax, regardless of the member's personal motives or policy preferences. Discussions of the constitutionality of a wealth tax sometimes conflate this descriptive analysis—as to what the Constitution in fact does and should require—with a predictive analysis of how particular members of the current Supreme Court might rule. Although this brief primarily offers a descriptive analysis of the constitutional provisions and what they require, the final section addresses the separate question of whether Congress should enact a wealth tax at a time when particular members of the Supreme Court may rely upon maximalist arguments to strike it down.

A federal wealth tax warrants sustained and careful debate on the merits: how it should be designed, how it will affect economic activity and tax revenues, and how it should interact with other taxes. This important debate, however, should not be short-circuited by reflexive arguments that a wealth tax would be unconstitutional. Rather, voters and legislators should determine the scope and design of a federal wealth tax, as the Constitution ultimately requires.

THE CONSTITUTION GRANTS CONGRESS A BROAD TAXING POWER, WITH SOME LIMITATIONS

Understanding Congress's taxing power under the Constitution begins with a consideration of the tax provisions and their role in the constitutional structure. Article I Section 8 Clause 1 provides Congress's general taxing power: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

This language grants Congress a broad general taxing power for a broad range of public purposes.[2] The provision only includes one explicit restriction: that such measures must be imposed uniformly across the country. As described below, the courts have not interpreted the uniformity requirement as a significant limitation to Congress's taxing power.

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[2] Article 1 Section 9 Clause 5 provides the only explicit constitutional limit on Congress's taxing power: Congress cannot tax state exports. Other constitutional restrictions that are beyond the scope of this brief, such as the Due Process Clause in the Fifth Amendment, could also limit Congress's taxing power in particular circumstances.

One additional restriction appears at two other locations in the Constitution, which is referred to as the "apportionment rule." Article 1 Section 2 Clause 3 originally provided, in the context of the structure of the House of Representatives, that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Article 1 Section 9 Clause 4 similarly provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."

The apportionment rule, when it applies, requires a tax to be imposed in each state, proportional to that state's population. This rule, by definition, treats taxpayers differently based on their geographic location, and is therefore incompatible with the uniformity requirement, which precludes such differential treatment. As a result, the uniformity requirement and the apportionment rule are commonly understood to apply to different forms of taxes, but not simultaneously to the same tax.[3]

THE MEASURED INTERPRETATION OF THE APPORTIONMENT RULE AVOIDS THE PROBLEMS WITH MAXIMALIST AND MINIMALIST INTERPRETATIONS

Would a federal tax on an individual's net wealth be a "direct tax" subject to apportionment? This question cannot be answered with certainty since the scope of the term "direct tax" is innately ambiguous and indeterminate. Scholars have acknowledged the challenge of interpreting a "fuzzy historical record,"[4] as even the delegates to the constitutional convention did not share a common understanding of what taxes would be subject to apportionment and in what circumstances.

As James Madison famously recounted, fellow delegate Rufus King asked for a precise definition of the term "direct taxation," but "no one answered."[5] This often-repeated anecdote cautions against definitive claims as to exactly what taxes the term "direct taxes"

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[3] *See* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 856 (2009). ("The uniformity requirement is incompatible with apportionment, because apportionment . . . must necessarily impose different tax rates with respect to different states.").

[4] Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2414 (1997).

[5] James Madison, IV, The Writings of James Madison, The Journal of the Constitutional Convention, Aug. 20, 1787, at 252 (G.P. Putnam's Sons 1905).

should include, or as to the delegate's understanding of the term. More recently, in the case of *NFIB v. Sebelius*, Chief Justice John Roberts observed that "even when the Direct Tax Clause was written it was unclear what else, other than a capitation [tax] . . . might be a direct tax."[6]

The apportionment rule's original purpose, its role within the constitutional structure, and Supreme Court precedent all support a measured interpretation of the rule, as has been advocated in the prior literature. A measured interpretation recognizes that the apportionment rule is the product of an intentionally ambiguous compromise over representation and slavery, with only a vestigial role today. As described later in this brief, this measured interpretation would align the interpretation of the apportionment rule with the interpretation of the uniformity requirement, which the Supreme Court has interpreted narrowly, notwithstanding uniformity's more central role in the constitutional structure.

