Apportioned Direct Taxes

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The Constitution requires that Congress apportion any "direct" tax among the states by population. This once-dormant provision is now the most important constitutional limitation on Congress's taxing power. Last year, in Moore v. United States, *the Supreme Court seriously considered, for the first time in decades, whether to invalidate an Act of Congress as an unapportioned direct tax. While the law survived,* Moore *has opened a new era in which scholars and policymakers must again take apportionment seriously. Yet the apportionment requirement remains poorly understood.*

This Article provides a new perspective on apportionment by examining how Congress and Treasury sought to design and implement apportioned direct taxes. Today, apportionment is regarded as a complete nonstarter. But Congress enacted apportioned direct taxes at three distinct junctures: in 1798, during the War of 1812, and once more in 1861. We study the design and consequences of these taxes—and, in so doing, uncover new details. Apportioned direct taxes never raised the funds that Congress directed and were never successfully apportioned as the Constitution seemingly requires.

These findings call for reevaluating tax apportionment. Existing accounts of apportionment's disappearance focus on the conflict between apportionment and modern tax progressivity, but we identify a deeper tension in the Constitution's requirement: between the need to specify an "apportioned" revenue target and a "direct" tax base. Congress and Treasury were more successful in apportioning taxes only when they relaxed the definition of the direct base. Indeed, the political branches never embraced a consistent definition of the direct tax base or a rigid understanding of what apportionment required—findings with ongoing relevance for today's new debate over the scope of the taxing power.

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INTRODUCTION

The Constitution requires that any "direct" tax laid by Congress be apportioned among the states by population.[1] This requirement, when it applies, has dramatic consequences for Congress's taxing power. Congress has wide latitude to structure "indirect" taxes.[2] But labeling a tax as "direct"—and therefore subject to apportionment—is commonly regarded as a death sentence, on the assumption that it would be impossibly inequitable to apportion modern taxes.[3]

The apportionment requirement lay dormant for long stretches of American history, but (after some twists and turns) the modern Supreme Court has started to resurrect it as a major limitation to the taxing power.[4] For the first century of the Republic, the Court interpreted the term "direct" narrowly—covering only taxes on persons and land[5]—and upheld other exercises of the taxing power.[6] The 1895 case of *Pollock v. Farmers' Loan and Trust Company* then briefly restored the apportionment requirement as a significant constraint on the taxing power, holding that the 1894 federal income tax was an unapportioned—and therefore unconstitutional—direct tax.[7] And then the Sixteenth Amendment, ratified in

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[1] *See* U.S. Const. art. I, § 2, cl. 3 (as amended by U.S. Const. amend. XIV, § 2) ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."); *see also id.* art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.").

[2] "Indirect" taxes (the widely adopted colloquialism for what the Constitution formally labels "Duties, Imposts and Excises") must only be "uniform"—that is, having the same force and effect everywhere. *See id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."); *see also* Ptasynski v. United States, 462 U.S. 74, 79 (1983) (defining a uniform tax as one that "operates with the same force and effect in every place where the subject of it is found" (quoting The Head Money Cases, 112 U.S. 580, 594 (1884))).

[3] *See infra* note 24 and accompanying text.

[4] For a review of the Court's approach to interpreting the apportionment requirement and how it has evolved over time, see *infra* Section I.C.

[5] *See. e.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

[6] For discussion of the Supreme Court's narrow and functional interpretation of the direct tax definition until *Pollock*, see Ari Glogower, *The Constitutional Limits to the Taxing Power*, 93 FORDHAM L. REV. 781, 792–94 (2024).

[7] 157 U.S. 429 (1895).

1913, repudiated *Pollock* and interred apportionment once more, by empowering Congress to "lay and collect taxes on incomes, from whatever source derived, *without* apportionment."[8] For most of the twentieth century, the consensus on Congress's unfettered taxing power was sufficiently strong that the legendary tax scholar Boris Bittker could joke that it was pointless to study its limits. After all, he once noted, "there *are* no limits to the federal taxing power."[9]

Bittker's joke would not land the same today. The petitioners in the landmark 2024 case of *Moore v. United States* asked the Court to answer a question that, for Bittker's generation, appeared settled: "Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states."[10] And the *Moore* opinion studiously and repeatedly avoided answering that question—upholding the tax at issue on narrow and technical grounds[11]—while also suggesting that apportionment would be required on other facts.[12] *Moore* thus signals a new era in which legal scholars and practitioners must again take apportionment seriously—and an era in which the history of constitutional tax practices will be of increasing importance.[13]

But how should we understand the Constitution's requirement to apportion direct taxes? This Article turns to one underappreciated source of information: the record of what happened when Congress and Treasury grappled with apportionment. We study the congressional and administrative records of the three periods in which these taxes were used—in 1798, during the War 1812, and in 1861—and consider the implications of that record for how we should understand the apportionment requirement today.

While existing scholarship covers many important aspects of apportioned direct taxation, there is no literature systematically evaluating how the apportioned

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[8] U.S. CONST. amend. XVI (emphasis added). After the Sixteenth Amendment questions about the apportionment requirement receded but never fully disappeared. See, for example, the discussion of the 1920 case *Eisner v. Macomber,* 252 U.S. 189*, infra* notes 96–100 and accompanying text.

[9] Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 THE TAX LAWYER 3, 3 (1987).

[10] Brief for Petitioners at i, Moore v. United States, 602 U.S. 572 (2024). *Compare* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991) ("As this Court has recognized, the concept of realization is 'founded on administrative convenience.'" (citing Helvering v. Horst, 311 U.S. 112 (1940)).

[11] *See infra* notes 102–108 and accompanying text.

[12] *See infra* notes 107–108 and accompanying text.

[13] *See infra* note 40 and accompanying text.

taxes were designed and implemented. In the legal scholarship, a voluminous and still-growing literature examines the possible meaning of a "direct" tax[14]; the origins of apportionment[15]; and its interaction with the Sixteenth Amendment.[16]

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[14] For some recent work on the meaning of the term "direct tax," see generally, for example, David M. Schizer & Steven G. Calabresi, *Wealth Taxes Under the Constitution: An Originalist Analysis*, 76 FLORIDA L. REV. __ (2025) (proposing a theory of what the direct tax limitation was supposed to provide, and arguing that modern wealth taxes would require apportionment); Glogower, *supra* note 6, Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297 (2015) (consulting dictionaries and other early materials to provide definitions of the constitutional terms); Evgeny Magidenko, *Classifying Federal Taxes for Constitutional Purposes*, 45 U. BALT. L. REV. 57 (2015) (reviewing the relevant constitutional history and proposing a framework for categorizing taxes according to the constitutional categories); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment under the Constitution?*, 11 U. PA. J. CONST. L. 839 (2008) (providing an account of the scope of direct taxes with applications to contemporary policy debates); Erik M. Jensen, *Taxation and Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999) (arguing against Ackerman's account of the scope of the taxing power, especially with respect to direct taxes).

[15] *See, e.g.*, Glogower, *supra* note 6, at 798–810 (arguing that apportionment did not serve an important federalism function in the constitutional structure); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295 (2004) (sketching history of apportionment and arguing that it is a constitutional absurdity); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999) (tracing and theorizing the origins of the taxing power, especially as it relates to slavery); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) [hereinafter "Foul Up"] (also arguing that apportionment was a constitutional absurdity and that apportionment was originally designed to reach state wealth, not to protect it). For more recent work on the relationship between modern tax policy and constitutional tax issues see, Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2019) (discussing the relationship between modern wealth taxation and the apportionment requirement).

[16] *See, e.g.*, John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1 (2024) (providing an account of the original meaning of Sixteenth Amendment read as a whole and its relationship to the *Pollock* opinion); Thomas R. Lee et al., *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, 73 DUKE L.J. ONLINE 159 (2024) (using corpus linguistics to provide an account of the term "incomes" in the Sixteenth Amendment). Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004) (disagreeing with professors Ackerman and Johnson and arguing that the direct tax clauses were intended to be a significant and binding constitutional limitation even after the ratification fo the Sixteenth Amendment).

Meanwhile, historians of early American public finance have examined the relationship between the taxing power and the origin of the Constitution.[17] Historian and legal scholar Nick Parrillo has examined the implementation of the 1798 direct tax, but focuses on the implications for the nondelegation doctrine rather than the taxing power.[18] Others still have studied the direct taxes as examples of wartime fiscal policy.[19] But there is surprisingly little work on the historical apportionment practices of Congress and the Executive Branch, and the outcomes of those efforts.[20]

We study those practices partly as overdue investment in basic science: to provide a more complete understanding of the fiscal operation of apportioned

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[17] *See, e.g.*, MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867, at 17–49 (2014) (examining "the Constitution and the origins of American public finance"); ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 111–199 (2008) (documenting the emergence of a "national tax politics"); ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION, at 184–99 (1993) (arguing that the national taxing power was part of a project to "redeem republican government"); ROBERT A. BECKER, REVOLUTION, REFORM AND THE POLITICS OF AMERICAN TAXATION, 1763–1783 (1980); E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 289–243 (1961) (contextualizing the taxing power within the emergence of a "nationalist public finance"); HENRY CARTER ADAMS, TAXATION IN THE UNITED STATES 1789–1816 (1884) (examining early exercises of the taxing power as motivated by trade policy).

[18] *See generally* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L. J. 1288 (2020) (providing an detailed study of the administrative implementation of the 1798 direct tax and deriving lessons for the modern debate over the nondelegation doctrine).

[19] *See* STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, WAR AND TAXES 26–44 (2008) (discussing the Civil War experience with direct taxation).

[20] One recent and important paper on which we build is John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75 (2022), which discusses many aspects of nineteenth century American taxation and especially the important judicial doctrines governing congressional exercise of the taxing power. But the scholarly literature in this area has been less focused on the practices of the political branches. This imbalance is also true, we argue elsewhere, concerning Congress's Article I authority to impose "Duties, Imposts, and Excises." *See* Conor Clarke & Ari Glogower, *Duties, Imposts, and Excises* (working draft on file with authors); *see also* Conor Clarke, *Moore: The Overlooked Excise Power*, 181 TAX NOTES FEDERAL 1759 (2023) (collecting some examples of early uses of Congress's power to impose excises).

direct taxes. We aggregate information from early legislation and Treasury reports to generate new, and sometimes surprising, facts about how these taxes worked. Early American public finance was (as is well known) dominated by sources of "external" revenue—that is, customs duties on imports.[21] But, relative to other sources of "internal" tax revenue, apportioned direct taxes were at times a significant revenue source.[22] At the same time, apportioned direct taxes never raised the amount of revenue that Congress mandated. More strikingly, we show that the burdens of the direct taxes were not ultimately apportioned as the statutes prescribe. We document large variations across states in compliance with the apportioned revenue quotas. Of course, the implementation of many legal regimes involves variation and some roughness around the edges—including in the modern apportionment of *congressional* representatives.[23] But the variations we document are both enormous and contrary to the text of the underlying statutes—not reflective of difficult congressional judgments.

The story of apportioned direct taxes is therefore double-edged. These taxes were at times a significant source of tax revenue. But they never operated as intended, and they declined to obsolescence before the close of the nineteenth century and subsequent rise of the broad-based progressive income tax.

This history enables a new understanding of what apportioned taxes were and why they all ultimately failed. The conventional wisdom holds that regres-

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[21] *See* ADAMS, *supra* note 17, at 5–6 (describing how, under the earliest exercises of the taxing power, "all revenue discussions were largely influenced by considerations of external policy and foreign intercourse.")

[22] As we report *supra* Section II.C.1, the annual magnitude of the early direct tax revenue often approached that of all other internal indirect taxes—that is, internal duties and excises.

[23] In this regard, we also supplement some of the existing literature on the difficulties faced by the apportioning of congressional representatives. *See, e.g.*, Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921 (2017); *see also* Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 325 n.391 (2020) (summarizing additional literature). The inequalities in modern congressional apportionment are well known. For example, under the 2020 Census, there is on average one congressional representative for every 761,169 people. But this can produce reasonably large differences in representation for states that have total populations slightly above and below this number, and states that have larger populations that are almost divisible by it. California (2020 population of 39,538,223) was apportioned one representative for every 761,091 people, while Montana's 1,084,225 people were apportioned two representatives, for an average of one for every 542,112.5 people; Delaware's 990,837 people had one representative.

sivity is the greatest challenge to apportionment, since apportionment can require higher average tax burdens in poorer states.[24] But that standard account is an incomplete explanation for why apportionment failed in practice. Early American policymakers were aware of the fairness concerns in apportioning direct taxes—but did not consider them to be apportionment's greatest challenge.[25]

Instead, tax apportionment was beset by practical challenges. These practical challenges were numerous and varied, but we use them to highlight a basic tension in the apportionment mechanism: the tension between the requirement to specify both an "apportioned" revenue target and a "direct" taxable base. To apportion any direct tax (other than a uniform capitation tax[26]) Congress must first specify a total amount to be raised—what we refer to as the "sum certain."[27] If New York has 6% of the U.S. population and Texas has 9%, it is only by starting with a specific sum certain (say, $100 million) that Congress can assign the states' apportioned shares ($6 million and $9 million, respectively). Without the target of a sum certain, Congress cannot ensure that a direct tax burden will be apportioned by population. For this reason, *all* historical direct tax legislation began by specifying just such a total.[28] All modern federal taxes, by contrast, do not specify

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[24] For example, in the 1796 case *Hylton v. U.S.* 3 U.S. (3 Dall.) 171, 174 (1796), Justice Chase considers the inequity of tax on carriages that was apportioned among two states with equal population in an amount of $80,000 each, but where the first state had 100 carriages and the second state had 1000. In case, Justice Chase concluded that the tax cannot be apportioned "without very great inequality and injustice," as the rate of tax in the first state would have to be ten times the rate in the second. *Id.* For this reason, Bruce Ackerman argues that apportionment would require an outcome that is "politically absurd." Ackerman, *supra* note 15, at 2.

[25] For example, Congress sought to introduce progressive features in the design of 1798 direct tax. *See infra* Section II.B.1. Fairness issues were also discussed extensively prior to the adoption of the first direct tax. *See infra* Section III.A.1.

[26] For example, a tax of $10 per person would automatically be apportioned among the states by population, without the need to specify the revenue to be raised from the tax. So far as we are aware, Congress never considered a capitation tax of this form. One plausible reason is that a tax of this form is profoundly unfair by almost any standard: It makes no effort to link the tax burden with either ability to pay or the benefits of government spending.

[27] This legal term is widely used (for example, in contract law) but we are aware of no prior usage in tax law—though we hope it is intuitive for these purposes. *See also* Brooks & Gamage, *supra* note 20, at 93 (referring to apportioned taxes designed to raise a certain amount of revenue as "lump sum taxes").

[28] For example, the Direct Tax of 1798 specified that the legislation would raise a total of $2 million, then identified the share of that quota to be collected from each state. *See* Act of

the total revenue to be raised, but instead designate the taxable base and the applicable rates—e.g., a tax on income, with rates up to 37%.[29]

Apportionment therefore required a fundamentally different approach to calculating tax liabilities. With a typical tax, such as the federal income tax, the choices in defining and administering the tax drive the amount of revenue collected. But apportionment flips this formula: the necessity of raising a fixed amount of revenue drives the choices in defining and administering the tax.[30]

This reversal made an apportioned tax much more difficult to design and administer. With apportionment, Congress's fundamental design challenge was to specify both the constitutionally mandated sum certain to be raised *and* a "direct" tax base that would produce that exact amount. *Ex ante*, however, Congress could not predict exactly much revenue a specified base and rate schedule will raise. In practice, apportionment left the Executive Branch with the unenviable task of muddling toward a solution that might satisfy the precise constitutional requirement. Indeed, we see this tension repeatedly in practice: Congress prescribes revenue quotas that go unmet; revenue trickles in as local agents struggled to assess and collect the tax with the legally required precision. The practical history of apportioned taxation also reveals many other complications that have gone underappreciated in existing literature.[31] But, we argue, it was the tension of the sum-certain mechanism—the need to fix a precise *ex ante* revenue target and then figure out how to raise it—that was a central and distinctive factor in Congress and Treasury's struggles to translate the apportionment requirement into a workable tax system.[32]

July 14, 1798, ch. 75, 1 Stat. 597 (an act "[t]o lay and collect a direct tax within the United States"). *See infra* Section II.B.1.

[29] *See* I.R.C. § 1(a)–(d), (j). *See also infra* notes 68–70 accompanying text. As also described *infra* note 67 and accompanying text, revenue targets are still sometimes used in different and narrower contexts in tax design, such as in the cases of legislation that must conform to budget projections or local property taxes.

[30] For a more detailed examination of this distinction and its consequences, see *infra* notes 67–72 and accompanying text.

[31] For example, the federal government grappled with the treatment of out-of-state property owners; the relative roles of the federal government, state governments, and individuals; and the taxation of non-state jurisdictions such as the territories and the District of Columbia. *See infra* Sections III.B.2.

[32] One might also wonder how such a method came to be included in the Constitution. We therefore also sketch its evolution in the era of the Revolutionary War—and explain why a method that was once necessary and logical during a period with no federal taxing power

The political branches experimented with different structures as they struggled to resolve this tension. But they came closest to hitting apportionment targets only as they relaxed the definition of the taxable base—and, indeed, left the choice of tax base up to the states.[33] As we explain, they did so by allowing state governments to assume the federal tax obligation. States that did so could pay the direct tax from fungible dollars in the state coffers and without laying any new taxes at all.

This basic tension was also commented upon by those in power who were responsible for crafting tax legislation that could comply with the Constitution. During the Civil War debates over taxation, for example, the great radical Republican Thaddeus Stevens noted the benefits of allowed states to assume their apportioned quotas: "there could be no difficulty in ascertaining what should be the quota to be paid by each State, and there could be no difficulty, therefore, in allowing each State to assume its quota."[34] But, he continued, the logic of apportionment made it impossible to directly impose federal taxes not assumed by the states, as "it is impossible to ascertain what [the amount collected] would be until the assessors had made their valuation in every instance."[35]

This history shows that the problems with apportionment extend beyond the familiar linguistic indeterminacy of the term "direct"—a point emphasized and debated in the prior literature[36]—and reach the basic structural coherence of the apportionment mechanism itself. Much has been written about the word "direct"; we focus the lens on what it meant for a tax to be "apportioned." Indeed, we argue that there is often a basic tradeoff between the two constitutional elements: The more one reads the term "direct" as narrowly defining the relevant tax base, the harder it becomes to guarantee that the base can produce a specified "apportioned" amount.

The practical struggles with apportionment also help illuminate how Congress and Treasury's interpretation of the direct tax base and the apportionment requirement evolved over time. The political branches did not embrace a consistent definition of the tax base, nor a rigid understanding of what apportionment required. Instead, they experimented with flexible new structures that

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operated in a fundamentally different way when it was imported into the Constitution. *See infra* Section II.A.

[33] *See infra* Sections III.B.2–3.

[34] 37 CONG. GLOBE 1217, 1239 (March 14, 1862).

[35] *Id.*

[36] *See supra* note 14 and accompanying text.

might comply with the enigmatic constitutional text and produce a workable tax system.

The direct tax of 1798 exemplified these struggles. There, Congress *did* carefully specify a taxable base and (to a lesser extent) an applicable rate schedule. But the relevant tax base in many states apparently could not readily yield the apportioned revenues. Collection sputtered along in some states for a decade; tax commissioners went unpaid and resigned because the collection game was not worth the candle; land seized for unpaid taxes went unsold.[37] In the successive direct taxes, Congress therefore sought, in varying ways, to give states more flexibility to produce their apportioned amounts. But these laws did not specify the base for a "direct" tax in the same way. States were often left free to pay their quotas out of fungible dollars from their coffers—or even satisfy their obligations in kind with goods and services.[38]

The history we recount also has implications for how we read the apportionment clauses today. Practical history matters for interpreting the taxing clauses because of the Court's general jurisprudential turn towards "history and tradition" as a factor in constitutional interpretation.[39] More specifically, it helps answer the call of *Moore*, in which Justice Kavanaugh's majority opinion stated that the effect of the Sixteenth Amendment was to return to "what had been the understanding of the Constitution before *Pollock*."[40] We hope to expand that understanding. But, as we explain, the disjointed history and inconsistent practice of apportionment offers only a clouded window into the meaning of the Constitution's text. Similarly, evidence from the 1798 direct tax may shed light on the original understanding[41]—but any such understanding was almost entirely abandoned in the subsequent (and still early) legislation. The history of tax apportionment is a history of pragmatism.[42] One longstanding view—expressed in early

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[37] *See infra* Section III.A.2.

