THE WEALTH TAX: APPORTIONMENT, FEDERALISM, AND CONSTITUTIONALITY

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Proposals of wealth taxation—as a mechanism to combat economic inequality and raise revenue for welfare programs—have dominated recent political debate. Despite extensive academic commentary, questions surrounding the constitutionality of a wealth tax remain unresolved. Previous scholarly approaches have drawn a dichotomy between two key cases. Supporters of the wealth tax emphasize Hylton's functional rule for identifying direct taxes, which must be apportioned under the Constitution, and reject Pollock, which invalidated the federal income tax on the grounds that it was a direct tax. Opponents of the wealth tax, in contrast, argue that Pollock, rather than Hylton, was correctly decided.

This Article examines the inequitable results of apportioning the wealth tax and argues that both Hylton's rule of reason and the underlying, federalism rationale of Pollock disfavor classifying the wealth tax as a direct tax. Using IRS personal-wealth data, I estimate the wealth tax rates as apportioned in accordance with the geographic distribution of wealth among the states. The disparate impact of apportionment—imposing tax rates ranging from 2% in D.C. to 40% in West Virginia—provide strong support for the constitutionality of wealth taxation at uniform rates.

* Yale Law School, J.D. Class of 2021; Yale University, Ph.D. 2018. The author would especially like to thank Anne Alstott for her insightful feedback, warm encouragement, and inspiring mentorship. The author also thanks Michael Graetz, as well as his Fall 2019 seminar on tax policy, for an engaging conversation about the wealth tax, and Heather Gerken for her wise guidance on the recent federalism scholarship. An earlier version of this Article was awarded the Clifford L. Porter Prize in Taxation at Yale Law School.

INTRODUCTION

Issues of taxation and economic inequality have dominated much of the debate in the 2020 Democratic presidential primaries. Concerned with increasingly concentrated wealth and the resultant emergence of a "democracy-distorting" oligarchy,[1] and criticizing the 2017 Tax Cuts and Jobs Act (TCJA)[2] as a giveaway to the rich,[3] Democratic politicians have offered various policy platforms to instantiate their sense of distributive justice. Among the most prominent—and perhaps the most controversial—are proposals to tax wealth, especially that of ultra-high-net-worth households. The proposed schemes of wealth taxation are not complex: for example, Senator Elizabeth Warren's plan—the "Ultra-Millionaire Tax"—involves imposing a 2% annual tax on household net worth above $50 million and a 4% annual Billionaire surtax (i.e., a 6% overall tax) on household net worth above $1 billion.[4] Senator Bernie Sanders's plan specifies a more graduated scale of tax rates, ranging from a 2% tax on net worth above $32 million to an 8% tax on net worth above $10 billion.[5] Implementation of wealth taxation, according to its advocates, will dilute the fortune of the top 1%, which holds roughly the same amount of wealth as the bottom 90%.[6] Revenue raised from taxing wealth—with the most optimistic estimates coming in at $3.75 trillion for the next decade—can pay for ambitious welfare programs, such as Medicare for All.[7] Even President Donald Trump, during his unsuccessful bid for the Reform

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[1] *See*, *e.g.,* Neil Irwin, *Elizabeth Warren Wants a Wealth Tax. How Would That Even Work?*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/upshot/warren-wealth-tax.html [https://perma.cc/5BLE-KZ35] (explaining that for wealth-tax advocates, "accumulation of untaxed or lightly taxed wealth . . . enables the creation of democracy-distorting dynasties who accumulate political power"); *see also Senator Warren Unveils Proposal to Tax Wealth of Ultra-Rich Americans*, OFF. SENATOR ELIZABETH WARREN (Jan. 24, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-proposal-to-tax-wealth-of-ultra-rich-americans [https://perma.cc/YM2S-B9CY] ("For decades, a small group of families has raked in a massive amount of the wealth American workers have produced, while America's middle class has been hollowed out. The result is an extreme concentration of wealth not seen in any other leading economy"); Letter from Emmanuel Saez & Gabriel Zucman, Professors of Economics, University of California at Berkeley, to Elizabeth Warren, U.S. Senator 4 (Jan. 18, 2019) [hereinafter Wealth Tax Estimates Letter], https://www.warren.senate.gov/imo/media/doc/saez-zucman-wealthtax.pdf [https://perma.cc/X9PU-JWBY] (noting that a "key motivation" for progressive wealth taxation is to "curb the growing concentration of wealth"); Matthew Smith, Owen Zidar & Eric Zwick, *Top Wealth in the United States: New Estimates and Implications for Taxing the Rich* 1 (July 19, 2019) (unpublished manuscript), http://ericzwick.com/wealth/wealth.pdf [https://perma.cc/BW9A-29Y3] (concluding that "[o]verall, wealth is very concentrated: the top 1% holds as much wealth as the bottom 90%").

[2] An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified in scattered sections of 26 U.S.C.).

[3] Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html [https://perma.cc/3CF6-FWQF] (citing Representative Nancy Pelosi's quote describing the 2017 tax legislation as "simply theft—monumental, brazen theft from the American middle class and from every person who aspires to reach it").

[4] *Ultra-Millionaire Tax*, ELIZABETH WARREN (Nov. 1, 2019), https://elizabethwarren.com/plans/ultra-millionaire-tax [https://perma.cc/4C3H-5JBV].

[5] *Tax on Extreme Wealth*, BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth [https://perma.cc/H86B-F7BG].

[6] *See Ultra-Millionaire Tax*, *supra* note 4; *see also* Wealth Tax Estimates Letter, *supra* note 1, at 4; Smith, Zidar & Zwick, *supra* note 1, at 3.

[7] *See* Joshua Jamerson et al., *Warren Would Tax the Wealthy, Companies to Pay for Medicare for All*,

Party's nomination in the 2000 presidential election, proposed imposing a one-time 14.25% tax on individuals and trusts with net worth above $10 million in order to pay off the national debt.[8]

The idea of wealth taxation has provoked vigorous criticism, ranging from concerns about its revenue-raising potential to administrability issues such as valuation and liquidity.[9] In addition to these routine critiques, opponents have also launched attacks on the constitutionality of the wealth tax, since it is assessed on the basis of net worth rather than on the basis of income. One prominent scholar, Jonathan Turley, has argued that Elizabeth Warren's proposed regime of wealth tax is "probably unconstitutional" based on an examination of constitutional "text, history and precedent."[10] Professor Turley's argument relies heavily on his reading of *Hylton v. United States*[11] and *Pollock v. Farmers' Loan & Trust Co.*[12] According to Turley, the former implicitly endorsed Alexander Hamilton's definition of a direct tax ("capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate"),[13] and the latter then reaffirmed *Hylton*'s prohibition in striking down the federal income tax.[14] In response, Bruce Ackerman has argued that *Pollock* was a historical and jurisprudential anomaly.[15] Relying on *Hylton*'s rule of reason (that the "rule of apportionment is only to be adopted in such cases where it can reasonably apply"),[16] Professor

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WALL STREET J. (Nov. 1, 2019), https://www.wsj.com/articles/warren-to-tax-wealthy-americans-companies-to-pay-for-medicare-for-all-11572614846 [https://perma.cc/YE5R-3HHK].

[8] Adam Nagourney, *Trump Proposes Clearing Nation's Debt at Expense of the Rich*, N.Y. TIMES (Nov. 10, 1999), https://www.nytimes.com/1999/11/10/us/trump-proposes-clearing-nation-s-debt-at-expense-of-the-rich.html [https://perma.cc/5E7W-JJR3].

[9] For example, Lawrence Summers and Natasha Sarin have estimated (based on Warren's previously proposed tax rates of 2% on net worth above $50 million, and 3% on net worth above $1 billion) that the wealth tax would raise only $25 billion per year, compared to Saez and Zucman's estimate of $212 billion per year. Summers & Sarin's estimate is based on existing IRS estate-tax data and criticizes Saez & Zucman for being "overly optimistic" and ignoring "the myriad ways wealthy people avoid paying estate taxes" that would apply to wealth taxes as well. These abuses include "questionable appraisals; valuation discounts for illiquidity and lack of control; establishment of trusts . . . [and] tax-advantaged lending schemes." *See* Lawrence H. Summers & Natasha Sarin, *A 'Wealth Tax' Presents a Revenue Estimation Puzzle*, WASH. POST (Apr. 4, 2019), https://www.washingtonpost.com/opinions/2019/04/04/wealth-tax-presents-revenue-estimation-puzzle [https://perma.cc/L678-3689]; *see also* David Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499, 526-31 (2000) (surveying the various administrability issues of a wealth tax, including collection and valuation problems); James R. Repetti, *It's All About Valuation*, 53 TAX L. REV. 607, 607 (arguing that the annual valuation requirement would "erode the tax base" and "make the wealth tax unmanageable," because taxpayers will be incentivized to minimize the value of their property and their tax burden).