In contrast to this measured interpretation, maximalist interpretations of the apportionment rule mistakenly interpret a provision arising from narrow and historically contingent circumstances in order to override the Constitution's unambiguous grant of a broad taxing power to Congress. Minimalist interpretations, on the other hand, might imply ignoring the rule altogether, and reading it out of the Constitution. In contrast to both of these approaches, the measured interpretation would preserve the role of the apportionment rule in the constitutional structure without inflating its significance and subverting Congress's taxing power.

The Origins of the Apportionment Rule Support Its Narrow Application

The delegates originally added the apportionment rule to the Constitution in order to reach agreement over the question of how enslaved persons should affect each state's representation in Congress. The question of how to allocate representation among the states—and how to account for enslaved persons—threatened to derail the 1787 constitutional convention. The delegates adopted the apportionment rule as part of the infamous "three-fifths compromise" granting Southern states partial representation with respect to the enslaved persons in these states.

In the context of this debate, Gouverneur Morris of New York proposed the apportionment rule for direct taxes, which he considered "a bridge . . . over a certain gulph" that could

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[6] *National Federation of Independent Business v Sebelius (NFIB)*, 567 U.S. 519, 570 (2012).

subsequently be removed.[7] The apportionment rule for direct taxes assured Northern delegates that any increased representation would be linked to a potential cost of higher taxation, but also assured Southern delegates that this higher taxation would only apply when Congress imposes direct taxes.[8]

Apportionment may also have appealed to Southern delegates for a more fundamental reason: to prevent "emancipation by taxation."[9] Southern delegates feared that a federal government with a broad taxing power could effectively end the institution of slavery by imposing an unapportioned tax on enslaved persons.[10] The apportionment rule in Article 1 Section 9 Clause 4 for capitation and other direct taxes ensured that Congress could not impose a slave tax at a rate high enough to end slavery. For this reason, historian Robin Einhorn argues that slavery and the three-fifths rule "lay at the heart of all discussion about apportioned direct taxes" and that the apportionment rule was ultimately "a rule about slavery."[11]

The history of the apportionment rule and the reasons why the delegates added it to the Constitution have implications for how it should be understood and interpreted. Most importantly, the rule arose from a dispute over the institution of slavery and as an integral part of the infamous three-fifths compromise over representation. The three-fifths rule has now been superseded by the Fourteenth Amendment, leaving apportionment as a vestigial byproduct of an obsolete law.[12]

The history of the apportionment rule also explains why the delegates would have adopted a rule without a clear understanding of when exactly it would apply. Ambiguity and uncertainty most likely served as advantages of the rule, so that the delegates could reach a compromise.

This history also explains the peripheral role of the apportionment rule in the constitutional structure. The delegates did not necessarily consider the apportionment rule to reflect any fundamental view of fiscal policy or federalism,[13] and consequently did not include the provision in Article I Section 8 Clause 1—which granted Congress's general taxing power—as they did in the case of the uniformity requirement. Rather, the delegates added the rule elsewhere in order to resolve the narrow question of representation and slavery.

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7 ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 166 (2006).

8 EINHORN, *supra;* Bruce Ackerman, *Taxation and the Constitution,* 99 COLUM. L. REV. 1, 10 (1999).

9 Vanessa Williamson, National Tax Association 113th Annual Conference, Racism and Tax Policy Plenary, Nov. 20, 2020.

10 EINHORN, *supra,* at 161–62.

11 *Id.*

12 U.S. Const. Amend. XIV § 2; *See* Ackerman, *supra*, at 26-27.

13 Ackerman, *supra*, at 11.

Early cases interpreted the apportionment rule and the direct tax definition narrowly, in light of its contingent origins and peripheral role in the constitutional structure. The early Supreme Court cases adopted a purely functional understanding of the apportionment rule. In *Hylton v. United States*, for example, Justice Samuel Chase argued that the apportionment rule was never intended to obstruct the federal taxing power, nor to prevent Congress from levying any particular form of tax, and therefore apportionment should only be required when it would be feasible or "could reasonably apply."[14] Subsequent cases generally followed the reasoning in *Hylton* and its narrow functional understanding of the apportionment rule.[15] For example, in *Veazie v. Fenno* the Court held that the apportionment rule is not a "limitation of power" but merely prescribes "a mode in which it shall be exercised."[16]

Maximalist Interpretations Inflate the Significance of the Apportionment Rule

Maximalist interpretations of the apportionment rule argue, to the contrary, that the rule should serve as a major barrier to Congress's taxing power, notwithstanding its peripheral role in the constitutional structure. These arguments rely, alternatively, upon elements in the historical record suggesting the rule should be interpreted broadly, or upon formalist understandings of the rule's operation regardless of its original meaning.

