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A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s

ABSTRACT. The Supreme Court is poised to toughen the nondelegation doctrine to strike down acts of Congress that give broad discretion to administrators, signaling a potential revolution in the separation of powers. A majority of the Justices have suggested in recent opinions that they are open to the far-reaching theory that all agency rulemaking is unconstitutional insofar as it coerces private parties and is not about foreign affairs. If adopted, this theory would invalidate most of the federal regulatory state. Jurists and scholars critical of rulemaking's constitutionality base their claims on the original meaning of the Constitution. But these critics face a serious obstacle: early Congresses enacted several broad delegations of administrative rulemaking authority. The critics' main response has been that these early statutes do not count, because they fall into two areas in which (say the critics) the original nondelegation doctrine did not apply, or applied only weakly: noncoercive legislation (e.g., giving benefits) or foreign-affairs legislation.

This Article finds that the originalist critics of rulemaking are mistaken to say that no early congressional grant of rulemaking power was coercive and domestic. There is a major counterexample missed by the literature on nondelegation, indeed by all of legal scholarship, and not discussed more than briefly even by historians: the rulemaking power under the "direct tax" of 1798. In that legislation, Congress apportioned a federal tax quota to the people of each state, to be paid predominantly by owners of real estate in proportion to their properties' respective values. Thousands of federal assessors assigned taxable values to literally every house and farm in every state of the Union, deciding what each was "worth in money"—a standard that the legislation did not define. Because assessors in different parts of a state could differ greatly in how they did valuation, Congress established within each state a federal board of tax commissioners with the power to divide the state into districts and to raise or lower the assessors' valuations of all real estate in any district by any proportion "as shall appear to be *just and equitable*"—a phrase undefined in the statute and not a term of art. The federal boards' power to revise valuations en masse in each intrastate tax district is identical to the fact pattern in the leading Supreme Court precedent defining rulemaking. Thus, each federal board in 1798 controlled, by rule, the distribution of the federal real-estate tax burden within the state it covered.

This Article is the first study of the federal boards' mass-revision power. It establishes that the mass revisions (a) were often aggressive, as when the federal board in Maryland raised the taxable value of all houses in Baltimore, then the nation's third-largest city, by 100 percent; (b) involved much discretion, given serious data limitations and the absence of any consensus method; (c) had a major political aspect, as the federal boards were inheriting the contentious land-tax politics that had previously raged within the state legislatures, pitting the typical state's rich commercial coast against its poor inland farms; (d) were not subject to judicial review; and (e) were accepted as constitutional by the Federalist majority and Jeffersonian opposition in 1798 and also by the Jeffersonians when they later took over, indicating the boards' power was consistent with original meaning or, alternatively, with the Constitution's liquidated meaning. In short, vesting administrators with discretionary power to make politically charged rules domestically affecting private rights was not alien to the first generation of lawmakers who put the Constitution into practice.

More broadly, this Article is the first in-depth treatment of the 1798 direct tax's administration. It shows that the tax, measured by personnel, was the largest federal administrative endeavor, outside the military, of the Constitution's first two decades. It is remarkable that today's passionate debate on whether the administrative regulatory state violates the Framers' Constitution has so far made no reckoning with this endeavor.

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ARTICLE CONTENTS

INTRODUCTION 1293

I. FEDERAL TAXATION OF REAL ESTATE IN 1798: FUNDAMENTALS 1318
- A. The Direct Tax's Background, Political Origins, and Substance 1318
- B. The Administrative Organization and Scale of the Valuation Apparatus 1327
- C. The Federal Boards' Sweeping Exercises of Power 1339

II. INDETERMINACY IN THE FEDERAL BOARDS' REVISIONS: HAMILTON'S "VERY BAD BUSINESS OF VALUATIONS" 1345
- A. The Continental Congress's Failure at Real-Estate Valuation, 1777-89 1348
- B. The Absence of Clear Principles in State Tax Statutes, 1796-98 1350
- C. Indeterminacy in Deciding Value from Land's Annual Income or Historical Sale Prices 1358
- D. Indeterminacy in the Federal Legislation of 1798: "No Necessity that the Principles of Valuation Should Be Uniform in All the States" 1366
- E. Indeterminacy in Implementing the Federal Legislation of 1798 1370
  1. Secretary Wolcott's Guidance 1370
  2. The Federal Boards' Regulations and Approaches 1372
  3. The Connecticut Federal Board's Sale-Price Research 1379
  4. Official Valuations and Population Density 1384

III. THE POLITICAL ASPECT OF THE FEDERAL BOARDS' REVISIONS 1391
- A. State Legislative Tax Politics That Federal Boards Inherited 1392
- B. Congress's Options for Handling Intrastate Politics and Its Choice to Delegate 1401
- C. Politics and the Structure, Personnel, and Process of the Federal Boards 1405
- D. Politics and the Substantive Decisions of Federal Boards 1408

IV. NO JUDICIAL REVIEW OF THE FEDERAL BOARDS' REVISIONS 1417
A. Equity? 1418
B. Writ of Error? 1419
C. Certiorari? 1419
D. Mandamus? 1421
E. Judicial Review Through Enforcement by Distress, or After? 1422
F. Judicial Review Through Enforcement by Sale of Land, or After? 1425
G. Conclusion: Statutes as the Sole Source of Review of Valuations 1427

V. CONSTITUTIONAL ACCEPTANCE OF THE FEDERAL BOARDS' REVISION POWER, 1798-1861 1429
A. Acceptance of the Federal Boards' Rulemaking Discretion in 1797-1800 1430
B. Repeal of the Record-Updating Provisions, 1800-1801 1437
C. The Jeffersonians' Continuing Implementation of the 1798 Direct Tax, 1801-05 1438
D. Jeffersonian Direct Taxes in the War of 1812 1440
1. The Initial Tax of 1813: Reducing Rulemaking Discretion, for Nonconstitutional Reasons 1441
2. The Permanent Tax of 1815: Increasing Rulemaking Discretion Back to the 1798 Level 1449
3. The Peacetime Pullback of 1816 1453
E. The Civil War Direct Tax, 1861 1454

CONCLUSION 1455

INTRODUCTION

Article I of the Constitution says: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[1] Since the nineteenth century, the Supreme Court has construed this language to mean Congress cannot give away its legislative powers: there is a constitutional limit on how much power Congress can delegate by statute to the President or to administrators in the executive branch.[2] While every statute inevitably gives some discretion to those who implement it, the Court requires the discretion delegated to be confined to that which is "executive" in nature,[3] not so broad as to be "legislative." This principle is called the nondelegation doctrine.[4] Since the 1920s, the Justices have said that a statute is constitutional under this doctrine so long as it lays down an "intelligible principle" for those administering it to follow.[5]

The doctrine has proven very loose. Only three statutes have ever been held to violate it, all in 1935-36.[6] Statutes have passed muster despite providing only vague guidance, such as telling an administrative agency to make regulations to serve the "public interest, convenience, or necessity."[7] With little judicial constraint on its freedom to delegate, Congress has vested numerous wide-ranging powers in the President and the agencies, including everything from the Environmental Protection Agency's statutory mandate to set national air-pollution standards that are "requisite to protect the public health" with "an adequate margin of safety,"[8] to the President's statutory power to declare a "national emergency" (an undefined term), which President Trump invoked to obtain

1. U.S. CONST. art. I, § 1.
2. Field v. Clark, 143 U.S. 649, 681-94 (1892).
3. *See* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").
4. In using this term, I follow convention. *But cf.* Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 88 (2020) (arguing that speaking in terms of a constitutional ban on "vesting and divesting" legislative power, rather than "delegating" it, would better capture the Constitution's meaning).
5. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
6. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-42 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 420-30 (1935).
7. Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 225-26 (1943).
8. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-76 (2001).

some of the funding to build a border wall between the United States and Mexico.[9]

But now, for the first time in nearly a century, the Supreme Court is poised to reformulate the nondelegation doctrine, opening the possibility of a revolution in separation of powers and administrative law. In *Gundy v. United States*, handed down in June 2019, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, declared that the "intelligible principle" test should be abandoned in favor of a new approach that demands greater specificity from Congress when it delegates authority to the administrative state.[10] The Court in *Gundy* had only eight Justices (because Justice Kavanaugh had not been confirmed at the time of the oral arguments), and Justices Ginsburg, Breyer, Sotomayor, and Kagan were unwilling to revisit the established, delegation-friendly test.[11] Justice Alito expressed sympathy with Justice Gorsuch's view and announced that he "would support" reconsidering the established test, but not with the Court short-staffed and divided 4-4. Justice Alito therefore opted to provide the fifth vote necessary to maintain the old test (and uphold the statute at issue), but only for the moment.[12] In November 2019, Justice Kavanaugh—since confirmed to the Court and carrying the potential swing vote—publicly suggested that Justice Gorsuch's "thoughtful" opinion rejecting the old test merited "further consideration."[13]

What can we expect of this apparently fast-approaching revolution? What will the new nondelegation doctrine be? One important possibility was articulated by Justice Thomas in an extensive solo concurrence in *Department of Transportation v. Association of American Railroads* back in 2015.[14] In his opinion, Justice Thomas argued that, "[u]nder the original understanding of the Constitution," it is unconstitutional for Congress to give the President or an agency "the discretion to formulate generally applicable rules of private conduct."[15] To

9. 50 U.S.C. § 1621(a) (2018); 10 U.S.C. § 2808(a) (2018); *see also A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. i, 3-43 (Dec. 5, 2018), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_15_EmergencyPowersFULL.pdf [https://perma.cc/RU3H-425Z] (detailing the 136 statutory powers that can become available to the President if a national emergency is declared).

10. 139 S. Ct. 2116, 2137-42 (2019) (Gorsuch, J., dissenting).

11. *Id.* at 2129-30 (plurality opinion).

12. *Id.* at 2131 (Alito, J., concurring in the judgment).

13. Paul v. United States, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari).

14. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66-91 (2015) (Thomas, J., concurring in the judgment).

15. *Id.* at 70. For elaboration of this point, see *id.* at 77.

this principle, Justice Thomas recognized only two exceptions. The first would be if the making of the rule turned simply on a "factual determination" by the agency, for example, if the statute states a restriction that shall go into effect if a certain event occurs, and the agency then finds that the event has in fact occurred.[16] Such an agency determination would be constitutionally permissible, said Justice Thomas, because it entails no "exercise of policy discretion."[17] The second exception would be if the delegated function "involved the external relations of the United States,"[18] given that the Court has long viewed the nondelegation doctrine as weaker in this area because of the President's independent constitutional authority therein.[19] Regulating international trade might be an example of this second exception for matters related to foreign affairs.[20] Overall, Justice Thomas's theory of nondelegation is that all agency rulemaking governing private conduct is unconstitutional unless it turns solely on a factual determination or involves foreign relations.

Given that today's regulatory statutes ubiquitously authorize agencies to engage in rulemaking that governs domestic, private rights, Justice Thomas's theory in *American Railroads* would seem—at least if its exception for nonpolicy "factual determinations" were interpreted narrowly—to invalidate most of today's domestic regulatory state.

But will the Court follow this far-reaching theory? Two recent opinions suggest that at least five Justices would consider it. The first is Justice Gorsuch's concurrence in *Kisor v. Wilkie*, decided in June 2019.[21] Joined by Justices Thomas, Alito, and Kavanaugh, this opinion expressly left the door open for Justice Thomas's theory. In discussing the question at issue (whether courts should defer to an agency's interpretation of its own rules), Justice Gorsuch stated that such rules are legally binding under current doctrine, but he dropped a footnote citing Justice Thomas's *American Railroads* concurrence and asserted that "our precedent allowing executive agencies to issue legally binding regulations to govern private conduct may raise constitutional questions."[22]

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16. *Id*. at 78-79.

17. *Id*. at 79. He later emphasizes that it was wrong to think "*any* degree of policy judgment is permissible" when an agency establishes "generally applicable rules governing private conduct." *Id*. at 86.

18. *Id*. at 80 & n.5.

19. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 324 (1936).

20. *American Railroads*, 575 U.S. at 80 & n.5 (Thomas, J., concurring in the judgment).

21. 139 S. Ct. 2400, 2425-48 (2019) (Gorsuch, J., concurring in the judgment).

22. *Id*. at 2438 n.84 (citing *American Railroads*, 575 U.S. at 66 (Thomas, J., concurring in the judgment)). The other opinions in *Kisor* (including those joined by Chief Justice Roberts) said nothing about the constitutionality of rulemaking.

The second opinion is Justice Gorsuch's *Gundy* dissent, noted earlier. Recall that it was joined by Chief Justice Roberts and Justice Thomas and then praised implicitly by Justice Alito and expressly by Justice Kavanaugh. As in Justice Thomas's *American Railroads* concurrence, Justice Gorsuch in *Gundy* contended that the current delegation-friendly approach "has no basis in the original meaning of the Constitution"[23] and declared that "the framers understood [nondelegable legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."[24] He further argued that, in order for agency rulemaking about "private conduct" to be constitutional, it must either (a) confine itself to "details" rather than "policy decisions,"[25] (b) turn simply on agency "fact-finding,"[26] or (c) overlap with "authority the Constitution separately vests in another branch," such as executive power over "foreign affairs."[27] Justice Gorsuch's exceptions for fact finding and foreign affairs follow the exceptions in Justice Thomas's *American Railroads* concurrence. Justice Gorsuch adds the exception for rulemakings that fill up "details," but this exception may be narrow, as it seems not to allow any rulemakings that make "policy decisions."[28]

Even if the Court does not categorically invalidate all agency rulemaking about domestic private conduct other than fact finding, rulemaking is so ubiquitous that mere doubt about its constitutionality could work major changes in the nondelegation doctrine and administrative law more generally. Two recent proposals illustrate the potential scope of such changes. First, Ronald Cass, in an article cited by Justice Gorsuch in *Gundy*,[29] argues that the Court should be relatively more willing to demand congressional specificity—and to pull the trigger by striking down statutes for loose delegation—when it comes to authorizations of rulemaking on domestic private conduct, as compared to other

23. Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

24. *Id*. at 2133.

25. *Id*. at 2136.

26. *Id*. at 2136-37.

27. *Id*. at 2137.

28. *Id*. at 2136. More recently, Justice Gorsuch joined a separate opinion by Justice Thomas that cites the *American Railroads* concurrence and says it is "constitutionally suspect" for an agency to make "general rules." Cty. of Maui v. Haw. Wildlife Fund, No. 18-260, slip op. at 5 (Apr. 23, 2020) (Thomas, J., dissenting) (citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67-87 (2015) (Thomas, J., concurring in the judgment)).

29. *Gundy*, 139 S. Ct. at 2135 n.32 (Gorsuch, J., dissenting) (citing Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 153 (2017)).

types of authorizations.[30] Similarly, Ilan Wurman, in a recent *Yale Law Journal* Feature, refrains from a categorical claim that rulemaking on domestic private conduct is unconstitutional, instead suggesting a looser test that bans rulemaking if it goes beyond "details" to decide "important subjects."[31] But in explaining how to apply this test, Wurman says that rulemaking power regarding private rights will be more likely to fail the test, because private rights tend to be more "important" than other matters.[32]

Even apart from the nondelegation doctrine proper, constitutional doubt about rulemaking could have sweeping effects. The "major questions" doctrine, which states that the judiciary should not defer to an agency statutory interpretation that concerns a question of "deep 'economic and political significance,'"[33] is essentially an application of the canon of constitutional avoidance to the nondelegation doctrine.[34] If the nondelegation doctrine even *possibly* prohibits all rulemaking as to domestic private conduct, the "major questions" doctrine automatically becomes more potent.[35] More broadly, constitutional doubt about rulemaking can instill judges with a sense that our entire modern regulatory state is suspect, and that sense may motivate them to constrain that state through every available doctrinal avenue. For example, such doubt makes the *Chevron* doctrine of judicial deference to agency statutory interpretation seem less legitimate as applied to rulemakings, as then-Judge Gorsuch suggested during his tenure on the Tenth Circuit (citing Justice Thomas's *American Railroads* concurrence).[36]

As the quotations above indicate, the Justices' doubts about rulemaking's constitutionality rest on their sense that rulemaking violates the original meaning of the Constitution. But given that the Court has expressly upheld agency

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30. Cass, *supra* note 29, at 177, 195-96.

31. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1500, 1503 & n.57 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825)).

32. *Id.* at 1503, 1540-44.

33. King v. Burwell, 576 U.S. 473, 486 (2015) (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

34. On this doctrine, see generally Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

35. *Cf.* Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari) (signaling interest in the major-questions doctrine); Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 176 (2019) (noting that the adoption of new principles of nondelegation will affect statutory construction under the avoidance canon).

36. De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015) (citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66-71 (2015) (Thomas, J., concurring in the judgment)); *see American Railroads*, 575 U.S. at 60-61 (Alito, J., concurring).

power to impose binding rules on private persons outside foreign affairs since 1911 at the latest[37]—and given that the body of regulatory legislation enacted in reliance upon this precedent is "massive"[38]—a judicial reversal on the constitutionality of rulemaking would demand strong originalist evidence.[39]

But is domestic coercive rulemaking actually doubtful as a matter of original meaning? Today's debate on nondelegation and original meaning has focused, to a large degree, on early congressional statutes.[40] This focus fits nicely with the Supreme Court's original-meaning case law, which has often assigned much weight to statutes enacted in the period from Congress's first session in 1789 through the very early 1800s.[41] The focus on early federal statutes is also

37. *See* United States v. Grimaud, 220 U.S. 506, 522-23 (1911).

38. David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 237 (2020).

39. *See* Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) ("[S]omething more than 'ambiguous historical evidence' is required before we will 'flatly overrule a number of major decisions of this Court.'") (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987)).

40. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 83-110 (2014) (discussing rulemaking statutes); *id.* at 191-226 (discussing adjudicatory statutes); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 44-48 (2012); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 329-35 (2020); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 73-79 (2017); Bamzai, *supra* note 35, at 182; Cass, *supra* note 29, at 155-58; Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719-20 (1969); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 744-50 (2019) [hereinafter Gordon, *Nondelegation*]; Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332-66 (2021); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735-36 (2002); Joseph Postell & Paul D. Moreno, *Not Dead Yet—or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41, 44-48 (2018); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 335-38 (2001); Wurman, *supra* note 31, at 1503-18, 1540-56; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3654564 [https://perma.cc/U33F-VYQ5]; Aaron Gordon, A Rebuttal to "Delegation at the Founding" 32-51 (Apr. 23, 2020) (unpublished manuscript), https://ssrn.com/abstract=3561062 [https://perma.cc/R3RE-HKTF] [hereinafter Gordon, Rebuttal]; *cf.* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 396-403 (2002) (denying such statutes' importance to originalist methodology but arguing their merits in the alternative).

41. Although the First Congress of 1789-91 is sometimes especially privileged, opinions of the Court rely on statutes throughout the 1790s and as late as 1806 in interpreting the Constitution's original meaning. Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745, 1768-69 (2006); *see, e.g.*, Cent. Va. Cmty. Coll. v. Katz,

quite understandable given that sources bearing on original meaning *besides* early congressional acts—constitutional text, preratification discourse, and structure—say very little about constitutional limits on delegation.[42] At most, these other sources might possibly indicate that there is *some* abstract, unspecified limit on delegation (I assume *arguendo* there is),[43] but they give no useful specifics for what the content or stringency of that limit might be, to say nothing of specifying whether there is a categorical ban on domestic coercive rulemaking.[44] Text, preratification discourse, and structure may tell us that there is

546 U.S. 356, 373-78 (2006) (relying upon early federal statutes to interpret constitutional meaning, mainly one from the year 1800, on the ground that they were passed in the "immediate wake of the Constitution's ratification"); *id.* at 385-86 (Thomas, J., dissenting) (agreeing with the majority that "the practice of the early Congresses can provide valuable insight into the Framers' understanding of the Constitution" while disagreeing on what implications to draw from early practice in the particular case); Alden v. Maine, 527 U.S. 706, 743-44 (1999) (relying upon early federal statutes, including two from 1798); Printz v. United States, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning." (internal quotation marks omitted)); *id*. at 905-10 (examining one statute from 1789, two from 1790, one from 1791, one from 1793, three from 1798, and one from 1802, without suggesting that any of these acts were more or less probative than the others by reason of temporal proximity to ratification, and making conclusions about what the acts "establish[ed]" as to how "the Constitution was originally understood"); *id.* at 948-54 (Stevens, J., dissenting) (analyzing statutes from the period between 1789 and 1802 without questioning their relevance); *see also* Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 122-23 (2011) (drawing upon, and making no differentiation in weight between, a House of Representatives rule of 1789 and a Senate rule of 1801). Conceptually, early statutes may be considered evidence of original meaning itself, or they may constitute the kind of regular practice that can (as James Madison said) "liquidate and settle the meaning" of open-ended constitutional terms. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 11, 61-63 (2019).

42. As pointed out by Posner & Vermeule, *supra* note 40, at 1733-34, the paucity of discussion of excessive delegation in the years 1787 and 1788 is not surprising, as the pressing issue at that time was legislative self-aggrandizement, not legislative abdication.

43. For a recent claim that the Constitution originally imposed *no* limit on delegation, see generally Mortenson & Bagley, *supra* note 40. For a critique of this claim, see generally Wurman, *supra* note 31.

44. As to text: Article I vests "[a]ll legislative Powers" in Congress but does not define "legislative power" or specify the difference between such power and the "executive power" to implement a statute that Congress can legitimately confer. U.S. CONST. art. I, § 1. At least two originalist defenses of the nondelegation doctrine have recognized this textual vagueness. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310-17, 1310 n.43 (2003) (analyzing Founding-era understandings of the term "legislative," denying that "all rulemaking occurring outside of Congress necessarily amounts to an exercise of legislative power," and stating that "legislative power was a matter of the degree/scope of the discretion" exercised); Rappaport, *supra* note 40, at 305 ("[T]he term 'executive power' is ambiguous."). For elaboration on the textual question, see Nicholas R. Parrillo, *Supplemental Paper to: "A Critical Assessment of the*

some limit on delegation, but these sources tell us basically nothing about whether that limit should be the loose one that the Court has embraced for the last eighty-plus years,[45] or the tremendously more stringent one (banning domestic coercive rulemaking) that some of today's Justices are interested in adopting—or some other type of limit. Early legislation of Congress may tell us more about the content and stringency of any limit that originally existed, for that legislation is evidence of how practically capacious any such limit was. While practical applications are not definitive of original meaning, they may be the most usable evidence of it.[46]

Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s," at 3-4 (C. Boyden Gray Ctr. for the Study of the Admin. State Research Paper No. 20-17 Supplement, 2020), https://ssrn.com/abstract=3696902 [https://perma.cc/V52X-SWK4] [hereinafter Parrillo, *Supplemental Paper*].

As to preratification discourse: I have combed through what I believe to be all originalist scholarship supporting the nondelegation doctrine, and I have found citations to only a handful of American sources from the start of the revolutionary crisis in 1765 through ratification in 1788 that assert a constitutional or other legal limit on a legislature's conferral of power on others. For the citations, see HAMBURGER, *supra* note 40, at 384; MCCONNELL, *supra* note 40, at 329-32; POSTELL, *supra* note 40, at 22-24, 32-33; Gordon, *Nondelegation*, *supra* note 40, at 741, 744; Gordon, Rebuttal, *supra* note 40, at 21-32; Wurman, *supra* note 31, at 1531-32, 1542. As I explain at length in a supplemental paper that directly examines all the cited sources and their context, every such assertion has at least one of the following characteristics, any one of which prevents the assertion from being useful for learning about the content or stringency of any nondelegation doctrine: (a) the assertion was rejected by a majority of the state political community to which it was addressed; (b) it concerned a delegation more radical than anything the U.S. Congress has ever attempted (for example, authorizing revolutionary councils of safety with unbounded power to create capital crimes); (c) it concerned a delegation whose content is unknown from extant sources; (d) it concerned, by its most natural reading, at most the existence of some limit in principle, without specifics; or (e) it was stated equivocally and thus was not really an assertion of a limit. *See* Parrillo, *Supplemental Paper*, *supra*, at 5-8, 36-49.

As to structure: leading works arguing that the nondelegation doctrine follows from the Constitution's original structure recognize that their method does not give any specifics on the doctrine's content or stringency. They say the limit for which they argue is "vague and difficult to apply," Rappaport, *supra* note 40, at 312, and that any attempt to verbalize the limit is so "self-referential" that a "rule-of-law devotee . . . flees from it as a vampire flees garlic," Lawson, *supra* note 40, at 361. For elaboration on structure, see Parrillo, *Supplemental Paper*, *supra*, at 8-9.

45. Justice Scalia accepted the nondelegation doctrine in principle but considered its stringency when enforced by courts to be a separate question; indeed, he found the Court's loose enforcement of the doctrine to be justifiable on the ground that judges were not capable of drawing a principled, workable boundary between permissible and excessive delegations. Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting).

46. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-79 (2007).