[10] Jonathan Turley, *Elizabeth Warren's Popular Plan to Tax the Rich Is Probably Unconstitutional*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/outlook/elizabeth-warrens-popular-plan-to-tax-the-rich-is-probably-unconstitutional/2019/02/14/60195bc4-2fec-11e9-8ad3-9a5b113ecd3c_story.html [https://perma.cc/GLK8-BQGF].

[11] Hylton v. United States, 3 U.S. 171 (1796).

[12] Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

[13] Springer v. United States, 102 U.S. 586, 598 (1881).

[14] *See* Turley, *supra* note 10.

[15] Bruce Ackerman, *The Constitutional Critiques of Elizabeth Warren's Wealth Tax Plan Are Absurd*, SLATE (Feb. 19, 2019), https://slate.com/news-and-politics/2019/02/elizabeth-warren-2020-wealth-tax-constitutional.html [https://perma.cc/AQ5B-YEZG].

[16] *Hylton*, 3 U.S. at 174.

Ackerman contends that any principled jurist should uphold the wealth tax based on the original understandings of the Direct Tax Clause and of the Sixteenth Amendment.[17] This recent debate on popular media reflects a deeper, longstanding disagreement over the scope and application of the Direct Tax Clause.[18]

Missing from recent discussions is an empirical analysis of how exactly the wealth tax would be apportioned and, relatedly, the recognition that even in *Pollock*, the Supreme Court interpreted the Direct Tax Clause as a federalism provision whose purpose is to preserve the ability of state and local governments to tax.[19] Supporters of the wealth tax have generally followed the path of Professor Ackerman and brushed *Pollock* aside as an infamous decision of the *Lockner* era.[20] Although this view may theoretically be correct, the contemporary Supreme Court has signaled that it disagrees. In *National Federation of Independent Business v. Sebelius*,[21] Justice Roberts—likely to be the swing vote if the wealth tax is enacted and litigated[22]—indicated that *Pollock*'s holding that taxes on personal property are direct taxes is still good law, even though its invalidation of the federal income tax has been overruled by the Sixteenth Amendment.[23] Any successful litigation strategy, therefore, must reconcile the wealth tax with *Pollock*, or at the very least take *Pollock* into account, articulating a theory about why a tax on net worth, which clearly constitute personal property, should not be a direct tax.

This Article argues that both *Hylton*'s rule of reason *and* the underlying rationale of *Pollock* disfavor classifying the wealth tax as a direct tax once we see the "great inequality and injustice"[24] that would result from apportioning the wealth tax. This Article proceeds as follows: Part I describes the doctrinal framework surrounding the Direct Tax Clause. Part II briefly examines previous scholarship about the constitutionality of wealth taxation. Part III analyzes how the wealth tax would be apportioned based on IRS data on personal wealth distribution,

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17 Ackerman, *supra* note 15.

18 *See infra* Part II.

19 Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 620-22 (1895) (explaining the "reasons for the clauses of the Constitution in respect of direct taxation").

20 *See, e.g.*, Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 127 (2018) (noting "the shocking deficiencies in the majority's analysis in *Pollock*" and its "remarkable lapse in judicial craft," while comparing *Pollock* to *Plessy v. Ferguson*, 163 U.S. 537 (1896)); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 298 (2004) ("*Pollock* was wrongly decided at the time . . . [and] [i]t is time now to overrule *Pollock* in full and to return to *Hylton*."); Letter from Bruce Ackerman, Anne Alstott, Philip Bobbitt, et al., Professors of Law, to Elizabeth Warren, U.S. Senator (Jan. 24, 2019), https://www.warren.senate.gov/imo/media/doc/Constitutionality%20Letters.pdf [https://perma.cc/4LSG-255H].

21 National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

22 *See, e.g.*, Noah Feldman, *Wealth Tax's Legality Depends on What 'Direct' Means*, BLOOMBERG (Jan. 30, 2019), https://www.bloomberg.com/opinion/articles/2019-01-30/elizabeth-warren-s-wealth-tax-is-probably-constitutional [https://perma.cc/6SKN-RHCM] ("The decision would likely come down to Roberts's vote—like so many other unsettled questions in today's constitutional law.").

23 *See Sebelius*, 567 U.S. at 571 (explaining that *Pollock*'s invalidation of the federal income tax "was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes" (citing Eisner v. Macomber, 252 U.S. 189, 218-19 (1920))); *see also* U.S. CONST. amend. XVI (granting Congress the "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").

24 *Hylton*, 3 U.S. at 174.

arguing that apportionment would run counter to both *Hylton* and *Pollock*'s conception of the Direct Tax Clause as a federalism provision. The conclusion provides suggestions about how a potential wealth tax should be drafted.

I. DOCTRINAL FRAMEWORK

A. "Direct Taxes" in the Constitution

The term "direct tax" appears twice in the Constitution. Article I, Section 2, which defines the composition of the House, commands that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."[25] This clause also effectuates the infamous Three-Fifths Compromise, but while the Fourteenth Amendment has explicitly repealed the three-fifths ratio in determining representation in the House,[26] the apportionment requirement itself remains intact. Indeed, Article I, Section 9, which enumerates specific limitations on congressional authority, prohibits any unapportioned direct taxation by the federal government: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[27]

The text of the Constitution yields only three main implications. It merely confirms that poll or capitation taxes, imposed on individual taxpayers at fixed rates that do not vary on the basis of income, wealth, or consumption, constitute direct taxes. In addition, it suggests that there exist other types of direct taxes that are not capitation taxes, without specifying exactly what they are or how to identify them. Lastly, the constitutional text and structure implies that "duties, imposts, and excises" cannot be direct taxes. This is because Article I, Section 8 requires that "all Duties, Imposts and Excises shall be uniform throughout the United States."[28] The requirement of uniformity is irreconcilable with the requirement of apportionment: as long as the distribution of population among the states differs from the distribution of the tax base, apportionment of the direct tax will result in differential (i.e., non-uniform) tax rates from state to state. But again, this implication only gives us three examples of what direct taxes are not, instead of any firm guidance what they are. Even from the founding era, it was often unclear what exactly a direct tax was. During the 1787 Constitutional Convention, Rufus King of Massachusetts famously asked what a direct tax was, and according to James Madison's notes, no one answered.[29] Due to the dearth of textual evidence and the inconclusiveness of historical records, scholars have long concluded that the meaning of direct taxes was unsettled during the Philadelphia Convention, or at least that there was no consensus behind one single definition of direct taxes.[30]

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25 U.S. CONST. art. I, § 2, cl. 3.

26 *See* U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

27 U.S. CONST. art. I, § 9, cl. 4.

28 U.S. CONST. art. I, § 8, cl. 1.

29 *See Pollock*, 158 U.S. at 640.

30 *See, e.g.*, J.H. Riddle, *The Supreme Court's Theory of a Direct Tax*, 15 MICH. L. REV. 566, 566 (1917) (concluding that "the authoritative opinion of those who have examined the records is that there was no definite meaning agreed upon in the Convention and that ["direct tax"] was a vague term," and quoting another scholar as stating that "no one knew exactly what was meant by a direct tax, because no two people agreed." (quoting E.R.A. Seligman, THE INCOME TAX 569 (1914))).

In the wake of the Court's (perhaps unexpected) decision to uphold the individual mandate as a valid exercise of Congress's taxing power in *Sebelius*, some scholars have argued that the term "direct tax" had a plain and clear meaning during the Founding Era. After an examination of the text of the Constitution and political and legislative materials from the 1780s, Professor Natelson concludes that "the distinction between direct and indirect taxes was widely understood during the Founding Era and that the term 'direct tax' was more expansive than commonly realized."[31] But—without providing a full critique that is beyond the scope of the present Article—this conclusion is problematic in at least two ways. First, Professor Natelson's argument depends heavily on historical materials produced outside of the context of the Philadelphia Convention, including from the *Anti-Federalist*,[32] when it is a cardinal rule of interpretation not to rely on loser's legislative history as authoritative or outcome-determinative.[33] It is also possible that specific actors outside of the Convention had a clear understanding of the meaning of direct taxes when there was no majority supporting a single definition at the Convention. Second, much of the same evidence on which Professor Natelson relies for a *broad* Founding-Era conception of direct taxes—for example, John Marshall's statement that direct taxes included lands, stock, and business capital,[34] or a Pennsylvania land tax that included levies not only on land but also on livestock and indentured servants[35]—may also support a *narrow* Founding-Era conception of direct taxes. For Professor Ackerman has shown that the Physiocrats—some of the leading economic thinkers of the eighteenth century—articulated an influential distinction between direct taxation (on land and agricultural production) and indirect taxation (on surplus value derived from agriculture) based on their belief that only agriculture generated wealth.[36] An ostensibly "broad" conception of direct taxes that includes any levy on land, livestock, and business capital can, therefore, also be framed as a "narrow" conception of direct taxes that includes only levies on the (relatively small) agricultural sector.[37] All of this suggests the absence of a settled conception of direct taxes during the Founding Era—the core meaning of the term (capitation taxes) may have been undisputed, but the peripheries were not clearly defined.