Proponents of a maximalist interpretation often rely upon the infamous 1895 *Pollock* cases,[17] in which the Supreme Court invalidated the Income Tax of 1894 and introduced a more expansive interpretation of the apportionment rule as a substantive limit on Congress's taxing power. In the *Pollock* cases, the Supreme Court departed from its history of judicial restraint and a broad interpretation of Congress's constitutional taxing power. The Court held that a tax on income is functionally equivalent to a tax on the property generating the income, and a tax on such property would be a "direct tax" subject to apportionment.

The *Pollock* rulings arrived at the dawn of the "Lochner Era," when the Court repeatedly struck down progressive measures through rulings limiting government regulation of

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[14] *Hylton*, 3 U.S. at 174 (opinion of Chase, J.).

[15] *See*, e.g., Pacific Insurance Co v. Soule, 74 U.S. (7 Wall.) 433 (1868); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869); United States v. Singer, 82 U.S. (15 Wall.) 111 (1873); Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1874); Springer v. United States, 102 U.S. 586 (1881).

[16] Veazie, 75 U.S. (8 Wall.) at 541.

[17] Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895); Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601 (1895).

economic activity.[18] Many scholars consequently view the *Pollock* holdings as a case of judicial overreach, where the Court departed from its own precedent and mistakenly attributed undue significance to the apportionment rule in order to invalidate democratically enacted legislation that threatened the interests of economic elites.[19] The Court's judicial overreach jeopardized the Court's perceived legitimacy and caused a public uproar that culminated in the enactment of the Sixteenth Amendment and a dramatic expansion of the federal tax system only two decades later.[20]

The Supreme Court has also subsequently repudiated the core logic underlying the holdings in *Pollock*, that a tax on income is equivalent to a tax on underlying property.[21] Nonetheless, the case continues to serve as a lodestar for maximalist interpretations of the apportionment rule. In *NFIB v. Sebelius*, Justice Roberts also cited approvingly *Pollock*'s holding that apportionment would be required for a tax on real estate or personal property.[22]

Two contemporary arguments for a maximalist interpretation of the apportionment rule—that would preclude a federal wealth tax—draw from the *Pollock* Court's maximalist interpretation and narrow view of Congress's taxing power. First, some argue that the delegates shared a common view that certain taxes would be subject to apportionment, even if they disagreed on the precise definition of a direct tax.[23] For example, in the *Hylton* case, Alexander Hamilton conceded that a tax on real estate would be a direct tax, even as he advocated for a broad federal taxing power that would allow for a federal tax on carriages at issue in the case.[24] Some scholars also argue, based on some of the statements in the historical record, that at least some delegates did consider the apportionment rule to serve an important role in promoting federalism and fiscal restraint.[25]

Some offer a second justification for a maximalist interpretation of the apportionment rule. Under this view the apportionment rule should endure as a formal restraint on the

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[18] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 173–77 (2009).

[19] *See,* e.g., Ackerman, *supra* note 8.

[20] FRIEDMAN, *supra*, at 173–91.

[21] *See* South Carolina v. Baker, 485 U.S. 505, 515–27 (1988) (overturning the *Pollock* holding that a tax on municipal bond interest was an unconstitutional tax on the instrumentalities or property of a state); New York ex rel Cohn v. Graves, 300 U.S. 308, 314–16 (1937) (repudiating the *Pollock* logic equating a tax on income from property with a tax on the underlying property).

[22] Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 567 U.S. 519, 571 (2012).

[23] *See* Erik M. Jensen, *The Constitution Matters in Taxation*, 100 Tax Notes 821, 829 (2003); Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES, Nov. 7, 2019, https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html.

[24] Alexander Hamilton, Brief for the United States, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), reprinted in 8 The Works of Alexander Hamilton 378, 382 (Henry Cabot Lodge ed., 1904); Hemel & Kysar, *supra.*

[25] *See, e.g,* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1069-70 (2001).

taxing power, irrespective of the rule's original purpose. This argument follows from a view that the constitutional provisions should be interpreted in a "robust form" so as to afford them substantive effect.[26] Professor Erik Jensen argues, for example, that "[W]e're not drafting a Constitution from scratch, and the apportionment rule *is* in the Constitution."[27] This view might imply that the apportionment rule should not be ignored or written out of the Constitution, even if it only remains as a vestigial clause with an original function that is no longer relevant.