What do acts of Congress circa 1789-1800 tell us? A long line of scholarship has pointed out that the early Congresses made many delegations of power to administrators with vague guidance for the power's exercise, or no guidance whatsoever, several of which were delegations of rulemaking power.[47] Originalist advocates for the nondelegation doctrine have often recognized that these early statutes confer broad rulemaking power but have insisted that the acts nonetheless do not count because they fall into one of two exceptional areas where the nondelegation doctrine supposedly does not apply or is supposedly weaker in a way that allows more latitude for rulemaking: (a) foreign affairs, including military affairs, or (b) the realm of voluntary transactions, government services, privileges, and benefits, as opposed to coercive regulation of private rights and private conduct. Invoking these two exceptions, originalist skeptics of rulemaking have found ways to explain away all of the early statutes delegating rulemaking power that have been invoked in prior literature.[48] More

47. This work began with JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 72-89 (1925), and grew from there. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 146-49, 163 n.240, 186-88, 244-48, 254-59 (1997); MASHAW, *supra* note 40, at 44-48; Chabot, *supra* note 40; Davis, *supra* note 40, at 719-20; Mortenson & Bagley, *supra* note 40, at 332-66; Posner & Vermeule, *supra* note 40, at 1735-36.

48. Thus, power delegated in 1790 to raise or lower the scale of all disabled soldiers' benefits has been explained away on the ground that benefits are a privilege, not a right, *see* HAMBURGER, *supra* note 40, at 86; Bamzai, *supra* note 35, at 182, or that it pertains to military affairs, Lawson, *supra* note 40, at 400-01. Power delegated in 1790 to make regulations for persons trading with Native Americans has been explained away on the ground that trade with Native Americans was foreign affairs, *see* Lawson, *supra* note 40, at 401-02; Wurman, *supra* note 31, at 1545, or that such trading was a privilege, *see* Bamzai, *supra* note 35, at 182. Power delegated in 1790 to write regulations for when and where the federal government would repurchase its debt has been dismissed as governmental engagement in voluntary contracts, as distinct from coercive exercises of sovereignty. Gordon, Rebuttal, *supra* note 40, at 36. Power delegated in 1792 to decide the locations of all post offices and the frequency of all mail nationwide, *see* CURRIE, *supra* note 47, at 149, has been dismissed because mail was "merely a government service," not anything coercive, HAMBURGER, *supra* note 40, at 202, 564 n.23. *See also* Gordon, Rebuttal, *supra* note 40, at 47 (similar). Power delegated in 1794 to lay an embargo on all international trade within a certain time period has been explained away as foreign affairs. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 80 (2015) (Thomas, J., concurring in the judgment); Cass, *supra* note 29, at 157-58; Gordon, Rebuttal, *supra* note 40, at 40. Other delegations have not been expressly addressed by proponents of toughening nondelegation, but it is easy to imagine either of the two exceptions being invoked. Power delegated in 1792 to decide whether to double the size of the army can be dismissed as military affairs. *See* MARVIN A. KREIDBERG & MERTON G. HENRY, HISTORY OF MILITARY MOBILIZATION IN THE UNITED STATES ARMY, 1775-1945, at 29 (1955). Power delegated in 1798 to set the eligibility criteria for giving government money and medical care to disabled merchant seamen, *see* Gautham Rao, *Administering Entitlement: Governance, Public Health Care, and the Early American State*, 37 LAW & SOC. INQUIRY 627, 634-46 (2012), would presumably be dis-

than that, they have gone on the offensive: the fact that every early rulemaking authorization falls into one of the exceptions, the skeptics claim, indicates that rulemaking *outside* the exceptions was *not* constitutional.[49]

This Article finds, through new primary research, that the originalist skeptics of rulemaking are mistaken to say that no early congressional grant of rulemaking power was coercive and domestic. There is a major counterexample missed by the literature on nondelegation, indeed by all of legal scholarship, and not discussed more than briefly even by historians[50]: the rulemaking power under the "direct tax" of 1798. This tax was an enormous administrative undertaking, and it fell upon literally every farmer, homeowner, and slaveholder in every state of the Union, subjecting the farmers and homeowners to federal rulemakings that could determine their tax liabilities.[51]

Part I of this Article explains the fundamentals of the federal taxation of real estate that was enacted in 1798 and its early demonstration of congressional commitment to rulemaking particularly and to administrative power more generally. Although Congress had relied overwhelmingly on foreign-import duties to finance the federal government from 1789 up to the late 1790s, a fiscal

missed as a privilege, not a right. For more on these early delegations and others, see Parrillo, *Supplemental Paper*, *supra* note 44, at 13-16. For a synthetic discussion of many of these delegations, suggesting they are all excepted from nondelegation constraints for the common reason that they fall within the historical bounds of the royal prerogative, see MCCONNELL, *supra* note 40, at 333-34.

49. *See, e.g.*, Cass, *supra* note 29, at 157-58, 198; Hamburger, *supra* note 4, at 104-08; Mascott, *supra* note 40, at 1392. In general, a negative inference can be drawn about the constitutionality of a type of congressional action if early Congresses refrained from doing the action. Alden v. Maine, 527 U.S. 706, 743-44 (1999).

50. *See infra* notes 61-68 and accompanying text.

51. The skeptics' dismissal of all early rulemaking authorizations as falling within exceptions for noncoercive or nondomestic legislation is subject to two additional objections besides the clear counterexample of the direct tax. First, the exceptions themselves may have no originalist basis; in particular, the few lawmakers in the 1790s who talked expressly of a nondelegation doctrine apparently thought it encompassed nondomestic and noncoercive matters. *See* Mortenson & Bagley, *supra* note 40, at 279 n.7, 363; Parrillo, *Supplemental Paper*, *supra* note 44, at 18-20; Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140-46 (2021). Second, the two purported exceptions actually cover the very large majority of legislation enacted by Congress in 1789-99, whether it delegated authority to administrators or not. Statutes not covered by the two exceptions (acts that were domestic and coercive) were so few that, even if they contained no rulemaking authorizations, the absence could be attributed simply to the paucity of the acts, not to a supposed congressional norm against delegation peculiar to such types of acts. It is hard to infer the impossibility of a positive result from an empirical lack of positive results if you have only a "small *N*," as the statisticians say. *See* Parrillo, *Supplemental Paper*, *supra* note 44, at 21-36 (making this claim based on a coding of all public acts of Congress in 1789-99).

shortfall struck in 1798 that pushed Congress to exercise, for the first time, its constitutional power to levy a "direct" tax (that is, roughly speaking, a tax on property[52]). Congress decided to raise $2 million nationwide and, per the Constitution's requirement for direct taxes, apportioned that sum among the states according to each state's free population plus three-fifths of its slave population. This meant a quota of $345,488 for Virginia, and $260,435 for Massachusetts, for example. In each state, slaveholders were to pay fifty cents for each enslaved person they owned.[53] Once the sum levied on a state's slaveholders was calculated, the remainder of the state's quota—which proved to be the large majority of the quota in every one of the twelve states for which records survive, including major slave states[54]—was to be paid by the owners of the state's real estate in proportion to the value of their respective properties[55] (that is,

52. *See infra* note 110 and accompanying text.

53. Slave ownership was taxed only if the enslaved person was "above the age of twelve, and under the age of fifty years," and not if "from fixed infirmity, or bodily disability" the enslaved person was "incapable of labor." Act of July 9, 1798 ("Valuation and Enumeration Act" or "V&E Act"), ch. 70, § 8, 1 Stat. 580, 585. This Article does not focus on the direct tax's administration as applied to slave ownership, for two reasons. First, the tax's relationship to slavery has been analyzed in excellent scholarship elsewhere. See ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2006), especially at 184-96. Second, the original-meaning debate has put my focus on rulemaking with binding effect on private rights, and while the determination of enslaved persons' ages and disabilities may well have entailed substantial frontline *adjudicatory* discretion, I have not found evidence that the tax's application to slave ownership involved the sweeping *rulemaking* discretion that the tax's application to real property did. The legislation did not tax slave ownership according to value, but instead at the fixed sum of fifty cents per enslaved person. Therefore, slave ownership, unlike real-estate ownership, was not subject to mass valuation revisions, which were the administrative actions that most clearly entailed generic mass determinations uniformly deciding many individual outcomes (i.e., rulemakings) with binding effect on private rights. Significantly, when Congress, in financing the War of 1812, shifted to a valuation-based approach for taxing slave ownership, the mass-revision power of federal boards under the 1815 legislation (which I describe briefly *infra* Section V.D.2) extended to the valuation of enslaved persons. *See infra* note 755 and accompanying text. Future research on the use of that power, while perhaps too long after 1788 to be strong evidence of original meaning, would be an important contribution to the history of slavery and federal administration.

54. *See infra* notes 167-168 and accompanying text (noting that slave ownership bore less than one-quarter of the tax quota even in the slave states Virginia and Maryland, with the majority of the quota falling on real estate).

55. To be exact, the legislation divided real estate into "dwelling-houses" and land-without-dwelling-houses. The reason for making this division was to tax expensive homes (seen as proxies for mercantile wealth) at a set of fixed progressive rates while taxing all other real estate at a flat rate that would "float" up or down to whatever level was necessary to fill the state's quota. For a full explanation, see *infra* note 143 and accompanying text.

what each property was "worth in money," as the statute said, without definition[56]).

Well over 1,500 frontline federal assessors fanned out across the nation to assign a value to literally every house and farm in every state, and a corps of more than 600 higher-level federal assessors decided appeals from owners who thought they had been assessed out of proportion to properties in their local area. As I demonstrate for the first time, this nationwide assessment involved more federal officials than any nonmilitary undertaking of the Constitution's first two decades.[57] Yet for all the work these officials did, there was one problem they were not positioned to solve: the danger that officials in some parts of a state might generally value real estate in their respective areas in a way that was out of proportion to what officials did in other parts of the state. To address this problem, Congress established in each state a board of federal tax commissioners, appointed by the President and confirmed by the Senate, with power to divide the state into federal assessment districts and to raise or lower all assessments within any district by any percentage amount "as *shall appear to be just and equitable*"—a phrase the statute did not define.[58] Each federal board's district-wide mass revisions were final. There was no review by any other official, nor by any court. Intrastate mass tax valuation revisions practically identical to those authorized under the direct tax of 1798 were held not to be adjudications for due-process purposes in *Bi-Metallic Investment Co. v. State Board of Equalization* (1915),[59] and that case has long been administrative law's touch-

56. V&E Act, ch. 70, § 8, 1 Stat. 580, 585 (1798) (using this definition for both dwelling-houses and lands).

57. *See infra* text accompanying notes 184-190.

58. V&E Act § 22, 1 Stat. at 589 (emphasis added).

59. 239 U.S. 441, 445-46 (1915). The *Bi-Metallic* Court said there was no adjudication for due-process purposes where a statewide board made "a general determination" as to "the principle upon which all the assessments in a county had been laid." *Id.* at 446. The Court distinguished the prior case of *Londoner v. Denver*, 210 U.S. 373 (1908). The *Bi-Metallic* Court explained that *Londoner* had involved a determination of "'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held they had a right to a hearing." *Bi-Metallic*, 239 U.S. at 446 (quoting *Londoner*, 210 U.S. at 385); *see also Londoner*, 210 U.S. at 381 (setting forth an administrative complaint indicating that the case concerned "Eighth avenue paving district No. 1"). Even if county-wide scope were the *minimum* scope necessary for a proceeding to cease being adjudicatory (which the *Bi-Metallic* Court certainly did not say), the 1798 legislation would still meet that test. Each federal board was to divide its state "into a suitable and convenient number of assessment districts." V&E Act § 7, 1 Stat. at 584. A board could create districts the size of counties, or smaller or larger: boards covering five of the sixteen states drew districts that were generally each coextensive with a county or larger, and boards covering another

stone for defining rulemaking.[60] Thus, the 1798 direct tax provides a clear Founding-era example of congressional delegation of rulemaking authority in a context that was both coercive and domestic: the taxation of real estate.

The direct tax of 1798 and its provision for the federal boards' mass revisions are virtually unknown to the literatures on the nondelegation doctrine and on administrative law.[61] The tax is known to tax-law scholars,[62] but only one tax-law article mentions the federal boards,[63] and none mentions their mass-revision power. The tax is better known outside the legal academy, to historians of slavery,[64] of wealth distribution,[65] of public finance,[66] and of hous-

three states drew several—though not all—of their districts coextensive with counties. *See infra* note 182 & tbl.1. For a board covering yet another state (North Carolina), records survive as to just one district, which was drawn coextensive with a county. *See infra* text accompanying note 263. When Congress reintroduced the boards in 1815, it provided for their mass revisions everywhere to be by county (or by "state district," a reference to the county-like districts into which South Carolina was divided for local government purposes). *See infra* note 752 and accompanying text.

60. *See* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 244-46 (1973); 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 407-08 (6th ed. 2019).

61. Philip Hamburger touches on the 1798 direct tax, noting the individual adjudicatory discretion of lower-level assessors; he does not discuss the tax's rulemaking power (that is, the federal boards' district-wide mass revisions). HAMBURGER, *supra* note 40, at 209-10. Leonard White briefly describes the tax, erroneously characterizing the federal boards' power as an individualized appellate-adjudicatory authority and ignoring their rulemaking authority. LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 452, 455-56 (1948).

62. *E.g.*, James R. Campbell, *Dispelling the Fog About Direct Taxation*, 1 BRIT. J. AM. LEG. STUD. 109, 142-44 (2012); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 J. CONST. L. 839, 872-75 (2009); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2355 (1997).

63. Charlotte Crane, *Reclaiming the Meaning of "Direct Tax,"* 21-22 n.25 (Feb. 15, 2010) (unpublished manuscript), https://ssrn.com/abstract=1553230 [https://perma.cc/HB65-QREJ].

64. EINHORN, *supra* note 53, at 184-96. Besides the just-cited passage discussing the federal direct tax of 1798 (and those of 1813-1815), Einhorn provides a larger two-hundred-year narrative that is essential background for understanding the politics of taxing property in America, including taxation of slave ownership. *See id.*

65. ROBERT E. GALLMAN & PAUL W. RHODE, CAPITAL IN THE NINETEENTH CENTURY 298-300 (2019); PETER H. LINDERT & JEFFREY G. WILLIAMSON, UNEQUAL GAINS: AMERICAN GROWTH AND INEQUALITY SINCE 1700, at 275-78 (2016); LEE SOLTOW, DISTRIBUTION OF WEALTH AND INCOME IN THE UNITED STATES IN 1798 (1989); Frank W. Garmon, Jr., *Population Density and the Accuracy of the Land Valuations in the 1798 Federal Direct Tax*, 53 HIST. METHODS 1 (2020).

66. DALL W. FORSYTHE, TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833, at 51-57 (1977); DONALD R. STABILE, THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES

ing.[67] Still, only four studies in these nonlaw subfields of history say anything about the mass revisions, and none more than briefly.[68]

This Article is the first study of the federal boards' mass-revision power in any field. It is also, more broadly, the first in-depth study of the administration of the 1798 direct tax—a study that is overdue, as the tax was the largest administrative endeavor of the federal government near in time to the adoption of the Constitution and outside the military. It is remarkable that today's passionate debate on whether the administrative regulatory state violates the Framers' Constitution has so far made no reckoning with this endeavor.

One cause of the neglect of the 1798 direct tax is that, although the federal boards' mass-revision power appears on the face of the legislation, the boards' dramatic and sweeping *use* of their power has been buried in sources that are quite obscure. The reports of the federal boards to the Treasury Department generally gave only the boards' final postrevision numbers, not their prior deci-

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OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776-1836, at 127-31 (1998); Frederick Arthur Baldwin Dalzell, Taxation with Representation: Federal Revenue in the Early Republic 321-36 (Oct. 1993) (unpublished Ph.D. dissertation, Harvard University), ProQuest Dissertations and Theses (PQDT) No. 9412326. The tax also figures in histories of politics in the early republic, but almost exclusively in that it led to Fries's Rebellion, a disturbance in one Pennsylvania county and some adjoining townships. But the Fries incident was far more minor than the Whiskey Rebellion of 1794 and, according to the standard history of the period, was notable mainly for the Federalist government's overreaction to it. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 696-700 (1993); *see also* PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION (2004) (treating the incident in depth); Romain Huret, *The Contested State: Revenue Agents, Resistance, and Popular Consent in the United States from the Early Republic to the End of the Nineteenth Century*, 33 TOCQUEVILLE REV. 87, 91-93 (2012) (focusing mainly on resistance). What is most striking, in my view, is that the early federal government levied a tax on literally every farm and house in every state and met no organized resistance much beyond a single county in a single state.

67. Carole Shammas, *The Housing Stock of the Early United States: Refinement Meets Migration*, 64 WM. & MARY Q. 549 (2007) [hereinafter Shammas, *Housing*]; Carole Shammas, *The Space Problem in Early United States Cities*, 57 WM. & MARY Q. 505 (2000) [hereinafter Shammas, *Space Problem*]; Judith Green Watson, *Kent and Warren, Connecticut in 1798: Dwelling House Size and Quality, Multi-Family Living Arrangements, and Crowding*, 56 CONN. HIST. REV. 144 (2017).

68. EINHORN, *supra* note 53, at 306 n.69; Garmon, *supra* note 65, at 4, 9 n.6; Shammas, *Housing*, *supra* note 67, at 565 n.16; Judith Green Watson, *The Implementation of the Federal 1798 Direct Tax in Connecticut*, 45 CONN. HIST. REV. 229, 232, 234-35 (2006). Einhorn briefly discusses the district-wide mass revisions under the analogous federal direct tax of 1815. EINHORN, *supra* note 53, at 307 n.75. She also provides important background on administrative bodies in other jurisdictions with powers analogous to those of the federal boards in 1798 and 1815. *E.g.*, *id.* at 49-50, 66-71, 91-92, 141-42.

sions about mass revisions.[69] Once the quotas in the states were assessed, the offices of the federal commissioners and assessors expired by their own terms—mostly by about 1800—and Congress chose to discontinue the smaller corps of officials who were to keep the assessment records.[70] Thereafter, the records of the federal boards' deliberations and decisions were scattered to the winds, and many were lost completely. Yet others have been preserved serendipitously—in miscellaneous federal field offices (when not used for kindling), or in the private papers of individual officials and their descendants.[71] The extant records show that the federal boards were often aggressive.[72] For instance, the federal board in Maryland raised the value of all houses in Baltimore (the nation's third-largest city as of 1800) by 100% while making no change or much smaller changes in the other districts with extant records.[73] The federal board in Pennsylvania raised the value of all lands in Allegheny County (a center of western Jeffersonian antagonism to the eastern part of the state) by 50% while keeping most other land the same.[74] The federal board in Massachusetts raised or lowered more than half the districts in the state, including increases of 50% for Salem (the nation's eighth-largest city as of 1800) and of 75% elsewhere.[75] Each federal board had the power to determine the intrastate distribution of the real-estate tax burden, and many were not shy about using it.

Part II shows how the federal boards had wide discretion in their mass-revision rulemakings because their task was far from determinate. People could agree, say, that land was generally worth more in a thickly settled area proximate to water transport than in a remote frontier area—but how much more? It was a high-stakes question and a contestable one. Even today, real estate is the prime example of an asset whose value is hard to determine, for unlike commodities, which are standardized and traded on public exchanges that provide

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69. See the state-by-state summary abstracts that make up the whole contents of Oliver Wolcott, Jr. Papers, Box 60 (oversize), Connecticut Historical Society. Two states, Connecticut and Rhode Island, apparently did report the prior mass-revision decisions.

70. *See infra* text accompanying notes 672-679.

71. For a lucid account of the scattering and loss of the records, see Judith Green Watson, *A Discovery: 1798 Federal Direct Tax Records for Connecticut*, 39 PROLOGUE MAG. 6 (2007). On the use of direct-tax records of 1798 for kindling at the Boston customhouse in the 1840s, see NEW ENG. HISTORIC GENEALOGICAL SOC'Y, AN INDEX AND GUIDE TO THE MICROFILM EDITION OF THE MASSACHUSETTS AND MAINE DIRECT TAX CENSUS OF 1798, at 1 (1979) [hereinafter NEHGS, INDEX].

72. For a complete survey, see *infra* Section I.C.

73. *See infra* text accompanying notes 253-258.

74. *See infra* text accompanying notes 247-252.

75. *See infra* text accompanying notes 224-240.

a knowable market price, real estate is heterogeneous and illiquid. Valuation was even harder in the 1790s, when markets were thinner, data harder to gather, and methods for reasoning from it less developed. Alexander Hamilton recognized this problem in 1797 when he urged those in power to drop the idea of value-based taxation of land and to adopt a tax on houses pegged *not* to value but instead to each house's objective features (i.e., so many cents' tax for each room, each chimney, each staircase, etc.)—an approach that he said would avoid "the very bad business of valuations."[76]

Numerous sources indicate that Hamilton was right about the uncertainty of valuation. The Continental Congress in the 1780s had attempted a nationwide land-valuation project but concluded it would never be possible to reach consensus on land values.[77] The states that drew upon assessors' valuations of real estate for their own taxes circa 1798 often gave no specifics on the principles, methods, or evidence to be used, and the few states that gave specifics did not agree on a common principle.[78]

Moreover, valuation in 1798 entailed many data limitations and open methodological choices that were obstacles to building a consensus around any determinate approach. Methods based on income estimation required data that were hard to get. Other methods based on historical sale prices ran into trouble because deeds might not reflect recent or true prices, recent sales were often few, and sales in any event were not a random or representative sample of a district's stock of land. Both methods required contestable guesses about whether past economic data fit with present and future conditions, especially considering that American land prices had been volatile for much of the late 1700s. Additionally, America in 1798 was suffering or just exiting a sudden recession and a money-supply slump at a time when such shocks had very disparate effects on land prices in different parts of a state—not to mention that Philadelphia and New York had been evacuated and cut off from commerce as of the legal date of the valuation due to yellow fever.[79]

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76. Letter from Alexander Hamilton to Oliver Wolcott, Jr. (June 6, 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-21-02-0059 [https://perma.cc/6346-KBC3]. (This database contains papers of leading Founders as edited and annotated in the principal modern academic collections of the various Founders' papers.) For Hamilton's plan to tax each house by a flat sum for each of certain listed objective features and not by value, see Alexander Hamilton, Enclosure: [Ideas on the Subject of Direct Taxes] ([Jan. 1797]), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-20-02-0319-0002 [https://perma.cc/ZT82-CVWK].

77. *See infra* Section II.A.

78. *See infra* Section II.B.

79. *See infra* Section II.C.

Congress, in writing the direct-tax legislation, recognized the uncertainty of the federal boards' mission and did not even try to tell them how to do it.[80] The statutory standard for the boards' mass revisions—"just and equitable"—connoted discretion; the phrase was not a term of art with a more specific meaning.[81] As Treasury Secretary Wolcott told the House when he first proposed delegating valuation to a federal board in each state, "[T]here appears to be no necessity that the principles of valuation should be uniform in all the States."[82] After the tax was enacted, the Treasury Department's guidance to the federal boards was reticent to recommend any particular data source beyond urban areas and was nonbinding even for those areas,[83] and the boards in their own regulations took different approaches from each other on key matters like how much to rely upon historical sale prices and whether to take account of alleged abnormalities in the money supply.[84] While federal officials' postrevision average valuations per acre by district generally show a correlation with districts' population density (which in turn is correlated with a host of things that officials might think are related to value), many districts nonetheless see wide departures between the officials' valuations and the predictions of a density-based model (e.g., in Virginia, 38% of the state's real estate by taxable value was located in districts whose official valuation was either more than 40% above or less than 40% below what a density-based model predicts).[85] Thus, while people tended to find that land in more thickly settled areas was worth more, this was only a tendency, leaving officials to decide much on the basis of who-knows-what other considerations that were distinct from density and its many correlates.

Part III demonstrates that the federal boards' discretion-laden rulemakings had an important political aspect. The key thing to understand is that each federal board was inheriting the intrastate political struggle that had been ongoing in its state with respect to *the state government's property taxes* in the years leading

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80. *See infra* Section II.D.

81. *See infra* text accompanying notes 376-383.

82. OLIVER WOLCOTT, JR., DIRECT TAXES (1796), *in* 1 AMERICAN STATE PAPERS: FINANCE 414, 441 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832) [hereinafter WOLCOTT REPORT].

83. *See infra* Section II.E.1.

84. *See infra* Section II.E.2. One federal board, covering Connecticut, conducted substantial empirical research on historical sale prices but used this research only as one nondispositive factor in its revisions, *see infra* Section II.E.3, and even that level of reliance on data gathering was unusual compared to other federal boards, *see infra* text accompanying notes 421-422.