[38] *See infra* Sections II.B.2–3.

[39] *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 301 (2024) (trademark and speech); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) (Religious Clauses); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 234 (2022) (due process and Fourteenth Amendment liberty interests); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022) (Second Amendment rights).

[40] 602 U.S. at 583.

[41] *See, e.g.,* Parrillo, *supra* note 18 (examining the 1798 direct tax as evidence of original understanding of Congress's ability to legate delegate discretionary rulemaking authority to administrative agencies in the exercise of its Article I powers).

[42] *See infra* notes 296–298 and accompanying text.

caselaw and, we show, by the Executive Branch[43]—is a kind of hyper-functionalism: apportionment is required only when it is feasible.

We proceed in three parts. Part I provides background on constitutional tax issues and explores the basic practical questions confronted in designing an apportioned direct tax. Part II turns to the central descriptive contributions of the Article. We provide an account of how the apportioned taxes worked—or failed to work—in practice, including some of their key fiscal effects. We document substantial deviations from both Congress's revenue goals and the constitutional requirements. Part III turns to the implications of these findings for understanding the relevance and scope of the apportionment requirement today.

I. BACKGROUND: TAXATION AND THE CONSTITUTION

A. The Constitutional Tax Clauses

Three key provisions in the Constitution govern the exercise of the federal taxing power.[44] Article I Section 8 grants Congress the general taxing power and imposes a uniformity requirement on so-called indirect taxes: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."[45] Two additional provisions require that any "direct" tax must be apportioned among the states by population. Article I Section 2 provides that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."[46] And Article I Section 9 similarly provides that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census."[47]

Some have claimed that the apportionment requirement for direct taxes was so important that it appeared in the Constitution twice.[48] But, while it is undeni-

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[43] *See infra* notes 276–279 and accompanying text.

[44] In addition to the provisions examined in this Article, the Constitution also prohibits Congress from taxing state exports. U.S. CONST. art. I, § 9, cl. 5.

[45] *Id.* § 8, cl. 1.

[46] *Id.* § 2, cl. 3

[47] *Id.* § 9, cl. 4.

[48] *See* DAVID J. BREWER, THE INCOME TAX CASES AND SOME COMMENTS THEREON 5 (1898) (making the claim that this was "one of the few matters deemed by the framers of the constitution so important as to be twice mentioned"); *see also* Brief for Petitioners at 7, Moore v. United States, 602 U.S. 572 (2024) (repeating this claim). For a discussion of how this rule came to be included twice, see Dodge, *supra* note 14, at 904–07.

able that taxes were an important source of controversy in the constitutional process—creating last-minute challenges during the drafting process and serious concerns during the ratification debates—the specific concerns motivating the direct tax provisions are debatable. If anything, the record suggests that the apportionment for direct taxes was badly undertheorized by the framers, with (at best) hazy and unforeseeable consequences for the taxing power.[49]

While the story of the constitutional tax provisions has been told many times, some background is important for understanding the practices and controversies that would shape the exercise Congress's taxing power. Under the Articles of Confederation, Congress had no centralized taxing power. Instead, the Articles prescribed a system of "requisitions," whereby Congress could ask—but not compel—states to provide funds for central spending, as well as manpower and supplies for centralized action.[50] The system did not work well. States were inconsistent in their compliance, and Congress resorted to borrowing and printing rapidly depreciating debt instruments to fund the Revolutionary War effort.[51] The failure of the requisitions system increased the pressure at the Constitutional Convention to create a centralized financial system with an independent federal taxing power.[52]

But striking a deal on the taxing power in the summer of 1787 proved awkward. The Anti-Federalists were skeptical of many elements of the proposed national charter—such as the creation of a new Presidency and the original lack of a bill of rights—and a broad federal taxing power was key among them.[53]

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[49] *See, e.g.,* EINHORN, *supra* note 17, at 158 (observing that "the framers gave little thought to how apportioned 'direct taxes' would work in practice").

[50] *See infra* notes 122–125 and accompanying text.

[51] For discussions, *see* BROWN, *supra* note 17, at 10–31; *see also* EINHORN, *supra* note 17 (discussing the various problems throughout); Conor Clarke, *The Debt Limit*, 101 WASH. U. L. REV. 1417, 430–33 (2023) (summarizing early history and rationales for constitutional borrowing limits and structure). When referring to "Congress" we refer to all the federal Congresses, including those that preceded that of the 1789 Constitution (i.e. the Continental Congresses and the Congress of the Confederation).

[52] *See* EDLING, *supra* note 17, at 87–104. A particular concern was the ability of the states to repay the debts of the Revolutionary War—a central financial challenge that the Articles of Confederation did not manage to solve, even as concerns about the potential for additional conflicts loomed.

[53] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 933, at 687 (1833) ("The opponents of the Constitution strenuously contended that the [taxing] power should be restricted; its friends as strenuously contended that it was indispensable for the public safety, that it should be general"); *see also* Ackerman, *supra* note 15, at 8.

Disagreements over how the states would share representation in Congress also threatened to derail the national project. The more populous states favored proportional representation, whereas the smaller states favored equal representation. This first impasse was resolved by the "Connecticut Compromise" proposed by Roger Sherman, whereby states would have equal representation in the Senate and representation based on population in the House.[54]

A second impasse soon emerged: the states disagreed over the formula for proportional representation in the House. The southern states believed they would have insufficient representation in the House if only free persons were counted, while Northern states believed the slave-holding states would have too much representation if total population were considered. The convention teetered on the brink of collapse over the inability to agree on the proper rule.

This second impasse was resolved by the infamous three-fifths compromise.[55] And, in connection with this debate, Gouverneur Morris of Pennsylvania suggested that states who benefited from additional representation should also pay a price in the form of higher taxes. Morris's idea—to apportion *both* representatives in the House and taxes using the same population formula—had intuitive appeal: greater political representation would come at a greater financial cost.[56]

But it was not obvious whether or how Morris's initial solution could be implemented. In memorable language, George Mason worried that "embarrassments might be occasioned" if the legislature tried to apportion *all* taxes based on population. Although the practical concerns on the minds of the founders is not well developed in Madison's records, there are brief mentions of potential

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[54] Sherman's "Connecticut Compromise," sought a middle ground between the "Virginia Plan" for proportional representation and the New Jersey plan for equal representation. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 192 (Max Farrand ed., Yale Univ. Press 1911) (June 11, 1787).

[55] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 92 (2012) (discussing the debates over alternative representation formulas).

[56] There is ongoing scholarly debate about the degree to which this development at the convention was directly tied to the broader debate over slavery. *Compare, e.g.*, Ackerman, *supra* note 15, at 10 (arguing that "by continuing to link taxation and representation" the apportionment requirement "served as a fig-leaf for antislavery Northerners opposed to the explicit grant of extra representation for Southern slaves"); *with* Daniel Hemel, *Formalism, Functionalism, and Nonfunctionalism in the Constitutional Law of Tax*, 2024 SUP. CT. REV. __, *23 (forthcoming) (arguing that "[t]he records of the Constitutional Convention provide a shaky foundation for the claim that the Direct Tax Clauses exist solely to shield slavery from taxation").

complications ahead. Morris quickly conceded, for example, that "[w]ith regard to indirect taxes on exports & imports & on consumption," the rule of linking taxation and representation "would be inapplicable"—presumably because variation across and within states over time would make such taxes impossible to apportion or politically infeasible.[57] Morris suggested, however, that such practical concerns "would be removed by restraining the rule to direct taxation."[58] Morris's solution ultimately won the day—and perhaps saved the Convention from collapse—and is reflected in the text of the existing constitutional provisions: only "direct" taxes must be apportioned on the basis of state population.

B. The Puzzles of Apportionment

The spare tax provisions that emerged from the Convention left many questions unanswered. The provisions did not specify exactly when apportionment would be required or how it was supposed to operate. The constitutional text and historical record also offered few clues about what constitutes a "direct" tax, beyond a tax on land or persons.[59] The difficulty in distinguishing between taxes that are "direct" and those that are not was apparent at the Convention itself, and produced what is surely the most quoted line from Madison's notes in all of tax scholarship: Rufus King asked his fellow delegates "what was the precise meaning of direct taxation," but "[n]o one answ[ere]d."[60]

One can imagine a variety of reasons why no one answered. Perhaps the delegates were simply tired of debating the Constitution over that long, hot summer—and reluctant to say anything concrete that might upset the delicate balance needed to strike a deal. On this account, the linguistic ambiguity of the word "direct" may have been a feature and not a bug—allowing the Constitution to move forward by kicking a can down the road.[61] Perhaps no one had a precise

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[57] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 54, at 592 (July 12, 1787). For example, international customs duties could not be readily apportioned given the variation in states' trade and access to a coast.

[58] *Id.*

[59] *See Hylton v. U.S.,* 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) ("I am inclined to think . . . that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax . . . and a tax on land"); *see also* EDWIN R.A. SELIGMAN, THE INCOME TAX 570 (1911) (observing that "land and poll taxes were considered direct taxes; but farther than that it is impossible to go").

[60] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., Yale Univ. Press 1911) (August 20, 1787).

[61] *See* Ackerman, *supra* note 15, at 10.

idea of what, exactly, "direct" meant. A combination of these accounts is also plausible. Perhaps "direct" was selected and retained precisely because it was ambiguous—and saved the fight for another day. One way or another, we find it difficult to resist the conclusion that there was significant uncertainty about the scope of the "direct" taxes in 1787, beyond possibly a tax on land or persons.[62]

This uncertainty is familiar. An extensive literature explores the linguistic ambiguity of a "direct" tax, examining both what that term might have meant at the founding[63] and how it should be read today.[64]

But less attention has been paid to the intrinsic ambiguity in the mechanics of apportionment. On this front, the case law and academic literature have primarily focused on the regressive consequences of apportionment, since apportioning a federal tax based on state population would require imposing higher tax burdens in relatively more populous but poorer states.[65] (As Justice Chase observed in the 1796 case of *Hylton v. U.S.*, a broad and rigid apportionment requirement would "create great inequality and injustice."[66]) Yet the Constitution leaves unanswered other fundamental questions about how apportionment should operate in practice. These other factors are just as critical for interpreting

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[62] Justice Roberts reached this same conclusion in the 2012 case *NFIB v. Sebelius*, where he noted that "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax." NFIB v. Sebelius, 567 U.S. 519, 570 (2012).

[63] *See, e.g.*, Johnson, Foul-Up, *supra* note 15, at 46–71 (evaluating contemporaneous definitions of the term "direct tax"); Jensen, *supra* note 14, at 694–99 (arguing that direct taxes were understood to share certain attributes, such as that they "imposed directly on individuals" and "not likely to be shiftable").

[64] *See, e.g.,* Ackerman, *supra* note 15*,* at 58 (arguing that "[t]he express condemnation of "Capitation" taxes should be respected, but no others-not even a classical tax on land-should any longer be considered "direct" for constitutional purposes"); Dodge, *supra* note 14, at 922 (proposing a definition that would limit direct taxes to a tax on items that "have a definite geographic location in a state").

[65] As illustrated *supra* note 24, for any given population, apportionment would require a state with less of a tax base to tax that base at relatively higher rates. To see this, imagine two states that have the same population but different ability to pay. The tax burden is the same, notwithstanding their different abilities to pay. *See also* FREDERIC C. HOWE, TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM, 1791–1895, at 84 (1896) ("[I]t must be apparent that the unequal territorial distribution of wealth at the present time renders even an approximation to justice impossible.")

[66] 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.).

the apportionment requirement—and for understanding the challenges the government encountered when it implemented apportioned direct taxes. We recount some here:

The Sum Certain. To apportion a tax in compliance with the constitutional prescription, Congress must necessarily first specify the "sum certain" to be raised by the tax, so it can then specify how the tax burden must be allocated among the states. This sum certain would have to be a constitutionally binding commitment, to ensure that the tax is properly apportioned. This mechanism is unlike most other forms of taxation[67]—including all current federal taxes—where Congress and Treasury have no constitutional obligation to collect a fixed amount of tax revenue. Because of the sum certain obligation, an apportioned tax is fundamentally more difficult to design and administer than other taxes not subject to apportionment.

Of course, Congress and Treasury always face challenges in defining and administering any kind of tax. But apportioned taxes are different. To see this, assume that Congress is determined to raise around $10 million by laying a new tax. Let's say first that it decides to raise the revenue by imposing an income tax, which is not subject to apportionment. In this case, as with current federal income tax rules, Congress would only need to define in the statute the base of taxable income (including things like deductions and exclusions) and the applicable rate schedule.[68]

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[67] "Sum certain" mechanisms are still sometimes used for certain narrow purposes in tax design. For example, some local property tax systems designate a revenue target or "levy", then calculate the amount of the available property tax base through assessments, and then determine the applicable rates on this base to yield the revenue target. *See, e.g.,* ILLINOIS DEPT. OF REVENUE, AN OVERVIEW OF PROPERTY TAX (2023), https://tax.illinois.gov/content/dam/soi/en/web/tax/research/publications/documents/pios/pio-16.pdf (explaining the method for calculating local property taxes in Illinois). A "sum certain" concept is also used in federal tax legislation, for tax laws passed by Congress through the reconciliation process. In this case, legislators first specify a total cost of legislation through an underlying budget resolution, and then must design tax rules with revenue effects that are expected to conform to the budget resolution. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–688 (1990)); MEGAN S. LYNCH, CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: TIMING OF LEGISLATIVE ACTION 1–2 (2026).

[68] For example, the federal income tax liabilities imposed on individuals, corporations, and trusts and estates are all calculated by applying a specified rate schedule to the defined based of taxable income. I.R.C. §§ 1(a)–(e), (j) (calculation of income tax liabilities for individuals

This tax may or may not raise exactly $10 million, and the actions of each branch of government will affect how much revenue is ultimately collected. Even if Congress defines the taxable base in detail in the statute, certain decisions would necessarily be left up to Treasury and the IRS to specify through regulations and administrative rulings.[69] The courts may also adjust the definition of the tax base through interpretations of the statute, which could further affect the revenues raised by the tax. And, finally, the IRS would have some discretion in deciding how and when to enforce and collect the taxes owed.[70]

Importantly, all these choices made by each of branch of government in defining and administering the tax drives the amount of revenue collected. This is why the $10 million of revenue from the tax can be estimated—but not guaranteed with certainty.

But apportionment flips this formula. The *necessity* of raising a fixed amount of revenue drives the choices in defining and administering the tax. To see why, imagine that Congress instead tries to raise the $10 million by laying a direct tax subject to apportionment. Congress would first commit to raising the $10 million and work backwards from there. Otherwise, it could not apportion the tax among

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and trusts and estates); § 11 (calculation of income tax liabilities for corporations). Congress could also introduce additional factors used in calculating tax liabilities, such as credits against tax. Modern sales taxes are similarly calculated by applying the sales tax rate to a base determined by the sale transaction. *See e.g.,* Mo. Rev. Stat. ch. 144 (2013) (Missouri sales tax of 4.225% imposed on a base of tangible personal property and taxable services sold at retail).

[69] For example, many tax statutes expressly authorize Treasury to provide further detail on how the statutory rules would operate. *See, e.g.*, I.R.C. § 336(e) (authorizing Treasury to issue regulations allowing for certain stock sales by a corporate parent to be treated as asset sales); Treas. Reg. §§ 1.336-1–5 (regulations providing for this treatment). The Code also provides generally that "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." I.R.C. § 7805(a).

[70] *See* Joel Slemrod & Shlomo Yitzhaki, *The Optimal Size of a Tax Collection Agency*, 89 SCANDINAVIAN J. ECON. 183 (1987) (explaining why maximum enforcement of every tax law may not be desirable from a policy perspective).

the states proportionally to their populations, as the Constitution seemingly requires.[71] In other words, the $10 million of tax to be raised, and the quotas assigned to each state, would now be an obligation—not an aspiration.[72]

If Congress then specified the base and the rates for the $10 million direct tax, like in the case of the unapportioned income tax, then it would be up to Treasury to determine the correct mix of interpretative rules and administrative actions that would yield the requisite amount of revenue. Every new choice or decision by Congress or Treasury will require adjustments to other choices. If Congress or Treasury changes the definition of the base, then the tax rates or the degree of enforcement must adjust to yield the sum certain. In effect, the branches must coordinate to hit an ever-moving target. They must ensure that the mix of design choices and administrative measures still yields the sum certain.

As we show in in the following Parts, Congress and Treasury struggled to comply with the basic prescription of specifying a sum certain—which was necessary to set the state quotas—and then collect the applicable taxes specified by these quotas. Their repeated struggles to implement apportioned taxes demonstrate this basic tension in the apportionment mechanism and raise the question of whether, as practiced, the constitutional prescription was ultimately viewed as a binding one.

The Significance of the Tax Base. The requirement that Congress specify a fixed amount of revenue to collect from each state also had the potential to diminish the relevance of the tax base. If the quota was borne by the states themselves—rather than the individual taxpayers within each state—the underlying taxable

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[71] The Constitution only explicitly requires that the share of a direct tax burden is apportioned among the states by their population. In principle a tax might technically still comply with the Constitution if the revenue target is not met, if the actual tax burdens as collected in each state still happened to be proportional to their populations. Importantly, however, Congress could not guarantee that this outcome would occur without specifying the amounts to be raised by each state—or having some *ex post* system of refunds or rebates—which is why in practice each of the direct taxes laid by Congress begins by specifying a sum certain and how it was to be apportioned among the states. *See infra* Section II.B.

[72] Of course, as in any tax policymakers can try to anticipate *ex ante* the right mix of base definition rules, rates, and administrative behaviors that would be expected to yield the sum certain. Budget estimators give revenue scores to tax legislation, and measure with some amount of precision how much revenue a given tax structure may yield. But importantly, these estimates would still only be *ex ante* predictions (which can prove inaccurate for any number of reasons) rather than an *ex post* guarantee as the Constitution would require.

base would not matter. In the former case, the states could raise the revenue however they saw fit, without regard to the taxable base specified by Congress.

Indeed, the apportionment mechanism obscures the seemingly simple questions of who must bear and remit the tax, and how the tax must be laid. As explored in Section II.B, the taxes were formally structured to fall on individuals; they created a legal obligation between individual taxpayers and the federal government. As a technical legal matter, the direct taxes were not understood as financial obligations imposed on the state governments.[73] At the same time, the direct taxes were also conceived as burdens on the states as separate entities.[74] After all, if an apportioned direct tax was *only* a federal tax on individuals, then why bother with state apportionment at all?

As discussed in greater detail below, most of the direct tax bills straddled this difficulty by giving states the option—but not the obligation—to collect and remit the revenue however they saw fit, and without regard to the tax base supporting the revenue.[75] In this case, however, it cannot be said that the direct tax is still laid on any particular base—or that the object of a direct tax necessarily matters at all.

Why were we left with this ambiguity about such a basic question? In a related context, Historian Robin Einhorn has argued that the delegates did not have a clear understanding of whether apportioned taxes should be the obligation of individual taxpayers or of the states. She observes that some of the delegates "imagined that these levies would be requisitions, with each state framing its own taxes and collecting them independently, presumably using its existing state tax system."[76] This understanding of apportionment is consistent with how it worked in the revolutionary war era, when Congress could only make requisitions form the states.[77]

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[73] *See, e.g.*, U.S. v. Louisiana, 132 U.S. 32 (1887) (holding that the Direct Tax of 1861 "was assessed and laid upon the real property of private individuals in the States" and that "[i]ts apportionment was merely a designation of the amount which was to be levied upon and collected from this property of individuals in the several States, respectively").