The primary problem with maximalist interpretations based on the historical record is simply that they tend to elide the apportionment rule's ambiguous and contingent origins described above, and the lack of a clear understanding among the delegates as to when apportionment would be required. These accounts elevate a vague and tangential provision reached in the context of a compromise over slavery and representation into a defining element of the constitutional structure.

Furthermore, one also cannot draw conclusions as to the scope of apportionment based on the delegates' stated definitions of a direct tax, since their definitions of the term depended upon their understanding of when apportionment would in fact be feasible. For example, Alexander Hamilton's interpretation of the direct tax definition reflects the same functional understanding of the apportionment rule adopted by the *Hylton* Court, and the same view that apportionment should only be required when feasible.[28] In the brief, he argued that the definition of the constitutional terms is uncertain, and "must be fixed by a species of arbitration, and ought to be such as will involve neither absurdity nor inconvenience."[29] That is, Hamilton thought a tax on real estate would be a direct tax because he presumed Congress could in fact apportion such a tax.

As Ari Glogower argues, a maximalist interpretation of the apportionment rule would also be inconsistent with Congress's unambiguous taxing powers under the Constitution, including its power to tax income under the Sixteenth Amendment.[30] Instead of taxing wealth separately, Congress could make adjustments to the income tax that would replicate the economic effects of a wealth tax. These adjustments, however, could not be disallowed without significantly narrowing Congress's power to tax income under the Sixteenth Amendment as it is currently understood. This fact makes it impossible to reconcile a maximalist interpretation of the apportionment rule with the contemporary understanding of Congress's taxing power.

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[26] *See* Jensen, *supra* note 4, at 2380.

[27] Jensen, *supra* note 25, at 1079.

[28] Hamilton, *supra* note 24; *see also* Ari Glogower, *Comparing Capital Income and Wealth Taxes*, 48 PEPP. L. REV. ___ (forthcoming 2021).

[29] Hamilton, *supra.*

[30] Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020).

For example, as an alternative to a net wealth tax, Congress could also tax wealth through wealth-based adjustments to the income tax. Congress could disallow cost recovery deductions, which would be economically equivalent to a wealth tax, or it could use a taxpayer's wealth as a factor in determining income tax liabilities.[31] A broad reading of the apportionment rule to invalidate these rules, since they indirectly tax wealth, could destabilize settled doctrine defining Congress's power to tax income under the Sixteenth Amendment.

This alternative tax design illustrates how maximalist interpretations of the apportionment rule could invite a more interventionist role for the Supreme Court in overturning democratically enacted tax legislation, with no discernible limiting principles that could preserve Congress's essential taxing power. The maximalist interpretation of the apportionment rule would essentially allow a peripheral and ambiguous constitutional provision with a contingent role in the constitutional structure to destabilize Congress's unambiguous constitutional taxing powers.

The discussion in the following sections also describes additional problems with the maximalist interpretations. First, even maximalist interpretations based on a formal understanding of the apportionment rule's role in the Constitution would not support the conclusion that a wealth tax would be unconstitutional, since in that case Congress could avoid a formal application of the apportionment rule for similarly formal reasons. Maximalist interpretations based on the original understanding of the apportionment rule might also render it impossible for Congress to implement a wealth tax at all—whether apportioned or not—even though the apportionment rule is clearly not intended to preclude Congress from implementing any particular form of tax. Finally, maximalist interpretations of the apportionment rule are inconsistent with the Court's narrow interpretation of the uniformity requirement as a limit on Congress's taxing power, despite the fact that the uniformity requirement has an even more central role in the constitutional structure.

Minimalist Interpretations Would Practically Eliminate the Apportionment Rule

Scholars have also advocated for minimalist interpretations of the apportionment rule as a vestigial and irrelevant provision, which could suggest reading the rule out of the Constitution entirely or only applying it in very narrow circumstances.[32] Professor Calvin

[31] Glogower, *supra*, at 727-57.

[32] Professors Bruce Ackerman and Calvin Johnson ultimately argue that the apportionment rule should be preserved and should still apply in narrow circumstances. Their arguments, however, could be interpreted to imply an even narrower role for apportionment.