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31 *See* Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297, 297 (2015). The normative and doctrinal upshot of this originalist analysis is that the individual mandate—if indeed a tax rather than an exercise of Congress's Commerce Clause power—is a direct tax and must be apportioned among the states. *See id.* at 343-50.

32 *See id.* at 309-10.

33 *See, e.g.*, WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 236-37 (2016) (describing the sore loser's canon of interpretation); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 118-28 (2012) (analogizing reliance on legislative history from the loser's side to confusing a judicial dissent for a majority opinion).

34 Natelson, *supra* note 31, at 309.

35 *Id.* at 312.

36 *See* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 17-18 (1999).

37 *See also* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 855 (2009) (arguing that "direct taxes" cannot seriously be characterized as anything beyond a property tax, and that "[a]n expansive view of apportionment is either not supported by, or is contrary to, the full range of approaches to constitutional interpretation: textualism, Framers' intent, contemporaneous understanding, doctrine, functionalism, and policy").

B. Hylton's Functional Rule

The Supreme Court encountered precisely this question in *Hylton* in 1796, which concerned Congress's imposition of a tax on carriages (with graduated rates based on the type of carriage, e.g., chariots, coaches, and two-wheeled vehicles).[38] Without reaching a precise definition of direct taxes, *Hylton* announced a broad functional rule: "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."[39] In other words, if apportionment of any tax would lead to unjust or inequitable results, that tax is absolved of any constitutional requirement to be apportioned. Justice Chase illustrates this principle with a hypothetical:

> Suppose two States, equal in census, to pay 80,000 dollars each, by a tax on carriages, of 8 dollars on every carriage; and in one State there are 100 carriages, and in the other 1000. The owners of carriages in one State, would pay ten times the tax of owners in the other. A. in one State, would pay for his carriage 8 dollars, but B. in the other state, would pay for his carriage, 80 dollars.[40]

Although the example's algebra is somewhat questionable,[41] the basic logic stands: if apportionment of a tax results in taxpayers in one state paying vastly more than similarly situated taxpayers in another state (for example, ten times as much), the tax is not a direct tax and needs not be apportioned. Framers, according to the Court, could not have intended such horizontal inequity: it was simply unthinkable that a taxpayer in South Carolina should be subject to a $100 tax burden for possessing the exact same type of coach carriage as a Pennsylvania taxpayer who pays $10 in taxes.

It is worthwhile to note the distinctive functional or equitable approach employed by *Hylton*. Broadly speaking, there are two main ways of identifying a direct tax: the court may look to the nature of the tax—i.e., on what base is the tax imposed?—or the court may look to the consequences of the chosen method of taxation—i.e., what results does apportioning the tax according to each state's population produce? In *Hylton*, the Court certainly could have decided the case using the former approach, by characterizing the carriage tax as a duty or excise tax that must be imposed at uniform rates throughout the country. In fact, this was precisely the government's argument at the Circuit Court, where it contended that direct taxes are those imposed on "the revenue and or income of individuals," whereas indirect taxes are those imposed on "their expenses, or consumption."[42] Taxes on carriages, John Wickham (the government's

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[38] Beyond its importance as a precedent for the meaning of "direct taxes" in the Constitution, *Hylton* also provides one of the earliest examples of judicial review of a congressional statute—the Carriage Tax Act of 1794, enacted to raise funds in anticipation of possible military confrontations with England. *See* Robert P. Frankel, *Before* Marbury*:* Hylton v. United States *and the Origins of Judicial Review*, 28 J. SUP. CT. HIST. 1 (2008).

[39] *Hylton*, 3 U.S. at 174.

[40] *Id.*

[41] It seems that, in order to raise $80,000 on 100 or 1000 carriages, the tax would have to be $800 or $80, respectively, not $80 or $8 as Justice Chase states.

[42] 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 363

lawyer) argued, were indirect because they were not imposed on income or income-generating property but on consumption goods that represent a depletion rather a potential increase in future revenue streams.[43] The functional rule announced in *Hylton*, however, does not adopt this approach or regard the nature of the tax base as dispositive in determining the direct/indirect status of a federal tax. The outcome-determinative question is whether—and perhaps to what extent—apportioning the tax according to state populations results in unjust or inequitable treatment of similarly situated taxpayers.

C. Pollock: Reading the Direct Tax Clause as a Federalism Provision

Roughly a century later, the Supreme Court retreated from the functional rule of *Hylton* and held, in *Pollock*, that taxes on real estate and personal property, as well as taxes on rents from real estate and on income from personal property, are direct taxes that must be apportioned among the states.[44] Income and rents were, of course, unevenly distributed in 1895,[45] just as carriages were unevenly distributed in 1796. The Court, however, declined to extend *Hylton*'s rule: despite the manifest inequality and injustice that would result from apportioning the income tax, *Pollock* held it to be a direct tax. Although *Pollock*'s invalidation of the income tax was in effect overruled by the Sixteenth Amendment, which authorized Congress to tax income from whatever source derived,[46] its holding that tax on personal property is a direct tax has persisted. In *Sebelius*, in declining to characterize Affordable Care Act's health insurance penalty as a direct tax, the Court explained that it "continued to consider taxes on personal property to be direct taxes," citing *Eisner v. Macomber*, a case decided after the enactment of the Sixteenth Amendment.[47] The *Sebelius* Court then reasoned that, since the ACA health insurance penalty was neither a capitation tax nor "a tax on the ownership of land or personal property," it was not a direct tax and did not need to be apportioned.[48] If the Court stands by its reading of *Pollock* as holding that taxes on personal property are direct (as it did in *Sebelius*), then a national wealth tax would seem to be unconstitutional, as wealth is clearly personal property, and at least part of the wealth held by high-net-worth households is in the form of land.

(Maeva Marcus ed., 2003).

[43] Curiously, with the passage of the Sixteenth Amendment, this dichotomy has completely flipped: income taxation is now constitutionally authorized without any need for apportionment, while the Supreme Court has unequivocally declared in *Sebelius* that it *continues* to regard taxes on personal property (e.g., for consumption) as direct taxes. *See* National Federation of Independent Business v. Sebelius, 567 U.S. 519, 571 (2012) (citing *Eisner*, 252 U.S. at 218-19).

[44] *Pollock*, 158 U.S. 601.

[45] A recent study, for example, estimates that North Carolina had a per capita income of $60 in 1890, compared to $449 for Montana. *See* Alexander Klein, *Personal Income of U.S. States: Estimates for the Period 1880-1910*, WARWICK U. ECON. RES. PAPERS 56 (Sept. 2009), https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2009/twerp_916.pdf [https://perma.cc/D89E-DSHZ].

[46] *See* U.S. CONST. amend. XVI. It is worthwhile to note that the scope of the Sixteenth Amendment is limited to income taxation.

[47] *Sebelius*, 567 U.S. at 571 (citing *Eisner*, 252 U.S. at 218-19) (holding that a stock dividend without distribution of profits is not "income" within the meaning of the Sixteenth Amendment, and that any taxation of stock dividends must be apportioned among the states).

