THE DIFFICULTIES FACING CALIFORNIA'S AND NEW YORK'S WEALTH TAX PROPOSALS

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ABSTRACT

The introduction of a state-level wealth tax has created contention among lawmakers and their constituents. A wealth tax, unlike an income tax, taps into an individual's total net worth. Taxing an individual's net worth at any level, state or federal, would be a monumental shift from the current tax law. California and New York, both states with progressive tax regimes, are likely to be among the first to implement such a tax. In 2020, both states had wealth tax bills on either their assembly or senate floor.

This Note analyzes the mechanisms and political implications of the proposed state-level wealth taxes in California and New York. Additionally, current federal tax law and its precedent, which many citizens are accustomed to, play a significant role in establishing a wealth tax. While the mechanisms, implementation barriers, and legal precedent created contention, the political battle over the wealth tax likely plays the largest role in its future. This has been reflected in federal wealth tax proposals, all of which have failed to be implemented, and raised strong partisan debate. The lack of a federal wealth tax plays a significant role in the state-level proposals due to state and federal tax harmonization.

While a wealth tax would be a significant change to current tax law, the state proposals seek to only apply the tax to a small portion of each state's population. However, this minority of

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individuals facing a proposed wealth tax holds substantial wealth. The debate over a wealth tax turns on whether society believes these wealthy individuals should be taxed on the money they hold rather than their net income.

I. INTRODUCTION

Taxing an individual's net wealth rather than their mere net income would be a monumental shift from current tax law and its precedent. The implementation of a wealth tax at any level is novel to tax law, but the idea of it is not.[1] A wealth tax has been a point of contention among legal tax scholars and politicians over the past century, yet none have been put into law.[2] In 2020, legislators from the tax-progressive states of California and New York introduced wealth tax bills—California's Assembly Bill No. 2088 and New York's Senate Bill S8277B—to their legislative floors.[3] The two bills differed greatly in whom the tax would apply to and how the tax would be implemented, but both focused on taxing the extremely wealthy.[4]

Economic wealth, i.e., an individual's total net worth, has been established by statutes and case law as "avoidable" unless under certain forms of disposition.[5] This precedent created tax-

[1] *See* Edward J. McCaffery, *Taxing Wealth Seriously*, USC GOULD SCH. L. CTR. L. SOC. SCI., SER. NO. 16–10.
[2] Howard Gleckman, *Inequality Is a Big and Growing Issue, but a Wealth Tax May Not Be the Solution*, TAX POL'Y CTR. (Jan. 23, 2020), https://www.taxpolicycenter.org/taxvox/inequality-big-and-growing-issue-wealth-tax-may-not-be-solution.
[3] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020); S.B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
[4] The two bills greatly differ in how they define "extremely wealthy." In reference to California's bill, the extremely wealthy qualify as those with a worldwide net worth of over $30 million. In New York's bill the extremely wealthy qualify as those with a worldwide net worth of over $1 billion. *Id.*
[5] The "easily avoidable" tax applies to capital. While taxes on wages are nearly impossible. The tax planning methods of "Escape, Shift, Defer, Recharacterize or Convert" have been ultimately shut down or blocked by tax law for wages. Taxes on capital on the other hand is easily available but only if you are rich with wealth. *See* EDWARD J. MCCAFFERY, THE OXFORD INTRODUCTIONS TO U.S. LAW: INCOME TAX LAW 22–24 (Oxford Univ. Press 2012) [hereinafter INCOME TAX LAW]; "A disposition is the act of selling or otherwise "disposing" of an asset or security. The most common form of a disposition would be selling a stock investment on the open market, such as a stock exchange." James Chen, *Disposition* INVESTOPEDIA (Dec. 31, 2020), https://www.investopedia.com/terms/d/disposition.asp.

planning strategies for the wealthy to avoid taxes.[6] Such strategies gained popularity throughout the twentieth century when the federal income tax was transformed into a wage tax, also referred to as a labor tax.[7] This transformation left capital, typically made up of financial instruments or other assets, to be taxed in specific, avoidable ways.[8] This transformation created the capital-labor divide, in which the extremely wealthy pay little to no taxes while those with less wealth who make a living through wages continue to pay high federal income taxes.[9] Many of the mid-to-late twentieth century high salary earners used tax shelters to avoid paying taxes.[10] Tax shelters were used to shift individuals' income to lower income brackets or to entities that paid lower tax rates.[11] In the years since, tax shelters have been shut down at both the federal and the state level, leaving wage earners with few strategies equivalent to those of the extremely wealthy.[12]

Intuitively, one might believe that the wealthier one is, the more taxes one pays. However, this is only true for those with wages or other forms of taxable income.[13] It is quite the opposite for those who obtain large sums of wealth.[14] For example, Former President Donald Trump, who

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[6] *Id.*

[7] Under the Haig-Simons definition of an income (Income = Consumption + Savings). Savings are difficult to tax because most people don't have savings, thus the income tax is obviously a consumption tax. The income tax can be broadened to focus on uses rather than sources, thereby creating a basic formula of Income (Labor + Capital = Income). Due to the removal of capital from the equation of calculating income, the income tax is primarily a wage tax. *Id.* at 6–11.

[8] Edward J. McCaffery, *The Death of the Income Tax (or, The Rise of America's Universal Wage Tax)*, 95 IND. L. J. 1233, 1241-1242 (2000) [hereinafter *The Death of the Income Tax*]; *What Is Capital Investment*?, LAW DICTIONARY, https://thelawdictionary.org/capital-investment (last visited Sept. 12, 2021).

[9] INCOME TAX LAW, *supra* note 5, at 24.

[10] *Id.* at 182; Before 1981, the top wage earners fell into a 70 percent tax bracket, until President Ronald Reagan knocked the top rate down significantly. The top marginal tax bracket now sits at 37 percent. Christopher Ingraham, *The Top Tax Rate Has Been Cut Six Times Since 1980—Usually with Democrats' Help*, WASH. POST (Feb. 29, 2019), https://www.washingtonpost.com/us-policy/2019/02/27/top-tax-rate-has-been-cut-six-times-since-usually-with-democrats-help.

[11] INCOME TAX LAW, *supra* note 5, at 182–201.

[12] *Id.* at 200.

[13] *Id.* at 24.

[14] *Id.*

has a disputed net worth of $2.5 billion, paid a mere $750 in federal income tax in 2017.[15] Like President Trump, many of the extremely wealthy have discovered how to avoid taxes by exploiting loopholes in the Tax Code. To maximize income tax avoidance, many of the country's wealthiest CEOs take extremely small salaries relative to their wealth. For example, Jeff Bezos, founder of Amazon and the second richest person in the world, has had the same $81,840 salary for the past two decades; in an even more extreme case, former Apple CEO Steve Jobs received a salary of $1.[16] These CEOs amass their wealth through their companies' stock.

The primary requirement these legal, tax-avoidance methods is to already be extremely wealthy.[17] The extremely wealthy described in this article are those with large sums of non-income-producing capital assets unlike an income-producing capital asset such as rental income from a property.[18] By contrast, those who are unable to amass capital must acquire their wealth through wages. Unfortunately, labor is highly taxed and unavoidable.[19] This makes it extremely difficult for those amassing wealth through labor to utilize these tax methods.[20]

In part, the idea of a wealth tax stems from a frustration that the extremely wealthy can use tax laws to avoid most taxes or evade them entirely, while those earning salaries are burdened with the federal income tax.[21] The frustration is motivated by the public perception that the wealthy are

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[15] FORBES, DONALD TRUMP, https://www.forbes.com/profile/donald-trump/?sh=6e0d4e9647bd, (last visited Jan. 15, 2021).
[16] David Goldman, *Jeff Bezos Made $81,840 Last Year. He's Still the Richest Person in the World*, CNN BUS., (Apr. 11, 2019), https://www.cnn.com/2019/04/11/tech/jeff-bezos-pay/index.html.
[17] INCOME TAX LAW, *supra* note 5, at 12.
[18] *Id.* at 13.
[19] *Id.* at 11–12.
[20] *Id.*
[21] *See* Marjorie E. Kornhauser, *People Don't Like Paying Taxes. That's Because They Don't Understand Them.*, WASH. POST (Apr. 14, 2017), https://www.washingtonpost.com/posteverything/wp/2017/04/14/people-dont-like-paying-taxes-thats-because-they-dont-understand-them; *Top Frustrations With Tax System: Sense That Corporations, Wealthy Don't Pay Fair Share*, PEW RSCH. CTR., (Apr. 14, 2017),

breaking the law or are the law's sole beneficiaries.[22] Although this frustration is understandable, the law is shaped to allow those with immense wealth and smart tax attorneys to legally pay minimal taxes relative to their net wealth. With the significant growth in the capital-labor divide and the political attention to the issue, California and New York have sought to implement a wealth tax to level the playing field.

The wealth tax would seek to prevent the extremely wealthy from utilizing the current tax loopholes. The main differentiating component of a wealth tax is how it is calculated; a wealth tax typically looks to the market value of an individual's total owned assets and then subtracts the liabilities.[23] Taxing wealth would expand the taxable umbrella beyond the current income tax law precedent shared federally and at a state level. This expansion will focus on appreciated assets, because an asset's mere appreciation is not considered income under current income tax law.[24] Thus, a tax on an appreciated asset that has not had any disposition will cause, and has caused, visceral contention among taxpayers. Nevertheless, it is important to note that these wealth taxes are only applicable to the extremely wealthy.

There is no surprise that California and New York are ideal candidates for a wealth tax. Both states contain a large number of wealthy individuals, and each has a history of progressive

https://www.pewresearch.org/politics/2017/04/14/top-frustrations-with-tax-system-sense-that-corporations-wealthy-dont-pay-fair-share.

