THE CONSTITUTIONAL LIMITS TO THE TAXING POWER

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The modern U.S. Supreme Court has elevated the apportionment requirement for direct taxes into the most important constitutional limitation to Congress's taxing power. The U.S. Constitution requires that any "direct tax" must be apportioned among the states by population, which is impracticable or impossible for a tax today. The modern interpretative approach focuses on the formal categorization of the tax base, as either a "direct tax" or not. This approach could bar Congress from enacting certain taxes—such as a federal wealth tax or possibly even capital income tax reforms—simply through their formal labeling as direct taxes.

This interpretation inflates apportionment's role in the Constitution and misreads the text. It breeds inconsistency and uncertainty in the tax law, and it shields the rich from the taxing power. As evidenced in the recent case Moore v. United States*, it now casts a shadow over even Congress's ability to tax capital income. The Court should return to its longstanding narrow interpretation of apportionment, which recognized that it was never meant to obstruct the taxing power in this way. This approach looked to the function and consequences of apportionment when interpreting the constitutional text and avoided a formalist interpretation that would unduly restrain the taxing power.*

Returning to a narrow interpretation of apportionment would not leave Congress with unfettered taxing powers. This Article introduces a new and competing theory of how the Constitution limits Congress's taxing power through other doctrines and provisions. The Article synthesizes these limitations to articulate a set of principles that operate together to constrain the taxing power in accordance with substantive constitutional values. These principles look to the legislative process, the identity of the taxpayers, the basis for taxation, and the severity of the tax burden when determining limits to the taxing power, rather than to the formal labeling of the tax base.

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This Article's understanding of how the Constitution limits Congress's taxing power offers an alternative to the Court's current path that places too much weight on apportionment as a bar to the taxing power. This alternative would ensure the democratic basis of tax legislation while also maintaining essential constitutional safeguards necessary to prevent Congress's abuse of this broad power.

INTRODUCTION

Debates over fundamental tax reform often begin—and sometimes end—with the question of whether Congress has the constitutional authority to lay a tax of one form or another. In 2019, Senator Elizabeth Warren (D-MA) introduced a federal wealth tax that would apply to the richest 0.1 percent of taxpayers.[1] Opponents quickly objected that a wealth tax would be

1. *See* Press Release, Elizabeth Warren, U.S. Sen., Senator Warren Unveils Proposal to Tax Wealth of Ultra-Rich Americans (Jan. 24, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-proposal-to-tax-wealth-of-ultra-rich-americans

unconstitutional and short-circuited discussion of the proposal's policy merits.[2] Senator Ron Wyden (D-OR) and the administration of President Joseph R. Biden, Jr. subsequently introduced capital income tax reforms that would tax high earners with respect to a portion of their "unrealized" capital gains.[3] In this case as well, some skeptics similarly objected that the reforms would be unconstitutional and, therefore, not even worth evaluating on their policy merits.[4]

The U.S. Constitution grants Congress a broad taxing power with few express limitations.[5] In the absence of other significant restraints, the modern U.S. Supreme Court has elevated one requirement in the Constitution—the apportionment requirement for direct taxes[6]—into the most important limitation to Congress's taxing power today. The apportionment clauses require that the burden of any "direct tax" must be borne proportionally by the states according to their populations, which would be impossible or impracticable for any modern progressive tax.[7] As a result, a court could categorically prevent Congress from imposing a new tax simply by labeling it as a direct tax, which could preclude a federal wealth tax or possibly even capital income tax reforms.[8]

Should apportionment carry the weight that it does today, as the most important constraint on the taxing power, and is there an alternative? This Article first examines the flaws with the broad reading of the apportionment requirement, which was first introduced in the 1895 *Pollock* cases[9] and is still

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[https://perma.cc/K4F7-MUZX] (proposing a tax on the net assets of households with a net worth of $50 million or more).

2. *See, e.g.*, James Freeman, Opinion, *Elizabeth Warren's Unconstitutional Wealth Tax*, WALL ST. J. (Jan. 25, 2019, 1:51 PM), https://www.wsj.com/articles/elizabeth-warrens-unconstitutional-wealth-tax-11548442306 [https://perma.cc/UF2Q-R4HY] (column posted the following day focusing on "the illegality of the Warren scheme" rather than "economic arguments" as to the proposal's policy merits).

3. *See* Press Release, U.S. S. Comm. Fin., Wyden Unveils Billionaires Income Tax (Oct. 27, 2021), https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax [https://perma.cc/WCS3-HMJU] (proposing a tax with respect to the unrealized capital income of taxpayers with $1 billion or more in assets or more than $100 million in income); DEPT. OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2023 REVENUE PROPOSALS 34–37 (2022) (proposing a "Billionaire's Minimum Income Tax" in the form of a minimum rate of tax that accounts for high-income taxpayers unrealized income). For further discussion of President Biden's proposal, see also *infra* note 254 and accompanying text.

4. *See, e.g.*, Editorial, *Biden's Big Wealth Tax?: Unconstitutional*, WALL ST. J. (Mar. 10, 2023, 6:54 PM), https://www.wsj.com/articles/president-biden-wealth-tax-16th-amendment-asset-appreciation-db12372c [https://perma.cc/TQB8-5UCV].

5. *See* U.S. CONST. art. I, § 8, cl. 1 (general grant of taxing power); *id.* art. I, § 9, cl. 5 (prohibition on federal taxation of state exports); *see also infra* Part I.A.

6. *See* U.S. CONST. art. I, § 2, cl 3; *id.* art. I, § 9, cl. 4; *see also infra* notes 56–60 and accompanying text.

7. For an explanation of how apportionment would be technically infeasible for a modern direct tax, see *infra* note 60 and accompanying text.

8. For a discussion of how under some interpretations the apportionment requirement could even bar capital income tax reforms, see *infra* notes 99–102 and accompanying text.

9. Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895) (*Pollock I*), *aff'd on reh'g*, 158 U.S. 601 (1895) (*Pollock II*).

prevalent today.[10] This approach mistakenly attributes a crucial role for apportionment in the constitutional structure and, in this way, has elevated this requirement into the most important constitutional limitation to Congress's taxing power.

This Article then introduces a fundamentally different understanding of how the Constitution limits Congress's taxing power, that is, instead, grounded in a set of substantive constitutional values. This alternative understanding of the taxing power ensures the democratic basis of tax legislation[11] while also maintaining the constitutional safeguards necessary to prevent Congress's abuse of this broad power.

Determining the scope of apportionment can be undertaken through two distinct inquiries: (1) identifying the meaning of the term "direct tax" and the taxes to which it applies and (2) understanding apportionment's function in the constitutional structure and consequences for the taxing power.[12] The meaning of the term "direct tax" was ambiguous at the founding and remains so today.[13] For more than a century after the Constitution was ratified, the Supreme Court defined the term direct tax narrowly in accordance with its understanding that apportionment served a limited function in the constitutional structure.[14] These cases avoided requiring apportionment whenever it would unduly impede the taxing power by declining to apply the label of "direct tax" to new taxes introduced by Congress.[15] Through this interpretative approach, the Court prevented the apportionment requirement from operating as a major bar to the taxing power, while still giving meaning to the constitutional text.

The Court's narrow understanding of apportionment ended with the 1895 *Pollock* cases,[16] which invalidated the Income Tax of 1894[17] by holding that it was in part a direct tax subject to apportionment.[18] The Sixteenth Amendment reversed the *Pollock* decision and provided that Congress may tax income without apportionment.[19] Subsequent cases have also overturned

10. For a discussion of how this interpretation still influences contemporary understandings of Congress's constitutional taxing power, see *infra* notes 93–102 and accompanying text.

11. For an argument that the democratic process should be a defining feature of tax legislation, see generally Clint Wallace, *A Democratic Perspective on Tax Law*, 98 WASH. L REV. 947, 947 (2023) (arguing that "democracy should be a more central consideration in designing and evaluating tax laws in a democratic system of government"); *see also infra* notes 230–32 and accompanying text.

12. For examples of these interpretative approaches, see *infra* Parts I.B–I.C; *see also* Part II.A.3 (explaining why the function of apportionment is relevant when interpreting the term "direct tax").

13. As discussed *infra* notes 70–71, 127–28 and accompanying text, the only settled definition of a "direct tax" at the time was that it applied to taxes on persons and land.

14. *See infra* Part I.B.

15. *See infra* Part I.B.

16. Pollock I, 157 U.S. 429 (1895); Pollock II, 158 U.S. 601 (1895).

17. An Act to Reduce Taxation, to Provide Revenue for the Government, and for Other Purposes, ch. 349, § 27, 28 Stat. 509, 553 (1894).

18. *See Pollock I*, 157 U.S. 429; *Pollock II*, 158 U.S. 601.

19. U.S. CONST. amend. XVI; *see also* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–

the specific holdings in *Pollock*, rejected its underlying logic, and narrowed its implications for other taxes.[20] The Supreme Court's recent decision in *Moore v. United States*[21] conclusively repudiated *Pollock*'s core reasoning that a tax on income was a direct tax.[22]

Although *Pollock* has little or no remaining doctrinal relevance, the case introduced a broad interpretation of apportionment that persists today. The case attributed an important function for apportionment in the constitutional structure, and consequently interpreted the term "direct tax" broadly in light of this constitutional role. As this Article explains, this legacy of *Pollock* continues to dominate understandings of the constitutional limits of Congress's taxing power to this day.[23] Because it interpreted apportionment as a barrier to the taxing power, the case also reoriented the constitutional analysis of Congress's taxing power around the single, overriding question of whether a tax is a "direct tax" or not.[24]

This Article identifies three problems with this broad interpretation of the apportionment clauses. This interpretation inflates apportionment's role in the constitutional structure and consequently misreads the constitutional text. This interpretation also breeds inconsistency and uncertainty in the tax law. Finally, this interpretation operates to shield the rich from the taxing power, even as the Court has affirmed Congress's authority to determine the distributional burdens of federal taxes.

First, this broad interpretation of apportionment incorrectly inflates the role of apportionment in the constitutional structure. The delegates to the Constitutional Convention added the apportionment requirement during debates over the formula for proportional representation in the House of Representatives and whether Southern states would receive greater representation with respect to their enslaved persons.[25] In the context of this

1929, at 247–89 (2014) (tracing the political and public reaction to the *Pollock* decision that culminated in the passage of the Sixteenth Amendment).

20. *See* South Carolina v. Baker, 485 U.S. 505, 515–27 (1988) (overturning *Pollock*'s holding that a tax on income from government contracts was unconstitutional); New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 314–16 (1937) (rejecting *Pollock*'s equation of a tax on income from property with a tax on the underlying property for purposes of constitutional analysis).

21. 144 S. Ct. 1680 (2024).

22. *See id.* at 1688 ("[T]he Sixteenth Amendment expressly confirmed what had been the understanding of the Constitution before *Pollock*: Taxes on income—including taxes on income from property—are indirect taxes that need not be apportioned.").

23. For discussion of how *Pollock*'s reasoning continues to influence contemporary understandings of the limits to Congress's taxing power, see *infra* notes 93–102 and accompanying text.

24. That is, this question only becomes an important one when the term "direct tax" is interpreted to apply to a broad scope of taxes. As described *infra* in Part I.B, before *Pollock*, the Court interpreted the term narrowly so that it would not significantly limit the taxing power, and thereby reduced the significance of the apportionment requirement as a constitutional barrier to taxation.

25. For discussion of the history of apportionment in the literature, see ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 157–99 (2006); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 6–19 (1999); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839,

infamous bargain, apportionment served as an intentionally ambiguous compromise with undetermined implications for the federal taxing power.[26]

Some have argued that apportionment did serve an important function in the Constitution as a key structural feature of federalism.[27] This view overstates the role of apportionment in the constitutional structure and, therefore, does not justify its interpretation as a major constraint on the taxing power. Of course, the division of governing authority between the federal and state governments was a central concern for the founders.[28] The apportionment requirement for direct taxes, however, did not implicate these core principles of federalism and the basic structure of the federal government. Rather, it only arose to resolve a narrower dispute over the formula for representation in the House of Representatives,[29] and to assuage the regional concerns of delegates from the Southern states.[30]

This Article also explains why understanding apportionment's function in the Constitution is necessary to interpret the term "direct tax."[31] As an interpretative matter, the constitutional text need not necessarily advance any substantive principle or value to be binding. This Article argues, however, that the innately ambiguous constitutional term "direct tax" can only be interpreted by inquiring into apportionment's function in the constitutional structure.[32]

The Court should also abandon the broad interpretation of apportionment for a second reason. This interpretative approach enshrined a rigidly formal logic that draws arbitrary distinctions between economically identical forms of taxation.[33] This approach is rife with doctrinal contradictions and has bred

883–903 (2009); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 725–26 (2020); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 115–20 (2018); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2377–402 (1997); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 12–24 (1998). For discussion in the early case law, see, e.g., Hylton v. United States, 3 U.S. (3 Dall.) 171, 177–78 (1796) (opinion of Paterson, J.).

26. *See infra* Part II.A.1.

27. *See, e.g.*, Pollock II, 158 U.S. 601, 622 (1895); Jensen, *supra* note 25, at 2396 ("The concern with direct taxes was not only that individuals could be harmed by an overzealous national government. Many of the founders were also worried about federalism—the potentially damaging effects of national taxes on the state governments.").

28. For example, James Madison highlighted this basic tension in *The Federalist No. 39*, where he maintained that the Constitution was "neither wholly *national*, nor wholly *federal*." THE FEDERALIST NO. 39 (James Madison) (Jacob E. Cooke, ed., 1961). For a detailed account of how concerns of federalism and the balance of state and national governing authority shaped the debates at the Constitutional Convention, see RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 105–23 (Random House 2010); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161–202 (Alfred A. Knopf, Inc. 1996).

29. *See infra* Part II.A.2.

30. *See* EINHORN, *supra* note 25, at 161–73.

31. For discussion of other arguments in the literature as to why apportionment should be interpreted narrowly because of the provision's origins, see *infra* note 103.

32. *See infra* Part II.A.3.

33. That is, this approach determines the scope of Congress's taxing powers solely based on the formal labeling or characterization of the tax as "direct" or not.

inconsistency in the case law and uncertainty as to how a future Court might evaluate future tax reforms.[34]

Finally, the broad interpretation of apportionment operates as a shield for the rich against Congress's taxing power. As this Article argues, this interpretation can prevent Congress from effectively taxing the financial capital that is disproportionately held by the richest taxpayers.[35] These high-end taxpayers can also take greatest advantage of formal constraints on the taxing power through complex structuring that sidesteps the activities or assets Congress can tax.[36] As evidenced in *Moore*, this broad interpretation casts a shadow over even reforms to the taxation of capital income.[37] At the same time, elevating apportionment to the most important constitutional limit to the taxing power allows Congress almost unlimited latitude to tax the labor income disproportionally earned by lower- and middle-income taxpayers, as such taxes would not be similarly subject to apportionment.

The broad interpretation's operation as a shield for the rich may pose normative concerns for those who believe that Congress should enact tax reforms to strengthen the progressivity of the tax system and to prevent high-end tax avoidance.[38] More importantly, however, this interpretation removes Congress's authority to determine the distribution of tax burdens in the first instance, even while the Court acknowledges it cannot explicitly limit the taxing power in this way.[39]

The Court should return to its earlier and narrower interpretation of apportionment, which did not elevate this rule into a major limitation to the taxing power. Abandoning the broad interpretation of apportionment would not leave Congress with unfettered taxing powers, however, as this provision does not offer the only avenue in the Constitution for limiting Congress's taxing power.

Part III of this Article introduces a new and competing understanding of how the Constitution limits Congress's taxing power through an alternative set of constitutional requirements. As an alternative to the broad interpretation of apportionment, this Article locates the primary limits to the taxing power elsewhere in the constitutional structure. As this Article

34. *See infra* Part II.B. Although constitutional interpretation often necessitates formalism and line drawing, this Article explains why doing so is particularly problematic when interpreting ambiguous text that does not advance any discernible constitutional value. *See infra* notes 197–99 and accompanying text.

35. *See infra* notes 205–16 and accompanying text.

36. *See infra* notes 218–23 and accompanying text.

37. For discussion of the *Moore* case and its potential implications for the taxing power, see *infra* notes 99–102, 210–14 and accompanying text.

38. *See, e.g.*, *infra* notes 211–13 and accompanying text (describing the motivation for capital income tax reform as a way to prevent tax avoidance by high-income taxpayers).

39. *See infra* notes 335–36 and accompanying text (describing the case law affirming Congress's authority to determine the distribution of tax burdens through progressive taxation). For further discussion, see also *infra* note 224 and accompanying text.

explains, these varied limitations operate together to constrain the taxing power in accordance with substantive constitutional values.[40]

These limitations begin with the requirements for the enactment of tax legislation, which by design ensure that reforms are tempered through the concessions and compromises necessary to build legislative coalitions.[41] Additional constitutional provisions and doctrines operate as safeguards against abuses by Congress of its broad taxing power.[42] The Constitution limits Congress's taxing power through the distinction among (1) exercises of the taxing power, (2) regulation through other enumerated powers that is designed to punish or compel behavior,[43] and (3) the exaction of private property for public use pursuant to the Takings Clause.[44] The Equal Protection and Due Process Clauses[45] also prevent Congress from imposing improper or discriminating tax burdens without justification.[46]

Although these constraints derive from different constitutional provisions and doctrines, they collectively delineate a set of common substantive principles that can constrain Congress's taxing power in accordance with constitutional values. This Article synthesizes these varied limitations to articulate a new, and normatively grounded, approach to the taxing power. It identifies and defines four limiting principles: (1) a "legislative process principle," which limits how Congress enacts tax laws; (2) a "particularity principle," which limits when tax laws may be tailored to individual taxpayers or their characteristics; (3) a "subject of tax principle," which considers the nature of the taxpayer's assets or activities burdened by the tax; and (4) a "degree of tax principle," which considers the overall burden of the tax as it relates to the affected characteristics or activities.[47]

The literature has long recognized that the taxing power could be subject to other constitutional restrictions beyond apportionment.[48] As Professor

40. By "substantive constitutional values," this Article refers simply to legal principles with a discernible function or animating reason for inclusion in the constitutional structure. In contrast, the broad interpretation reflects a form of hollow legal formalism that does not necessarily serve any intelligible reason or constitutional value.

41. *See infra* Part III.A.

42. Additional constitutional restrictions and principles, which are not the focus of this Article, limit how the government may administer and enforce the tax law. For a discussion of how the requirements of procedural due process may apply to the taxing power, see *infra* note 328 and accompanying text. This Article, in contrast, focuses on those constitutional provisions governing the design and definition of the taxable base in the substantive tax law.

43. *See infra* Part III.B.1.

44. U.S. CONST. amend. V; *see also infra* Part III.B.2; Brushaber v. Union Pac. R.R. Co. 240 U.S. 1, 24–25 (1916); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 627 (2013) (Kagan, J., dissenting). *See generally* Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189 (2002).