[74] *See* Calabresi & Schizer, *supra* note 15, at *41 (arguing that the delegates "did not want the new taxing power to impose disproportionate burdens on their own states" during a period when most of them "identified as citizens of their state first, and as Americans second").

[75] *See infra* Sections II.B.2–3 (describing this feature of the War of 1812 and the 1861 direct taxes).

[76] EINHORN, *supra* note 17, at 158.

[77] *See infra* Section II.A.

But other delegates, Einhorn continues, "imagined that they would be national taxes on land, slaves, or property generally, which Congress would design and the federal government would collect."[78] This understanding is certainly consistent with the idea that Constitution granted Congress an independent taxing power, and apportionment simply prescribed how it must be implemented for certain taxes. The text of the Constitution doesn't decide between these two understandings of apportionment—as early judicial commentators seemed to note.[79]

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Parts II and III return to these puzzles in detail. Section II examines the challenges they posed to the Congress and Treasury in designing and implementing apportioned direct taxes. Section III considers the implications of these puzzles for understanding the legal requirements of apportionment. As we examine later, Congress and the Executive Branch also encountered smaller, but no less perplexing, puzzles when seeking to implement apportioned direct taxes, which were all derivative of these basic challenges.[80] Taken together, these complications big and small illuminate inherent ambiguities and difficulties in implementing an apportioned direct tax. The next Section first reviews judicial interpretations of the apportionment requirement and the taxing clauses—and how they have changed over time—to explain the high stakes for understanding the apportionment requirement today.

C. The Rise and Fall (and Rise) of Constitutional Tax Issues

As discussed above, the legal effect of the apportionment clauses—including the meaning of the term "direct tax"—was ambiguous at and after the drafting of the Constitution. This ambiguity, however, did not have significant consequences for the taxing power in the decades that followed. From the vantage of

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[78] EINHORN, *supra* note 17, at 158

[79] In *Hylton*, for example, Justice Chase seemed to highlight this same ambiguity. He noted that, in principle, Congress could impose an apportioned tax on carriages, but then lay it in certain states—states that presumably did not have enough carriages to pay the tax—on entirely different objects of taxation: "in another on horses, in a third on tobacco, in a fourth on rice; and so on"—even as he concedes that such as tax "would not be a tax on carriages, but on a number of specific articles." 3 U.S. (3 Dall.) 171, 174–75 (1796) (opinion of Chase, J.). Chase's apparent bewilderment points to the intrinsic ambiguity in whether an apportioned direct can be properly characterized as a tax on a particular base at all.

[80] *See infra* Section III.B.2.

the present, there were two roughly century-long periods in which the courts avoided the difficulties of the text by remaining deferential to Congress.

In the century between the Supreme Court's 1796 opinion in *Hylton v. U.S.*[81] and its 1895 decision in *Pollock v. Farmers' Loan & Trust Company*,[82] the Court interpreted the word "direct" narrowly, to only encompass taxes on real property and head ("capitation") taxes. The Court interpreted the apportionment requirement functionally—based on its consequences for the taxing power—and reasoned that it should only apply when it would be feasible for Congress.[83] The *Pollock* decision briefly upended this period of constitutional settlement, by interpreting the scope of "direct" taxes more expansively, thereby subjecting a broader range of taxes to the rule of apportionment.[84]

The Sixteenth Amendment largely restored the pre-*Pollock* settlement of a broad federal taxing power and a narrow apportionment requirement. In the slightly-more-than-a-century-long period between the ratification of the Sixteenth Amendment and the recent decision in *Moore*, the scope of the constitutional term "incomes" was considered broad enough to authorize all aspects of the modern federal tax apparatus. But, in *Moore*, the Supreme Court signaled some openness to reopening these basic constitutional tax questions—and the potential return of apportionment as a significant restraint on the taxing power. Here, we briefly trace this historical evolution.

The 1796 *Hylton* case was significant not only for the taxing powers; it was the first case in which the Supreme Court reviewed an act of Congress.[85] At issue was a 1794 public law "laying duties upon Carriages for the conveyance of Persons."[86] Although the law imposed a tax on a form of property, Congress characterized the carriage tax as a "duty," and consequently designed the tax to be uniform—with rates that applied equally to all carriage owners in the new thirteen states—rather than apportioned. When it was challenged for its lack of apportionment, Alexander Hamilton argued before the Supreme Court on behalf of

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[81] 3 U.S. (3 Dall.) 171 (1796).

[82] 157 U.S. 429 (1895).

[83] *See infra* note 89 and accompanying text.

[84] *See infra* note 93 and accompanying text. For a survey of these two distinct periods in the Court's interpretation of the taxing power, see Glogower, *supra* note 6, at 792–97.

[85] *See* DOCUMENTARY HISTORY VII at 358 (noting that Hylton "marked the first time that the Supreme Court exercised the power of judicial review to determine the constitutionality of a statute passed by Congress and signed into law by the president").

[86] *See* Act of June 5, 1794, Pub. L. 3-45, ch. 45, 1 Stat. 373.

the government.[87] Hamilton contended that the carriage tax was not the sort of tax that qualified as "direct"—and, moreover, that the tax clauses should be interpreted in a flexible manner that allowed the new federal government to function.[88]

Hamilton prevailed. The Supreme Court upheld the carriage tax and appeared to embrace his functional approach to interpretating the scope of apportionment. Justice Chase, for example, stated his view that "[t]he Constitution evidently contemplated no taxes as direct taxes, but only such as Congress *could* lay in proportion to the census"—in other words, that "[t]he rule of apportionment is only to be adopted in such cases where it can reasonably apply."[89] Chase consequently interpreted the meaning of the term "direct tax" narrowly, and suggested that only capitation taxes and taxes on land qualified.[90]

The Supreme Court followed *Hylton* court's narrow and functional interpretation of the apportionment requirement in the decades that followed.[91] While the Court heard relatively few constitutional challenges to tax laws, when it did so it upheld exercises of the taxing power by finding that the laws in question imposed "indirect" taxes not subject to apportionment.[92]

This tradition of judicial deference to a broad congressional taxing power—and a narrow role for apportionment in the constitutional structure—was upended in 1895, when the Supreme Court struck down the 1894 income tax in

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[87] *See* THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 284 (Julius Goebel, Jr. ed., 1964).

[88] *Id.*

[89] 3 U.S. at 174 (emphasis added).

[90] Chase expressed his view in a tentative fashion. *See id.* at 175 ("I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND.") (capitalization in the original). Justices Paterson and Iredell agreed with Chase's narrow interpretation. *See id.* at 176 ("The Constitution declares, that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax.") (opinion of J. Paterson); *id.* at 183 ("A land or a poll tax may be considered of this description.") (opinion of J. Iredell).

[91] At the same time, this understanding of apportionment was not unanimous. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hillard, Gray & Co. 1833).

[92] *See, e.g.*, Pacific Insurance Co v. Soule, 74 U.S. (7 Wall.) 433 (1868) (upholding a tax on the income of insurance companies); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869) (upholding a tax on bank notes); Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1874) (upholding a tax on successions of real estate and personal property).

Pollock v. Farmers' Loan & Trust. The *Pollock* Court held that a tax on income from the ownership of certain property is not "so different from a tax upon the property itself" as to avoid the apportionment requirement.[93] And, in so doing, the Court struck down the entire 1894 Income Tax, on the theory that the law included such a tax on property ownership. The *Pollock* decision led, eventually but directly, to the ratification of the Sixteenth Amendment in 1913,[94] which empowered Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[95]

The Sixteenth Amendment yielded another long, era of relative settlement as to constitutional tax questions. Soon after ratification, in the 1920 case *Eisner v. Macomber,* the Court invalidated a portion of the Revenue Act of 1916 taxing shareholders on the receipt of a corporate stock dividend, regardless of whether the dividend affected their economic interests in the corporation.[96] In striking down this provision, the Court held that the Sixteenth Amendment only allowed the taxation of "realized" income without apportionment.[97] But a series of subsequent cases narrowed the holding in *Macomber* and repudiated its underlying logic, and thereby reestablished Congress's broad power to lay taxes on different forms of income without apportionment.[98] Since the ratification of the Sixteenth Amendment, we are aware of no other case (other than the D.C. Circuit's quickly

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[93] 158 U.S. at 618.

[94] *See* Ackerman, *supra* note 15, at 33–39 (describing the connection between the *Pollock* decision and the constitutional amendment); *see also* Brooks & Gamage, *supra* note 16, at 17–18.

[95] U.S. CONST. amend. XVI.

[96] Revenue Act of September 8, 1916, ch. 364, § 2(a), 39 Stat. 756 (providing that, for purposes of the individual income tax, taxable dividends include "mean any distribution made or ordered to be made by a corporation . . . out of its earnings or profits accrued . . . whether in cash or in stock of the corporation . . . which stock dividend shall be considered income, to the amount of its cash value").

[97] 252 U.S. 189 (1920). The Court quickly retreated from its holding in *Macomber*. *See, e.g.,* United States v. Phellis, 257 U.S. 156 (1921) (upholding the taxation of a stock dividend in the context of a corporate reorganization). And, in a more recent opinion, the Court interpreted *Phellis* as consistent with *Macomber*. *See* Cottage Savings Association v. Commissioner, 499 U.S. 554, 563–64 (1991).

[98] *See, e.g.,* New York ex rel Cohn v. Graves*,* 300 U.S. 308, 314–16 (1937) (rejecting *Pollock*'s reasoning that a tax on income from property was equivalent to a tax on the underlying property).

self-repudiated decision in *Murphy*[99]) in which the Supreme Court or any other United States court has struck down an act of Congress as a direct tax that violates the requirement of apportionment.[100]

The 2024 *Moore* case[101] resurfaced old questions about the limits of Congress's power to tax income without apportionment. The petitioners in *Moore* challenged the constitutionality of the 2017 mandatory repatriation tax ("MRT"), which required certain U.S. shareholders of foreign companies to pay taxes with respect to income that the firms had realized but not distributed to the shareholders.[102] The petitioners asked the Court to answer "[w]hether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.[103] Under the petitioners' theory, the MRT did not tax income that was realized *by the petitioners*, and therefore was unconstitutional because it was not apportioned.[104]

The majority in *Moore* declined to answer the broad question presented, and instead upheld the mandatory repatriation tax on the narrower grounds that the tax *did* apply to realized income—namely, income that was previously realized by the corporation, and was merely being attributed to the shareholders.[105] The Court exhibited a prudential approach to interpreting Congress's taxing power, and seemed eager to avoid an interpretation that could not contain (in Kavanaugh's memorable language) the "blast radius" of the holding.[106]

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[99] *See* Murphy v. I.R.S., 460 F.3d 79, 81 (D.C. Cir. 2006) (holding "that § 104(a)(2) is unconstitutional as applied . . . because compensation for a non-physical personal injury is not income under the Sixteenth Amendment"); *but see* Murphy v. I.R.S., 493 F.3d 170 (D.C. Cir. 2007) (holding, after vacatur of previous opinion, that the tax in question was not a direct tax subject to apportionment even on the assumption that it was not a tax on income).

[100] The Court considered whether taxes laid by Congress would be characterized as direct taxes subject to apportionment in subsequent case law, but did not invalidate taxes on this basis, nor did the Court appear to seriously entertain challenges on these grounds. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 570–71 (2012) (reasoning that the "individual mandate" penalty in the Affordable Care Act was a tax, but also that it was an indirect tax not subject to apportionment).

[101] 602 U.S. 572 (2024).

[102] I.R.C. § 965 (requiring U.S. shareholders to pay a one-time transition tax with respect to the undistributed foreign earnings of certain specified foreign corporations).

[103] Brief for Petitioners at i, Moore v. United States, 602 U.S. 572 (2024).

[104] *Id.* at 14–16.

[105] 602 U.S. at 581–600.

[106] *Id.* at 592.

While the majority opinion declined to upend settled understandings of Congress's taxing power, it also did little to signal that the answer to the question presented was necessarily "yes."[107] Meanwhile, four Justices signaled that the answer was "no," and therefor indicated an inclination to require the apportionment requirement for a broader range of federal taxes.[108]

Because it avoided the question presented, however, the Court left unanswered whether the apportionment requirement could ever limit Congress's ability to tax income. In its holding, the Court affirmed that a tax on income was necessarily an indirect tax[109]—thereby implying that *Pollock* was wrongly decided—and that the Sixteenth Amendment "expressly confirmed what had been the understanding of the Constitution before *Pollock*."[110]

The *Moore* case thereby reoriented questions about the scope of Congress's taxing power away from the Sixteenth Amendment, and back toward the original constitutional taxing clauses. For this reason, *Moore* made even more important the question of what tax practice looked like before the Sixteenth Amendment, and how apportioned direct taxation operated during this era.

II. THE PRACTICE OF APPORTIONED DIRECT TAXATION

This Part presents the primary descriptive findings of the Article. After reviewing the emergence of apportionment in the pre-constitutional era, we examine the three periods in which apportioned direct taxes were signed into law and implemented by Treasury. Section II.B examines the structural features of the three direct taxes; how these successive attempts to design and implement direct taxes reveal Congress and Treasury's evolving understandings of the direct tax base and the operation of apportionment; and how these actors struggled to reconcile the basic tensions of in the apportionment method. Section II.C then presents our findings on their fiscal effects. We rely on Treasury Annual Reports to

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[107] *Id*. at 598 ("For their part, the dissent and the opinion concurring in the judgment focus primarily on the realization issue—namely, whether realization is required for an income tax. We do not decide that question today.").

[108] Two justices concurring in the judgment (Barrett and Alito) and the two justices in dissent (Thomas and Gorsuch) thought income required realization. *See* 602 U.S. at 604–20 (opinion of Barret, J., concurring in judgment); 602 U.S. at 620–52 (opinion of Thomas, J., dissenting).

[109] 602 U.S. at 583–84.

[110] *Id.*

study the effectiveness (or not) of these apportioned taxes, including their revenue consequences and the degree to which the taxes raised were in fact successfully apportioned.

A. Apportionment Before 1789

The literature on apportionment has examined at length the possible meanings of the term "direct tax" and the function of apportionment at the time of the Convention,[111] but has devoted less attention to the early pre-constitutional practice of apportionment.[112] This Section begins by examining the origin and operation of apportionment in the United States before the Constitution.[113] These early experiences offer a window into where apportionment came from, and how this confusing mechanism came to be embedded in the Constitution. As this Section explains, the American apportionment mechanism evolved during a period in which there was no federal taxing power, and in which the early Congresses sought to coordinate revenue collection among the emerging but still loosely affiliated confederation of independent colonies.[114] The contradictions in the apportionment mechanism only emerged later, when the Convention delegates sought to translate this informal pre-constitutional practice into a constitutional rule for how Congress must impose direct taxes on individuals.

The revolutionary-era apportionment practices must be understood in the context of the American Revolution itself. Apportionment evolved from an *ad hoc* practice born of exigency and desperation—as a method of gathering soldiers, goods, and war matériel under the Continental Congress, and for preserving the value of the Continental currency—into a formalized though unenforceable legal prescription for allocating revenue requisitions under the Articles of

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[111] *See supra* notes 14–15 and accompanying text.

[112] To the extent that legal literature examines pre-constitutional apportionment, it largely focuses on the apportionment scheme in the Articles of Confederation as a precursor to the constitutional provisions. *See, e.g.*, Brooks & Gamage, *supra* note 20, at 94-97; Johnson, Foul Up, *supra* note 15, at 12–14.

[113] There was also a history with apportioned taxation in England, which we do not address here. *See generally* PETER WIEDENBECK, TAXES AND THE CONSTITUTION: A CONTRARIAN VIEW (draft manuscript 2025) (describing this history).

[114] The Second Continental Congress began to designate the colonies as "states" in 1776 around the time of the Declaration of Independence and formally adopted the term "United States" on Sept. 9, 1776. V JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 747 (Sept. 9, 1775) (Washington, DC, U.S. Govt. Printing Office, 1906). This Article consequently refers to the "colonies" for dates before this period, and the "states" thereafter.

the Confederation. Moreover, this period was characterized by congressional fiscal experimentation that blurred the inherently messy distinctions between taxation, property confiscation, currency issuances, and debt issuances.[115]

The Second Continental Congress apportioned requests from the colonies from the beginning of the Revolutionary War. At the onset of the war in 1775, with specie scarce in the colonies, the Second Continental Congress sought to fund the Continental Army with paper currency, issuing a total of $6 million in continental bills throughout the year.[116] Congress asked the colonies to exercise their independent taxing powers to collect and retire the currency, thereby supporting the currency's value and enabling future issuances. Congress apportioned this request to "sink" the continental currency in accordance with a rough estimate of each colony's relative population.[117]

Because Congress could not rely on currency issuances alone to fund the war,[118] it also resorted to a variety of alternative measures to secure necessary

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[115] For a history of the fiscal experimentation during the revolutionary era, see generally FARLEY GRUBB, THE CONTINENTAL DOLLAR: HOW THE AMERICAN REVOLUTION WAS FINANCED WITH PAPER MONEY (2023).

[116] FERGUSON, *supra* note 17, at 26.

[117] On June 29, 1775, Congress resolved "[t]hat each colony provide ways and means to sink its proportion of the bills ordered to be emitted by this Congress, in such manner as may be most effectual and best adapted to the condition, circumstances, and usual mode of levying taxes in such colony." II JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 221–22 (July 29, 1775) (Washington, DC, U.S. Govt. Printing Office, 1905). Congress resolved that, *in principle*, the "proportion or quota of each colony be determined according to the number of Inhabitants, of all ages, including negroes and mulattoes in each colony" but then resorted to a rougher allocation since each colony's true population could not "at present, be ascertained." *Id.* The journals did not specify the basis for this allocation, which only roughly correlated with contemporary estimates of the colonies' relative population. *Compare id.* with U.S. CENSUS BUREAU, BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 1168–79 (1975) (summarizing estimates of the colonies' populations in the 1770's).

[118]With the costs of the war quickly escalating, the currency issuances reached $25 million by the end of the following year. FERGUSON, *supra* note 17, at 26. Even these amounts quickly proved insufficient to support the war expenditures, as Congress continuously and desperately "stuffed the maw of the Revolution with paper money." *Id.* at 29 (citing John Hery, Jr. letter to Governor of Maryland, Feb. 14, 1778 in Burnett, ed. Letters III, 85). *See also id.* at 32 (presenting currency depreciation data).

supplies. These included price controls; direct confiscation of food and property[119]; resolutions asking the colonies to directly furnish specific goods; and both domestic and foreign loans.[120]

Following the Declaration of Independence, the Articles of Confederation formalized the principle of apportioned requisitions that had evolved loosely during the early war years. The Articles—which were adopted by the Second Continental Congress in 1777 but not ratified by all the states until 1781[121] —did not grant Congress an independent taxing power. As is well known, the Articles contemplated that the federal government would raise funds through requisitions from the states, but did not provide Congress with any formal authority to enforce these requests.[122]

The Articles also sought to shift the basis of apportionment from population to wealth, and prescribed a system whereby the states would contribute funds to Congress in proportion to the value of real property within each state.[123] Article VIII provided that "[a]ll charges of war, and all other expenses that shall be incurred for the common defence or general welfare . . . shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state"—a value that "shall be estimated, according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint."[124]

Because the Articles did not confer any new taxing powers, they also did not specify the tax base that should fund the apportioned revenues. As a result, the

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[119] For example, on April 8, 1781, the Board of War reported to Congress that "large quantities of flour and forage" as well as "fatted" cattle on the peninsula between the Chesapeake Bay and the Delaware River were at risk of capture by the British. Congress approved the Board's recommendation that it would be "both prudent and necessary that the means of subsistence should be kept out of the Enemy's hands, and transferred to our own troops." XIX JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 365–67 (Apr. 8, 1781) (Washington, DC, U.S. Govt. Printing Office, 1912).