Johnson argues that the apportionment rule was a "glitch" or "foul-up" in the drafting of the Constitution, with potential consequences that the delegates did not foresee.[33] He observes that the delegates may not even have understood how apportionment would operate and why it would be inconsistent with the uniformity requirement, and that they never intended it to preclude the federal government from implementing any particular form of tax.[34] Professor Bruce Ackerman similarly argues that, since the apportionment rule served the narrow purpose of bridging a compromise over slavery, the rule has no further relevance in the constitutional structure following slavery's abolition.[35]

Johnson argues that, due to the vestigial nature of the apportionment clause, apportionment should only be required for a tax when it would be "reasonable" or "convenient."[36] This view may imply that apportionment would not even be required for a tax on real estate or personal property, if it were unreasonable or inconvenient to do so now. This functional approach to interpreting the apportionment rule reflects the same reasoning in *Hylton* and the early case law: that the rule should only be applied when it would be feasible for Congress to do so today.[37]

These minimalist interpretations of the apportionment rule accurately describe its peripheral role in the constitutional structure and explain why it is arguably irrelevant today. At the same time, proponents of these minimalist interpretations also argue that the Court could still preserve a narrow role for apportionment, so as to not read the provision out of the Constitution entirely.

The Measured Interpretation Preserves an Appropriate Role for Apportionment

The Supreme Court would not need to read the apportionment rule out of the Constitution entirely and could still preserve a role for the rule in the constitutional structure in accordance with its original function. At the same time, the Court should also not attribute undue significance to this peripheral rule and transform it into a major barrier to Congress's taxing power.

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[33] Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 3 (1998).

[34] For example, as Johnson notes, even James Madison thought that some forms of excise taxes could also be considered direct taxes, subject to both uniformity and apportionment. Johnson, *supra*, at 66 (1998) (citing Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 The Papers of James Madison, 449 (Charles F. Hobson & Robert A. Rutland eds., 1979)).

[35] *See* Ackerman, *supra* note 8, at 51. Ackerman argues that this tainted origin of the apportionment rule explains why the Court should not expand its role, even if the Court preserves a narrow role for the rule in the constitutional structure.

[36] Johnson, *supra*, at 11.

[37] As described above, however, the early Supreme Court cases presumed at the time that it would in fact be feasible to apportion a tax on real estate, as Congress did on occasion during this period.

Scholars have proposed a measured interpretation of the apportionment rule: to only require apportionment for a tax on real estate located within each state—regardless of how easy it would be for Congress to do so today—and not to require apportionment for a broader tax on a broader measure of an individual's net wealth.[38] This measured interpretation would preserve the Supreme Court precedent and most accurately reflect the original understandings of the apportionment rule and its role in the constitutional structure.

The measured interpretation reflects the area of broad agreement in the case law and the scholarly literature. The Court has consistently held that a tax on real estate would be a direct tax, even in the early cases reflecting the view that apportionment should only be required when feasible. To the extent the delegates held any common understanding of apportionment at all, the historical record does suggest a shared assumption that apportionment would be required for a tax on real estate.

This measured interpretation is also consistent, however, with the logic underlying maximalist interpretations of the apportionment rule. That is, even if the apportionment rule is understood to require apportionment for real estate, and even if the rule should be preserved as a formal constitutional constraint divorced from its original purpose, neither of these considerations would necessarily preclude an unapportioned federal wealth tax.

If the apportionment rule only persists as a formal constraint prohibiting a tax on real estate, then Congress could avoid its application on similarly formal grounds, by designing a wealth tax that avoids any possibility of falling within the formal definition of a direct tax. For example, as Professor Ackerman argues, even if one assumes that the Constitution would still require apportionment of a tax on real estate alone for purely formal reasons, it should not also require apportionment for a broader wealth tax base that includes real estate as one factor in the taxable base, but that is qualitatively different from a tax on real estate alone.[39] Throughout the early case law, the Supreme Court followed this same approach: adopting formal distinctions to resolve formal constraints in the constitutional provisions.[40]

Finally, as described in the following section, the measured interpretation avoids a potentially illogical outcome in which a maximalist interpretation of the apportionment

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[38] *See* Ackerman, *supra* note 8, at 56 (arguing that apportionment should only be required for a tax on real estate); Dodge, *supra* note 3, at 924 (arguing that apportionment should only be required for a tax on real estate or tangible personal property).

[39] Ackerman, *supra*; *see also* Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND L.J. 111, 126 (2018).

[40] *See, e.g.*, the cases described *supra* note 15.

rule could preclude Congress from implementing particular forms of tax entirely. The measured interpretation avoids this difficulty by only requiring apportionment when it would be unambiguously possible, at least in principle, for Congress to do so.