45. U.S. CONST. amends. V, XIV.

46. *See Brushaber*, 240 U.S. at 24–25; *see also infra* Parts III.B.3–4.

47. *See infra* Part III.C.

48. For prior discussion of how various constitutional provisions could apply to tax legislation, see generally Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized?: Centennial Reflections on* Eisner v. Macomber *(1920)*, 16 DUKE J. CONST. L. PUB. POL'Y 65 (2021); Reuven S. Avi-Yonah & Yoseph M. Edrey, *Constitutional Review of Federal Tax*

Boris I. Bittker observed decades ago, the federal income tax "swims in a sea of constitutional limits."[49] This prior literature, however, typically characterizes these restrictions as ancillary or secondary constraints on the taxing power.[50] This Article argues, in contrast, that these constitutional constraints are substantively coherent, not haphazard. It makes a positive case that these rules should operate as the primary constraints on the federal taxing power, in connection with a return to the Court's earlier and narrow interpretation of the apportionment requirement. This set of constraints can effectively bind Congress's taxing power without placing arbitrary obstacles in Congress's path, and they can serve as an alternative to *Pollock*'s broad interpretation that still influences understandings of the taxing power today.[51]

The courts should not subject exercises of the taxing power to elevated standards of scrutiny under these provisions. To the contrary, the judiciary should maintain its historic posture of general deference to Congress's broad authority to implement economic policy through taxation[52] and to the limitations on the taxing power that are inherent in the legislative process. Rather, courts should resort to these limitations when necessary—rather than to *Pollock*'s broad interpretation of apportionment—as the primary safeguards against potential abuses by Congress of its broad taxing power.

Grounding the constitutional limits to the taxing power in these substantive principles offers several advantages over the broad interpretation of apportionment. A renewed focus on this alternative set of constraints could alleviate concerns that returning to a narrow interpretation of apportionment would leave Congress with unfettered taxing powers. This approach avoids the interpretative mistakes in the broad interpretation, as well as its resulting doctrinal uncertainty and inconsistency. It also imposes meaningful and necessary constitutional constraints on the taxing power without arbitrarily impeding Congress's authority to design an effective system of taxation and to realize an equitable allocation of tax burdens.

More generally, this interpretive path aligns understandings of the taxing power with the constitutional principles that constrain Congress's other legislative powers. It recognizes the unique domain of economic legislation through taxation, while also ensuring that this power remains circumscribed in accordance with constitutional values. In this way, this approach ensures the democratic basis of tax legislation while maintaining essential constitutional safeguards necessary to prevent abuse of the taxing power.

Legislation, 2023 U. ILL. L. REV. 1; William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1 (2006); Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3 (1987); Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291 (2009) (evaluating the application of the Due Process Clauses to retroactive tax rules).

49. Bittker, *supra* note 48, at 12.

50. *See infra* note 228 and accompanying text.

51. For a discussion of how *Pollock* continues to influence interpretations of apportionment and the direct tax definition, see *infra* notes 96–102 and accompanying text.

52. *See infra* notes 230–32 and accompanying text.

The remainder of this Article proceeds as follows. Part I reviews the constitutional provisions governing the federal taxing power and the Court's changing interpretation of these provisions over time. Part II explains the problems with the broad interpretation of the apportionment requirement that was first introduced in *Pollock* and remains influential today. Part III maps out an alternative set of constraints on the taxing power grounded in substantive constitutional values, explains how they reflect a set of common principles, and evaluates the advantages of this alternative interpretative path.

I. A TALE OF TWO INTERPRETATIONS

This part begins by providing a brief overview of the tax provisions in the Constitution and how the Supreme Court has interpreted the apportionment requirement over time. The early cases adopted a functional interpretation of apportionment that looked to the role of apportionment in the constitutional structure and its consequences for the taxing power. This approach consequently interpreted the term "direct tax" narrowly in light of apportionment's limited constitutional function. This interpretative approach maintained Congress's broad taxing power while still giving meaning to the constitutional text. The *Pollock* Court rejected this narrow interpretation and introduced a broad interpretation of apportionment, which elevated the requirement into the primary barrier to the taxing power that it remains today.

A. The Constitutional Provisions

The Constitution grants Congress a broad taxing power with few express limitations, and none that explicitly prevent Congress from imposing different forms of taxes.[53] Article I, Section 8 provides generally that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[54] The Constitution only provides for one express limitation on this broad taxing power: Article I, Section 9 explicitly provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."[55]

The Constitution also provides for two requirements as to *how* Congress must exercise its taxing power when it imposes different forms of taxes. Article I, Section 8 provides that "all Duties, Imposts and Excises shall be uniform throughout the United States."[56] Article I, Section 2 also provides

53. As described *infra* in note 328 and the accompanying text, this Article does not address procedural restrictions on the administration and enforcement of the tax law. This discussion also does not address constitutional limitations on the taxing power of the states and other sub-federal taxing jurisdictions. *See, e.g.*, Hayes Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371, 377–87 (2017) (describing how the Due Process Clause limits the enforcement jurisdiction of state taxing authorities).

54. U.S. CONST. art. I, § 8, cl. 1.

55. *Id.* art. I, § 9, cl. 5.

56. *Id.* art. I, § 8, cl. 1.

that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers."[57] This apportionment requirement for direct taxes is also repeated in Article I, Section 9, which provides that "[n]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein."[58] Any tax subject to apportionment must be imposed on the residents of each state in proportion to the state's population. As a result, a state that is relatively populous, but less wealthy, would necessarily bear a greater proportion of the total burden of the tax.[59] For this reason, apportionment is commonly understood to be either impractical or impossible for any modern progressive tax.[60] As the following two sections describe, the apportionment requirement was originally interpreted narrowly, in light of its limited function in the constitutional structure, before the *Pollock* Court introduced a broad interpretation that elevated apportionment into the primary constraint that it remains today.

Unlike the apportionment requirement, which has been elevated into a major limitation to the taxing power, the Court has interpreted the Article I, Section 8 uniformity requirement in a manner that practically reads this provision out of the Constitution. The modern jurisprudence understands this provision to only require some degree of geographical uniformity, and that it only would prohibit tax rules that explicitly benefit or disadvantage taxpayers based on where they live.[61] Even this minimal requirement, however, has been construed narrowly so as to not preclude Congress from providing geographically-based tax preferences.[62]

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57. *Id.* art. I, § 2, cl. 3.

58. *Id.* art. I, § 9, cl. 4.

59. In the formative 1796 case *Hylton v. United States*, Justice Chase observed that for this reason, apportionment would "create great inequality and injustice." 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.). For a simple illustration of the inequity that resulted from apportionment, assume that two states have equal populations but one state which is poorer has less of the taxable base than the other. In this case, the two states would be responsible for equal total tax burdens, and as a result the poorer state would be required to impose a higher rate on its (smaller) share of the taxable base. For discussion, see also Glogower, *supra* note 25, at 725–26.

60. *See* Ackerman, *supra* note 25, at 2 (arguing that apportionment would require a tax to be implemented in a way that is "politically absurd"); Glogower, *supra* note 25, at 724 ("[T]he apportionment requirement likely prevents Congress from imposing a modern direct tax."). One view in the literature argues that apportionment for a modern tax might be possible in theory even if difficult to implement in practice. *See* John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75, 79 (2022) (arguing that apportionment would be a "more arduous" but nonetheless "viable" path).

61. *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 106 (1900) (concluding that the uniformity requirement in the Taxing Clause does not refer to "intrinsic" uniformity "but simply a geographic uniformity").

62. *See, e.g.*, United States v. Ptasynski, 462 U.S. 74, 80–86 (1983) (upholding a tax exemption that was only provided for certain regions in Alaska as not violating the uniformity requirement).

B. The Narrow Interpretation of Apportionment

After the Constitution's ratification, the Supreme Court interpreted the meaning of the term "direct tax"—and therefore the scope of apportionment—narrowly. This narrow interpretation gave meaning to the constitutional text without elevating apportionment into a major constraint on the taxing power. This approach bore through three key analytic features. First, the Court recognized that these provisions did not advance an important constitutional value and, therefore, should not be interpreted in a way that is inconsistent with their role in the constitutional structure. Second, the Court adopted a functional approach that would interpret apportionment's reach based on its consequences for the taxing power. Finally, the Court defined the term "direct tax" narrowly in light of the functional effects of apportionment and its role in the constitutional structure in order to uphold congressional exercises of the taxing power.

The Court first established this interpretative approach in the formative 1796 case of *Hylton v. United States*,[63] when it held that a tax on carriages was not a direct tax subject to apportionment.[64] First, the justices reasoned that apportionment did not serve a significant role in the constitutional structure. Justice Samuel Chase observed that "[a] general power is given to Congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports," whereas apportionment did not abrogate this power, but rather only specified how it should be exercised in certain cases.[65] Justice William Paterson similarly observed that the apportionment requirement had a specific and narrow role in the constitutional structure—to protect Southern states against the taxation of their enslaved persons and land at higher rates.[66] This understanding of apportionment's function justified his similarly narrow interpretation of direct taxes as only covering taxes on persons and land.[67]

Based on this understanding of apportionment's limited role in the constitutional structure, Justice Chase established a functionalist approach that would only apply the rule when it was feasible for Congress to do so:

> The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply . . . . If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.[68]

63. 3 U.S. (3 Dall.) 171 (1796).

64. *Id.* Professor Bruce Ackerman has characterized *Hylton* as establishing a "tradition of restraint" that interpreted apportionment narrowly. Ackerman, *supra* note 25, at 4.

65. *Hylton*, 3 U.S. (3 Dall.) at 174.

66. *Id.* at 177.

67. *Id.*

68. *Id.* at 174.

Justice Chase stated that the carriage tax "cannot be laid by the rule of apportionment, without very great inequality and injustice."[69] The Court then relied on this functional analysis to interpret the term "direct tax" narrowly. Justice Chase suggested that only a "capitation, or poll tax" or "a tax on land" would be a direct tax, as he presumed apportionment would be feasible in these cases.[70] Justice Paterson similarly observed that "[w]hether direct taxes . . . comprehend any other tax than a capitation tax, and tax on land, is a questionable point."[71]

The Court relied on the interpretive path used in *Hylton* in subsequent cases. These cases similarly attributed a limited function for apportionment in the constitutional structure, considered the consequences of apportionment for the tax at issue in the case, and then interpreted the term "direct tax" narrowly—but not as a null set—so as to uphold the taxes in question while still giving meaning to the constitutional text. The Supreme Court used this interpretative approach to uphold a series of Civil War-era taxes on the income of insurance companies in 1868,[72] on bank notes the following year,[73] on spirits and tobacco in 1873,[74] and on successions of real estate and personal property in 1874.[75]

Revenue pressures during the Civil War led to the enactment of the first federal income tax in 1864.[76] In the 1881 case *Springer v. United States*,[77] the Court upheld "Lincoln's Income Tax" by adopting the same narrow interpretation of apportionment introduced in the early cases. The *Springer* Court reaffirmed the historical account in *Hylton*: the delegates added the apportionment requirement to resolve a specific impasse over the representation of the Southern states in the House of Representatives with respect to enslaved persons.[78] The Court also affirmed *Hylton*'s functional interpretation, which was that "the Constitution could not have intended that apportionment should be made" in situations where doing so would be "intolerably oppressive" for a relatively populous and poorer state.[79] The *Springer* Court consequently concluded, as in *Hylton*, that the term "direct

69. *Id.*
70. *Id.* at 175.
71. *Id.* at 177.
72. Pac. Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1868).
73. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869); *see id.* at 541 (observing that apportionment and uniformity "are not strictly limitations of power" but rather "rules prescribing the mode in which it shall be exercised").
74. United States v. Singer, 82 U.S. (15 Wall.) 111 (1873).
75. Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1874).
76. Internal Revenue Act of 1864, ch. 173, 13 Stat. 223 (1864). For discussion of the wartime revenue pressures necessitating new Civil War taxes including the first income tax, see W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY 58–69 (3d ed. 2016).
77. 102 U.S. 586 (1881).
78. *Id.* at 596.
79. *Id.* at 600.

tax" should be construed narrowly as including "only capitation taxes . . . and taxes on real estate."[80]

These cases offer a template for how the apportionment requirement could still be interpreted today. As in these cases, a court could determine that the requirement does not operate as a major limit to the taxing power, consider the consequences of requiring apportionment for the tax at issue in the case, and consequently interpret the scope of direct taxes narrowly to uphold exercises of the taxing power.

A court returning to this narrow interpretation could uphold a potentially broad range of taxes by narrowly interpreting the scope of direct taxes in different ways.[81] For example, Professor Bruce Ackerman has argued that direct taxes should be limited to capitation taxes and taxes on real estate, as in the holdings of the early cases, but should not preclude a broader tax on a measure of the taxpayer's total net wealth that included, but was not limited to, real estate.[82] Professor Calvin H. Johnson argues more broadly that as a categorical rule, the court should *only* interpret a direct tax as one that would be feasible to apportion, such as a "head tax" or "a requisition upon the states."[83] Finally, others have argued that a broad range of possible taxes may also be upheld as "excises," making them subject to the rule of uniformity rather than apportionment.[84]

C. Pollock*'s Elephant in a Mousehole*

The 1895 *Pollock* cases radically departed from the Court's longstanding interpretation of the apportionment requirement and elevated the provision into a major barrier to the taxing power.[85] Departing from longstanding and

80. *Id.* at 602. The *Springer* Court also observed that, in practice, Congress had only ever apportioned taxes upon enslaved persons and real estate as corroboration of this narrow interpretation. *Id.* at 598–99.

81. This Article does not address which of these specific directions would be the most desirable way to narrow the definition of a direct tax in connection with a return to the narrow interpretation. Importantly, for purposes of this Article, the Court could return to the narrow interpretation through a variety of doctrinal arguments.

82. Ackerman, *supra* note 25, at 56–58.

83. Johnson, *supra* note 25, at 11, 71. Professor Johnson concedes that his approach would "require one to ignore the lexicographic meaning given to 'direct tax' by the Founders of the Constitution, and to admit that the country's founding document includes a technical error." *Id.* at 11–12.

84. *See* Dodge, *supra* note 25, at 881 (observing that "[t]he post-*Pollock* excise tax cases effectively hold that characterization of a tax as an excise removes it from the 'direct tax' category"). Professors David Gamage and John Brooks similarly argue that the cases upholding taxes as excises reflect what they term the "Excise Tax Canon," whereby courts should defer to congressional designations of a tax as an excise "on uses of property or on activities or privileges relating to property" rather than a direct tax on underlying property. Brooks & Gamage, *supra* note 60, at 82–83.

85. In its first opinion (*Pollock I*), the Court held that the portion of the Income Tax of 1894 taxing income from real estate was unconstitutional as a direct tax on the real estate itself. 157 U.S. 429, 583 (1895). Upon rehearing, the second opinion (*Pollock II*) broadened this decision to hold that all taxes on income from personal property were direct taxes subject to apportionment and struck down the entire Income Tax of 1894 on these grounds. 158 U.S. 601, 635–37 (1895).

continuous precedent, the *Pollock* Court attributed an important role for apportionment in the constitutional structure, and consequently interpreted the term "direct tax" broadly to effectively preclude Congress from enacting a wide range of tax reforms. Through this reconstruction of apportionment, the *Pollock* Court essentially reinvented apportionment as an "elephant in a mousehole,"[86] and the most important barrier to the taxing power.

Pollock's broad interpretation adopted a contrary position on each of the main elements of the narrow interpretation established as precedent. First, the Court asserted that apportionment served an important role in the constitutional structure by operating as a structural feature of federalism and preventing abuses of the taxing power by coalitions of states. The Court maintained that "[n]othing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states."[87]

Whereas the early cases interpreted the meaning of the term "direct tax" narrowly, the *Pollock* Court interpreted the term broadly so that it would operate to significantly constrain the taxing power and, accordingly, to invalidate the Income Tax of 1894 at issue in the case. The Court ultimately concluded that a direct tax included not only taxes on persons and real estate but also taxes on personal property, as well as taxes on income derived from these assets.[88] In this manner, the *Pollock* Court dramatically increased the scope of federal taxes subject to apportionment, and thereby significantly limited Congress's constitutional taxing power.

Even as the *Pollock* Court maintained that there was an important function for apportionment, it ultimately rested its holding on a formal reading of the constitutional text without regard for its underlying reason or function in the constitutional structure. After discussing the possible reasons for apportionment, the Court essentially dismissed their significance as a matter of constitutional interpretation, concluding that "whatever the reasons for the constitutional provisions, there they are."[89] Whereas the early interpretation looked to the consequences of requiring apportionment, the *Pollock* Court instead ultimately dismissed the significance of apportionment's function in the Constitution and strictly required apportionment for any tax that it found to fall within the Court's broad definition of a "direct tax."

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86. In *Whitman v. American Trucking Ass'ns*, the Court reasoned that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." 531 U.S. 457, 468 (2001). Although this term originated in the context of statutory interpretation of legislation, the *Pollock* Court essentially undertook the same exercise as a matter of constitutional interpretation: it found a "fundamental detail" of Congress's constitutional taxing power within the ambiguous and ancillary apportionment requirement.

87. *Pollock I*, 157 U.S. at 582. For an examination of this claim and its implications for understanding apportionment's function in the Constitution, see *infra* Part II.A.2.

88. *Pollock I*, 157 U.S. at 583.

89. *Pollock II*, 158 U.S. at 622.

In certain respects, the specific holdings in *Pollock* were quite narrow. The *Pollock* Court only held that the Income Tax of 1894 was unconstitutional because it included income earned from property as part of the taxable base.[90] However, it also affirmed that Congress could tax income from business and "vocations" without apportionment as an excise tax.[91] Furthermore, the Sixteenth Amendment and subsequent cases have repudiated the underlying elements of *Pollock*'s reasoning and its doctrinal significance.[92]

Pollock's lasting legacy, however, is its broad interpretation of the apportionment requirement, which continues to influence understandings of how the Constitution limits Congress's taxing power today. Because *Pollock* repudiated the early narrow interpretation of apportionment and its settled doctrine as to the scope of the taxing power, it opened a door to the Court's greater scrutiny of tax legislation under the apportionment requirement. Through its broad interpretation of apportionment, and the definition of a direct tax, *Pollock* elevated the provision into the most important constitutional barrier to the federal taxing power that it remains today.

This interpretative legacy of *Pollock* still influences the Court's understanding of how the Constitution limits Congress's taxing power. Soon after the ratification of the Sixteenth Amendment, the Court resuscitated *Pollock*'s restrictive understanding of the taxing power in the 1920 case *Eisner v. Macomber*.[93] That case, concerning the taxation of a stock dividend, held that a tax on income that was not yet "realized" would still be subject to apportionment.[94] As in *Pollock*, the *Macomber* court relied on a broad interpretation of the term "direct tax" and the role of apportionment in the constitutional structure.[95]

Macomber's resurrection of *Pollock* and assertion of a constitutional realization requirement has been widely critiqued[96] and narrowed to its

90. *Id.*

91. *See id.* at 635 (The Court stated that "[w]e have considered the act only in respect of the tax on, income derived from real estate, and from invested personal property" while explaining that they had "not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."); *see also* John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 121 WASH. U. L. REV. (forthcoming) (manuscript at 14–15) (arguing that "*Pollock* did not disrupt the jurisprudence as much as some went on to assume" because it only invalidated taxes on certain forms of income).