[120] *See* FERGUSON, *supra* note 17, at 32–47.

[121] XIX JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 119, at 213–23 (Mar. 1, 1781) (reporting the ratification by the final state, Maryland).

[122] *See, e.g.,* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA 22 (3d ed. 2016) (observing that the Articles "did little more than codify the way Congress was already conducting its business" and "left final approval of the total amount of taxes raised to the states.").

[123] Professor Calvin Johnson argues that the Articles' prescription of apportionment by wealth indicates that the formula was "written to reach wealth, not to protect it." Johnson, Foul Up, *supra* note 15, at 1–2.

[124] ARTICLES OF CONFEDERATION OF 1781, art. VIII, para 1.

Articles merely provided that "[t]he taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states."[125]

The mounting needs of the War could not wait for a congressional taxing power—nor even for the Articles and its new requisition scheme to be formally in effect. Congress made its first requisition only a week after the Articles were drafted and long before their complete ratification. On November 22, 1777, Congress issued a requisition for $5 million in continental currency and specified the amounts to be provided by each state.[126] And, although the draft Articles specified that requisitions would be allocated based on the value of real property in each state, Congress instead allocated this requisition based on state population—with representatives apparently concerned that they could not assess land amid the ongoing war.[127] Congress issued subsequent currency requisitions throughout 1779 totaling over $100 million.[128] But Congress only succeeded in collecting a small portion of these amounts from the states. Historian James Ferguson notes that by 1780 the states had only accumulated credits for paying requisitions in the amount of $13 million.[129] The literature frequently and rightly highlights the failure of this requisition system as a primary impetus for the Constitutional Convention and the Constitution's broad federal taxing power.[130] Since the states were not practically obligated to comply with the requisitions, they faced a textbook collective action problem, whereby individual states had an incentive to free-ride on the contributions of others.[131]

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[125] *Id*. art. VIII, para 2.

[126] IX JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 955 (Nov. 22, 1777) (Washington, DC, U.S. Govt. Printing Office, 1912).

[127] *See* FERGUSON, *supra* note 17, at 33; *see also* Parrillo, *supra* note 18. Evidently in an effort to comply with the quota formula prescribed by the Articles, Congress provided that the states would be credited with the amounts actually paid as well as interest, "until the quotas shall be finally ascertained and adjusted by the Congress." IX JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 126, at 955.

[128] FERGUSON, *supra* note 17, at 34.

[129] *Id.* at 34–35.

[130] *See, e.g.*, BROWNLEE, *supra* note 122, at 28 (describing the need for a "national government that had the capacity to produce significant tax revenues" as a primary motivation for the Constitutional Convention).

[131] The early requisition attempts also faced additional challenges beyond the basic collective-action problem. To maintain the war, Congress and miliary officials increasingly relied on "direct impressments" of goods needed for the war—often ad hoc and involuntary, and

After the demise of the continental currency in 1799, Congress also relied increasingly on requisitions of specific supplies, which were not explicitly contemplated by the Articles. Congress did not apportion these supply requisitions according to a consistent formula, and instead seemed to take account, on a case-by-case basis, of each state's capacity and geographic proximity.[132] States could supply these requisitions however they saw fit.[133]

Congress attempted further financial requisitions after the Article's ratification in 1781, to stabilize the national fiscal system and to rein in the public debt.[134] And, after gaining independence from Britain in 1783, the Congress of the Confederation continued to make requisitions from the states. But, once the perils of the war began to fade, the collective-action problem of the requisitions system became more pronounced, as (without the urgency of war) states had even less

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paid for with government certificates of dubious value and legal validity. FERGUSON, *supra* note 17, at 58–65. The proliferation of these informal instruments frustrated Congress's attempts to stabilize the value of the continental currency—which finally collapsed in 1799—and collect formal requisitions from the states. *Id.* at 65 ("[I]t was politically impossible . . . for the states to refuse to accept certificates for any taxes, especially when impressments were putting them into the hands of the people."). Moreover, the states had limited taxing capacity and strained finances. And the states *were* actively contributing to the war effort through other means—including by mustering and equipping their own soldiers and militia, providing war matériel, and building fortifications. *Id.* at 35. In addition, the states obviously varied in the degree to which they were affected by the war, raising difficult issues of inter-state fairness.

[132] For example, in September 1780, Congress ordered a specific requisition of cattle for Washington's army: 1,000 cattle weekly apportioned among New Hampshire, Massachusetts, and Connecticut, plus a one-time requisition of 2,056 cattle apportioned among New Jersey, Pennsylvania, and Delaware. XVIII JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 828–29 (Sept. 15, 1780) (Washington, DC, U.S. Govt. Printing Office, 1910). The allocation did not correspond to the relative wealth or population of these states, but presumably was based on the availability of cattle in these states and each state's proximity to the army.

[133] FERGUSON, *supra* note 17, at 49.

[134] After assuming the newly created office of Superintendent of Finance in 1781, Robert Morris pushed through an $8 million requisition payable only in specie or new specie notes issued by his office. Although Morris was skeptical of requisitions payable in specific supplies and government certificates, he ultimately accepted some payments in specific supplies. *Id.* at 141. The following year, Congress passed an additional special requisition for $1.2 million to maintain interest payments to public creditors, after Morris threated to stop such payments until the passage of a national impost. *Id.* at 151.

of an incentive to comply.[135] State participation with the post-war requisitions steadily declined. One study estimates that the states paid 66% of the requisition of April 1784; 35% of the September 1782 requisition; 20% of the September 1785 requisition; and the states paid merely 2% of the August 1786 requisition.[136]

A few key aspects of this pre-constitutional apportionment practice bear emphasizing and repeating. First, and unsurprisingly, all the requisitions for money and supplies during this period were structured as "sum certain" levies—they identified the specific amount requested. So did the requisitions for specific goods and supplies. Second, Congress could only *request* that the colonies—and then the states—comply with their apportioned quotas. For this reason, none of these requisitions identified how the states should raise the requested sums. These early practices offered a familiar model for the delegates when structuring Congress's taxing power under the Constitution. As the following Sections describe, however, apportionment might have made sense in the pre-Republic context—but Congress and Treasury soon discovered that it operated differently as a rule governing the federal taxing power.

B. The Apportioned Direct Tax Legislation

Apportionment took on a new meaning in 1787 under the Constitution—not as a rough method for allocating requisitions from the states, but as a legal prescription for certain exercises of Congress's new independent taxing power.

Following ratification, the new Congress immediately took up the matter of funding the government. Congress initially imposed only external custom duties, which were uncontroversially classified as indirect taxes not subject to apportionment.[137] As a result, the apportionment requirement played no role in the design of the very first federal revenue measures. In the following years, Congress ex-

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[135] In this era Congress primarily provided non-rivalrous and non-excludable public goods, such as national defense and the promotion of commerce, which nonpaying states could still access. Furthermore, it is likely that states simply did not face the same motivations to make essentially voluntary contributions to the national fisc once the perils of the war had receded. *See* Keith L. Dougherty & Michael J. G. Cain, *Marginal Cost Sharing and the Articles of Confederation*, 90 PUBLIC CHOICE 201, 210 (1997) (describing the collective action problems during this era).

[136] Dougherty & Cain, *supra,* at 210.

[137] Act of July 4, 1789, ch. 2, 1 Stat. 24 (an act "For laying a duty on goods, wares, and merchandises imported into the United States); *see also* ADAMS, *supra* note 17, at 5–45.

panded the tax system to internal duties and excises on domestic business activities—other forms of taxation that did not require apportionment.[138] Indeed, duties and excises were the primary sources of federal tax revenue for the next century, and until the introduction of the modern federal income tax.[139]

At three junctures, however, Congress and Treasury grappled with the questions of how, and whether, apportionment could be implemented as part of a workable tax system. In all three cases, Congress sought to implement direct taxes in periods of crisis—crises that produced concern that duties, imposts, and excises would provide insufficient revenue. Congress first enacted an apportioned direct tax in 1798,[140] amid rising tensions with France and fears that a commercial blockade would sap customs revenue.[141] Congress then imposed a series of direct taxes to provide additional revenue during and immediately after the War of 1812. Congress implemented a third, and final, round of direct taxation in 1861, at the dawn of the Civil War.[142]

In these three episodes, Congress experimented with different structures for implementing an apportioned tax. None was ultimately successful. (Indeed, perhaps the most basic and intuitive evidence for that proposition is the fact that, since 1861, Congress has not tried again.) As we explain, these three efforts also contemplated fundamentally different roles for the states—and, as a result, reflected fundamentally different conceptions of the tax base. Congress's choices also had significant consequences for revenue and potential compliance with the constitutional prescription of apportionment. This Section examines the basic legislative design of these three taxes, while the subsequent Sections examine their fiscal effects and lessons for the taxing power.

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[138] The first internal duty Congress imposed was an excise on distilled spirits in the Tariff of 1791. Act of March 3, 1791, ch. 15, 1 Stat. 199 (an act "repealing . . . the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States").

[139] *See* Revenue Act of 1913, ch. 16, 38 Stat. 114 (an act "[t]o reduce tariff duties and to provide revenue for the Government, and for other purposes"). For further discussion see *supra* notes 94–95 and accompanying text.

[140] Act of July 14, 1798, ch. 75, 1 Stat. 597 (an act "[t]o lay and collect a direct tax within the United States"). Congress had previously enacted legislation establishing the infrastructure to administer such a tax. Act of July 9, 1798, ch. 70, 1 Stat. 580 (an act "[t]o provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States").

[141] ADAMS, *supra* note 17, at 50–51.

[142] Act of August 5, 1861, ch. 45, 12 Stat. 292 (an act "[t]o provide increased revenue from imports, to pay interest on the public debt, and for other purposes").

1. The Direct Tax of 1798

Congress implemented the first direct tax in 1798. After charging a series of committees to research how such a tax might be designed, Congress laid the first direct tax amid rising tensions with France that placed the country "on the brink of war."[143] This first attempt to implement an apportioned direct tax was also the most ambitious: the legislation detailed a taxable base and applicable rates, and provided for an army of federal assessors and collectors who would administer the tax.[144]

Prior to 1798, Congress and Treasury considered at length how an apportioned tax should be structured. In 1794, a congressional committee appointed to study government revenue needs resolved that "750,000 dollars [should] be raised" from an apportioned tax "agreeabl[e] to the rule prescribed by the constitution."[145] But the matter required further study.[146] In late 1796, at the request of the House, Treasury Secretary Oliver Wolcott wrote to Congress sketching how the government might lay and collect a first direct tax.[147] Wolcott's report considered three basic options for structuring and administering the tax—and, in so doing, foresaw many of the basic challenges that would plague the efforts to implement direct taxes in the decades to come.

Wolcott's first option was to simply assign a revenue quota to each state and require that it pay the quota by a specified date.[148] But Wolcott was skeptical of

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[143] Joseph J. Thorndike, *Federal Wealth Taxes Have a Long and Uneasy History*, TAX NOTES: TAX HIST. ARCHIVE (Nov. 25, 2019).

[144] For a detailed account of the administration of the Direct Tax of 1798, see generally Parrillo, *supra* note 18.

[145] In 1796, the Committee on Ways and Means reported that a direct tax was "competent to yield such a revenue as appears necessary" to support the new Republic. Increase of Duties (April 17, 1794) *in* 1 AMERICAN STATE PAPERS: FINANCE 276, 276 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

[146] The Committee elsewhere observed that the subject was "of a new impression" and therefore presented "various difficulties" that were "such as [to] prevent the completion of a proper system, during the present session." Increase of Revenue (March 17, 1796) *in* 1 AMERICAN STATE PAPERS: FINANCE 409, 409. As a result, the Committee concluded, it would "go no further, at this time, than to report a resolution preparatory to that object." *Id.*

[147] *See* Direct Taxes (Dec. 14, 1796) *in* 1 AMERICAN STATE PAPERS: FINANCE 414.

[148] Under Wolcott's first option, if a state did not pay, then the quotas would "be assessed and collected by authority of the United States, upon the same objects of taxation, and pursuant to the same rules, by which the last taxes were assessed and collected by the respective States." *Id.* at 436.

such an approach. He assumed it would fail for the same reason that requisitions struggled under the Articles of Confederation: it relied on state compliance and left the federal government with less recourse against individual taxpayers. Indeed, Wolcott observed that this scheme "deserves but a momentary consideration," given that "it is obviously liable to every objection which can attend a reliance upon State contributions."[149]

Wolcott's second and third options relied more on the federal government to design and administer the tax. His second option was a tax on individuals that would be administered by the federal government but that would use each state's preexisting tax base.[150] Under Wolcott's third option, by contrast, the federal government would both define a new uniform national tax base and collect it directly.

Wolcott favored the third option. He thought the second option presented serious and disqualifying challenges. While Wolcott conceded that there would be advantages to using the preexisting state tax bases,[151] he also outlined two problems with such a scheme.

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[149] *Id.* at 436. Wolcott added that "it partakes of the system of requisitions upon the States, which utterly failed under the late confederation," and "presupposes a possible necessity of recourse to the national authority, under circumstances of unavoidable collision with the State Governments." *Id.* This concern would reappear during the Civil War, when Representative John Bingham opposed reliance on states to collect the Direct Tax of 1861 for the same reason. *See* 37 CONG. GLOBE 1217, 1241 (March 14, 1862) (arguing that state collection would make "the law inoperative in the hands of men, if such men can be found in the several States that would assume the duty, who would desire to shirk the provisions of the law, to some extent, or almost to the extent of the entire provision within that particular State," and there was "no method known to the law of the United States by which the Government of the United States would not be at the mercy of the State assessors and collectors"). For further discussion of the Direct Tax of 1861, see *infra* Section II.B.3.

[150] Under this scheme the tax would be "assessed and collected under authority of the United States" but "upon the same objects of taxation, and pursuant to the rules of collection by which taxes are collected in the States." *Id.* at 436.

[151] For example, Wolcott observed generally that "the fiscal systems of the several States . . . have been long established; that, in general, they are well approved by the people; [and] that habit has rendered an acquiescence under the rules they impose, familiar." *Id.* He also noted that such fiscal systems were created by legislatures that had "a minute and Particular knowledge of the circumstances and interests of the respective States," he continued, there was "[a] presumption in favor of their intrinsic merit."[151] Relying on them, moreover, would help avoid "the hazards of new experiments, and the delays incident to the organization of a new plan." *Id.*

First, Wolcott expressed concern that, because there was substantial variation in state tax systems—as is the case today, states varied in what they taxed—a federal tax that piggybacked on state systems would not have the benefits of national consistency.[152] Second, Wolcott noted that the states varied in who they considered taxpayers: some taxed persons; some taxed districts; others taxed corporate entities; some used a combination.[153] In Wolcott's view, it would be logistically costly, if not impossible, for the federal government to oversee and coordinate this patchwork of different taxing schemes. On the other hand, if the federal government left questions of tax design and implementation to the local collection districts, it would generate bad incentives—including a variation on the familiar collective-action problem, whereby individual officials would have a strong incentive to understate the tax burden of their own districts, leaving other districts to pick up the slack.[154] (Indeed, solving this kind of principal-agent problem appears to have been the original purpose of tax apportionment as practiced by parliament.[155])

For these reasons, Wolcott concluded that his third proposed option—whereby Congress would independently specify the tax base and provide for its collection—was likely the best way to implement a national apportioned direct tax.[156] But Wolcott did not express great confidence in his conclusion. Indeed, he observed that it might be just as hard, or even harder, to establish a new and uniform national tax base.[157]

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[152] Wolcott outlined several advantages to having a consistent national tax policy, but a major concern was that following state variation would magnify (in hard-to-anticipate ways) the policy effects of local choices. It would also magnify the degree to which state tax choices affected foreign trade—which, Wolcott argued, should be determined at the national and not the state level. *See id*. at 437.

[153] *Id*. at 438.

[154] Wolcott writes that "[u]nder such a system, there could be no security that local partiality would not lead to connivances for the suppression and concealment of property justly subject to taxation." *Id*.

[155] *See* WIEDENBECK, *supra* note 113 at *28 ("When first imposed, apportionment actually increased the fairness of the tax because it ensured a modicum of responsibility in local assessment—preventing one community from unfairly casting its burden on others through under valuations and unjustified grants of exemption.").

[156] *Id.*

[157] *Id* at 438 ("The Secretary presumes that it has been evinced that there are weighty, if not insuperable objections, against an adoption of the State systems by the United States; the more difficult task of proposing a plan, not attended with difficulties of equal or greater magnitude, remains to be attempted.").

After receiving Wolcott's recommendation, Congress requested more detail on how such a tax might work.[158] And, in early 1798, Wolcott sent a detailed proposal for structuring the direct tax under the third option.[159]

In this second report, Wolcott seemed aware that a bill specifying a rigid tax base and rate schedule might fail to raise a specified sum certain—and, therefore, might not be correctly apportioned. He sought to navigate this tension by reserving flexibility in some components of the tax base—flexibility that would help hit the revenue targets—while applying specific rates to components that were presumably easier to measure. For example, Wolcott thought that a per-capita tax on enslaved persons would be practical to estimate, and believed it would be feasible in principle—if also costly and time consuming—to assess dwelling houses.[160]

Taxing land was a greater challenge. "The variety of the principles upon which the State assessments have been formed," he concluded, made it impossible to "estimate . . . the probable rate of assessment in the different States."[161] Instead, Wolcott proposed that the tax rate on lands be left free-floating, so that it could be adjusted to "true up" each state's contribution to the specified sum certain after the taxes on dwellings and enslaved persons had been collected.[162] Wolcott thus sought to navigate the tension between the tax base and the sum certain by leaving open the questions of how land would be valued and taxed. In effect, Wolcott treated the land values as the primary dependent variable—a variable that could be adjusted to reach the fixed revenue targets as needed, based on the fixed inputs of the taxes on enslaved persons and dwellings.

Congress adopted Wolcott's recommendations with some small modifications.[163] On July 9, 1798, Congress passed preliminary legislation establishing the

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[158] *See* Apportionment of Direct Taxes (May 25, 1798) *in* 1 AMERICAN STATE PAPERS: FINANCE 588, 588 (describing Congress's request that Wolcott "exhibit a calculation of the quotas of the respective States").

[159] *See id*.

[160] *Id.* (observing that "houses are believed to be the most certain and eligible objects of taxation to which resort can be had").

[161] *Id.* Wolcott could only predict was that the eventual tax on lands would be "really moderate, when the immense value of that species of property in the United States is duly considered." *Id.*

[162] *See* Direct Taxes, 1 AMERICAN STATE PAPERS: FINANCE at 438 (noting that there was no "possibility of an estimate of the probable rate of assessment in the different States").

[163] For example, the progressive rates on dwellings are slightly different in the final law than in Wolcott's report. Perhaps most notably, Congress's draft bill originally had an exemption

basic infrastructure to collect the direct tax.[164] Later that week, Congress passed the substantive legislation: A law to raise a sum certain of $2 million, and specifying the apportioned amounts for each of the sixteen states at the time.[165]

At Wolcott's recommendation, the legislation specified three different elements of the taxable base: dwellings, enslaved persons, and land.[166] And, once again following Wolcott, the scheme sought to shoehorn three different tax bases into the confines of a sum-certain tax.[167] The law prescribed specific rates for elements of the tax base that could be measured and predicted with relative certainty: a tax of 50 cents for each enslaved person,[168] and an *ad valorem* tax on dwellings with a specified progressive rate schedule.[169] (The rate increased with the value of the dwelling.) The revenue from dwelling houses and enslaved persons would then be deducted from each state's quota, and a tax on land would make up the difference.[170] This meant that the amount of required revenue would drive land valuations and tax rates as dependent variables, not the other way around.[171]

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from taxation for houses below $200 in value; Wolcott suggested pushing that to $80; the final legislation and the public law settled at $100.