[48] *Id.*

But such a simplistic reading of *Pollock* ignores the underlying rationale of the decision. Recent discussions emphasize that *Pollock* was controversial in its time, generating a 5-4 vote and four vigorous dissents, and was a manifestation of the *Lochner*-era anachronism of economic substantive due process.[49] This view obscures the fact that *Pollock* also reflects a deep, jurisprudential debate about the meaning and the purpose of the Direct Tax Clause. In his dissent, Justice Harlan castigated the majority for reviving a product of the slavery compromise: the majority "so interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government."[50] According to Justice Harlan, then, the original intent of the Framers in enacting the Direct Tax Clause was to prevent Congress from "tax[ing] slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure."[51] The majority in *Pollock*, however, abused this provision to grant ordinary citizens the immunity from federal income taxation. Also in dissent, Justice Brown agreed with this assessment, commenting that the "rule of apportionment was adopted for a special and temporary purpose, that passed away with the existence of slavery."[52] Such an interpretation of the Direct Tax Clause originates from *Hylton*, where Justice Paterson, in a seriatim opinion, made the following observations, worth quoting in full:

> [The Southern states] possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.[53]

According to Justice Paterson—who himself attended the 1787 Philadelphia Convention, proposed the New Jersey Plan, and signed the Constitution—the purpose of the Direct Tax Clause was to prohibit unapportioned federal taxation on slaves *and* land. Since the Southern states had an abundance of slaves and relatively under-populated (and therefore comparatively unproductive) land, the Constitution protected them against direct taxation that, even framed in neutral terms (e.g., $1 per acre of privately owned land, or $1 per slave), would have disparate impact across the states. In arguing that the majority impermissibly expanded the scope of the Direct Tax Clause, Justices Harlan and Brown in *Pollock* both emphasized the slavery-protecting

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49 *See, e.g.*, Ackerman, *supra* note 36, at 39-43 (grouping *Pollock* with the *Child Labor Tax Case* under the "Age of *Lochner*"); Johnsen & Dellinger, *supra* note 20, at 114, 135 ("*Pollock* stands, along with other *Lochner*-era decisions, as a quintessential example of the Court grossly exceeding its authority on a matter of extreme importance.").

50 *Pollock*, 158 U.S. 601, 684 (Harlan, J., dissenting).

51 *Id.* at 645 (Harlan, J., dissenting).

52 *Id.* at 687 (Brown, J., dissenting).

53 *Hylton*, 3 U.S. at 177.

aspect this provision.

But if we scrutinize Justice Paterson's words, it becomes less clear that the Direct Tax Clause aims *solely* to protect slavery. After all, the Clause also protected Southern states (or more generally, the states that are less densely populated than the national average) against unapportioned federal taxation of land. In particular, it is difficult to determine the level of *generality* with which to view the Direct Tax Clause: (1) At the most specific and selective level, we may interpret it as a product of the slavery compromise, which obviously has and should have no application today;[54] (2) We may also interpret it as a specific proscription of unapportioned federal taxation of land and slaves *only*; (3) At the most general level, however, we interpret the Direct Tax Clause as a federalism provision, one that prevents the federal government from enacting any scheme of taxation that, because of its disparate impact across the states, would destroy the ability of the several states to tax on their own. The majority in *Pollock* adopted exactly the third possibility and interpreted the Direct Tax Clause at the highest level of generality:

> The states, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit. . . . [In ratifying the Constitution, t]hey retained the power of direct taxation, and to that they looked as their chief resource. . . . Therefore they did not grant the power of direct taxation without regard to their own condition and resources as states, but they granted the power of apportioned direct taxation. . . .[55]

Although I do not necessarily agree with the *Pollock* majority's characterization of the Direct Tax Clause, it is not unreasonable. Under the Articles of Confederation, the national government had no independent taxing power but relied on the states and foreign loans to sustain its operations. An intense object of debate leading up to the ratification of the Constitution, therefore, concerned the broad taxing power granted to the national government under Article I,[56] and, more precisely, whether state and local governments could continue to raise revenue after the federal government chose to exercise its taxing power.[57] After the Civil War, constitutional amendments repealed many of the pro-slavery provisions (e.g., the Fourteenth Amendment repealed the Three-Fifths Clause),[58] but the Direct Tax Clause was left intact. For a textualist-

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54 *See* Ackerman, *supra* note 36.

55 *Pollock*, 158 U.S. at 620-21.

56 *See* U.S. CONST. Art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.").

57 *Compare* THE FEDERALIST NO. 31 (Alexander Hamilton) (describing and rejecting as speculative the fear that "all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments") *with* THE ANTI-FEDERALIST NO. 6 (Brutus) (observing that if taxpayers cannot afford to pay a federal tax and a state tax, they would forgo paying the state tax because of the Supremacy Clause, with the result that "the respective state governments will not have the power to raise one shilling in any way, but by the permission of the Congress").

58 *Compare* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . including . . . three fifths of all other Persons.") *with* U.S. CONST. amend. XIV ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

originalist court, since the Direct Tax Clause remains in the constitutional text, and since the Civil War ended the institution of slavery, a ready option is to interpret the Clause at a high level of generality. Read as a provision of federalism, the Direct Tax Clause is meant to preserve the taxing capacities of state and local governments, so that they can exercise their traditional taxing power concurrently with the federal government, and consequently spend in accordance with local priorities and preferences.

Therefore, at least with respect to wealth taxation, we can easily reconcile the underlying rationale of *Pollock* with the functional rule of *Hylton*. If apportionment of a direct tax would produce, in *Hylton*'s words, "great inequality and injustice" among the states,[59] it would necessarily impair the ability of *some* states to tax (though perhaps rewarding other states with increased ability to tax).[60] To use the example that Justice Chase offered in *Hylton*: if the carriage tax is apportioned among the states, and state A faces an $80 tax per carriage while state B faces an $8 tax per carriage, the apportionment would clearly impair state A's taxing capacity. An apportioned wealth tax would be even more detrimental to the ability of certain state and local governments to tax, for two reasons: *first*, wealth includes a much broader set of personal properties than carriages, so an apportioned wealth tax would *more completely* destroy the ability of certain (i.e., poor) states to tax—not only would the state be unable to tax carriages, it would also find other property taxes hard to collect; *second*, wealth, unlike ordinary consumer goods, is more unevenly distributed, especially for households with net worths above $50 million—New York likely has many more ultra-millionaires than West Virginia, even after adjusting for differences in population.[61] The upshot is that the functional rule of *Hylton* concerns the unfair consequences of apportioning a direct tax *not only* to the taxpayers *but also* to the states and localities that rely on at least some inter-jurisdictional equity in the distribution of federal tax burdens. In short, both equitable treatment of similarly situated individual taxpayers and federalism animate the functional rule.

II. REVIEW OF LITERATURE

This Part of the Article briefly reviews previous scholarship on direct and wealth taxation. The most authoritative treatment of the Direct Tax Clause is Bruce Ackerman's 1999 article, *Taxation and the Constitution*, which argues that the provision should "rest in peace."[62] Emphasizing the "tainted origins of the direct tax clauses," Professor Ackerman describes them as parts of the slavery compromise during the Constitutional Convention, a setup for the sake of political expedience rather than independent judgment about designing a tax system.[63] As a result, the Supreme Court has narrowly interpreted the Direct Tax Clause, making sure not to expand the scope of a bargained-for exception to Congress's broad taxing power.[64] This treatment, of course,

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59 *Hylton*, 3 U.S. at 174.

60 For example, should Congress enact an apportioned national wealth tax—which would definitely survive a constitutional challenge under the Direct Tax Clause—and use it to finance federal spending, Utah residents may face a wealth tax rate of 15% while New York residents may face one of 4%. *See infra* Section III.A. States that bear a lighter federal tax burden can then preserve more of their tax base for state and local taxation.

61 *See also* Part III.

62 Ackerman, *supra* note 36, at 3.

63 *Id.* at 4.

64 *Id.* at 4, 20-28.

accords with the general rule that exceptions must be narrowly interpreted.[65] An act of judicial activism that radically departed from precedents, *Pollock* was incorrectly decided at the time and remains, deservedly, a "dead letter," as subsequent Supreme Court decisions demonstrate.[66] Since the Civil War and the Reconstruction Amendments effectively overruled the slavery compromise, the direct tax provisions should have no place in today's constitutional jurisprudence. National tax policy, Professor Ackerman contends, should be crafted with an eye toward distributive justice, without any regard for issues of constitutionality.[67]

Recent scholarship has generally followed this path. In an article directly addressing the constitutionality of a wealth tax, Professors Johnsen and Dellinger argue that *Pollock* was "so wrong and contrary to national interests that it directly inspired a constitutional amendment."[68] They contend further that the "erosion of *Pollock* through a combination of Supreme Court decisions and the Sixteenth Amendment" constitutes the only reason that the Supreme Court has not overruled it (yet).[69] Similarly, Professor Johnson argues that *Pollock* must be overruled, because the majority "used apportionment as a convenient excuse to kill a federal tax that the Justices disliked for political reasons."[70]

On the other extreme of the spectrum, Professor Erik Jensen argues that the Constitution does *not* grant Congress plenary power in taxation, and that certain national consumption taxes would be unconstitutional.[71] In supporting a broad interpretation of the Direct Tax Clause, as a check on oppressive government, Professor Jensen contends that *Pollock* was correctly decided, whereas *Hylton* is "inherently flawed, largely because the Justices relied excessively on the imaginative, but misleading, arguments of Alexander Hamilton."[72] Other scholars have expressed similar doubts about the constitutionality of the wealth tax, whether it is framed as a plain tax on wealth or as an income tax on a base equal to the risk-free return on assets.[73]

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65 *See, e.g.*, WILLIAM N. ESKRIDGE, INTERPRETING LAW 111 (2016) ("When a general policy is qualified by an exception or proviso, courts 'usually read the exception narrowly in order to preserve the primary operation of the policy.'" (quoting Comm'r v. Clark, 489 U.S. 726, 739-40 (1989))).