85. *See infra* Section II.E.4. For the Virginia figures cited, see *infra* text accompanying notes 450-451.

up to 1798. With regard to those *state* taxes, all the state legislatures who taxed real estate by value felt the need to address the danger of inconsistency in officials' approaches to valuation across the state, but the state legislatures, in addressing this danger, jealously kept the intrastate geographic distribution of state taxation in their own hands—without delegation. The state legislatures did this by hammering out various specifics in their property-tax statutes, such as the average per-acre value of land in each county, or each county's (or town's) percentage of the statewide burden of a purportedly value-based tax. For example, an act of the Maryland legislature mandated that the average per-acre taxable value of land in Prince George's County *had to* come out to 31½ shillings; in Caroline County, 15¾ shillings; and so forth, with a number for each of the state's counties.[86] No state legislature allowed administrators to determine the distribution of taxable value or of tax liability across a geographic area larger than a county, to say nothing of allowing administrators to decide such things across a whole state. Such geographically sweeping distributive decisions were made solely by elected politicians.[87] Indeed, when the state legislatures hammered out the intrastate geographic apportionments of value or of liability for their respective property taxes, their decisionmaking tended to follow a pattern of political struggle that repeated itself in state after state: on one side, the seaports and the rich, coastal, market-oriented farms; and on the other side, the "back country" inland farms that were poorer and more subsistence-oriented.[88] Tax politics within a state often got nasty, and deciding the relative value of real estate in rival parts of a state partook of that nastiness. In 1783, an address adopted by the Continental Congress and drafted by James Madison recognized "the local injustice and discontents which have proceeded from valuations of the soil in every State where the experiment has been made."[89]

When Congress in 1798 enacted the first federal property tax, it could have decided, in the text of the federal legislation, the average taxable value of real estate (or, equivalently, the total tax liability) of each locality of each state. That would have tracked what the state legislatures had always been doing (and it is actually what Congress itself did in one of the multiple direct taxes it enacted later, in the 1800s). Congress in 1798 also could have made specific distributive

86. Act of Mar. 8, 1786, ch. 53, § 2, 1785 Md. Laws Nov. Sess. (no page numbers).

87. *See infra* notes 455-461 and accompanying text.

88. *See infra* notes 463-470 and accompanying text.

89. Address to the States (Apr. 26, 1783), *in* 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 280 (Gaillard Hunt ed., Washington, D.C., Gov't Printing Office, 1922). On the intrastate politics of mass valuation, see *infra* notes 476-509 and accompanying text.

decisions in a variety of other ways. But it did not. Instead, Congress in 1798 established the federal boards and delegated to them the power to decide all these discretionary and politicized questions of mass tax valuation through rulemaking, "as shall appear to be just and equitable." Each federal board was in position to manage the potential struggles within its own state, meaning that Congress would not have to.[90] Notably, each federal board in 1798 was structured like a mini state legislature: it had one member from each of several congressionally drawn geographic "divisions" of the state; it operated by majority vote; and commonly the board members had previously served, or were simultaneously serving, as state legislators.[91] Political controversy over valuation could indeed flare up on the federal boards, as in South Carolina, where one member (from a division in the backcountry) resigned in protest when his fellow members opted not to imitate the approach to land valuation that the state's legislature had previously adopted in response to the backcountry's complaints of unfairness.[92]

Part IV shows that the federal boards' mass revisions were final and absolutely binding on taxpayers: none of the potential avenues for judicial review of tax administration in the period were available to review the revisions, either in general or as applied. The 1798 legislation provided each assessed property owner with a statutory appeal to a higher-level assessment official to ensure consistent assessment of properties within the same district; these appeals occurred prior to the federal boards' mass revisions, and the legislation provided for no review of those mass revisions. Nor was there any nonstatutory means to obtain judicial review of the quantum of an assessment (as distinct from more categorical questions like whether property was taxable at all), whether in equity or at common law, including writs of error, certiorari, or mandamus. Nor was there any opportunity for judicial review of the quantum of the assessment during the enforcement process (in which the delinquent taxpayers' goods could be seized by distress, or their land sold against their will). Nor was there such an opportunity in tax-title litigation after enforcement, nor in tort suits against officers for unlawful distress of goods after enforcement.

Part V shows that the federal boards' power achieved wide, enduring, and bipartisan acceptance at a constitutional level, indicating the power's consistency with the Constitution's original meaning or, alternatively, with its liquidated

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90. *See infra* Section III.B. The case of direct taxation thus involved a different relationship between congressional delegation and federalism values than that which Jennifer Mascott finds for the case of import duties. Mascott, *supra* note 40, at 1394-96 (finding that Congress's refusal to delegate decisions about import duties furthered federalism values).

91. *See infra* Section III.C.

92. *See infra* Section III.D.

meaning.[93] There were no constitutional objections (indeed no objections at all) to the delegation of the mass-revision power in the extensively recorded debates on the 1798 direct-tax legislation. Though mainly a Federalist measure, the legislation passed by 3-to-1 majorities in the House (winning most of the *Jeffersonian* votes) and unanimously in the Senate, and the federal boards' mass-revision power was explained and endorsed at length by Representative Albert Gallatin, the House Jeffersonian leader. The tax drew no nondelegation objections from lawmakers even as the Jeffersonian opposition made vociferous constitutional objections to the near-simultaneous Alien and Sedition Acts, and even as Gallatin himself made express nondelegation arguments against the near-simultaneous bill to authorize the President to raise a provisional army.[94] To be sure, Jefferson himself opposed the direct tax as a political matter, but he did not question its constitutionality in public. Even in private letters he questioned its constitutionality only in the sense that it was part of a larger military buildup that he considered unrepublican; he never suggested—even in private—that the tax's *administration* was unconstitutional.[95] On the contrary, when Jefferson became President in 1801, he joined with his Treasury Secretary (Gallatin) and his congressional allies to take affirmative measures to complete the assessment process (including mass revisions) where it had been delayed in South Carolina.[96] Years later, when the Jeffersonian Congress prosecuted the War of 1812, it enacted its own direct taxes. The first of these, in 1813, omitted the mass-revision power (instead apportioning the tax burden in the statute itself, county-by-county within each state), but lawmakers' reasons for the shift were prudential (to avoid the delay that mass revisions would cause), not constitutional.[97] As the War of 1812 worsened and created more need for revenue, Congress in the winter of 1814-15 imposed a permanent annual direct tax, and *this* time it reinstated the federal boards and their mass-revision power, using the same open-ended "just and equitable" language as in 1798.[98] This confirms

93. Consistency of early practice over time is evidence that the practice follows true original meaning. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1166 (2003). Consistency of practice across multiple branches of government or multiple political parties strengthens the case that the Constitution's meaning has been liquidated in a manner embodied in the practice. Baude, *supra* note 41, at 18-19; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012).

94. *See infra* notes 632-660 and accompanying text.

95. *See infra* notes 667-671 and accompanying text.

96. *Infra* Section V.C.

97. *Infra* Section V.D.1.

98. *Infra* Section V.D.2.

widespread acceptance of the power's constitutionality under different parties. Indeed, when Congress resorted to direct taxation of real estate for the last time—to help finance the Civil War in 1861—it essentially copied the mass-revision power from the winter of 1814-15, right down to the language "just and equitable."[99]

Overall, the sweeping rulemaking powers of the federal boards of tax commissioners who administered the direct tax of 1798—combined with their decisions' binding power (insulated against judicial review) and the wide bipartisan acceptance of their power at the time and in subsequent enactments into the 1800s—are important evidence that the American political nation in the Founding era viewed administrative rulemaking as constitutional, even in the realm of domestic private rights. Congress's willingness to delegate rulemaking power in that realm was similar to the willingness it showed in other realms during the Constitution's early years of implementation.[100] Vesting power in administrators to make sweeping discretionary decisions with high political stakes was not alien to the federal lawmakers who first put the Constitution into practice.

* * *

Before closing this Introduction, let me discuss two responses that skeptics of rulemaking's constitutionality may give to these findings. First, no matter how sweeping, indeterminate, and politicized the questions of mass valuation were, the skeptics could potentially choose to label them as "factual" in nature, given that the definition of what questions are factual is quite malleable, especially if we do not require a factual question to be objective or specific.[101] Label-

99. *Infra* Section V.E.

100. On those other delegations of rulemaking power, see Parrillo, *Supplemental Paper*, supra note 44, at 13-16.

101. A leading proponent of strengthening the nondelegation doctrine has noted in a commentary on Justice Gorsuch's *Gundy* dissent that "there is no clear principle that can be used to draw" the distinction between factual questions and other kinds of questions; the distinction is "conventional, not metaphysical or epistemological" and "must often be drawn solely on the basis of policy." Gary Lawson, "*I'm Leavin' It (All) up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2019 CATO SUP. CT. REV. 31, 66-67. Compare the view of another leading proponent, who argues that, for purposes of a strengthened nondelegation doctrine, legitimately delegable factual determinations do not include those whose uncertainty is too great, e.g., inferring the health effect of a substance at low-exposure levels from its observed effect at high levels—the kind of evidence-light determination that "can only be made on a policy basis." Michael B. Rappaport, A Two Tiered and Categorical Approach to the Nondelegation Doctrine 23 (Oct. 17, 2020) (San Diego Legal

ing the federal boards' mass revisions as factual would cause them to fall within Justice Thomas and Justice Gorsuch's exceptions for determinations of fact (as distinct from policy), making the rulemakings technically consistent with those Justices' theories. But if the skeptics do this, then the 1798 legislation provides an originalist basis for construing those Justices' factual exceptions to a constitutional ban on rulemaking so broadly as to bless most and perhaps all statutory authorizations for rulemaking.[102] That would actually fit nicely with a long

Studies Paper No. 20-471), https://ssrn.com/abstract=3710048 [https://perma.cc/5YNZ-SK8P].

102. To begin with, the mandate for the federal boards "to revise, adjust and vary the valuations" in each district "as shall appear to be just and equitable," V&E Act, ch. 70, § 22, 1 Stat. 580, 589 (1798), does not fit easily with the idea that the boards were simply to make factual determinations devoid of policy choice; the provision does not expressly call for any factual finding at all and is very open-ended. But say we ignore that problem and interpret the mandate to mean—more specifically—that each board was to bring valuations across districts in line with the board's view of the relative average per-acre values of the districts. Even this would hardly mean the board's task was factual to the exclusion of policy. In 1798 there was no generally accepted definition of real-estate value or method for deciding it. *See infra* notes 272-273 and accompanying text and Sections II.A, II.B, II.E.2. Such valuation was subject to many indeterminacies of method, not to mention problems in obtaining data if and when a method was chosen. *See infra* Section II.C. Contemporaries in the late 1700s and early 1800s often characterized real-estate valuation as uncertain or as variable depending upon different opinions or approaches. See *infra* notes 264-269, 280-286, 287-288, 374-375, 388, 397, 412, 540, 542 and accompanying text. The direct-tax legislation did not specify any definition or method; on the contrary, lawmakers voted down a mandate for lower-level officials to value land at what it "might be sold for immediate payment in money" and opted instead for the vaguer term "worth in money." *See infra* notes 147-150 and accompanying text and Section II.D. And even if—contrary to what happened—Congress had adopted something like today's concept of fair market value (that is, what the land would sell for under normal market conditions, however defined), this would have required each federal board to predict the average per-acre price at which land in each district of its state would sell. But of course, the vast majority of parcels in a district had not been sold recently and would not be sold in the near future, that is, the vast majority never actually sold under market conditions identical or close to those on the statutory date of valuation. *See infra* notes 353-361, 429-430 and accompanying text (estimating that usual annual rates of turnover were around 1%). Thus, the board's determination for each district would involve taking the average of the predicted prices of a large number of future transactions (sales of all the parcels in each district of the state) that would, with few exceptions, never come to pass. It would require a mass prediction of hypothetical, never-to-occur events. Gathering data on historical sale prices in different districts would not yield determinate predictions, as the few lands sold in each district would not be a random or representative sample of all the district's lands, and (worse) the relationship between an owner's tendency to sell and the value of an owner's land could vary across districts. *See infra* text and accompanying notes 362-365. In light of problems like these, two economic historians say "it was impossible for eighteenth-century contemporaries to produce a meaningful average price per acre," as hedonic regression was not invented until the twentieth century. David B. Ryden & Russell R. Menard, *South Carolina's Colonial Land Market: An Analysis of Rural Property Sales, 1720-1775*, 29 SOC. SCI. HIST.

599, 611-12 (2005). Consistent with the idea that resolving such indeterminacy is unavoidably a matter of policy and therefore political, the relative taxable value of real estate in different parts of each state, for purposes of state property taxes, was generally decided by the respective state legislatures as of 1798. *See infra* notes 455-461 (on the state legislatures' control of mass valuation), 462-509 (on political controversy over legislative decisions regarding mass valuation) and accompanying text; *see also infra* Section III.D (on political controversy over federal boards' mass revisions); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 245 (1955) (noting that factual inferences from evidence depend on "theories of probability" having the status of "rules" that "are partially determined by policy, i.e., by law-making considerations"—an "aspect of the fact-finding process [that] is particularly pronounced in administrative fact-finding").

All that said, and despite all this indeterminacy, the category of "fact," as distinct from "policy" or "value judgment," is susceptible to so many definitions (for a review, see HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 7-45, 135-39 (2002)) that one could presumably find some definition that would encompass the boards' mass valuations. But that definition of "fact" would need to be very broad—encompassing determinations that are predictive, uncertain, and sweeping in scope, in which evidence-light presumptions can hardly be avoided. Such determinations play a central role in agency rulemaking. *See, e.g.*, 1 HICKMAN & PIERCE, *supra* note 60, at 597-99; Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1384-96 (2016). As Kenneth Culp Davis said, such findings of "judgmental facts" are "mixed with judgment, policy ideas, opinion, discretion, or philosophical preference." 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.10, at 180 (2d ed. 1980). Categorizing such determinations as factual and thus permissible to delegate would be to uphold the constitutionality of a large proportion of rulemaking delegations. And the "factual" category becomes even broader if we define it to encompass the power to specify the definition (or, equivalently, the methodology) for vague concepts like "worth in money," to say nothing of deciding what "shall appear to be just and equitable."

A side note: one might think we could shed light on the fact-or-policy status of the federal boards' determinations by considering that courts of the early republic, in litigation over land, viewed valuation as a question for the jury. *See, e.g.*, Faw v. Marsteller, 6 U.S. (2 Cranch) 10, 32 (1804). But jury questions were not confined to factual matters in this period. *See* Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 AM. J. LEGAL HIST. 35, 36-40 (2005). More importantly, even if valuation *were* considered a factual question *in court*, this would only shed light on valuation's status for purposes of the binary fact/law distinction characteristic of the judiciary, not for purposes of the tripartite fact/law/policy distinction at issue in today's debate on legislative delegation to the executive. *See, e.g.*, Rappaport, *supra* note 101, at 11-24 (arguing that it is constitutional for Congress to delegate law questions and fact questions but not policy questions). And even if we were to categorize a *court's* determination of land's value as factual for purposes of a tripartite fact/law/policy distinction, we must keep in mind the vast difference between such a determination (confined to one or a few specific parcels in a single lawsuit) and the task of each federal board (determining the relative average per-acre value of land between all districts across an entire state). The latter was more general and complex by orders of magnitude. Prior to 1798, such statewide mass determinations of relative value had been undertaken only by state legislatures. *See infra* notes 455-461 and accompanying text; *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769-70 (2003) (finding that, "in practice," courts drawing the law/fact dis-

line of Supreme Court cases that have upheld agency rulemaking powers as turning on supposedly factual questions when it was obvious they were actually highly subjective questions laden with policy choice.[103]

Second, the skeptics might recognize a third exception to the nondelegation doctrine, for taxation, on top of their existing exceptions for noncoercive measures and for foreign and military affairs. I think such a move would be untenable, for three reasons. First, the nondelegation doctrine is premised on Article I's vesting of "legislative power" in Congress, and the Framers explicitly and repeatedly defined taxation as a legislative power. In *The Federalist*, Hamilton asked, "What is the power of laying and collecting taxes, but a *legislative power*, or a power of *making laws*, to lay and collect taxes?"[104] And Madison said that "there is, perhaps, no *legislative* act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice," than the "apportionment of taxes, on the various descriptions of property."[105] Second, the Supreme Court held unanimously in 1989 that the nondelegation doctrine applies equally to taxation as to other types of legislation.[106] Third, Justice

tinction tend, apart from relying simply upon convention or pragmatic views of judges' and juries' relative competence, to find matters factual if they are more "specific" and "localized" and have less "general import").

103. *See* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 57-58 (1975) (arguing that the delegated power to lift trade restrictions on a foreign nation if and when that nation "shall cease to violate the neutral commerce of the United States," upheld as a fact determination in *Cargo of the Brig Aurora v. United States* (*The Aurora*), 11 U.S. (7 Cranch) 382 (1813), really called for "a policy choice, not a factual judgment"); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 56 (1965) (characterizing the delegated power to retaliate against foreign tariffs that the President "may deem to be reciprocally unequal and unreasonable" and to continue retaliation "for such time as he shall deem just," upheld as a fact determination in *Field v. Clark*, 143 U.S. 649 (1892), as really a "wide and uncertain area of judgment" and "not a formula at all but a bargaining power put into the President's hands").

104. THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

105. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

106. Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214 (1989). In this case, the Court treated taxation as typical, not exceptional, for purposes of nondelegation under Article I. The Court has also treated taxation as typical for the purpose of other constitutional doctrines, such as procedural due process under the Fifth and Fourteenth Amendments, evidenced by *Bi-Metallic*'s status as a leading case. *See supra* notes 59-60 and accompanying text. That said, the Court has sometimes treated taxation as exceptional, perhaps most notably with regard to Article III's "judicial power" clause. Under Article III, the Court has distinguished between "public rights" that may be adjudicated by administrators and "private rights" that must be adjudicated by courts, and it has long placed taxation in the "public rights" category, relying upon the long history of administrative tax adjudication, some of which is noted in Part IV *infra*. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 248-53 (7th ed. 2016);

Gorsuch's own formulation seems to leave no space for a tax exception. His *Gundy* opinion defines legislative power as "the power to adopt generally applicable rules of conduct governing future actions by private persons."[107] Ordering landowners to pay a sum of their money to the government, under penalty of having their goods or lands seized, is a rule of conduct for private persons. To be sure, it governs conduct as between a private person and the government, not conduct as between one private person and another.[108] But I fail to see why the imperative for laws to be made by Congress would be weaker for governing the former type of conduct than the latter. (If anything, my intuition runs the opposite way.) And Justice Gorsuch seems to agree that conduct as between private persons and the government would fall within this definition. In *Gundy*, he defined as "rules of conduct" the requirements of the Sex Offender Registration and Notification Act, which generally required previously convicted persons to report and disclose information about themselves *to the government*, which would then disseminate that information to others.[109]

Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 586-90 (2007). Two scholars have recently suggested that Article III's distinction between public and private rights could serve as a model for reformulating the Article I nondelegation doctrine—in particular, that privileges and benefits (which take up most of the category of public rights) should be free (or relatively free) from nondelegation constraints, whereas private rights should be fully subject to such constraints. Bamzai, *supra* note 35, at 178, 180-82; Rappaport, *supra* note 101, at 4-11. But neither scholar addresses whether taxation's placement in the "public rights" category for Article III purposes means taxation should also fall in that category for Article I purposes. Apart from the question of whether an exception to the nondelegation doctrine for even noncoercive public rights has an originalist basis, *see supra* note 51, it seems very strange to think that the Framers, *if* they thought it more important for some matters to be under legislative control than others, would put taxation on the *lesser* end of that scale.

107. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

108. Or rather, it governs conduct between private persons only indirectly, by affecting people's incentives to buy or sell the taxed article (i.e., land).

109. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting) (describing the Act's requirements); *id.* at 2144 (characterizing the Attorney General's discretion to impose such requirements as the power to write "a code of conduct governing private conduct for a half-million people"); *cf.* HAMBURGER, *supra* note 40, at 60 (referring to the "power to tax or otherwise bind subjects").

I. FEDERAL TAXATION OF REAL ESTATE IN 1798: FUNDAMENTALS

A. The Direct Tax's Background, Political Origins, and Substance

The founding generation distinguished between two types of taxes. The first was *direct taxes*, a category whose boundaries were elusive and contested, though all agreed it included any tax on real estate, and most saw it as including any tax on the ownership of property if levied without regard to its "use or role in commerce" and if "defined in a way that could be repeated year after year on the identical" object of taxation,[110] which would include taxes on slave ownership. The second category was *indirect taxes*—that is, taxes that were paid by an importer, manufacturer, or retailer of goods, who passed on the burden to consumers through higher prices. Indirect taxes were either *external* (import duties) or *internal* (excises on domestic goods paid by manufacturers or retailers).[111]

During the 1780s, Americans faced unprecedented tax burdens due to Revolutionary War debts and the cost of defending the newly independent nation. The Continental Congress made large requisitions of the state legislatures, who tried to pay mainly by levying direct taxes, especially on real-estate and slave ownership.[112] These state direct taxes of the 1780s proved to be disastrous politically. In contrast to import duties and excises—which were paid by cash- and credit-rich merchants and manufacturers who made up a tiny fraction of the population—direct taxes required officials to assess and extract payment from the great mass of ordinary farmers, who often had little access to cash or credit and thus found payment to be a hardship.[113] Farmers resisted officials by threats and violence (occasionally open rebellion) and by forming electoral coalitions to weaken state tax laws, thus preventing states from paying requisitions.[114] Nonpayment caused the national fiscal crisis of the mid- to late 1780s, which prompted elites across the states to unite in establishing a Constitution

110. Crane, *supra* note 63, at 46.

111. Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297, 319-21, 324, 328 (2015).

112. ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 33-37 (1993); MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783-1867, at 54-56 (2014).

113. For comparisons between direct and indirect taxes, see BROWN, *supra* note 112, at 36-38; EDLING, *supra* note 112, at 69; MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 188-89, 214 (2003) [hereinafter EDLING, REVOLUTION]; and EINHORN, *supra* note 53, at 155, 188.

114. BROWN, *supra* note 112, at 53-138.

that would allow the national government to levy the taxes and obtain the credit necessary for national survival.[115]

The new Constitution empowered Congress to impose indirect taxes, external and internal, so long as they were uniform for all goods and transactions across the country,[116] and it also authorized direct taxes, so long as they were apportioned among the states according to the free population plus three-fifths of the slave population.[117] The consensus was that, in ordinary times, Congress should rely mainly on indirect external taxes (import duties) since officials collecting them needed only to deal with a tiny number of cash-rich merchants, who then passed along the burden invisibly to the consuming public with minimal political friction.[118] But while direct taxes were nobody's first choice as a source of federal revenue, the Framers were emphatically committed to having direct taxation in the federal arsenal. It was the only way that Congress, when facing a crisis like war or insurrection, could tap the nation's full resources—especially its landed wealth in a society that was overwhelmingly agricultural. A direct tax would be especially crucial if the United States entered into a maritime conflict that could cut off sea trade and eliminate import-duty revenue at the very hour of need.[119]

When the new federal government began operating in 1789, Congress immediately enacted import duties, which worked beautifully, providing more than 90% of federal revenue, with excises playing a small, supplemental role.[120] The success of import duties allowed the federal government to cease requisitions and to assume the states' debts. State governments circa 1790 suddenly ascended from fiscal hell to fiscal heaven, reducing their direct taxes on the order of 75% to 90% and, in some cases, eliminating them altogether.[121] (This meant that, when the federal government later considered its own direct taxes in 1798, it was doing so at a time when *no* American jurisdiction above the local level had levied heavy direct taxes in about a decade—that is, at a time when

115. *Id.* at 141-99. *See generally* EDLING, REVOLUTION, *supra* note 113.

116. U.S. CONST. art. I, § 8, cl. 1.

117. U.S. CONST. art. I, § 2, cl. 3; *id.* at art. I, § 9, cl. 4; *see also* EINHORN, *supra* note 53, at 158, 165-66 (discussing the three-fifths compromise).

118. On the consensus in favor of import duties and reasons for it, see EDLING, REVOLUTION, *supra* note 113, at 185-88, 194-95; and EINHORN, *supra* note 53, at 149, 155, 164-65.

119. *See* EDLING, REVOLUTION, *supra* note 113, at 194-95; EINHORN, *supra* note 53, at 184.

120. *See* EDLING, REVOLUTION, *supra* note 113, at 209-10; ALBERT GALLATIN, ANNUAL RECEIPTS FOR SEVENTEEN YEARS (1809), *in* 2 AMERICAN STATE PAPERS: FINANCE 318, 319 (Walter Lowrie & Matthew St. Clair Clarke eds., D.C., Gales & Seaton 1832).

121. EDLING, *supra* note 112, at 61-68, 77-78.

the most salient memory of direct taxation, in everyone's minds, was the politically explosive state direct taxes of the 1780s.)