[164] Act of July 9, 1798, ch. 70, 1 Stat. 580 (an act "[t]o provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States"). The legislation separated each state into geographic divisions, and provided for the appointment of a commissioner for each division who would have the responsibility of overseeing the assessment of land, dwellings, and enslaved persons within that division. *Id.*

[165] Act of July 14, 1798, ch. 75, 1 Stat. 597 (an act "[t]o lay and collect a direct tax within the United States").

[166] *Id.* at § 2. The progressive structure of this tax was apparently inspired in part by "*l'impot progressif*" adopted by the French Assembly during this time. ADAMS, *supra* note 17, at 56–57.

[167] *See also* Brooks & Gamage, *supra* note 20, at 102-103 (characterizing this structure as "three separate taxes" which were only apportioned with respect to their combined revenue).

[168] Act of July 14, 1798, ch. 75, 1 Stat. 597, at § 2.

[169] *Id.*

[170] *Id.*

[171] *Id.* The legislation also provided for broad exemptions for any property that was exempted from tax under applicable state law, providing that: "no part of said tax shall be assessed upon such lands or dwelling-houses and slaves as at the time of passing this act are especially exempted from taxes by the laws of the states, respectively." *Id.*

The structure of the 1798 tax reflected the many tradeoffs inherent in reconciling a standardized, national tax scheme with the variance among state tax bases—while also seeking to comply with the constitutional requirement of raising a specified sum certain that could be divided among the states. As a result, the statute was able to specify some tax bases and applicable rates—but *necessarily* left significant discretion to Treasury.[172] In effect, the law left to the Executive Branch the difficult task of reconciling the tax base and the sum-certain quota. As we shall see, this reconciliation effort left assessors and collectors in the difficult position of trying to value the land and assign rates in a way that could match a fixed revenue target.[173]

Section II.C returns to examine the fiscal effects of the Direct Tax of 1798. The tax proved unpopular; in some instances it provoked violent opposition.[174] This first experiment with a direct tax came to an abrupt end after the election of 1800, when Jefferson's Democratic-Republican party claimed the presidency and both houses of Congress.[175] In 1802, Congress provided for winding down the vast administrative apparatus of the 1798 tax once collections were complete.[176]

2. The War of 1812 Direct Taxes

Congress again laid a series of direct taxes during and immediately after the War of 1812, as an additional domestic revenue source amid the nation's second major conflict with England. This time, then-Treasury Secretary Albert Gallatin advocated for a simpler taxing scheme than the one adopted in 1798. Indeed,

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[172] Professor Nick Parrillo examines in detail the discretion given to Treasury in assessing and collecting the 1798 Direct Tax, as an early example of a broad congressional delegation to an administrative agency. Parrillo, *supra* note 18. This Article's examination of the design of the 1798 tax, and its choices in reconciling the sum certain with the tax base, explains why this high degree of administrative discretion was compelled by the legislative structure.

[173] *See infra* Section II.A.2.

[174] *See* CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846 (1991) ("[T]he direct taxes of 1798 provoked Pennsylvanian German farmers into Fries' Rebellion and dogged Republicanism . . . ."); *see also* Joseph J. Thorndike, *How the First Federal Property Tax Sparked an Armed Rebellion,* TAX NOTES (Dec. 9, 2024).

[175] *See* HOWE, *supra* note 65, at 34 ("The advent of the Democratic party to power in 1801 was signalized by the complete abolition of all of the taxes so laboriously established by Hamilton and his successor").

[176] Act of Apr. 6, 1802, ch. 19, § 2, 2 Stat. 148, 148–49. Because the Direct Tax of 1798 was only laid for a single year, it did not have to be formally repealed.

Gallatin's scheme adopted features of the proposals that Wolcott had previously considered and rejected.[177]

These taxes emerged from an 1812 Treasury report, in which Secretary Gallatin provided Congress with an estimate of how war with Britain might affect the revenue of the United States. Gallatin worried that war would depress revenue from imported merchandise, on which the government primarily relied. Gallatin noted that "under existing laws and circumstances" these duties accounted for a robust annual revenue of $6 million. But, he continued, it would "be unsafe . . . to calculate, in the event of a war, on more than 2,500,000 dollars" from those duties.[178] Gallatin therefore recommended an apportioned direct tax to help meet probable war needs. After accounting for the increase in the American population, Gallatin argued that a direct tax of $3 million would "not . . . be a much greater direct tax" than the $2 million that Congress passed in 1798.[179]

But Gallatin urged a fundamentally different structure than what had been enacted almost 15 years earlier. As noted above, Secretary Wolcott favored a scheme whereby the federal government would itself define the tax base, measure it, and collect revenue.[180] Gallatin instead favored a tax that would lean heavily on the established state systems of taxation, and that would grant states more authority in assessing and remitting the tax.

Gallatin acknowledged the benefits of a uniform federal tax base—a central policy priority that had motivated the design of the 1798 law.[181] But he concluded that the advantages of national uniformity were outweighed by the practical administrative benefits of relying on the preexisting state systems. "It is believed," he continued, "that the systems of taxation . . . adopted by the several States . . . will generally be found to be best adapted to the local situation and circumstances of each State" and would be "most congenial with the feelings and habits of the People."[182] Gallatin consequently proposed that the new federal tax "should be laid and assessed in each State upon the same objects of taxation on which the direct taxes, levied under the authority of the State, are laid and assessed."[183]

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[177] *See* ADAMS, *supra* note 17, at 58–59.

[178] Increase of Revenue (Jan. 20, 1812) *in* 2 AMERICAN STATE PAPERS: FINANCE 523, 524.

[179] *Id.* at 525.

[180] *See supra* Section II.B.1.

[181] Increase of Revenue, *in* 2 AMERICAN STATE PAPERS: FINANCE at 524 ("[A] tax laid . . . on the same articles, in all the States, as was done in the direct tax of 1798, is recommended by its uniformity, and supported by respectable authority.").

[182] *Id.*

[183] *Id.*

Congress largely adopted Gallatin's recommendations. As in 1798, Congress first established the administrative infrastructure to assess and collect the tax.[184] On August 2, 1813, Congress then laid a direct tax of $3 million dollars, apportioned among the 18 states admitted at the time,[185] as well as among the counties in each state.[186]

Perhaps most strikingly, the legislation did not specify exactly what the tax base should be, nor how its components should be measured or at what rates. Instead, the enabling legislation only provided broadly that "whenever a direct tax shall be laid," it "shall be assessed and laid on the value of all lands, lots of ground with their improvements, dwelling houses and slaves."[187] In contrast to the 1798 tax, this structure left a more precise specification of the tax base and its components to the discretion of the assessors and collectors of the tax. In effect, it allowed for a broader range of variables that could be adjusted to fill the state and local quotas prescribed by the statute.

Unlike the 1798 tax, the new legislation also allowed the states to pay their quotas directly, from any available state funds, without levying a "direct" tax at all. States that selected this option were given a 10 or 15% discount if they paid their apportioned share within a designated time frame, likely as a way of very

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[184] Act of July 22, 1813, ch. 16, 3 Stat. 22 (an act "for the assessment and collection of direct taxes and internal duties).

[185] Act of August 2, 1813, ch. 37, 3 Stat. 53, at § 1 (an act "[t]o lay and collect a direct tax within the United States").

[186] *Id.* § 2. At the same time, the 1813 tax provided that "each state may vary, by an act of its legislature, the respective quotas imposed by this act on its several counties or districts, so as more equally and equitably to apportion the tax hereby imposed; and the tax laid by this act shall be levied and collected in conformity with such alterations and variations, as if the same made part of this act." 3 Stat. at 71.

[187] Act of July 22, 1813, ch. 16, 3 Stat. 22, at § 5.

roughly accounting for the costs of administering and collecting the tax.[188] Almost half the states paid the tax directly and took the discount.[189] (And, as discussed below, the mere fact that a significant number of states were able to pay less than their requisitioned amount—while others paid fully—raises questions about how Congress understood the constitutional prescription of apportionment.[190])

Congress followed the 1813 direct tax with two more taxes related to the war effort. The subsequent levies followed the basic structure of the August 1813 legislation with minor modifications. President Madison signed a subsequent annual direct tax of $6 million into law in early 1815.[191] While this levy generally followed the same structure as the 1813 tax, it dispensed with the complex (and ultimately unnecessary) county-level apportionment.[192] Like the 1813 law, this legislation did not specify the applicable rates to be imposed on these bases, but only provided that these "articles subject to taxation, shall be enumerated and valued by their respective assessors at the rate each of them is worth in money."[193] The next year, Congress repealed the 1815 annual tax and replaced it with a one-

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[188] Act of August 2, 1813, ch. 37, 3 Stat. 53, at § 8. This discount was likely designed to account for the expected costs of administering and collecting the tax, that would be borne in these circumstances by the states rather than the federal government. *See also* Brooks & Gamage, *supra* note 20, at 103-104 (arguing that this discount option suggests that "for apportionment purposes there may be a formal distinction between the tax itself and any credits against that tax").

[189] *See* EINHORN, *supra* note 17, at 158 (noting that "seven states (of eighteen) assumed the 1813 tax and four assumed the 1815 tax"); *see also* Direct Tax and Internal Duties (Oct. 13, 1814), *in* 2 AMERICAN STATE PAPERS: FINANCE 855, 856 (noting that because "the States of New Jersey, Pennsylvania, Virginia, South Carolina, Georgia, Ohio, and Kentucky" have "assumed the payment of the direct tax").

[190] That is, any states who were able to claim the discount paid less than the amount apportioned according to relative their population, whereas any states who did not claim the discount ultimately bore a higher proportion of the total revenue collected. *See infra* Section III.B.2.

[191] Act of January 9, 1815, ch. 21, 3 Stat. 164 (an act "[t]o provide additional revenues for defraying the expenses of government and maintaining the public credit, by laying direct tax upon the United States, and to provide for assessing and collecting the same").

[192] Act of Jan. 15, 1815, at § 5, 3 Stat. at 166.

[193] *Id.*

time direct tax of $3 million, but left the basic structure unchanged.[194] In subsequent legislation, Congress tinkered with the details of this tax, but left the basic contours unchanged.[195]

In structuring the War of 1812 direct taxes, Congress and Secretary Gallatin embraced a fundamentally different approach to apportioned taxation and retreated from Wolcott's favored third option. These new taxes dispensed with the complicated formulas for allocating revenue among different tax bases and did not even specify a uniform national tax base from which the funds were to be raised at all. In this way, Congress sought to reconcile the tension between the definition of the tax base and the sum certain mechanism by diminishing the significance of the tax base; local officials would therefore have more flexibility to raise the funds however they could.

These levies more explicitly embraced the fundamental logic of an apportioned tax—and, in some ways, reverted to the understanding of apportionment that had existed before 1789. During the Revolutionary War, the Continental Congress did not specify in any form *how* the colonies were to collect quotas of the paper currency—nor was there any particular need to.[196] The War of 1812 taxes reflected a similar logic. Broadly construed, these direct taxes allowed the states to raise a quota of funds in any convenient fashion—affording the states significant leeway to collect their apportioned quotas as they saw fit.

3. The Direct Tax of 1861

Congress attempted to impose an apportioned direct tax one more time, nearly a half century later, during the Civil War. On July 4, 1861, then-Treasury Secretary Salmon Chase issued a report proposing new revenue sources to suppress the "vast conspiracy against the union"—sources that included a new direct

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[194] *See* Act of March 5, 1816, ch. 24, 3 Stat. 255; *see also* Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q. J. ECON. 436, 443–444 (1889) (describing this progression of laws).

[195] For example, Congress extended the direct tax to the District of Columbia for the first time. Act of February 27, 1815, ch. 60, 3 Stat. 216 (an act "[t]o provide additional revenues for defraying the expenses of government and maintaining the public credit, by laying a direct tax upon the District of Columbia").The legislation imposed a "direct tax" of $19,998.40 on the District, and provided that it should generally be assessed and collected in the same manner as the general January 1815 levy. *Id.* at § 1, 3 Stat. at 216. The 1816 legislation replaced the 1815 tax of $19,998.40 on the District of Columbia with a new levy of $9,998.20 for 1816. Act of March 5, 1816, at §§3–4, 3 Stat. 254–55.

[196] *See supra* Section II.A.

tax and a raft of new internal and external duties and excises.[197] The next month, President Lincoln signed into law a broad tax bill that followed Chase's recommendations and included a direct tax for a sum certain of $20 million.[198] The legislation apportioned the tax among the 34 states established at the time—including, at least on paper, those that had recently seceded[199]—as well as the seven territories and the District of Columbia.[200]

The Direct Tax of 1861 combined features of both the 1798 and War of 1812 direct taxes. The new legislation described the tax base in broad terms: "all values of land and lots of ground, with their improvements and dwelling houses."[201] But, like the 1798 tax, the law also contained more specifics and had a degree of progressivity—for example, exempting properties with a value of $500 or less that were actually occupied by the owner.[202] Like in the War of 1812 taxes, however, the 1861 legislation also provided that a state could pay its quota "in its own way and manner"—that is, it could use whatever collection method it wanted as an alternative to what was prescribed in the statute.[203] The law also allowed a 15% discount to states governments that collected and remitted the tax on their own.[204]

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[197] S. EX. DOC. NO. 2, REPORT OF THE SECRETARY OF TREASURY ON THE FINANCES, at 1, 6–16 (July 4, 1861).

[198] Act of August 5, 1861, ch. 45, 12 Stat. 292 (an act "[t]o provide increased revenue from imports, to pay interest on the public debt, and for other purposes").

[199] The legislation provided that, with respect to any states "in actual rebellion against the United States at the time this act goes into operation, so that the laws of the United States cannot be executed therein," the President was authorized to "execute the provisions of this act . . . as soon as the authority of the United States therein is re-established," with an additional interest charge of 6% annually until the tax was finally paid. *Id.* at § 21, 12 Stat. at 311. This levy was only one measure that authorized the collection of property held by individuals in the seceded states. On the very next day, Congress also enacted the Confiscation Act of 1861 providing for the direct confiscation of property used in promoting "the present or future insurrection against the Government of the United States of America." Confiscation Act of 1861, ch. 60, 12 Stat. 319 (an act "[t]o confiscate property used for insurrectionary purposes").

[200] *See* Act of August 5, § 8, 12 Stat. at 292.

[201] *Id.* at § 13.

[202] *Id.*

[203] *Id.* at § 53, 12 Stat. at 311.

[204] *Id.*

In 1862, Congress passed a supplemental bill with different rules for the collection of the direct tax from "insurrectionary" states.[205] These states had no option to pay the taxes directly at a discount. Instead, the legislation provided that, where the tax could not be "peaceably executed," it would be charged as an automatic lien against parcels of land, with a penalty of 50%.[206] If the tax was not paid, the land would then be forfeited to the U.S. government, which would have the right to sell the land to collect the taxes due.[207]

The 1861 legislation also provided for the $20 million tax to be laid annually, rather than as a one-time assessment.[208] But the annual tax was effectively abandoned after the first year, due to the difficulties in collection and administration.[209]

When the war ended, Congress periodically suspended further collection of the tax in the southern states.[210] The direct tax lingered on the books, little-enforced, for decades. During this period, Congress faced a conundrum: It no longer needed the revenue but was reluctant to forgive unpaid amounts without

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[205] Act of June 7, 1862, ch. 98, 12 Stat. 422 (an act "[f]or the collection of direct taxes in insurrectionary districts within the United States, and for other purposes").

[206] *Id.* at § 1.

[207] *Id.* at §§ 4–7, 12 Stat. 423.

[208] *Id.* at § 1.

[209] *See* H.R. Rep. No. 552, 50th Cong., at 39 (statement of William Oates (D-AL) (1888) (arguing that "[a] discovery of these difficulties doubtless caused an abandonment of the direct-tax act, for it expressly laid $20,000,000 annually, and no effort was made to collect under it but for the first year of its existence.").

[210] *See* Act of July 28, 1866, ch. 298, 14 Stat. 328, § 14 (an act "[t]o protect the revenue, and for other purposes") (suspending the collection of the tax in the "insurrectionary states" until 1868); Act of July 23, 1868, ch. 69, 15 Stat. 260 (joint resolution "to amend the fourteenth Section of the Act approved July twenty-eighth, eighteen hundred and sixty-six, entitled 'An Act to protect the Revenue, and for other Purposes'") (suspending the tax for an additional year).

accounting for the taxes already collected.[211] After years of debate, Congress ultimately cancelled the unpaid quotas and reimbursed the states for the amounts collected.[212]

C. Measuring Apportioned Taxation

How effective were these apportioned direct taxes, and how were their burdens ultimately apportioned among the states? This section turns from legislative design to fiscal analysis. We rely on revenue information from the Treasury's Annual Reports—combined with additional information from congressional and Treasury records—to study, in broad strokes, the effectiveness and distribution of apportioned direct taxation, and to provide an overview of how they fit into early American public finance.[213]

We emphasize two broad and unfamiliar points. First, the apportioned taxes never raised the amount of revenue that Congress specified. As noted above, each direct tax law necessarily started with a congressional statement of the sum certain to be raised. But, in the aggregate, the direct taxes implemented over the late-eighteenth and nineteenth centuries raised about 80% of the revenue specified in those statutes. This fact does not suggest that apportioned taxes necessarily failed as a revenue tool, or contained legal problems. They raised millions of dollars in revenue, and the 80% rate is partly explained by the federal government's own discounts and adjustments. Still, 80% compliance is hardly a triumph. The shortfalls speak to the practical challenges these taxes faced.[214]

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[211] Nearly a quarter century later, Representative Ezra Taylor (R-OH) would lament that "[t]he collection of the tax, so far as it is unpaid, has, for many years, been suspended, and a feeling of injustice in bearing unequally the burdens." H.R. Rep. No. 552, 50th Cong., at 1 (1888).

[212] Act of March 2, 1891, ch. 496, 26 Stat. 822 (an act "[t]o n act to credit and pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August fifth, eighteen hundred and sixty-one").

[213] Treasury's *Annual Reports* provide the most comprehensive available revenue estimates by source and by year. Numerous other Treasury reports provide additional details on revenue and distribution. A particularly valuable source for us are the early reports collected in the American State Papers on finance, which in many years provide details data on the distribution of the apportioned taxes by state.

[214] *See supra* notes 211–212 and accompanying text.