66 Ackerman, *supra* note 36, at 6, 28-33.

67 *Id.* at 3 ("[M]odern-day reformers should be focusing on a single objective—to convince the American People of the twenty-first century of the justice of their cause."); *see also* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).

68 Johnsen & Dellinger, *supra* note 20, at 135.

69 *Id.* at 130.

70 Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Taxes*, 21 CONST. COMMENT. 295, 298 (2004); *accord* Calvin H. Johnson, *Purging out Pollock: The Constitutionality of Federal Wealth or Sales Taxes*, 97 TAX NOTES 1723 (2002).

71 *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional*, 97 COLUM. L. REV. 2334, 2338 (1997).

72 *Id.* at 2351 (noting in addition that "most commentators assume that *Hylton* is right and *Pollock* wrong").

73 *See, e.g.*, George K. Yin, *Accommodating the "Low-Income" in a Cash-Flow or Consumed Income Tax World*, 2 FLA. TAX REV. 445, 464-65 (1995) (discussing how certain models for progressive wealth taxation, such as one imposed periodically rather than on transfers, are "of questionable constitutional validity in the absence of state apportionment"). *Compare* Deborah H. Schenk, *Saving the Income Tax as a Wealth Tax*, 53 TAX L. REV. 423, 442 (2000) ("[T]he demonstration of economic equivalence [between a wealth tax and an income tax on risk-free returns to certain assets] might well persuade the Court to uphold the wealth tax on the basis that, in substance and labels aside, in fact, it is a tax on income within the Sixteenth Amendment and not a direct tax.") *with* Joseph Bankman & Daniel Shaviro, *Piketty*

My approach here contributes to existing scholarship in two ways. *First*, by focusing on the *Pollock* majority's interpretation of the Direct Tax Clause as a federalism provision, it challenges traditional assumptions and argues that the underlying rationale, at least, of *Pollock* can be reconciled with the functional rule of *Hylton*. *Second*, by providing an empirical analysis of how a wealth tax would be apportioned, the Article argues that neither the rationale of *Pollock* nor the rule of *Hylton* justifies characterizing the wealth tax as a direct tax.

III. APPORTIONING THE WEALTH TAX

The Constitution instructs that direct taxes be laid "in Proportion to the Census,"[74] i.e., in proportion to the population counted by the U.S. Census by state. This Part of the Article examines how the wealth tax would be apportioned in accordance with the Constitution and discusses the federalism concerns that arise from apportionment.

A. Methodology

A methodological note first: accurate data on the geographic distribution of wealth are difficult to obtain. The best data on the wealth and net worth of U.S. households may be found in the Survey of Consumer Finances (SCF), a comprehensive, triennial study of the financial conditions of over 6,000 families maintained by the Federal Reserve.[75] Unfortunately, "due to strict disclosure agreements," SCF does not disclose any geographic data (e.g., the state of residence of the surveyed families).[76] The second-best data come from the Internal Revenue Service (IRS), which publishes both estate-tax and personal-wealth data.[77] Again, because "thinness of the data creates large disclosure concerns in many states with smaller populations," the IRS does not publish estate-tax or personal-wealth data that are divided up by state *and* by sizes of the estate or net worth.[78] Instead, the only data available by state are the numbers and the wealth of households with net worth above $5 million.[79]

Although the IRS personal-wealth data are not perfect for assessing the geographic distribution of wealth across the United States, they are sufficient for the purposes of this Article

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in America: A Tale of Two Literatures, 68 TAX L. REV. 453, 491 (2015) (explaining that, in order for an income tax to mimic the wealth tax perfectly, it must be "determined solely by applying the tax rate to one's wealth at the relevant moment" and therefore "face the same constitutional challenge as a straightforwardly labeled property tax").

74 U.S. CONST. art. I, § 9, cl. 4.

75 *See Survey of Consumer Finances (SCF)*, BOARD OF GOVERNORS OF FED. RES. SYS., https://www.federalreserve.gov/econres/scfindex.htm [https://perma.cc/K2MP-TM2W].

76 Email from SCF Staff, Board of Governors of the Federal Reserve System, to Alex Zhang (Nov. 20, 2019, 06:30 EST) (on file with author).

77 *See SOI Tax Stats—Estate Tax Statistics*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics [https://perma.cc/RG2L-XLKW] (indicating that the IRS publishes data on estate tax statistics); *SOI Tax Stats—Personal Wealth Statistics*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-personal-wealth-statistics [https://perma.cc/S2ZE-YA8H] (indicating that the IRS publishes data on personal wealth statistics).

78 Email from David Jordan, Statistics of Income Division, Internal Revenue Service, to Alex Zhang (Nov. 25, 2019, 13:45 EST) (on file with author).

79 I have attached the spreadsheet at the end of the Article. *See infra* appendix I (containing such data).

for three reasons. First, in order to examine how a wealth tax would be apportioned among the states, I need not the exact amount of wealth possessed by taxpayers within each state (expressed in absolute numbers), but only the relative percentage of wealth distribution across the states. That is, assessing exactly how unequally a wealth tax would be apportioned does not need the type of data necessary for calculating the revenue estimates of the wealth tax. As a result, while the IRS personal-wealth statistics are based on amounts reported on estate tax returns, they should reflect at least the comparative distribution of wealth across the states, as long as we assume that the tax-evading ability of, e.g., the ultra-rich in Delaware is roughly equivalent to the tax-evading ability of, e.g., the ultra-rich in Arizona. Since the personal-wealth data are compiled from estate tax returns, they automatically take into account the type of techniques—whether they are valuation irregularities, creation of corporate or trust entities to shield wealth from taxation, or offshoring—that rich taxpayers would surely utilize to evade the wealth tax.

Second, it is certainly true that wealth distribution of households with net worth above $5 million does not perfectly mirror the wealth distribution of households with net worth above $50 million (the starting point at which Elizabeth Warren's wealth tax would be assessed).[80] But if anything, wealth held by households with net worth above $50 million would be even more unevenly distributed than wealth held by households with net worth above $5 million: New York, for example, would likely have a much larger percentage of the ultra-rich than West Virginia, compared with the relative percentages of the rich.

Lastly, the IRS data do not account for the possibility of estate tax evasion on the state level. That is, wealthy New Yorkers (or residents of any high-tax jurisdiction) might report their residence in Florida (or any low-tax jurisdiction). However, the result of this evasion would shift wealth out of wealthy states and toward less wealthy states in the IRS data, implying an even larger actual imbalance of wealth distribution in the United States. Therefore, an accurate apportionment of the wealth tax, assessed at $50 million, would create even more inequality and injustice, bolstering the main argument of this Article.

B. Apportionment

Based on the IRS personal-wealth data for 2013[81] and the 2013 census estimates of state population,[82] and assuming a 2% wealth tax rate for D.C., which has the highest per capita wealth held by households with net worth above $5 million,[83] the table below lists the wealth tax rate as apportioned among the states. The states are ordered from the richest jurisdiction, with the lowest wealth tax rate (D.C.; 2%), to the poorest jurisdiction, with the highest wealth tax rate (West Virginia; 40.027%).

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[80] *See supra* note 4 and accompanying text (indicating that Senator Warren's wealth tax plan starts with household net worth above $50 million).

[81] *Infra* Appendix I. The 2013 data set is the most recent from the IRS; Email from David Jordan, IRS SOI, to Alex Zhang, *supra* note 78.

[82] *State Population Totals and Components of Change: 2010-2018*, U.S. CENSUS BUREAU (July 22, 2019), https://www.census.gov/data/datasets/time-series/demo/popest/2010s-state-total.html [https://perma.cc/545Y-NHPP].

