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Constitutional Flaws of California's Proposed Wealth Tax

August 2026

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Key Findings

- The California Billionaire Tax Act (Proposition 40), which imposes a one-time 5 percent tax on billionaires' net worth, is vulnerable to numerous constitutional challenges, any of which could invalidate the tax in whole or in part.
- Drafters' characterization of the levy as an excise tax rather than a tax on property is irrelevant; if amendments superseding the state constitution's limits on intangible property taxation fail, then the new tax fails as well.
- The retroactive residency date is fatally flawed under Supreme Court precedent barring retroactive imposition of a "wholly new tax."
- The tax's 100 percent apportionment system violates nexus, fair apportionment, and internal consistency requirements.
- The measure's sweeping anti-avoidance rules include assets the taxpayer does not own, raising due process issues and, in certain cases, guaranteeing double taxation.
- By seeking to lock taxpayers into full liability whether they stay or leave, the tax burdens the right to travel, which could force the state to defend these provisions under strict scrutiny.
- The tax base impermissibly includes US Treasuries and other federal obligations.
- Uncapped penalties on appraisers who value hard-to-value assets raise Excessive Fines Clause concerns because they are grossly disproportionate to any good-faith errors.
- Drafters have asked courts to reform the statute to cure any defects, but the measure's constitutional flaws far exceed what can be accomplished through judicial reformation and point toward striking the tax down in its entirety.

Introduction

If California adopts a wealth tax, the only undisputed winners will be the lawyers. The California Billionaire Tax Act (CBTA), appearing on the November 3, 2026, ballot as Proposition 40, is vulnerable to a range of legal challenges on numerous grounds and on multiple levels: as-applied challenges to the tax imposed on specific individuals; challenges to the validity of specific provisions as written, like the snapshot residency and valuation dates; and challenges to the constitutionality of the tax as a whole.

A prior paper examined how litigation over the CBTA's residency and valuation provisions could require judicial reformation, eliminating some or all wealth tax liability for billionaires who leave the state in 2026—if the tax could survive such a challenge at all.[1] This paper explores the more fundamental question of whether the proposed wealth tax passes constitutional muster.

The measure's drafters fully anticipated that their proposal would draw intense legal scrutiny and recognized that it would raise serious constitutional questions. They embedded a set of preemptive legal defenses into the tax's design, attempting to insulate it from these challenges. But not all potential constitutional infirmities can be overcome by legal cunning, and the measure's defensive provisions are an acknowledgment of a wealth tax's fundamental legal vulnerabilities.

If courts invalidate the tax, California will have the worst of all worlds: a threat that drives away some of the state's wealthiest taxpayers and spooks the next wave of startup founders, costly litigation that could drag on for years, and not a single dollar in new revenue. This is not a minor concern. The tax is legally dubious as well as economically damaging. This paper examines the legal deficiencies that could, and should, lead to the tax being struck down.

The Excise Tax Characterization Fails

The measure defines the wealth tax as an excise tax on the "activity" of "sustaining excessive accumulations of wealth."[2] But courts, in California and at the federal level, have long held that the character of a tax is determined by its substance, not its form or label.[3] Merely calling a tax an excise tax does not make it one, and even if it is possible to define a tax as an excise in some fashion, it does not lose its ordinary characteristics.

A wealth tax is, fundamentally, a tax on property, and styling it as a tax on an "activity" does not change that fact, any more than ordinary real property taxes could be deemed to no longer be property taxes (and thus, perhaps, not subject to Proposition 13 assessment limits or rate caps) but rather an excise tax on the activity of sustaining ownership of real property. If excise tax framing can override the substance of a tax, that has implications for every taxpayer in California, because it could be used to avoid laws limiting any specific tax.

1 Jared Walczak, "Mid-Year Movers and the California Wealth Tax," Tax Foundation, May 26, 2026, https://taxfoundation.org/research/all/state/california-billionaire-wealth-tax-legal-challenges/.
2 California Proposition 40 (2026), § 50301.
3 *Ingels v. Riley*, 5 Cal. 2d 154 (1936); see also *Weekes v. City of Oakland*, 21 Cal. 3d 386 (1978).