Those legal questions are also implicated by our second finding: the revenue raised from individual states did not match the apportioned quotas in the statutes. There were large variations in the timing and amount of state payments. In the case of the 1798 Direct Tax, for example, the last count of state amounts—offered at the close of 1809, more than ten years after the enactment of the law—identified two states that had still paid less than 50% of their shares, and four states that had paid less than 80%.[215] (Later, we consider the implications of these findings for how would should understand the apportionment requirement and its consequences for the taxing power.[216])

1. The Early American Tax Landscape

We begin with a brief overview of the early American tax landscape. The figures below provide an overview of federal revenues in this era, aggregating annual revenue from the three largest standalone sources: External customs, land sales, and "internal" taxes.[217]

As these figures suggest, American public finance in the early years looked rather different from the system of public finance to which we are accustomed today. In the early decades of the Republic, by far the largest source of public funds was from external customs—the "impost" on goods coming into the country. Revenue from customs and tariffs provided well over 90% of funds for the government in most of its early years. In some years, moreover, the second largest source of public revenue is a tool that is largely unfamiliar in modern American government: public lands sales.[218] What we conventionally think of as "taxes" was an important supplemental source of revenue, especially during and immediately

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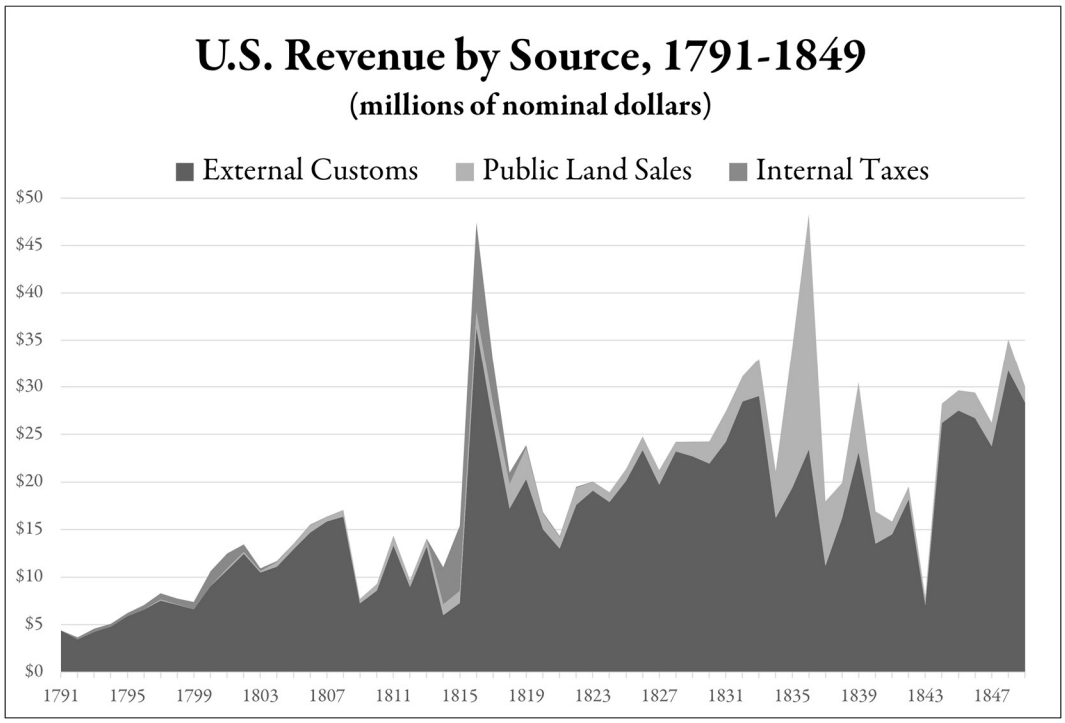
[215] *See* Direct Tax (Dec. 27, 1809), *in* 2 AMERICAN STATE PAPERS: FINANCE 387, 388.

[216] *See infra* Section III.B.2.

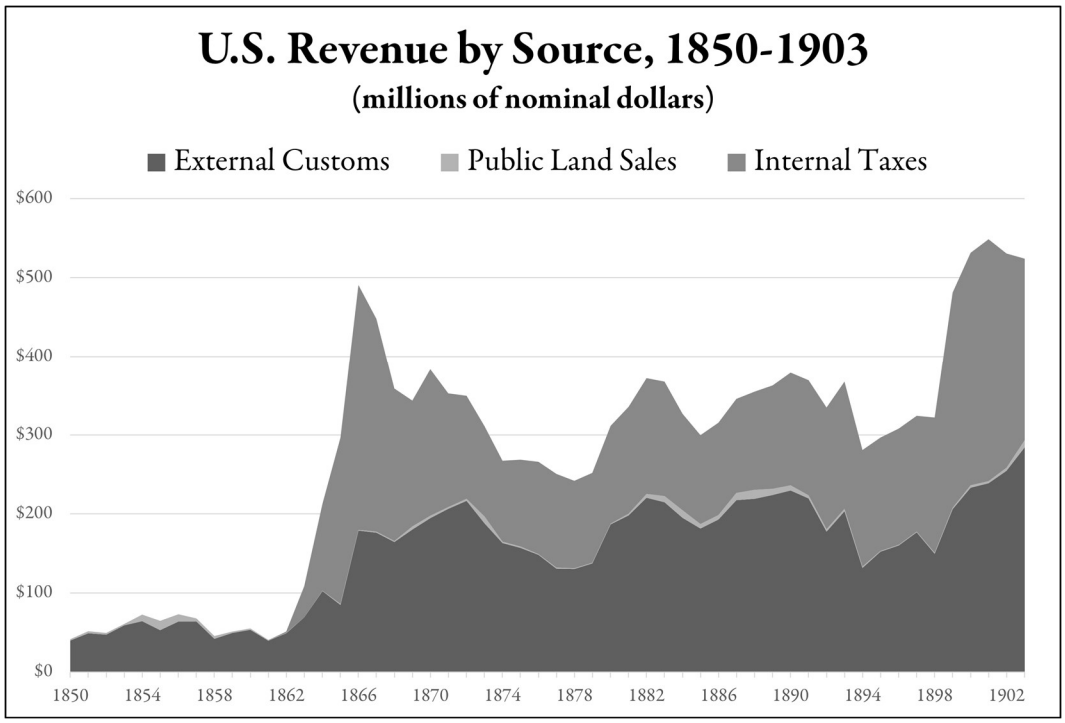
[217] The category of internal taxes here includes both apportioned direct taxes and indirect taxes—that is, excise taxes and internal duties. These counts are drawn from the Treasury Annual Reports. In everyday language, customs and tariffs can be described as forms of taxation, but we follow the historical Treasury categories in organizing this data. These figures also omit revenue from borrowing—which is large, especially during war years, but because it creates an attendant liability it is not an unambiguous source of public revenue—and several small miscellaneous categories in the Treasury data, such as occasional government interest income.

[218] For two years after the Nullification Crisis and during the Jackson Presidency, for example—1835 and 1836—the sale of land accounted for almost 50% of federal revenue. For discussion of the Nullification Crisis and its relation to fiscal policy, see SELLERS, *supra* note 174, at 329–31.

after the War of 1812. But federal revenue was also highly variable. And, for many years, there were *no* operative internal federal taxes.



The picture changes in the second half of the 19th century. During the Civil War, revenue from more conventional (by today's lights) tax instruments exceeded the revenue from customs and tariffs for the first time. The Civil War also marked a structural shift. Conventional taxes would remain an important source of public revenue (and, in the twentieth century, would overtake customs and tariffs to become by far the dominant source of tax revenue).



These broader trends offer context for thinking about the role of apportioned direct taxes in early America. Taxes as we understand them today were not the most important federal revenue source—that came from tariffs. Within the world of internal taxes, however, the early apportioned taxes were important at key early junctures. Between the founding and the Civil War, direct taxes were responsible for about 36% of domestic internal tax revenue. During and immediately after the War of 1812—perhaps the heyday of apportioned taxes, if there was one—the direct taxes brought in more than 41% of domestic internal tax revenue.

But this trend did not continue. During the Civil War, the annual amount raised by direct taxes declined in both absolute and relative terms—even before accounting for the refund offered decades later.[219] Direct raised a smaller nominal amount of revenue during the Civil War than during the War of 1812—despite the change in real values and the vastly greater expense of the Civil War. As

[219] This is based on a comparison of the revenue totals in the Treasury *Annual Reports*. *See supra* note 213 and accompanying text. The 1861 direct tax brought in more revenue overall—but much of that revenue was after the Civil War had long ended (and, eventually, the tax was refunded). *See supra* notes 211–212 and accompanying text.

the following sections explain, the federal government's efforts to implement direct taxes revealed their limitations as effective tax instruments—and the challenge of complying with the apportionment requirement.

2. Revenue Shortfalls and Delays

How much did the direct taxes collect, and when they did collect it? This subsection summarizes what we know about the amount and timing of direct-tax collection, relative to the amounts required by statute. Because each direct-tax law specified the amount of revenue that the tax "shall" raise, and because the Treasury annual reports contain the amounts raised each year from different revenue sources, one can thus compare the public-law quotas with the amounts actually collected.

That comparison reveals persistent gaps between the congressional targets and the fiscal realities. And, as we suggest below, these recurring shortfalls reflect the fundamental difficulties of starting with the amount to be raised, rather than a rate and a defined base—an issue that is integral to apportionment.[220]

As noted above, the five public laws imposing direct taxes—in 1798, 1813, 1815, 1816, and 1861—each contained a face value of the amount to be raised (two million, three million, six million, three million, and 20 million, respectively). Because early Treasury records separately account for direct tax revenue, one can compare the revenue target with the amount raised. At the most basic and general level, Congress apportioned $34 million in direct taxes, which ultimately raised approximately $28 million in revenue.

More granular comparisons are difficult. Some direct taxes were collected simultaneously—especially around the War of 1812—and the Treasury reports do not consistently differentiate between sources. Nevertheless, it appears that the 1798 direct tax raised slightly more than $1.7 million of its $2 million target. The three War of 1812 direct taxes—arguably the most practically successful of the bunch—raised about $11 million of their $12 million target. The Civil War direct tax raised $15.4 of its $20 million target.[221]

The timing of collection is also notable. The direct taxes exhibited long tails: collection dribbled in for many years (or even decades) after the initial tax was

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[220] *See infra* Section III.A.2.

[221] Here, we report counts from the general direct tax tallies in the Treasury Annual Reports on the assumption that collection of the 1798 direct tax had ended by the War of 1812. (That is, we attribute all direct-tax revenue between 1798 and 1812 to the 1798 tax, and subsequent revenue to the War of 1812 taxes.) No direct taxes were enforced or collected in the decades before the Civil War, so accounting for the 1861 tax is easier.

imposed. Revenue from the direct tax of 1798 was still trickling in during 1812.[222] Revenue from the War of 1812 taxes was still recorded by the Treasury in 1839.[223] Treasury last reported revenue from the Civil War direct tax long after the war ended (and shortly before the government refunded it all) in 1888.[224]

Finally, there was variation in how much it cost to collect the tax in each state and over time. The cost of collection nationally and per state is only reported in Treasury records for certain years during the War of 1812. But it reflects additional aspects of the challenge Treasury faced in reconciling the taxes collected from the direct taxes with the sum certain amounts specified in the direct tax bills.[225] In particular, the costs of collection (per dollar of revenue) are higher in sparsely populated states, and the costs of collection are higher as the Treasury approached the statutory target of each direct tax.

The War of 1812 direct taxes came reasonably close to their revenue targets. This was partly because many states accepted the statutory discount. Seven states assumed the tax burden directly, took a 15% markdown, and paid the tax directly (and, so far as we can tell, immediately) from fungible state revenue. For those states that didn't accept the discount, the statute still left flexibility in how the federal collectors would define the tax base.

The story of the 1861 direct tax is more complicated. Administration of the tax was (unsurprisingly) hindered by the fact that the Southern states had seceded from the Union, which produced intractable challenges in apportioning the revenue collection among the states.[226] As the following Section describes, the challenges the federal government encountered in collecting the revenue due from the direct taxes also complicated the efforts to apportion the tax burden among these states as the Constitution required.

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[222] *See* State of the Finances (Dec. 7, 1812), *in* 2 AMERICAN STATE PAPERS: FINANCE 580 (summarizing federal revenue for 1812).

[223] *See* ANNUAL REPORT OF THE TREASURY ON THE STATE OF THE FINANCES, at xciv (1888) (reporting direct tax revenue for 1839).

[224] *Id.* at xcvi (reporting direct tax revenue for 1888). Later Treasury reports suggest no subsequent revenue from any direct taxes. *See, e.g.*, ANNUAL REPORT OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1903, at 88–90 (1903) (displaying direct tax revenue for all years between 1791 and 1903, and reporting no such revenue before 1800 and no revenue after 1888).

[225] *See infra* Section III.A.2.

[226] *See infra* Section II.B.3.

3. Were the Direct Taxes Successfully Apportioned?

In many years, Treasury reports also contain information about the amount of direct-tax revenue raised from each state. Those reports show that the revenue raised was not apportioned to the states' population—and, in many cases, it was not particularly close. What states actually paid varied from—and, in many cases, varied wildly from—their relative populations and assigned shares.

As noted above, each piece of direct-tax legislation contained both a total tax burden and quota for each state, with the state quota apportioned based on that state's population share. As a facial matter, the legislation imposing direct taxes was reasonably apportioned: While the apportionment requirement is not (and has never been) self-interpreting,[227] Congress seems to have made efforts to ensure that a state's apportioned quota tracked what was known of population shares. In application, however, Treasury reports show that the share of taxes collected varied from state to state.[228] While state revenue is not available for all of the direct taxes or for all years, the available reports show large differences in the timing and amounts that the states actually paid.

Some state variation from quotas is surely unsurprising, given the inherent unpredictability in administering any tax specified as a sum certain.[229] Congress can only apportion through legislation the expected amount of revenue, not the amounts ultimately collected.[230] And the officials who designed the direct taxes were also aware of likely hurdles.[231] One might therebefore be tempted to overlook minor variances between the legislative targets and what states (or their residents) actually paid. But the Treasury returns do not show minor variations. Below, we summarize some of the key reports:

The 1798 Direct Tax. The figure below reports the shares of the direct tax that were collected in each state—the percentage of each state's statutorily assigned amount—at the time Treasury made its final report on the collection of the tax

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[227] *See supra* Section II.B.2.

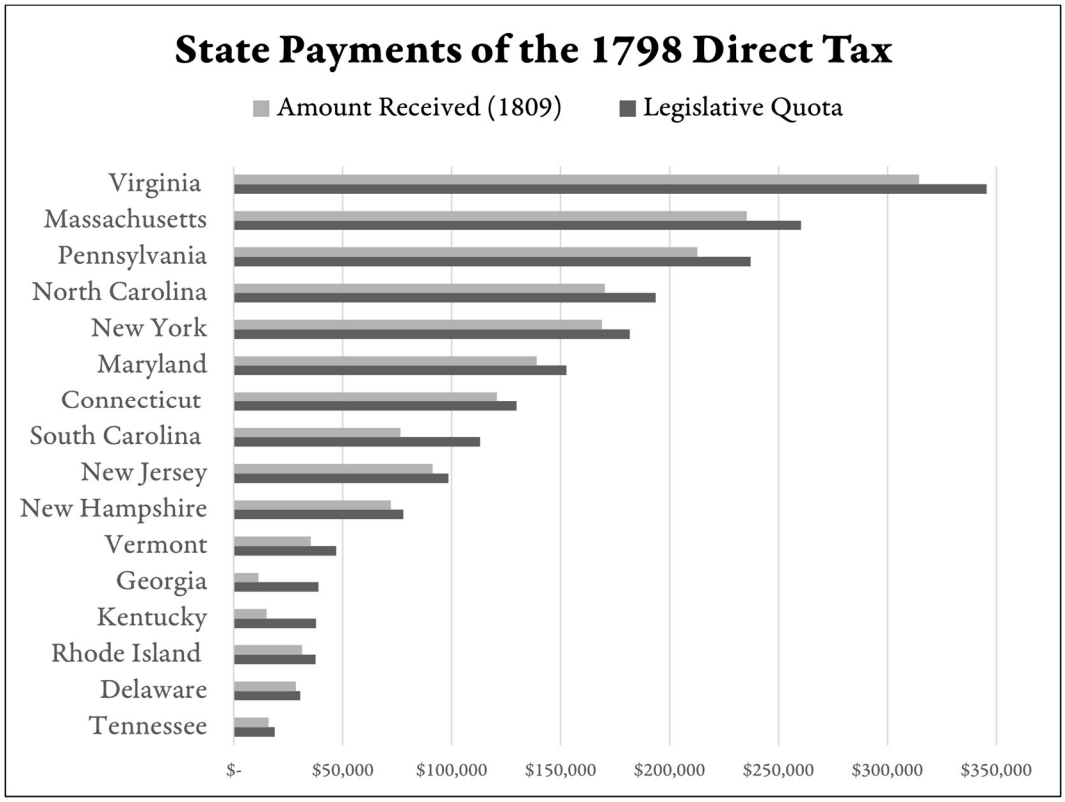
[228] *See infra* Section III.B.2.

[229] As noted previously, starting with a sum certain is a logical necessity if Congress is required to apportion the burden of the tax. If Congress only specifies a base of tax and an applicable rate schedule—such as in most modern federal tax instruments—then it cannot predict with certainty exactly how much revenue the tax will raise, let alone how the burden of the tax will be borne among the states. *See supra* Section I.B.

[230] *See infra* note 252 and accompanying text.

[231] *See. e.g.,* Wolcott's concerns discussed *supra* note 160 and accompanying text.

in 1809.[232] As detailed below, the government encountered large and varied difficulties in collecting this amount.[233] The disparities observed in 1809 are large: Georgia had paid less than 30% of its quota; Kentucky paid less than 40%, and the South Carolina paid less than 70%.



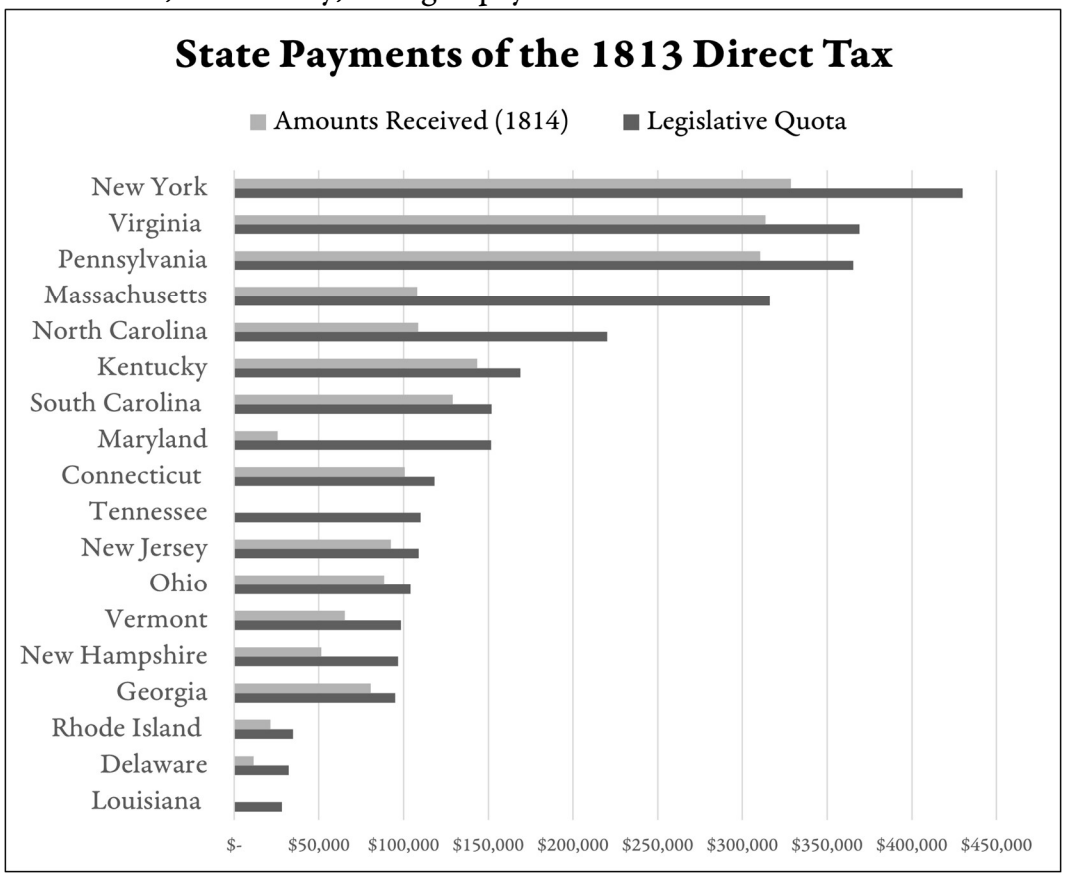
The War of 1812 Direct Taxes. The War of 1812 direct taxes responded directly to the problems of the 1798 direct tax in two ways. First, the legislation offered a discount to states that assumed the tax directly. And, second, for those states that declined the discount, the law did not specify the tax base in detail; instead, it left broad discretion to the assessors in each state, and gave state governments the power to exempt certain property from federal taxation.[234] As the figure below shows, the states that took the discounts—New Jersey, Pennsylvania, Virginia, South Carolina, Georgia, Ohio, and Kentucky—were all recorded as having paid

[232] As noted above, trace amounts of revenue from the tax continued to be collected in 1810, 1811, and 1812—though not of a large enough amount to substantially affect the shares observed in 1809.