92. *See supra* notes 19–22 and accompanying text.

93. 252 U.S. 189 (1920).

94. *See id.* at 212 (concluding that, in the case of a stock dividend, the shareholder "has not realized or received any income in the transaction").

95. *See id.* at 205–06 (affirming *Pollock*'s interpretation of apportionment and consequently interpreting the effect of the Sixteenth Amendment narrowly).

96. *See* Helvering v. Griffiths, 318 U.S. 371, 373 (1943) (observing that the *Macomber* holding "was promptly and sharply criticized"); *see also* MICHAEL J. GRAETZ & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 47 (9th ed. 2022) (characterizing *Macomber* as an "archaic exception" within the modern jurisprudence on the taxing power).

specific facts by subsequent cases.[97] Even as the Court has effectively overruled *Macomber*'s doctrinal relevance,[98] it has also not explicitly denied *Macomber*'s underlying claim that a tax on unrealized income would be subject to apportionment.

The broad interpretation of apportionment in *Pollock* and *Macomber* formed the basis of the 2024 case *Moore v. United States*, which considered the constitutionality of the "Mandatory Repatriation Tax" (MRT).[99] The petitioners asked the Court to determine whether the Sixteenth Amendment only allows Congress to tax income without apportionment if the income has been "realized," such as through the sale or disposition of an asset.[100] Although the Court ultimately upheld the MRT on narrow grounds, how the Court might rule on other tax reforms remains uncertain. At least four justices indicated that they would invalidate an unapportioned tax on unrealized capital gains if one came before the Court,[101] while the five-vote majority opinion expressly avoided the question of whether a tax on wealth or unrealized income would be unconstitutional.[102]

Importantly, this line of cases only casts doubt on the constitutionality of tax reforms because of *Pollock*'s broad interpretation of apportionment. Under the narrow interpretation that prevailed before *Pollock*, the Court could readily conclude that the scope of "direct taxes" was narrow and only applied to taxes on real property and persons, but not other exercises of the taxing power.

II. PROBLEMS WITH THE BROAD INTERPRETATION OF APPORTIONMENT

The Court's longstanding narrow interpretation of apportionment and *Pollock*'s broad interpretation represent two fundamentally different understandings of the provision and its consequences for the taxing power. Either apportionment was a minor footnote to the Constitution, or an essential restraint on the taxing power and a structural feature of federalism. Either courts should interpret the direct tax definition narrowly, to prevent the apportionment requirement from hindering the taxing power, or broadly, to

97. *See, e.g.*, United States v. Phellis, 257 U.S. 156 (1921) (upholding a tax on dividends received in a corporate reorganization); Helvering v. Bruun, 309 U.S. 461 (1940) (upholding the income taxation of a landowner upon a tenant's abandonment of property).

98. *See* Brief for Amici Curiae Tax Law Center at NYU Law and Professors Ari Glogower, David Kamin, Rebecca Kysar, and Darien Shanske in Support of Respondent at 5–12, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800) (presenting evidence that the Court has essentially "cabined *Macomber* to its facts").

99. I.R.C. § 965.

100. *See* Brief for Petitioners at 14–15, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800). For a discussion of *Moore*'s broader implications for Congress's ability to tax wealthy and high-income taxpayers, see *infra* notes 210–14 and accompanying text.

101. *See Moore*, 144 S. Ct. at 1699–709 (Barrett, J., concurring); *id.* at 1709–27 (Thomas, J., dissenting).

102. *See id.* at 1689 n.2 (majority opinion) ("[O]ur analysis today does not address the distinct issues that would be raised by . . . taxes on holdings, wealth, or net worth; or . . . taxes on appreciation.").

categorically preclude Congress from implementing a potentially wide range of tax reforms.

This part identifies and explains three basic problems with the broad interpretation. First, as a matter of constitutional interpretation, it is the wrong interpretative fit for the tax provisions and is inconsistent with apportionment's role in the constitutional structure. Second, the broad interpretation has bred doctrinal inconsistency and uncertainty in the jurisprudence, and it leads to absurd readings of the constitutional text. Finally, the broad interpretation operates as a shield for the rich, enabling them to avoid Congress's taxing power, while potentially allowing for high and even oppressive rates of tax on lower-income taxpayers.

A. Misinterpreting Apportionment

This section argues that the broad interpretation is the wrong interpretative fit for the apportionment requirement, given the provision's function in the constitutional structure and the textual ambiguity as to the meaning of the term "direct tax." This discussion examines both the reason for apportionment's inclusion in the constitutional structure and why this reason matters when interpreting the constitutional text.[103]

The prior literature considers at length not only the historical record of how apportionment came to be included in the Constitution[104] but also the possible understandings of a direct tax at the time of the founding.[105] This section does not seek to offer a new positive account of either the origins of the apportionment clause or the intrinsic meaning of the term direct tax. Rather, the discussion only reviews key aspects of the historical record which are relevant for this Article's argument that the broad interpretation is the wrong interpretative fit for apportionment and the direct tax definition.

1. Origins: "A bridge . . . over a certain gulph"

The literature and the case law reflect two basic views of how apportionment came to be included in the Constitution. Under views following the narrow interpretation, the apportionment requirement for direct taxes was the outcome of an ambiguous compromise to resolve

103. Previous works have offered other reasons why apportionment should be interpreted narrowly based on its history. For example, Professor Ackerman argues that apportionment was fundamentally "tainted" by its origins in a bargain over slavery and representation and should be "narrowly construed . . . after the rest of the bargain with slavery had been repealed by the Reconstruction Amendments." Ackerman, *supra* note 25, at 5. Professor Johnson argues that the apportionment requirement was simply the result of a misunderstanding or a "foul-up" that did not reflect any "constitutional value," and for this reason, the provision has "no constitutional weight." *See* Johnson, *supra* note 25, at 28.

104. See the discussion on the history in the literature cited *supra* note 25.

105. *See, e.g.*, *supra* notes 81–84 and accompanying text (discussing the arguments as to the meaning of a direct tax); *see also* Charlotte Crane, Reclaiming the Meaning of "Direct Tax" (Feb. 15, 2010) (unpublished manuscript), https://www.ssrn.com/abstract=1553230 [https://perma.cc/WE5C-CYT5].

disagreements over the representation of states in the House of Representatives with respect to enslaved persons. Under this view, apportionment did not embed an important and substantive constitutional value, but rather it served as a "bridge . . . over a certain gulph," which threatened to derail the Constitutional Convention.[106] Under the alternative view, apportionment reflected an important substantive constitutional value, as a bulwark of federalism and as an essential check on the federal taxing power.

At the time of the Convention, the concept of apportionment was familiar to the delegates. Apportionment was central to the requisitions process under the Articles of Confederation, which provided that expenses of the United States for the "common defence or general welfare" would be apportioned among the states in proportion to the value of the land in each state.[107] Although the Continental Congress specified the amount of taxes to be raised, each state maintained the authority to lay and levy the taxes raised in order to pay the apportioned amounts.[108] This requisition system failed, primarily because the Continental Congress could not force states to pay the requested amounts.[109] This failure demonstrated that Congress would need an independent taxing power and the ability to enforce it, which was one of the primary motives for the Convention and the adoption of the Constitution.[110]

The basic chronology of how the apportionment requirement came to be included in the Constitution is uncontroversial.[111] This sequence of events during the Convention is important for understanding apportionment's role in the constitutional structure. The delegates included the apportionment requirement for direct taxes during debates over how representation in the

106. At the Convention, Gouverneur Morris of Pennsylvania initially proposed the apportionment requirement for direct taxes but subsequently argued that it should be removed on the grounds that "[h]e had only meant it as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106 (Max Farrand ed., Yale Univ. Press 1911) (July 24, 1787).

107. *See* ARTICLES OF CONFEDERATION of 1781, art. VIII, paras. 1–2 (providing for collection of tax revenues for common expenses by apportionment); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 201 (detailing, on June 11, 1787, the argument by James Wilson of Pennsylvania that the apportionment method in the Articles of Confederation should be adopted in the Constitution).

108. ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 2.

109. *See* BROWNLEE, *supra* note 76, at 27 (observing that the states fulfilled "only about one-third of the requisition quotas that the Congress set between 1781 and 1786").

110. *See id.* at 28 (observing that the "movement for the Constitution" was motivated by "both widespread concern over a host of economic problems and the growing conviction that the paralyzed national government could not solve them unless it acquired the capacity to produce significant tax revenues").

111. Historian Max Farrand notes that the primary accounts of the Constitutional Convention were only published decades later, were based on incomplete records, and may have been influenced at times by the perspectives of the authors. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at xii–xxii; *see also id.* at xiii (noting that with respect to the Journal of the Federal Convention, "a word of warning [is] necessary" and that it "cannot be relied upon absolutely"); *id.* at xvi–xvii (noting discrepancies between the Journal of the Federal Convention and Madison's account).

new Congress should be shared among the states. Disagreements among the delegates over the structure of Congress threatened to derail the Convention and the prospects for a new national government.[112]

From the beginning of the Convention, the delegates struggled with a basic question of how to allocate representation in Congress between the larger and smaller states. The larger states favored representation proportional to population, while the smaller states favored equal representation for every state.[113] On May 29, 1787, and soon after the Convention commenced, Edmund Randolph presented the "Virginia Plan" for a new national legislature with a bicameral structure and representation proportional to each state's population or "Quotas of contribution."[114] On June 9, William Paterson of New Jersey decried a rule of proportional representation and insisted that states should be represented equally in the new Congress.[115]

On June 11, Roger Sherman of Connecticut first proposed what came to be known as the "Connecticut Compromise" with proportional representation in the lower branch of Congress and equal representation in the Senate.[116] On that date, the delegates also approved a resolution that had been advanced by the proponents of the Virginia Plan—that representation in the House should be allocated "according to some equitable ratio of representation" rather than equally among the states.[117] At this time, the delegates began to debate how proportional representation should be calculated before deciding whether representation in the Senate should also be proportional or shared equally among the states.

When debating this separate question—the formula for proportional representation in the House—the disagreement was no longer between the large and small states, but instead among states who would win or lose under different formulas. Delegates from Southern states sought to ensure that any formula would account for their enslaved populations.[118] In this context, for purposes of calculating proportional representation in the House, James Wilson of Pennsylvania and Charles Pinckney of South Carolina proposed the infamous "three-fifths compromise" whereby each enslaved person would be counted as three-fifths of a free person.[119]

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112. For an account of how these central debates threatened to derail the Convention, see BEEMAN, *supra* note 28, at 163–89.

113. *See id.* at 152–57.

114. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 18–23 (May 29, 1787); *see also* BEEMAN, *supra* note 28, at 88, 106–07.

115. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 177–79 (June 9, 1787). Paterson formally presented the competing "New Jersey" plan on June 15th, which provided that all states were represented equally in Congress. *See infra* note 120 and accompanying text.

116. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 196 (June 11, 1787).

117. *Id.* at 192 (June 11, 1787).

118. *See* EINHORN, *supra* note 25, at 161 (noting that for this reason "[s]lavery and the three-fifths rule . . . lay at the heart of all discussions about apportioned direct taxes").

119. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 193 (June 11, 1787).

This proposal did not resolve the deeper disputes about the structure of Congress, which depended on how representation should be shared in the Senate. On June 15 Paterson presented the full "New Jersey" plan on behalf of small states, which called for a more limited national government, equal representation, and greater individual autonomy for the states.[120] According to historian Richard Beeman, for the following month, the "Convention would find itself nearly paralyzed by the deadlock between the large-state nationalists and the defenders of small-state interests," which put the "success of the Convention . . . very much in jeopardy."[121]

By July 2, the question of representation was assigned to a committee in the hopes that a smaller group could reach a resolution,[122] while Elbridge Gerry of Massachusetts complained that "[i]f we do nothing . . . we must have war and confusion."[123] In the context of the ensuing debate over the formula for proportional representation in the House, on July 12, Gouverneur Morris proposed that the three-fifths rule should be modified so that "direct taxation" would be "proportioned according to representation."[124] This modification offered a concession to the Northern states, in exchange for granting Southern states representation with respect to enslaved persons.[125]

The historical record indicates that the delegates did not share a common understanding of exactly what taxes would be subject to this rule, and in fact the matter appears to have been scarcely discussed at the time of Morris' proposal.[126] According to James Madison, Rufus King of Massachusetts famously asked later in the Convention "what was the precise meaning of *direct* taxation," a question which "[n]o one answered."[127] In his argument for the government in the *Hylton* case, Alexander Hamilton similarly observed that there was no clear distinction between direct and indirect taxes, and that "[i]t is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain

120. *Id.* at 242–45 (June 15, 1787).

121. BEEMAN, *supra* note 28, at 162.

122. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 509 (July 2, 1787).

123. *Id.* at 519 (July 2, 1787).

124. *Id.* at 589 (July 12, 1787).

125. *See* Ackerman, *supra* note 25, at 10 (arguing that this compromise "served as a fig-leaf for antislavery Northerners opposed to the explicit grant of extra representation for Southern slaves," whereas "[f]or the South, it offered more real-world advantages especially if the range of 'direct' taxes was kept narrow").

126. Professor Erik M. Jensen argues that the delegates did share a broad common understanding that "direct taxes" were those taxes that could not be easily avoided or shifted to other parties (such as an excise tax). *See* Jensen, *supra* note 25, at 2359–60. Even if this were true, this vague standard does not offer a clear principle for distinguishing among taxes, since in principle any tax except for possibly a capitation tax would be avoidable in some way. *See* Lawrence Zelenak, Essay, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833, 838–40 (1999) (explaining the problems with classifying taxes based on whether they are "avoidable" or not).

127. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 350 (Aug. 20, 1787).

for any antecedent settled legal meaning to the respective terms—there is none."[128]

The apportionment compromise is often characterized as a turning point that resolved the major disagreements over representation in Congress,[129] notwithstanding its ambiguous legal consequences. Although this compromise certainly resolved one impasse, the apportionment rule for direct taxes did not resolve the disagreements over the allocation of representation in Congress generally, nor did it fully resolve the immediate disputes over the formula for proportional representation in the House specifically, which were not overcome until further modifications to this formula were adopted on July 13.[130]

The apportionment compromise also did not resolve the fundamental structural dispute between the large and small states regarding representation in the Senate. Three days later, on July 16, the delegates voted by a narrow margin to provide for equal votes in the Senate in accordance with the Connecticut Compromise.[131] After further threats from dismayed delegates, and requests for adjournment and further deliberation, opposing delegates ultimately acquiesced the next day.[132]

The subsequent public debates during the Constitution's ratification process did not clear up the uncertainty as to apportionments' function or the definition of a direct tax. In the transition from debating and drafting the Constitution to selling it to the public, advocates for ratification offered a host of rationalizations for apportionment and explanations of its effects.

For one example, historian Pauline Maier documents that, at the first New York ratifying convention in June 1788, Federalists and Anti-federalists debated Article I, Section 8 extensively and considered the advantages and dangers of giving Congress a broad taxing power as well as its effect on the state taxing authorities.[133] The New York delegates spent significantly less time, however, debating the definition of a direct tax or the consequences of apportionment. When delegate John Jay asked the "critical question" of what the meaning of a direct tax is, only one other delegate, Robert R. Livingston, offered a vague answer, and "the only subsequent speaker . . . was Jay

128. 8 THE WORKS OF ALEXANDER HAMILTON 378–79 (Henry Cabot Lodge ed., 1904).

129. *See, e.g.*, Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 703 (1999) (arguing that "[l]inking direct taxation and representation through the apportionment rule, with the three-fifths counting rule for slaves used for both, was a way to effect a compromise and keep the Convention going").

130. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 603–06 (describing the July 13, 1787 debate and vote on subsequent amendments to the formula for proportional representation proposed by Randolph); *see also* BEEMAN, *supra* note 28, at 211–13 (detailing the subsequent debates over the formula for proportional representation following the adoption of the apportionment requirement for direct taxes).

131. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 14 (July 16, 1787).

132. *See* BEEMAN, *supra* note 28, at 220.

133. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, at 364–69 (2010).

himself."[134] Furthermore, Maier observes that the delegates made no mention of the consequences of apportionment, even though the delegates otherwise "discussed the proposed federal tax system at length."[135]

2. A Weak Federalism Function

Did apportionment advance an important constitutional value? The case law and literature justifying apportionment's broad interpretation most commonly argue that it advanced a principle of federalism by maintaining a balance between the federal taxing power and the interests of the separate states. For example, the *Pollock* Court stated that "[n]othing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States."[136] This view that apportionment served an important federalism function has persisted until the present day. For example, one of the supporting briefs for the taxpayers petitioning the Supreme Court in *Moore* argued that "[t]reating direct and indirect taxes separately also served the purposes of federalism" as "[l]imiting the federal government's ability to impose direct taxes reserved that power for the states."[137]

The question of whether apportionment advanced an important federalism function is critical when interpreting the constitutional text. As discussed in the following section, if apportionment did have an important function, then a broad interpretation of its scope, and the definition of direct taxes, may be justified.[138] As this section explains, however, none of the variations of the federalism justification for apportionment can be supported in light of its history and operation. This discussion does not suggest that apportionment was not seen to be important at the time of framing and ratification. Rather, this provision was added to the Constitution to resolve narrower disagreements that did not directly implement principles of federalism. Furthermore, apportionment does not meaningfully advance this broader function in practice, irrespective of its origins.

What could federalism mean in this context, and how might apportionment operate to advance this structural feature of the Constitution? Broadly speaking, a federal system of government divides political power between "central and subordinate authorities."[139] Among its varied justifications, federalism can preserve individual liberty and popular sovereignty by preventing the consolidation of power in a single governing body,[140] promote

134. *Id.* at 368.
135. *Id.*
136. Pollock I, 157 U.S. 429, 582 (1895).
137. Brief Amici Curiae of The Manhattan Institute for Policy Research and Professors Erik M. Jensen and James W. Ely in Support of Petitioners at 7, Moore v. United States, 144 S. Ct. 1680 (2024) (No 22-800).
138. *See infra* Part II.A.3.
139. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1488 n.5 (1994).
140. For example, the Supreme Court has proclaimed that "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the

policy innovation and political participation,[141] and maximize the preference satisfaction of a diverse citizenry.[142]

Undoubtedly the division of power between the federal and state governments was a fundamental concern at the Convention, where the delegates struggled to negotiate a balance of power between the states and the new federal government.[143] As a practical matter, the delegates also grappled with the limited capacity of the federal government to govern a large and expanding territory with limited communication and transportation infrastructure.[144]

The Constitution most directly reconciled these tensions by limiting the new federal government to its enumerated powers in Article I.[145] The Tenth Amendment ensured the corollary that residual powers would reside with the states and the citizenry.[146] The structure of the Senate hammered out in the Connecticut Compromise also served as a linchpin of federalism in two ways: it ensured that each state would have equal representation and—prior to the Seventeenth Amendment[147]—it gave state legislators the institutional role of selecting senators.[148]

How might apportionment have functioned as a feature of federalism in the constitutional structure? The *Pollock* Court offered three related but distinct reasons for apportionment, each of which implicated different aspects of federalism. These reasons have been repeated in the literature and subsequent case law as possible justifications for its broad interpretation. They also serve as a useful framing for examining the possible functions for apportionment in the constitutional structure.