At the congressional level, the period from 1789 through the mid-1790s did not produce the sort of crisis for which people conventionally thought a federal direct tax was suited. Even so, some lawmakers—including the successive House Jeffersonian Republican leaders James Madison and Albert Gallatin—increasingly argued that Congress's source for supplemental revenue should not be excises but rather direct taxation.[122] These proponents thought that excises required unduly intrusive surveillance of businesses, drew upon a manufacturing sector that was still too small, operated unfairly to the South, and were invisible to the mass citizenry in a manner that perversely allowed Federalist lawmakers to tax and spend excessively.[123]

Madison and Gallatin's efforts were initially futile, but in 1796-98, a crisis arose that ultimately led Congress to adopt direct taxation. Angered by congressional implementation of a treaty friendly toward Britain, revolutionary France in mid-1796 began seizing American merchant ships.[124] In late 1796, Treasury Secretary Oliver Wolcott (Hamilton's successor and close ally) submitted a long report to the House on the possibility of direct taxation.[125] In early 1797, after debate, the House adopted a resolution, 49 to 39, endorsing a direct tax in principle. The issue did not break along partisan lines. Those in favor included 29 Republicans (Madison and Gallatin among them) and 20 Federalists, while those opposed included 18 Republicans and 21 Federalists.[126] Although Secretary Wolcott drafted a direct-tax bill (now lost) in consultation

122. 2 ANNALS OF CONG. 1846 (1791) (statement of Rep. Madison) (stating a preference for direct taxation over excises).

123. 5 ANNALS OF CONG. 848-49 (1796) (statement of Rep. Gallatin); 4 ANNALS OF CONG. 1117 (1795) (statement of Rep. Madison); 2 ANNALS OF CONG. 1534-42 (1790) (statement of Rep. Madison); EINHORN, *supra* note 53, at 114, 186-89; Dalzell, *supra* note 66, at 303-04; Letter from James Madison to George Thompson (Jan. 29, 1789), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-11-02-0315 [https://perma.cc/8L2E-4QDQ].

124. GEORGE C. DAUGHAN, IF BY SEA: THE FORGING OF THE AMERICAN NAVY—FROM THE AMERICAN REVOLUTION TO THE WAR OF 1812, at 292-98, 304 (2008).

125. WOLCOTT REPORT, *supra* note 82.

126. 6 ANNALS OF CONG. 1941-42 (1797). Party affiliations for this and later congressional votes are from the Biographical Directory of the United States Congress, https://bioguideretro.congress.gov [https://perma.cc/DS72-NF78], with the few gaps supplied by American National Biography, anb.org [https://perma.cc/6PJD-N3AM].

with the Ways and Means Committee,[127] it never came to a vote; instead, Congress in March 1797 further increased import duties.[128]

Foreign relations reached a full crisis in the spring of 1798, when sensational revelations about French-American diplomatic negotiations revealed the French to be far more hostile than most Americans had supposed. As spring turned to summer, Federalists controlling Congress enacted an unprecedented military program, doubling the army[129] and building up the navy from almost nothing.[130]

To help pay for all this, the Federalists, who previously had been no more interested and probably less interested in direct taxation than the Republicans, now united themselves in support of a direct tax.[131] Republicans were split: their most prominent leaders had a track record of supporting direct taxes, but the present tax was to finance a military program that they mostly opposed. That said, many Republicans, and especially Gallatin, were averse to public debt and thus willing to cooperate with Federalists to enact a direct tax to avoid more loans.[132]

Federalist unity combined with partial Republican support meant the direct tax moved through Congress with "little effective opposition."[133] The debate was less about whether to impose the tax than how to structure it. The Ways and Means Committee reported a bill on May 15, 1798,[134] with slaveholding to be taxed at a uniform sum for each enslaved person; land by a flat rate ad valorem; and houses by categorizing each in a value class that had its own tax sum (e.g., houses worth $200 to $600 were each taxed $1.50)—a scheme the bill's

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127. For its introduction, see 6 ANNALS OF CONG. 2095 (1797). On its preparation, see *id.* at 2262-63 (statement of Rep. Harper); and Letter from Oliver Wolcott, Jr. to Oliver Wolcott, Sr. (Feb. 20, 1797), *in* 1 GEORGE GIBBS, MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS, EDITED FROM THE PAPERS OF OLIVER WOLCOTT, SECRETARY OF THE TREASURY 443 (N.Y., Van Norden 1846).

128. Act of Mar. 3, 1797, ch. 10, 1 Stat. 503, 503-04; Letter from James Madison to Thomas Jefferson (Jan. 15, 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-29-02-0206 [https://perma.cc/FZ9P-KA32] (explanation provided in editor's footnote).

129. KREIDBERG & HENRY, *supra* note 48, at 31-35.

130. DAUGHAN, *supra* note 124, at 311-15, 321-22, 343.

131. Dalzell, *supra* note 66, at 325.

132. 8 ANNALS OF CONG. 1919 (1798) (statement of Rep. Gallatin); Markus Claudius Cachia-Riedl, Albert Gallatin and the Politics of the New Nation 117 (1998) (unpublished Ph.D. dissertation, University of California, Berkeley), PQDT No. 9902016.

133. Dalzell, *supra* note 66, at 328.

134. 8 ANNALS OF CONG. 1707 (1798).

proponents said would put a higher effective rate on houses than on land.[135] The rationale for taxing houses separately and more heavily was that houses served as a proxy for financial and mercantile wealth that ought to bear some of the tax's burden yet could not be assessed directly.[136] (Prior to the rise of large nodal institutions like banks or widely owned corporations that could serve as third-party reporters, governments found it insurmountably difficult to assess individuals' financial and mercantile wealth except crudely.[137]) Gallatin opposed the separate taxation of houses, contending instead that every house should be taxed with the parcel on which it sat, as one unit, at whatever flat rate was necessary for the state's quota of the tax. He moved on May 29 to delete the house-classification provision,[138] and the House agreed with him, 45 to 39.[139] Because this change "would occasion many alterations," the House recommitted the bill to committee.[140]

When the committee reported again, in early June, it had decided to implement the tax through two separate but interlocking bills, the first of which governed the assessment, and the second of which actually levied the tax (according to the assessment under the first bill) and provided for the tax's collection.

The first bill, which I call the *Valuation and Enumeration Act*, was reported to the House on June 5;[141] it would ultimately become law with the full title "An Act to Provide for the Valuation of Lands and Dwelling Houses, and the Enumeration of Slaves Within the United States."[142] As reported, this bill eschewed the categorization of houses into value-based classes that Gallatin had persuaded the House to delete from the original bill, yet it still provided for houses to be given separate valuations, thus leaving the door open for Congress to tax them at a different rate than lands (in the second bill that would actually

135. OLIVER WOLCOTT, JR., APPORTIONMENT OF DIRECT TAXES (May 25, 1798), *in* 1 AMERICAN STATE PAPERS: FINANCE, *supra* note 82, at 588, 589; 8 ANNALS OF CONG. 1839 (1798) (statement of Rep. Harper); *id.* at 1845-46 (statement of Rep. N. Smith); *id.* at 1847 (statement of Rep. Sitgreaves); *id.* at 1851 (statement of Rep. Gallatin).

136. EINHORN, *supra* note 53, at 191; Dalzell, *supra* note 66, at 326-27.

137. Identifying such intangible wealth (or income from it) was a continuing problem through the nineteenth century and was not solved until the early twentieth. AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 44-45, 198, 208-09, 228-29, 232-33, 237, 240 (2013).

138. 8 ANNALS OF CONG. 1837-38 (1798) (statement of Rep. Gallatin).

139. 8 ANNALS OF CONG. 1854 (1798).

140. *Id.* at 1855, 1866.

141. *Id.* at 1869.

142. *See* V&E Act, ch. 70, 1 Stat. 580 (1798); *supra* note 53.

levy the tax).[143] Gallatin said the new bill "was not formed . . . altogether to his wish; but it was as nearly so as he could get it, and it was necessary the money should be raised."[144] The House debated the bill at length, without making any changes involving delegation,[145] and then passed it on June 13, by a vote of 69 to 19. The yeas were 48 Federalists and 21 Republicans (including Gallatin), while the nays were one Federalist and 18 Republicans.[146] Once the bill was in the Senate, a select committee there recommended some targeted but important changes. The one relevant for our purposes was to change the bill's standard for valuation of land and houses. Whereas the House-passed bill said to value each parcel and house at the amount "for which" it "might be sold for immediate payment in money," the Senate committee wanted to replace this with a vaguer mandate to value each parcel and house at what it was "worth in money," a recommendation the Senate adopted.[147] A few days later, a Senator

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143. *See* 8 ANNALS OF CONG. 2054 (1798) (statement of Rep. Venable). Separate taxation of houses and lands introduced a potential for confusion because, obviously, every house was attached to a parcel of land. The eventual statute said that, if the house was on a parcel of two acres or less, officials should value the house and land as a unit and designate the whole thing as a house for tax-rate purposes. *See* V&E Act § 8. Things got more complicated when the house was affixed to a parcel of land bigger than two acres, as with a farmhouse. In that case, the legislation apparently meant that the assessing officials should imagine that the house and the area (two acres) on which it sat were a separate parcel and categorize that imaginary parcel as a house (to be taxed at the progressive rate), and then value the remainder of the parcel as land (to be taxed at whatever flat rate proved necessary to make up the state's quota after tax liabilities were determined for slave ownership and houses). *See infra* note 384 and accompanying text.

144. 8 ANNALS OF CONG. 1919 (1798).

145. *Id.* at 1893-96, 1898-99, 1917-25.

146. *Id.* at 1925.

147. On Senate consideration of the select committee report, see 7 ANNALS OF CONG. 592 (1798). On the Senate's agreement to the committee report on June 30 (including the amendment about "worth in money," discussed in the remainder of this footnote), see S. JOURNAL, 5th Cong., 2d Sess. 524 (1798) [hereinafter SENATE JOURNAL]. I obtained the Senate committee report from the ProQuest Congressional database, where it forms part of a single PDF document that is catalogued as a "bill" and is designated "5 H.R. 56*," which is a designation made by ProQuest in recent years, not by Congress in 1798. The PDF document on ProQuest consists of (a) the printed House-passed bill with Senate amendments written on it by hand and (b) a series of unnumbered and untitled handwritten and printed pages that give the Senate committee's amendments, sometimes duplicatively. The printed page giving the Senate committee's amendments (which is the 28th page of the PDF) begins with the words, "The Committee to whom was referred the bill." That page has one item that says: "Folio 9. Section 8, line 20, strike out the words 'for which,' and, in the following line 21, the words 'might be sold for immediate payment,' and, in lieu of the last words stricken out, insert 'are worth.'" After this item, the word "agreed" is handwritten twice, indicating the Senate adopted the committee's amendment. The page then has an item that says: "Line 26,

moved to "restore" the language about "immediate payment," but the Senate rejected the motion, 14 to 8,[148] sticking with the vaguer wording. On July 2, the Senate passed the bill, 22 to none.[149] The House on July 3 agreed to most of the Senate amendments (including the change in the valuation standard) but disagreed on an issue unrelated to delegation.[150] The Senate on July 5 receded on this issue,[151] bringing the chambers into agreement. Finally, President Adams signed the Valuation and Enumeration Act on July 9.

The second bill, which I call the *Lay and Collect Act*, was reported to the House on June 22;[152] it would ultimately become law with the full title "An Act to Lay and Collect a Direct Tax Within the United States."[153] The key provisions of the bill as reported—all of which made it into the final act—provided for a tax of $2 million dollars; apportioned the sum among the states; and provided for each state's quota to fall *first* on the state's slaveholders at fifty cents per enslaved person, *then* on the state's house-owners according to a progressive rate on the value of their houses (rather than the lumpier value-based classes of the original bill), and *lastly* on the state's landowners at whatever flat rate on the value of land proved necessary to make up the remainder of the state's quota.[154] The Lay and Collect Act said that valuations of houses and lands were to be those determined under the Valuation and Enumeration Act.[155]

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same section, strike out the word 'for;' strike out, in line 27, these words: 'might be sold for immediate payment,' and insert these words: 'is worth.'" After this item, the word "agreed" is handwritten twice, indicating the Senate adopted this committee amendment as well. One can use the folio (page) and line numbers to find corresponding handwritten changes in the text of the full House-passed bill that comes at the start of the PDF document, thus confirming what changes were being made. The changes correspond to the final enacted text of section 8 of the V&E Act, 1 Stat. 580, 585 (1798). The source of the PDF document in the ProQuest database is a microfilm roll from the Library of Congress, labeled "5th Congress, 1797-1799, House Bills, 1st Session, 2nd Session, 3rd Session, Resolutions," designated Shelf No. 2D, LL-01. I thank Catherine Johnson at ProQuest for this information.

148. 7 ANNALS OF CONG. 596 (1798).

149. *Id.* at 597.

150. The issue was what land to exempt from tax. SENATE JOURNAL, *supra* note 147, at 527; H.R. JOURNAL, 5th Cong., 2d Sess. 366 (1798) [hereinafter HOUSE JOURNAL]; 8 ANNALS OF CONG. 2087-88 (1798); 7 ANNALS OF CONG. 598 (1798).

151. HOUSE JOURNAL, *supra* note 150, at 368.

152. 8 ANNALS OF CONG. 2033 (1798).

153. *See* Act of July 14, 1798 ("Lay and Collect Act"), ch. 75, 1 Stat. 597 ("An Act to Lay and Collect a Direct Tax Within the United States").

154. *Id.* §§ 1-2, 1 Stat. at 597-98.

155. *Id.* § 2.

The House debated the Lay and Collect Act at length,[156] especially a proposal by Republican Samuel Smith of Maryland to tax houses uniformly with land at whatever flat rate was needed for each state's quota,[157] and a more modest proposal by Gallatin to maintain the set of progressive rates for houses but have them all float up or down, as needed to fill each state's quota, in a manner to ensure that the lowest rate for houses equaled the flat rate for land.[158] By this proposal, Gallatin—whose rural western-Pennsylvania district had a political rivalry with Philadelphia—sought to make sure the brunt of the tax did not fall too heavily on farmers in the event that the unpredictable rate on land (which depended on how much of the state's quota remained to be filled after tax liabilities for slaveholding and houses were determined) ended up higher than the rates on houses toward the low end of the progressive rate structure. But the House defeated both Smith and Gallatin's proposals. On July 2, it passed the bill, by a vote of 62 to 18. The yeas were 43 Federalists and 19 Republicans, while the nays were 17 Republicans and one Federalist.[159] Gallatin ended up voting nay, despite all his work on the bill, apparently because of the failure of his proposal to protect farmers against the possibility of a high rate for land relative to the rates for houses.[160]

The bill went to the Senate, which made targeted but important amendments, including one to replace the progressive rates for houses with a flat rate of four mills.[161] The Senate then passed the bill without a recorded vote on July 9.[162] When the Senate amendments reached the House, Gallatin said the Senate's four-mill rate for houses was inadequate because it would not necessarily protect farms from bearing the brunt of the tax, as the rate on land might still end up higher than four mills.[163] The House rejected the Senate's amendment on this point, among other disagreements.[164] The Senate then receded from the flat four-mill rate,[165] and the House then receded from other disagree-

156. 8 ANNALS OF CONG. 2049-61 (1798).

157. HOUSE JOURNAL, *supra* note 150, at 357-58; 8 ANNALS OF CONG. 2049-52, 2059 (1798).

158. HOUSE JOURNAL, *supra* note 150, at 359-60; 8 ANNALS OF CONG. 2053, 2055, 2060 (1798).

159. 8 ANNALS OF CONG. 2066-67 (1798).

160. *Id.* at 2067.

161. 7 ANNALS OF CONG. 601-02 (1798); U.S. SENATE, 5TH CONG., AMENDMENTS OF THE SENATE, TO THE BILL, INTITULED, "AN ACT TO LAY AND COLLECT A DIRECT TAX WITHIN THE UNITED STATES." (1798), Readex Early American Imprints, Series 1, no. 34702.

162. SENATE JOURNAL, *supra* note 147, at 533; 7 ANNALS OF CONG. 605 (1798).

163. 8 ANNALS OF CONG. 2172 (1798) (statement of Rep. Gallatin).

164. *Id.*; *see also* HOUSE JOURNAL, *supra* note 150, at 381.

165. SENATE JOURNAL, *supra* note 147, at 536; 7 ANNALS OF CONG. 608 (1798).

ments,[166] bringing the chambers into alignment. President Adams signed the Lay and Collect Act on July 14.

As it turned out, the direct tax of 1798 was primarily a tax on real estate. The aggregate tax burden (in the twelve states for which statistics survive) ended up falling mainly on land, not slave ownership or houses: land bore at least fifty-eight percent of each state's total tax burden, and often far more, with the sole exception of New York, where it bore forty-three percent, due mainly to the high value of urban homes and the mercantile wealth they represented.[167] Though data are missing for the Carolinas and Georgia, slave ownership bore less than a quarter of the burden in major slave states like Virginia (twenty-two percent) and Maryland (sixteen percent).[168]

The approximately $2 million in revenue raised, which arrived over the next few years at a pace comparable to contemporaneous direct taxes by the states,[169] made the federal direct tax a substantial source of funds amid the maritime hostilities with France that lasted up to 1800.[170] But it was hardly the primary one, for while import duties did fall because of the sea conflict, they never went below $6 million per year after 1792.[171] Yet we should not lose sight of the direct tax's true financial significance, which had less to do with immediate revenue than with credit. The government's immediate needs had to be met primarily by borrowing, and the federal government's demonstration of its *capacity* for direct taxation—the only kind of taxation capable of reaching the bulk of American wealth—was considered important to maintain the United States' credibility with lenders.[172]

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166. SENATE JOURNAL, *supra* note 147, at 538; HOUSE JOURNAL, *supra* note 150, at 384; 7 ANNALS OF CONG. 609 (1798).

167. EINHORN, *supra* note 53, at 306 n.71.

168. These calculations are based on Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Edward Carrington, Supervisor of Va. (Apr. 2, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 4, Connecticut Historical Society); and Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to John Kilty, Supervisor of Md. (May 2, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 5, Connecticut Historical Society).

169. *Compare* GALLATIN, *supra* note 120, at 319 (giving receipts of federal direct tax over time), *with* EDLING, *supra* note 112, at 56-58 (describing time of collection for state property taxes).

170. DAUGHAN, *supra* note 124, at 342.

171. GALLATIN, *supra* note 120, at 320.

172. For discussion of the relationship between the direct tax and national credit, see 8 ANNALS OF CONG. 1599, 1608-09, 1615, 1618 (1798). On how Congress authorized the President to borrow against direct-tax revenue as soon as the tax was enacted, see Paul Douglas Newman, *The Federalists' Cold War: The Fries Rebellion, National Security, and the State, 1787-1800*, 67 PA. HIST. 63, 88 (2000).

B. The Administrative Organization and Scale of the Valuation Apparatus

To understand the sweeping rulemaking power of the direct-tax regime, we must first consider the structure and sheer size of the official organization that valued real estate.[173] That organization was established by the Valuation and Enumeration Act, enacted July 9, 1798.[174] The Lay and Collect Act, enacted a five days later on July 14, levied the tax "according to the valuations and enumerations to be made pursuant to" the Valuation and Enumeration Act,[175] which meant that administrative acts under the Valuation and Enumeration Act automatically carried coercive force, without any need for further congressional action.

The first thing the Valuation and Enumeration Act did was to establish in each state a federal board of tax commissioners. To do this, the Act divided each state into an odd number of federal tax "divisions," each of which consisted of one or more counties. The number of divisions within a state varied from eleven in the most populous state (Virginia) to three in each of the least populous ones (e.g., Delaware).[176] For each division, the President was to nominate, and the Senate to confirm, a federal tax commissioner "who shall reside within the same" division for which he was appointed.[177] Commissioners apparently

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173. The federal officials described in this Section were responsible not only for the valuation of real estate, but also for enumerating enslaved people, for each of whom the slaveholder was taxed a flat sum of fifty cents, with certain exceptions. Here I do not focus on the counting of the enslaved population because I have not found evidence that it involved the kind of sweeping rulemaking discretion that the tax's valuation of real estate did. *See supra* note 53.

174. V&E Act, ch. 70, 1 Stat. 580 (1798).

175. Lay and Collect Act, ch. 75, § 2, 1 Stat. 597, 598 (1798).

176. V&E Act § 1, 1 Stat. at 580-83.

177. *Id.* § 3, 1 Stat. at 584. This provision does not expressly provide for presidential nomination or Senate confirmation of the commissioners. Instead it states, somewhat cryptically, that "there shall be one commissioner appointed for each of said divisions," and adds that "if the appointment of said commissioners, or any number of them, shall not be made during the present session of Congress, the President of the United States shall be, and he is hereby empowered to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session." *Id.* Whatever the reason for this textual oddness, President Adams on July 16, 1798, did "nominate" a full slate of commissioners covering all boards in all states, and the Senate on July 17 did "advise and consent" to them. 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA: FROM THE COMMENCEMENT OF THE FIRST, TO THE TERMINATION OF THE NINETEENTH CONGRESS 287-89 (D.C., Duff Green 1828) [hereinafter SENATE EXECUTIVE JOURNAL]; *see also* [Untitled Printed Commission Starting with Text, "John Adams, President of the United States of America"] (Elisha Reynolds Potter, Sr. Papers, Box 1, Folder 14, catalog number MSS 629 SG 2, Rhode Island Historical Society) [hereinafter Untitled Printed Commission] (stating, over President Adams's signature, "I have nominated, and by and

served at the President's pleasure.[178] The commissioners appointed in each state constituted a board covering that state.[179] Thus, Virginia was covered by an eleven-member board, Delaware by a three-member board, and so on. A majority of each board's commissioners could exercise all of the board's powers.[180]

Each board had the power to divide its state "into a suitable and convenient number of assessment districts."[181] This was the boards' first rulemaking power. The power governed the assessment's organization, of course, but it also governed the assessment's substance, because the boundaries of the assessment

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with the advice and consent of the Senate do appoint" the named persons as commissioners under the Valuation and Enumeration Act).

178. The Valuation and Enumeration Act said nothing about the commissioners' removal. The standard printed commission given to the commissioners said they would "hold the same [offices] . . . during the pleasure of the President of the United States for the time being." For an example, see the Untitled Printed Commission, *supra* note 177.

179. In each state, a "majority of the commissioners" were "declared to be a board competent to transact and discharge any business or duties enjoined by this act," V&E Act § 4, 1 Stat. at 584, and contemporaries referred to them as a "board." For example, U.S. Senator John Rutherfurd used the term "board of commissioners" in this way in a public letter soon after the Act was passed. *Copy of a Letter from the Hon. John Rutherford [Rutherfurd], Esq. One of the Senators of the State of New Jersey, to Charles Pemberton, Esq. Sheriff of the County of Sussex*, GENIUS OF LIBERTY (Morristown, N.J.), Sept. 6, 1798, at [3], [3] [hereinafter *Copy of a Letter from the Hon. John Rutherford [Rutherfurd] to Charles Pemberton*] (printing letter dated July 11, 1798). Secretary Wolcott referred to the body of commissioners in each state as a "Board" in his first circular of instructions to the commissioners. OLIVER WOLCOTT, JR., U.S. DEP'T OF TREASURY, CIRCULAR [TO THE COMMISSIONERS FOR ASSESSING DIRECT TAX] 1 (Aug. 7, 1798) (Oliver Wolcott, Jr. Papers, Box 21, Folder 17, Connecticut Historical Society).

180. When conferring powers on the "commissioners" within a state, the Valuation and Enumeration Act conferred several of those powers expressly on a majority of the commissioners. *E.g.*, V&E Act § 4, 1 Stat. at 584 (to adjourn a meeting); § 6, 1 Stat. at 584 (to accept an excuse for absence from a meeting); § 8, 1 Stat. at 585 (to establish regulations); § 22, 1 Stat. at 589 (to order a new valuation). More generally, the Act declared "a majority of the commissioners" in each state "to be a board competent to transact and discharge any business or duties enjoined by this act." § 4, 1 Stat. at 584. Secretary Wolcott wrote: "It is my opinion, and I believe that of the gentlemen appointed to execute the law in the States generally, that not only a majority of the Com[missione]rs in a State are sufficient to form a Board, but also, that the majority of the Com[missione]rs present at a meeting of the Board are competent to the decision of any question." Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury to Royal Tyler, Clerk, Vt. Bd. of Comm'rs (Nov. 22, 1798) (Oliver Wolcott, Jr. Papers, Box 19, Folder 10, Connecticut Historical Society).

181. V&E Act § 7, 1 Stat. at 584. The Treasury Secretary could "reduce the number of assessment districts in any state, or the number of assistant assessors in any district, if either shall appear to him to be too great." *Id.* § 7, 1 Stat. at 585. In the many letters by Secretary Wolcott to federal boards (or clerks or members thereof), I have seen no examples of him exercising this power. *See* Oliver Wolcott, Jr. Papers, Boxes 19-21, Connecticut Historical Society.

districts determined which properties would be bundled together for purposes of the board's eventual en masse revisions of real-estate valuations. The boards took advantage of the discretion conferred upon them: they made widely divergent choices in how large the districts should be, as shown in Table 1 (using population figures from the 1800 census).