Fortunately, California and federal courts have historically disregarded labels when they conflict with the clear substance or nature of the tax in question, and it is a maxim of jurisprudence in California that "[t]he law respects form less than substance."[4] The CBTA is a tax on both tangible and (especially) intangible property, with liability triggered by ownership on a fixed date, measured against net worth, and imposed without there being any transaction, transfer, or realization event. "Sustaining" accumulations of wealth is indistinguishable from ownership. The proposed wealth tax is a property tax.

This matters because the state constitution imposes a 0.4 percent cap on the taxation of intangibles, and also requires taxes on property to be uniform, both of which undeniably conflict with the proposed wealth tax.[5] The measure's drafters understood this, despite their efforts to frame the tax as an excise tax. They explicitly acknowledge the issue in one of their white papers on the proposal,[6] and their solution is to embed a constitutional amendment within the measure that authorizes this particular one-time tax notwithstanding any other provision of the constitution with which it might conflict.

Ballot measures are permitted to amend the constitution but not "revise" it—a distinction about how fundamental and sweeping the changes are. Some have suggested that the constitutional elements are broad enough to constitute an impermissible revision, and if courts came to that conclusion, then the state constitution's limits on property taxation would apply to the tax, and its "excise tax" characterization is highly unlikely to save it. Similarly, courts may conclude that these constitutional amendments exceed what is permitted under the single subject rule for ballot initiatives, with the same result.

Meanwhile, the attempt to characterize the tax as an excise tax could backfire against proponents in federal constitutional litigation, because the whole framing of the tax is about taxing a status rather than a transaction or property ownership, which buttresses the case that this is a "wholly new tax"—a problem for its retroactivity, discussed below—and which complicates the tax's already vexing apportionment problems.

The Retroactive Provisions Are Fatally Flawed

The CBTA imposes a one-time 5 percent tax on the net worth of billionaires who resided in California as of January 1, 2026, based on wealth measured on December 31, 2026. Since the measure is on the ballot in November, its residency snapshot predates the potential adoption of the tax by more than 10 months.

As noted in prior analyses, retroactivity is not necessarily a legal impediment by itself. Many taxes are modified retroactively in ways that have survived legal scrutiny. However, retroactivity has limits, some better defined than others. The period of retroactivity is a relevant consideration, but a period of less than a year is not unusual. Similarly, due process violations arise if "retroactive application is so harsh and oppressive as to transgress the constitutional limitation,"[7] which the courts would have to determine. Most pertinent for the wealth tax, however, is that the Supreme Court has distinguished between "modest"

4 CA Civ Code § 3528 (2025).
5 Cal. Const. art. XIII, §§ 1, 2.
6 Brian D. Galle, David Gamage, Emmanuel Saez, and Darien Shanske, "Expert Report on the California 2026 Billionaire Tax: Revenue, Economic, and Constitutional Analysis," University of Missouri School of Law Legal Studies Research Paper No. 2026-01, Dec. 31, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5996554.
7 *Welch v. Henry*, 305 U.S. 134 (1938).

revisions of existing taxes and the adoption of a "wholly new tax,"[8] twice acting to strike down retroactive applications of a new tax—even when it only applied to periods when a taxpayer had good reason to believe that such a tax was forthcoming ("constructive notice").[9]

The ordinary remedy for retroactivity is to exclusively apply the tax prospectively. Because the CBTA is designed as a one-time tax, however, this option is not readily available. The tax only contains one residency date, and it is retroactive. Invalidating any application prior to the November enactment date would therefore leave little, if any, of the tax intact.

Drafters knew the dates they chose invited such a challenge, and sought to build in a safety valve, asking courts to engage in "judicial reformation" to set later dates if these dates are deemed unconstitutional. The express request may help the case, but California's courts have been reluctant to reform tax laws because they cannot reasonably anticipate whether lawmakers (or, in this case, voters) would have supported the measure had it been presented to them in revised form.