The first possible reason is simply that apportionment made it harder for Congress to lay certain types of taxes. For example, the *Pollock* Court argued that apportionment assured that "the power of direct taxation . . . should not be exercised" by the federal government "except on necessity."[149] In this account, apportionment's function was simply to prevent Congress from

diffusion of sovereign power.'" New York v. United States, 505 U.S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

141. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261 (2009).

142. *See* Kramer, *supra* note 139, at 1511.

143. *See* BEEMAN, *supra* note 28, at 105–23.

144. For example, Oliver Ellsworth of Connecticut observed at the Convention that the administrative capacities of the states would be essential to "supporting a Gen[eral] Gov[ernment]." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 106, at 406–07 (June 25, 1787).

145. U.S. CONST. art. I, § 8. For an argument that the structure of the Constitution sufficiently protects state autonomy and interests, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985).

146. U.S. CONST. amend. X.

147. *Id.* amend. XVII (providing for direct election of senators).

148. *Id.* art. I, § 8.

149. Pollock II, 158 U.S. 601, 621 (1895). The *Pollock* Court also cited approvingly a letter written by Madison, who opposed the apportionment requirement on the grounds that it was "calculated to impair the [taxing] power, only to be exercised in extraordinary emergencies." *Id.* at 620.

fully exercising its taxing powers by making it harder for Congress to impose certain taxes.

After presenting this first reason, the *Pollock* Court offered a second: that apportionment ensured that the taxing power "should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden."[150] Under this view, apportionment could prevent a coalition of states with majority voting control—based on the chosen formula for representation—from imposing taxes which disproportionally burdened other states that had less representation in Congress. This concern more directly addressed how the federal government, as controlled by one coalition of states, could impose taxes that would disproportionately burden taxpayers in another group of states.

Finally, the *Pollock* Court offered a third reason for apportionment, which had nothing to do with the relative share of the tax burden among the states. As the Court reasoned, apportionment ensured that the federal power to lay direct taxes "should be so exercised as to leave the States at liberty to discharge their respective obligations."[151] Under this view, apportionment preserved the states' institutional authority over the collection of direct taxes, and the role of state administrative capacity, even when these taxes are laid by and paid to the federal government.

According to the logic of this third reason, apportionment allowed states the ability to collect federal "direct" taxes from their own citizens in the form that they chose, and to then remit those amounts to the federal government. The Court reasoned that this was preferable, as the states "retain[] the power of direct taxation."[152] Therefore, the *Pollock* Court claimed that, although the federal government held a "concurrent power" over this same tax base, apportionment gave states "the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government."[153]

Importantly, this argument suggests a fundamentally different aspect of federalism. This view does not consider apportionment to limit the federal taxing power, per se, but rather simply as a device that allowed states to maintain control over the methods for collecting the federal tax revenues. Under this view, apportionment determined the identity of the entity responsible for directly collecting the taxes, but it did not limit Congress's power to lay those taxes in the first instance nor to require their payment by the states to the federal government.

None of these reasons offer a convincing account of apportionment as an important structural feature of federalism. The first rationale—that apportionment simply operated as some method of constraining the taxing power—is not consistent with the Framers' reason for adding the

150. *Id.* at 621.
151. *Id.*
152. *Id.* at 620.
153. *Id.* at 620–21.

apportionment requirement at the Convention. Undoubtedly, the constitutional establishment of a new national taxing power was a major concern for the Anti-federalists at the Convention and in the subsequent ratification debates.[154] As described in the preceding part, however, the apportionment requirement arose in the context of the debates over the formula for proportional representation in Congress, rather than during debates about the scope of the new federal government's powers.[155] Furthermore, in this context, the apportionment requirement was added to reconcile a division between Northern and Southern states, not one between Federalists and Anti-federalists.[156]

The differing understandings of apportionment in the case law and the literature agree that the delegates intended to grant Congress broad taxing power.[157] Apportionment only prescribed one mode through which Congress must exercise this taxing power, but it was not designed for the express purpose of limiting this power.[158] As Justice Paterson observed in *Hylton*, "it was . . . obviously the intention of the framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports," and "the term taxes . . . was made use of to vest in Congress plenary authority in all cases of taxation."[159] Even the *Pollock* Court conceded that, if a direct tax "were placed by both governments on the same subject, the claim of the United States had preference."[160] This understanding conforms with *Hylton*'s narrow and functional interpretation of apportionment: that it should only be required "in such cases where it can reasonably apply."[161]

This first rationale for apportionment, as a limitation on the federal taxing power, also would not address the division of power between the federal and state governments. Instead, it most directly limited the federal government's powers in relation to individual citizens. As such, apportionment would only factor into the structure of federalism as a restriction to one of Congress's enumerated powers. Further, as Part III explains, if apportionment has now

154. *See* JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781–1788, at 143 (1961) (observing generally that the "vast majority" of Anti-federalists "conceded that some federal taxation was necessary, but they were convinced that the Constitution had gone too far"); *see also, e.g.*, *supra* notes 133–35 and accompanying text (summarizing the debates between Federalists and Anti-federalists at the New York ratification convention).

155. *See supra* notes 112–19 and accompanying text.

156. *See supra* notes 112–19 and accompanying text.

157. *See, e.g.*, Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 22 (1992) ("Well aware of the fatal flaw in the Articles of Confederation, the Supreme Court traditionally viewed the original taxing powers broadly."); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869) ("[N]othing is clearer . . . than the purpose to give this power to Congress . . . in its fullest extent.").

158. *See, e.g.*, *Veazie*, 75 U.S. (8 Wall.) at 541 (characterizing both the apportionment and uniformity requirements as "not strictly limitations of power" but rather "rules prescribing the mode in which it shall be exercised"); *see also* Glogower, *supra* note 25, at 727.

159. Hylton v. United States, 3 U.S. (3 Dall.) 171, 176 (1796) (opinion of Paterson, J.).

160. Pollock II, 158 U.S. 601, 620 (1895).

161. *Hylton*, 3 U.S. (3 Dall.) at 174; *see supra* note 68 and accompanying text.

come to serve this function—as simply some method for constraining the taxing power—then the Constitution provides other and better ways to do so in accordance with substantive constitutional values.

The second reason—that apportionment prevented a coalition of states from imposing a tax burden that would be disproportionately borne by other states—must also be understood in the specific context in which apportionment arose. Importantly, this rule was not meant to achieve a balance of power in Congress between large and small states, nor to reconcile the basic tension between proportional and equal representation in Congress. This important choice between equal and proportional representation *did* implicate fundamental principles of federalism and political theory, since equal representation placed the states as entities on an equal footing in Congress.[162] In contrast, apportionment only sought to fine-tune the formula for proportional representation in the House once this basic rule was already accepted, and thereby to resolve a secondary sectional dispute between the Northern and Southern states over this formula.

Some have argued that apportionment offered an advantage to the states that transcended regional interests, by preventing "fiscal raids" by a group of states against tax bases concentrated in other states.[163] Furthermore, it could be argued that apportionment might have come to serve this broader function, even if it was not intended at the time of the Convention. Importantly, however, this concern was obviated by the adoption of equal representation in the Senate through the "Connecticut Compromise" that the delegates reached *after* they had adopted the apportionment requirement for direct taxes.[164] This rule of equal representation in the Senate prevented relatively populous states with greater representation in the House of Representatives from exercising their taxing preferences to the detriment of less populous states.[165]

Finally, the third reason—that apportionment preserved states' autonomy to collect taxes from their citizenry—similarly only pertained to the administration and enforcement of the tax system, rather than to the ability of the federal government to lay taxes in the first instance. This dimension of apportionment reflected the perceptions at the time that the states should retain autonomy over certain tax collections and that, in all events, the federal government would not have the administrative capacity to enforce and collect these taxes.[166] This rationalization reflected only a secondary concern that

162. BEEMAN, *supra* note 28, at 223; *see also* Ackerman, *supra* note 25, at 19 ("The original understanding of these clauses was political, not economic. They were not put into the text to crystallize some hard-won truth of political economy.").

163. *See generally* David M. Schizer & Steve G. Calabresi, *Wealth Taxes Under the Constitution: An Originalist Analysis*, FLA. L. REV. (forthcoming), https://ssrn.com/abstract=4867878 [https://perma.cc/4239-KLK4].

164. *See supra* notes 131–32 and accompanying text.

165. For discussion of bicameralism and the procedural requirements for the enactment of tax legislation, see also *infra* notes 233–43 and accompanying text.

166. *See supra* note 144 and accompanying text.

was unrelated to imposing limits on the substance of Congress's taxing power.

3. Does the Reason for Apportionment Matter?

Apportionment arose in the context of specific debates over the formula for proportional representation and did not serve an important function in the structure of federalism. Does the reason for apportionment necessarily matter, however, when interpreting its reach and the definition of a direct tax?

From one perspective, it matters a great deal. It may only seem logical that the term "direct tax" should be interpreted in a manner that is consistent with its role in the Constitution and the values apportionment advances. Arguments in the literature and in the case law as to how the provisions should be interpreted—whether broadly or narrowly—are generally paired with arguments regarding apportionment's role in the constitutional structure.

Justice Paterson made this connection explicit in *Hylton*: "The rule of apportionment . . . cannot be supported by any solid reasoning . . . . The rule, therefore, ought not to be extended by construction."[167] As described above, cases adopting this narrow interpretation similarly highlighted apportionment's minor role in the constitutional structure.[168] Scholars who have argued that apportionment should be interpreted narrowly have similarly justified this position based on the understanding that it did not play a significant role in the Constitution. For example, according to Professor Ackerman, the apportionment clause was the product of "political expediency" rather than "economic principle," and consequently it should be allowed to "rest in peace" and no longer be interpreted as a significant restraint on the taxing power.[169]

For those on the other side of the debate, the *Pollock* Court similarly paired its interpretation of the term "direct tax" with an understanding of apportionment's function. In this case, the Court justified its broad interpretation of the term "direct tax" by claiming that apportionment served an important function in the constitutional structure.[170] In contemporary debates, advocates of a broad scope for direct taxes similarly argue that apportionment had an important and discernible function.[171]

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167. Hylton v. United States, 3 U.S. (3 Dall.) 171, 178 (1796) (opinion of Paterson, J.).

168. *See supra* Part I.A.

169. Ackerman, *supra* note 25, at 3–4.

170. *See supra* Part I.C.

171. *See, e.g.*, *supra* note 137 and accompanying text. Professor Jensen looks at this question from the other direction, and observes, "Unless apportionment is interpreted as a significant limitation on the taxing power, why is the rule in the Constitution?" Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1078 (2001). This perspective implies that we should interpret apportionment broadly, precisely so that its inclusion in the Constitution would be justified.

From a different perspective on constitutional interpretation, however, the reason for apportionment may not necessarily matter. Under this view, the constitutional text has independent and binding effect, irrespective of its original reason or function. Even the *Pollock* Court, after perhaps failing to fully convince itself of apportionment's intended function, stated that "whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language."[172]

This conclusion in *Pollock* reflects an interpretative approach whereby the constitutional text has legal effect independent of its function or purpose.[173] For example, Professors William Baude and Michael Stokes Paulsen argue that "[i]t is the *enduring text* of the Constitution that supplies the governing rule, not the ostensible 'purpose' or specific historical situation for which the text was written. Constitutional provisions, written into our fundamental law, live beyond the circumstances that prompted their adoption."[174] From this perspective, even a provision designed to address specific concerns, and that was a "creation and creature of its day," will be legally binding when "written in broad, or general, terms that obviously extend beyond the specific situation or situations that led to their enactment."[175]

Even the *Pollock* Court's textualist view of the apportionment requirement does not suggest, however, that discerning the reason for constitutional provisions is irrelevant. To the contrary, this project of discerning the reasons for the constitutional text can be crucial in interpreting this text, even if it is this text itself that bears the legal effect. For example, Professors Baude and Paulsen note that "[w]hile evidence of intention, usage, purpose, and political context can assist in ascertaining the meaning of the enactment, it is that objective meaning that constitutes the law, not the ostensible purposes or motivations that supposedly lay behind it."[176] That is, even if the constitutional text is legally binding, regardless of its functions or motives, the text still cannot be interpreted without reference to those same functions or motives.

This insight explains why the reason for apportionment is so important to its interpretation. If the definition of a direct tax was clear and unambiguous, as an interpretative matter, that might be the end of the story. Since the term is profoundly ambiguous, however, investigating the reason for apportionment and the constitutional values it was designed to advance can similarly assist in "ascertaining the meaning of the enactment."[177]

Interpreting the term "direct tax" when determining apportionment's reach presents a further challenge. Scholars have observed that constitutional language will often have a "core of settled meaning" and, at the same time, a

172. Pollock II, 158 U.S. 601, 622 (1895).

173. *See* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 67–70 (2007).

174. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 613 (2024).

175. *Id.* at 613–14.

176. *Id.* at 614.

177. *Id.* (emphasis omitted).

"penumbra of debatable meaning."[178] Unlike many other terms in the Constitution with innate linguistic meanings, however, the term "direct tax" operates as a technical term of art that does not have any independent meaning that may be discerned without reference to the function of apportionment. The only "core of settled meaning" for the term direct tax, as a term of art, encompassed just taxes on persons and possibly on land.[179] Any further meaning, in contrast, can *only* be properly interpreted by reference to apportionment's function in the constitutional structure. This is also why it is so significant that the founders and the public did not share a common understanding of what the term "direct tax" encompassed nor how apportionment was meant to operate.[180]

For these reasons the *Pollock* Court introduced two separate interpretative mistakes. First, it erred in ultimately falling back upon a conclusion that the ambiguous constitutional terms "appear to us to speak in plain language."[181] Second, the *Pollock* Court mischaracterized the importance of apportionment in the constitutional structure to justify its broad interpretation of the ambiguous term "direct tax."[182]

In sum, apportionment is properly understood as the outcome of an ambiguous compromise between factions of states over the formula for proportional representation in the House of Representatives. It operated as neither a deliberate major impediment to the taxing power nor as an important structural feature of federalism and the balance of power between Congress and the states. This understanding of apportionment's function in turn informs how the ambiguous and indeterminate term "direct tax" should be interpreted and, ultimately, explains why the broad construction is the wrong interpretative fit for apportionment and the direct tax definition.

B. Doctrinal Inconsistency and Uncertainty

The *Pollock* Court's broad interpretation is not just the wrong interpretive fit for the apportionment requirement—it also introduced doctrinal inconsistency and uncertainty. By grounding the limits of Congress's taxing power in the single question of what a "direct tax" is—and therefore whether it is subject to apportionment—this broad approach places enormous pressure on an essentially unanswerable question, which has fostered confusion and contradiction in the doctrine.

As a starting point, the courts, when characterizing a particular tax rule as a direct tax or not, have struggled to identify exactly what it means to impose

178. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988) (paraphrasing H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608–12 (1958)).

179. *See* Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (citation omitted) ("Even 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.").

180. *See supra* notes 127–28 and accompanying text.

181. Pollock II, 158 U.S. 601, 622 (1895).

182. *See supra* Part I.C.

a tax "on" something. Modern tax systems, including the individual income tax and rules for taxing various business entities, often account for a range of factors and attributes when calculating the resulting tax liabilities.[183] The courts have not articulated a clear rule as to when a tax system that accounts for factors or attributes in calculating tax liabilities constitutes a tax "on" these factors for purposes of characterizing a rule as a direct tax or not.

If every individual tax rule that accounted for a different factor or attribute was considered a tax "on" that factor, then many rules in the tax system could be susceptible to constitutional challenge. For example, Chief Justice Roberts illuminated this conundrum in the 2012 case *National Federation of Independent Business v. Sebelius*,[184] where he mused about a hypothetical fifty-dollar penalty imposed on taxpayers who did not have energy-efficient windows, and which is adjusted based on certain factors including the taxpayer's income.[185]

Chief Justice Roberts suggested that such a rule would undoubtedly be a tax that would operate similarly to an explicit tax on income.[186] He did not specify whether this would be characterized as a tax on windows, on income, or possibly on both, for purposes of determining whether the tax must be apportioned or not. Indeed, the Court has upheld the use of certain taxpayer characteristics as factors when determining the tax liability imposed on a permissible tax base, even if taxing those factors directly as base for taxation would not be permissible.[187] Similarly, a number of rules in the current tax law account for a taxpayer's total assets as a factor in determining their income tax liability, and these rules have not been challenged as wealth taxes subject to apportionment.[188] The broad interpretation's characterization of a potentially broad range of taxes as "direct" simply cannot account for the reality of complex tax systems that account for multiple factors in determining tax liabilities.[189]

The broad interpretation has also bred contradictions in the doctrine and an understanding of apportionment that approaches absurdity. Consider first the common points of agreement in the interpretation of this clause. First, all

183. For discussion of this problem, see Glogower, *supra* note 25, at 728–32.

184. 567 U.S. 519 (2012).

185. *Id.* at 569.

186. *Id.* ("No one would doubt that this law imposed a tax, and was within Congress's power to tax.").

187. *See, e.g.*, Scholey v. Rew, 90 U.S. (23 Wall.) 331, 345–52 (1874) (upholding an unapportioned tax on the succession of real estate even though the tax had the effect of burdening the ownership of land).

188. For just one example, the tax code disallows certain expense deductions for banks with assets above a certain amount. I.R.C. § 162(r) (disallowing phaseout of deductions for FDIC premiums paid by financial institutions with assets of ten billion dollars or more). This rule has the effect of imposing higher income tax burdens on these taxpayers based on their asset holdings, even if directly taxing these assets could be susceptible to constitutional challenge as an unapportioned direct tax. For discussion of this provision and how it effectively accounts for a taxpayer's wealth when calculating income tax liabilities, see Glogower, *supra* note 25, at 772.

189. For example, see Glogower, *supra* note 25, at 765–80 (describing the doctrinal uncertainty as to whether apportionment would be required for a wealth-adjusted income tax).

interpretations agree that the apportionment requirement does not *prohibit* Congress from imposing any form of tax, but merely specifies how certain taxes must be laid.[190] Furthermore, the constitutional provisions suggest that any tax must be subject to either the uniformity requirement or the apportionment requirement,[191] and that it would be impossible for a single tax to comply with both requirements at the same time.[192]

A broad interpretation of the direct tax definition, however, can lead to exactly this implausible result: that a tax could be subject to both the uniformity and apportionment requirements at the same time, such as when a single tax rule contained both direct and indirect tax elements.[193] Since Congress cannot comply with the two requirements simultaneously, characterizing a single tax instrument as subject to both rules would in effect prevent Congress from laying the tax, which all interpretations agree is not the function of the apportionment requirement.