THE PRACTICAL CONSEQUENCES OF APPORTIONMENT ALSO SUPPORT THE MEASURED INTERPRETATION

The apportionment rule does not expressly preclude Congress from levying any particular form of tax. As a result, even proponents of maximalist interpretations concede that apportionment would not be required when it would prevent Congress from implementing a tax of any kind. In practice, apportioning a modern federal tax would be innately impossible, possible in theory but unfeasible in practice, or at least complicated, depending upon different views in the literature and different possible interpretations of what exactly apportionment requires. This consideration provides additional support for the measured interpretation, so that apportionment would not be required when it could effectively prevent Congress from implementing a tax.

Apportionment could have the regressive effect of imposing a proportionally higher burden on a relatively populous but poorer state. For example, assume a simple case of a wealth tax apportioned between two states: State A, which is relatively rich, has one-third of the total population and two-thirds of the total wealth, while State B, which is relatively poorer, has two-thirds of the total population and one-third of the total wealth. Under apportionment, the relatively poorer residents of State B would bear twice the total wealth tax burden as would the richer residents of State A, notwithstanding the fact that the State B residents only own half as much wealth as do the State A residents.[41]

These potential regressive effects of apportionment have long been understood as sufficient reasons to conclude that the Constitution would not require apportionment for taxes whenever their apportionment would result in this "great inequality and injustice."[42] As expressed by Justice Chase, "If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule."[43] Based on this logic, the *Hylton* Court found that the tax at issue was therefore not a direct tax.

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[41] *See* Hylton v. U.S. 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.).

[42] *Id.* at 174 (Chase, J.); *see also id.* at 178–179 (Paterson, J.), 182 (Iredell, J.).

[43] *Id.* at 174 (Chase, J.).

Some scholars have recently proposed more complex systems that could enable Congress to apportion a wealth tax while avoiding or at least mitigating these sorts of regressive effects. For example, professors John Brooks and David Gamage argue that Congress could apportion a comprehensive federal wealth tax in a manner similar to how the 1798 Direct Tax Act was apportioned—using a residual tax on land value to effectuate the apportionment—and then use a "fiscal equalization" system to counteract the regressive effects this would otherwise cause between wealthier and less wealthy states.[44] Others argue that this system would be unworkable in practice or that it would still not be constitutional under a maximalist view of the apportionment rule.

It is also not entirely clear whether apportionment in accordance with the term's original understanding would be possible at all for a comprehensive wealth tax, including in its base assets without any identifiable geographic location, such as intangible assets. Professor Joseph Dodge argues that a wealth tax should be limited to a tax on real estate alone, where apportionment based on the geographic location of the asset is in principle feasible, but should not be required for a tax on intangibles with no identifiable location.[45]

The 1798 Direct Tax Act and other early Direct Tax Acts did not apply to intangible assets, so it is not known how or whether the delegates would have apportioned a tax on intangibles. Arguably, the apportionment rule might be interpreted as requiring apportionment based on the geographic location of the specific assets subject to the tax, rather than the location of the taxpayer. This understanding is arguably consistent with original practice, since in principle, tax administrators could identify the assets physically located in each state.

For example, in the 1798 Direct Tax Act, Congress imposed a "direct tax" on real estate, which was apportioned among the states by population, and then levied accordingly on the property "within such state."[46] While it would be possible in principle for tax administrators to identify the location of tangible assets and value them accordingly,[47] intangible assets do not have an actual physical location and therefore would not be apportionable under this understanding of the rule.[48] Of course, Congress could always

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[44] John Brooks & David Gamage, *Why A Wealth Tax is Definitely Constitutional* (Jan. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489997&download=yes.

[45] *See* Dodge, *supra* note 3, at 922–26.

[46] An Act: To lay and collect a direct tax within the United States, ch. 75, § 2, 1 Stat. 597, 598 (1798). See also the description of how apportionment was understood to operate in *Hylton*, 3 U.S. at 178–79.

[47] Nicholas Parillo describes the enormous challenges in administering the 1798 apportioned tax on real estate. Nicholas R. Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L. J. ___ (forthcoming 2021).

[48] *See* Dodge, *supra*, at 926-27.

determine some method for apportioning intangibles, such as on a destination basis. While there is a "well settled rule of domicile with respect to taxation" of treating "the situs of intangible property as the owner's domicile,"[49] there are no Supreme Court precedents on whether such an approach would satisfy the apportionment rule for a federal wealth tax including intangibles in its base, in accordance with how the term was originally understood to function.