As the California appeals court noted in one such case, "In the context of cases involving tax statutes that violate the Commerce Clause, the courts have consistently declined to exercise the power of judicial reformation to cure the constitutional violation." Rewriting a statute "would involve us in precisely the type of judicial policymaking and encroachment on the legislative function in violation of the separation of powers doctrine."[10]

The importance drafters have placed on a lock-in residency provision will make it difficult for courts to modify the date to meet constitutional muster. The claim that the measure prevents billionaires from reacting to the tax by moving has been a key selling point for the measure's drafters and chief proponents.[11] Upon a determination that the CBTA impermissibly imposes a wholly new tax retroactively, the courts may have no choice but to strike the tax down entirely rather than save it by establishing new, post-enactment assessment and valuation dates.[12]

The CBTA Overreaches on Nexus and Apportionment

States are permitted to tax their residents' worldwide assets and interests, but due process requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[13] That connection must exist when the interest is being taxed.[14] This connection is severed when a person establishes domicile outside the state, yet the measure's design explicitly taxes former residents—billionaires who left the state earlier in 2026—based on their wealth as of December 31, 2026. The tax falls on a person who is no longer domiciled in California, on the entirety of their net worth rather than a prorated share reflecting their time in the state, based on a post-departure valuation that includes wealth acquired or accrued in another state.

8 *United States v. Carlton*, 512 U.S. 26 (1994).
9 *Blodgett v. Holden*, 275 U.S. 142 (1927); *Untermyer v. Anderson*, 276 U.S. 440 (1928). The distinction was affirmed in *United States v. Hemme,* 476 U.S. 558 (1986), and reiterated in Justice O'Connor's concurrence in *United States v. Carlton*, 512 U.S. 26 (1994).
10 *Ventas Finance I, LLC v. Franchise Tax Board*, 165 Cal. App. 4th 1207 (2008).
11 See, e.g., Galle et al., "Expert Report on the California 2026 Billionaire Tax: Revenue, Economic, and Constitutional Analysis"; Id., "Response to 'The Net Present Value of the Billionaire Tax Act' March 4, 2026," Mar. 17, 2026, https://eml.berkeley.edu/~saez/responsetorauh26.pdf.
12 For a much more extensive treatment of residency questions and the resulting retroactivity challenges, including rebuttals to proponents' arguments, see Jared Walczak, "Mid-Year Movers and the California Wealth Tax." The present analysis is a significantly abridged treatment.
13 *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954).
14 *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. 262 (2019).

Movables follow the person, by longstanding legal maxim: *mobilia sequuntur personam*. The measure's December 31 valuation date determines the amount of the levy at a time when, for a mid-year mover, neither the person nor their property has any link to California. Property acquired before moving to California, or accrued after departure, moreover, *never* had such a connection.

Proponents dismiss this objection, saying that the obligation attaches while the person is still a resident and the valuation on December 31 merely measures it, but this is inconsistent with the constitutional power to tax, which is based on contemporaneous protection and benefits. By proponents' logic, if a valuation date of December 31, 2026, is justified, what about a valuation date of 2030 or 2040? On the contrary, the Supreme Court has insisted that due process requires a minimum connection with the very object of the tax—a connection that must exist at the time of, and with respect to, the interest being taxed.[15]

Proponents also point to trailing nexus doctrines, under which some taxation of business receipts is permitted if those receipts are attributable to earlier in-state activity, but these trailing nexus rules do not permit the entire subsequent earnings of a former resident to be taxed. Wealth, moreover, is a status, and offers nothing to "trail."

The proposed tax runs afoul of the Commerce Clause. Under *Complete Auto Transit, Inc. v. Brady*, a tax must demonstrate (1) substantial nexus between the taxpayer or activity and the taxing state; (2) fair apportionment such that only the portion of the activity within the taxing state is taxed; (3) nondiscrimination such that the state does not favor in-state taxpayers over nonresidents or out-of-state businesses; and (4) a fair relationship between the tax and the services, benefits, and protections provided by the state to the taxpayer.[16]

The measure conflicts with the internal consistency requirement in multiple ways, especially when spouses are domiciled in different states, a point that will be considered later. Professors Michael Knoll and Ruth Mason have described the requirements of internal consistency as "competitive neutrality."[17] Essentially, what the internal consistency test asks is: "If every state adopted the identical tax regime, would it result in double taxation or yield greater burdens on interstate movers than on stayers?"