[22] PEW. RSCH. CTR., *supra* note 21.

[23] *Weatlh Tax*, TAX FOUND., https://taxfoundation.org/tax-basics/wealth-tax (last visited Jan. 15, 2021); Adam Hayes, *Liability definition*, INVESTOPEDIA (Sept. 10, 2021), https://www.investopedia.com/terms/l/liability.asp ("A liability is something a person or company owes, usually a sum of money. […] Recorded on the right side of the balance sheet, liabilities include loans, accounts payable, mortgages, deferred revenues, bonds, warranties, and accrued expenses.").

[24] Eisner v. Macomber, 252 U.S. 189, 217 (1920).

tax laws.[25] Politics play a large role in both states' wealth tax proposals, as progressives and conservatives are pitted against each other. While California's and New York's legislatures ended 2020 without advancing either bill,[26] the growing public and political support for a wealth tax indicates the likelihood of similar taxes being proposed in the near future.

II. FEDERAL AND STATE INCOME TAX

To properly understand the controversy behind a wealth tax, one must first look at the federal income tax structure and, specifically, understand what constitutes "taxable income." In 1909, the Sixteenth Amendment established that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . . ."[27] Thus, Congress could theoretically tax anything.[28] Under section 61 of the Internal Revenue Code ("IRC"), income is defined as "all income from whatever source derived," which includes (but is not limited to) the following items:

> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Annuities; (9) Income from life insurance and endowment contracts; (10) Pensions; (11) Income from discharge of indebtedness; (12) Distributive share of partnership gross income; (13) Income in respect of a decedent; and (14) Income from an interest in an estate or trust.[29]

While the Sixteenth Amendment and IRC section 61 did not provide a perfect definition of income, case law assisted in narrowing the definition. In the landmark case *Eisner v. Macomber*,

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[25] Lyman Stone, *Which States Have the Most Progressive Income Taxes?*, TAX FOUND., (Sept. 24, 2014), https://taxfoundation.org/which-states-have-most-progressive-income-taxes-0.
[26] *See, e.g.*, Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[27] U.S. CONST. amend. XVI.
[28] Much of the reasoning behind the lawmakers' vague and broad choice of verbiage was to, ironically, prevent citizens from finding ways around a narrow tax definition. Thus, arguments that a pure wealth tax is unconstitutional must battle the 16th amendment's broad definition of income. INCOME TAX LAW, *supra* note 5, at 33.
[29] 26 U.S.C. § 61 (1954).

the Supreme Court defined income as "gain derived from capital, from labor, or from both combined."[30] Additionally, in *Commissioner v. Glenshaw Glass Co.*, the Court defined income as "[an] undeniable accession[] to wealth, clearly realized, and over which the taxpayers have complete dominion."[31]

With the definition narrowed, two limits must be accounted for: income must be (1) realized and (2) recognized.[32] The first limit was established under *Macomber*, which stated that income must be "realized."[33] A realization event can be broadly defined as "anything other than nothing."[34] *Macomber*'s realization requirement established that the "mere appreciation" of an asset is not income, which, in regard to taxable income, is "nothing."[35] Thus, an asset is not taxable until there has been a realization event, commonly attributed to a sale, disposition, or "anything other than nothing."[36] The appreciation of capital assets is most commonly attributed to stocks and real property.

When calculating the appreciation of an asset, one must first understand "basis." Basis measures and tracks what money needs to be taxed when a realization event occurs.[37] Basis is also referred to as "after-tax dollars," which represents the amount of income tax the individual has

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[30] Ms. Macomber received additional shares from a stock dividend and the government wanted to treat the stocks as income. The Court ruled in favor of Ms. Macomber stating that "stockholder's share in the accumulated profits of the company is capital, not income." Eisner v. Macomber, 252 U.S. 189, 219 (1920).
[31] Taxpayers received punitive damages but did not report the damages received as gross income. In the Court's analysis of determining whether damages received from a judgement is income, the Court looked to whether the source of the income was played a role in whether it could be defined as income. The Court concluded that the damages did not fall under the Gift exemption or any other exemption provision of the law. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
[32] INCOME TAX LAW, *supra* note 5, at 48, 62.
[33] *Macomber*, 252 U.S. at 212.
[34] INCOME TAX LAW, *supra* note 5, at 126.
[35] *Macomber*, 252 U.S. at 217.
[36] INCOME TAX LAW, *supra* note 5, at 126.
[37] *Id.* at 237.

already paid.[38] When acquiring an asset, one typically receives it with a basis equal to its fair market value ("FMV"). At the point of acquisition, the FMV establishes a floor as to what the government considers taxable, which means that the dollar amount below the floor has already been taxed.[39] Using the basis and the FMV, one can calculate the taxable gain by finding the difference between the two (Gain = FMV - Basis),[40] although gain is only taxable upon a realization event. For example, if an employee receives a $2,000 stock from their employer and pays income tax on that $2,000, the stock thus has a basis of $2,000 (after-tax dollars). Now, if the stock appreciates to $10,000, under *Macomber*'s realization requirement, the $8,000 increase is not taxable because it is "mere appreciation."[41] Selling the $10,000 stock will qualify as a realization event—something other than nothing. The realization event of selling the stock of triggered the "tax time-bomb."[42] Thus, when subtracting the basis from the FMV, the taxable gain would be equal to $8,000.[43]

The second limit to the federal income tax is the recognition requirement. The recognition requirement refers to statutory exclusions of realized income that the government excludes from gross income.[44] Under IRC section 102, gifts are considered statutory exclusions.[45] Further,

[38] *Id.*
[39] *Id.* at 50.
[40] *Id.* at 45.
[41] Eisner v. Macomber, 252 U.S. 189, 217 (1920).
[42] The tax time-bomb refers to the built-in gain of an appreciated asset and as McCaffery states, "sooner or later, [the] tax time bombs go off." INCOME TAX LAW, *supra* note 5, at 51.
[43] The amount that an individual would pay in taxes would depend on if the asset qualifies for capital asset. *Id.* at 237. There are two types of tax treatments: "Ordinary" and Capital Gains. Ordinary income typically comes from common cashflows such as wages, interest, and dividends. The sale of an asset, which is considered ordinary income, would be added to an individual's total income and taxed at its marginal rate. Ordinary income rates are typically much higher, with a possible top tax treatment of 37 percent. On the other hand, capital gains treatment is taxed at much lower percentage at 15 percent. *Id.* at 238. Capital assets are "property under IRC §1221, that has been held for over one year." *Id.* at 237.
[44] *Id.* at 62.
[45] *Id.* at 64.

"[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance," but gifts from employers (hereafter "employee gifts") are considered taxable income.[46] To differentiate between a gift under section 102 and an employee gift, the Supreme Court ruled in *Commissioner v. Duberstein* that the gift must be made out of "detached and disinterested generosity" to be tax-exempt.[47]

The basis is different in a situation where the asset has appreciated and is then gifted. The recipient receives the gifted asset with a *carryover basis*.[48] Under IRC section 1015, if "property was acquired by gift . . . , the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift."[49] Thus, the basis carries over into the giftee's hands, and the tax time-bomb does not go off.[50] To illustrate, if a stock with a $10,000 FMV and a basis of $2,000 is gifted with detached and disinterested generosity, the giftee will have a basis of $2,000. The tax time-bomb does not go off in either party's hands.[51]

While not a statutory exclusion, debt is an important aspect of tax law because of its tax ramifications. Debt, or borrowing, is not considered income under *Glenshaw Glass* or IRC section 61.[52] For example, someone who borrows $10,000 from a bank technically has an undeniable

[46] 26 U.S.C. § 102 (1954).
[47] The Supreme Court ruled in this direction because if the "detached and disinterested generosity" standard didn't exist, employers would pay their employees in gifts rather than salaries to evade income tax. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) (quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956)); INCOME TAX LAW, *supra* note 5, at 65.
[48] INCOME TAX LAW, *supra* note 5, at 238.
[49] 26 U.S.C. § 1015 (1954).
[50] INCOME TAX LAW, *supra* note 5, at 238.
[51] *Id.* at 50.
[52] *Id.* at 58.

accession to wealth, but that increase in wealth is offset by the note to pay back the loan.[53] Therefore, the increase in income nets out to zero and is not taxable.[54]

III. HOW THE EXTREMELY WEALTHY ARE AVOIDING TAXES

When referring to the "extremely wealthy," most would likely think of the professional class (lawyers, doctors, accountants, etc.). However, the extremely wealthy referred to in this article are typically not members of the professional class but those with wealth in the tens of millions or billions of dollars. Granted, the professional class can attain this level of wealth, but there is one major distinction relevant to this comparison: the professional class gain their wealth from a salary, while the extremely wealthy to whom I am referring typically do not have salaries.[55] An individual making their wealth from a salary is unable to avoid taxes.[56] Otherwise, the government would generate very little revenue.[57] In contrast, the extremely wealthy can exploit certain rules of tax law by using the "buy, borrow, die" strategy to avoid taxes.[58]

First, the "buy" step consists of purchasing assets that appreciate in value (i.e., property, stocks) and do not have cash flows.[59] Non-cash-paying assets are essential to playing buy, borrow, die. Cash flows from property, such as dividends or rents, are recognized as realization events and

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[53] *Id.*
[54] It is important to note that the discharge of debt is considered income because that would be considered "undeniable accessions to wealth, clearly realized, and over which the taxpayer have complete dominion." Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
[55] McCaffery, *supra* note 8, at 1234.
[56] INCOME TAX LAW, *supra* note 5, at 25.
[57] *Id.*
[58] *Id.* at 15.
[59] *Id.* at 12–13.

are taxable.[60] As time goes on, these assets will appreciate and will not be taxable under *Macomber* due to the realization requirement.[61]