The narrow interpretation would avoid this inconsistent result. Justice Chase noted this impossibility in *Hylton*, observing that: "I believe some taxes may be both direct and indirect at the same time. If so, would Congress be prohibited from laying such a tax, because it is partly a direct tax?"[194] For exactly this reason, Justice Chase concluded that the apportionment cannot be required so broadly, and therefore must only be required "where it can reasonably apply."[195]

In addition to these inconsistencies, the broad interpretation has also led to profound uncertainty in the doctrine and, therefore, uncertainty as to the limits of Congress's taxing power. Quite simply, the single question of what a "direct tax" is now bears enormous stakes for the fiscal system, even though the answer to this question is fundamentally unknowable and left in large part to the guesswork of the Supreme Court justices. This uncertainty also creates ongoing risks for Congress, which cannot legislate with the benefit of certainty as to the scope of its taxing powers. Further, as described above,

190. *See, e.g.*, Pollock II, 158 U.S. 601, 620 (1895) (reasoning that the states "retained the power of direct taxation" but "if the tax were placed by both governments on the same subject, the claim of the United States had preference"); *see also supra* notes 157–59 and accompanying text.

191. The *Pollock* Court proclaimed that "[t]he Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class." *Pollock II*, 158 U.S. at 617–18.

192. A single tax could not satisfy both the uniformity and apportionment requirements at the same time whenever there was a discrepancy between the states' relative shares of the population and the taxable base, since uniformity would require uniform rates of tax across different geographic areas, whereas apportionment would require different tax rates in different states. *See* Dodge, *supra* note 25, at 869.

193. For example, *Pollock* characterized the Income Tax of 1894 in this way, by taxing both income from property that was subject to apportionment, as well as other forms of income that would be subject to the uniformity rule as indirect taxes. *See supra* notes 88–91 and accompanying text.

194. Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J.).

195. *Id.*

the broad interpretation has also generated uncertainty as to even Congress's power to tax income pursuant to the Sixteenth Amendment.[196]

Of course, interpreting indeterminate constitutional language often necessitates uncertainty and line drawing, even when the outcomes may seem somewhat arbitrary.[197] A broad interpretation of the apportionment requirement creates even greater line drawing challenges, however, since apportionment does not reflect substantive principles or values that can guide the interpretive exercise.[198] Further, as a technical term of art, "direct tax" does not lend itself to the same tools of interpretation that may be available to other constitutional terms or provisions that have at least a "core of settled meaning" and only a "penumbra of debatable meaning."[199]

C. A Shield for the Rich

The broad interpretation of the apportionment requirement has one practical consequence for tax design. It transformed the apportionment requirement into a shield for the rich, which prevents Congress from implementing tax reforms that could tax wealth or effectively tax capital income. The broad interpretation has yielded a bifurcated legal regime that allows for potentially burdensome rates of tax on lower-income taxpayers while at the same time inhibiting progressive tax reforms that would increase the share of taxes paid by the rich.

As this section explains, this bifurcated system is a consequence of the broad interpretation that focuses the limits of Congress's taxing power on the single question of the definition of the taxable base. This approach allows high-end taxpayers to avoid taxation for two reasons. First, these taxpayers disproportionately hold financial assets and earn capital income, which the broad interpretation can shield from taxation by expanding apportionment's reach. Second, these taxpayers can more often change the form of their economic activities to avoid those bases that Congress can still tax without apportionment.

The justices of the *Pollock* Court who advanced the broad interpretation of apportionment understood well its distributional consequences. In *Pollock I* the distributional stakes were at the forefront of both the majority and the dissenting opinions. Writing in a concurring opinion for the majority, Justice Stephen J. Field observed that "[t]he present assault upon capital is but the

196. For example, the answer to this question can also determine Congress's ability to implement reforms to improve the income tax. *See infra* notes 210–14 and accompanying text.

197. Madison observed, for example, that "however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered." THE FEDERALIST No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1088–91 (2017) (identifying the fundamental problems with the premise that linguistic interpretation can be used to discern legal meaning from text).

198. For contrast, even if the meaning and legal effect of the term "equal protection" in the Fourteenth Amendment may be indeterminate and subject to judicial interpretation, the term at least embodies an intelligible principle that can guide its interpretation.

199. *See supra* note 178 and accompanying text.

beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich."[200] In his lengthy *Pollock II* dissent, Justice John M. Harlan issued the following warning: "In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but tangible personal property, '*invested* personal property, bonds, stocks, investments of all kinds,' and the income that may be derived from such property."[201]

Highlighting the stakes of the majority's interpretation for the distribution of tax burdens, Justice Harlan observed:

> [B]y its present construction of the Constitution the [C]ourt, for the first time in all its history, declares that our government has been so framed that, in matters of taxation, . . . those who have incomes derived from the renting of real estate or from the leasing or using of tangible personal property, or who own invested personal property, bonds, stocks and investments of whatever kind, have privileges that cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of their skill, or the use of their brains.[202]

Since *Pollock*, the Sixteenth Amendment and the Court have affirmed Congress's ability to tax income, including capital gains.[203] Indeed, the government derives significant revenue from the taxation of capital gains and other forms of investment income.[204] Nonetheless, the broad interpretation of apportionment still shields the rich from taxation—even as it allows potentially burdensome levels of taxation for lower-income taxpayers—for two reasons. First, a broad interpretation of apportionment most readily shields capital assets, and potentially certain forms of capital income, from the reach of Congress's taxing power. In the United States, financial capital is heavily concentrated among the richest taxpayers.[205] Economists and Professors Emmanuel Saez and Gabriel Zucman argue that, "[b]y any metric, the period from 1980 to 2020 has been an era of extraordinary wealth

200. Pollock I, 157 U.S. 429, 607 (1895) (Field, J., concurring).

201. Pollock II, 158 U.S. 601, 671 (1895) (Harlan, J., dissenting).

202. *Id.* at 672.

203. *See supra* notes 19–22, 90–92 and accompanying text.

204. For example, the Congressional Budget Office (CBO) estimates that taxable capital gains accounted for more than 14 percent of total individual income tax revenue in fiscal years 2021 and 2022. CONG. BUDGET OFFICE, CBO'S PROJECTIONS OF REALIZED CAPITAL GAINS SUBJECT TO THE INDIVIDUAL INCOME TAX (2023), https://www.cbo.gov/system/files/2023-02/58914_capital_gains.pdf [https://perma.cc/C9RX-6YSM]. The CBO also estimated, however, that this proportion would decline to approximately 7 percent by fiscal year 2033. *Id.*

205. By "financial capital" and "human capital," this Article refers, respectively, to assets generating capital income and an individual's capacity to earn labor income, based on their abilities, training, and other factors that determine labor market earnings. For discussion of this distinction, see Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1424 n.13, 1435–36 (2018) (describing the basic distinctions between human capital and "nonhuman capital"); Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1497–98 (1994).

accumulation among the rich in the United States."[206] The Federal Reserve's Survey of Consumer Finances similarly found that the holding of financial assets, such as publicly traded stock, nonresidential property, and business equity—exactly the forms of wealth and income that would be best shielded from taxation under the broad interpretation—is heavily concentrated at the top of the income distribution.[207]

The broad interpretation most directly complicates or precludes a federal wealth tax because any tax on a broad asset base that includes real estate could be challenged under a broad interpretation of apportionment and the definition of a direct tax.[208] On the other hand, the apportionment requirement would not bar a tax on labor income, which is the proceeds of human capital.[209] This approach centered on apportionment, and an inquiry into the formal definition of the tax base as a "direct tax" or not, also would not impose any other significant constitutional restrictions on the taxation of labor income.

The broad interpretation could also threaten income tax reforms, even after the Sixteenth Amendment and the Court have repudiated *Pollock* and affirmed Congress's power to tax income without apportionment.[210] Many have argued that wealthy taxpayers have taken undue advantage of the statutory "realization requirement"—which generally allows for the deferral gains on capital income until a sale or a disposition of an asset[211]—to avoid capital income taxation.[212] As a result, scholars and policymakers have proposed reforms to improve the taxation of capital income, and to prevent taxpayers from avoiding taxation by taking advantage of the realization requirement.[213]

As described above, the Court's recent holding in *Moore v. United States* now casts a shadow over Congress's ability to tax unrealized income without apportionment.[214] The fact that the Court might even countenance interpreting the apportionment requirement so broadly as to contravene

206. Emmanuel Saez & Gabriel Zucman, *The Rise of Income and Wealth Inequality in America: Evidence from Distributional Macroeconomic Accounts*, J. ECON. PERSP., Fall 2020, at 3, 11.

207. BD. OF GOVERNORS OF THE FED. RSRV. SYS., CHANGES IN U.S. FAMILY FINANCE FROM 2019 TO 2022: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES 16–24 (2023).

208. For discussion, see Glogower, *supra* note 25, at 751–52 (summarizing views in the literature endorsing the broad interpretation of apportionment to argue that a wealth tax would be unconstitutional).

209. *See supra* note 91 and accompanying text.

210. *See supra* notes 90–92 and accompanying text.

211. *See* I.R.C. § 1001 (only taxing gains resulting from "amount[s] realized" from a sale or disposition of an asset).

212. *See, e.g.*, Ari Glogower, *Taxing Capital Appreciation*, 70 TAX L. REV. 111, 114–21 (2016) (describing how sophisticated taxpayers can exploit the realization rule to avoid income taxation).

213. *See generally id.* (proposing a system that would tax certain assets on a mark-to-market basis and others upon realization with an interest charge to account for the benefit of deferring taxable income). *See also supra* note 3 and accompanying text (describing Senator Wyden's reform proposal with a comparable structure).

214. *See supra* notes 99–102 and accompanying text.

Congress's express authority to tax income pursuant to the Sixteenth Amendment demonstrates the essential flaws with the broad interpretation.

Under the narrow interpretation, in contrast, apportionment would only be required for circumstances where it could be practicably implemented by Congress, and the term direct tax was understood narrowly to only encompass taxes on persons and possibly on land.[215] An approach that did not require apportionment in other cases would allow Congress broad latitude to design effective taxes on capital income, but also, potentially, a broader base of net wealth that accounts for all of a taxpayer's assets.[216]

While operating as a shield for the rich, the broad interpretation can still allow for potentially burdensome levels of taxation on lower-income taxpayers who disproportionately earn income from their labor. If apportionment is understood to be *the* primary constraint on the taxing power, and if apportionment does not interfere with Congress's power to tax human capital realized in the form of labor income,[217] then Congress may be able to tax this income at high or potentially even confiscatory rates.

For an illustration of the broad interpretation's capacity for uneven tax burdens, consider two taxpayers. Taxpayer A has no savings or financial capital and earns $40,000 per year from their labor income. Taxpayer B, who is wealthier, also earns $40,000 per year from their labor income, but also earns $60,000 of unrealized income from the investment return on their accumulated wealth. Assume that, based on the broad interpretation, the apportionment requirement is construed broadly enough to prevent Congress from even reaching Taxpayer B's unrealized investment income, but imposes no other restrictions on Congress in taxing Taxpayer A's labor income. In this case, Congress could tax up to 100 percent of the income earned by Taxpayer A, but only forty percent of the income earned by the richer Taxpayer B.

The broad interpretation also shields the rich from Congress's taxing power for a second reason. When Congress can tax some bases based on formal distinctions between different forms of taxes, but not others, the primary beneficiaries of these distinctions will always be the wealthiest and highest-income taxpayers. These taxpayers have the greatest opportunities to structure their transactions so that they can avoid engaging in those activities that Congress has the power to tax.[218] Meanwhile, lower-income taxpayers often have fewer opportunities to restructure their activities to avoid the reach of Congress's taxing power.

For example, higher-income taxpayers can take the greatest advantage of a broad interpretation of apportionment that would prevent Congress from

215. *See supra* Part I.B.

216. *See supra* notes 82–84 and accompanying text.

217. *See supra* note 91 and accompanying text.

218. For a discussion of how taxpayers with greater economic resources often have more opportunities to structure their economic affairs to optimize for tax considerations, see Joshua D. Blank & Ari Glogower, *The Tax Information Gap at the Top*, 108 IOWA L. REV. 1597 (2023) (describing how high-end taxpayers often have greater flexibility to structure their transactions to avoid information reporting requirements).

taxing unrealized income pursuant to the Sixteenth Amendment. High-income taxpayers earning capital income can often structure their activities to avoid a "realization event," such as a sale or disposition of their investments.[219] In many cases, taxpayers can even still monetize the appreciation in their assets, including by borrowing against these assets or through the use of engineered derivatives or other financial products.[220] Even when lower-income taxpayers do make capital investments, they often have fewer opportunities to engage in these sophisticated strategies that can delay or avoid realization events.[221]

High-income taxpayers who earn labor income may also have opportunities to recharacterize their earnings as capital income, which can similarly escape taxation under a broad interpretation of apportionment. The share of business income earned through both corporations and pass-throughs is also heavily concentrated at the top of the income distribution.[222] In many cases, taxpayers earning ordinary labor income through these businesses can structure their interests to recharacterize a portion of their labor income—which Congress can tax pursuant to the Sixteenth Amendment—into capital income for tax purposes, which can be more readily shielded from taxation under the broad interpretation. For example, high-income taxpayers in certain industries may be able to disguise their labor income as unrealized capital appreciation in "founder stock" or as carried interest returns.[223]

An interpretation of the Constitution that shields the rich from taxation, while allowing potentially onerous tax burdens on lower-income taxpayers, may be problematic on normative grounds alone. More importantly, however, the Court has affirmed that it is Congress's responsibility to determine the distribution of tax burdens and the overall progressivity of the tax rules.[224] The broad interpretation takes this authority away from

219. *See supra* note 212 and accompanying text.

220. *See* Glogower, *supra* note 212, at 119–20.

221. For example, a taxpayer who can afford to defer their investment gains for a long term, or for their entire lifetime, can maximize their advantages under the realization rule. *See id.*

222. *See* Matthew Smith, Danny Yagan, Owen Zidar & Erick Zwick, *Capitalists in the Twenty-First Century*, 134 Q.J. ECON. 1675, 1689–91 (2019) (finding that wage income is more predominant from the ninetieth to the ninety-ninth percentiles of the income distribution, whereas the "main source of income at the very top of the income distribution is business income").

223. *See* Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 43–47 (2008) (describing how investment fund managers can structure their activities to convert the returns to their labor into carried interest taxable as capital income); Victor Fleischer, *Taxing Founders' Stock*, 59 UCLA L. REV. 60, 85–87 (2011) (describing how the company founders and stockholders can similarly convert their labor on behalf of the company into a capital income return in the form of appreciated interests in the company); *see also* Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, J. ECON. PERSPS., Fall 2011, at 165, 181 (describing the "difficulties in telling apart labor and capital income" and the implications of this challenge for optimal tax design).

224. *See infra* notes 334–36 and accompanying text (describing the case law affirming Congress's authority to determine the distribution of tax burdens through progressive taxation).

Congress and empowers the Court to determine the distributional effects of tax legislation through formal constitutional restrictions, even while the Court acknowledges it cannot explicitly limit the taxing power in this way.

III. ALTERNATIVE LIMITS TO THE TAXING POWER

The preceding part outlined the problems with the Court's broad interpretation of the apportionment requirement and the definition of a direct tax. The narrow interpretation offers an alternative understanding of these provisions that would give meaning to the constitutional text without inflating apportionment into the major limitation to the taxing power that it is today.

The flaws in the broad interpretation point toward the need for a new taxing power jurisprudence: one that is not grounded in sweeping and ahistorical applications of ambiguous constitutional text and that does not shield the wealthy from meaningful taxation while allowing onerous burdens on other groups of taxpayers.

Some may view the broad interpretation as a welcome, even if imperfect, constraint on the taxing power.[225] They may fear that, despite its flaws, dispensing with the broad interpretation and returning to the narrow interpretation could leave Congress with unfettered taxing powers. Perhaps any constraints on the taxing power may be preferable to having no constraints at all.

This part outlines an alternative set of constitutional limits that meaningfully constrain Congress's taxing power in accordance with substantive constitutional values. The Constitution already limits the taxing power through the process requirements for the enactment of tax legislation, which have moderated the outcomes of tax legislation throughout successive eras of tax reform.[226] The Constitution also contains a set of provisions and doctrines that operate together, in accordance with substantive constitutional values, to prevent congressional abuses of its taxing power.[227] At the same time, these constraints would also not obstruct Congress's essential domain of economic regulation through tax legislation.

These constraints have long been recognized in the case law and the literature as potential limits on Congress's taxing power, in theory, if not as much in practice. In the last century, these alternative constraints have been overshadowed, to a degree, by the broad interpretation and a fixation on the operation of apportionment. As a result, most views characterize these other constitutional limitations as ancillary, if not irrelevant, constraints on the

225. *See, e.g.*, *supra* note 149 and accompanying text.

226. *See infra* Part III.A.

227. *See infra* Part III.B. This discussion does not seek to provide an exhaustive catalog of all possible constitutional constraints on the taxing power but rather considers how a set of constitutional provisions and doctrines can operate together as the primary limitations to the taxing power and an alternative to the broad interpretation of apportionment. For discussion of other possible constitutional constraints that are not the focus of this Article but that can also operate as additional limitations on the taxing power, see *supra* note 42.

taxing power. For example, Professor Bittker argues that general constitutional constraints have limited effect as applied to the taxing power and observes that they "rarely impinge on the day-to-day work of the tax lawyer."[228]

These constraints on the taxing power are not mere afterthoughts. They are substantively coherent and can operate as the primary constitutional constraints on the taxing power in connection with a return to the narrow interpretation of apportionment. Further, these constraints can operate together to meaningfully limit abuses of the taxing power in accordance with substantive constitutional values. Accordingly, this part synthesizes these varied constraints to identify a set of basic constitutional principles that can meaningfully limit the taxing power as an alternative to the broad interpretation of apportionment.

A. Legislation as a Constitutional Constraint

The Constitution provides for one fundamental and overriding structural limitation on Congress's taxing power: the requirements for the enactment of tax laws through the legislative process. The Supreme Court has long recognized that the legislative process itself serves as the most important protection against abuse of the federal taxing power. As the Court pronounced in its 1819 decision in *McCulloch v. Maryland*:[229]

> [T]he power of taxing the people and their property is essential to the very existence of government and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it. The only security against the abuse of this power is found in the structure of the government itself.[230]

Justice Harlan, in his *Pollock* dissent, vigorously critiqued on similar grounds that the majority had usurped Congress's authority to implement economic policy through tax legislation. He linked this argument to his critique of the majority's distributional motives in protecting the rich from the taxing power.[231] Justice Harlan argued that the constraints on progressive income taxation must be found in the legislative process:

> With the policy of legislation of this character, this court has nothing to do. That is for the legislative branch of the government. It is for Congress to determine whether the necessities of the government are to be met, or the interests of the people subserved, by the taxation of incomes. With that

228. Bittker, *supra* note 48, at 12. Professor Reuven S. Avi-Yonah argues that, in general, the U.S. income tax law should not be "constitutionalized" but that "this does not mean that the constitutional inquiry is worthless," since Congress can nonetheless incorporate constitutional principles in the design of the tax law, even if they should not be scrutinized by the courts. Avi-Yonah, *supra* note 48, at 87–88; *see also* Avi-Yonah & Edrey, *supra* note 48, at 9 ("We want to clarify up front that we are not envisaging this analysis as a practical proposal for adoption by the Supreme Court.").