In other words, while no other state currently imposes a wealth tax, the measure has to yield consistent outcomes for residents and nonresidents in a hypothetical scenario where multiple, or all, states had the same wealth tax regime. Drafters try to address this for taxpayers who might be subject to wealth taxes in multiple states by offering a credit for wealth taxes paid to other states. There are scenarios, discussed below, where credits would be inadequate and violate internal consistency, but it is also notable that the credits invoke a theory of taxation incompatible with the snapshot-based residency and valuation provisions in the CBTA.

Because California and other states use facts-and-circumstances tests rather than bright-line rules for residency, along with a presumption that domicile continues in the state until affirmatively demonstrated in another, it is entirely possible for two states (even if they have identical statutes) to determine that

15 Id.
16 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).
17 Michael S. Knoll and Ruth Mason, "The Economic Foundation of the Dormant Commerce Clause," *Virginia Law Review* 103 (2017): 309–65.

the same taxpayer is a resident of both states as of January 1, 2026. This is not a new problem in state taxation, but it takes on newfound importance due to the wealth tax's 100 percent apportionment method, which is the same thing as unapportionment. The measure uses credits to address this issue, but the credits are based on the number of days in the year that the taxpayer was a resident of the other state.

The flaw is obvious: for California tax purposes, days of residence are irrelevant. A person whose California domicile terminates on January 2 is still taxable on 100 percent of their wealth at the end of 2026. But if, as of January 1, they had been simultaneously claimed by another state with an identical wealth tax (perhaps a state to which they had been in the process of moving, with the states disagreeing on when domicile changed), their credit against that other state's wealth taxes would be based on the portion of the year they were a resident elsewhere. The credits are apportioned against a tax that is not itself apportioned. There are plausible circumstances in which this raises internal consistency problems, but it also illustrates the incoherence of the CBTA's 100 percent apportionment regime.

A state's ability to tax all the assets of a resident taxpayer, wherever and whenever acquired, only works in a system where that authority is extinguished once a taxpayer becomes a nonresident. If California can claim the right to tax all of a former resident's assets post-departure, then their new domiciliary state's claim on those assets under an identical tax structure yields double taxation. This becomes a particularly salient issue for payment under so-called Optional Deferral Accounts (ODAs), which in many cases are not optional in any meaningful sense of the term.

Liquidity-constrained taxpayers are eligible for ODAs, under which the state functionally becomes a co-investor in the taxpayer's illiquid assets and takes a deemed 5 percent stake in those assets, collected whenever value is realized, withdrawn, or transferred. If these assets—for instance, an ownership stake in a private business—appreciate after the taxpayer leaves California, the state would tax all that subsequent appreciation. Meanwhile, if the taxpayer's new state of residence implemented an identical wealth tax, that second state would also tax 100 percent of their wealth, including the newly generated wealth taxed by California.

Despite the name, this is not mere deferral of a prior tax obligation. It represents obligations that continue to accrue after the taxpayer has departed. Similarly, despite being represented as "optional," they may not be optional in any realistic way for the owner of a private business, who cannot realistically obtain the necessary liquidity. This is particularly true if their voting shares exceed their economic shares, as owners of private businesses are unequivocally taxed on the greater of their economic or voting interests in those businesses.[18] If liability approaches or exceeds the realizable value of taxpayers' interests, the levy ceases to resemble a tax and instead becomes what the Supreme Court has characterized as an exaction "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property."[19]

18 This question is disputed for special voting shares in publicly traded companies. Drafters did not intend to apply it in those circumstances, but poor drafting creates the risk of such an interpretation. There is, however, no question of their intent and the measure's application to private business holdings. See Jared Walczak, "The Proposed California Wealth Tax Is Far Higher than 5 Percent," Tax Foundation, Jan. 14, 2026, https://taxfoundation.org/research/all/state/california-wealth-tax-billionaires-proposal/.