[83] *I.e.*, suppose that the amount of wealth, held by households with net worth > $5 million and as measured by the IRS, is expressed as A/W, and suppose that the census population is expressed as P. Then D.C., the richest jurisdiction, would have the highest A/W divided by P, and West Virginia, the poorest jurisdiction, would have the lowest A/W divided by P.

Table 1: Wealth Tax Apportionment

State of residence	Household with net worth > $5 million		Census Population 2013	Wealth Tax Rate (%) (Assuming D.C. = 2%)
	Number	Wealth (in millions)		
District of Columbia	4,993	46,716	650,431	2.000
Connecticut	12,316	207,003	3,594,915	2.495
Montana	1,073	45,527	1,013,564	3.198
Vermont	2,287	26,514	626,212	3.393
Wyoming	1,412	21,746	582,123	3.845
New York	53,038	712,276	19,628,043	3.958
Nebraska	3,299	59,527	1,865,414	4.501
Florida	36,703	617,817	19,563,166	4.549
North Dakota	2,877	22,144	721,999	4.684
California	78,413	1,123,895	38,280,824	4.893
Nevada	3,383	78,822	2,776,972	5.061
Maine	4,335	37,156	1,328,196	5.135
Minnesota	11,323	145,541	5,413,693	5.343
Alaska	2,648	19,056	737,045	5.556
Iowa	4,448	75,025	3,093,078	5.922
Massachusetts	12,383	158,892	6,713,944	6.070
New Jersey	13,957	200,859	8,858,362	6.335
Kansas	5,643	61,054	2,893,510	6.808
Oklahoma	9,960	80,432	3,853,205	6.882
Rhode Island	2,322	21,151	1,055,122	7.166
Texas	41,736	530,581	26,489,464	7.172
Maryland	7,792	118,316	5,923,704	7.192
South Carolina	7,889	91,076	4,764,153	7.514
Missouri	3,899	113,689	6,040,658	7.632
Illinois	17,597	240,630	12,898,269	7.700
Washington	10,303	128,356	6,962,906	7.792
Colorado	4,962	92,484	5,270,482	8.186
Idaho	2,660	28,187	1,611,530	8.213
South Dakota	1,165	14,388	842,270	8.409
Virginia	11,208	137,868	8,253,053	8.599
New Mexico	4,763	34,411	2,092,792	8.736
New Hampshire	1,684	20,798	1,326,408	9.161
Pennsylvania	13,428	194,665	12,776,621	9.428
Kentucky	3,288	55,828	4,404,817	11.334
Alabama	4,115	55,864	4,830,460	12.421
North Carolina	11,931	113,321	9,843,599	12.478

(…continues on next page)

Wisconsin	4,722	63,550	5,736,952	12.968
Mississippi	2,340	32,678	2,988,797	13.138
Georgia	10,149	108,776	9,973,326	13.170
Indiana	5,416	66,877	6,568,367	14.108
Ohio	10,861	116,394	11,576,576	14.287
Michigan	8,535	98,191	9,913,349	14.503
Arizona	5,345	65,383	6,634,999	14.577
Utah	1,701	27,181	2,897,927	15.315
Hawaii	826	13,066	1,408,453	15.484
Louisiana	3,611	40,627	4,624,577	16.351
Oregon	3,115	33,312	3,922,908	16.916
Tennessee	4,716	48,567	6,493,432	19.206
Arkansas	1,342	19,783	2,959,549	21.490
Delaware	350	3,571	923,638	37.154
West Virginia	613	6,653	1,853,873	40.027

As Table 1 shows, apportioning the wealth tax would create precisely the kind of "great inequality and injustice" that *Hylton* prohibits.[84] Recall that Justice Chase in *Hylton* illustrates the meaning of "great inequality and injustice" by example of an apportionment that would result in taxpayers in one state paying *ten times* as much tax per carriage than taxpayers in another state.[85] Apportioning the wealth would result in even greater inequality and injustice: while residents of D.C. would pay a 2% tax on their net worth, residents of West Virginia would have to pay a 40% tax on their net worth, i.e., *twenty times* as much tax as D.C. taxpayers. If a 10× difference is sufficient to characterize a tax as an indirect tax, *a fortiori*, a 20× difference in tax rate on a tax base that is much more all-inclusive than a carriage tax suffices to characterize the wealth tax as indirect. Overall, apportionment would subject 18 states to tax rates that are at least five times as much as the tax rate in the richest jurisdiction. Even disregarding D.C., which technically is not a state, West Virginia taxpayers would encounter a tax burden that is *sixteen times* as much as Connecticut taxpayers. Therefore, under *Hylton*'s functional rule, the wealth tax should not be regarded as a direct tax.

A second insight that we may draw from Table 1 is that apportionment of the wealth tax creates such disparate tax rates that would dramatically impair, if not completely destroy, the ability of state and local governments to tax—a result contrary to the *Pollock* majority's reading of the Direct Tax Clause as a provision of federalism. Recall that the *Pollock* Court explained that the purpose of the Direct Tax Clause was to preserve the capacity of several states to tax concurrently with the federal government.[86] Imposing an annual, 40% (or even 15% or 20%) tax on more or less the entirety of the assets of households (even of ultra-rich households) would surely destroy the ability of the states to impose any additional tax on top of it.[87] This is especially

84 *Hylton*, 3 U.S. at 174.

85 *Id.*

86 *See supra* Part I (demonstrating that the *Pollock* Court held the Direct Tax Clause had such a purpose).

87 In fact, a wealth tax at such a high rate, combined with the income tax, would make federal taxation alone in these poor jurisdictions reach almost confiscatory levels.

the case considering the TCJA's limitation of the deduction for state and local taxes to $10,000.[88] If the Supreme Court were to adopt *Pollock*'s reading of the Direct Tax Clause as a provision of federalism, holding the wealth tax as a direct tax that must be apportioned among the states would run counter to the very purpose of the clause. Apportionment would practically eliminate state and local taxation as we know it, instead of enabling it. It would also create huge incentives for capital to flow from poor (high-tax) to rich (low-tax) states, further exacerbating the uneven geographic distribution of wealth. For a Supreme Court that is highly attentive to issues of federalism,[89] apportionment of the wealth tax leads to a disastrous result.

A more careful look at Table 1 reveals an additional fact: apportioning the wealth tax would harm, most of all, the Southern states that, according to Justice Paterson in *Hylton*, the Direct Tax Clause was meant to protect.[90] If the original meaning—conceived at a very high level of specificity—was to prevent the enactment of facially neutral tax regimes that disparately impact the Southern states with less productive land and other resources, then apportionment of the wealth tax would fall directly into what the Direct Tax Clause was intended to prohibit. Among the 25 states with the highest apportioned wealth tax rates, 10 are in the South, including West Virginia, Arkansas, Tennessee, Louisiana, Georgia, Mississippi, North Carolina, Alabama, Kentucky, and Virginia. These represent the vast majority of the Southern states, and apportionment of the wealth tax under the Direct Tax Clause—which was originally inserted into the Constitution to protect them from unfair federal taxation—would impair their ability to tax most of all. The current Supreme Court has espoused originalism—at least a specific form of originalism—as an interpretive methodology[91] and thus ought to take into account the originalist argument against apportionment.[92]

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[88] § 11042, 131 Stat. at 2085 (codified as amended at I.R.C. § 164).

[89] *See, e.g.*, Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS 441, 441 (2016) ("Federalism has been a central focus of some of the U.S. Supreme Court's most important and controversial decisions since John Roberts became Chief Justice in 2005.").

[90] *See supra* note 53 and accompanying text (indicating that *Hylton* intended to protect Southern states). It would be somewhat ironic if the 2017 tax act's limit on state and local tax (SALT) deduction ends up harming the states that would bear a heavy federal tax burden under an apportioned national wealth tax. The $10,000 SALT cap was wide perceived as an attempt by the Trump administration to punish Democratic states that supported Hilary Clinton during the 2016 presidential election. *See, e.g.*, Alicia Parlapiano & K.K. Rebecca Lai, *Among the Tax Bill's Biggest Losers: High-Income, Blue State Taxpayers*, N.Y. TIMES (Dec. 5, 2017), https://www.nytimes.com/interactive/2017/12/05/us/politics/tax-bill-salt.html [https://perma.cc/M5T9-XPPZ] (identifying a correlation between the states hit hardest by the 2017 tax bill and those that most strongly supported Hillary Clinton in 2016); Carolyn Y. Johnson et al., *Blue States Will Be Hit Hardest by GOP Tax Plan's Limits on Deductions*, WASH. POST (Nov. 3, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/11/02/the-gop-tax-plan-limits-deductions-used-in-blue-states [https://perma.cc/K48V-H4RG] (providing additional support for the suggestion that predominantly-Democratic states were hit hardest by the 2017 tax bill). Under an apportioned national wealth tax, taxpayers in traditionally low-state-and-local-tax jurisdictions are likely to face heavy federal tax burdens when they cannot deduct more than $10,000 of state and local taxes that would fund local expenditures.