The "borrow" step consists of borrowing against the appreciated assets.[62] Borrowing, or incurring debt, is not considered income under *Glenshaw Glass* because there is no undeniable accession to wealth.[63] Under the balance sheet approach, debt does not increase net wealth because the increase of borrowed money is offset by the note to pay it back, thus netting out at zero.[64] Therefore, a wealthy individual can borrow against the appreciated property to purchase items (e.g., homes, sports cars, and jewelry) rather than selling those appreciated items and causing a realization event.[65]

Finally, the "die" step consists of holding on to the appreciated assets until death.[66] Under IRC section 1014, heirs of the deceased receive their assets with a stepped-up basis.[67] Stepped-up basis adjusts the basis to equal the FMV and prevents a tax time-bomb from going off in the hands of the heirs.[68] Through the taxable gain calculation (Gain = FMV - Basis), when property transfers to the heirs, they don't need to pay tax on the appreciation from the original asset owners basis. This is illustrated when the property is immediately sold by the heirs to pay off the deceased's debt, because the basis is equal to the FMV (FMV - $\text{Basis}_{(\text{equal to FMV})}$ = \$0 gain).[69]

[60] *Id.*
[61] Eisner v. Macomber, 252 U.S. 189, 217 (1920).
[62] INCOME TAX LAW, *supra* note 5, at 13.
[63] Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
[64] INCOME TAX LAW, *supra* note 5, at 58.
[65] *Id.* at 13–15.
[66] *Id.*
[67] *Id.* at 241; 26 U.S.C. § 1014 (1954).
[68] INCOME TAX LAW, *supra* note 5, at 51.
[69] INCOME TAX LAW, *supra* note 5, at 15.

This strategy, if used properly, legally provides individuals a way to avoid paying federal taxes and pass the wealth to their heirs.[70] Their heirs can then use the inherited wealth to pay off any debt, and then, if any money is still left over, they can follow the same path.[71] The availability and legality of this tax strategy make it extremely attractive to those who can "play."[72] The wealth tax seeks to hinder or entirely stop this strategy.

A. HARMONIZATION OF STATE AND FEDERAL TAXES

Typically, the income tax structure is similar at both the state and federal level.[73] Thus, the extremely wealthy can utilize similar tax strategies under state income tax laws. California and New York both follow the current federal income tax structure.[74] Both states use the federal marginal tax bracket's structure, which is the "rate of tax one pays on the next dollar of income."[75] Additionally, both states use progressive rate structures, in which "higher earners or spenders pay a higher average tax rate than the lower earners or spenders."[76]

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[70] *Id.*
[71] *Id.*
[72] *See id.*
[73] Taryn A. Rounds, *Tax Harmonization and Tax Competition: Contrasting Views and Policy Issues in Three Federal Countries*, 22 PUBLIUS 91, 106 (1992).
[74] CAL. REV. & TAX. CODE §17071 (West 1999) ("Section 61 of the Internal Revenue Code, relating to gross income defined, shall apply, except as otherwise provided"); *International Students and Scholars Spring 2010 Workshop*, N.Y. STATE DEP'T TAX'N & FIN. 14, https://www.nyit.edu/files/student_resources/SR_TaxInformation_NYSInternationalScholarsWorkshopPresentationSlides_2010.pdf (last accessed Sept. 12, 2021).
[75] Andriy Blokhin, *State Income Tax vs. Federal Income Tax: What's the Difference?*, INVESTOPEDIA (Jan. 5, 2021), https://www.investopedia.com/ask/answers/060515/what-difference-between-state-income-tax-and-federal-income-tax.asp; INCOME TAX LAW, *supra* note 5, at 239.
[76] INCOME TAX LAW, *supra* note 5, at 240.

IV. FEDERAL WEALTH TAX

A wealth tax is not a novel idea, nor is it unique to the United States. In 1934, in the wake of the Great Depression, Huey Long, a senator from Louisiana, introduced the infamous "Share Our Wealth" plan.[77] One of the key elements of the "Share Our Wealth" plan contained tax consequences or caps based on individual fortunes.[78] While these wealth tax proposals were never implemented, Senator Long was recognized for laying the foundation for such programs as Social Security, veterans benefits, college financial aid, national public works, Federal Deposit Insurance Corporation bank insurance, labor rights of minimum wage and forty-hour work week standards, farm assistance, public utility regulation, graduated income tax and inheritance tax, Medicare and Medicaid, food stamps, and housing assistance.[79] After Senator Long's assassination, and throughout the twentieth century, wealth tax proposals remained relatively dormant in the United States.

The wealth tax made a major political resurgence in 2019 and 2020 when progressive Democratic Senators Elizabeth Warren and Bernie Sanders both ran for President.[80] The number of progressive Democrats has grown significantly over the past two decades.[81] Since the year 2000, the percentage of registered Democrats who consider themselves "very liberal" has more than

[77] *Share Our Wealth*, HUEY LONG, https://www.hueylong.com/programs/share-our-wealth.php (last visited Sept. 12, 2021).
[78] Cap personal fortunes at $50 million each—equivalent to about $600 million today (later reduced to $5 to $8 million, or $60 to $96 million today); limit annual income to one million dollars each (about $12 million today); limit inheritances to $5 million each (about $60 million today). *Id.*
[79] *Id.*
[80] Huaqun Li & Karl Smith, *Analysis of Sen. Warren and Sen. Sanders' Wealth Tax Plans*, TAX FOUND. (Jan. 28, 2020), https://taxfoundation.org/wealth-tax.
[81] Hannah Gilberstadt & Andrew Daniller, *Liberals Make Up the Largest Share of Democratic Voters, but Their Growth Has Slowed in Recent Years*, PEW RSCH. CTR. (Jan. 17, 2020), https://www.pewresearch.org/fact-tank/2020/01/17/liberals-make-up-largest-share-of-democratic-voters.

doubled—from 6% to 15%.[82] Senator Warren, who helped found the Consumer Financial Protection Bureau ("CFPB"), ran for President with an economic focus on "mak[ing] the rich pay their fair share."[83] Bernie Sanders also ran with an economic focus on "ensur[ing] that the wealthy are not able to evade the tax[es] by implementing strong enforcement policies."[84] Both Warren and Sanders pushed for some form of a wealth tax in their political agendas.

A. SENATOR ELIZABETH WARREN'S WEALTH TAX

Elizabeth Warren, in consultation with economists Emmanuel Saez and Gabriel Zucman, introduced a federal wealth tax proposal known as "The Ultra-Millionaires Tax" in January 2019.[85] Warren's "Ultra-Millionaires Tax" would implement a "2-cent tax on the wealth of fortunes above $50 million," where "the top 0.1%—the wealthiest 75,000 Americans—would have to pitch in two cents for every dollar of net worth above $50 million and three cents for every dollar on net worth over $1 billion."[86] Saez and Zucman estimated that "about 75,000 American households (less than 0.1%) would be liable for the wealth tax and that the tax would raise around $2.75 trillion over the ten-year budget window 2019–2028, of which $0.3 trillion would come from the billionaire 1% surtax."[87]

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[82] *Id.*
[83] Elizabeth Warren, *Tax the Ultra-Rich*, WARREN DEMOCRATS, https://elizabethwarren.com/plans#make-the-rich-pay-their-fair-share (last visited Sept. 12, 2021); *Elizabeth Warren*, BALLOTPEDIA, https://ballotpedia.org/ElizabethWarren (last visited Sept. 12, 2021).
[84] *Tax on Extreme Wealth*, BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth (last visited Sept. 12, 2021).
[85] Li & Smith, *supra* note 80.
[86] Elizabeth Warren, *Ending the Stranglehold of Health Care Costs on American Families*, MEDIUM (Nov. 1, 2019), https://medium.com/@teamwarren/ending-the-stranglehold-of-health-care-costs-on-american-families-bf8286b13086.
[87] Letter from Emmanuel Saez & Gabriel Zucman, Professors of Econ., U.C. Berkeley, to Sen. Warren (Jan. 18, 2019), http://gabriel-zucman.eu/files/saez-zucman-wealthtax-warren.pdf.

B. SENATOR BERNIE SANDERS'S WEALTH TAX

Bernie Sanders proposed his own version of a federal wealth tax, stating that "[i]n order to reduce the outrageous level of inequality that exists in America today and to rebuild the disappearing middle class, we must establish an annual tax on the extreme wealth of the top 0.1%."[88] Sanders's wealth tax targets a larger base by applying it to married couples those with a net worth of $32 million or more.[89] The proposal includes a "1 percent tax on net worth above $32 million for a married couple[,] . . . 2 percent on net worth from $50 to $250 million, 3 percent from $250 to $500 million, 4 percent from $500 million to $1 billion, 5 percent from $1 to $2.5 billion, 6 percent from $2.5 to $5 billion, 7 percent from $5 to $10 billion, and 8 percent on wealth over $10 billion."[90] Sanders estimates that his wealth tax would "raise an estimated $4.35 trillion over the next decade and cut the wealth of billionaires in half over 15 years . . . ."[91]

C. PRESIDENT JOE BIDEN'S TAX PROPOSALS

Prior to his election, President Joe Biden proposed nine paramount tax changes.[92] Of those nine, most relevant to a wealth tax is the potential repeal of the stepped-up basis under IRC section 1014.[93] The stepped-up basis, which values inheritance at its FMV, is crucial to the extremely wealthy's tax avoidance strategy.[94] With Democrats controlling both the House and the Senate,

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88 SANDERS, *supra* note 84.
89 *Id.*
90 *Id.*
91 *Id.*
92 Joe Kimmet, *Nine Biden Tax Proposals to Know as We Near Election Day*, JDSUPRA (Oct. 6, 2020), https://www.jdsupra.com/legalnews/nine-biden-tax-proposals-to-know-as-we-99316.
93 Taylor Tepper, *Stepped Up Basis Reform: Biden's Middle-Class Tax Hike?*, FORBES (May 7, 2021), https://www.forbes.com/advisor/investing/stepped-up-basis-biden-tax-plan/
94 26 U.S.C. § 1014 (1954); INCOME TAX LAW, *supra* note 5, at 58.

such a proposal could have a greater chance of being implemented.[95] However, as Biden has "vowed" his presidency will be "a time to heal in America," a monumental tax change such as repealing section 1014 could be too controversial.[96] Furthermore, unlike a wealth tax that applies only to the ultra-wealthy, a repeal of section 1014 would apply across the board to all tax-paying individuals who inherit appreciated property.