TABLE 1.
FEDERAL ASSESSMENT DISTRICTS CREATED BY THE FEDERAL BOARDS[182]

Federal Board	Contents of Each District	Number of Districts	Avg. Free and Slave Population per District	Avg. Free Population per District	Avg. Slave Population per District
New Hampshire	4 to 12 towns	30	6129	6128	0
Vermont	1 to 20 towns	24	6436	6436	0
Massachusetts	1 to 4 towns (usually)	145	3963	3963	0
Rhode Island	1 town (usually)	28	2469	2455	14
Connecticut	1 town (usually)	67	3746	3732	14

182. Sources: Except for Georgia and South Carolina, assessment districts are from the summary abstracts for the federal boards in the respective states. *See* Oliver Wolcott, Jr. Papers, Box 60 (oversize), Connecticut Historical Society. Data for Georgia is taken from Summary Abstract of Lands, Lots, Buildings, & Wharves Owned, Possessed or Occupied on the First Day of October 1798, Within the State of Georgia, Record Group 217, Misc. Records of the Dept. of the Treasury, Manning Collection, Misc. File, Box 19, Folders 1-2, National Archives, Washington, D.C. Data for South Carolina is taken from Letter from Albert Gallatin, Sec'y, Dep't of Treasury, to John Randolph, Chairman, House Ways & Means Comm. (Nov. 24, 1804), *in* CITY GAZETTE (Charleston, S.C.), Dec. 29, 1804, at [2], [2] (referring to the twenty-seven districts with revisions and the seventeen without). The total populations by state are for 1800, drawn from Michael R. Haines, *State Populations*, *in* HISTORICAL STATISTICS OF THE UNITED STATES: MILLENNIAL EDITION ONLINE, sers. Aa2244-Aa6550 (Susan B. Carter, Scott Sigmund Gartner, Michael R. Haines, Alan L. Olmstead, Richard Sutch & Gavin Wright eds., 2006) [hereinafter HSUS], https://hsus.cambridge.org/HSUSWeb/HSUSEntryServlet [https://perma.cc/6N54-KLVR]. Slave populations by state are drawn from *Work and Welfare*, *in* HSUS, *supra*, at sers. Bb1-Bb98. Free populations by state are calculated by subtracting slave populations from total populations.

New York	cluster of towns (1 to 4 clusters/county)	63	9350	9018	332
New Jersey	cluster of towns (1 to 5 clusters/county)	37	5707	5371	336
Delaware	1 to 4 intra-county hundreds	9	7141	6458	684
Pennsylvania	1 county, sometimes 1/2 or 1/3 county	38	15,852	15,807	45
Maryland	1 county or 1 city (except D.C.)	21	16,264	11,234	5030
Virginia	1 county (occasionally more)	84	10,549	6433	4117
North Carolina	(no records)	?	?	?	?
South Carolina	(unclear from source)	44	7854	4533	3322
Georgia	1 county	24	6779	4303	2475
Kentucky	1 to 3 counties	13	16,997	13,893	3103
Tennessee	1 county	15	7040	6135	906
Total / Weighted Average		*642*	*7418*	*6244*	*1174*

In each district it drew, the federal board was to "appoint one respectable freeholder to be principal assessor, and such number of respectable freeholders to be assistant assessors, as [the board] shall judge necessary for carrying this act into effect."[183] The assistant assessors were to make initial valuations of all the real estate, and the principal assessor of each district was to hear appeals from valuations by that district's assistant assessors.

The scale of this operation was immense for the time: the direct-tax assessment involved more federal officials than any nonmilitary operation of the federal government before about 1810. The commissioners that made up the

183. V&E Act § 7, 1 Stat. at 584-85.

boards covering all the states totaled 94.[184] And the boards created 642 assessment districts nationwide (not counting North Carolina, for which records are missing), each of which had a principal assessor.[185] That adds up to 736 officials. On top of these, there were the assistant assessors. While surviving records do not tell us their total number, they provide the basis for a crude but very conservative (low) estimate of at least 1,600 assistant assessors nationwide.[186] Combined with the 736 known commissioners and principal assessors

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184. *Id.* § 1, 1 Stat. at 580-83.

185. *See supra* note 182 & tbl.1.

186. Below are exact or minimum numbers of assistant assessors in various states (or part of a state) for which they are known, with ratios between their numbers and the respective states' total populations (in the 1800 census):

- *Rhode Island*: 74 assistant assessors (one for every 934 persons). Record Book of the "Rhode Island Board of Commissioners . . . for valuation and enumeration of 1798," at 9-10 (Direct Tax Records, Catalog Number MSS 232 sg4, Rhode Island Historical Society) [hereinafter FB-RI Minute Book].
- *Connecticut*: 246 assistant assessors (one for every 1,020 persons). Record Book of the Board of Commissioners for the State of Connecticut, 1798-1799, at 6 (Connecticut Historical Society, Ms. Stack) [hereinafter FB-CT Minute Book].
- *New Jersey*: 113 assistant assessors (one for every 1,869 persons). U.S. Commission for the Valuation of Lands in New Jersey, Record Book, 1798 (Rutgers University Library Special Collections and Archives, Ac. 303, unnumbered pages [8]-[13]) (entry for Aug. 29, 1798) [hereinafter FB-NJ Minute Book]. Although this manuscript book is not in Rutgers's electronic catalog, it is listed in HERBERT F. SMITH, A GUIDE TO THE MANUSCRIPT COLLECTION OF THE RUTGERS UNIVERSITY LIBRARY 140 (1964) (entry number 1101).
- *Pennsylvania*: 375 assistant assessors (one for every 1,606 persons). Letter to the Editor, *Philadelphia, Oct. 9, The Direct Tax*, TIMES & D.C. DAILY ADVERTISER (Alexandria, Va.), Oct. 15, 1800, at [2], [2] (from Bucks County, Pa., dated Oct. 2, 1800).
- *South Carolina*: *more than* 161 assistant assessors (one for *fewer than* every 2,147 persons). A federal tax commissioner located in the state wrote that the number of assistant assessors there was "considerably" *more than* the membership of the state legislature. Letter to the Editor, CITY GAZETTE (Charleston, S.C.), Sept. 4, 1799, at [2], [2] (from "a Member of the Board of Commissioners," dated Aug. 31, 1799). The membership of the state legislature was 161. S.C. CONST. of 1790, art. I, §§ 3, 7.
- *North Carolina's federal district coextensive with Iredell County*: 5 assistant assessors (one for every 1,771 persons). Hugh Hill Wooten, *The Land Valuations of Iredell County in 1800*, 29 N.C. HIST. REV. 523, 526 n.4 (1952). The population of Iredell County was 8,856. *See Iredell County, North Carolina, Genealogy*, FAMILYSEARCH, https://www.familysearch.org/wiki/en/Iredell_County,_North_Carolina_Genealogy [https://perma.cc/Q33Y-ABV2].

Of all these ratios, the largest number of persons per assistant assessor is that for South Carolina (one for every 2,147 persons). If we raise this number by half (to get 3,221) and then

(plus however many principal assessors North Carolina had), that adds up to at least 2,300 or 2,400 federal direct-tax assessment officials. Prior to 1810, the nearest rivals in size outside the military were the Post Office and the customhouses.[187] But Post Office officials numbered only about 1,000 in 1800,[188] and they appear to have reached the 2,300 mark only just before 1810.[189] And customhouse officials numbered under 1,400 in counts published in 1802 and 1820.[190]

In keeping with the magnitude of the assessment officialdom, the valuation task was enormous: to value literally *all private real estate in every state*, with only minor exceptions for land that was permanently exempt from taxation by state law (which meant exemptions for things like churches and schools, but *not* for

divide 3,221 into the population of all the states combined (5,240,483), that gives us a crude but very conservative (that is, low) estimate of 1,627 assistant assessors nationwide.

187. Nothing else came close. The officialdom administering the indirect internal taxes (the whiskey excise and others) numbered about 450 in 1801. The calculation is based on TREASURY DEP'T, INTERNAL REVENUES (Dec. 21, 1801), *in* 1 AMERICAN STATE PAPERS: FINANCE, *supra* note 82, at 718, 719. (Congress abolished these indirect internal tax officials in 1802.) The frontline officials conducting the census—known as "assistant marshals"—numbered about 650 in 1790 and would not have been much more numerous in 1800. MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 14, 18-19 (2d ed. 2015) (noting the estimate of 650 for 1790 and that the census in 1800 was similar in format and data collected).

188. TREASURY DEP'T, ROLL OF THE OFFICERS, CIVIL, MILITARY, AND NAVAL, OF THE UNITED STATES (Feb. 17, 1802), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 260, 289-99 (Walter Lowrie & Walter S. Franklin eds., D.C., Gales & Seaton 1834) [hereinafter ROLL OF THE OFFICERS] (listing, as of about 1800, approximately 1,000 deputy postmasters and no other postal field officials); *id.* at 305 (listing 10 postal officials at the Washington headquarters). On how deputy postmasters made up the overwhelming majority of postal employees, see *infra* note 189.

189. The register for 1817 lists by name all of the deputy postmasters (each of whom ran one post office), all "Clerks or Assistants in Post Offices," and all personnel in the "General Post Office" in Washington, down to the clerks and a messenger. The deputy postmasters numbered over 3,000, while the clerks, assistants, and General Post Office personnel totaled less than 200. A REGISTER OF OFFICERS AND AGENTS, CIVIL, MILITARY, AND NAVAL, IN THE SERVICE OF THE UNITED STATES ON THE THIRTIETH DAY OF SEPTEMBER, 1817, at 15-16, *1-*85 (D.C., De Krafft 1818). This indicates that the deputy postmasters were the overwhelming majority of officials, which means that a good proxy for the number of such officials is the number of post offices, whose numbers were explicitly recorded every year. The number of post offices passed 2,000 for the first time in 1809 and reached 2,300 in 1810. *See Pieces of Mail Handled, Number of Post Offices, Income, and Expenses Since 1789*, USPS (Feb. 2020), https://about.usps.com/who-we-are/postal-history/pieces-of-mail-since-1789.pdf [https://perma.cc/6MC4-ZL9V].

190. For the counts covering collectors, naval officers, surveyors, gaugers, weighers, inspectors, measurers, appraisers, etc., see ROLL OF THE OFFICERS, *supra* note 188, at 261-80; and A REGISTER OF OFFICERS AND AGENTS, CIVIL, MILITARY, AND NAVAL, IN THE SERVICE OF THE UNITED STATES, ON THE 30TH OF SEPTEMBER, 1819, at 20-37 (D.C., Davis & Force 1820).

unimproved private land, such as the holdings of speculators).[191] While many records of the direct tax are lost, those that survive give a sense of the ocean of information that was gathered. The surviving valuation records created for Massachusetts alone, which are not even complete, exceed 16,000 pages.[192]

Valuation began with the foot soldiers of this administrative army, the assistant assessors. In each of the more than 642 districts, they were to divide the district, by "mutual agreement" among themselves, into subdivisions as "they shall deem convenient," with at least one assistant assessor per subdivision.[193] In each subdivision, the assistant assessors were to locate, list, and value all the land parcels and houses in their respective subdivisions. The value was to be what the house or land parcel was "worth in money"[194] as of October 1, 1798.[195] In completing this task, the assistant assessors were to require the owner or occupier of each house or land parcel to provide a "list" giving some minimal physical information about the house or land.[196] Other than that, the legislation said little about what data the assistant assessors were to gather about real estate or how they were to determine valuations.[197] To the extent the assistant assessors received any direction, it would have to be through the boards' exercise of their second rulemaking power: the Valuation and Enumeration Act empowered each board of commissioners to "establish all such regulations, as to them, or a majority of them, shall appear suitable and necessary, for carrying this act into effect; which regulations shall be binding on each commissioner

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191. *See* V&E Act, ch. 70, § 8, 1 Stat. 580, 585 (1798) (exempting property "permanently exempted from taxation" under state law); Instructions to [] Assistant Assessor of the [] Assessment District, in the [] Division, in the State of New-York 2 (Oct. 2, 1798) (Ebenezer Foote Papers, Box 8, Folder 3, Princeton University Library) [hereinafter FB-NY Instructions] ("Light-houses, forts and State lands are exempted; so also are jails, and court-houses, as well as houses of public worship, and colleges, academies, and school-houses.").

192. NEHGS, INDEX, *supra* note 71, at 1.

193. V&E Act § 9.

194. *Id.* § 8 (repeating the phrase for both houses and lands). Regarding lands, this section of the Act added an obvious statement in a circuitous way: land should be "valued by the quantity, either in acres, or square feet, as the case may be, at the average rate which each separate and entire tract or lot is worth in money." *Id.* That is, if a parcel varied in its per-acre value internally, the assessor should take the value of the whole parcel.

195. *Id.* § 12.

196. *Id.* § 9.

197. For a more in-depth discussion, see *infra* text accompanying notes 367-375.

and assessor, in the performance of the duties enjoined by, or under this act."[198] (The boards' regulations are discussed in Section II.E.2, below.)

Once the assistant assessors had made the initial valuations of all parcels and houses, they were to give their valuations to the principal assessor of the district,[199] who was to "advertise" that the valuations were available for public inspection for fifteen days.[200] During that time, property owners had the right to make administrative "appeals" to the principal assessor, who could "hear and determine" them, "in a summary way, according to law and right."[201] The Valuation and Enumeration Act specified that "the question to be determined by the principal assessor, on an appeal respecting the valuation of any lands or dwelling-houses, shall be, whether the valuation complained of be, or be not, in a just relation or proportion to other valuations in the same assessment district."[202] As to properties on which appeals were made, "the principal assessor shall have power to re-examine and equalize the valuations as shall appear just and equitable; but no valuation shall be increased, without a previous notice of at least five days to the party interested, to appear and object to the same, if he judge proper."[203]

But even if valuations of properties within a district were brought into proportion by the principal assessor, valuations *between* districts might not be in proportion. This possibility loomed large because of the high level of indeterminacy in real-estate valuation,[204] and also because the principal and assistant assessors of each district were all property owners in that district and thus had an incentive to lowball the valuations, to minimize their own taxes and their neighbors'. Additionally, they might lowball if only because they feared that officials in *other* districts were lowballing—"competitive underassessments."[205]

For the sake of fairness across all the districts in a state, the Valuation and Enumeration Act gave each state's federal board its third—and greatest—rulemaking power: to revise the valuations of each district en masse. Once the

198. V&E Act § 8. The board could also "frame instructions for the said assessors, informing them, and each of them, of the duties to be by them respectively performed under this act." *Id.*

199. *Id.* § 12.

200. *Id.* § 18.

201. *Id.* § 19.

202. *Id.*

203. *Id.* § 20.

204. *See infra* Section II.C.

205. On this problem in ad valorem real-estate taxation generally, see EINHORN, *supra* note 53, at 49.

principal assessors were done adjusting individual valuations within their respective districts in response to appeals, they and their assistants sent copies of their complete lists of valuations to the board of commissioners covering the state, including summaries of the valuations ("abstracts") in a format to be set by the Treasury Department.[206] The Act then provided:

> [T]he commissioners . . . shall have power, on consideration and examination of the abstracts to be rendered by the assessors, as aforesaid, and of the lists aforesaid, to revise, adjust and vary, the valuations of lands and dwelling-houses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, as shall appear to be just and equitable: *Provided*, that the relative valuations of the different lots or tracts of land, or dwelling-houses, in the same assessment district, shall not be changed or affected . . . .[207]

Thus, federal administrators had the power to raise or lower the tax assessments of thousands of property owners all at once, by any percentage amount, so long as the change "shall appear to be just and equitable."[208]

Once the commissioners decided on their en masse revisions, the principal assessors in each district were required to alter the individual assessments in the lists accordingly, multiplying all the original valuations by whatever percent (upward or downward) the board had ordered for the district.[209] The revised valuations were then sent to the Treasury Secretary, who processed them and, on the basis of them, authorized a separate corps of officials to proceed with collection, under the Lay and Collect Act.[210] The Secretary's processing of the

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206. V&E Act § 21.

207. *Id.* § 22.

208. *Id.*

209. *Id.* § 23.

210. After laying out the boards' power to revise valuations district-wide (and an additional power to order the lower-level officials to conduct a do-over valuation in the event of "manifest error"), the Valuation and Enumeration Act said that "after such valuations shall have been completed and confirmed, in the manner prescribed by this act, the said commissioners shall cause the aforesaid abstracts and lists to be transmitted to the Secretary of the Treasury." *Id.* § 22. The drafting here was awkward: the just-quoted language about transmitting valuations to the Secretary appeared to refer only to valuations that were conducted as a do-over after a board finding of manifest error, though the language might be read more broadly to require transmittal of all valuations in the ordinary course. It seems the broader reading was adopted, perhaps because it was most consistent with a related provision in the Lay and Collect Act that provided for the federal supervisor in each state to initiate collection of the tax therein upon receiving "instructions from the Secretary," which the Secretary was to issue "so soon as the valuations and enumerations directed to be made by" the Valuation and

valuations was quite limited in scope. He corrected clerical errors,[211] certain categorical legal errors that bordered on clerical,[212] and errors as to which property was exempt.[213] And he did the arithmetic to determine the flat rate upon land necessary to fill up the state's quota.[214] The legislation said nothing to authorize the Secretary to engage in substantive review of the valuations or of the boards' revisions thereof, and in fact Secretary Wolcott disclaimed any control over the boards' substantive decisionmaking about valuations.[215]

In early 1800, after the boards had finished their work in several states but were still proceeding in others, Congress enacted two statutes that further increased the rulemaking discretion of the boards that were still operating. First, in January 1800, with boards in about eight states still at work,[216] Congress

Enumeration Act "shall have been completed." Lay and Collect Act, ch. 75, § 3, 1 Stat. 597, 598-99 (1798). This series of steps only makes sense if the Secretary was receiving material from the assessment apparatus that he could use as the basis for instructions to the supervisors. Also, later legislation clearly contemplates that board-revised valuations were to be sent to the Secretary for processing. Act of May 10, 1800, ch. 53, § 1, 2 Stat. 71, 71-72.

211. *E.g.*, Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to James Van Inger, Comm'r in N.Y. (June 17, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 6, Connecticut Historical Society); Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Andrew Kingsbury, Comm'r in Conn. (Sept. 10, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 11, Connecticut Historical Society); Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Paul Zantzinger, Comm'r in Pa. (Feb. 14, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 2, Connecticut Historical Society).

212. *E.g.*, Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Sam M. Hopkins, Clerk to the Bd. of Comm'rs in N.Y. (Sept. 13, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 11, Connecticut Historical Society).

213. *E.g.*, Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Sam M. Hopkins, Clerk to the Bd. of Comm'rs in N.Y. (Feb. 3, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 2, Connecticut Historical Society).

214. *See infra* note 216 and cited letters.

215. When a dispute arose in South Carolina over the federal board's regulations on how much certain categories of land were worth, Wolcott wrote to one commissioner: "I do not consider myself authorized to control the decisions of the Commissioners." Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Isaac Alexander, Comm'r in S.C. (Oct. 7, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 13, Connecticut Historical Society). He provided his view of the relevant provisions of the Valuation and Enumeration Act but then said, "I submit these observations to your consideration [and] request that they may be considered by the Board merely as my opinions. I am sensible that the decision of any question of this kind must rest with the Commissioners." *Id.*

216. The timeline on which the federal boards completed their revisions in the various states can be learned from the following sources, which (unless otherwise noted) are Wolcott's letters notifying collection officials covering each state of the completion of the respective federal board's work:

said that, in making revisions to assessments "as shall appear to be just and reasonable," a board had power not only to revise for a whole district, but also to

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- *Tennessee*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to John Overton, Supervisor of Tenn. (June 13, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 6, Connecticut Historical Society).
- *Connecticut*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to John Chester, Supervisor of Conn. (Sept. 12, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 11, Connecticut Historical Society).
- *New Hampshire*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Nathaniel Rogers, Supervisor of N.H. (Sept. 30, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 12, Connecticut Historical Society).
- *New Jersey*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Aaron Dunham, Supervisor of N.J. (Oct. 1, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 13, Connecticut Historical Society).
- *Kentucky*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to James Morrison, Supervisor of Ky. (Nov. 20, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 14, Connecticut Historical Society).
- *Vermont*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Nathaniel Brush, Supervisor of Vt. (Nov. 22, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 14, Connecticut Historical Society).
- *Delaware*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to George Truitt, Supervisor of Del. (Dec. 4, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 15, Connecticut Historical Society).
- *Massachusetts*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Jonathan Jackson, Supervisor of Mass. (Dec. 30, 1799) (Oliver Wolcott, Jr. Papers, Box 20, Folder 15, Connecticut Historical Society).
- *Rhode Island*: FB-RI Minute Book, *supra* note 186, at 53-67 (completing revisions at a meeting of the board held January 8-20, 1800).
- *Pennsylvania*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Henry Miller, Supervisor of Pa. (Feb. 17, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 2, Connecticut Historical Society).
- *Virginia*: Letter from Oliver Wolcott, Jr. to Edward Carrington (Apr. 2, 1800), *supra* note 168.
- *Maryland*: Letter from Oliver Wolcott, Jr. to John Kilty (May 2, 1800), *supra* note 168.
- *New York*: Letter from Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury, to Nicholas Fish, Supervisor of N.Y. (Sept. 1, 1800) (Oliver Wolcott, Jr. Papers, Box 21, Folder 8, Connecticut Historical Society).

North Carolina's and Georgia's federal boards completed their work in about mid-1801, after Wolcott left office. Letter from Albert Gallatin, Sec'y, U.S. Dep't of Treasury, to Thomas Jefferson, U.S. President (July 11, 1801), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-34-02-0417 [https://perma.cc/4662-NQSZ] ("The assessments of North Carolina are completed; those of Georgia nearly so."). South Carolina's took until 1804. *See infra* notes 683-688 and accompanying text.

revise "each and every subdivision of the several assessment districts,"[217] *subdivisions* being the bailiwicks into which assistant assessors divided a district among themselves.[218] The Ways and Means Committee Chair explained the need for the bill:

> [D]ifficulties had occurred carrying the present law into execution, especially in the large states, where the assessment districts were also large, and the subdivisions of such districts numerous; the consequence of which was, that as different methods of assessment were taken, in those subdivisions, in some the rates were given too high, and in others too low, and no power existed in the commissioners to establish a due proportion among the subdivisions.[219]

Second, in May 1800, with boards in about four states still at work,[220] Congress said a board could

> revise the valuations of unseated [i.e., unimproved] lands in each and every assessment district of their respective states, and in each and every subdivision of such districts respectively, and . . . vary and adjust the said valuations by adding thereto, or deducting therefrom such rate per centum as to them shall appear just and reasonable.[221]

Thus, each board now had power, within a given district or subdivision, to revise all the assessments uniformly *or* to revise the assessments on *unimproved* land by a different uniform percentage than the uniform percentage by which they revised *improved* land. This legislation was prompted by a concern of the federal board in New York, which told the Secretary that, in large undeveloped subdivisions, assistant assessors had not valued unimproved and improved land in proportion to each other, making it impossible (absent new legislation)

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217. Act of Jan. 2, 1800, ch. 3, § 1, 2 Stat. 4, 4.

218. The Valuation and Enumeration Act refers to these small bailiwicks as "divisions" of a district. V&E Act, ch. 70, § 9, 1 Stat. 580, 585-86 (1798). The Act confusingly uses the same term ("divisions") to refer to the much larger areas into which Congress divided the states for purpose of appointing commissioners. *Id.* § 1. It appears that Congress in January 1800 used the term "subdivisions" to make clear that it was referring to the smaller of the original Valuation and Enumeration Act's two types of "divisions."

219. *Congressional Register*, VERGENNES GAZETTE & VT. & N.Y. ADVERTISER, Jan. 9, 1800, at [2], [2] (reporting the House debate of December 11, 1799).

220. *See supra* note 216.

221. Act of May 10, 1800, ch. 53, § 1, 2 Stat. 71, 71-72.

to make a just reduction for the improved land without bringing unimproved land in the same subdivision to an unjustly low valuation.[222]

C. The Federal Boards' Sweeping Exercises of Power

The federal boards' statutory power to raise or lower assessments district-wide "as shall appear to be just and equitable"[223] was a broad power on its face, and several federal boards in fact exercised it broadly. The evidence of the boards' decisionmaking shows this, even though that evidence is fragmentary and must be assembled from scattered sources and repositories.

In Massachusetts, digitized manuscript valuation lists (and sometimes summary abstracts) are available for 130 of the 145 federal districts in the state.[224] For valuations of land parcels, the board made documented changes in 85 of the districts. Of these 85, 21 saw decreases (eleven of 5%,[225] and ten of 10%[226]). The remaining 64 districts saw increases, of which 22 saw up to 10%,[227] another 17 saw more than 10% and up to 20%,[228] another 18 saw more

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222. OLIVER WOLCOTT, JR., LETTER FROM THE SECRETARY OF THE TREASURY TO THE CHAIRMAN OF THE COMMITTEE OF WAYS AND MEANS, TRANSMITTING TO HIM A LETTER FROM THE COMMISSIONERS OF VALUATION OF HOUSES AND LANDS IN THE STATE OF NEW-YORK 5-6 (Phila., House of Representatives 1800).