229. 17 U.S. (4 Wheat.) 316 (1819).

230. *Id.* at 428.

231. *See supra* notes 201–02 and accompanying text.

> determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern.[232]

Even as enactment of fiscal policy falls within the essential domain of Congress, the structural constraints on the legislative process itself offer extensive protections against abuses of the taxing power. These structural constraints in the Constitution begin with the Origination Clause requiring that any tax legislation must technically originate in the House.[233] The process for enacting tax legislation is also constrained by the general requirements for congressional legislation of bicameralism—necessitating passage by both the House and the Senate—and presentment to the President.[234]

Importantly, as discussed in Part II.A.2, these basic structural requirements for the enactment of tax legislation also render moot what has been claimed to be the reason for apportionment: a group of states with greater proportional representation in the House cannot enact tax policies that overly burden taxpayers in other states.[235] The requirements of bicameralism and presentment ensure that any tax legislation must also be passed by the Senate, in which every state has equal representation, and also must be signed by the President. Accordingly, the only constitutional reason for apportionment claimed by proponents of its broad interpretation was already adequately addressed through the structure of the legislative process.

Beyond these constitutional requirements, Senate rules for enacting tax legislation further constrain the outcomes of tax legislation. The ordinary procedure for the Senate to pass tax legislation requires a filibuster-proof sixty vote supermajority.[236] In an era of a politically divided Senate, where tax legislation can succeed or fail by a narrow margin, reaching the sixty-vote hurdle is typically only possible for tax legislation that incorporates the concessions and compromises that are necessary to build a sufficient voting coalition.[237]

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232. Pollock II, 158 U.S. 601, 674 (1895) (Harlan, J., dissenting).

233. U.S. CONST. art. I, § 7, cl. 1. Professor Bittker has argued that the Origination Clause itself has limited practical effects on tax legislation, as in all events the House would need to approve tax legislation originating in the Senate. *See* Bittker, *supra* note 48, at 6 ("Since it takes two to tango, what difference does it make whose foot first touches the ballroom floor?"). This clause ensures, however, that the House alone can prevent Congress from even initiating the process for enacting any form of tax legislation. In practice, the Senate, including through tax reform proposals introduced through the U.S. Senate Committee on Finance, also plays an important informal role in the origination of tax legislation. *See, e.g.*, the Senate capital gains reform proposal described *supra* in the text accompanying note 3.

234. U.S. CONST. art. I, § 1 (vesting of legislative authority in the House and Senate); *id.* art. I, § 7, cl. 2 (presentment procedures).

235. *See supra* notes 164–66 and accompanying text.

236. *See* STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15–17 (1st Sess. 2013), http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf [https://perma.cc/8BT8-4QCP].

237. For examples of this dynamic and its consequences for the structure of tax reform, see *infra* notes 247–50 and accompanying text.

Alternatively, the Senate can pass legislation with only a simple majority through the reconciliation process.[238] This process begins with an underlying budget resolution that specifies the amount by which the subsequent tax legislation can increase federal outlays or reduce revenues over a designated budget window.[239] The "Byrd Rule," which was adopted in 1985, imposes additional restrictions on tax legislation enacted through the reconciliation process,[240] and prevents Congress from enacting legislation that is "extraneous" to the budget resolution.[241] For these purposes, "extraneous legislation" includes provisions that have outlay or revenue effects that are "incidental" to their nonbudgetary effects, or that increase net outlays or decrease net revenues during a fiscal year outside the budget resolution window.[242]

These structural rules constrain the outcomes of tax legislation in important ways. If Congress enacts tax reform through the standard legislative procedures, it can only do so in a way that can attract a broad enough political coalition to overcome a Senate filibuster. Alternatively, tax legislation passed through the reconciliation process, and with a simple majority in the Senate, must comply with the alternative set of constraints on the scope of the legislation as required by the Byrd Rule.

The historical experience with major tax reform demonstrates how these structural constraints on the legislative process shape the substantive outcomes of tax legislation. Significant tax reforms are invariably heavily contested, negotiated, and subject to intensive lobbying by interest groups.[243] Forging the political coalitions necessary to pass tax reform also necessitates concessions and moderation throughout the process of translating policy preferences into tax law.

Of course, Congress is not only constrained by the legislative process in these ways when it enacts tax laws. There may be nothing particularly unique regarding the tax law in this respect, as compared to other areas of legislation. The modern federal tax system, however, has an immediate effect on the household finances of every taxpayer, and in that respect tax legislation can be particularly salient to voters and their representatives. For this reason, tax legislation is always heavily contested and negotiated, and the outcomes of

238. For an overview of the reconciliation process, see Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS. 99, 102–08 (2018).

239. 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)). This budget window has typically been a ten-year period, although in principle a window of another duration could be adopted. Aprill & Hemel, *supra* note 238, at 103.

240. *See generally* Aprill & Hemel, *supra* note 238.

241. 2 U.S.C. § 644.

242. *Id.* § 644(b)(1).

243. For a discussion of how even relatively small interest groups or coalitions with high private stakes can significantly influence the shape of tax legislation, see generally Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159 (2006).

the legislative process routinely fall short of the original ambitions embedded in reform proposals.

The major pieces of tax reform throughout the past century all evidence how major tax legislation is contested and shaped by compromise, as well as the political risks legislators face when they test the limits of Congress's taxing power. For example, the landmark Tax Reform Act of 1986,[244] which passed with a Senate supermajority,[245] resulted from a heavily negotiated legislative process characterized by compromise, concessions, and coalition building.[246]

These same moderating effects in the legislative process continue to shape the outcome of tax reform even in the current era of partisan tax legislation. In 2017, congressional Republicans scaled back many aspects of their ambitious agenda for tax reform, which had to be enacted through the reconciliation process, to win sufficient votes for their package of tax cuts.[247] These concessions included the abandonment of proposals for a larger corporate tax cut and more ambitious reforms to the taxation of corporate income,[248] in favor of a smaller and more conventional corporate tax cut.[249] Furthermore, to comply with the budget restrictions in the legislative process, Congress ultimately introduced many of the reforms as temporary legislation that would be subject to reexamination in subsequent years.[250]

The Democrats similarly compromised on their ambitions for tax reform after gaining control of Congress and the White House in 2020. In 2021, the Biden administration and Congress introduced the Build Back Better Act, an ambitious package of tax and spending reforms which included, among other provisions, 5 percent and 8 percent surtaxes on the highest income earners.[251] The legislation was substantially scaled back by the time it passed the House,

244. Pub. L. No. 99-514, 100 Stat. 2085.

245. *See* Anne Swardson, *Senate Approves Tax Revision, 74-23*, WASH. POST, Sept. 28, 1986, at A1.

246. For an account of the intensively negotiated bipartisan process that resulted in the Tax Reform Act of 1986, see JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987).

247. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

248. For example, then-presidential candidate Donald J. Trump originally pushed for a 15 percent corporate tax rate, which eventually was increased to 21 percent in the final legislation, while congressional Republicans had originally proposed a plan to implement an ambitious and more complex corporate tax reform that would have economic effects similar to a tax on consumption. *See* DONALD J. TRUMP, TAX REFORM THAT WILL MAKE AMERICA GREAT AGAIN (2015), https://www.wsj.com/public/resources/documents/trump-tax-reform2015plan.pdf [https://perma.cc/4JCE-2PRQ]; GOP, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 24–29 (2016), https://www.novoco.com/sites/default/files/atoms/files/ryan_a_better_way_policy_paper_062416.pdf [https://perma.cc/VY5L-TMKY].

249. Pub. L. No. 115-97, § 13001, 131 Stat. 2054, 2096–2100 (2017) (codified at I.R.C § 11).

250. For example, the § 199A deduction for pass-through businesses was enacted on a temporary basis and only through the 2025 taxable year. I.R.C. § 199A(i).

251. *See* Press Release, The White House, President Biden Announces the Build Back Better Framework (Oct. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/ [https://perma.cc/QK2Y-DBZW]; Build Back Better Act, H.R. 5376, 117th Cong. (2021).

after its total cost was slashed by more than a third, from $3.5 trillion to $2.2 trillion.[252] Even this compromise reform failed to garner enough votes in the Senate to reach even a simple majority threshold.[253]

The following year, the Biden administration introduced its ambitious proposal for a "Billionaire Minimum Income Tax," which would impose a minimum rate of tax with respect to a broader base of high-end taxpayers' realized and unrealized income.[254] The proposal was subsequently introduced in Congress[255] but similarly failed to garner sufficient political support. Congress eventually enacted the much more modest Inflation Reduction Act of 2022,[256] which did not include these more ambitious tax and spending reforms that were originally proposed.[257]

Even when Congress does enact significant changes to the tax system, tax rules perceived by the public to be unduly burdensome can be subject to taxpayer revolts and subsequent reforms reigning in perceived oversteps. For example, in the late 1970s, a widespread view that the progressive income tax rates imposed excessive burdens on earners—as they were not adjusted for the inflation at the time—influenced one of the largest tax cuts in history in 1981.[258] Low-tax advocates can also stoke opposition among the public to high taxes. For example, in the late 1970s, business interests in California led a popular revolt against high property taxes resulting in Proposition 13, an amendment to the state Constitution which, among other measures, severely restricted property tax rates in the state.[259]

The central insight from *McCulloch v. Maryland*—that the structure of government itself provides essential security against abuses of the taxing power—remains true two centuries later. Any understanding of how the Constitution limits the taxing power must necessarily begin with the

252. *See* Emily Cochrane & Jonathan Weisman, *House Passes Biden's Social Safety Net Bill*, N.Y. TIMES, Nov. 20, 2021, at A1.

253. *See* Coral Davenport & Lisa Friedman, *"Build Back Better" Hit a Wall, but Climate Action Could Move Forward*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/climate/build-back-better-climate-change.html [https://perma.cc/MS6R-VQSS].

254. *See* DEPT. OF TREASURY, *supra* note 3, at 34–37.

255. H.R. 8558, 117th Cong. § 2 (2022) (proposed for codification at I.R.C. §§ 1481–1482).

256. Pub. L. No. 117-169, 136 Stat. 1818 (codified as amended in scattered titles and sections of the U.S. Code).

257. *Id.*

258. Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, 95 Stat. 172. For a comparison of ERTA's revenue effects to that of other tax legislation, see Jerry Tempalski, *Revenue Effects of Major Tax Bills* 8 (U.S. Dep't of the Treasury, Off. of Tax Analysis, Working Paper No. 81, 2006).

259. CAL. PROPOSITION 13: TAX LIMITATION—INITIATIVE CONSTITUTIONAL AMENDMENT (1978), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1849&context=ca_ballot_props [https://perma.cc/3LBS-PXBW] (embodied as amended in CAL. CONST. art XIII A). In particular, these measures limited the maximum tax rates, the basis for determining the assessed values, and the annual increases in assessed value. *See* CAL. CONST. art. XIII A, §§ 1(a), 2(a)–(b). For a discussion of Proposition 13 as a case study in political revolts against the perceptions of high taxation, see generally ARTHUR O'SULLIVAN, TERRI A. SEXTON & STEVEN M. SHEFFRIN, PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 (1995).

legislative process and its profound effect in tempering exercises of this power.

In her concurring opinion in *Moore v. United States*, Justice Jackson affirmed Justice Harlan's view and emphasized that the legislative process itself should operate as the most important limitation to the taxing power: "I have no doubt that future Congresses will pass . . . taxes that strike some as demanding too much, others as asking too little . . . . '[T]he remedy for such abuses is to be found at the ballot-box.'"[260] As the following sections describe, beyond this fundamental constraint of the legislative process, an array of additional constitutional provisions and doctrines also operate as further limitations on the taxing power, in accordance with a set of substantive constitutional values.

B. Substantive Constitutional Safeguards

The requirements of the legislative process operate as a fundamental constraint on the taxing power. As this section describes, a set of constitutional provisions and doctrines also safeguard against abuses of the taxing power in accordance with substantive constitutional values. These safeguards operate as critical limitations to the taxing power even as courts have used these constraints with caution so they do not impair Congress's authority to implement economic policy through tax legislation.

Some of these safeguards limit the scope of the legislation that Congress can characterize as exercises of its taxing power. Others look to the substance—rather than the form—of the tax to assess both the degree of taxation and the characteristics of taxpayers and their assets or attributes subject to tax.

1. Taxation and Regulation

Courts have limited Congress's taxing power by distinguishing between taxes imposed pursuant to Article I, Section 8 and legislation designed to regulate or punish pursuant to Congress's other enumerated powers, which may be subject to separate constitutional constraints. This distinction ensures that Congress cannot exceed its other constitutional powers simply by characterizing legislation as exercises of the taxing power.

Exercises of Congress's other enumerated powers are subject to limitations that do not apply to tax legislation. For example, although Congress has broad authority to enact legislation through the Commerce Clause,[261] the Court has emphasized in recent years that even this enumerated power also has limitations. Most notably, the Court has held that Congress cannot enact

260. 144 S. Ct. 1680, 1699 (2024) (Jackson, J., concurring) (quoting Pollock II, 158 U.S. 601, 680 (1895) (Harlan, J., dissenting) (alteration in original)).

261. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

legislation through the Commerce Clause that does not have "a substantial effect on interstate commerce."[262]

The courts have not adopted a clear bright line in distinguishing between taxes and regulation because a narrow definition of taxes could impair Congress's broad authority to implement economic policy through the tax system. Indeed, the tax system contains a multitude of rules and provisions that can serve different objectives of fiscal policy. Some rules, such as the progressive rate schedule on income, primarily serve the function of collecting tax revenues in accordance with distributional objectives.[263] Other rules, sometimes characterized as "tax expenditures," seek to replicate the effect of direct government outlays through tax subsidies that are designed to benefit certain taxpayers or to incentivize taxpayer behavior.[264] Conversely, some tax "penalties" serve a primary function of discouraging certain behaviors through adverse tax consequences.[265]

The overlapping functions of many tax rules further complicate the task of distinguishing between taxation and regulation. A single tax rule or provision can serve multiple functions at the same time in collecting revenue or in replicating the effects of explicit government outlays through tax benefits, in advancing distributional objectives, and in encouraging or discouraging certain taxpayer behaviors in accordance with policy goals and initiatives. As just one example, 26 U.S.C. § 30D, also known as the "clean vehicle credit," has a primary function of incentivizing green energy investments,[266] but it also phases out the benefit for higher-income taxpayers,[267] which changes the distributive effects of the provision.

Despite these challenges, the Supreme Court has consequently affirmed a basic distinction between exercises of the taxing power and exercises of Congress's other enumerated powers, and the principle that Congress cannot always use its taxing powers to sidestep limitations on other forms of legislation. Furthermore, the Court has maintained this distinction while recognizing the broad range of functions and policy objectives advanced through the tax law.

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262. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating a federal statute that prohibited possessing a gun near a school as having exceeded Congress's legislative authority under the Commerce Clause).

263. *See* I.R.C. § 1(a)–(d), (j) (progressive rate schedule on taxable income). For a discussion of the distinction between different functions of tax rules and fiscal policy, see RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY 6–27 (1959) and Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 188 (2004).

264. For a general description of the tax expenditure concept and how they can operate as a substitute for direct fiscal outlays, see STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 1–6, 99–107 (1985).

265. For example, Professor Daniel N. Shaviro gives the example of a hypothetical pollution tax, which is not designed for the purposes of raising revenue or affecting the distribution of resources per se, but that is rather "designed to give polluters the right incentives with regard to pollution abatement." Shaviro, *supra* note 263, at 207.

266. *See* JOINT COMM. ON TAX'N, JCX-38-21, DESCRIPTION OF SUBTITLE G—GREEN ENERGY: BUDGET RECONCILIATION LEGISLATIVE RECOMMENDATIONS 41 (2021).

267. I.R.C. § 30D(f)(10).

In distinguishing between the exercises of the taxing power and regulatory power, the Court has focused on the essentially noncompulsory nature of the taxing power. Through general regulation, Congress may bring the force of the state to compel individuals to engage in or to abstain from particular behaviors. By contrast, in the case of the taxing power, Congress can only provide that, if a taxpayer chooses to engage in certain behaviors, those behaviors may result in tax liabilities. For example, although an individual may choose how to earn income, and how much to earn, the consequences of these choices may affect their resulting income tax liabilities.

In the formative 1922 case *Bailey v. Drexel Furniture*,[268] the Court considered whether a 1919 law that heavily taxed businesses that employed child laborers[269] could be upheld as an exercise of the taxing power. In this case, the law could be upheld if it were an exercise of the taxing power since it would otherwise be subject to challenge as an infringement on state regulatory powers under the doctrine at the time.[270] In striking down the law, the Court held that "the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable."[271]

In reaching this conclusion, the Court acknowledged that a tax, in addition to raising revenue, may have the effect of incentivizing or disincentivizing certain behavior, but it cannot have the effect of simply punishment or coercion. Furthermore, the Court suggested that distinguishing between the two objectives may be a matter of degree and the fundamental nature of the tax:

> Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous . . . . But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.[272]

Subsequent cases, on the other hand, have upheld exercises of the taxing power, even when Congress clearly intended to regulate, if not actually to suppress, certain behaviors through the tax. In a 1937 decision, *Sonzinsky v. United States*,[273] the Court upheld a tax and registration requirement for

268. 259 U.S. 20 (1922). In the preceding case of *Hammer v. Dagenhart*, the Court had struck down a similar law attempting to regulate the employment of child labor which was not structured as an exercise of the taxing power. 247 U.S. 251 (1918).

269. The Child Labor Tax Law, Revenue Act of 1919, Pub. L. No. 65-254, 40 Stat. 1057, *invalidated by* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

270. *Drexel Furniture*, 259 U.S. at 36.

271. *Id.* at 37. On the same day, the Court also issued an opinion in a second case on the distinction between taxation and regulation, which similarly struck down a tax on grain futures designed to regulate the trade of these instruments. *See* Hill v. Wallace, 259 U.S. 44 (1922).

272. *Drexel Furniture*, 259 U.S. at 38.