V. CALIFORNIA'S PROPOSED WEALTH TAX

California's Assembly Bill No. 2088 ("A.B. 2088") would have imposed an "annual tax at a rate of 0.4% of a resident of this state's worldwide net worth in excess of $30,000,000, or in excess of $15,000,000 in the case of a married taxpayer filing separately."[97] Those with a net worth of $30,000,000 or more are referred to as ultra-high net worth ("UHNW") individuals.[98] A.B. 2088 was estimated to apply to around 30,400 UHNW individuals who make up the top 0.1% of Californians.[99] It was estimated to raise "approximately $7.5 billion annually."[100] The bill was supported by Commit to Equity, a campaign for legislatures to dismantle systemic inequality.[101] The Commit to Equity is "backed by the California Federation of Teachers, Patriotic Millionaires,

[95] Patricia Zengerle & Susan Cornwell, *Democrats Take Narrow Control of U.S. Senate*, REUTERS (Jan. 20, 2021), https://reut.rs/3o6e4XI.
[96] Charlotte Alter, *President-Elect Joe Biden Vows to Usher in 'a Time to Heal in America'*, TIME (Nov. 7, 2020, 9:55 PM), https://ti.me/2U5498m.
[97] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[98] *Uncover the Wealthiest US States*, WEALTH-X, https://www.wealthx.com/ultra-wealthy-population-as-percentage-of-total-us-state-population (last visited Sept. 12, 2021).
[99] Mark Calvey, *Affluent Californians Could Face the Nation's First Wealth Tax*, S.F. BUS. TIMES (Aug. 13, 2020, 2:53 PM), https://www.bizjournals.com/sanfrancisco/news/2020/08/13/proposed-california-wealth-tax-called-embarrassin.html.
[100] *Id.*
[101] Laura Mahoney, *Pressure Rises for California Wealth Tax Plan to Return in 2021*, BLOOMBERG TAX (Nov. 27, 2020, 1:45 AM), https://news.bloombergtax.com/daily-tax-report-state/pressure-rises-for-california-wealth-tax-plan-to-return-in-2021.

and other labor and social justice groups."[102] However, the bill faced contention from the California State Governor. Criticism of the bill's mechanical makeup and political pressure likely led to its demise.

A. THE MECHANICS

A.B. 2088 was focused on taxing individuals whose total net worth of at least $30 million.[103] The legislators behind this bill requested that the Franchise Tax Board expand its umbrella to contain the wealth tax.[104] The bill provided that an individual's net worth would be calculated by combining their income and their assets, but would not include real property.[105] The assets subject to the wealth tax included the following:

> (1) Stock in any publicly and privately traded C-corporation; (2) Stock in any S-corporation; (3) Interests in any partnership; (4) Interests in any private equity or hedge fund; (5) Interests in any other noncorporate businesses; (6) Bonds and interest bearing savings accounts; (7) Cash and deposits; (8) Farm assets; (9) Interest in mutual funds or index funds; (10) Put and call options; (11) Futures contracts; (12) Art and collectibles; (13) Financial assets held offshore; (14) Pension funds; (15) Other assets, excluding real property; (16) Debts other than mortgages or other liabilities secured by real property; (17) Real property; (18) Mortgages and other liabilities secured by real property.[106]

Under current tax law, these assets are typically not taxable until some form of disposition or sale occurred.[107] Each asset would be valued through a valuation method, but publicly traded and non-publicly traded assets would be valued differently.[108] Under the valuation method, publicly traded assets would be valued by their market value at the end of the year.[109] While all

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[102] COMMIT TO EQUITY, https://committoequity.org (last visited Mar. 13, 2021).
[103] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See generally* Eisner v. Macomber, 252 U.S. 189 (1920); 26 U.S.C. § 61 (1954).
[108] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[109] *Id.*

non-publicly traded assets, "the best available methodology and information [would] be used to estimate a current value at the end of the tax year."[110]

A.B. 2088's provisions would apply to temporary and part-year residents of California.[111] Temporary residents are defined in the bill as those "who spend[] more than 60 days in California."[112] A part-year resident is "a resident of th[e] state during a portion of the taxable year [or] a nonresident of th[e] state during a portion of the taxable year."[113] To calculate the taxes due for temporary and part-year residents, their "worldwide net worth [would] be multiplied by the percentage of days in the year such taxpayer was present in th[e] state."[114] Under the bill, residents, temporary residents, and part-year residents who leave California would be subject to the wealth tax for the next ten years.[115] Hank Adler, an accounting professor at Chapman University, illustrated the wealth tax applied to a temporary resident:

> If Bill Gates spent 60 days a year in his Palm Desert home, for each day in California his wealth tax would be more than $1 million. While the tax would diminish each year if he stayed out of the state, he would continue to be subject to a tax on his world-wide net worth for another decade.[116]

Over the ten years, the now ex-residents, would have to pay a 1.80 percent exit tax on a sliding scale (see Figure A).[117]

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] CAL. REV. & TAX. § 17015.5 (2002).
[114] Assemb. B, 2088, 2019–20 Reg. Sess. (Cal. 2020).
[115] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[116] Hank Adler, *A California Plan to Chase Away the Rich, Then Keep Stalking Them*, WALL ST. J. (Dec. 18, 2020, 5:44 PM), https://www.wsj.com/articles/a-california-plan-to-chase-away-the-rich-then-keep-stalking-them-11608331448.
[117] Joe Bishop-Henchman, *California Wealth and Exit Tax Would Be an Unconstitutional Disaster*, NAT'L TAXPAYERS UNION FOUND. (Aug. 27, 2020), https://www.ntu.org/foundation/detail/california-wealth-and-exit-tax-would-be-an-unconstitutional-disaster.

Figure A: Exit Tax Rates Over Time Under A.B. 2088

Year	Proposed California Wealth Tax Rate on Taxpayers Who Leave the State in Year 1
1	0.40%
2	0.36%
3	0.32%
4	0.28%
5	0.24%
6	0.20%
7	0.16%
8	0.12%
9	0.08%
10	0.04%
Total, Years 1 through 10	1.80%

(Figure A)[118]

Regarding penalties, the bill provided that an "understatement" of taxable income over the next ten years would result in a penalty of $1 million or "twenty percent of the tax shown on an original return or shown on an amended return filed on or before the original or extended due date of the return for the taxable year."[119]

B. WHERE CALIFORNIA CURRENTLY STANDS WITH TAXES

California has not implemented a wealth tax to date, but it has "some of the steepest sales tax, personal income tax, and corporate tax rates in the United States."[120] California's top marginal individual income tax rate is 13.3%, which is greater than the next highest state by 2.3%.[121] While California's property tax rate of 0.73% sits below the national average of 1.07%, California's average home value ranks as one of the most expensive.[122]

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[118] *Id.*
[119] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020).
[120] *California Tax Facts*, CALTAX, https://www.caltax.org/caltax-resources/california-tax-facts (last visited Mar. 13, 2021).
[121] Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2021*, TAX FOUND. (Feb. 17, 2021), https://taxfoundation.org/publications/state-individual-income-tax-rates-and-brackets.
[122] *California Property Tax Calculator*, SMART ASSEST, https://smartasset.com/taxes/california-property-tax-calculator (last visited Mar. 13, 2021); Amy Frontinelle, *Average House Price by State in 2020*, THE MOTLEY FOOL (Aug. 4, 2020), https://www.fool.com/the-ascent/research/average-house-price-state.

Additionally, Donald Trump's Tax Cut and Job Act ("TCJA") of 2017 decreased "the home mortgage interest deduction (HMID) allow[ing] itemizing homeowners to deduct mortgage interest paid on up to $750,000 worth of principal," rather than the previous $1 million.[123] With the average home in California valueing at approximately $700,000, this was a significant change.[124] Additionally, the recently passed Proposition 19 ("Prop. 19") mandates that Californians' "inherited homes that are not used as principal residences, such as second homes or rentals, be reassessed at market value when transferred."[125] Finally, in 2020, San Francisco voters approved an additional tax on companies whose chief executive officers ("CEOs") make "100 times more than their median workers."[126] Clearly, California is not reluctant to taxing the wealthy.