Ultimately, scholars may disagree on whether it would be impossible, unfeasible, or just complicated for Congress to apportion a wealth tax in the first instance or to mitigate any unacceptably regressive effects. In the former cases, maximalist interpretations of the apportionment rule could in effect become categorical restrictions on Congress's ability to implement certain forms of taxes, which was clearly not how the delegates intended for apportionment to operate.

LESSONS FROM THE UNIFORMITY REQUIREMENT

Advocates for maximalist interpretations of constitutional limits on Congress's taxing power might have instead focused on a more appropriate target: the uniformity requirement. Recall that the delegates included the uniformity requirement as the only explicit limitation in Article 1 Section 2 Clause 8, which is the section granting Congress's general taxing power. As a result, the uniformity requirement might be understood as a central restraint on this taxing power, and a more important one than the apportionment rule which appears elsewhere in the constitutional structure.

The history of this provision over time, however, offers a lesson in how the requirements in the constitutional structure need not be interpreted so as to impede the administration of a modern taxing system. As such, it provides a counterexample to maximalist interpretations of constitutional limits on Congress's taxing power, and a precedent for the measured interpretation of these provisions.

The delegates included the uniformity requirement in order to address central and legitimate concerns: The requirement ensured that consistent rates and rules would replace the patchwork of uncoordinated regional taxes that impeded trade at the time, and that Congress could not use the taxing power to discriminate against specific states or regions.[50]

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[49] Burton v New York State Dept. of Taxation & Fin. Court of Appeals of New York, 25 N.Y.3d 732 *; 37 N.E.3d 718 (2015).

[50] DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 99–101 (1975).

Despite the uniformity requirement's central role in the constitutional structure, however, the Supreme Court has interpreted the requirement narrowly so as to diminish—and virtually eliminate—its role as a restraint on the taxing power. The provision has been referred to as an "empty shell" that has been practically written out of the Constitution.[51] In early cases, the Court held that the uniformity requirement did not require "intrinsic uniformity"—and therefore did not prevent Congress from treating taxpayers differently, based on their income level or other personal attributes—but only required "geographic uniformity" so that taxpayers are not treated differently based on where they live.[52]

In the modern era, the Court has held that the uniformity requirement would not even bar tax rules that differentiate among taxpayers based on where they live. In the 1983 case *U.S. v. Ptasynski*,[53] the Supreme Court adopted a measured interpretation of the uniformity requirement, which would preserve some role for the requirement and avoid reading it out of the Constitution, but which would also avoid interpreting the requirement in a way that would unduly constrain Congress's taxing power. The Court held that the uniformity requirement does not prohibit "geographically defined classifications" and suggested that the uniformity requirement would only prohibit a law that reflected explicit "geographic discrimination" without any other policy rationale.[54] In effect, this holding preserved a narrow role for the uniformity requirement, without interpreting the rule in a way that would inhibit Congress's basic exercise of its taxing power.

The story of the uniformity requirement, and its interpretation over time, illustrates why it would be wrong to attribute maximalist interpretations to every limitation in the Constitution's tax provisions. Maximalist interpretations of the apportionment rule could have exactly the effect the Court avoided in the case of the uniformity requirement, in precluding Congress from imposing certain forms of taxes. The Supreme Court, however, has correctly avoided such interpretations of the uniformity requirement in order to preserve Congress's basic taxing power.

The divergent approaches to the interpretation of the uniformity requirement and the apportionment rule suggest a basic inconsistency in the interpretation of the constitutional tax provisions: The same voices advocating for maximalist interpretations of the apportionment rule—so as to preclude a federal wealth tax—apparently have no objections to a minimalist interpretation of the even more important uniformity requirement.

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[51] Nelson Lund, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1193 (1984).

[52] *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 84–85 (1900).

[53] 462 U.S. 74 (1983)

[54] 462 U.S. 74, at 83–86.

To avoid this inconsistency, the Court should similarly interpret the apportionment rule so that it would be neither "absurdly strict" nor "completely empty." By adopting the measured interpretation, the Court could accede that the Constitution would require apportionment for a tax on real estate alone, but not for a broader wealth tax base that would be either impossible or extremely difficult to apportion in accordance with the rule's original understanding.

WHAT ABOUT THE CURRENT SUPREME COURT?

Of course, any particular justices on the Supreme Court at any particular moment in history could find grounds to invalidate an unapportioned wealth tax, based on the maximalist interpretations of the apportionment rule described above. Some current Supreme Court members who have indicated a preference for shielding economic interests from government intervention might be even more inclined to endorse these arguments so as to justify striking down congressional exercises of the taxing power. We do not believe, however, that a democratically elected Congress should legislate so as to satisfy the political preferences of any particular justice. Rather, Congress should legislate in accordance with its constitutionally prescribed powers.