273. 300 U.S. 506 (1937).

dealers in firearms, irrespective of Congress's motives for the tax.[274] In 1953, the Court similarly upheld a tax and registration requirement for persons facilitating illegal gambling as exercise of the taxing powers, notwithstanding a clear legislative intent "to curtail and hinder, as well as tax" the gambling activities, in *United States v. Kahriger*.[275] The *Kahriger* Court suggested that even a tax that "falls with crushing effect on businesses deemed unessential or inimical to the public welfare" may still be upheld as an exercise of the taxing power, so long as it has the concurrent effect of producing tax revenue.[276]

Notwithstanding these holdings that suggest broad congressional authority to implement economic policy through taxation, the modern Court has reaffirmed this core distinction between taxation and compulsion as an essential constraint on the taxing power. Returning to the 2012 case *NFIB v. Sebelius*, the Court considered whether the statutory "individual mandate" that penalized individuals who did not buy health insurance could be upheld as an exercise of the taxing power.[277] In upholding the mandate as a tax, Chief Justice Roberts observed that "although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior."[278] In the case of regulatory legislation enacted through the Commerce Clause, Chief Justice Roberts explained, "[o]nce we recognize that Congress may regulate a particular decision under the Commerce Clause . . . Congress may simply command individuals to do as it directs."[279]

Chief Justice Roberts noted that the taxing power, in contrast, is fundamentally more limited:

> Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more . . . . We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.[280]

These cases suggest several factors courts may consider in distinguishing between exercises of Congress's taxing power and general regulatory powers. These factors include the nature of the burdened activity, the degree of the economic burden, and the purpose of the legislation. Furthermore, as evidenced in both *Drexel Furniture* and *NFIB*, this analysis does not depend

274. *Id.* at 513–14 (reasoning that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts").
275. 345 U.S. 22, 27 (1953).
276. *Id.* at 28.
277. NFIB v. Sebelius, 567 U.S. 519 (2012).
278. *Id.* at 573.
279. *Id.*
280. *Id.* at 574.

on whether the provision is formally labeled as a tax or not.[281] Rather, these cases seek to balance Congress's powers to enact economic policy through the tax law with a limitation that it cannot use these powers to solely and excessively coerce and punish certain behavior, nor simply to avoid other constitutional restrictions on its other enumerated powers.

2. Taxation and Takings

The Constitution also limits Congress's taxing power through the distinction between taxes and takings. The Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation."[282] This provision recognizes that in some cases the government must make exactions for public purposes with respect to specific property and individuals, but in these cases, it must compensate the individual subject to the exaction. In a 1960 opinion, the Court reasoned that this provision "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[283]

In principle, distinguishing between a tax and a taking may seem relatively clear and intuitive. They may be distinguished based on the nature of the exaction, the extent of the affected individuals, and the public use of the exaction. In the cases of the taxing power, the government lays a fiscal obligation upon the taxpayer and can use the revenue collected for general public purposes. This principle is explicit in the notion that the Constitution grants Congress a taxing power in order to "pay the Debts and provide for the common Defence and general Welfare of the United States."[284] Unlike in the case of a taking, any "compensation" to a taxpayer in exchange for the tax revenues collected will be made indirectly in the form of the benefits the taxpayer receives when the government spends the tax revenues collected.[285]

Further, a basic objective of the progressive fiscal system is to advance distributional objectives through both the pattern of taxes and government spending.[286] Congress may lay taxes according to one distributional pattern, and then spend the resulting tax revenue according to another pattern, thereby

281. *See id.* at 564 (reasoning that the label of the provision "does not determine whether the payment may be viewed as an exercise of Congress's taxing power" and citing *Drexel Furniture* for this proposition).

282. U.S. CONST. amend. V.

283. Armstrong v. United States, 364 U.S. 40, 49 (1960).

284. U.S. CONST. art. I, § 8, cl. 1.

285. For this reason, comprehensive distributional studies of fiscal policy account for the distributional effects from both taxes as well as the government spending that they fund. *See* Ari Glogower, *A Basic Needs Baseline for Distributional Analysis*, 48 BYU L. REV. 1697, 1716–20 (2023).

286. For discussion of this core distributive function of progressive taxation and fiscal policy, see Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471, 495–98 (2022).

adjusting the overall distribution of economic resources.[287] In the case of a taking, however, the basic premise of the "just compensation" requirement is that the taxpayer must be made whole after the exaction, which ensures that no direct redistribution occurs as a result of the taking and corresponding compensation.[288]

Finally, taxes are laid generally on the public, rather than on specific individuals, and are typically payable only in money.[289] A taking, in contrast, is exacted on specific individuals and may take the form of an exaction in-kind of property owned by the taxpayer or other specific burdens imposed on the taxpayer as the result of government actions.[290]

Notwithstanding these basic distinctions, courts have struggled to define a boundary between exercises of the taxing power and takings.[291] In drawing this distinction, courts have looked to both the extent of the individuals subject to the exaction, as well as the form that the exaction takes.

Professor Eric A. Kades argues that the "classical grounds to distinguish takings from taxation" is an inquiry into the extent of the individuals subject to the exaction.[292] Whereas "[t]axes fall on a broad swath of the community . . . takings are burdens concentrated on one or a few citizens owning assets needed for some public project."[293] Professor Kades argues consequently that taxation and takings may be distinguished under this classical view, which necessitates examining the generality or specificity of both the burdens and the benefits resulting from the exaction.[294]

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287. *See* Glogower, *supra* note 285, at 1717–18 (describing how "[a]ccounting for both taxes and government spending can change assessments of the overall progressivity of government policy").

288. *See, e.g.*, *Armstrong*, 364 U.S. at 49 (reasoning that the compensation requirement for takings prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). For a more nuanced argument as to when compensation should be provided when a government infringes upon private property rights, see Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 163–64 (1971) (summarizing a "traditional view" that compensation is due upon any formal violation of property rights, and proposing an alternative theory that would only require compensation when "an owner is being prohibited from making a use of his land that has no conflict-creating spillover effects").

289. Although federal tax liabilities are remitted in U.S. dollars, scholars have evaluated the possible advantages of allowing the payment of tax revenues in the form of in-kind goods and services. *See generally* Jeremy Bearer-Friend, *Tax Without Cash*, 106 MINN. L. REV. 953 (2021).

290. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 172–74 (1995) (describing the equivalencies between property takings and regulatory takings).

291. *See generally* Kades, *supra* note 44.

292. *Id.* at 202–03.

293. *Id.* at 202; *see also id.* ("Taxation operates upon a community or upon a class of persons in a community . . . . The exercise of the right of eminent domain operates upon an individual, and without regard to the amount, or value exacted from any other individual, or class of individuals." (citing Griffin v. Mayor of Brooklyn, 4 N.Y. 419, 420 (1851))).

294. *Id.* at 203 ("Taxation, then, couples burdens on a broad swath of the population with benefits from the use of tax revenues sprinkled over a similarly large portion of society. Takings, on the other hand, burden one or a relatively narrow subset of property owners for projects with much wider social benefits.").

A 2013 case decided by the Supreme Court, *Koontz v. St. Johns River Water Management District*[295] illustrates these basic considerations in distinguishing between taxes and takings.[296] In *Koontz*, a divided Court considered the constitutionality of monetary exactions designed to mitigate the loss of wetlands in exchange for the grant of land-use development permits.[297] The 5–4 majority held that in this case the conditions still constituted a regulatory taking, which entitled the petitioner to just compensation, on the grounds that the monetary exactions burdened "the ownership of a specific parcel of land."[298]

The majority in *Koontz* conceded, that "teasing out the difference between taxes and takings is more difficult in theory than in practice,"[299] noting that it has "found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax."[300] The majority ultimately affirmed "this Court's long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain."[301] In this case, the Court ultimately relied on the fact that the governing authority did not claim that the exactions were in the form of a tax and that if the exaction had been an exercise of the taxing power, then the action would have been subject to additional restrictions under applicable state law.[302] Ultimately, the *Koontz* majority declined to articulate a clear distinction between a taking and an exercise of the taxing power. In dissent, Justice Kagan advocated for a clearer bright line distinction and asserted that "the imposition of an order to pay money" should be distinguished from a taking, as the latter only applies to "the appropriation of a specific property interest."[303]

How can courts distinguish between taxes and takings, and how might this distinction operate as a limit to Congress's taxing powers? Whereas Professor Kades observes that "[n]o one . . . has offered a coherent theory of the relationship between taxes and takings,"[304] Professr Eduardo M.

295. 570 U.S. 595 (2013).

296. In this case, the Court also affirmed that the Takings Clause also applies in the land-use permitting context, even if no property is actually taken by the government. *Id.* at 606–09.

297. *See id.* at 599–602.

298. *Id.* at 613; *see also id.* at 614 (noting that because of "the direct link between the government's demand and a specific parcel of real property . . . this case implicates the central concern . . . the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue" (footnote omitted)).

299. *Id.* at 616.

300. *Id.* at 615.

301. *Id.* at 616.

302. *Id.* at 616–17.

303. *Id.* at 623 (Kagan, J., dissenting) (citing E. Enters. v. Apfel, 524 U.S. 498 (1998)); *see also id.* ("The key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking requiring just compensation?").

304. Kades, *supra* note 44, at 190. Professor Kades proposes that taxes may be distinguished from takings through what he terms the "Continuous Burden Principle,"

Peñalver argues that the current understandings of the Takings Clause are too broad to be reconciled with the taxing power and that the former should be narrowed to not require compensation for "any regulation that can easily be translated into a permissible tax."[305]

Notwithstanding these ambiguities in the current doctrine, a few principles emerge from the case law and academic literature. Most importantly, a taking implies a greater degree of particularity than a tax, along multiple dimensions. First, the archetypical scenario of a taking is an exaction from a particular individual, whereas a tax affects a broad group of taxpayers in accordance with common characteristics.[306] Second, an exaction is more likely to be characterized as a taking when it applies to a particular property, or, as in *Koontz*, the monetary exaction is made with respect to a particular property.[307] Third, an exaction is more likely to be characterized as a taking when it is designated for a particular public purpose or use, in contrast to taxes which are in the paradigmatic case laid for the broader purpose of providing for the "general welfare" of the public as a group.[308]

3. Equal Protection

The Constitution also constrains Congress's taxing power through the Fourteenth Amendment's Equal Protection Clause, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[309] In general, equal protection requires that laws must treat individuals the same unless there is a sufficient justification for differential treatment.[310]

Of course, the law routinely treats individuals differently depending on their circumstances. Legislators regularly enact laws that do so as part of their basic legislative function in the pursuance of legitimate policy objectives. As one example, an occupational licensing requirement will necessarily impose different legal consequences for practitioners in a profession who are not licensed.[311]

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whereby "there are no large jumps—discontinuities, in an imprecise sense—between the burden imposed on any taxpayer and the next-most-burdened taxpayer." *Id.* at 190–91.

305. Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2182 (2004); *see also id.* at 2192, 2241–42.

306. *See supra* notes 292–94 and accompanying text.

307. *See supra* note 298 and accompanying text.

308. *Cf.* U.S. CONST. art. I, § 8, cl. 1 (defining broadly the purposes for which federal revenues may be collected pursuant to Congress's federal taxing power).

309. *Id.* amend. XIV, § 1. The Court has held that this equal protection restriction also extends to the federal government by operation of the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

310. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–63 (2011) (reviewing the modern history of equal protection jurisprudence). In principle the uniformity requirement for indirect taxes in Article I, Section 8 could also provide for some of the same limitations on tax law governed by the Equal Protection Clauses, but this restriction has only been held to require a modicum of geographic uniformity in the allocation of tax burdens. *See supra* notes 61–62 and accompanying text.

311. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (upholding state licensing requirements that restricted the rights of unlicensed persons to practice as optometrists or

For this reason, the Supreme Court has held that, as a default, laws will only be subject to a standard of "rational basis" review when assessing their constitutionality under the Equal Protection Clause. This standard requires the government to have a legitimate state purpose in enacting the law as justification for any inequality the law prescribes.[312] The Court has held that certain laws are subject to a heightened standard of "strict scrutiny" if they affect fundamental rights or discriminate on the basis of "suspect classifications."[313] In general, the strict scrutiny standard requires that a law be "narrowly tailored" to further a "compelling state interest."[314] Finally, some laws may be subject to a standard of "intermediate" or "heightened" scrutiny, such as those providing for a classification based on gender or sex.[315]

Equal protection is a central constitutional value, and these legal standards for scrutiny of legislation under this requirement also operate to constrain the taxing power as well. However, the Court has declined to impose equal protection requirements in ways that would impair Congress's authority to enact economic policy through the tax law. Specifically, and importantly, the Court has largely declined to identify socioeconomic status as a protected class warranting heightened scrutiny under the Equal Protection Clause.[316] As a result, tax laws that treat taxpayers differently based on their economic status—such as the progressive tax structure which imposes proportionally higher tax burdens on higher-income taxpayers—would only be subject to the rational basis standard of equal protection review.[317] For example, in its 1938 decision in *Welch v. Henry*,[318] the Court held that a tax rule that

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ophthalmologists). For discussion, see also Joshua D. Blank & Ari Glogower, *When Should Means Matter?: The Case of Tax Compliance*, 42 VA. TAX. REV. 241, 249–50 (2022); Yoshino, *supra* note 310, at 759–60.

312. Yoshino, *supra* note 310, at 755–56.

313. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1281–83 (2007) (summarizing judicial applications of the strict scrutiny test in the equal protection context). This strict scrutiny standard originated in the famous "footnote four" in *United States v. Carolene Products Co.*, which suggested that certain forms of legislation may be subjected to "more exacting judicial scrutiny" under the Equal Protection Clause, including in cases of "prejudice against discrete and insular minorities." 304 U.S. 144, 152 n.4 (1938).

314. *See* Fallon, *supra* note 313, at 1315–34 (summarizing the elements of a strict scrutiny analysis).

315. Under an intermediate level of scrutiny, the law must generally serve an "important" government interest through means that are "substantially related" to that interest. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

316. *See* Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 112 (2009) (observing that the courts have only accounted for "socioeconomic rights tangentially" in equal protection analysis, and in ways that have been "unsatisfying in terms of either centering class in the judicial analysis or creating a humane and robust constitutional jurisprudence for socioeconomic disparity").

317. *See* Blank & Glogower, *supra* note 311, at 262 (arguing that only a rational basis standard would be applied to tax compliance rules that vary depending on a taxpayer's economic circumstances).

318. 305 U.S. 134 (1938).

discriminates among forms of income that a taxpayer earned would only be invalidated for violating equal protection if it evidenced "hostile or oppressive discrimination" against certain taxpayers.[319]

Despite this posture of judicial restraint in the domain of economic legislation, the Equal Protection Clause still operates as a meaningful constraint on the taxing power. Most importantly, it requires strict or heightened scrutiny for any tax rules that discriminate on the basis of suspect classifications or that deprive individuals of fundamental rights.[320] This rule has been in place for more than a century: in its 1890 opinion in the case *Bell's Gap Railroad Co. v. Pennsylvania*,[321] the Court held that the Equal Protection Clause would prohibit taxes reflecting "clear and hostile discriminations against particular persons and classes."[322]

Furthermore, just because general tax legislation is only subject to the lower standard of rational basis review, this standard does not mean that it cannot be reviewed at all. Indeed, general tax legislation could, in principle, be invalidated if it oversteps these limits. For example, Professor Reuven S. Avi-Yonah has argued that some tax rules may be subject to scrutiny even under a rational basis standard, such as the exclusion for employer-provided insurance.[323] Even if a rule like this is likely to pass muster under a rational basis standard,[324] this requirement could still preclude Congress from enacting laws that violated the equal protection requirements with no plausible policy justification.

4. Due Process

The Due Process Clause of the Fifth Amendment, which provides that no person "be deprived of life, liberty, or property, without due process of law,"[325] also operates to constrain Congress's taxing power. This clause is

319. *Id.* at 146. For discussion of this holding in the context of retroactive tax legislation, see Gunning, *supra* note 48, at 297–98.

320. For an argument that Congress should follow equal protection principles when designing certain types of taxes, see Avi-Yonah & Edrey, *supra* note 48, at 9 (arguing that Congress should comply with equal protection principles when implementing what they term as "regulatory taxes").

321. 134 U.S. 232 (1890).

322. *Id.* at 237; *see also* Flint v. Stone Tracy Co., 220 U.S. 107, 161–62 (1911) (upholding a corporate income tax against an equal protection challenge even though nonincorporated businesses were not similarly subject to the tax).

323. Avi-Yonah, *supra* note 48, at 82–83 (arguing that "[t]here is no rational justification for U.S. tax law's distinction between employer coverage and independently purchased coverage, other than history and political popularity"); *see also id.* at 68 (observing that "the Court frequently invalidates *state* tax laws on equal protection grounds"). For the rules governing the exclusion for employer-provided insurance, see I.R.C. § 106.

324. For possible justifications for the employer-provided healthcare exclusion that could be used to uphold it under a rational basis standard, see BOB LYKE, CONG. RSCH. SERV., RL34767, THE TAX EXCLUSION FOR EMPLOYER-PROVIDED HEALTH INSURANCE: POLICY ISSUES REGARDING THE REPEAL DEBATE 9–10 (2008) (arguing that the provision originally served the purpose of reducing uncertainty in the tax law and increasing the total amount of health insurance coverage).

325. U.S. CONST. amend. V. This requirement also applies to the states through the inclusion of the same language in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

commonly understood to safeguard both procedural protections when the government enforces the law[326] and substantive rights that the government cannot unreasonably abridge.[327]

The requirements of procedural due process constrain how governments may administer the tax system and collect taxes that are owed.[328] Because this Article focuses on the constitutional limits in the design of tax rules by Congress, rather than on their implementation by government actors, it does not consider in greater detail these additional procedural constraints on the taxing power pursuant to the Due Process Clause.

In the 1905 case of *Lochner v. New York*,[329] the Supreme Court held that a law that interfered with the rights of employers and employees to enter into a private contract was unconstitutional under the Due Process Clause.[330] The thirty-year period that followed is known as the Court's "*Lochner* era," during which the Court invalidated laws abridging rights to contract on due process grounds.[331] Since the end of the *Lochner* era,[332] however, the Court has largely declined to find economic rights as an element of substantive due process.[333]

Even during the *Lochner* era, however, the Court held that taxpayers cannot challenge Congress's basic right to lay taxes according to a progressive schedule on substantive due process grounds. In the 1916 case of *Brushaber v. Union Pacific Railroad Co.*,[334] the taxpayer challenged the Income Tax of 1913 on the grounds that its exemption levels for low incomes and its progressive rate schedule violated the Due Process Clause.[335] In holding that Due Process did not negate Congress's essential taxing power, the *Brushaber* Court reasoned that "such clause is not a limitation upon the

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Because this Article focuses on constraints to the federal taxing power, it only addresses due process as it applies to the federal government.

326. *See generally* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871 (2000).

327. *See generally* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999).

328. *See generally, e.g.*, Richard M. Lipton, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 U. CHI. L. REV. 594 (1977) (summarizing the procedural due process requirements for predeprivation and postdeprivation hearings in the context of state tax collections).

329. 198 U.S. 45 (1905).

330. *See generally id.* (striking down a state law limiting the number of hours bakers could work on substantive due process grounds).