In the public's perception and in the media, California is gaining a reputation of "chasing away the wealthy."[127] With California's continuously increasing income tax rates and other tax-progressive initiatives, there has been a purported "exodus" of wealthy citizens moving to states with lower income tax rates or no income tax at all (e.g., Texas and Florida).[128] However, according

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[123] Scott Eastman & Anna Tyger, *The Home Mortgage Interest Deduction*, TAX FOUND. (Oct. 15, 2019), https://taxfoundation.org/home-mortgage-interest-deduction.
[124] Marco Santarelli, *California Housing Market Shows No Signs of Cooling in July 2021*, NORADA REAL ESTATE INV., https://www.noradarealestate.com/blog/california-housing-market/#:~:text=Existing%2C%20single%2Dfamily%20home%20sales,14.5%20percent%20from%20August%202019 (last updated Aug. 18, 2021).
[125] *California Proposition 19, Property Tax Transfers, Exemptions, and Revenue for Wildfire Agencies and Counties Amendment (2020)*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_19,_Property_Tax_Transfers,_Exemptions,_and_Revenue_for_Wildfire_Agencies_and_Counties_Amendment_%282020%29 (last visited Mar. 13, 2021).
[126] Mahoney, *supra* note 101.
[127] *See, e.g.*, Adler, *supra* note 116.
[128] Stephanie Lai, *California Exodus Intensifies as Retirees, Teachers, Musicians Seek Cheaper, Less-Crowded Pastures*, L.A. TIMES (Jan. 12, 2021, 6:00 AM), https://www.latimes.com/california/story/2021-01-12/california-exodus-intensifying-retirees-musicians-teachers-actors; *see also* Eric Escalante, *Here's Why Another 650,000 People Left California Last Year*, ABC10 (Nov. 17, 2020, 7:00 PM), https://www.abc10.com/article/news/local/california/653000-people-leave-california/103-f3c88956-791a-43ca-bc8f-bcbaa76cf790. It is important to look at migration data from 2018–2019 because this was data accumulated before the 2020 COVID-19 pandemic. The migration data of 2020 must be analyzed knowing that the pandemic likely

to a study by the nonpartisan California Policy Lab, the exodus, based on numbers alone, has not occurred.[129] The study found that "the number of people leaving California tracks the number of people entering California, but this pattern deviated in Q4 2020, when 267,000 people left the state and only 128,000 entered."[130] The study further found that, of those exiting, "there is no evidence that wealthy households are leaving the state en masse. Their rates of exit track trends in less wealthy areas."[131]

C. FACTORS LEADING TO A.B. 2088'S FAILURE

A.B. 2088 would have applied to such a small percentage of California citizens that it would make sense for California to implement such a law easily, given its progressive tax system. In reality, the progressive tax laws in California likely worked against the bill's implementation. The novel and complex aspects of the bill were ambiguous, which likely contributed to California taxpayers' hesitation to support such a change to their laws. The arguments facing California's wealth tax are focused on the idea that California plans to "chase away the rich."[132]

A "slippery slope" argument likely played a large role in the outcome of the assembly bill. A slippery slope argument exists when "a course of action is rejected because, with little or no

played a role in preventing people from moving. *See* Brian Uhler & Justin Garosi, *California Losing Residents Via Domestic Migration*, LEGIS. ANALYST'S OFF. (Feb. 21, 2018), https://lao.ca.gov/laoecontax/article/detail/265.

[129] Sean Coffey, *New Research: People Are Leaving SF, but Not California*, CAL. POL'Y LAB (Mar. 4, 2021), https://www.capolicylab.org/news/new-research-people-are-leaving-sf-but-not-california/.

[130] *Id.*

[131] *Id.*

[132] *See, e.g.*, Adler, *supra* note 116; Tyler Durden, *California Accelerates Plan to Chase Away the Wealthy*, CITIZENS J. (Dec. 23, 2020), https://www.citizensjournal.us/california-accelerates-plan-to-chase-away-the-wealthy/; David Briceno, *California Making Mistake by Chasing Away Its Wealthy*, THE UNION (Feb. 23, 2013), https://www.theunion.com/news/twi/california-making-mistake-by-chasing-away-its-wealthy/; Kristin Tate, *San Francisco Wealth Tax Will Fuel Next Blue Exodus for Rich Earners*, THE HILL (Nov. 27, 2020, 2:00 PM), https://thehill.com/opinion/finance/527731-san-francisco-wealth-tax-will-fuel-next-blue-exodus-for-rich-earners.

evidence, one insists that it will lead to a chain reaction resulting in an undesirable end or ends."[133] Here, the slippery slope argument may be as follows: we cannot allow a wealth tax for those with $30 million net worth, because next, they will apply it to those with $20 million, then $10 million, and so on. Multiple opinions and articles published by media outlets referenced this slippery slope argument as justification for opposing the wealth tax.[134] Additionally, in a poll conducted by the Public Policy Institute of California, the data "consistently show[ed] that a majority of voters support taxes on the wealthy but are concerned about possible unintended consequences."[135] The slippery slope argument was also used by those advocating against the controversial Proposition 15 ("Prop. 15"), which, for tax purposes, would have assessed commercial real estate by its FMV rather than its original purchase price.[136] It was argued and feared that the implementation of Prop. 15 would lead to repealing Proposition 13 ("Prop. 13").[137] Prop. 13 fixed the assessment of value of both residential and commercial property to the original purchase price.[138]

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[133] *Slippery Slope*, TEX. ST. U. DEP'T PHIL., https://www.txstate.edu/philosophy/resources/fallacy-definitions/Slippery-Slope.html (last visited Mar. 13, 2021).
[134] Adler, *supra* note 116; Virginia La Torre Jeker, *Everyone—Including Foreigners…Stay Away from California! 10-Year Wealth Tax Looms for Single Year Stays Over 60 Days*, U.S. TAX TALK (Jan. 7, 2021), https://us-tax.org/2021/01/07/everyone-including-foreigners-stay-away-from-california-10-year-wealth-tax-looms-for-single-year-stays-over-60-days/; *Capitalisn't: The Morality or Immorality of a Wealth Tax*, CHI. BOOTH REV. (Apr. 25, 2019), https://review.chicagobooth.edu/economics/2019/article/capitalisn-t-morality-or-immorality-wealth-tax.
[135] Mahoney, *supra* note 101.
[136] Proposition 15, CAL. S'Y ST., https://vig.cdn.sos.ca.gov/2020/general/pdf/topl-prop15.pdf (last visited Sept. 16, 2021); *California Proposition 15, Tax on Commercial and Industrial Properties for Education and Local Government Funding Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_15,_Tax_on_Commercial_and_Industrial_Properties_for_Education_and_Local_Government_Funding_Initiative_(2020) (last visited Sept. 16, 2021).
[137] Ryan Menezes & Sandhya Kambhampati, *How Prop. 15 Would Roll Back California's Landmark Tax Rule and Raise Billions*, L.A. TIMES (Oct. 21, 2020), https://www.latimes.com/projects/prop-15-property-taxes-impact-california-funding/.
[138] *California Proposition 13, Tax Limitations Initiative (1978)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_13,_Tax_Limitations_Initiative_(1978) (last visited Sept. 16, 2021).

While California's Democratic Governor, Gavin Newson, supported Prop. 15, he outwardly and directly stated that he was not in support of a state wealth tax.[139] Governor Newsom said, "In a global, mobile economy, now is not the time for the kind of state tax increases on income we saw proposed at the end of this legislative session, and I will not sign such proposals into law."[140] Governor Newsom made these statements roughly three months prior to the death of A.B. 2088.[141] Furthermore, in the wake of the COVID-19 pandemic and Governor Newsom's own political hurdles, supporting an extremely controversial change to existing tax law might not be in his best political interest.[142]

After considering the popularity of Prop. 15 and 19, one might ask why the wealth tax has not made its way onto the ballot and whether the public would have voted it into law. California is one of twenty-four states that allows its citizens to vote on "propose[d] statutes and amendments to the [state] Constitution and to adopt or reject them."[143] This gives the populous a chance to vote into effect or repeal specific laws outside of the legislative process. Some of the more controversial ballot measures gain large sums of monetary contributions on either side.[144]

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[139] Mahoney, *supra* note 101.
[140] *Id.*
[141] *Id.*
[142] Jeremy B. White, *Newsom Recall Drive Faces Tight Finish Based on Latest California Data*, POLITICO (Feb. 19, 2021, 8:29 PM), https://politi.co/2ZxPbKJ.
[143] CAL. CONST. art. II, § 8 (amended 1976); *see generally How Do Initiatives Get on the Ballot?*, BALLOTPEDIA, https://ballotpedia.org/How_do_initiatives_get_on_the_ballot (last visited Sept. 16, 2021).
[144] In 2020, contributions in support of Proposition 15 totaled $56,320,926, while the opposition raised $60,905,901. If the wealth tax makes it on to the ballot it will likely see similar funds on either side. *See Proposition 15*, CAL. SEC'Y ST., https://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/2020-ballot-measure-contribution-totals/proposition-15-increases-funding-public-schools-community-colleges-and-local-government-services-changing-tax-assessment-commerc (last visited Sept. 16, 2021) (listing the lobbying efforts in support and opposed to Proposition 15).

Regarding the wealth tax, the Assemblymen who brought A.B. 2088 to the legislative floor, Rob Bonta and Miguel Santiago, stated that "they are willing to ask voters to approve statewide tax increases at the ballot box if the Legislature and governor don't."[145] A wealth tax on the ballot could have a fighting chance of becoming law if compared with the recently defeated Prop. 15. Prop. 15 was marketed as a tax on wealthy property owners and summarized on the ballot as "increas[ing] funding sources for public schools, community colleges, and local government services by changing [the] tax assessment of commercial and industrial property."[146] A wealth tax could likely make its way to the ballot and be attached to a tax initiative summary that voters might not fully understand but whose vague verbiage would draw a voter's eye and heart.