223. V&E Act, ch. 70, § 22, 1 Stat. 580, 589 (1798).

224. For most of the 130 districts, a revision figure can be drawn from that district's manuscript "general list" or "summary abstract" for land parcels or houses, respectively. These documents have been digitized by the New England Historic Genealogical Society in the database "Massachusetts and Maine: Direct Tax, 1798," available (with paid subscription) at https://www.americanancestors.org/search/databasesearch/183/massachusetts-and-maine-direct-tax-1798 [https://perma.cc/ZQL7-AD85] [hereinafter NEHGS Database]. The earlier microfilm collection of the same records is NEW ENGLAND HISTORIC GENEALOGICAL SOCIETY, MASSACHUSETTS AND MAINE DIRECT TAX CENSUS OF 1798 (18 reels, 1979), and the finding aid for that microfilm collection, NEHGS, INDEX, *supra* note 71, provides a handy reference, matching volumes to district numbers and town names. In examining the digitized records cited in this Section covering Massachusetts, Pennsylvania, and Maryland, I was helped greatly by consulting the electronic datasets that Professor Carole Shammas compiled of those records in their predigital, microfilm form for her studies of housing, Shammas, *Housing*, *supra* note 67; Shammas, *Space Problem*, *supra* note 67. I am grateful to her for sharing those datasets with me.

225. In this and the notes following, I give references for the various districts, each in the form of [volume]:[page]. NEHGS Database, *supra* note 224, at 12:722, 13:294, 13:414, 13:768, 14:30, 14:696, 15:427, 15:618, 16:304, 16:468, 20:435.

226. *Id.* at 1:483, 9:373, 12:626, 13:110, 13:656, 16:382, 16:554, 19:2, 20:306, 20:539.

227. *Id.* at 1:51, 2:584, 6:808, 7:876, 8:74, 8:349, 8:652, 9:627, 10:34, 10:622, 11:32, 11:296, 12:93, 12:125, 12:276, 14:110, 14:252, 14:308, 15:501, 18:304, 20:377, 20:505.

than 20% and up to 30%,[229] another 3 saw 40%,[230] another 3 saw more than 40% and up to 50% (including Salem, the nation's eighth-largest city as of 1800, at 50%),[231] and one saw 75% (covering the towns of Barre and Hubbardstown).[232] For valuations of houses, the board made documented changes in 48 of the districts. Of these 48, 8 were decreased, up to 15%.[233] The remaining 40 were increased: 15 up to 10%,[234] 11 more than 10% and up to 20%,[235] 11 more than 20% and up to 30%,[236] 2 at 40-45%,[237] and finally Salem at 50%.[238] Notably, the increase across land and houses appears, on average, most pronounced in Hampshire County, the cradle of Shays's Rebellion back in 1786 (which had been caused partly by money-supply shortages that could decrease real-estate values, though whether to recognize the decrease and how to measure it were contestable).[239] If we compute the average documented district revision for each of the nine federal divisions of the state, once for land and once for houses, and then take the average of the two (weighted by the portions of the state's quota borne by land and houses), the division coextensive with Hampshire County is the highest at 19.2%, followed by two Maine divisions at 18.3% and 14.2%, then Essex County at 11.9%.[240]

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228. *Id.* at 1:183, 1:453, 2:651, 5:111, 8:142, 9:30, 9:118, 10:144, 11:382, 11:472, 11:666, 15:239, 17:24, 18:142, 18:742, 20:655, 20:675.

229. *Id.* at 1:337, 1:387, 1:607, 2:499, 3:23, 4:13, 10:698, 12:506, 14:808, 15:571, 16:614, 16:675, 17:696, 18:582, 18:668, 18:818, 19:444, 20:151.

230. *Id.* at 2:129, 9:423, 20:56.

231. *See id.* at 2:59, 7:48 (Salem), 18:34. On Salem's population ranking, see Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, tbl.3 (U.S. Census Bureau, Working Paper No. POP-WP027, 1998), https://www.census.gov/library/working-papers/1998/demo/POP-twps0027.html [https://perma.cc/W5SZ-4YDK].

232. NEHGS Database, *supra* note 224, at 14:732.

233. *Id.* at 1:547, 15:548, 16:358, 16:434, 20:258, 20:325, 20:417, 20:571.

234. *Id.* at 1:39, 6:2, 7:384, 8:264, 8:728, 9:599, 10:594, 11:2, 11:84, 16:276, 16:588, 16:658, 18:414, 20:359, 20:503.

235. *Id.* at 1:441, 5:166, 9:2, 9:76, 10:2, 10:116, 11:280, 11:352, 17:762, 18:120, 20:657.

236. *Id.* at 1:589, 10:674, 11:164, 11:450, 12:444, 12:472, 18:556, 18:636, 18:792, 19:414, 20:125.

237. *Id.* at 18:2, 20:30.

238. *Id.* at 7:2.

239. On Shays's Rebellion and the money shortage, see BROWN, *supra* note 112, at 108-17. On the effect of the money supply on real-estate values, see *infra* notes 326-327 and accompanying text.

240. The division coextensive with Hampshire County was the one numbered 8th, for which the general lists appear in NEGHS Database, *supra* note 224, at volumes 16-20.

In Rhode Island, the federal board's minute book reveals the board's activity for all 28 districts. The board made no changes in valuations of houses, but for land parcels, it was active: while 8 districts saw no change, one saw a decrease of 10%, another 7 saw an increase up to 10%, another 8 saw an increase of more than 10% and up to 20%, another 3 saw an increase of more than 20% and up to 30%, and one saw an increase of 40%.[241]

In Connecticut, the federal board's minute book gives the board's revisions for all 67 districts. The board treated valuations of land parcels and houses uniformly. For both, 54 districts saw no change. Three saw a decrease, of which one was 5%, another 12.5%, and another 15%. Ten saw an increase: 6 up to 10%, 2 of 15%, one of 25%, and one of 30%.[242]

In New Jersey, the federal board's minute book reveals the board's activity for all parts of the state. It shows that, six months prior to the statute of January 1800, expressly authorizing the boards to revise valuations by the subdivision of the district (rather than only by the district),[243] the board simply decided unilaterally that it had that power under the original Valuation and Enumeration Act (without checking with the Treasury Secretary or anyone else, apparently).[244] The board had drawn 37 districts, but because it made some revisions on an intradistrict basis, there were 42 distinct areas in which it considered revisions as to land parcels (generally defined according to townships): one area was unchanged, and another 13 were revised up or down by no more than 10%. Five were decreased by more than 10% and up to 20%, 3 were decreased by more than 20% and up to 30%, and one was decreased by 33%. Nine were increased by more than 10% and up to 20%, 2 were increased by more than 20% and up to 30%, 7 were increased by more than 30% and up to 40%, and one was increased by 50%.[245] As to valuations of houses, the board's decision to revise at the subdivision level meant there were 104 local areas in which it considered revisions (again generally defined by townships): 50 saw

241. FB-RI Minute Book, *supra* note 186, at 53-65. For duplicate data, see Summary Abstract of Lands, Rhode Island (Oliver Wolcott, Jr. Papers, Box 60 (oversize), Connecticut Historical Society), which includes the entries for the Rhode Island districts.

242. FB-CT Minute Book, *supra* note 186, at 28, 41. The two pages conflict regarding District 34 (decrease of 5% versus decrease of 12.5%). I have relied upon the latter figure because it was entered later in time and matches the Summary Abstract for Connecticut (Oliver Wolcott, Jr. Papers, Box 60 (oversize), Connecticut Historical Society).

243. *See supra* notes 216-219 and accompanying text (discussing Act of Jan. 2, 1800, ch. 3, § 1, 2 Stat. 4, 4).

244. *See* FB-NJ Minute Book, *supra* note 186, at unnumbered pages [45]-[46] (entry dated June 8, 1799).

245. *Id.* at [57]-[61] (entry dated June 15, 1799).

no change, and eleven were revised upward by up to 10%. Fourteen were increased by more than 10% and up to 20%; 16 were increased by more than 20% and up to 30%; 12 were increased by more than 30% and up to 40%; and one was increased by 50%.[246]

In Pennsylvania, digitized summary abstracts record the federal board's revisions across all 38 districts of the state.[247] Most strikingly, for valuations of land parcels, the board imposed a 50% increase on all land parcels in the district coextensive with Allegheny County,[248] the cradle of the Whiskey Rebellion back in 1794. As for land parcels elsewhere, the board left 27 districts unchanged and, in the remaining 10 districts, made increases to select subdivisions within the district (rising as high as 60%),[249] using its new intradistrict power under the statute of January 1800.[250] As for houses, the board again imposed an increase on the whole district coextensive with Allegheny County, this time of 25%, and imposed a 25% increase on one other entire district, covering about half of Bucks County.[251] For houses elsewhere, the board left 13 districts unchanged and, in the remaining 23, made increases in select subdivisions (rising as high as 50%).[252]

In Maryland, where the federal board created 21 districts (one for each county and one for the city of Baltimore),[253] digitized manuscript valuation

246. *Id.* at [46]-[53] (entries dated June 8 and June 10, 1799).

247. The records were microfilmed as NATIONAL ARCHIVES AND RECORDS SERVICE, UNITED STATES DIRECT TAX OF 1798: TAX LISTS FOR THE STATE OF PENNSYLVANIA (24 reels, microcopy no. 372, 1962). The microfilms have now been digitized as *Pennsylvania, U.S., U.S. Direct Tax Lists, 1798*, ANCESTRY (2012) [hereinafter *Pennsylvania Tax Lists*], https://www.ancestry.com/search/collections/2060 [https://perma.cc/3LXP-KT5M]. To find the summary abstracts, go into the entry for "Green, Washington, and Allegheny" (note that this entry's title is deceptively narrow, in that it does not indicate that the summary abstracts covering the whole state are located therein). The entry contains 872 images. The summary abstracts are at image numbers 774 to 836. Revisions are listed in each image in the second full column from the right.

248. *See Pennsylvania Tax Lists*, *supra* note 247, at image 836.

249. *See id.* at images 806-36. For a 60% subdivision increase, see image 810. For 24 of the unchanged districts, the abstracts expressly say the frontline officials' valuations were confirmed, while for 3, the relevant columns are simply blank, those being at images 806 and 816.

250. *See supra* notes 216-219 and accompanying text.

251. *See Pennsylvania Tax Lists*, *supra* note 247, at images 782 (Bucks), 804 (Allegheny).

252. *See id.* at images 774-804. For 50% subdivision increases, see *id.* at images 780, 784, and 785.

253. See the summary abstract for Maryland, giving district numbers and locations, in Oliver Wolcott, Jr. Papers, Box 60 (oversize), Connecticut Historical Society. There were minor deviations from this pattern for what became the District of Columbia.

lists are available for 10 counties plus the city of Baltimore, showing some of the board's acts for those districts.[254] Strikingly, as to the valuation of houses, the federal board imposed an increase of 100% on all houses in the city of Baltimore, which was the nation's third-largest city as of 1800;[255] it made no more than a 1% increase on houses in any of the other districts for which board activity is documented.[256] As to land parcels, the federal board imposed substantial changes on some of the districts for which its activity is documented: increases in 3 of 10% to 14%,[257] and decreases in another 3 of 10% to 25%.[258]

In South Carolina, where the federal board completed its valuations after a long delay (in 1804),[259] a general summary of the board's activity appears in a

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254. The lists were microfilmed by the Maryland State Archives as MARYLAND STATE PAPERS (FEDERAL DIRECT TAX) 1798 (MSA citation SM56, 14 reels, numbered 3468 to 3480, no date), catalogued at http://guide.msa.maryland.gov/pages/series.aspx?ID=SM56 [https://perma.cc/PQT6-UUS7]. The lists have now been digitized by the Maryland State Archives and posted at *Volume 729: 1798 Federal Direct Tax—Maryland*, ARCHIVES MD. ONLINE, [hereinafter MD DATABASE, VOLUME 729], https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000729/html/index.html [https://perma.cc/AHM4-FL8X].

255. See MD DATABASE, VOLUME 729, *supra* note 254, at images 5121-5210, which consist of the general lists for houses in Baltimore city. The column headed "Rate Per Centum of ___ prescribed by the Commissioners" is filled with the handwritten number "100" at the top. The column headed "Valuations as revised and equalized by the Commissioners" (the postrevision valuations) is filled with figures that are always 100% greater than the prerevision valuations (which appear in the column headed "Valuations as determined by the Principal Assessors"). Additionally, image 5263 gives the "Summary Abstract of all Dwelling-Houses . . . within the Ninth District," that is, the city of Baltimore. The abstract gives the "Valuation as Determined by the Principal Assessors" as $2,981,287.00. It gives the "Rate percentum of addition prescribed by the Commissioners" as 100. And it gives the "Valuations as revised and Equalized by the Commissioners" as $5,962,574.00, which is 100% greater than the prerevision figure. On Baltimore's population ranking, see Gibson, *supra* note 231, at tbl.3.

256. In the general lists on housing in the other 10 districts, one indicates an increase of 0.2%. *See id.* at image 9 et seq. (Anne Arundel County). Two give postrevision values identical to prerevision values, indicating the board made no change. *See id.* at image 2245 et seq. (Queen Anne's County); image 4385 et seq. (Talbot County). Seven give prerevision values but leave blank the columns for the board's percentage change and for postrevision values, leaving the board's acts unclear. *See id.* at image 371 et seq. (Baltimore County, as distinct from Baltimore city); image 1084 et seq. (Caroline County); image 1405 et seq. (Charles County); image 1507 et seq. (Harford County); image 1969 et seq. (Prince George's County); image 2863 et seq. (St. Mary's County); image 3717 et seq. (Somerset County).

257. *Id.* at image 407 et seq. (Baltimore County, as distinct from Baltimore city); *id.* at image 1541 et seq. (Harford County); *id.* at image 2900 et seq. (St. Mary's County).

258. *Id.* at image 1374 et seq. (Charles County); *id.* at image 2268 et seq. (Queen Anne's County); *id.* at image 4409 et seq. (Talbot County).

259. *See infra* notes 683-688 and accompanying text.

letter from Treasury Secretary Gallatin to Congress, published in a newspaper. As Gallatin noted, the documents he had received from the board contained serious errors: the pre- and postrevision valuations were the same even though the document listed nonzero percentages of adjustment. Gallatin's understanding was that the board did intend to make revisions but accidentally substituted the prerevision valuations for the postrevision ones, or vice versa. As to houses, Gallatin said that of forty-four districts, that board had made increases for twenty-seven, "in some cases as high as fifty per cent." As to lands, Gallatin said "there are many instances in which" an "addition is stated to have been made by the commissioners," though their intent was not always clear, given that the stated percentages of adjustment and the pre- and postrevision valuation figures often did not all correspond.[260]

In Georgia, interestingly, a manuscript summary abstract of the valuations for land parcel indicates the federal board there made *no* revisions.[261] (There seems to be no record of what the board did for houses.) The apparent reticence of the board in Georgia underscores just how much discretion the federal boards had to intervene aggressively or not.

There is more fragmentary evidence for two additional boards. In New York, a newspaper item about the federal board's revision proceedings in June 1799 said, "In most cases the valuations of the assessors were confirmed—in some few instances, however, material alterations were made—and in the district which comprises the City of Albany and the town of Watervliet, *forty per-cent* was added to their valuation."[262] In North Carolina, a manuscript valuation list for a single district (covering one county) contains a cover note that says the federal board increased the valuations therein by twenty-five percent.[263]

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260. Letter from Albert Gallatin to John Randolph, *supra* note 182 & tbl.1.

261. Summary Abstract of Lands, Lots, Buildings, & Wharves Owned, Possessed, or Occupied, on the First Day of October 1798, Within the State of Georgia, *supra* note 182 & tbl.1.

262. *From Albany, June 3*, COMMERCIAL ADVERTISER (N.Y.C.), June 7, 1799, at [2], [2]. That said, we know this board conducted an additional round of revisions much later, affecting at least the unimproved lands, which it gained the power to revise separately through the legislation of May 1800 discussed in notes 220-222 *supra* and accompanying text. *See* [Untitled], SPECTATOR (N.Y.C.), Aug. 27, 1800, at [3], [3] (quoting from the *Albany Gazette*: "The Board . . . held a special session in this city [Albany], the week past, for the purpose of further revising the assessments made in pursuance of the said act within this state.—We are told, the Board have, in several instances, reduced the assessments on *new lands*, particularly several tracts in Macomb's purchase, and in Delaware and Tioga counties; and that the gross sum so reduced will amount to about 500,000 dollars").

263. IREDELL COUNTY (N.C.) LAND VALUATIONS BOOK, 1800 (Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill, Collection No. 03919-z), https://finding-aids.lib.unc.edu/03919 [https://perma.cc/PLU8-A5XS]. At the start of the

(For boards in the remaining six states—New Hampshire, Vermont, Delaware, Virginia, Kentucky, and Tennessee—I have found no sources on the boards' revisions.)

II. INDETERMINACY IN THE FEDERAL BOARDS' REVISIONS: HAMILTON'S "VERY BAD BUSINESS OF VALUATIONS"

This Part is about what Alexander Hamilton in mid-1797 called "the very bad business of valuations."[264] Hamilton was telling his successor Wolcott that this "bad business" could be mercifully "avoided" if Congress would defer the idea of a land tax and impose a house tax with liability pegged *not* to each house's "value" but instead to objective features of the house (so many cents' tax for each room, each chimney, each staircase, etc.).[265] By sidestepping valuations in this way, said Hamilton in another letter of 1797, taxation of houses would be "more certain, avoiding the evasions and partialities to which valuations will be forever liable"; otherwise taxation would entail the "errors of valuations," which would increase the taxpayers' "discontent."[266] To Hamilton, the "business of valuations" was maddeningly uncertain. Members of Congress in 1797-98 likewise recognized the uncertainty. Robert Goodloe Harper, the South Carolina Federalist chairing the Ways and Means Committee, said "valuations are at best uncertain."[267] A New York Federalist said that, in most states, "it was

digitized document is an archivist's typewritten description, dated 1971, which contains a transcription of a handwritten statement on the first page of the book, by the commissioner of the division covering the county, that the federal board "at their meeting at the University in July 1800 in equalizing the different valuations of lands within the District of North Carolina for a direct tax did order that on the valuations of lands in the County of Iredell there should be added 25 percent." *Id.* at 1.

264. Letter from Alexander Hamilton to Oliver Wolcott, Jr., *supra* note 76.

265. *Id.* For Hamilton's plan to tax each house by a flat sum for each of certain listed objective features and not by value, see Alexander Hamilton, Enclosure: [Ideas on the Subject of Direct Taxes], *supra* note 76. Hamilton did add in his letter to Wolcott that "rents or valuations may be adopted" with "regard to *stores, if they are comprehended*" in the tax, then referred later in the sentence to stores being taxed simply by "rents." Letter from Alexander Hamilton to Oliver Wolcott, Jr., *supra* note 76. On the distinct subject of *state* taxation in New York, Hamilton in 1787 had similarly proposed legislation that would have avoided the need for valuation. *See infra* notes 496-497 and accompanying text.

266. Letter from Alexander Hamilton to Theodore Sedgwick (Jan. 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-20-02-0319-0001 [https://perma.cc/H86C-R6NF].

267. 8 ANNALS OF CONG. 1839 (1798) (statement of Rep. Harper). He added that "it is well to reduce that uncertainty as much as possible" and argued that taxing houses separately would reduce uncertainty—the opposite argument of Rep. Gallatin. *Id.* In the previous Congress,

impossible to lay a land tax with any degree of accuracy."[268] A North Carolina Republican acknowledged "there would always be great uncertainty as to the value of property."[269]

Hamilton and the others were right. Valuation involved a lot of indeterminacy. Even if we assume the Valuation and Enumeration Act's vague phrase "just and equitable" implied some kind of guiding direction in principle—say, that the federal board was to discern the average value of real estate per acre in each district and adjust the valuations of each district so that their average matched that value—the application of that principle would be subject to contestable methodological questions, plus difficulties in gathering and reasoning from data, all of which would leave the boards with inevitably wide discretion.

Even today, real estate is the prime example of an asset whose value is hard to determine. In contrast to commodities, which are standardized and traded on thick public exchanges that provide a transparent market price, real estate is heterogeneous and relatively illiquid. Its valuation is therefore a matter of devising imperfect techniques and making contestable choices of which technique(s) to use and how. When thinking of taxation, we are accustomed to believe the rate is what matters, but when it comes to taxing real estate, the choice of rate is "dwarfed by the impact of alternate valuation methods."[270] Devising and elaborating such methods and debating their relative merits has been the subject of a published literature that began in the early 1900s and is now vast.[271]

In late-eighteenth-century America, there was even more uncertainty, as markets were thinner, data was harder to gather, and methods of reasoning

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Harper had stated even more vehemently "the impossibility of apportioning such a tax equally," that "from the attachments and interests of the persons employed on such an occasion [i.e., an assessment], there would be no certainty of obtaining a just valuation, it would appear incalculable," and that, although "[i]n small and thickly inhabited districts it may be more equalized," in less-thick areas this would not happen. 6 ANNALS OF CONG. 1867-68 (1797) (statement of Rep. Harper).

268. 6 ANNALS OF CONG. 1899 (1797) (statement of Rep. Williams). I corrected the garbled punctuation in the *Annals* using the original newspaper account, *Congress of the United States*, PHILA. GAZETTE, Jan. 21, 1797, at 1.

269. 8 ANNALS OF CONG. 1840 (1798) (statement of Rep. Macon). For more congressional views on divergence of ideas on valuation, particularly Rep. Gallatin's, see *infra* notes 520-523 and accompanying text.

270. JOAN YOUNGMAN, A GOOD TAX: LEGAL AND POLICY ISSUES FOR THE PROPERTY TAX IN THE UNITED STATES 51 (2016).

271. Norman G. Miller, Jr. & Sergey Markosyan, *The Academic Roots and Evolution of Real Estate Appraisal*, 71 APPRAISAL J. 172, 173 (2003).

from it were less developed.[272] Even if people could agree that land was generally more valuable in (say) a thickly settled area proximate to water transport than in a remote frontier area, there were high stakes and much uncertainty to the question: "*how much* more valuable?" The very magnitude of the district-wide mass revisions made by several of the federal boards under the 1798 tax, set forth in Section I.C, above, indicates that officials charged with making valuations of land could differ widely on its value. In other countries of the time, like England, valuation might rely upon fairly comprehensive bodies of objective data in the form of rent contracts entered by tenant farmers—sums attached to each parcel of land, current to the year, by a market mechanism. But rental prices were far less common in America, where most land was worked by people who owned it or were enslaved.[273] One therefore had to fall back upon methods that used much smaller and less representative bodies of data, if one had any methods at all.

This Part demonstrates the open-endedness of the valuation inquiry and the consequent breadth of the federal boards' discretion by considering the Continental Congress's failure at mass real-estate valuation in the 1770s and 1780s; the absence of any common principles in state tax statutes regarding valuation circa 1798; the empirical difficulties and open methodological ques-

272. Hamburger makes some acknowledgment of a subjective and discretionary aspect to valuations in English and sub-federal American governance. HAMBURGER, *supra* note 40, at 99-102. Though the rise of institutional mortgage lending in the nineteenth and twentieth centuries would foster professional research and professional conventions on valuation, those developments were still far off in the 1790s. Commercial banks in the 1790s were not yet in the business of making loans secured by real estate. ROBERT E. WRIGHT, THE WEALTH OF NATIONS REDISCOVERED: INTEGRATION AND EXPANSION IN AMERICAN FINANCIAL MARKETS, 1780-1850, at 27, 167-68 (2002). State "land banks" in the 1700s had made loans with real estate as security, but they required the valuation to be double, triple, or even quadruple the loan, leaving an enormous margin for error. John Paul Kaminski, Paper Politics: The Northern State Loan-Offices During the Confederation, 1783-1790, at 52, 115, 152, 179 (Jan. 19, 1972) (unpublished Ph.D. dissertation, University of Wisconsin), PQDT No. 7215361. Regarding speculation in unsettled lands, a recent study notes how some surveyors or speculators and their agents gained reputations as "judges" of land's capacity and likely value, though the study also explains how the field was characterized by uncertainty, "puffing," performance, and self-fulfilling prophecies. Michael Albert Blaakman, Speculation Nation: Land and Mania in the Revolutionary American Republic, 1776-1803, at 96-114 (May 2016) (unpublished Ph.D. dissertation, Yale University) (on file with author). One study says that "most speculators had no understanding of the real value of the property they acquired." THOMAS M. DOERFLINGER, A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA 323 (1986). Indeed, land speculation was subject to a bubble in the 1790s that ended in a crash circa 1797, ruining some of the largest players. *See* JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 322-24, 332 (1978); DOERFLINGER, *supra*, at 324-27.