19 *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24–25 (1916).

Under *Oklahoma Tax Commission v. Jefferson Lines*, apportionment must reasonably reflect the in-state component of an identified taxable event to pass the "external consistency" test.[20] The CBTA fails this test by attributing 100 percent of wealth to California for anyone deemed a resident as of January 1, 2026, regardless of where they generated that wealth or where they resided the rest of the tax year, and without any accounting for wealth generated after a mid-year move. The measure explicitly stipulates 100 percent apportionment "without reduction or multiplier based on residency history," which is not really apportionment at all, but its repudiation. The wealth is wholly unapportioned. For mid-year movers, this not only implicates fair apportionment but also the fair-relation prong, since it is difficult to identify any services, benefits, or protections that California extends to the taxpayer or their wealth post-departure, even though subsequently accrued wealth is taxed.

The drafters recognized that this would, in some instances, yield plainly unconstitutional outcomes. Their solution was to establish a mechanism for as-applied challenges, permitting a taxpayer to seek to prove, by clear and convincing evidence, that their wealth was neither substantially accumulated nor substantially sustained in California. Even when the taxpayer can meet this evidentiary standard, the measure still sets a 25 percent apportionment floor. Ironically, this limited concession on apportionment represents an even more blatant commitment to unconstitutional taxation, as it requires at least 25 percent apportionment even when a taxpayer can demonstrate by clear and convincing evidence that a lesser amount is required.

Even in scenarios where apportionment at or above the 25 percent threshold (but below 100 percent) is appropriate, the proposed wealth tax inverts the constitutional burden. It is the state's responsibility to ensure fair apportionment, not the taxpayer's. This requirement impermissibly shifts the state's fair apportionment burden onto the taxpayer.

A statute that requires taxpayer adjudication to achieve a constitutionally legitimate outcome is legally flawed. California cannot presume 100 percent apportionment in all cases, require taxpayers to rebut that presumption with clear and convincing evidence, and then establish a floor of 25 percent even for those who can demonstrate that apportionment of less than 25 percent is correct. Moreover, since taxpayers could be assessed at more than 100 percent in a world where every state adopted an identical law, there is a facial defect of internal consistency.

The requirements, moreover, are tilted in favor of the state: a taxpayer must prove, under high evidentiary standards, that their wealth was not *substantially* accumulated or sustained in California to obtain any relief, even though wealth could be substantially accumulated in California without justifying 100 percent. Even if a taxpayer were able to prove, under these exacting requirements, that the apportioned amount must be under 25 percent, the measure would still require 25 percent apportionment unless the courts determine that a still lower percentage is "required to avoid grossly disproportionate taxation" that would unequivocally violate the federal or state constitution.[21] Some level of disproportionality is not just permitted, but *intended* by the floor, which serves no purpose other than to tax in excess of fair apportionment.

20 *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).
21 California Proposition 40 (2026), § 50306(b).

The measure also contains a validation action that obligates courts to determine its facial validity on an expedited schedule in 2027 and makes the measure incontestable (except for as-applied challenges) thereafter. While expedited review has some precedent, a measure making an expedited review binding is astonishing in its overreach.[22] This is particularly notable in the context of fair apportionment, where the measure stipulates that facial validity must be decided once and for all shortly after the measure's enactment, but also that the courts cannot judge fair apportionment outside fact-specific analysis of individual cases that will arise later.

Family and Trust Provisions Yield Unconstitutional Outcomes

Families and trusts create further complications. Aggressive anti-avoidance provisions designed to short-circuit avoidance activity involving transfers to spouses, children, or trusts are so sweeping as to create glaring constitutional infirmities.

The measure taxes any contribution to a non-grantor trust made after October 15, 2025, as if the contribution was never made and the assets were still in the billionaire's possession. Notably, this involves greater retroactivity than the rest of the measure, employing a date prior to the announcements of efforts to put a wealth tax on the ballot.[23]

The definition of applicable trusts includes any non-grantor trust "whether or not such trust is a California resident" so long as any California billionaire who is currently alive, or any entity associated with them, has *ever* transferred property to it. Even if the California billionaire has no continuing relationship with the trust—if it is administered by a trustee in another state, and all of its beneficiaries, assets, and administration are outside the state—the mere fact that a California billionaire once contributed to it means that the CBTA would tax the contributing billionaire on the trust's assets.