331. *See, e.g.*, Adkins v. Child.'s Hosp., 261 U.S. 525 (1923) (finding that a federal minimum wage law was an unconstitutional violation of due process). For a study of *Lochner*'s influence and legacy, see David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005).

332. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage law and marking the end of the *Lochner* era).

333. *See* Chemerinsky, *supra* note 327, at 1503–05 (describing how the Court has "repudiated economic substantive due process" through a series of cases beginning in the mid-1930s); *id.* at 1503 n.9 (citing *West Coast Hotel Co.*, 300 U.S. 379, as a paradigmatic case that "emphatically rejected *Lochner*'s principles").

334. 240 U.S. 1 (1916).

335. *Id.* at 21.

taxing power conferred upon Congress . . . the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."[336] This reasoning illustrates why courts have declined to strike down tax legislation on substantive due process grounds: a broad application of this principle could subvert the very premise of Congress's taxing power.

Professor Bittker consequently argued that *Brushaber* "virtually deprived [the Due Process Clause] of any jurisdiction over the federal taxing power."[337] The *Brushaber* case did not hold, however, that the taxing power could never be subject to substantive due process claims. Even as it affirmed Congress's basic power to shape fiscal policy through the design of the tax system, the *Brushaber* Court left open the possibility that due process could still prevent Congress from imposing a tax "so arbitrary . . . that it was not the exertion of taxation but a confiscation of property" or "so wanting in basis for classification as to produce such a gross and patent inequality."[338]

Throughout the century following *Brushaber*, the Court has affirmed that substantive due process still operates to limit Congress in the design of the tax rules. For one application of this principle, the Court has considered the limits of Congress's ability to assign taxable attributes to taxpayers. For example, in the 1933 case of *Burnet v. Wells*,[339] the Court considered the constitutionality of a law that attributed the income of an irrevocable grantor trust to the taxpayer and settlor of the trust.[340] Justice Benjamin N. Cardozo upheld Congress's ability to attribute the trust's income to the settlor in this case but suggested that a tax rule could violate the Due Process Clause if "in attributing to [the taxpayer] the ownership of the income of the trusts . . . the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit."[341] In effect, the *Burnet* Court applied a rational basis standard of review for tax rules under a substantive due process analysis, under which Congress would be prohibited from enacting tax laws that were arbitrary or that did not relate the basis for taxation in some manner to the activities or attributes of the taxpayer.

The Court has applied substantive due process principles most consistently when evaluating the constitutionality of retroactive tax legislation that imposes tax burdens with respect to taxpayers' previous activities.[342] In general, retroactive legislation is evaluated under a rational basis standard and must be "supported by a legitimate legislative purpose furthered by rational means."[343] In the tax context, Courts have generally upheld tax laws

336. *Id.* at 24.
337. Bittker, *supra* note 48, at 11.
338. *Brushaber*, 240 U.S. at 24–25.
339. 289 U.S. 670 (1933).
340. *Id.*
341. *Id.* at 679.
342. For discussion of how courts have applied substantive due process principles to assess retroactive tax legislation, see generally Gunning, *supra* note 48.
343. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984).

that apply to past activities in recently completed taxable years. For example, in the 1994 case of *United States v. Carlton*,[344] the Court upheld a 1987 amendment to the tax code that disallowed a deduction with respect to actions the taxpayer, the executor of an estate, had taken in 1986.[345] In upholding the law, the Court reasoned that both "Congress'[s] purpose in enacting the amendment was neither illegitimate nor arbitrary" and that the law only applied a "modest period of retroactivity."[346]

Although the Court has not invalidated a federal law on these grounds in the modern era, a number of state appellate courts have struck down state tax laws with retroactivity provisions that imposed taxes with respect to taxpayer activities more than one year in the past.[347]

Furthermore, the Court suggested in its 2024 *Moore v. United States* opinion that tax legislation may still be subject to scrutiny under the Due Process Clause.[348] At the appellate stage, the taxpayers initially argued before the U.S. Court of Appeals for the Ninth Circuit that the MRT also violated due process because it could tax shareholders with respect to a corporation's income earned before a taxpayer acquired their interest in the corporation.[349] The Ninth Circuit ultimately held that the MRT did not violate due process on these grounds[350] and the taxpayers did not raise the question in their petition to the Supreme Court.[351] However, the question resurfaced at oral argument before the Supreme Court, where the justices affirmed the potential role of the due process clause as a possible restraint on the taxing power, even if the MRT was unlikely to be invalidated on these grounds.[352]

The Court's opinion in *Moore* upholding the MRT affirmed that "the Due Process Clause proscribes arbitrary attribution" and suggested that it could restrict retroactive legislation on other facts.[353] The Court observed,

344. 512 U.S. 26 (1994).

345. The amendment to I.R.C. § 2057, as applicable at the time, restricted the circumstances when an estate could claim a deduction with respect to the sale of certain securities to an "employee stock ownership plan." *Id.* at 28.

346. *Id.* at 32.

347. For discussion, see Gunning, *supra* note 48, at 318–22 (citing Rivers v. State, 490 S.E.2d 261 (S.C. 1997); City of Modesto v. Nat'l Med. Inc., 27 Cal. Rptr. 3d 215 (Ct. App. 2005); Johnson Controls, Inc. v. Rudolph, 2006 Ky. App. LEXIS 132 (Ct. App. 2006)).

348. Moore v. United States, 144 S. Ct. 1680, 1697 (2024).

349. Moore v. United States, 36 F.4th 930, 934 (9th Cir. 2022), *aff'd*, 144 S. Ct. 1680 (2024).

350. *Id.* at 938–39 (finding that the MRT satisfied the standard established in *Carlton*).

351. *See* Petition for Writ of Certiorari at 14–15, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800).

352. For example, at oral argument, the justices considered the potential application of substantive due process principles with respect to the MRT's lookback period as well as its effect in attributing income among taxpayers. *See* Transcript of Oral Argument at 46–47, 68, Moore v. United States, 144 S. Ct. 1680 (2024) (No. 22-800).

353. *Moore*, 144 S. Ct. at 1697; *see also id.* at 1708 (Barrett, J., concurring in judgment) (reasoning that an arbitrariness of attribution limit is also "implicit in the Sixteenth Amendment").

however, that petitioners did not present these legal questions in their challenge to the MRT.[354]

C. A Set of Common Principles

These different constraints on the taxing power draw from varied constitutional provisions and doctrines, which developed along separate paths within the case law. In reviewing a variety of possible constitutional restrictions on the taxing power, Professor Bittker characterized the varied limitations as "a grab bag of items that defy attempts to impose a logical sequence."[355]

Despite their unique features and applications in the case law, the constitutional constraints examined in this Article also collectively embed a set of common substantive principles and values. This section synthesizes these varied constitutional limitations to articulate a new understanding of the taxing power. Broadly speaking, these principles look to the legislative process, the identity of the taxpayers, the basis for taxation, and the degree of the tax burden, when determining the limits of Congress's taxing power.

First, the legislative process principle, ensures that any exercises of taxing power are subject to multiple checks, veto points, and opportunities for negotiation and compromise through the legislative process.[356] These basic structural constraints include the requirements of bicameralism and presentment, which invariably shape and temper those legislative reforms that achieve enactment. This principle explains why courts have adopted a posture of substantial deference when Congress enacts economic legislation through the design of the tax laws,[357] and why the legislative process operates as a foundational and overriding constraint on the federal taxing power.

Second, a particularity principle limits how closely tax laws can be tailored to characteristics of individuals or groups of affected taxpayers. This principle can be relevant when evaluating the constitutionality of a tax law under different doctrines and provisions outlined in the previous section. For example, a tax that is narrowly tailored to a particular taxpayer, or their unique characteristics, may be more readily subject to characterization as a taking, rather than an exercise of the taxing power.[358] Likewise, tax laws that provide different treatment for narrowly defined groups of taxpayers could be subject to greater scrutiny under the Equal Protection Clause, either at the levels of rational basis review, intermediate scrutiny, or strict scrutiny, depending on the group subject to the differential tax treatment.[359] Under these standards, the tax laws will only be upheld if they meet the corresponding standards in justifying the differential treatment.

354. *Id.* at 1691 n.4, 1695 n.6 (majority opinion).
355. Bittker, *supra* note 48, at 5.
356. *See supra* Part II.A.1.
357. *See, e.g.*, *supra* notes 316–17, 333–36 and accompanying text.
358. *See supra* notes 293, 306 and accompanying text.
359. *See supra* notes 312–15 and accompanying text.

Third, a subject of tax principle limits Congress's ability to design the basis for taxation by imposing a tax on certain assets or activities of taxpayers. For example, taxes on narrowly defined taxpayer activities could face scrutiny as exercises of the government's general regulatory powers, rather than of the taxing powers.[360] Similarly, exactions tailored to apply to certain assets or economic activities of taxpayers could also face greater scrutiny as potential government takings, rather than as exercises of the taxing power.[361] Furthermore, taxes imposed on specific taxpayer activities or entitlements that implicate fundamental rights could also be subject to strict scrutiny under the Equal Protection Clause,[362] in the same manner as taxes on the basis of group classifications.

Finally, a degree of tax principle limits the overall level of taxation that can be imposed on a chosen tax base. As an example of this principle, a tax on a particular activity could only be recharacterized as a regulatory act rather than an exercise of the taxing power if the tax is imposed at a high enough level to severely burden or effectively prohibit the activity.[363] Similarly, under an equal protection analysis regarding a fundamental right, the evaluation of a tax would depend on its severity and, therefore, the degree to which a taxpayer is subject to a deprivation of the right.[364] Finally, an excessive or onerous level of taxation may be recharacterized as a "confiscation of property" that is subject to a taking analysis, or it may be scrutinized under an expansive understanding of substantive due process.[365]

This discussion does not intend to suggest that the courts should subject tax legislation to excessive scrutiny under these principles nor that the judiciary should depart from its historic posture of deference to economic regulation through tax legislation. To the contrary, courts have long recognized that these provisions and doctrines should not interfere with the ordinary course of tax legislation.

When viewed together, however, these substantive principles can serve as a backstop to the essential process constraints in the enactment of tax legislation, and they can meaningfully prevent abuses of the taxing power in accordance with constitutional values. Furthermore, understanding how these doctrines operate together to constrain the taxing power in accordance

360. *See supra* Part II.A.2.

361. *See supra* note 303 and accompanying text.

362. *See supra* note 313 and accompanying text.

363. *See, e.g.*, *supra* note 272 and accompanying text (describing the standard in *Drexel Furniture*). As described *supra* note 276, the Court suggested in *Kahriger* that even a heavily burdensome tax can be upheld as an exercise of the taxing power. A tax imposing a relatively low burden, however, is nonetheless unlikely to be subject to recharacterization as a regulatory act in the first instance.

364. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25–40 (1973) (holding that local tax financing system that disadvantaged less wealthy students did not violate the Equal Protection Clause because the policy did not result in an "absolute deprivation" of an interest or implicate a fundamental right).

365. As described *supra* note 338 and accompanying text, the *Brushaber* court essentially collapsed the Takings Clause and substantive due process analysis in the case of an excessively burdensome degree of taxation.

with these substantive principles can alleviate concerns that returning to the narrow interpretation of apportionment would not leave Congress with an unfettered taxing power.

D. Evaluating the Alternative Limitations

This section evaluates these substantive limitations as the primary constraints on Congress' taxing power and as an alternative to the broad interpretation of apportionment. It first considers what would change in the doctrine, as well as what would not, if courts embrace this understanding of Congress's constitutional taxing power and its limits. The discussion then considers both the advantages and possible disadvantages of defining Congress's taxing power through this set of substantive limits, rather than through relying on apportionment as the primary limitation to the taxing power. Finally, this section outlines generally the practical consequences of this shift for the structure of the federal tax system.

Courts do not need to fundamentally reinterpret these constitutional doctrines limiting the taxing power, nor expand them to more frequently invalidate tax legislation through more exacting standards of review. These constraints are already embedded in the Constitution and in the case law, and are therefore only in need of a reappraisal, rather than a fundamentally new approach to the taxing power. Whereas these constraints may have been previously perceived as peripheral or secondary constraints on the taxing power,[366] in fact they already operate as significant and sufficient constraints on the taxing power, and can continue to do so as an alternative to the broad interpretation that is grounded in the apportionment requirement.

These limitations on the taxing power are already embedded in the Constitution and the case law, and courts could, in some cases, apply them more assertively under their established standards of review when doing so would be warranted, in connection with a return to the narrow interpretation of apportionment. For example, when evaluating the constitutionality of tax legislation under the Equal Protection and Due Process Clauses, courts can use a more searching inquiry when applying a rational basis standard of review. Similarly, courts may more carefully consider not only taxes that impose excessive burdens on taxpayers, but also those that overstep the distinction between exercises of the taxing power, on the one hand, and takings or other enumerated powers on the other. Any such scrutiny would be moderated, however, by the settled doctrine on the ways in which these provisions and doctrines do not and should not operate to limit the taxing power.[367]

366. *See supra* note 228 and accompanying text.

367. *See, e.g.*, *supra* notes 273–76 and accompanying text (describing limitations on the distinction between taxation and regulation); *supra* notes 316–17 and accompanying text (describing limitations on equal protection scrutiny of tax legislation); *supra* notes 332–38 and accompanying text (describing limitations on substantive due process scrutiny of tax legislation).

These constitutional constraints offer a fundamentally different understanding of the taxing power and imply different basic structural possibilities and limitations to the tax system. First, these substantive constraints do not focus on a formal analysis of the tax base and the labeling of taxes as direct or not, which would categorically allow Congress to impose certain forms of taxes but not others. Rather, these constraints necessitate an inquiry into the nature of the tax, the degree of the tax burden, and its effect on different taxpayers, in light with the common principles outlined in the preceding section.

The broad interpretation of apportionment has resulted in doctrinal inconsistency and uncertainty, which has, in turn, posed unnecessary risks and roadblocks for Congress when structuring tax reform.[368] The broad interpretation operates as a shield for the rich, which prevents Congress from designing tax rules that could effectively tax the wealthiest and highest-earning taxpayers, while, at the same time, allowing for the possible imposition of potentially onerous tax rates on lower- and middle-income earners.[369]

In contrast, limiting the taxing power through the alternative constraints in connection with a return to the narrow interpretation allows Congress to apply the tax law more consistently at different income levels. By lifting the apportionment bar's arbitrary restraint on certain forms of taxation, this approach would enable Congress to structure rules that could more effectively tax capital. Wealthy and high-income taxpayers could not simply restructure their transactions to take advantage of formal limits on the definition of the tax base.[370] At the same time, these alternative substantive constraints could be applied more consistently across all taxpayers, regardless of income or wealth, based on the burdens of the taxes and their effect on certain taxpayer activities and characteristics.

This approach ultimately strikes a different balance between Congress's legislative taxing power and the constitutional constraints on this power. These alternative limitations would preserve Congress's essential role of implementing economic policy through tax legislation, while safeguarding against abuses of this power in accordance with substantive constitutional values.

To be sure, the alternative limitations on the taxing power also pose unsettled questions, along with substantial uncertainty, for both Congress and the courts. For example, when does a tax improperly discriminate against particular individuals or groups of taxpayers? What is the proper relationship between the permissible severity of a tax burden and the nature of the activities or taxpayer characteristics burdened by the tax? For exactly these reasons, courts and scholars have argued that the Court should not be in the business of second guessing the choices Congress makes when it designs tax

368. *See supra* Part II.B.
369. *See supra* Part II.C.
370. *See supra* notes 218–23 and accompanying text.

law through the legislation process and pursuant to its essential role of implementing economic policy.[371]

Answering these questions would also entail difficult line drawing exercises that are inherent in interpreting the text of other constitutional provisions and in constructing their legal consequences.[372] In many areas of constitutional law, however, this line drawing is done in the service of upholding important constitutional values, rather than merely gratuitously and arbitrarily.[373]

This distinction helps to explain the difference between the type of line drawing that is required by theses substantive constraints on the taxing power and the broad interpretation of apportionment. In the case of the broad interpretation, courts have no meaningful ways of drawing lines to limit Congress's taxing power, except through guesswork as to the fundamentally unknowable definition of a "direct tax," which is an undefined term of art. Furthermore, courts cannot reasonably make this determination based on the effects of the apportionment requirement, as this requirement does not serve an important function in the constitutional structure, and instead operates as an arbitrary break on the taxing power.[374] In contrast, sourcing the limits of Congress's taxing power to substantive principles would entail line drawing in the service of important constitutional values, and in a manner that would be informed by these principles.

The Court's reliance on apportionment as the primary constraint on the taxing power over the past century has also crowded out the development of these substantive doctrines as they apply to taxation. A renewed emphasis on these substantive values would, over time, result in the accumulation of case law and precedent on how these principles apply to tax legislation and would incrementally "liquidate" the unsettled questions as to the how they operate to limit the taxing power.[375]

CONCLUSION

The modern Supreme Court has elevated the apportionment requirement for direct taxes into the most important limitation to Congress's taxing power today. This approach misinterprets the role of apportionment in the constitutional structure, has bred inconsistency and uncertainty in the doctrine, and operates as a shield for the rich against Congress's taxing power. In the 2024 case *Moore v. United States*, this interpretation even casts

371. *See supra* notes 228–32 and accompanying text.
372. *See supra* note 197 and accompanying text.
373. *See supra* note 198 and accompanying text.
374. *See supra* Part II.A.2.
375. The principle of constitutional "liquidation" traces to Madison, who reasoned that "all new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST No. 37, *supra* note 197, at 236. For a discussion of the elements of constitutional liquidation, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019) (arguing that constitutional liquidation results from textual indeterminacy, a course of deliberate practice, and a resulting constitutional settlement).

a shadow over Congress's ability to tax income under the Sixteenth Amendment.

The early Supreme Court cases correctly interpreted the meaning of a direct tax narrowly, and therefore limited apportionment's reach in accordance with the provision's limited function in the constitutional structure. Returning to this narrow interpretation, however, would not leave Congress with unlimited taxing powers.

This Article has introduced an alternative understanding of the limits to Congress's taxing power, that would be grounded in substantive constitutional values, rather than in apportionment. This approach looks to the legislative process itself as a primary constraint on the taxing power, as well as a set of constitutional doctrines that could effectively prevent abuses of the taxing power in accordance with substantive constitutional values. The Article synthesized these alternative limitations to articulate a set of substantive principles that operate together to limit the taxing power in accordance with constitutional values. These principles take account of the process for enacting tax legislation, the identity of the taxpayers, the basis for taxation, and the degree of the tax burden when determining limits to the taxing power, rather than the formal labeling of the tax base.

These principles can preserve both Congress's essential role in implementing economic regulation through the tax system and the legislative process itself as the primary constitutional check on the taxing power. At the same time, these substantive principles can also ensure that exercises of this power do not violate other important constitutional values. In this way, this Article's approach can ensure both the democratic basis of tax legislation while maintaining essential constitutional safeguards necessary to prevent abuse of the taxing power.