273. On this contrast, see WOLCOTT REPORT, *supra* note 82, at 439-41.

tions facing Americans who sought to gather and use information about land's income or its historical sale prices to construct values; the vagueness of the federal valuation legislation of 1798; and the variability of the Treasury Secretary's and federal boards' pronouncements and decisions thereunder.

A. The Continental Congress's Failure at Real-Estate Valuation, 1777-89

To appreciate the uncertainty of valuation in early national America, we can begin with the Continental Congress's abject failure to fulfill its stated goal of conducting a nationwide land valuation in the 1780s. In drafting the Articles of Confederation in 1777, the delegates, desperate to reach some kind of agreement to prosecute the Revolutionary War, ended up inserting a provision to distribute the cost of war-fighting among the states according to the value of land within each state because that plan, although "wildly unworkable" in the words of one historian, avoided the rupture among the Northern and Southern states that might occur if apportionment were by population (as population would raise the question of whether to include enslaved people).[274] After the Articles were ratified in 1781, the Continental Congress never actually put the land-valuation plan into effect; instead it repeatedly apportioned requisitions using a stopgap formula (involving no attempt at land valuation) until the Confederation was superseded by the new Constitution.[275] The closest the Continental Congress came to valuing land was to ask the states in 1783 to send reports of the *quantity* of their lands, with a promise that the Congress itself would then decide the lands' respective values,[276] though even this preliminary request for information "was agreed to with great reluctance by almost all [the delegates], by many from a spirit of accommodation only, [and] the necessity of doing something on the subject."[277] Only two months later, the Continental Congress asked the states to amend the Articles so as to repeal the land-value provision and replace it with a provision setting requisitions according to free population plus three-fifths of slave population.[278] From then to 1786, nine

274. EINHORN, *supra* note 53, at 124. On the unworkability of the plan and its motivation by the imperative to avoid potential disagreements about slavery, see *id.* at 124-32, 143-45.

275. *See id.* at 127, 134, 139-40, 144.

276. Resolution (Feb. 17, 1783), *in* 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 89, at 133, 136-37 (1922).

277. James Madison, Notes on Debates (Feb. 17, 1783), *in* 6 PAPERS OF JAMES MADISON 247, 247 (William T. Hutchinson & William M.E. Rachal eds., 1969).

278. Resolution (Apr. 18, 1783), *in* 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 89, at 256, 257-61.

states agreed to repeal the land-value provision, while four refused (thus blocking amendment); *no* states made the requested reports of land quantities.[279]

A major reason why the Continental Congress sought to abandon land valuation in favor of population was that it seemed impossible to arrive at a valuation that most players would agree upon as accurate. To be sure, the valuation task faced by the Continental Congress in the 1780s differed from that faced by the federal boards under the 1798 direct tax, in that the Continental Congress was tasked with devising a mode of uniform valuation across all the states, whereas each federal board aspired only to a mode of uniform valuation within its own state. Yet the delegates in the 1780s, in explaining why they found the task intractable, at times noted that valuation was already quite difficult in the intrastate context, or just in an absolute sense. "[I]f we find so great difficulty in ascertaining the proportion of each town and parish" within one state, asked John Taylor Gilman of New Hampshire in 1783, "what may we expect between state [and] state?"[280] In 1786, a committee of the Continental Congress—consisting of delegates from Massachusetts, Connecticut, Virginia, and South Carolina—renewed the plea for the states to substitute a population provision for the land-value provision, emphasizing that, while population was "easily ascertained," "the value of lands and their improvements are rather matters of opinion, and men will not, probably rate them so much according to truth, as to certain rules they have been accustomed to in fixing, from time to time, this value."[281]

Further, when members of the Continental Congress talked of the danger of letting the individual states judge their own respective land values for the purpose of setting requisitions, they clearly understood that the states did and would use different approaches to valuation, confirming there was no single, specific way to do the task. The committee advocating repeal of the Articles' land-value provision in 1786 noted "how uncertain and fluctuating the value of real property in the several states is; [and] how variant [are] their rules and opinions in ascertaining it."[282] Hamilton, who hoped for repeal of the land-value provision and also voted against the Continental Congress's preliminary step of asking the states to report quantities of land, believed "that the value of all the land in each state cannot be ascertained with any thing like exactness"

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279. Committee Report (Mar. 8, 1786), *in* 30 JOURNALS OF THE CONTINENTAL CONGRESS 100, 102-04 (1934).

280. Letter from John Taylor Gilman to Josiah Bartlett (Jan. 9, 1783), *in* 19 LETTERS OF DELEGATES TO CONGRESS 566, 567 (Paul H. Smith ed., 1992).

281. Committee Report, *supra* note 279, at 100, 105-06.

282. *Id*. at 104-05.

and that, if each state legislature were to value its state's own land, then "the degree of care, judgment and method employed in the execution would alone make extreme differences in the results," even "[w]ithout supposing more liberality in one state than in another."[283] If land valuation had to be tried, the "best plan" was for the Congress to appoint officers in each state and for "[g]eneral principles" to "be laid down for the government of their conduct by which uniformity in the manner of conducting the business would obtain"—principles Congress had not specified.[284] During a floor debate in 1783, Madison helped convince the delegates to vote against allowing each state to value its own land when he cited "a comparison of an average valuation in Pa. & Va.," apparently from state tax valuations, "which amounted in the latter to 50 PCt. more than in the former, altho[ugh] the real value of land in the former was confessedly thrice that of the latter."[285] According to the North Carolina delegates, Madison's comparison and other evidence showed "the different frauds or the diversity of opinions respecting the value of lands which prevail in different states."[286]

B. The Absence of Clear Principles in State Tax Statutes, 1796-98

The absence of any specific consensus method for how to value real estate is evident from the state statutes on real-estate taxation of the 1790s. Reflecting on these state laws, U.S. Supreme Court Justice William Paterson—a signer of the Constitution and onetime governor of New Jersey—said in 1796 that any federal direct tax would be "full of inequality, injustice and oppression," even if imposed solely on real estate, because of the lack of agreement on how to value it, even on an intrastate basis:

> Do the laws of the different states furnish sufficient data for the purpose of forming one common rule, comprehending the quality, situation, and value of the lands? In some of the states there has been no land tax for several years, and where there has been, the mode of laying

283. Letter from Alexander Hamilton to George Clinton (Feb. 24[-27], 1783), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-03-02-0168 [https://perma.cc/7NPB-R5W9].

284. *Id.*

285. James Madison, Notes on Debates (Feb. 7, 1783), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-06-02-0051 [https://perma.cc/DW6Z-4F64].

286. Letter from North Carolina Delegates to Alexander Martin (Mar. 24, 1783), *in* 20 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 89, 90 (Paul H. Smith ed., 1993).

> the tax is so various, and the diversity in the land is so great, that no common principle can be deduced, and carried into practice. Do the laws of each state furnish data, from whence to extract a rule, whose operation shall be equal and certain in the same state? Even this is doubtful.[287]

Paterson believed that a direct "tax upon land" was "scarcely practicable," partly due to all this uncertainty.[288]

Paterson was correct that the states did not furnish one "common principle" of real-estate tax valuation. To see this, consider the state governments' taxation of real estate at the time of Congress's deliberations on the direct tax in 1796-98.[289] Three states—Vermont, North Carolina, and Tennessee—did not even try to value real estate; they simply taxed it by a flat sum per acre, with no regard to value.[290] Another four states—Connecticut, South Carolina, Georgia, and Kentucky—enacted statutory schedules assigning per-acre values to certain classes of land, defined by the region of the state in which the land was situated and/or by its type (e.g., in South Carolina, tide swamp, high river swamp, and pine barren).[291] In these states, administrators categorized land by class but did

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287. Hylton v. United States, 3 U.S. (3 Dall.) 171, 179 (1796) (opinion of Paterson, J.).

288. *Id.* at 180. For a summary (without citations and with some inaccuracies) of diverse modes of taxing real estate in the states, see WOLCOTT REPORT, *supra* note 82, at 437.

289. In finding the most recent state legislation as of the enactment of the federal direct tax, I have been guided mainly by the statutes that appear to be the ones referenced in Secretary Wolcott's report of December 1796 (though that report has no exact citations). WOLCOTT REPORT, *supra* note 82. Note that in some cases, the most recent state statutes were old, dating to the 1780s.

290. On Vermont, see An Act, for the Purpose of Raising Thirty Thousand Dollars (Nov. 3, 1791), *in* 2 THE LAWS OF THE STATE OF VERMONT DIGESTED AND COMPILED 237 (Randolph, Sereno Wright 1808); An Act, Assessing a Tax of One Cent on Each Acre of Land in This State for the Support of Government, During the Year One Thousand Seven Hundred and Ninety-Seven, and for Other Purposes (Nov. 10, 1797), *in* 2 THE LAWS OF THE STATE OF VERMONT DIGESTED AND COMPILED 256 (Randolph, Sereno Wright 1808). For Tennessee, see Act of Oct. 25, 1797, 1797 Tenn. Acts 114, 115. For North Carolina, see An Act to Amend an Act Entitled 'An Act for Ascertaining What Property in This State Shall Be Deemed Taxable Property, the Method of Assessing the Same, and Collecting Public Taxes,' 1784 N.C. Sess. Laws. 344, 344-45. *See also* JOHN HAYWOOD, A MANUAL OF THE LAWS OF NORTH-CAROLINA, ARRANGED UNDER DISTINCT HEADS IN ALPHABETICAL ORDER 407-28 (Raleigh, J. Gales 1801) (confirming no substantial changes as of 1801).

291. For Connecticut, see An Act for the Direction of Listers in Their Office and Duty (no date), *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 274, 277-78 (Hartford, Hudson & Goodwin 1796). For South Carolina, see Act of Dec. 19, 1795, 1795 S.C. Acts 3-4. For Georgia, see Act of Feb. 22, 1796, 1796 Ga. Laws 5, which raises money for the state. Please note that the pagination of the Georgia session laws of 1796 available in HeinOnline restarts

not really value it. Critics in these states said the crude classification schemes were disconnected from what land was "worth," from what it "produces,"[292] from its "value,"[293] or from what it "will sell for."[294]

The other nine states purported to tax real estate according to assessors' individualized valuations, but the vagueness of the approaches set forth in many of their statutes, and the diversity of those approaches when viewed collectively, confirm the subjectivity of the undertaking. In discussing these nine states, I should note that each of them provided for (1) valuation of individual parcels of real estate by officials in the first instance; and (2) apportionment of the statewide tax burden among the geographic parts of the state by the state legislature, in the form of mandatory average per-acre values or quotas assigned to each county or each town. In states where the legislature's apportionment was to counties, the legislature would sometimes then provide for a subapportionment, by an elected county political body, to the towns within a county. In this Section, I focus on the statutory principles and methods (or lack thereof) pertaining to point (1) above, that is, valuation of individual parcels. Point (2) above—legislative assignment of averages or quotas to counties or towns—was decided by lawmakers themselves. This was often a nakedly political process, which I discuss in Section III.A, below. However, a few states had public documents that said something about the principles or methods by which the legislature was to set the county or town quotas, and I shall discuss those in this Section.

Of the nine states that had assessors give individualized valuations of real estate, four—Rhode Island, New York, New Jersey, and Virginia—gave no statutory definition of value or method of determining it whatsoever. Begin with Rhode Island. The statute was quite vague: assessors in the first instance were to make "a list containing the value of all such person's estates, according to the best judgment and estimate of the Assessors," and if taxpayers gave accounts of their property that were "not just and true," the assessors were to "es-

at 1 multiple times; the Act of Feb. 22 begins on the third page paginated "5." For Kentucky, see Act of Dec. 21, 1793, 1793 Ky. Acts 19, *amended by* Act of Dec. 19, 1795, 1795 Ky. Acts 39, which establishes a permanent revenue.

292. C.H., Letter to the Editor, CONN. COURANT & WKLY. INTELLIGENCER, Jan. 6, 1784, at [1].

293. 6 ANNALS OF CONG. 1868 (1797) (statement of Rep. Harper) (discussing South Carolina); 26 ANNALS OF CONG 323 (1813) (statement of Rep. Montgomery) (discussing Kentucky).

294. Letter to the Editor, CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.), Sept. 4, 1799, at [2] (from "A Corn Planter").

timate such person's estate at such a value in said list as they shall think it worth."[295]

In New York, the legislature was likewise vague: a town official was to "set down the real value of all [the taxpayer's] whole estate real and personal" without further definition or guidance, and the supervisors elected respectively by the towns were to apportion the county's quota (set by the state legislature) to the towns "in such manner as they shall judge to be just and equitable," again without further definition or guidance.[296]

In New Jersey, the legislation was vague and affirmatively acknowledged the officials' discretion. "All Tracts of Land" were to be "valued and rated *at the Discretion* of the said Assessors," "at any Sum not exceeding Eighty Pounds by the hundred Acres," and houses were to be "valued by the respective Assessors at their Discretion, having Regard to their yearly Rent [i.e., presumably, *if* they were rented] and Value, proportioning the same as nearly as may be to the Val-

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295. An Act Regulating the Assessing and Collecting of Taxes (last updated 1798), *in* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 407, 408 (Providence, Carter & Wilkinson 1798). Like several other states, Rhode Island's legislature apportioned the statewide tax burden by quotas to localities (towns), but unlike most states, Rhode Island had a statutorily-prescribed information-gathering process that led up to the legislature's determination of quotas in 1795-96. That process further confirms the subjectivity. A committee in each town was to make a "just and true Estimate of all the rateable Property" in the town, and then a committee of the state legislature was to "call upon the Committees of the several Towns to appear before them . . . and to inform them, the said State's Committee, of the Principles upon which they, the Town's Committee, have proceeded," implying that each town could choose and explain its own "Principles" (certainly no principles were specified in the act). Act of June, 1795, 1795 R.I. Laws June Sess. 25. The state legislative committee would then, "from the Estimates so made [by the towns], together with any other Information they can obtain, either from the Town's Committee, or by comparing the Estates in the different Towns, form a general Estimate of all the rateable Property in the States." *Id.* The state legislative committee reported a set of town quotas to the legislature in 1796, having considered the town estimates "together with such other Information as we have been able to obtain," and the legislature adopted the quotas. Resolution of June 1796, 1796 R.I. Laws June Sess. 16-17.

296. An Act for Defraying the Public and Necessary Charge in the Respective Counties of this State (Mar. 7, 1788), ch. 65, *in* 2 LAWS OF THE STATE OF NEW YORK 769, 770 (Albany, Weed, Parsons, and Co. 1886). This statute is for the assessment of county-level taxes, but the process therein for defraying counties' contingent charges was incorporated by reference for the assessment of state taxes. An Act for Raising Monies by Tax (Mar. 19, 1788), ch. 86, *in* 2 LAWS OF THE STATE OF NEW YORK 811-12 (Albany, Weed, Parsons, and Co. 1886). Note that this legislation was New York's most recent tax legislation as of 1796. *See* WOLCOTT REPORT, *supra* note 82, at 425. There was no new statewide tax legislation until 1799. *See* Alexander Hamilton, An Address to the Electors of the State of New-York n.28 (Mar. 21, 1801), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-25-02-0197 [https://perma.cc/2XAF-JEBS] (editor's footnote).

ue of the Land aforesaid."[297] Once the town assessors had valued individual properties, all those assessors within a county were to form a board for the county, which then was to "determine and adjust the Quotas to be levied and collected within each Township" to make up the county's portion of the statewide tax (as assigned to the county by the state legislature), "at such Valuation as [the assessors on the board] or a Majority of them then present, *in their Discretion*, shall think reasonable to fix according to the Restrictions limited by Law for that Purpose."[298]

In Virginia, the legislature similarly kept things vague, telling the tax commissioners in each county to "ascertain the value of the said lands," "with due regard to their situation," without further guidance on valuation.[299] And the legislature affirmatively acknowledged the subjectivity of the enterprise by providing that, "where any two commissioners . . . shall differ in opinion as to the value of any land or lots as aforesaid, the two sums shall be added together and one half thereof shall be taken for the value of said land or lots."[300]

So much for the four states that had individualized assessor valuations but gave no methods or principles whatever; what about the other five that also had individualized assessor valuations? Three of them—Pennsylvania, Delaware, and Maryland—had statutory language suggesting that officials should think in terms of the likely market sale price of the property. Those states also authorized officials to examine public records that explicitly or probably included deeds that might have historical sale prices, though none of the statutes were explicit about using deeds to figure out market value, and they may well have meant for the deeds to be used in identifying overlooked property or in determining its owner or quantity.

In Pennsylvania, the statute said all properties should be "valued at and for so much bona fide as they are worth and would sell for."[301] The legislature did

297. Act of Feb. 17, 1794, ch. 466, § 5, 1793 N.J. Laws 1st & 2d Sitting 897, 898-99 (emphasis added). Another levy with nearly identical provisions was enacted soon after this one. Act of Dec. 1, 1794, ch. 511, 1794 N.J. Laws 964.

298. Act of June 5, 1787, ch. 203, 1786 N.J. Laws, 2d Sitting 412, 413 (emphasis added). This was a general tax-administration statute that was incorporated by reference in later statutes that imposed actual levies. *See, e.g.*, Act of Feb. 17, 1794, ch. 466, § 3, 1793 N.J. Laws 1st & 2d Sitting, 897, 898.

299. An Act for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue, ch. 40, § 1, 1781 Va. Acts Nov. Sess. 151, 152.

300. *Id.* North Carolina, though mostly taxing land without regard to value, made an exception for urban lots, for which it adopted a similar scheme for averaging officials' disparate opinions. Act of Apr. 19, 1784, ch. 1, § 5, 1784 N.C. Sess. Laws 342, 342.

301. Act of Mar. 16, 1785, ch. 1137, § 19, *in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 454, 470-71 (James T. Mitchell & Henry Flanders eds., 1906) [hereinafter

not elaborate, but clearly meant for officials to think in terms of future market sale. The statute also said officials "may search all public records within their respective counties" and that all record-keeping officers had to assist "in such searches" and give "free access at all proper times to the said public records for the said purpose without fee or reward"—a provision that might seem to contemplate searches of deeds for historical sale prices, but that interpretation appears unlikely because the search power was said to be for the "purpose" of "gain[ing] information of all taxable property concealed or refused to be returned" by the taxpayers.[302] The searches were apparently to identify overlooked property, not to value known property.

In Delaware, the assessors were to "estimate each tract or parcel of land at its actual worth in ready money, from the best information they can obtain, regarding all circumstances and advantages of the same from situation or convenience to market."[303] The words "ready money" called upon the assessor to imagine a market sale, and one without credit. And the phrase "convenience to market" gave at least a little specificity about how to imagine the market sale, albeit not in terms of historical sale prices. The same provision said the assessors were

> authorized and required to call upon the owner or owners of the land in the several hundreds [i.e., county subdivisions] respectively, in the county in which the land lies, to discover and ascertain the quantity thereof, and also on the Recorder of Deeds and Surveyor of their respective counties, who is hereby required to give any information to the said Assessors, or any of them, which his records may afford.[304]

As in Pennsylvania, this reference to the Recorder of Deeds might have contemplated examining deeds for historical sale prices of land, though the provision did not provide for this and seemed more aimed at figuring out the "quantity" of land.[305]

PA. STATUTES]. This 1785 tax was continued through 1789, after which no general tax was imposed through 1796. WOLCOTT REPORT, *supra* note 82, at 427.

302. Act of Mar. 16, 1785, ch. 1137, § 14, *in* 11 PA. STATUTES, *supra* note 301, at 468.

303. Act of Feb. 9, 1796, ch. 98, § 4, 1796 Del. Laws 1247, 1249.

304. *Id*.

305. Also, assessors were to value urban lots at "the value thereof in ready money, and the rents of such houses and lots, and by whom paid; and they shall have power . . . to discover what rent is paid for the same; and shall assess the value thereof as is herein before directed, upon the best information they can get, and view of the premises, if necessary." *Id*. § 5, 1796 Del. Laws at 1249.

In Maryland, the tax commissioners were to estimate each parcel of real estate "at its present actual worth in ready current money, regarding all circumstances and advantages of the land from situation or convenience to market, and taking particular care that all land in their county of equal quality and advantages of situation be estimated by them at the same price."[306] The references to "ready money" and "price" suggested thinking in terms of market sales, and the reference to "convenience to market" added a bit of specificity. In an earlier part of this long provision, the statute also empowered the assessors "to call on the clerks of their counties to deliver them a list of alienations" since the year 1783; this might have contemplated examination of historical sales prices, though the statute did not say that, and it may have been aimed at identifying who owned which parcel.[307]

Of the nine states that had individualized assessor valuations of real estate, we have now considered the five that gave no principles or methods and the three that invoked market sales; we can now consider the final two, which took a different approach more focused on land's annual income. To be sure, income-based valuation and sale-price-based valuation ought to converge, as a matter of theory, but that assumes a frictionless market with costless information. Thus, while Wolcott could say in his 1796 report that "[t]axes proportioned to the value of improved lands, and taxes proportioned to their produce, or annual income, or rent, are nearly, if not entirely, alike *in principle*,"[308] the Continental Congress committee on valuation in 1786 noted that, in practice, there was not "always a due proportion between the value and profits of real estates."[309]

In New Hampshire, the legislature taxed land according to its physical productivity. For example, arable land was taxed at one shilling for each portion of the parcel that "will produce twenty five bushels of Indian corn or other grain," and pasture land was taxed at five pence for each portion "as will keep one cow."[310] This was cruder and more objective than a valuation of land according to its actual income, which would have required determining market prices for the land's products, cost of transportation, a discount rate, etc. But it

306. Act of Mar. 8, 1786, ch. 53, § 5, 1785 Md. Laws (no page numbers) (act to ascertain the value of land).

307. *Id.*

308. WOLCOTT REPORT, *supra* note 82, at 439 (emphasis added).

309. Committee Report, *supra* note 279, at 105.

310. Act of Feb. 22, 1794, 1793 N.H. Laws 471, 471.

pointed in the direction of income, and it focused on a different kind of information than historical sale prices of parcels.[311]

In Massachusetts, the legislature's instructions to the assessors in the first instance were simply vague (to assess "according to the just value of the real estate of each inhabitant"),[312] but Massachusetts was unusually explicit about how it did valuation for another stage of the taxing process, that is, apportionment of the statewide tax burden by the legislature's assignment of quotas to towns. About once every five years, the legislature would conduct a special statewide valuation for the exclusive purpose of apportionment among towns,[313] and the assessors for this valuation were to report the physical productivity of the land in bushels of grain, cows fed, etc.[314] A large committee of the legislature would then examine the returns and propose a statewide valuation apportioned by town. The committee's valuation, as its report of 1793 said, was "regulated by the income of the property as deducible from the different kinds and quantity of produce apparent from [the assessors'] returns, making such allowances for circumstances of locality and other appendages, as to [the committee] appeared reasonable."[315] The committee's report did not further specify how it got from the raw productivity numbers to the values. The "circumstances of locality" and "other appendages" considered by the committee might have included, for example, market prices for produce or transportation costs. This would render the valuation less crude than that of New Hampshire, but also more discretionary, as shown by the committee's announcement that it had made whatever allowances "appear[] reasonable." Interestingly, although one might think the returns of land's physical productivity and especially of its mere quantity would be the easiest and most objective stage of the process, the committee in 1793 announced that it questioned many of the returns sent by the town assessors, even as to the *amount* of land in use. The committee therefore added such "amount of property not included in the returns, as by [the committee's] best judgment, deliberately used, it appeared the inhabitants of the different places must be possessed of, to give that support to themselves and subsistance [sic] for their cattle actually kept, which it was evident they de-

311. New Hampshire also taxed "all other buildings and unimproved lands" vaguely "at half of one percent of the real value." *Id.* at 472.

312. TAX NO. ELEVEN, COMMONWEALTH OF MASSACHUSETTS 23 (Bos., Adams & Larkin 1794), Readex Early American Imprints, Series 1, no. 27294 (pamphlet printing of Massachusetts statute).

313. VAN BECK HALL, POLITICS WITHOUT PARTIES: MASSACHUSETTS, 1780-1791, at 4-5 (1972).

314. Act of Feb. 23, 1792, 1792 Mass. Acts Jan. Sess. 144, 144-45.

315. REPORT OF THE COMMITTEE ON THE VALUATION (Mar. 21, 1793), *in* [1792-93] ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 322 (Bos., Wright & Potter Printing Co. 1895).

rived from sources within their own limits."[316] The committee said it acted "*in many instances*, with direct proof of the facts," which implied it *didn't* have direct proof in all instances.[317] The committee was sensitive to the controversy it was inviting by these aggressive revisions, as I discuss below.[318]

C. *Indeterminacy in Deciding Value from Land's Annual Income or Historical Sale Prices*

Today, it may seem strange that most states refrained from putting valuation on a concrete basis like annual income or historical sale prices—and that even the states that did put valuation on one of those bases at a theoretical level did very little to explain what data to gather or how to get from data to values. But in fact, it was understandable for lawmakers to be reticent on these matters, because any process of data gathering and value estimation would be far from determinate, given the difficulty in the 1790s of finding appropriate data on income or prices and making inferences from what was available.