[91] *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412, 423 n.37 (providing an additional argument that originalism may exert a "gravitational pull" or influence on non-originalist jurists).

[92] *See also* Ackerman, *supra* note 15 ("If the Roberts court were to hold true to its purported originalist principles, it would have to uphold a wealth tax.").

C. Apportionment and Federalism

Scholarly conceptions of federalism have shifted dramatically in the past few decades.[93] Partly motivated by the Rehnquist and Roberts Courts' emphases on federalism in constitutional adjudications,[94] and partly responding to the demise of the sovereignty model,[95] scholars have innovatively theorized the relationship between states and the federal government in the post-New-Deal and post-Civil-Rights-Movement era. This section situates the main issue addressed by the Article—the state-by-state apportionment of a wealth tax—within the federalism literature, arguing that the results of apportionment not only destabilize our system of federalism but also impair the states' abilities to carry out *federal* regulations and initiatives.

The traditional notion of federalism attributes sovereignty to both state and the federal governments: within its own (separate and exclusive) sphere of regulation, each government possesses plenary power without interference.[96] Under the framework of dual and sovereignty-based federalism, which is outdated but still occasionally invoked by the Court, the apportionment of a national wealth tax leads to disastrous results. First, although the precise contours of sovereignty as a concept of political control and authority remain murky, it is generally accepted that the ability to tax and to determine tax policy is central to sovereignty.[97] Tax policy is an instrument through which governments effectuate many of their substantive economic goals and execute welfare programs (e.g., the Earned Income Tax Credit). Severe restrictions on a state's ability to shape its domestic tax policy, coupled with a substantial reduction in its taxing power, thereby represent a concrete threat to the governmental entity's sovereignty. Second, if we take seriously the idea that state and local governments are authoritative over certain spheres of

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[93] *See generally* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017) (surveying the past two generations of federalism literature and proposing a research agenda for federalism scholars in the twenty-first century).

[94] *See* CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT (2012) (indicating that the Rehnquist and Roberts Courts heavily relied on federalism concerns in their constitutional adjudications); Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (providing additional support for this heavy focus on federalism by the Rehnquist and Roberts Courts); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX L. REV. 1 (2004).

[95] *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) ("[I]deas that true sovereignty in our system lies only in the People of the United States, and that all governments are thus necessarily limited . . . pervade the Constitution and inform its structure of federalism.").

[96] *See* Corwin, *supra* note 95, at 4 (1950) ("Within their respective spheres the two centers of government are 'sovereign' and hence 'equal.'"); *see also* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 12 (2010) ("Sovereignty—which formally guarantees a state's power to rule without interference over a policymaking domain of its own—has sometimes been invoked as federalism's definitional limit.").

[97] *See* Tracey A. Kaye, *Show Me the Money: Congressional Limitations on State Tax Sovereignty*, 35 HARV. J. ON LEGIS. 149, 149 (1998) ("One of the core elements of sovereignty reserved to the states under the Constitution is the power of a state to define its own tax system."); *see also* Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 559 (2009) ("[O]ne important 'right' of the sovereign state—tax sovereignty—carries meaningful content. The ability to control tax policy enables a state to meet its functional duties (revenue raising and fiscal policy design) and support its two important democratic norms—democratic accountability and democratic legitimacy.").

regulation (e.g., education and municipal services)—or even the much softer, process-federalism suggestion of "preserv[ing] the regulatory authority of state and local institutions to legislate policy choices"[98]—apportioning the wealth tax deprives the state and local governments of any fiscal resource to implement their policy preferences. In short, whether we think of sovereignty as depending on separate spheres of regulation or on states' autonomy, it is impossible to govern without the ability to tax—a lesson that the national government learned well from the Articles of Confederation.

The dual sovereignty theory of federalism has fallen out of favor in the academy,[99] even if some scholars maintain that newer conceptions still reflect a troubling persistence of the sovereignty assumption.[100] Due to federalization—the process through which the federal government moves into domains traditionally regulated by states—recent federalism literature increasingly emphasizes the significant roles played *by the states* in federal regulatory regimes.[101] State and local agencies and institutions, for example, play central roles in implementing the health care reforms of the Affordable Care Act,[102] constitute an indispensable instrument in the regulation of immigration,[103] and even shape policies in national security and counter-terrorism,[104] which are areas traditionally thought to belong exclusively to the federal government. If the state governments lose their ability to tax and their (relative) fiscal independence, they will cease to fulfill their duties (and use their powers) as "servants" to the federal government.[105]

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98 Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000).

99 *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 8 SUP. CT. REV. 346, 346 (1985) ("The rhetoric of state sovereignty is responsible for much of the intellectual poverty of our federalism-related jurisprudence."); *see also* Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, 55 NOMOS 34, 36 (2014) ("Dual federalism died in the middle of the twentieth century because the Court found itself unable to draw determinate lines to define the exclusive sphere of state authority into which national power might not enter.").

100 *See* Gerken, *supra* note 93, at 1698 ("The scholarly response to the death of sovereignty has been either to move to the nationalist camp, all but erasing the states from constitutional discourse, or to pivot from a sovereignty account of state power to an autonomy account. Ironically, both positions reveal the persistence of the old sovereignty story.").

101 *See id.* at 1700-02 (asserting various domains that states assert power informally within the federal regulatory schemes regulating traditionally state domains).

102 *See* Abbe Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 539-40 (2011) (highlighting the Affordable Care Act's requirement that states establish health insurance exchanges).

103 *See* Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) ("[T]he federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole to absorb immigration flows and manage the social and cultural change that immigration inevitably engenders.").

104 *See* Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012) (describing the various ways that state statutes, state constitutional doctrines, municipal legislation and regulations, judicial consent decrees, and state and local administrative guidelines are used to shape and implement federal national security and counter-terrorism efforts).

105 Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006).

CONCLUSION: HOW TO DRAFT THE WEALTH TAX

This Article argues that both the functional rule of *Hylton* and the underlying rationale of *Pollock* disfavor classifying the wealth tax as a direct tax. Under the former, apportionment would create great inequality and injustice; under the latter, apportionment would impair the taxing powers of some of the poorest states in the nation. Although I arrive at this conclusion from a different path, debates about wealth taxation—as Professor Ackerman argues—should be resolved on the merits, i.e., in accordance with a democratic deliberation about its potential to further ideals of social and distributive justice.[106]

As this Article goes to print, Joe Biden has emerged as the 2020 Democratic presidential nominee. But calls for a progressive wealth have not ceased. The novel coronavirus is currently ravaging the world, and there is preliminary evidence that the COVID-19 pandemic has disparately impacted poorer communities[107]—who cannot afford to stay at home and engage in social distancing—*and* will exacerbate existing inequality.[108] As a result, prominent scholars, such as Professor Daniel Markovits, have advocated imposing a one-time assessment of a 5% wealth tax in order to fund the federal government's coronavirus relief efforts.[109] The wealth tax has captured the liberal imagination for the past few decades—for good reasons—and as long as economic inequality remains a defining social issue of our time, a progressive wealth tax will continue to be a staple of political debate.

In addition, both the doctrinal and the apportionment analyses developed here provide policy suggestions about how the wealth tax should be drafted.[110] By focusing on apportionment and issues of federalism, I hope to change the framing of the current debate: the relevant question is *not* whether a wealth tax would be constitutional or would be held constitutional by the current Supreme Court; rather, the question is whether a wealth tax needs or should be apportioned *in order to* pass constitutional muster. Therefore, in drafting the wealth tax legislation, Congress should consider adding a clause that provides for a constitutional apportionment among the states, *should the wealth tax be judicially characterized as a direct tax*. In other words, if a federal court adopts such a broad view of the Direct Tax Clause as to subsume the wealth tax under it, the court

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106 *See supra* note 67 and accompanying text.

107 *See* Jennifer Valentino-DeVries et al., *Location Data Says It All: Staying at Home During Coronavirus Is a Luxury*, N.Y. TIMES (Apr. 3, 2020), https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-stay-home-rich-poor.html [https://perma.cc/A8Z7-8BXR].