D. CONSTITUTIONALITY OF A.B. 2088'S "EXIT TAX"

Another argument raised against A.B. 2088 addresses the constitutionality of the ten-year "exit tax" portion of the bill, also referred to as the "trailing nexus."[147] According to Richard Pomp, a tax professor at the University of Connecticut School of Law, a trailing nexus of this magnitude would violate the Commerce and Due Process Clauses of the Constitution.[148] According to Pomp, "California could obviously have a wealth tax on Californians if this is what it wants . . . . But this is trailing nexus on steroids. I don't see a court, outside of California, upholding that."[149] The

145 Mahoney, *supra* note 101.
146 *Proposition 15*, CAL. SEC'Y ST., https://web.archive.org/web/20210429193951/https://voterguide.sos.ca.gov/propositions/15 (last visited Mar. 13, 2021).
147 Maria Koklanaris, *Calif. Wealth Tax Proposal Likely Faces Constitutional Challenges*, LAW360 (Aug. 28, 2020, 7:49 PM), https://www.law360.com/tax-authority/articles/1305258/calif-wealth-tax-proposal-likely-faces-constitutional-challenges; a "[t]railing nexus is a method used by some states under which businesses that cease the activities that created nexus with the state continue to have a tax obligation after those activities have ended. Jennifer Carr, *Is Trailing Nexus Constitutional?I*, TAXANALYSTS (Dec. 5, 2012), http://www.taxhistory.org/www/features.nsf/Articles/711DFCFB75E5668E85257ACB00726795?OpenDocument.
148 *Id.*
149 *Id.*

unprecedented ten-year trailing nexus "would be a very attenuated due process linkage."[150] As to the Commerce Clause issue, Joseph Bishop-Henchman, a vice president at the National Taxpayers Union Foundation, claimed that "taxing a resident's worldwide wealth without apportioning or crediting for parts not accumulated in California would be a 'fatal flaw.'"[151] Further, Bishop-Henchman argued that the bill would burden individuals' right to travel through taxation, which was found unconstitutional in *Crandall v. Nevada.*[152] Some experts believe this trailing nexus is too impractical on top of an already complex, novel wealth tax.[153] Even with mechanical, constitutional, and implementation issues aside, the emotional and visceral reaction to the tax may be too much for Californians to handle at the moment.[154]

With the constitutional challenge focused on the trailing nexus of the wealth tax, lawmakers could simply adjust the bill to exclude the trailing nexus or make it less robust. Some might argue that the trailing nexus is vital to the wealth tax, given fears of an "exodus" of wealthy Californians.[155] However, as the above-mentioned California Policy Lab data suggests, the proclaimed exodus did not occur—but a wealth tax could be the tipping point.[156]

VI. NEW YORK'S PROPOSED WEALTH TAX

New York's Senate Bill S8277B ("S.B. S8277B") would create a billionaire mark-to-market tax applying to residents with net assets worth $1 billion or more.[157] A mark-to-market

[150] *Id.*
[151] *Id.*
[152] *See* Crandall v. Nevada, 73 U.S. 35 (1868) (holding that a $1 tax placed on residents leaving the state was unconstitutional under the Commerce Clause); *see generally* U.S. CONST. art. I, § 8, cl. 3.
[153] Koklanaris, *supra* note 147.
[154] *Id.*
[155] Lai, *supra* note 128.
[156] Coffey, *supra* note 129.
[157] S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).

approach annually taxes the "change in an asset's value year-over-year."[158] Therefore, the bill purely challenges the realization requirement established in *Macomber* by taxing the appreciation of an asset.[159] Unlike California's A.B. 2088, which taxes the net worth of an individual based on the FMV of their assets, S.B. S8277B uses the resident's net worth as a threshold for the mark-to-market tax to apply.[160]

New York is home to 118 billionaires with a combined net worth of $521.5 billion.[161] Taxing these individuals with a mark-to-market tax was estimated to have "raise[d] more than $5.5 billion a year, on average, and about $23 billion the first year it goes into effect."[162] Lawmakers planned to use the billionaire mark-to-market tax revenue to "finance the creation of a worker bailout fund and program."[163] The bill is supported by some of New York's most progressive legislators, such as Congresswoman Alexandria Ocasio-Cortez and Congressman Jamaal Bowman.[164] Congresswoman Ocasio-Cortez currently leads a progressive movement with the slogan "tax the rich."[165] Despite New York's progressive movement gaining traction and the state

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[158] Scott Eastman, *Evaluating Mark-to-Market Taxation of Capital Gains*, TAX FOUND., https://taxfoundation.org/mark-to-market-taxation-of-capital-gains (last visited Sept. 16, 2021).
[159] Eisner v. Macomber, 252 U.S. 189 (1920).
[160] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020); S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
[161] Carter Coudriet, *The States with the Most Billionaires*, FORBES (2020), https://www.forbes.com/sites/cartercoudriet/2020/04/09/the-states-with-the-most-billionaires-2020.
[162] Luis Ferré-Sadurní & Jesse McKinley, *Tax the Ultrarich? Cuomo Resists, Even With a $14 Billion Budget Gap*, N.Y. TIMES (Sept. 7, 2020), https://www.nytimes.com/2020/09/07/nyregion/wealth-tax-budget-billionaires.html; James Nani, *Group Calls for NY 'Mark-To-Market' Tax to Raise $5.5B*, LAW360 (Aug. 12, 2020, 7:52 PM), https://www.law360.com/tax-authority/articles/1300630/group-calls-for-ny-mark-to-market-tax-to-raise-5-5b.
[163] "The worker bailout program provides workers and individuals and with $3,300 per month, if they are: 1) excluded from Unemployment and the CARES Act; and 2) during the current state of emergency, a loss of income of either the individual or a close family member-who they were dependent upon for wages- or a loss of income due to death or disability; and 3) Have been released from post arraignment incarceration or detention on or after October 1st, 2020." S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
[164] Jimmy Vielkind, *Some Democratic Lawmakers Push for Wealth Tax on New York Billionaires*, WALL ST. J. (Feb. 18, 2021), https://www.wsj.com/articles/some-democratic-lawmakers-push-for-wealth-tax-on-new-york-billionaires-11613692224.
[165] Alexandria Ocasio-Cortez (@AOC), TWITTER (Jan. 27, 2021, 1:08 PM), https://twitter.com/aoc/status/1354536756033572864.

facing a record-setting $15 billion deficit, the bill still faced opposition from the state's Democratic Governor at the time, Andrew Cuomo.[166] The governor believed that the "potential benefit of new revenue from taxing the rich would be far outstripped by the negative impact on the state's highest earners, who already shoulder the bulk of the state's taxes."[167]

A. THE MECHANICS

Under S.B. S8277B, a billionaire's taxable income "includes the full value of capital gains in the year they accrue, whether the gain is realized or not."[168] The bill would also "[treat] residential billionaires['] capital gains on their net assets as annual income, furthermore, taxing billionaires['] yearly unrealized capital gains."[169] Like California's proposed wealth tax, New York's tax will be calculated by looking at an individual's assets.[170] The assets subject to the wealth tax included, but are not limited to, the following:

> (i) stock held in any publicly traded corporation; (ii) stock held in any private traded c corporation; (iii) stock held in any s corporation; (iv) interests in any private equity or hedge fund organized as a partnership; (v) interests in any other partnerships; (vi) interests in any other noncorporate businesses; (vii) bonds and interest bearing savings accounts, cash and deposits; (viii) interests in mutual funds or index funds; (ix) put and call options; (x) futures contracts; (xi) financial assets held offshore reported on irs tax form eight thousand nine hundred thirty-eight; (xii) real property; (xiii) art and collectibles; (xiv) pension funds; (xv) other assets.[171]

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[166] Morgan McKay, *Cuomo Throws "Cold Water" on Increased Wealth Tax Proposals*, SPECTRUM NEWS (Jan. 11, 2021), https://spectrumlocalnews.com/nys/central-ny/politics/2021/01/11/cuomo-throws--cold-water--on-increased-wealth-tax-proposals; Ferré-Sadurní & McKinley, *supra* note 162.
[167] Ferré-Sadurní & McKinley, *supra* note 162.
[168] Greg Leiserson & Will McGrew, *Taxing Wealth by Taxing Investment Income: An Introduction to Mark-to-Market Taxation*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 11, 2019), https://equitablegrowth.org/taxing-wealth-by-taxing-investment-income-an-introduction-to-mark-to-market-taxation.
[169] *Summary of* Provisions, S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020), https://www.nysenate.gov/legislation/bills/2019/s8277.
[170] *Id.*
[171] *Id.*

The net gains or losses of each asset would be recognized as if the "individual taxpayer were [selling the asset] for its fair market value on that date."[172] The net gains, referred to as "sales," will be included as income up to a phase-in gap amount.[173] The phase-in gap amount "shall be equal to a quarter of the worth of a taxpayer's net assets in excess of one billion dollars on such date."[174] The mark-to-market wealth tax also factors in "assets held by private foundations (including charities) to which [the taxpayer is] a substantial contributor, and to gifts they give, which are taxed as if they were still owned by the taxpayer."[175]

Additionally, S.B. S8277B would only apply if the individual is a "resident" under New York law.[176] Under New York income tax law, resident status depends on whether the individual is domiciled in New York, "i.e., [whether] the taxpayer's permanent and primary home is located in New York."[177] However, the bill does not contain a trailing nexus; thus, the tax will not follow the billionaires if they lose their New York resident status.[178]

B. WHERE NEW YORK CURRENTLY STANDS WITH TAXES

New York is also considered one of the top tax-progressive states in the nation.[179] New York residents carry an average local-state sales tax rate of 12.7%, which is among the highest in

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172 *Id.*
173 *Id.*
174 *Id.*
175 Jared Walczak, *Taxes and New York's Fiscal Crisis: Evaluating Revenue Proposals to Close the State's Budget Gap*, TAX FOUND. (Dec. 8, 2020), https://taxfoundation.org/new-york-budget-gap-new-york-revenue-shortfall/#_ftnref52.
176 S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
177 Matter of Gaied v. N.Y. State Tax Appeals Trib., 6 N.E.3d 1113 (N.Y. 2014), *see also* N.Y. TAX § 605 (Consol. 2021).
178 S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
179 Stone, *supra* note 25.