Presumably due to a drafting error, moreover, the CBTA appears to capture the *entire* value of any trust to which assets are transferred in 2026, not just the value of that transfer. Under the proposal, "net worth shall for all purposes include the value of property held by any trust (other than a grantor trust or tax-exempt trust) to which the individual transfers property in 2026, and seventy-five percent of the value of such property transferred in 2025."[24] This is clearly unconstitutional, as it taxes assets that have never had any connection to the taxpayer, and it remains to be seen whether the Franchise Tax Board (charged with implementing the tax) or the courts could adopt a saving interpretation that narrows its scope.

Such a narrowing would still be insufficient. Under Supreme Court rulings, even in-state beneficiaries are insufficient to tax a trust in the state if it is administered out-of-state or the beneficiaries' interests are contingent.[25] Here, California would assert a right to levy tax based on a trust that has no in-state beneficiaries at all, and indeed has no remaining ties to the state. This is inconsistent with due process under the US Constitution.

22 Id., § 50314.
23 Id., § 50303(c)(11).
24 Id., § 50303(c)(6)(B).
25 *Safe Deposit & Trust Co. of Baltimore v. Virginia*, 280 U.S. 83 (1929); *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*.

The measure also attributes a non-resident spouse's out-of-state wealth to a resident spouse,[26] which conflicts with *Hoeper v. Tax Commission*, where the Court struck down a Wisconsin law taxing a husband on a wife's separate income, concluding that "any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process."[27] The issue is not taxation of community property as such, which is affirmed in other cases and would be legally unobjectionable with two resident spouses,[28] but rather mandatory aggregation (not elective joint filing) that reaches the nonresident spouse's property for which California would otherwise lack ownership or territorial nexus.

Furthermore, the measure fails the internal consistency test as applied to spouses domiciled in different states. As noted previously, under the internal consistency test, if the same law were in place in all 50 states, the result cannot be double taxation or disparate taxation of nonresidents. But by taxing "the taxpayer and their spouse worldwide . . . wherever such spouse is resident,"[29] both states would wind up taxing the entirety of the couple's assets. Credits for wealth taxes paid to other states would not help, because they are based on the taxpayer's days of residence in another state, with no reference to their spouse, who does not need to be in the taxing state at any time to have their assets taxed.

A couple split across two states would pay 10 percent, whereas a couple domiciled together would pay 5 percent based on the spousal aggregation rule, yielding a facial violation of the internal consistency requirement. This problem arises even if each spouse's residence is undisputed across all of 2026, and does not require there to be any question of which state or states may claim them as residents as of the snapshot residency date.

The trust provisions give rise to similar problems. If the spouses, domiciled in different states, jointly fund an applicable trust in a third state where its beneficiaries reside, and all three states had identical wealth taxes, the trust could be taxed as many as five times. Each spouse's state would tax its resident spouse on a base that includes the trust's assets, and would separately tax the trust itself because of the resident's contribution, while the third state would tax the trust as its own residential trust.[30]

In both cases, the problem is not just that a taxpayer is claimed by two states, which can sometimes be resolved by credits for tax paid to other states. Instead, it arises from attributing the same wealth to several different taxpayers who are each fully taxed in different states.

Divorce creates further legal issues. Debts to related persons are added back to net worth if incurred after October 15, 2025,[31] and a related person is defined as "any person that is related to the taxpayer . . . as of January 1, 2026."[32] If a divorce resulted in a division of assets, any indebtedness to the taxpayer's ex-spouse would be treated as if no such debt was incurred, with those assets still subject to tax. This likewise yields taxation of assets the taxpayer does not own, with clear due process implications.