108 *See* Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html [https://perma.cc/K73V-KCJ5].

109 *See* Daniel Markovits, *A Wealth Tax Is the Logical Way to Support Coronavirus Relief*, N.Y TIMES (Apr. 21, 2020), https://www.nytimes.com/2020/04/21/opinion/coronavirus-wealth-tax.html [https://perma.cc/2PG8-ZFXG].

110 *Cf.* John T. Plecnik, *The New Flat Tax: A Modest Proposal for a Constitutionally Apportioned Wealth Tax*, 41 HASTINGS CONST. L.Q. 483, 514-15 (proposing that the federal government should collect a wealth tax at a uniform rate and return the excess unapportioned share of the tax revenue to the states of origin via a pick-up tax mechanism, in order to satisfy the Direct Tax Clause). Although Professor Plecnik's pick-up tax mechanism may resolve the constitutional difficulty, the highly uneven distribution of wealth (and the apportionment schedule, *see supra* tbl.1) means that the pick-up mechanism will result in very little federal revenues from the wealth tax (and a large pick-up tax revenue to the wealthy states). The main point of enacting a wealth tax, after all, is to pay for ambitious federal social-welfare programs, *see supra* note 7 and accompanying text, not to enrich the treasuries of certain state governments.

will also have to impose an apportionment schedule—an unjust and inequitable one—on the taxpayers. The apportionment clause of a wealth tax legislation forces the federal judiciary to confront the uneasy political consequences of its own Direct-Tax-Clause jurisprudence: will judges impose substantive injustice—which surely results from apportionment[111]—as a cost of constitutionality?[112]

111 *See supra* tbl.1.

112 Of course, a federal court may also declare that the apportionment of the wealth tax itself violates the federalism provisions of the Constitution, in addition to invalidating an unapportioned wealth tax. But such a scenario would be unprecedented, and today's federal courts are not generally inclined to (and certainly not equipped to) reach tax-policy judgments of national significance. The recent litigation concerning the 2017 tax act's limit on SALT deductions is instructive. In July 2018, New York, Connecticut, Maryland, and New Jersey filed lawsuit in federal court, arguing that TCJA's $10,000 cap on SALT deductions violated the Tenth Amendment and exceeded Congress's taxing power. Complaint & Demand for Jury Trial, *New York v. Mnuchin*, 18-CV-6427 (JPO), 2019 WL 4805709 (S.D.N.Y. 2019). The federal district court quickly granted the federal government's motion to dismiss the four states' constitutional challenge. In dismissing the lawsuit, the court held that the TCJA cap does not violate the Tenth Amendment, since the states "remain free to exercise their tax power however they wish," and the lone fact that a legislation "affects the decisional landscape within which states must choose how to exercise their own sovereign authority" does not "render[] the law an unconstitutional infringement of state power." New York v. Mnuchin, 2019 WL 4805709, at *15 (quoting United States v. Ptasynski, 462 U.S. 74, 82, 103 (1983)).

APPENDICES

Appendix I: High Net Worth Households by State [113]

State of residence	Net worth (Household net worth > $5 million)	
	Number of households	Wealth (millions USD)
Total	**481,239**	**6,542,469**
Alabama	4,115	55,864
Alaska	2,648	19,056
Arizona	5,345	65,383
Arkansas	1,342	19,783
California	78,413	1,123,895
Colorado	4,962	92,484
Connecticut	12,316	207,003
Delaware	350	3,571
District of Columbia	4,993	46,716
Florida	36,703	617,817
Georgia	10,149	108,776
Hawaii	826	13,066
Idaho	2,660	28,187
Illinois	17,597	240,630
Indiana	5,416	66,877
Iowa	4,448	75,025
Kansas	5,643	61,054
Kentucky	3,288	55,828
Louisiana	3,611	40,627
Maine	4,335	37,156
Maryland	7,792	118,316
Massachusetts	12,383	158,892
Michigan	8,535	98,191
Minnesota	11,323	145,541
Mississippi	2,340	32,678
Missouri	3,899	113,689
Montana	1,073	45,527
Nebraska	3,299	59,527
Nevada	3,383	78,822
New Hampshire	1,684	20,798

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[113] Amounts are in millions of dollars. Aaron Barnes, *Personal Wealth, 2013*, at 22 tbl.6, STAT. OF INCOME, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-soi/soi-a-inpw-id1902.pdf [https://perma.cc/Y2AZ-F3L2].

New Jersey	13,957	200,859
New Mexico	4,763	34,411
New York	53,038	712,276
North Carolina	11,931	113,321
North Dakota	2,877	22,144
Ohio	10,861	116,394
Oklahoma	9,960	80,432
Oregon	3,115	33,312
Pennsylvania	13,428	194,665
Rhode Island	2,322	21,151
South Carolina	7,889	91,076
South Dakota	1,165	14,388
Tennessee	4,716	48,567
Texas	41,736	530,581
Utah	1,701	27,181
Vermont	2,287	26,514
Virginia	11,208	137,868
Washington	10,303	128,356
West Virginia	613	6,653
Wisconsin	4,722	63,550
Wyoming	1,412	21,746

Appendix II: Apportionment of the Wealth Tax (Alphabetical)[114]

State of residence	Net worth		Census Population 2013	Wealth Tax Rate (%) (Assuming D.C. = 2%)
	Number	Amount (millions USD)		
Alabama	4,115	55,864	4,830,460	12.421
Alaska	2,648	19,056	737,045	5.556
Arizona	5,345	65,383	6,634,999	14.577
Arkansas	1,342	19,783	2,959,549	21.490
California	78,413	1,123,895	38,280,824	4.893
Colorado	4,962	92,484	5,270,482	8.186
Connecticut	12,316	207,003	3,594,915	2.495
Delaware	350	3,571	923,638	37.154
District of Columbia	4,993	46,716	650,431	2.000
Florida	36,703	617,817	19,563,166	4.549
Georgia	10,149	108,776	9,973,326	13.170
Hawaii	826	13,066	1,408,453	15.484
Idaho	2,660	28,187	1,611,530	8.213
Illinois	17,597	240,630	12,898,269	7.700
Indiana	5,416	66,877	6,568,367	14.108
Iowa	4,448	75,025	3,093,078	5.922
Kansas	5,643	61,054	2,893,510	6.808
Kentucky	3,288	55,828	4,404,817	11.334
Louisiana	3,611	40,627	4,624,577	16.351
Maine	4,335	37,156	1,328,196	5.135
Maryland	7,792	118,316	5,923,704	7.192
Massachusetts	12,383	158,892	6,713,944	6.070
Michigan	8,535	98,191	9,913,349	14.503
Minnesota	11,323	145,541	5,413,693	5.343

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[114] In order to arrive at the wealth tax rate, we can first calculate the a comparative ratio between the state's (or locality's) share of overall population and the state's (or locality's) share of over-threshold wealth. We can then normalize this ratio, on the basis of, for example, a base 2% tax in D.C., to arrive at the tax rates for all states and localities.

Mississippi	2,340	32,678	2,988,797	13.138
Missouri	3,899	113,689	6,040,658	7.632
Montana	1,073	45,527	1,013,564	3.198
Nebraska	3,299	59,527	1,865,414	4.501
Nevada	3,383	78,822	2,776,972	5.061
New Hampshire	1,684	20,798	1,326,408	9.161
New Jersey	13,957	200,859	8,858,362	6.335
New Mexico	4,763	34,411	2,092,792	8.736
New York	53,038	712,276	19,628,043	3.958
North Carolina	11,931	113,321	9,843,599	12.478
North Dakota	2,877	22,144	721,999	4.684
Ohio	10,861	116,394	11,576,576	14.287
Oklahoma	9,960	80,432	3,853,205	6.882
Oregon	3,115	33,312	3,922,908	16.916
Pennsylvania	13,428	194,665	12,776,621	9.428
Rhode Island	2,322	21,151	1,055,122	7.166
South Carolina	7,889	91,076	4,764,153	7.514
South Dakota	1,165	14,388	842,270	8.409
Tennessee	4,716	48,567	6,493,432	19.206
Texas	41,736	530,581	26,489,464	7.172
Utah	1,701	27,181	2,897,927	15.315
Vermont	2,287	26,514	626,212	3.393
Virginia	11,208	137,868	8,253,053	8.599
Washington	10,303	128,356	6,962,906	7.792
West Virginia	613	6,653	1,853,873	40.027
Wisconsin	4,722	63,550	5,736,952	12.968
Wyoming	1,412	21,746	582,123	3.845