the nation.[180] Of the $50 billion of income tax that New York brings in from its personal income tax, half comes from the top 2% of the state's earners.[181] These high earners' income is taxed at the top 8.82% bracket, which applies to those making over $1,077,550 annually.[182] Most of the state's wealthiest individuals live in New York City, which has its own 3.88% personal income tax for top earners.[183]

With New York facing a $8.2 billion deficit, Democratic lawmakers are pushing to "plug a budget hole" by increasing taxes on the wealthy.[184] Former Governor Cuomo proposed raising the top income-tax rate by 2%, which would raise the high personal income tax rate that is currently at 8.82%, to 10.82%.[185] As a result, top-earning New York City residents could be paying 14.7% in state and city income taxes.[186] New York lawmakers are pushing to gain tax revenue through many different avenues. New York lawmakers have presented a "pied-à-terre tax,"[187] Senate Bill S44B ("S.B. S44B"), which would "[i]mpose[] an additional tax [surcharge] on certain non-primary residence class one and class two properties in [New York City]."[188] A stock buyback

[180] *State-Local Tax Burden Rankings FY 2012*, TAX FOUND. (Jan. 20, 2016), https://taxfoundation.org/publications/state-local-tax-burden-rankings.
[181] Jimmy Vielkind, *New York State Lawmakers Weigh Tax Increase on Wealthy*, WALL ST. J. (Dec. 16, 2020, 8:21 AM), https://www.wsj.com/articles/new-york-state-lawmakers-weigh-tax-increase-on-wealthy-11608124891.
[182] *Id.*
[183] Karen Langley, *Tax Hikes for High Earners are on the Table in Some States*, WALL ST. J. (Feb. 24, 2021, 5:30 AM), https://www.wsj.com/articles/tax-hikes-for-high-earners-are-on-the-table-in-some-states-11614162600.
[184] Vielkind, *supra* note 164.
[185] Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2020*, TAX FOUND. (Feb. 2020), https://files.taxfoundation.org/20201130112944/State-Individual-Income-Tax-Rates-and-Brackets-for-2020-U.pdf; Jimmy Vielkind, *New York City Top Earners Face Highest Income Tax in U.S. Under Cuomo Proposal*, WALL ST. J. (Jan. 19, 2021, 6:55 PM), https://www.wsj.com/articles/new-york-awaits-federal-aid-to-fill-budget-hole-11611057600?mod=article_inline.
[186] Langley, *supra* note 183.
[187] A pied-a-terre tax would tax the owners of vacant second homes in New York City worth at least $5 million. Annie McDonough, *How New York Could Raise Taxes on the Rich*, CITY & ST. N. Y. (Sept. 18, 2020), https://www.cityandstateny.com/articles/policy/policy/how-new-york-could-raise-taxes-rich.html.
[188] *Senate Bill S44B*, N.Y. ST. SENATE, https://www.nysenate.gov/legislation/bills/2019/s44 (last visited Sept. 16, 2021); S. B. S44B, 2019–20 Leg. Sess. (N.Y. 2020); *Annie McDonough, How New York Could Raise Taxes on the*

surcharge under Senate Bill S7629 ("S.B. S7628") would "impos[e] a specific tax on all corporate stock buybacks of issued shares."[189] Finally, Senate Bill S7231A ("S.B. S7231A") proposes a corporate landlord tax that relates "to requiring the recording of mezzanine debt and preferred equity investments . . . [and] including mezzanine debt in the mortgage recording tax."[190] These bills have led to similar reactions among conservative commentators who believe that these taxes will lead—and have led—to the wealthy "fleeing" the state to head toward the warm beaches of Florida.[191]

The tax increases on the ultra-wealthy have gained support throughout the COVID-19 pandemic in New York.[192] The state's Senate Majority Leader, Andrea Stewart-Cousins, has displayed her support for increasing taxes on the wealthy with a "renewed political momentum."[193] Stewart-Cousins's statement regarding taxing "multimillionaires and billionaires to help [the] state shoulder [its] extraordinary burden" was supported by unions and more than one hundred Democratic lawmakers.[194]

C. FACTORS LEADING TO S.B. S8277B'S FAILURE

S.B. S8277B was proposed while New York was devastated by the COVID-19 pandemic. Additionally, New York had from an $8.2 billion deficit, mass unemployment, and an increased

Rich, CITY & ST. N. Y. (Sept. 18, 2020), https://www.cityandstateny.com/articles/policy/policy/how-new-york-could-raise-taxes-rich.html.

[189] *Senate Bill S7629*, N.Y. ST. SENATE, https://www.nysenate.gov/legislation/bills/2019/s7629 (last visited Sept. 16, 2021); S. B. S7629, 2019–20 Leg. Sess. (N.Y. 2020); McDonough, *supra* note 188.

[190] *Senate Bill S7231A*, N.Y. ST. SENATE, https://www.nysenate.gov/legislation/bills/2019/s7231 (last visited Sept. 16, 2021); S. B. S7231A, 2019–20 Leg. Sess. (N.Y. 2020); McDonough, *supra* note 186.

[191] Rainer Zitelmann, *Rich People are Fleeing New York, but Not Because of the Coronavirus*, NAT'L INT. (Feb. 20, 2021), https://nationalinterest.org/feature/rich-people-are-fleeing-new-york-not-because-coronavirus-178496.

[192] *Id.*

[193] Ferré-Sadurní & McKinley, *supra* note 162.

[194] *Id.*

wealth gap though this period.[195] Progressive legislators are pushing to increase taxes on the wealthy to prevent budget cuts, but conservatives have argued that "the state's fiscal problems are driven by overspending and a lack of accountability on economic development projects that don't provide promised jobs."[196] While the arguments seem convincing, the state's own former governor, who was criticized for his handling of the pandemic in the state and alleged sexual harassment, has outwardly stated his lack of support for a wealth tax.[197] Governor Cuomo stated, "There is no combination of savings, efficiencies, tax increases that could ever come near covering the deficit," and he redirected the focus to requesting federal aid.[198] While Governor Cuomo was under intense scrutiny, a novel and monumental tax initiative likely would not have worked in his favor in regard to public perception. Conservatives had already criticized "the state's fiscal problems [as being] driven by overspending and a lack of accountability on economic development projects that don't provide promised jobs."[199] Additionally, many critics of the wealth tax argue increased taxes on the wealthy will lead the wealthy to leave the state.[200]

The wealth tax will likely lead billionaires to rethink staying in the state entirely.[201] With the lack of a trailing nexus, there is nothing stopping these 118 billionaires from immediately

[195] *Id.*
[196] Marina Villeneuve, *Lawmakers Pitch Tax Hikes on High Earners in New York*, ASSOCIATED PRESS (Feb. 17, 2021), https://apnews.com/article/new-york-andrew-cuomo-legislation-coronavirus-pandemic-c8006053ad01cd724905976ff20d3979.
[197] Kelsey Vlamis, *The Tide Has Turned Against Gov. Andrew Cuomo as Federal Investigators Scrutinize His Handling of New York's COVID-19 Crisis*, BUS. INSIDER (Feb. 17, 2021, 8:16 PM), https://www.businessinsider.com/cuomo-faces-federal-investigation-over-handling-of-covid-19-2021-2; Cameron Peters, *Two More Women Accuse New York Gov. Andrew Cuomo of Sexual Harassment*, VOX (Mar. 7, 2021, 4:28 PM), https://www.vox.com/2021/3/7/22318003/more-women-accuse-new-york-gov-andrew-cuomo-sexual-harassment.
[198] Ferré-Sadurní & McKinley, *supra* note 162.
[199] Villeneuve, *supra* note 196.
[200] *Id.*
[201] *Id.*

leaving New York once the tax is implemented, or even before.[202] Former Governor Cuomo reinforced this skepticism of the wealth tax, stating, "If they want a tax increase, don't make New York alone do a tax increase—then they just have the people move to Connecticut. Let the federal government pass a tax increase."[203]

D. CONSTITUTIONALITY OF S.B. S8277B UNDER NEW YORK LAW

S.B. S8277B faces its own state constitutional challenges. New York's Constitution states that "intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measure by income generally. Undistributed profits shall not be taxed."[204] This would indicate that the state's constitution blocks the taxation of unrealized income.[205] However, it is argued that S.B. S8277B was designed to work around the state's constitution by not taxing wealth as a whole but by taxing the economic gains of those who are extremely wealthy.[206] Thus, this tax is unlike California's proposal and those of Elizabeth Warren and Bernie Sanders (discussed above), who seek to tax the total net worth of an

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[202] Coudriet, *supra* note 161.
[203] Robert Frank, *Billionaires in New York Could Pay $5.5 Billion a Year Under New Tax*, CNBC (July 21, 2020, 11:41 AM), https://www.cnbc.com/2020/07/21/billionaires-in-new-york-could-pay-5point5-billion-a-year-under-new-tax.html.
[204] N.Y. Const. art. XVI, § 3 (defining *ad valorem* as "imposed at a rate percent of value" which is similar to valuation methods used in Senate Bill S8277B wealth tax). *See also* Christopher Robbins & Sydney Pereira, *New York Is in a Financial Tailspin, Millions Are Suffering. Why Shouldn't Billionaires Pay More Taxes?*, GOTHAMIST (Oct. 29, 2020, 12:17 PM), https://gothamist.com/news/new-york-billionaires-tax-fiscal-crisis-budget-ultrarich-nyc.
[205] *Id.*
[206] Bill Mahoney, *Would a New Billionaires' Tax Be Constitutional?*, POLITICO (July 30, 2020, 5:00 AM), https://politi.co/3hRauOE.

individual.[207] S.B. S8277B seeks to only use the individual's net wealth as a threshold before applying the mark-to-market tax.