[233] *See supra* note 257 and accompanying text.

[234] *See supra* note 187 and accompanying text.

their 85% when Treasury made its initial report on the tax in October of the following year.[235] For states that did not accept the discount—and in which federal assessments took place in connection with state law—the issues with measuring a base that could supply the quota persisted. Some states (Louisiana, Tennessee) had paid nothing; many others had paid well under half of their allotment. This practice gradually improved—the Treasury report the next year shows more states approaching compliance—but still speaks to the major disparities in amount and, more subtly, timing of payment.

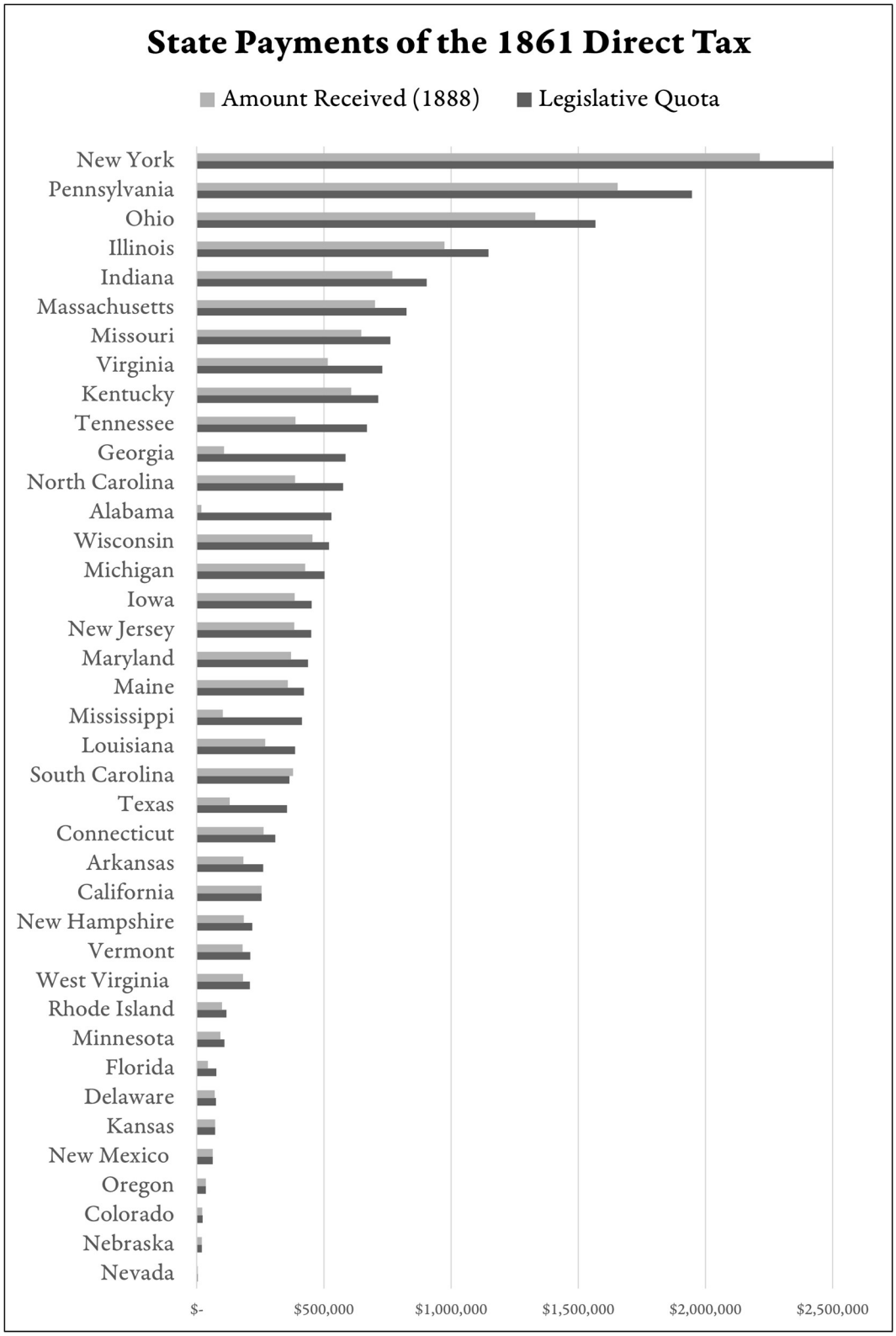


The Civil War Direct Tax. As noted above, the 1861 direct tax raised some unusual issues: it was imposed on confederate states; some states were credited for having paid in goods and services; and the federal government eventually refunded much of the tax, partly because of concerns over how much the different states had paid and when.[236] For many years, moreover—as the federal agents struggled to collect the tax—there is no information in Treasury's reporting on

[235] *See* Direct Tax and Internal Duties, 2 AMERICAN STATE PAPERS: FINANCE at 856.

[236] *See supra* notes 198–212 and accompanying text.

the state payments. In 1888, however, in connection with the debate over legislation that would refund the tax, Treasury furnished a complete statement of state payments to the House of Representatives; these accounts were published in connection with a House Report and reproduced below.


State Payments of the 1861 Direct Tax
Amount Received (1888)
Legislative Quota
New York
Pennsylvania
Ohio
Illinois
Indiana
Massachusetts
Missouri
Virginia
Kentucky
Tennessee
Georgia
North Carolina
Alabama
Wisconsin
Michigan
Iowa
New Jersey
Maryland
Maine
Mississippi
Louisiana
South Carolina
Texas
Connecticut
Arkansas
California
New Hampshire
Vermont
West Virginia
Rhode Island
Minnesota
Florida
Delaware
Kansas
New Mexico
Oregon
Colorado
Nebraska
Nevada
$-
$500,000
$1,000,000
$1,500,000
$2,000,000
$2,500,000

III. IMPLICATIONS

This Part turns from the Article's primary descriptive contributions to consider the implications of those findings for understanding the apportionment requirement today.

A. Why Did Apportioned Direct Taxes Struggle?

Congress's experiments with apportioned direct taxation demonstrate the basic challenges of designing and implementing a tax to meet the Constitution's apportionment requirement. In the revolutionary era, apportionment may have been a logical—perhaps the best, or at least the only—method of collecting requisitions from the loosely affiliated states.[237] The pre-constitutional Congresses could do little more than specify amounts of needed currency and supplies; apportion the requisition among the states in a way that was roughly fair; and then leave it to each state to levy taxes or collect their quotas through other means. These requisitions were seldom fully answered. They reflected the hopeful aspirations of the pre-federal Congresses—not binding commitments. No legal consequences flowed from non-payment, and there were no transfers between individual state taxpayers and the federal government.

But the constitutional ratification transformed—with little serious practical thought—this aspirational system born of necessity into a legal requirement. As in the revolutionary era, the constitutional apportionment provision still required the specification of a "sum certain" amount of revenue to be raised. Yet constitutional apportionment also transformed the amount of revenue collected itself into a binding constitutional requirement—since only by collecting a sum certain of revenue can Congress properly apportion this amount among the states. It is perhaps no surprise that this system struggled in practice.

1. Beyond Regressivity

As noted above, the standard critique of tax apportionment is that it is fundamentally unfair.[238] Perhaps the most common concern is that apportioning an

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[237] *See supra* Section I.A.

[238] *See* EINHORN, *supra* note 17, at 159 (describing the regressive effects of apportioned taxes as "ludicrous"); *see also* Glogower, *supra* note 6, at 791 (discussing fairness issues). However, a recent body of work also argues that these issues can be cured via various legal mechanisms. *See, e.g.*, Brooks & Gamage, *supra* note 20, at 81 ("[T]his Article explains how the

individual income tax would lead to absurd results: Poorer states pay higher rates precisely *because* they are poorer. To see this, consider again two states with identical populations but radically different levels of income. The states have the same apportioned quota—they necessarily pay the same totals because they have the same populations—but the residents of the poorer state must pay higher average rates to produce that amount; a higher rate is required to extract more from the smaller base.[239]

Concerns about fairness and apportionment are not new to the era of progressive taxation. Inter-state fairness concerns were present in some of the earliest debates over apportioned taxation. But, in this era, policymakers did not perceive fairness concerns as a fundamental barrier to an apportioned tax. As noted above, legislators even sought to introduce modest progressive adjustments to some of the direct taxes, to at least partially mitigate any oppressive burdens on taxpayers with limited ability to pay.[240]

Early policymakers also rationalized the fairness concerns in other ways. For example, Treasury Secretary Gallatin's 1812 report on the revenue—in which Gallatin sketched plans by which Congress might raise additional direct tax revenue for a war—reflects a balanced concern for the fairness of apportioned taxation.[241] "The rule of apportionment," Gallatin noted, "operates with perhaps as much equality as is practicable, in relation to States not materially differing in wealth and situation."[242] Most coastal states, Gallatin suggested, would not suffer much inequality here.[243] But, Gallatin continued, "in reference to the Western States . . . the constitutional rule of apportionment . . . may be supposed to be unequal." Because such states were "at a greater distance from a market" and had, "on account of the recent date of their settlements, less accumulated capital," Gallatin conceded that they could not "pay as much, or with the same facility, as

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nature of the modern fiscal world has since evolved further, so that apportionment is once again practically viable."); Donald Tobin, *Have your Cake and Eat it Too, An Apportioned Wealth Tax* (Draft Working Paper, 2025). This Article does not address the separate questions of whether these adjustments to mitigate the regressivity problem would be feasible or would be compliant with the Constitution's apportionment requirement.

[239] *See supra* note 24 and accompanying text.

[240] As noted above, the direct taxes of 1798 and 1861 both contained progressive rate adjustments for personal dwellings. *See supra* notes 169, 202 and accompanying text.

[241] *See* Increase of Revenue (Jan. 20, 1812), *in* 2 AMERICAN STATE PAPERS: FINANCE 523.

[242] *Id.* at 525.

[243] *Id.*

the Atlantic States." But Gallatin did not think such fairness concerns were fatal to the direct tax.[244]

This is not to say that Gallatin was right, or that fairness issues are unimportant. (And, among other things, it might be that the fairness issues have become *more* pressing over time, as inter-state inequalities grow.) But, in our view, the concern with regressivity and apportionment, as commonly presented in the case law and literature, overlooks additional, and perhaps more basic, challenges with implementing an apportioned tax.

2. The Problems of Sum-Certain Taxation

What, then, *were* the major problems with apportioning taxes? No doubt the collection of the direct taxes was bedeviled by many problems—political, technological, and practical. We should not underestimate the difficulties of collecting revenue in the late eighteenth and nineteenth centuries with the limited information and administrative technology available. Indeed, as Secretary Gallatin noted in an 1803—in a document to Congress explaining why the Direct Tax of 1798 was still hundreds of thousands of dollars in arrears—it was partly just "the novelty of the experiment" that accounted for delay.[245] Among the multifarious reasons for delay mentioned in Treasury's regular updates on collection were: garden-variety employee delinquencies (not to mention employee deaths and

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[244] *Id.* In Gallatin's view, two points diminished the force of such objections. First, he speculated that internal duties would fall less heavily on the western states, because the western citizens tended to produce many products within their states. Second—and perhaps more intriguingly—Gallatin speculated that much of an apportioned tax in the western states would fall on non-residents, since non-residents owned much of the western land. *See id.* ("A considerable portion of the direct taxes, in those States, is laid on lands owned by persons residing in other States, and will not fall on the inhabitants."). Gallatin also expressed this concern if the tax were laid on underdeveloped territories. Direct Tax on the District of Columbia (Jan. 23, 1815), *in* 2 AMERICAN STATE PAPERS: FINANCE 889, 889–90 ("The situation of the other territories is materially different: at a distance from market, with a large portion of unimproved and unproductive land, they are still struggling with all the inconveniences attendant on infant settlements, surrounded by powerful tribes of hostile savages.").

[245] Arrears of Direct Taxes (March 1, 1803), *in* 2 AMERICAN STATE PAPERS: FINANCE 30, 30.

criminality)[246]; sickness[247]; an inexplicable failure to schedule needed meetings[248]; and book-keeping errors[249]—among many others.[250] One Treasury report noted that some federal tax funds had been lost in the mail. [251] Such delays can hardly be laid at the doorstep of the inherent features of apportionment; they reflect the more mundane stumbling blocks of all human affairs, and the inevitable challenges with designing and administering any tax that requires property assessment and tax collection.

Nevertheless, our review of the history offers an additional and less familiar reason why apportionment struggled in practice: Apportioned direct taxes always started with a specified total amount to be raised, and that was required of each state. This is unlike most modern taxes, which start with a rate and identify a base to which that rate is applied.[252] With apportioned taxes, Congress must identify a precise revenue target *ex ante*—without any guarantee that, in a given state, there will be a sufficiently deep tax base to deliver it, or the political or practical will to deliver it quickly.

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[246] *See* Direct Tax (Dec. 31, 1804), *in* 2 AMERICAN STATE PAPERS: FINANCE 219, 219 (noting "delinquencies of some of the officers employed"); *id.* at 220 (noting that "[s]undry collectors have proved delinquent, and have been committed to prison under the proper process, but without obtaining the money"); *see also* Direct Tax (Dec. 20, 1803), *in* 2 AMERICAN STATE PAPERS: FINANCE 65, 69 (noting that "in South Carolina, the assessment, which it not yet Completed, has been principally retarded by the difficulty of obtaining a commissioner in the first district, in which five gentlemen, successively appointed commissioners, refused to act, two resigned, and one died"); Direct Tax (Dec. 28, 1809), *in* 2 AMERICAN STATE PAPERS: FINANCE 387, 389 (observing that a "[s]um due by Gilbert Drake, a collector of direct tax, discharged from prison by act of Congress."); *id.* at 391 ("Collectors Harbison and Ballinger have absconded, their securities are insolvent, and the sums due from them will be lost.").

[247] Direct Tax, 2 AMERICAN STATE PAPERS: FINANCE at 69 (noting that "the amount due from the city of New York would have been collected . . . had not the late unhappy situation of the city, from sickness, prevented that measure").

[248] *Id.* (noting that "in Georgia, the business was delayed one year for want of a meeting of the Board of commissioners" and that the work of the board was "on account of numerous inaccuracies, returned, for the purpose of being corrected").

[249] *Id.*

[250] Direct Tax, 2 AMERICAN STATE PAPERS: FINANCE at 390 (describing "losses by insolvencies, removal of slaves, errors in assessments, property not found, and expenses of collection").

[251] *Id.* ("Bank notes lost in the mail by collector Chappel.").

[252] *See supra* Section I.B.

The requirement of a sum certain was always understood as an essential feature of an apportioned direct tax. In his initial report on the feasibility of direct taxes—supplied at the request of Congress—Secretary Wolcott certainly understood that such a tax would need to apportion a specific sum.[253] The strict certainty required of an apportioned tax contrasted with other forms of taxation—the revenue from which, Wolcott noted, naturally ebbs and flows in response to other economic factors.[254] And this unique feature of apportioned taxes was also expected to produce unusually high delays and administrative costs.[255]

Many sources of shortfalls and delays that came to pass flowed from the inherent features of the apportioned direct tax. In the case of the direct tax of 1798—which specified a base and an amount to be raised, but did not and could not specify a rate *ex ante*, at least for land—it was left to the Executive Branch to figure out, on a state-by-state basis, what combination of valuations and rates would produce the requisite amount of tax revenue. This produced a deluge of unique problems caused by the imperatives of apportionment.

In his initial March 1803 report on the collection of the 1798 direct tax—by which time the law had been in effect for five years and had collected only 77% of the congressional quota, with several states yet to start paying into the Treasury *at all*[256]—then-Secretary Gallatin wrote to Congress with a variety of "reasons which, in the opinion of the [revenue] commissioner, have delayed the completion of the collection of that tax."[257] Several stood out as reflecting the basic difficulties of apportioned taxation.

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[253] Because Congress had not supplied Wolcott with a sum to be raised in its request for his views, he presumed that "the sum to be apportioned should be sufficient to consummate the system" that Congress had previously identified—namely, reducing the debt and paying for the exigencies of government. Direct Taxes, 1 AMERICAN STATE PAPERS: FINANCE at 414.

[254] *Id.* at 417 (describing the ebb and flow of internal excise taxes and duties on imports, and noting that "some of the causes which may diminish the revenue from importations, will tend to increase that derived from internal objects").

[255] "From a general view of the operation of the system," he noted, "an allowance ought to be made for a defalcation of fifteen per centum, on account of abatements to indigent and unfortunate persons, for erroneous assessments or calculation, and for charges and expenses of collection." Direct Taxes, 1 AMERICAN STATE PAPERS: FINANCE at 417. In this context, the unusual (to modern ears) word "defalcation" refers generally to a failure or mismatch of accounting.

[255] *See supra* Section II.C.2.

[256] *See* Direct Tax (Dec. 20, 1803), in 2 AMERICAN STATE PAPERS: FINANCE 65, *66* (reporting that South Carolina and Georgia are yet to pay anything by this point).

[257] Arrears of Direct Taxes, 2 AMERICAN STATE PAPERS: FINANCE at 30.

The most basic challenge was "the difficulty of completing the assessments."[258] Because the direct tax of 1798 specified only a rough base and a sum certain, it was left to local commissioners to figure out whether, how, and to what extent the assigned figure could be raised and collected in each state. Doing so was (in Gallatin's words) "a circumstance which has exceeded all others" in producing delay—a "tedious period . . . consumed by some of the Boards of commissioners, in making up the reports" that were necessary to producing a fit between the rate, base, and the sum to be raised.[259] Looking back on this experience years later, Gallatin again noted that the need to figure out rates and valuations could produce a specific amount in each state was the source of "great delay."[260] And decades later, at the cusp of the Civil War, this challenge was again regarded as the most serious objection to the federal government implementing an apportioned direct tax—not concerns about inter-state fairness.[261] This problem led Treasury to conclude that other sources of "internal" revenue were most cost-effective to collect.[262] (Indeed, apportioned taxes had the surprising potential to be loss-making—since even when the cost of collection exceeded the expected revenue, the legal obligation to pursue it to comply with the Constitution remained.[263]) Valuing and assessing property is always difficult, of course. But it was made far more difficult by the need to assess values that could produce a specific amount.

This basic problem—the tension between the taxable base and the sum certain—also yielded a host of secondary problems. For example, the federal government often found it in the position of selling unoccupied lands and for unpaid

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[258] *Id.*

[259] *Id.* at 31.

[260] *See* Increase of Revenue, 2 AMERICAN STATE PAPERS: FINANCE at 525 ("The attempt made, under the former direct tax of the United States, to equalise the tax by authorizing a Board of Commissioners, in each State, to correct the valuations made by the local assessors, was attended with considerable expense, and productive of great delay.").

[261] REPORT OF THE SECRETARY OF THE TREASURY, CONTAINING ESTIMATES OF THE PUBLIC REVENUE AND PUBLIC EXPENDITURES, AND PLANS FOR IMPROVING AND INCREASING REVENUE, 1861, at 9 ("It is the absence of such valuations in some of the States, and the uncertainty of effective co-operation in all, which make the employment of an extensive and complicated federal machinery for the collection of direct taxes necessary, and supply the basis of the most serious objections against that mode of levying internal revenue.").

[262] *Id.* at 10 ("Internal duties may be collected more cheaply than direct taxes, by fewer agents, and with less interference with finances of the States.")