26 California Proposition 40 (2026), §§ 50301(a), 50308(f).
27 *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931).
28 See, e.g., *Fernandez v. Wiener*, 326 U.S. 340 (1945).
29 California Proposition 40 (2026), §§ 50308(f), 50301(a).
30 Id., §§ 50301(a), 50303(c)(6), 50308(b).
31 Id., § 50302(e).
32 Id., § 50308(k).

The CBTA Has Right-to-Travel Implications

The Supreme Court has repeatedly held that the Constitution confers a right to travel, and that any law penalizing the exercise of that right is subject to strict scrutiny, with the state required to show that such a law is "necessary to promote a compelling governmental interest."[33] Ordinarily, the right to travel is implicated if a state penalizes departures or treats new residents worse than existing ones, whereas proponents would point out that the measure treats those who maintain residency throughout the year and those who depart identically.

The measure does, however, deny an ordinary privilege of departure: the ability to put oneself under a different state's laws, including its tax code. With its attempt to lock taxpayers in at 100 percent apportionment whether they leave or stay, the measure discourages migration since the taxpayer would experience all the costs of departure without any of the ordinary tax benefit. If courts concluded that this implicated the right to travel, proponents would have to demonstrate a compelling state interest in the provision—and maximizing revenue or preventing tax-induced migration would not suffice.

The right-to-travel case is not clear-cut, as movers and non-movers face the same liability. But since the CBTA is not a tax on 2026 residence, applying even if January 1 was the only day that a taxpayer was a resident of the state, it imposes a burden on those exercising the right to leave. Specifically, only nonresidents would pay a tax on wealth accumulated out of state, potentially raising some of the same questions addressed in *Crandall v. Nevada*, which prohibits a tax on the act of leaving.[34]

And even if courts do not strike the law down on right-to-travel grounds alone, it is part and parcel of the broader analysis of the lock-in effect as it pertains to retroactivity and non-apportionment. If right-to-travel concerns are entertained and the state has to defend the penalizing provisions under strict scrutiny, the state would have to argue that the retroactive residency date and (for some taxpayers) post-departure valuation date involve compelling state interests and are narrowly tailored to that end—essentially a claim that these provisions are essential to the proper functioning of the tax, which would be inconsistent with the notion that they could be judicially reformed without vastly changing the CBTA.

The CBTA Illegally Taxes Federal Obligations

Federal law exempts federal obligations from any form of state taxation other than corporate franchise, estate, and inheritance taxes.[35] The CBTA's base contains no exclusion for US Treasury bills, notes, bonds, or similar instruments, and the measure bars any exemption not expressly authorized.

Constitutionally, federal law supersedes the proposed California wealth tax, so, notwithstanding the language of the measure, either the Franchise Tax Board would have to implement the exclusion based on federal law or the courts would order them to do so. This would narrow the base, not invalidate the broader tax, but it also offers a likely avoidance channel for liquid assets of affected billionaires, who could not be subject to the wealth tax on any assets they converted into investments in federal notes by the CBTA's December 31 valuation date.

33 *Shapiro v. Thompson*, 394 U.S. 618 (1969). See also *Saenz v. Roe*, 526 U.S. 489 (1999).
34 *Crandall v. State of Nevada*, 73 U.S. 35 (1867)
35 31 U.S.C. § 3124(a).

The CBTA Levies High, Potentially Constitutionally Excessive Fines

Under the CBTA, asset valuation is a taxpayer's responsibility. This is straightforward for publicly traded assets, but exceptionally difficult for non-traded assets—a challenge made even more difficult by unique valuation rules implemented for the wealth tax.[36] Particularly for startups, valuation can be speculative and uncertain, and good faith estimates could vary substantially.

If the Franchise Tax Board disagrees with a taxpayer's valuation, however, penalties can be up to 40 percent of the understatement of liability. Such penalties are not unheard of, though they are aggravated by the exceptional uncertainty of the underlying valuation. Even more significant, however, is that the certified appraisers the taxpayers hire are themselves subject to penalties of up to 4 percent of the understatement of tax.[37] For an appraiser, a 4 percent penalty on an understatement of the value of a billionaire founder's private company could be ruinous.