VII. VALUATION ISSUES

Both California's and New York's wealth tax bills involve the valuation of assets that have not been realized.[208] Each asset is valued by looking to the FMV then finding the sum of all those assets.[209] Some assets, such as homes, sports cars, or basic appreciated stocks, might be easy to value, while calculating a billionaire's interest in a closely held business might not.[210] After studying New York's wealth tax, David Shakow, a professor at the University of Pennsylvania Law School, stated, "The real significant problem is with closely held stock. If [the law] were to pass, undoubtedly, you'd have a big fight."[211] Assigning a fair value to closely held stock and other interests in business is likely to be extremely difficult. These practical implementation issues might have led, in part, to each bill's failure to be signed into law.

VIII. CLAIMS OF SOCIALISM

In today's political climate, conservative commentators who oppose the wealth tax have warned that liberal Democrats "have chosen to go down the road to socialism."[212] This has likely played a large role in framing any tax increase as part of a socialist agenda.[213] Progressive

[207] S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
[208] Assemb. B. 2088, 2019–20 Reg. Sess. (Cal. 2020); S. B. S8277B, 2019–20 Gen. Assemb. (N.Y. 2020).
[209] Farrell Fritz, *New York's Proposed "Billionaires' Tax"–Bad Idea*, FARRELL FRITZ ATT'YS (Dec. 14, 2020), https://www.taxlawforchb.com/2020/12/new-yorks-proposed-billionaires-tax-bad-idea.
[210] Robbins & Pereira, *supra* note 204.
[211] *Id.*
[212] Brian Naylor, *Republicans Blast Democrats as Socialists. Here's What Socialism Is*, NPR (Aug. 25, 2020, 3:20 PM), https://www.npr.org/2020/08/25/905895428/republicans-blast-democrats-as-socialists-heres-what-socialism-is.
[213] *Id.*

Democrats, such as Congresswoman Ocasio-Cortez, have been at the center of political media, where they are focused on a 70 percent top marginal tax rate for incomes over $10 million."[214]

With popular liberal figures pushing for tax increases, the conservative media and former President Donald Trump have pushed a narrative that Democrats are radical socialists.[215] Trump remarked, "A vote for any Democrat in 2020 is a vote for the rise of radical socialism and the destruction of the American dream."[216] Senator Sanders and Congresswoman Ocasio-Cortez do identify as "Democratic Socialists."[217] Notably, their socialist initiatives align with the those of Denmark and Sweden, "where universal health care and a wide range of social benefits—and higher taxes—are the norm, but capitalism still prevails, rather than with countries such as Venezuela and Cuba, where the state does control major industries, and authoritarians rule."[218]

While many of these claims may be ill-founded and propagated for political gain, the general idea of a wealth tax does align with socialistic ideals.[219] A key element of socialism that aligns with the wealth tax justification is the pillar of community—the belief that "[p]eople should recognize positive duties to support other people, or, as Einstein (1949) put it, a 'sense of responsibility for [their] fellow men.'"[220] To Senators Warren, Sanders, and Long, a wealth tax is justified to support those hose struggling economically.[221]

[214] Dylan Matthews, *How to Tax the Rich, Explained*, VOX (Mar. 19, 2019, 10:00 AM), https://www.vox.com/2019/3/19/18240377/estate-tax-wealth-tax-70-percent-warren-sanders-aoc.
[215] Reid J. Epstein & Linda Qui, *Fact-Checking Trump's Claims That Democrats Are Radical Socialists*, N.Y. TIMES (July 20, 2019), https://www.nytimes.com/2019/07/20/us/politics/trump-democrats-socialists.html.
[216] *Id.*
[217] Naylor, *supra* note 212.
[218] *Id.*
[219] Pablo Gilabert & Martin O'Neill, *Socialism*, STAN. ENCYCLOPEDIA PHIL. (July 15, 2019), https://plato.stanford.edu/entries/socialism/#SociPrin.
[220] *Id.*
[221] SANDERS, *supra* note 84; Warren, *supra* note 86.

IX. IS THERE STILL HOPE?

However, California and New York differ in the degree of opposition they would face for their wealth tax proposals. For example, New York's bill would apply to roughly 118 residents, while California's bill would apply to 30,400 residents. While 118 billionaires are a lot, the 30,400 Californians are likely to put up a bigger fight. California's wealth tax bill is a true wealth tax in the sense that it taxes an individual's net wealth rather than using net wealth as a threshold to apply a tax. Additionally, California's bill further complicates the matter with a trailing nexus that discourages the wealthy from leaving the state. Such a provision could generate greater outcry among those to whom the bill does not apply.

The COVID-19 pandemic has likely strengthened the possibility of such a tax being accepted by the American public. During the pandemic, those with significant assets actually saw an increase in their wealth as the rest of the population struggled.[222] There was a recorded $2.1 trillion wealth increase among the nation's billionaires from March 18, 2020 to October 18, 2021.[223] The total $5 trillion, held by only 745 individuals, is nearly $2 trillion more than the wealth of the bottom 50% of the country's population—165 million people—combined.[224] The growth of the wealth divide, coupled with the economic struggles of the nation, may lead to greater frustration toward the extremely wealthy.

The implementation of wealth taxes elsewhere in the world, which prompted similar skepticism and resistance, has provided a learning opportunity on developing an effective wealth

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[222] Chuck Collins, *Updates: Billionaire Wealth, U.S. Job Losses and Pandemic Profiteers*, INEQUALITY.ORG (Feb. 24, 2021), https://inequality.org/great-divide/updates-billionaire-pandemic.
[223] *Id.*
[224] *Id.*

tax.[225] In 1990, out of forty-four European nations, twelve countries had a net wealth tax, yet in 2021, the policy only exists in three nations.[226] Many of these nations experienced the difficulties of a net wealth tax and discovered other ways to tax wealth.[227]

X. CONCLUSION AND OTHER WAYS TO TAX THE RICH

Taxpayers' visceral reactions to the prospect of a wealth tax might lead to the policy's early demise. Over generations, Americans have become accustomed to not being taxed on unrealized income. Thus, such a change, even if made to a small portion of the population, would create uncertainty and could discourage the wealthy from investing in capital.[228]

There are other avenues of taxing the extremely wealthy that do not involve a wealth tax. First, the buy, borrow, die tax strategy could be dismantled.[229] The major and most likely change is the repeal of section 1014, the stepped-up basis.[230] Removing the stepped-up basis would mean that heirs would receive assets with massive built-in gain of an appreciated asset would be taxed.[231] President Biden has even mentioned considering either removing or changing the stepped-up basis.[232]

[225] Greg Rosalsky, *If a Wealth Tax Is Such a Good Idea, Why Did Europe Kill Theirs?*, NPR (Feb. 26, 2019, 7:32 AM), https://www.npr.org/sections/money/2019/02/26/698057356/if-a-wealth-tax-is-such-a-good-idea-why-did-europe-kill-theirs.
[226] *Id.*; Elke Asen, *Wealth Taxes in Europe*, TAX FOUND. (Dec. 17, 2020), https://taxfoundation.org/wealth-taxes-in-europe-2020.
[227] Timothy Taylor, Why Have Other High-Income Countries Dropped Wealth Taxes?, BNNTIMES (Feb. 2, 2021), https://www.bbntimes.com/global-economy/why-have-other-high-income-countries-dropped-wealth-taxes.
[228] Allison Schrager & Beth Akers, *What's Wrong with a Wealth Tax*, MANHATTAN-INST. (Oct. 8, 2020), https://www.manhattan-institute.org/whats-wrong-with-a-wealth-tax.
[229] McCaffery, *supra* note 1, at 87.
[230] *Id.* at 93–94.
[231] *Id.*
[232] Alter, *supra* note 96.

Second, implementing a progressive spending tax would allow the extremely wealthy to hold their money but then be taxed at high rates when they spend it.[233] The progressive spending tax would avoid changing any existing buy/die policies that the wealthy exploit. Instead of repealing the realization requirement or removing the stepped-up basis, the progressive spending tax would merely focus on consumption.[234] The progressive spending tax would tax the "acquisition" of debt and then provide deductions for paying back the debt.[235] This would incentivize the extremely wealthy to pay back their debt during their life, rather than avoiding it entirely until death.[236] The taxing of debt acquisition would hold the extremely wealthy accountable for their use of debt rather than permitting using debt to entirely avoid paying taxes.[237] However, some argue that this would deter commercial activity and spending by the wealthy.[238]

The final issue at hand, and possibly the most important, is the complexity of tax itself. Many frustrations with tax policies arise out of a lack of understanding of them. Taxation is complex and very nuanced, but many people receive little to no education on how it works throughout their lives.[239] Thus, the population's better understanding of taxation could lead to improved, better-balanced tax policies. Such a focus on the people's knowledge of taxation could reduce the visceral negativity many feel when it comes to the mere discussion of tax. Therefore, tax education could lead to an understanding of why we either do or do not need a wealth tax.

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[233] McCaffery, *supra* note 1, at 92–93.
[234] *Id.*
[235] Edward J. McCaffery, *A Better Way to Tax*, PEOPLE'S TAX PAGE, https://www.peoplestaxpage.org/a-better-way (last visited Sept. 16, 2021).
[236] *Id.*
[237] *Id.*
[238] Robert Frank, *Progressive Consumption Tax*, 8 DEMOCRACY J. (Spring 2008), https://democracyjournal.org/magazine/8/progressive-consumption-tax.
[239] Howard Gleckman, *What Do People Think About Taxes? They Are Partisan, Dazed, and Confused*, TAX POL'Y CTR. (Sept. 11, 2020), https://www.taxpolicycenter.org/taxvox/what-do-people-think-about-taxes-they-are-partisan-dazed-and-confused.