[263] *See* State of the Finances (Dec. 21, 1801), *in* 1 AMERICAN STATE PAPERS: FINANCE 701, 703 ("[D]elays, and perhaps an eventual loss, may be expected, on the last part of the collection [of the direct tax].").

taxes—but the price of sale needed to be determined by the apportioned quota, not market demand. As a result, the government found that "extraordinary difficulties . . . attended the sales of land, for unpaid taxes."[264] Indeed, for a large quantity of lands, there appears to have been no sale price that would generate the statutorily required amounts, or that the process of sale dragged on.[265]

In one sense, the regressivity problem with apportioned taxation may also appear to derive from these same challenges in reconciling the specification of the taxable base with the sum certain. If one assumes that the measurement of the taxable base and the amount of revenue to be raised are fixed, then the only variable left to reconcile these amounts would be the applicable tax rates applied to the base, which yields the well-known result that states with lower amounts of the taxable base are taxed at necessarily higher rates.[266] What this conventional account misses, however, is that it assumes the taxable base is a fixed and unchanging independent variable, rather than an additional independent factor that also had to be defined and measured by Congress and Treasury.[267] In other words, the dictates of the sum certain do not just cause conceptual fairness problems—if the tax base can in fact be defined and measured—but also more basic practical problems when defining and measuring the taxable base in the first instance.

This account does not suggest that apportioned taxes—or all taxes that start with a sum certain—necessarily fail. As noted above, some tax instruments today use features of a sum certain taxation—such as local property taxes in certain jurisdictions.[268] On the other hand, these mechanisms do not stem from constitutional requirements, and do not have any obligation to impose proportional burdens of subdivisions of the taxing jurisdictions, such as on the states in the case of a federal direct tax. It is also undeniably easier to design taxes using a sum certain mechanism in the case of a local property tax, when the tax is imposed on

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[264] *Id.*

[265] *See* Direct Tax, 2 AMERICAN STATE PAPERS: FINANCE at 219 (noting delinquencies in direct tax collection "principally because they have been unable to sell a number of lots or tracts of land which had been returned in the assessment and cannot be found"); *see also id.* (noting delays in Kentucky because of "taxes on lands which have been exposed to sale, and for which no bidders could be found"); *id.* (citing "the length of the process necessary to effect a sale of unoccupied lands").

[266] *See supra* note 24 and accompanying text.

[267] *See infra* Section III.A.2.

[268] *See supra* note 67.

a narrowly defined base within a small and relatively uniform jurisdiction under the control of a single taxing authority.

More generally, of course, taxes fail to meet (and sometimes exceed) revenue expectations all the time.[269] But, if a direct tax fails to raise the sum certain specified in a direct tax, it also cannot guarantee that the amount of revenue raised is apportioned among the states by their population, as the Constitution requires. As we argue in the next section, this produced hydraulic pressure that tested both the notion of a direct tax base and what apportionment required.

B. How Should We Understand Apportioned Direct Taxes?

1. What Was the Apportioned Direct Tax Base?

As noted above, the pre-*Pollock* understanding of the scope of "direct" taxes is that the term covered only capitation taxes and taxes on real property.[270] By and large, the first direct tax of 1798 reflected this view: It imposed a federal tax on dwellings, land, and enslaved persons.[271]

But the later direct taxes did not operate in this same way. The War of 1812 taxes did not apply only to a defined base, as the federal government did not limit how states that took the discounts paid their quotas.[272] In the discount states, the federal government did nothing to define or value a "direct" tax base at all.[273] During the Civil War, likewise, state governments had flexibility in how they paid the quotas; at least some state governments appear to have engaged in borrowing

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[269] *See, e.g.*, Justin Theal & Alexandre Fall, *Falling Tax Revenue Drags More States Below Long-Term Trends* (May 7, 2024), PEW (noting that recent downward trend in state tax revenue is "a significant departure from the unexpectedly high tax revenue that states realized in the second and third budget years of the COVID-19 pandemic"); *see also* CONG. BUDG. OFF., THE BUDGET AND ECONOMIC OUTLOOK: 2025 TO 2035 (Jan. 17, 2025) (projecting over the next ten years "what the federal budget and the economy would look like . . . if laws governing taxes and spending generally remained unchanged").

[270] *See supra* note 59 and accompanying text.

[271] *See supra* notes 166–170 and accompanying text.

[272] *See supra* Section II.A.2.

[273] *See e.g.*, Direct Tax and Internal Duties (Oct. 15, 1814), *in* 2 AMERICAN STATE PAPERS: FINANCE 855, 856 ("The States of New Jersey, Pennsylvania, Virginia, South Carolina, Georgia, Ohio, and Kentucky, having assumed the payment of the direct tax under the act of August 2, 1813, the valuations have not been made in those States.").

to fund their shares.[274] Perhaps more than anything else, the imposition of direct taxes was defined by inconsistency and pragmatism.

Why was this? Compared to conventional tax instruments, the apportionment requirement suggests a fundamentally different role for the tax base. The core features of an apportioned tax—raising a sum certain, and allocating it among the states—have nothing to do, in principle, with the definition of a tax base. For example, Congress may specify an apportioned direct tax on land, but in effect this would only require the states to raise a specified amount of tax revenue, either by taxing land in its jurisdiction or possibly through other means. This dynamic subverts the premise that apportionment was a method that was only required for certain objects of taxation.

2. What Did Apportionment Actually Require?

Constitutional apportionment may sound intuitive and simple: The burden of a tax must be apportioned among the states by their populations. It may also appear straightforward to write legislation that complies with this simple and intuitive version of apportionment: Take a total amount of revenue and multiply it by each state's share of the total population.

The revenue targets in the direct tax legislation satisfied this simple vision of apportionment. But, as described above, the collections entailed large deviations from the facial apportionment of these statutes—and, more broadly, from the notion of a strict apportionment requirement. Many of these deviations speak to the basic ambiguity of what apportionment required:

The Amounts Actually Paid. Most obviously, we document deviations between the amounts apportioned by statute and the amounts actually paid by the state and individual taxpayers. This is perhaps most striking in the case of the direct tax of 1798: Some states (Georgia, Kentucky) paid well under half of their congressional allotment; others (Connecticut, Delaware) paid almost all of it. No state paid the entire apportioned amount for the 1798 tax or for any other direct tax.[275]

This may suggest a kind of hyper-functionalism in the history of tax apportionment. Indeed, during the Civil War, the Executive Branch explicitly took the

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[274] *See* H. Rep. No. 552 (Feb. 21, 1888) (noting that "[c]ertain of the States borrowed the money with which they paid the [direct] tax").

[275] *See supra* Section II.C.3.

position that a direct tax would not become unconstitutional if the amounts actually paid were not ultimately apportioned. In 1861, Treasury Secretary Chase noted in a report that there were objections to using any direct tax at that time, on the theory that "in consequence of the disturbed condition of the country"—a reference to secession—"the apportionment required by the Constitution cannot be made."[276] But, Chase continued, it was his opinion that "the constitutional requirement [of apportionment] will be satisfied if Congress, in the act of levying the tax, shall apportion it among the several States in the required manner."[277] It was Chase's view that a direct tax "cannot become unconstitutional because it may be difficult, or even temporarily impossible, to collect it as apportioned."[278]

Secretary Chase's position raises questions about whether, and how much, the Executive Branch may deviate from the amount and allocation of direct tax revenues contemplated by statute.[279] In an extreme case—and it is difficult to imagine a case more extreme than the Civil War—Chase's position might be read to suggest that a public law need only make reference to apportionment, even when the apportioned formula is known to be unrealistic. Perhaps that position is mitigated by some notion of good-faith effort to collect the tax as apportioned in the statute—which was arguably made, though obviously not successfully, during the Civil War and other periods. A less permissive constitutional standard than the one suggested in the Treasury report must contend, however, with the inherent

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[276] S. EX. DOC. NO. 2, REPORT OF THE SECRETARY OF TREASURY ON THE FINANCES, at 10 (July 4, 1861)

[277] *Id.*

[278] *Id.* Chase pressed this argument with a comparison to the internal duties subject to the uniformity requirement. If a strict allegiance in implementation were required, he noted, "the objection would [also] be fatal to internal duties." This was because "in the present condition of the country it is impossible, whatever uniformity may be observed in the law imposing such duties, to make them unform in collection." *Id.* Federal manufacturing duties or licensing fees would presumably be difficult to collect in Mississippi or Alabama during the Civil War. In practice today, these issues are largely moot with respect to the uniformity requirement, because the Court has interpreted the requirement narrowly. *See, e.g.*, Ptasynski v. United States, 462 U.S. 74, 80-86 (1983) (upholding tax exemptions for certain regions of Alaska as not violating a narrow requirement of geographic uniformity). For discussion of the Court's inconsistent interpretations of the uniformity and apportionment requirements, see *Glogower, supra* note 6, at 791 (arguing the modern Court has elevated the apportionment requirement "into a major limitation to the taxing power" while interpreting the uniformity requirement in a manner that "practically reads this provision out of the Constitution").

[279] As Chase notes, the same question might be asked regarding the uniformity requirement for indirect taxes.

impossibility of predicting the amount and distribution of revenue raised from any direct tax.

Discounts. Direct tax legislation during the War of 1812 and the Civil War offered state governments a discount on their apportioned quotas if the state assumed the quota and remitted it to the Treasury. The state discount policy was backed by an intuition that had some fit with the apportionment requirement: When a state accepted the discount, it saved the federal government the cost of collection. Moreover, if *all* states accepted the discount, the tax would still be apportioned. But the discount policy on offer—typically a flat 15% reduction in a state's quota—was exceptionally rough justice.[280] And all states did not accept the discount.

The Costs of Taxation. The questions of the discounts also points to more basic questions as to whether the costs of collecting and administering the taxes should be accounted for under apportionment. At various point, in its reports the Congress on the revenue and arrears of the direct taxes, Treasury considered the cost of collection (in a seemingly ad hoc and informal way) in assessing whether a state quota had been met. As noted above, Secretary Wolcott anticipated a leakage of approximate fifteen percent from administrative costs, errors, abatements, and unpaid amounts.[281] Accounting for costs of tax administration is a familiar and central consideration for tax design and policy.[282] But the early direct tax legislation did not explicitly account for the costs of collection in setting the quotas (beyond appropriating funds for administrative costs in the enabling legislation), nor is it obvious from the text of the constitution why and how costs should be incorporated into the assessment of a direct tax burden. Moreover, there was state-by-state variation in the cost of collecting the direct tax,[283] and one might

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[280] *See supra* notes 188 and 204 and accompanying text. This 15% discount seemed to reflect Wolcott's initial estimate of the shortfall that might attend the collection of a direct tax due to administrative expenses and uncollected revenue, but not their actual costs. For the federal government, the costs of collecting the direct taxes seemed to vary between five and six percent.

[281] *See supra* note 255 and accompanying text.

[282] *See generally, e.g.,* Joel Slemrod *&* Shlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1423, 1428 (Alan J. Auerbach *&* Martin Feldstein eds., 2002) (arguing all relevant costs of taxation, including administrative costs, should be considered for purposes of optimal tax design).

[283] *See supra* Section II.C.2.

reasonably expect the ratio of fixed and marginal costs to vary with the size of a given state, as well with variations in the definition of the taxable base and the rates of taxation.

The Form of Payment. In principle, the apportionment requirement might also require a unform form of payment, so that the tax burdens of the states could be accurately measured and compared. During the Civil War, the Treasury Department took the position, however, that states could satisfy their apportioned-tax obligations by receiving credit for their own expenditures on military goods and services—essentially, a system of in-kind payments.[284]

Nonresident Property Owners. Some property is (rather obviously) located in one state but owned by persons in another. But how should apportionment be allocated in cases when the relevant tax base is the value of property owned in a particular state? The Constitution provides that the burden of a direct tax must be allocated among the states, but doesn't make clear how a direct tax should be apportioned for property located in one state and owned by a taxpayer in another, but only.[285] To deal with the inevitable coordination problems that would arise, the statutes, the direct tax bills generally relied on a scheme of inter-state credits for taxes assessed in one state on property owned by someone out of state.[286]

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[284] *See* REPORT OF THE SECRETARY OF THE TREASURY, ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDING JUNE 30, 1863 at 3–4 (noting that most direct tax receipts had been received has been received "in the form of payments for military supplies and services by the States, for which they are entitled to credit beyond their several proportions of the tax," though also noting that "incomplete settlements" prevented the full value from appearing on the books of the Treasury).

[285] *See* Dodge, *supra* note 14, at 929–30 (arguing that the premise of an apportioned direct tax is that it reserved to the states' power to tax property within their jurisdictions). Perhaps, if we assume that individual owners are also voters who elect congressional representatives, we might conclude that apportionment should track the residence of the individual owners. On the other hand, courts and legislators seemed to assume that a direct tax should be apportioned on the property located in each state, regardless of where the owners were located. *See, e.g.,* Justice Chase's carriage tax example in *Hylton v. U.S.* 3 U.S. (3 Dall.) 171 (1796), described *supra* note 24.

[286] *See* Direct Tax and Internal Duties (Feb. 11, 1817), *in* 3 AMERICAN STATE PAPERS: FINANCE 183, 184 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (describing credits "arising from taxes on non-residents property" and "transferred to the designated collector").

Territories and the District of Columbia. The Constitution does not specify how to tax property in non-state jurisdictions like territories and the District of Columbia. While the direct taxation of property in non-state jurisdictions might seem like a minor wrinkle, it speaks to basic ambiguities in the function of apportionment in the constitutional structure. After all, if the purpose of apportionment is to connect the formula for representation in the House of Representatives to the allocation of tax burdens—which is well-established in the historical record and the literature[287]—then this burden should not be allocated to taxing jurisdictions that lack such representation. This principle might suggest that a direct tax should be allocated only among the states—the jurisdictions that are mentioned in the constitutional text. (And such a reading might produce absurd results: It might suggest that Congress could only tax a "direct" base in the District of Columbia if the actual burden was borne by the states.) On the other hand, the apportionment requirement was not meant to *preclude* Congress from imposing any form of tax.[288]

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All these questions demonstrate the fundamental ambiguities in apportionment and what it in fact required—both in theory and as practiced. They also help explain why the political branches adopted a flexible understanding of apportionment. Except in the case of the dramatic state underpayments during the Civil War—when the direct tax was imposed on rebel states who were an implausible source of Union tax revenue—the administrative record is largely devoid of concern that deviations from a strict understanding of apportionment created constitutional issues. These questions suggest that, if anything, apportionment can only be understood as a flexible standard, rather than a rigid prescription for certain exercises of the taxing power.

3. The Tradeoff Between "Direct" and "Apportioned"

What explains the many deviations, compromises, and uncertainties described above? Broady, Congress's efforts at enacting apportioned taxes followed two separate tracks. The first track—exemplified by the direct tax of 1798—involved the federal government defining a tax base (land, dwellings, and enslaved

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[287] *See supra* notes 55–56 and accompanying text.

[288] *See supra* notes 52–53 and accompanying text.

persons) that the federal government would measure and tax in each state. This approach produced notable inconsistencies and delays. More than ten years after the law's enactment, multiple states had borne less than half of their apportioned quota.

The second track—exemplified by certain features of the War of 1812 direct taxes and adopted after the delays and drawbacks of the 1798 direct tax—allowed state governments to directly assume the burden of the apportioned tax, and allowed states to pay that share from any source they saw fit. Almost half the statutes took this option. Those that did, paid. We offer no view on whether the War of 1812 direct taxes were an absolute success, but they certainly seem like a relative success: These laws came closest to raising the statutory quota that Congress set out in the enabling legislation, and they survived as a "model" (in a manner of speaking) for the direct tax of 1861.[289]

What lessons can be drawn from these two tracks and the tradeoffs between them? One way of thinking about this history, we submit, is that there is a tradeoff between the requirement that a tax have a specific base (a "direct" base) and the requirement that the tax be apportioned. As Congress and the Executive Branch sought to comply with the constitutional requirement, they necessarily drifted away from the notion that the apportioned tax was imposed on any particular taxable base in the first instance. That is, apportionment only worked to the extent Congress gave up trying tax a particular base, and as the burden of the direct tax was as likely to fall on other objects of taxation. On the other hand, a restrictive understanding of the direct tax base, that would formally require apportionment for certain objects of taxation but not others, would frustrate efforts to in fact apportion the tax.

C. Lessons for Interpretive Debates

Do the historical struggles of apportionment tell us anything about how we should read the direct tax clauses today? Perhaps. The Supreme Court has recently signaled an increasing role for "history and tradition" as a factor in constitutional interpretation.[290] For just one recent example, in the 2024 trademark case *Vidal v. Elster*, Justice Thomas's opinion for the Court looked to the history

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[289] *See supra* Section II.B.3.

[290] In general, the interpretative approach of "history and tradition" or "traditionalism" takes account of the "post-ratification practices or traditions of other actors–political actors and state courts," rather than presuming the "Constitution's meaning is fixed at ratification." Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1479 (2023). For a list of recent cases that take history and tradition into account, see *supra* note 39.

and tradition of content-based trademark restrictions under the First Amendment to evaluate a prohibition on a mark comprising the name of a living individual without their consent.[291] And, as noted above, Justice Kavanaugh's majority opinion in *Moore* stressed the importance of understanding "what had been the understanding of the Constitution before *Pollock*" in evaluating constitutional tax questions.[292] We have started to sketch the history and tradition of apportionment.

At the same time, our account does not provide simple answers. We document a disjointed history and a shifting tradition, as the political branches repeatedly tried—and largely failed—to translate the constitutional requirement of apportionment into a workable system of taxation. If anything, this Article shows a "history and tradition" of interpreting the requirement flexibly and pragmatically—and not as a rigid formal requirement.

Likewise, the direct tax of 1798—debated and introduced close to the ratification—might be thought relevant to an originalist interpretative approach,[293] as probative evidence of the original understanding of how apportionment was meant to operate in practice.[294] But this, too, is double-edged. In the run-up to the 1798 tax, Secretary Wolcott sketched many different—and, in his view, plausible—accounts of how the first direct tax should operate. And, by all accounts, the 1798 direct tax was a failure not to be repeated, and its underlying assumptions of how apportionment should be structured and a tax base identified were abandoned in subsequent legislation.[295]

The history of apportioned taxation is one of pragmatism, flexibility, and experimentation. As noted above, Justice Chase stated in *Hylton* that apportionment "is only to be adopted in such cases where it can reasonably apply"[296] and

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[291] 602 U.S. 286, 301–02 (2024).

[292] 602 U.S. at 583; *see also supra* note 40 and accompanying text.

[293] Generally speaking an originalist approach would look to the original meaning of the Constitution during the founding period when interpreting the constitutional text. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 12–41 (Grant Huscroft *&* Bradley W. Miller, eds., 2011); William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354–56 (2015) (examining different possible "relationships that originalism could have with American law").

[294] *See, e.g.,* Parrillo, *supra* note 18; *see also supra* note 41 and accompanying text.

[295] *See supra* Sections II.B.1–2.

[296] 3 U.S. at 174.

subsequent cases interpreted apportionment's scope narrowly so it would not impede exercises of the taxing power.[297] This reasoning follows from the uncontroversial understanding that the purpose of apportionment was never to restrict Congress from exercising its taxing powers. Half a century later—and in a coincidence of surnames—Secretary Chase would express a similar view on behalf of the Executive Branch. And our examination of the historical practice reveals the fundamental design challenges with apportionment—further complicating feasibility of complying with the constitutional requirement. We show why apportionment would be even less practical than is commonly assumed, regardless of whether the proposed solutions to mitigate its regressive effects are workable or not.[298]

CONCLUSION

This Article has offered a detailed examination of Congress's three experiments with apportioned direct taxation: in 1798, during and immediately after the War of 1812, and in 1861. The legislative and administrative records of these episodes offer valuable insight into the design, implementation, and consequences of these taxes—revealing the evolving understanding of apportionment and the scope of a direct tax in the political branches.

We offer new and surprising insights into the historical practice of apportionment. The apportioned taxes never succeeded in raising their specified revenue targets and the states varied in how much of their quotas they paid. This record offers new insights into the fundamental challenge of implementing an apportioned direct tax—and how the apportionment requirement should be understood today.

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[297] *See supra* note 92 and accompanying text.

[298] *See supra* note 238 and accompanying text.