At the federal level, appraisers' penalties are capped at 125 percent of the fee received for the appraisal to ensure that sanctions are proportionate.[38] The CBTA has no such cap, exposing appraisers to penalties measured in tax owed by billionaires. In 2019, the Supreme Court affirmed that the Excessive Fines Clause is incorporated against state governments,[39] and under *United States v. Bajakajian*, a fine is unconstitutionally excessive if it is grossly disproportionate to the gravity of the offense,[40] which is surely relevant to good-faith efforts to appraise difficult-to-value non-traded assets.

Judicial Reformation Cannot Save the CBTA

A previous paper explored the limits of judicial reformation in the context of residency provisions, but the issue is relevant to other legal impediments as well.[41] California's courts have some capacity to engage judicial reformation—the partial rewriting of statutes to render them constitutional—but they are highly reluctant to apply it to tax laws.

The basic contours of judicial reformation are outlined in *Kopp v. Fair Political Practices Commission*, which holds that "a court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute."[42] However, in multiple cases, including *Abbott Laboratories v. Franchise Tax Board*, *Ventas Finance I, LLC v. Franchise Tax Board*, and *Ceridian Corp. v. Franchise Tax Board*, California courts have refused to apply judicial reformation to tax laws.[43]

36 Jared Walczak, "The Proposed California Wealth Tax Is Far Higher than 5 Percent."
37 California Proposition 40 (2026), § 50312.
38 26 U.S.C. § 6695A(b). These appraisals are for federal estate and gift tax purposes, as well as income tax deductions for non-cash charitable deductions.
39 *Timbs v. Indiana*, 586 U.S. 146 (2019).
40 *United States v. Bajakajian*, 524 U.S. 321 (1998).
41 Jared Walczak, "The Proposed California Wealth Tax Is Far Higher than 5 Percent."
42 *Kopp v. Fair Political Practices Commission*, 11 Cal. 4th 607 (1995).
43 *Abbott Laboratories v. Franchise Tax Board*, 175 Cal. App. 4th 1346 (2009); *Ventas Finance I, LLC v. Franchise Tax Board*, 165 Cal. App. 4th 1207 (2008); *Ceridian Corp. v. Franchise Tax Board*, 85 Cal. App. 4th 875 (2000).

The basic rule is that courts may not redraft a statute when doing so requires legislative line-drawing. Reformation is available when there is a single, obvious cure. If, for instance, the Franchise Tax Board declined, or did not believe it was empowered, to exclude Treasuries from the tax base, this may be curable through judicial reformation. There is only one option—creating the exclusion—and a court might conclude that the modification is not substantial enough to call into question whether voters still would have approved the measure with this difference.

Other defects, however, do not admit of easy reformation. Which date replaces January 1 if that residency date is rejected? What apportionment system replaces the one included in the measure? How should the treatment of trusts be revised? Is spousal aggregation struck outright or is some other rule adopted? Choosing among possible options to cure these constitutional defects is an exercise of legislative, not judicial, power. Even with the residency and valuation dates, where drafters expressly invite judicial reformation, courts' hands can be tied. Drafters cannot delegate to the courts a power that is not theirs under separation of powers.

The sheer number of defects, and the degree to which addressing one can further expose others, points toward invalidation, not modification. A measure judicially modified to address every constitutional challenge, even if that proved possible, would be drastically different than the one submitted to voters.

Conclusion

If the CBTA fails under any of the constitutional challenges it faces, the state will seek to argue that the provisions are severable or subject to judicial reformation. But some of these provisions go to the core of the tax's architecture, which argues for striking the tax down in its entirety. Even if the tax manages to survive facial challenges to its constitutionality, moreover, it could face as-applied challenges from each taxpayer in turn.

The pending ballot measure is driving billionaires out of California, and its passage would also drive away future founders fearful that California will later adopt a permanent wealth tax that would avoid some of these legal pitfalls. And it could inflict all this damage—departures, the chilling effect on future founders, and years of litigation—without ever generating a single dollar of tax liability, if the tax is felled by its numerous constitutional flaws.