The current Supreme Court may in fact strike down any number of desirable legislative initiatives that Congress should nonetheless pursue. For example, in a recent speech, Justice Samuel Alito expressed a range of policy preferences, including expanding gun ownership rights and restricting government measures necessary to prevent the spread of COVID-19.[55] Similarly, in her confirmation hearing, Justice Amy Coney Barrett would not confirm whether she believed Social Security and Medicare were constitutional.[56]

We don't believe that Congress should legislate so as to anticipate such preferences, and for the same reason, we don't believe Congress should structure tax reform to satisfy particular justices' anticipated preferences regarding the structure of the tax system. Congress's primary responsibility is to make all laws "necessary and proper" according to its constitutional powers, based on faithful interpretations of these powers.

Furthermore, it is critically important for scholars and policymakers to distinguish between *descriptive* accounts of what the Constitution in fact allows, and *predictive*

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[55] *See* Scott Lemieux, NBCNews.com, *Supreme Court Justice Alito's Federalist Society Speech Shows How Political the Court Will Get* (Nov. 13, 2020) https://www.nbcnews.com/think/opinion/supreme-court-justice-alito-s-federalist-society-speech-shows-how-ncna1247751.

[56] *See* Nancy Altman, TheHill.com, *Is Social Security Safe from the Courts?* (Oct. 15, 2020) https://thehill.com/blogs/congress-blog/judicial/521131-is-social-security-safe-from-the-courts.

accounts of how it may be interpreted by any particular justices at a particular moment in time. Some scholars have framed objections to a federal wealth tax by describing possible arguments that a Court could rely upon to find it unconstitutional. Without a clear distinction between the predictive and descriptive accounts, however, these same arguments can be interpreted as positive claims as to how the Constitution *should* be properly interpreted. More generally, we disagree with accounts in the literature presuming or implying that a federal wealth tax would be unambiguously unconstitutional while eliding ambiguous and historically contingent origins of the constitutional taxing provisions summarized in this brief.

Finally, what if Congress expends political capital enacting a federal wealth tax only for the Court to strike it down? One answer, which may not be entirely satisfactory, is to let Congress do its job based on good-faith interpretations of its constitutional powers and to then hope that the Court will execute its duties in good faith as well.

There can also be unexpected consequences if a Supreme Court subverts constitutional and democratically enacted legislation with broad national support. For example, in the 1895 *Pollock* cases, a reactionary Court motivated to insulate monied interests from legislative intervention overturned the 1894 income tax, based on an ahistorical interpretation of the constitutional provisions. As described above, this judicial overreach jeopardized the Court's perceived legitimacy and directly led to the enactment of the Sixteenth Amendment and the expansion of the federal tax system soon after. Judicial overreach in striking down a federal wealth tax today could lead to similar consequences in the years to come.

CONCLUSION

Congress can exercise its broad taxing power under the Constitution to implement an unapportioned federal wealth tax. Maximalist interpretations of the apportionment rule—currently marshalled to support the claim that an unapportioned wealth tax would be unconstitutional—overstate the rule's original purpose and role in the constitutional structure. By upholding an unapportioned wealth tax, the Supreme Court would also follow its own precedent, by not interpreting the constitutional provisions in a manner that subverts Congress's essential taxing power.

ABOUT THE AUTHOR

Ari Glogower is an Associate Professor of Law at The Ohio State University Moritz College of Law. Glogower researches and writes on tax law and policy, with a focus on progressive tax design, the taxation of capital gains and business entities, and the role of wealth and inequality in the tax system. He is a graduate of Yale University and New York University School of Law.

David Gamage is a Professor of Law at Indiana University Bloomington, Maurer School of Law, and a scholar of tax law and policy and health law and policy. He has written extensively on tax and budget policy at both the state and federal levels, as well as on tax theory, fiscal federalism, and the intersections between taxation and health care. He is a graduate of Stanford University and Yale Law School.

Kitty Richards is a fellow at the Roosevelt Institute, where her work focuses on tax and fiscal policy. She has previously worked on federal budget and tax policy at several think tanks and has served as an economic policy staffer on Capitol Hill, in the White House, and on the Washington DC City Council. She is a graduate of Reed College and New York University School of Law.

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