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Warren's Ultra-Millionaire Tax Revives Centuries-Old Legal Fight

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The fate of Sen. Elizabeth Warren's wealth tax proposal could lie in three landmark Supreme Court cases and an extensive interpretation of the 16th Amendment.

Warren's announcement of the "Ultra-Millionaire Tax" came as the pool of Democratic 2020 presidential contenders continues to widen and as progressive voices have shifted the scope of what is considered acceptable tax policy debate on the left. The proposal could provide an early glimpse into what may become a progressive pillar of a Democratic campaign, though it stands little chance of passage in a divided Congress.

Backers and detractors of the proposal—a 2 percent levy on households with a net worth of at least \$50 million, rising to 3 percent on household wealth above \$1 billion—have their arguments handy. Its survival may rest on whether it falls within Congress' 16th Amendment powers and is considered a "direct" or "indirect" tax.

Warren, a Democrat from Massachusetts who formed a presidential exploratory committee, tried to preempt challenges to her proposal when she posted on Jan. 24 two letters from constitutional scholars defending it. The letters' authors cite case law and the debate surrounding the 16th Amendment, which allows Congress to enact direct income taxes, even if they're not apportioned, or allocated among the states based on population. But the amendment doesn't give Congress the power to levy unapportioned indirect taxes, which the scholars contend didn't need to be included at the time it was passed and ratified.

In the end, whether Warren's proposal would be considered constitutional would depend on what the conservative-leaning U.S. Supreme Court thinks. Here's a breakdown of the debate:

Proponents and critics of the tax's constitutionality point to Article I of the Constitution, where one clause says Congress has the authority to lay and collect taxes. Another, however, forbids any "capitation" or other direct tax unless it is levied in proportion to the census. An additional clause says direct taxes must be apportioned among the states according to population.

In its decision for the 1796 case *Hylton v. United States*, the Supreme Court said a \$16 tax on every carriage owned by a business or individual wasn't a direct tax and thus didn't violate the

Constitution. But it also said a direct tax on every person—a “capitation”—would be unconstitutional if it didn’t fit that “apportionment” standard.

This was the right move, according to constitutional scholars, because you can’t apportion a tax on something that not everyone has.

Think about the impracticality of apportioning a hypothetical tax on luxury yachts across coastal and landlocked states, Indiana University Maurer School of Law professor Dawn Johnsen and Walter Dellinger, a partner at O’Melveny & Myers LLP, said in a recent [paper](#).

Constitutional Amendment

Constitutional scholars who back Warren’s proposal say the debate around the writing of the 16th Amendment reveals lawmakers’ intentions at the time for what kinds of taxes should be constitutionally permissible.

Congress passed the 16th Amendment in 1909, repudiating an 1895 Supreme Court case, *Pollock v. Farmers’ Loan & Trust Co.*, that had rejected lawmakers’ ability to impose direct taxes on income from personal property, such as interest and dividends. The decision also vastly expanded the apportionment requirement.

With the new amendment ratified in 1913, Congress could impose direct income taxes, free of any census-based apportionment requirement.

But only income taxes. Scholars say that is because the amendment endorsed a 1900 Supreme Court decision that upheld a tax on the transfer of inheritances without apportionment, characterizing the levy as indirect. In light of the court’s backing down in that case, *Knowlton v. Moore*, writers of the 16th Amendment didn’t feel the need to broaden their authority beyond a direct income tax, according to the argument outlined in one of the two letters to Warren.

Case law aside, the “apportionment” requirement for direct taxes is an archaic and now useless standard, those who support the wealth tax’s constitutionality argue.

“Capitation was right at the center of the three-fifths compromise,” along with, relatedly, apportionment, Bruce Ackerman, a Yale Law School professor who signed on to one of the letters to Warren, told Bloomberg Tax.

It is practically impossible to rely on interpretation of centuries-old case law, “especially when you’re talking about taxes that weren’t conceived,” said Ari Glogower, a professor at the Ohio State University Moritz College of Law, who believes Warren’s proposal is constitutional and recently authored a [paper](#) on methods for taxing wealth.

Can’t Get No (Transaction)

Warren’s detractors and those who believe the apportionment standard is still relevant point to *Hylton*’s characterization of a “head tax”—not an income tax, but a flat tax on every person—as unconstitutional if not apportioned.

“If it’s a direct tax on wealth, it has to be apportioned by the states,” said Ilya Shapiro, director of the Cato Institute’s Robert A. Levy Center for Constitutional Studies.

The unconstitutionality of Warren's proposal, Shapiro said, is "more clear-cut" than the contested mandate that individuals purchase health insurance or face a tax penalty under the Affordable Care Act.

Critics also find a sticking point in the fact that *Knowlton* upheld an indirect tax on the transfer of estates, not an annual levy on the estate itself.

But that tax was levied on a transaction—the transfer of wealth—while Warren's proposal would be an annual tax on the wealth itself.

Brian Galle, a professor at Georgetown Law, said he agrees with the notion that the lack of any transaction would be a challenge for Warren's tax. And *Pollock*, which rejected Congress' unapportioned, direct tax on income from property, still applies, Galle said. He added that Warren's letter writers didn't provide her with enough caution regarding the risk of litigation and failure in court.

"I think people are right that *Pollock* was wrong," he said. "My only point is that the Supreme Court doesn't think that *Pollock* was wrong."

Whose Court Is It, Anyway

And in reality, that is all that would matter: Warren's proposal would almost certainly face litigation if passed and enacted.

"I think the answer to whether or not it's constitutional depends on who you ask," said Steve Rosenthal, a senior fellow at the Urban-Brookings Tax Policy Center and former legislation counsel with the Joint Committee on Taxation. "If you ask today's Supreme Court, the answer would be no."