One obstacle to determinacy in estimating real estate's annual income was that any such estimate—whether for a single parcel or for a whole district to calculate an average—required several pieces of information that might each be costly to research and measure. First, you needed to project the produce of the land. Only the land's owner (or the tenants or enslaved people working the land) were likely to know this for sure, and neither any state statute nor the Valuation and Enumeration Act authorized officials to demand such information. However, it seems that some officials heard through word of mouth, or simply asked and were told,[319] though of course the owner would have an incentive to lowball the answer. Judging physical productivity also raised a normative question: whether to value the land by what it *was* producing historically, or by what it *could* produce with optimal use.[320] Second, you needed to know what portion of the produce would go to market. This was complicated in an age of "composite farming," where farmers grew food for subsistence and

316. *Id.*

317. *Id.* (emphasis added).

318. *See infra* note 490 and accompanying text.

319. *See* Extract of Letter of Enoch Mason, FED. GAZETTE (Baltimore), Oct. 2, 1800, at 2 (federal direct-tax principal assessor for Stafford County, Virginia recounting the inquiring of tenants).

320. *Cf.* Thomas Jefferson, Enclosure: Notes on Virginia Lands (Aug. 3, 1791), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-20-02-0370 [https://perma.cc/76GH-QMGA] (noting "husbandry [in Virginia] is in general very slovenly" and estimating productivity on that premise).

then sold a surplus whose proportion varied greatly between different communities, and even individual farms, and over time.[321] Third, you needed to project the market price of the produce, in light of the volatility of the commercial economy and the fact that different communities had very different levels of engagement with it (more on this in the next paragraph). Fourth, you needed to know the costs the owner faced, especially the cost of transportation, which varied depending on the proximity and navigability of waterways and the quality of nearby roads, if any.[322] Fifth, you needed to select a discount rate. Of course, it was possible for a decisionmaker to ignore some of these factors and settle for a cruder approximation of income (as the New Hampshire legislature did), but the decision about what to ignore was an important discretionary choice.

A second obstacle to determinacy in predicting real estate's future income—and in inferring real estate's current value from its historical sale prices—was that these predictions and inferences required the decisionmaker to guess how future economic conditions would differ from the past conditions that prevailed at the times from when income or sale-price data were drawn. In particular, the decisionmaker making these guesses had to confront intrastate geographic unevenness in economic conditions and the volatility of the prices of real estate's produce and of real estate itself.[323] American history up to the 1790s gave no reason to think real-estate prices would be generally stable: they had often doubled or tripled in the 1750s and 1760s,[324] then fallen by 25% to 50% or more in the depression of the 1780s.[325] Real-estate prices were profoundly affected by the money supply,[326] which varied greatly by time and geographic location in this period, and Americans would sometimes insist that real estate had "value" in an inherent or long-run sense that was higher than the actual market price it commanded amid a low money supply that might be considered abnormal.[327] Prices of real estate were also affected—insofar as land had

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321. *See* Richard Lyman Bushman, *Markets and Composite Farms in Early America*, 55 WM. & MARY Q. 351, 367 (1998).

322. 6 ANNALS OF CONG. 1867 (1797) (statement of Rep. Harper).

323. I thank Scott C. Miller for a valuable conversation about this issue.

324. Bushman, *supra* note 321, at 371-72.

325. U.S. TREASURY DEP'T, PUBLIC CREDIT (Jan. 14, 1790), *in* 1 AMERICAN STATE PAPERS: FINANCE, *supra* note 82, at 15, 16.

326. *Id*.

327. *E.g.*, Debates in the Convention of North Carolina, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 76 (D.C., Jonathan Elliott ed., 2d ed. 1836) (statement of Samuel Spencer on July 26, 1788); WOLCOTT REPORT, *supra* note 82, at

transportation links to the larger commercial economy—by the robustness of international trade.[328] The linked processes by which farms became more productive and more engaged with commercial markets (raising the farms' incomes and their potential sale prices) proceeded at dramatically different speeds in different localities of a single state. In Massachusetts, from 1771 to 1801, "the experiences of individual towns [in terms of aggregate grain output] varied between a more than fivefold increase in Blandford and a more than 50 percent decrease in Springfield," and "there were fifty towns where [grain yields] increased far more than [the statewide average of 14 percent]—in four of them yields more than doubled—but thirty-three towns where they actually fell, in one case to nearly half the 1771 level."[329] Likewise, the supply of money and credit was higher in a state's ports and in its areas that were more commercially connected (often near the coast) compared with those less connected (often inland).[330] In keeping with this, in 1794 Massachusetts Congressman Samuel Dexter said that "[l]ands increase in value very unequally in different places, and the [geographic] proportion [of any direct-tax valuation] will be forever altering."[331] The more a locality was engaged with the commercial economy, the more the income and potential sale price of its real estate would have to be gauged in light of the swings of that economy, which were big near the time of the federal direct tax. By a leading modern estimate, real national output per capita rose steadily from 1790 through 1796, fell in 1797 and 1798 (amid the panic that landed some of America's richest men in debtors' prison and led to the first federal bankruptcy act), was nearly flat in 1799, and recovered in 1801.[332] Wholesale prices for U.S. agricultural products increased great-

437; Louis Maganzin, Economic Depression in Maryland and Virginia, 1783-1787, at 227, 242 (June 1967) (unpublished Ph.D. dissertation, Georgetown University) (ProQuest No. 302254909). The Supreme Court in 1804 said that a jury, in determining the value of a parcel of land in 1779, "ought not to be governed by the particular difficulty of obtaining gold and silver coin at the time, but their [i.e., the jurors'] conduct ought to be regulated by the real value of the property, if a solid equivalent for specie had been made receivable in lieu thereof." Faw v. Marsteller, 6 U.S. (2 Cranch) 10, 32 (1804) (Marshall, C.J.).

328. *See* 26 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 317-18 (Gaillard Hunt ed., 1928) (report of the committee on foreign commerce from April 30, 1784).

329. WINIFRED BARR ROTHENBERG, FROM MARKET-PLACES TO A MARKET ECONOMY: THE TRANSFORMATION OF RURAL MASSACHUSETTS, 1750-1850, at 221 (1992). On geographic differences in farms' commercial engagement in America generally (dependent on factors like proximity to navigable water), see Bushman, *supra* note 321, at 361.

330. 6 ANNALS OF CONG. 1866-67 (1797) (statement of Rep. Harper) (on differences within Pennsylvania and within South Carolina); Dalzell, *supra* note 66, at 313.

331. 4 ANNALS OF CONG. 646 (1794) (statement of Rep. Dexter).

332. Richard Sutch, *National Income and Product*, *in* HSUS, *supra* note 182, at ser. Ca11.

ly from 1790 to 1796 but suffered "a sharp drop in 1797, and then a period of erratic fluctuations where prices remained well below their 1796 levels until at least the War of 1812."[333] The supply of money and credit in 1797 fell where they had previously been high,[334] and farmers "complained of a money scarcity."[335] These swings would not affect the *relative* value of real estate in different parts of a state *if* one assumed the fluctuations were uniform across the state, but that assumption would be wrong: within a state, the less commercially connected areas felt the swings far less, while the port cities felt them most.[336] In trying to infer real estate's value from historical prices for its produce or for the land itself, one had to predict whether future conditions would follow the most recent prices, or some average of prices over a longer period, or prices over a period that excluded moments that seemed aberrational, etc.

A third obstacle to determinacy in predicting real estate's future income or making inferences from its historical sale prices was that administrators would have to decide how to weigh the extraordinary epidemics that decimated some of the largest U.S. cities in the 1790s, especially in 1798, just around the statutory valuation date of October 1. In New York, there had been no yellow fever for decades, but the disease struck slightly in 1794 (killing no more than 30), then worse in 1795 (killing 732), then not at all in 1796 or 1797, then worst in 1798 (killing 2,086, in summer and fall) in a city population of about 50,000.[337] In Philadelphia, where there likewise had been no yellow fever for decades, the disease struck in 1793 (killing approximately 4,000), in 1797 (killing 1,700), in 1798 (killing at least 3,500, mainly from August through October), and 1799 (killing more than 1,000), in a city population of about 55,000.[338] Unlike COVID-19—a disease that humans spread directly to one another that can thus be prevented by social distancing—yellow fever is spread to humans by mosquitoes, meaning an epidemic can pervade a geographic area where mosquitoes are common, such as a seaport. Though Americans in the 1700s did not know mosquitoes spread the disease, they could tell that the disease was pervading a certain geographic area, and they reacted by evacuating

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333. Richard S. Chew, *Certain Victims of an International Contagion: The Panic of 1797 and the Hard Times of the Late 1790s in Baltimore*, 25 J. EARLY REPUBLIC 565, 604 (2005).

334. *Id*. at 586.

335. TERRY BOUTON, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION 247 (2007).

336. Chew, *supra* note 333, at 569-70, 588, 596-97.

337. Claude Edwin Heaton, *Yellow Fever in New York City*, 34 BULL. MED. LIBR. ASS'N 67, 69, 71, 74 (1946).

338. Gary W. Shannon & Robert G. Cromley, *Philadelphia and the Yellow Fever Epidemic of 1798*, 3 URB. GEOGRAPHY 355, 357, 360 (1982).

that area. An estimated one-third to one-half of New York City evacuated in the summer and fall of 1798,[339] and more than two-thirds of Philadelphia did so during the same period, especially the wealthy,[340] who were most likely to own real estate. "Trade and business intercourse were completely disrupted at all levels by quarantines imposed against Philadelphia by other cities," "almost all shops and businesses were closed," and "migration to the city, the primary source of population growth, was greatly reduced."[341] The epidemics and evacuations presumably distressed the real-estate markets of the cities they struck, and the diversion of trade would have affected produce prices and costs for commercial farmers in the regions that normally used those ports. What is the "worth" of properties under these distressed conditions? If no property sales were occurring, should the valuation be zero? If sale prices were suddenly much lower than in the past, should the valuation be equally low? If that is going too far, what is the alternative? Should the tax valuation match sale prices just *before* the epidemic? This, too, seems unsatisfying. Shouldn't *some* discount for the epidemic be allowed—especially if what happened in 1798 increased the probability it might happen again? But how big should it be? These are questions data alone could not answer.

Besides these three obstacles to determinacy in predicting real estate's income or making inferences from its historical sale prices, there were three additional obstacles that pertained specifically to sale prices.

First, good sale-price data might be hard to get. Buyers of land did frequently record deeds, and these often included a sale price. But "[n]ot all deeds were recorded, and many were recorded years, decades, and in some cases, even a century late."[342] Such lateness was problematic for valuation, as recent sales were the most relevant for current value. To be sure, many states incentivized buyers to record their deeds by giving a recording buyer priority over any other claimant to the same land, though not all states did this as of 1798.[343] And some states provided almost no incentive to record, for they allowed a party

339. THOMAS CONDIE & RICHARD FOLWELL, HISTORY OF THE PESTILENCE, COMMONLY CALLED YELLOW FEVER, WHICH ALMOST DESOLATED PHILADELPHIA, IN THE MONTHS OF AUGUST, SEPTEMBER & OCTOBER, 1798, at 95 (Phila., R. Folwell 1799).

340. Shannon & Cromely, *supra* note 338, at 367.

341. *Id*. at 368.

342. Robert E. Wright, *Ground Rents Against Populist Historiography: Mid-Atlantic Land Tenure, 1750-1820*, 29 J. INTERDISC. HIST. 23, 32 (1998) (using a sample of 1,000 deeds from 5 deed books for Philadelphia County between 1780 and 1820).

343. New Jersey, for example, did not. *See* Read v. Richman, 13 N.J.L. 43, 49-51 (1832) (noting the first priority statute was in June 1799 and only applied prospectively, to deeds executed starting in 1800).

who bought first-in-time to get priority by recording even *after* a subsequent buyer recorded: North Carolina continually extended the period during which first-in-time buyers could get this benefit,[344] with the result that almost no buyers recorded promptly,[345] and Tennessee did the same.[346] Even in states with strong incentives to record, sellers who sold on installments apparently had a practice of not allowing the buyer to record until all installments were paid, years after the price was negotiated.[347] Moreover, deeds that did get recorded were housed in scattered repositories, often county courthouses,[348] meaning that a statewide valuation authority (like a federal board in 1798) would find it much easier to use the records by employing its field service for the task (presumably the principal and assistant assessors). But getting such a large corps of officials to do such a task probably meant it could not be done in secret, and if the taxing authority's reliance upon deeds became public, that might incentivize buyers in the future to conceal the full prices.[349] Whether for reasons of tax avoidance, or simple privacy, buyers might record only a nominal price, or a price that was more than nominal but less than accurate. At least one federal official in 1799 expressed suspicion that deed prices did not reflect actual sale prices,[350] and the new state tax boards of the late 1800s and early 1900s

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344. For the North Carolina extensions through 1794, see Toxey H. Sewell, *The Tennessee Recording System*, 50 TENN. L. REV. 1, 5-6, 5 n.20 (1982). For further extensions, see An Act Giving Further Time for the Registering Grants and Proving Deeds and Mesne Conveyances, ch. 12, 1800 N.C. Sess. Laws 152; An Act Giving Further Time for the Registering Grants, Proving Deeds and Mesne Conveyances Which Have Not Been Proved, ch. 25, 1798 N.C. Sess. Laws 126; An Act Granting Further Time for Registering Grants, Proving Deeds and Mesne Conveyances, Also Bills of Sale and Deeds of Gift, ch. 16, 1796 N.C. Sess. Laws 95.

345. Hill v. Jackson, 31 N.C. (9 Ired.) 333, 336 (1849) ("There is scarcely one grant in a hundred, which is registered within two years from its date.").

346. Sewell, *supra* note 344, at 6-7.

347. ROBERT E. WRIGHT, ORIGINS OF COMMERCIAL BANKING IN AMERICA, 1750-1800, at 168 (2001).

348. *See, e.g.*, *id.* at 168 & n.45.

349. *Cf.* 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 318-19 (Edwin Cannan ed., Methuen & Co. 1904) (5th ed. 1789) (noting that European tax authorities valuing land refrained from relying upon recorded rental contracts because they "suspected, probably, that the lessor and lessee, in order to defraud the public revenue, might combine to conceal the real terms of the lease"). As I discuss later, the commissioners in Connecticut investigated deed-book prices themselves or sent certain lower-level officials to do it ad hoc, but Connecticut was a small state, and even then, the commissioners got in trouble with the Treasury for their unusually expensive process. *See infra* notes 417-433 and accompanying text. None of the several extant federal-board instructions tell the assessors to investigate deeds. *See infra* notes 413-414 and accompanying text.

350. *See infra* note 425 and accompanying text.

sometimes refused to rely upon deed prices, or did so with great caution, fearing inaccuracy.[351] Finally, the deed of a sale on credit might not describe the full terms and conditions,[352] meaning that deeds giving transparent prices might be less likely to involve credit, rendering them nonrepresentative of the overall population of sales.

Second, inferences from sale prices (especially when calculating a district average) could be indeterminate because of a dearth of sales. Even today, real estate is considered the prime example of a relatively illiquid asset whose valuation is therefore challenging, even though U.S. annual turnover in the modern era is, for urban homes, on the order of 15%,[353] and for rural land, on the order of 4% (by parcel) or 2% (by acre).[354] It is likely that liquidity of real estate in the 1790s was even lower. In what appears to be the only published econometric study of American land sales prior to the mid-nineteenth century,[355] economic historians David Ryden and Russell Menard find annual turnover in South Carolina in 1720-75 to have been about 2% per year by acre, but this surprisingly high figure is driven overwhelmingly by purchases in the coastal rice belt and especially by planters buying parcels to create larger and thus more profitable plantations; the study found far less turnover in the interior, where farms were not as large or rich as in the rice belt.[356] And the buildup of large plantations in the rice belt of South Carolina was radically exceptional compared to the rest of eighteenth-century America. A huge study of American wealth across a range of counties as of 1774 finds wealth holders of Charleston

351. HARLEY LEIST LUTZ, THE STATE TAX COMMISSION: A STUDY OF THE DEVELOPMENT AND RESULTS OF STATE CONTROL OVER THE ASSESSMENT OF PROPERTY FOR TAXATION 58-59, 61-63, 243-45 (1918); S.N. WOOD, J.D. ELLIS & J.L. WILLIAMS, ANNUAL REPORT OF STATE ASSESSORS, FOR THE YEAR 1886 [NEW YORK], at 27 (Albany, Argus Co. 1887).

352. David B. Ryden & Russell R. Menard, *South Carolina's Colonial Land Market: An Analysis of Rural Property Sales, 1720-1775*, 29 SOC. SCI. HIST. 599, 601 (2005). On the importance of credit in land sales, see WRIGHT, *supra* note 347, at 167-69.

353. *See* Jessica Guerin, *High-Turnover Cities Have Greatest Home Price Growth*, HOUSING WIRE (Jan. 29, 2019, 5:47 PM), https://www.housingwire.com/articles/48041-high-turnover-cities-have-greatest-home-price-growth [https://perma.cc/Z5WA-UBKV].

354. GENE WUNDERLICH, ECON. RESEARCH SERV., U.S. DEP'T. OF AGRIC., BULL. No. 601, TRENDS IN OWNERSHIP TRANSFERS OF RURAL LAND 1 tbl.1 (1990) (noting annual national turnover of rural land in 1988 as 5.7% by parcel and 3.5% by acre); *id.* at 3 tbl.3 (noting that for 1988 the proportion of transfers that are voluntary sales, as opposed to foreclosures, family sales, gifts, or swaps, is 72% by parcel and 57% by acre). If we discount the turnover percentages to exclude all but the voluntary sales, we get the rough figures I gave in the text.

355. On the dearth of studies, see WRIGHT, *supra* note 347, at 168-69; and Ryden & Menard, *supra* note 352, at 600, 618.

356. Ryden & Menard, *supra* note 352, at 604-09.

to have been richer than those of any other county *by a factor of more than three to one*,[357] making the South Carolina rice-belt planters "the wealthiest population in British North America, if not the entire world."[358] In light of this, the illiquidity of South Carolina's interior was very likely more representative of America than the liquidity of its coastal rice belt. Consistent with this idea, economic historian Robert Wright's study of early American finance states that "land in colonial and early national America was *quite* illiquid."[359] Later, we will see that, when one federal board (in Connecticut) did compile land sales from deeds in certain districts, the sales it located per year amounted to roughly 1% of total land by parcel,[360] compared with rural turnover on the order of 4% in the modern era.[361]

Third, inferences from sale prices (say, in calculating a district's average value per acre) could be indeterminate in that real estate was heterogeneous and the properties sold within a district were not a random or representative sample of that district's real estate. In fact, local studies suggest that properties sold were often unrepresentative, and in ways that vary with place and time. In one part of backcountry South Carolina, sellers of land in 1790 were about as likely to be slaveholders as the rest of their community, whereas in 1800 they were less likely.[362] In Kinderhook, New York, those buying between 1800 and 1810 had wealth 70% below the average of the area's taxpayers, while "older, richer, and more influential families tended to stay."[363] Given this, it would be a huge mistake to average the prices of properties sold and assume it to reflect the average value of all land in the area. One needs to control for the various characteristics of the parcels that determine their value. But that is extremely complex. Economists attempt it today using hedonic regression (invented in the 1930s), but of course people in 1798 had nothing like that. In their study of South Carolina, Ryden and Menard go so far as to say "it was impossible for eighteenth-century contemporaries to produce a meaningful average price per

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357. ALICE HANSON JONES, WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF THE REVOLUTION 357 tbl.A1 (1980). Technically the county-like locality of Charleston was called a "district," not a "county." *Id.*

358. Peter A. Coclanis, *Bitter Harvest: The South Carolina Low Country in Historical Perspective*, 45 J. ECON. HIST. 251, 251 (1985).

359. WRIGHT, *supra* note 347, at 27-28.

360. *See infra* note 429 and accompanying text.

361. *See supra* note 354 and accompanying text.

362. PETER N. MOORE, WORLD OF TOIL AND STRIFE: COMMUNITY TRANSFORMATION IN BACKCOUNTRY SOUTH CAROLINA, 1750-1805, at 87 (2007).

363. MARTIN BRUEGEL, FARM, SHOP, LANDING: THE RISE OF A MARKET SOCIETY IN THE HUDSON VALLEY, 1780-1860, at 24-25 (2002).

acre."[364] When New York State in 1860 first vested administrators with the power to adjust taxable real-estate values en masse across different counties of the state, those administrators gathered historical sale prices but reported that

> these assessments and actual sales formed but a very slight data for fixing the par value of the real estate, as the sales were not uniform[,] and but a small portion of the land was changing owners in any given year, and the parcels sold were by no means an average of the lands in the county.[365]

D. Indeterminacy in the Federal Legislation of 1798: "No Necessity that the Principles of Valuation Should Be Uniform in All the States"

Congress in the direct-tax legislation of 1798 left the principles and methods of valuation open and allowed the federal boards in the individual states to fill the gap. Lawmakers followed the view taken by Secretary Wolcott in his report to the House of late 1796, in which he said, "No more eligible mode occurs, for obtaining a correct valuation and register of taxable lands, than by the appointment of commissioners for each State," and then announced that "*there appears to be no necessity that the principles of valuation should be uniform in all the states*."[366] It was acceptable for Congress to leave the principles undecided, and for the federal boards of commissioners to figure out different principles in each state, either by regulations the boards would promulgate prior to the assessment, or by whatever principles they each followed in their district-wide mass revisions afterward.

Consider the open-endedness of the Valuation and Enumeration Act's provisions for defining value and allowing for its revision. The Act said the assistant assessors should value each parcel and house at what it was "worth in

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364. Ryden & Menard, *supra* note 352, at 611.

365. FIRST ANNUAL REPORT OF THE STATE ASSESSORS OF THE STATE OF NEW YORK 5 (N.Y. 1860) (transmitted to the New York Legislature on January 6, 1860).

366. WOLCOTT REPORT, *supra* note 82, at 441 (emphasis added). He added, "It is certain that the records and documents which are known to be attainable, would exceedingly facilitate the adoption of principles, for determining the relative value of lands in different districts of the same State." *Id.* It is unclear what "records and documents" he had in mind. Most likely they are the state laws, though some would be out of date or inapplicable to the valuation at issue, and Wolcott himself had strongly opposed having federal law follow the individual state laws. Possibly he might be referring to existing state assessment rolls or recorded deeds, but it seems odd to say that these voluminous parcel-by-parcel documents would be used to "facilitate the adoption of principles."

money."[367] The Act's vague phrase "worth in money" was inserted by the Senate to replace the language in the original House-passed version, which said to value each at the amount "for which" it "might be sold for immediate payment in money."[368] The "immediate payment" language suggested thinking in terms of market transactions without credit, but the rest of the House-passed bill did not elaborate on this concept of value. The Senate took away even the House's modest level of conceptual clarity. But the Senate did not find it necessary to change any other language on the definition of value, which was already minimal in the House-passed version and remained so in the final enactment. Thus, for houses, the Act said the valuation was to be "with a due regard to situation," without defining what that was.[369] For land parcels, it said the valuation was to be "in a due relation to other lands and lots, and with reference to all advantages, either of soil or situation, and to all buildings and other improvements of whatever kind," without elaborating.[370] It also said the valuation of both land parcels and houses should be "in a just proportion," without more.[371]

At the level of data-gathering, the Valuation and Enumeration Act—both as it originally passed the House and as it finally became law—focused on a few physical features of the real estate, left open what these physical features had to do with value, and said nothing about economic productivity, prices of produce, costs, proximity to market, or historical rents or sale prices of the real estate itself.[372] Finally, the act contemplated that, in *identifying and locating* houses

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367. V&E Act, ch. 70, § 8, 1 Stat. 580, 585 (1798); *see also supra* note 194.

368. See *supra* notes 147-151 and accompanying text.

369. V&E Act, § 8, 1 Stat. at 585.

370. *Id.*

371. *Id.* § 16, 1 Stat. at 587.

372. In each subdivision, the assistant assessor was to "require all persons owning or possessing any" houses or lands therein, "or having the care or management thereof, to deliver separate written lists," specifying houses in one, lands in another. *Id.* § 9, 1 Stat. at 586. The house-owners or occupiers, in the lists they submitted, were to specify the houses' "situation, their dimensions or area, their number of stories, the number and dimensions of their windows, the materials whereof they are built, whether wood, brick or stone, the number, description and dimensions of the out-houses appurtenant to them, and the names of their owners or occupants"—all physical data, with nothing about rents, prices, etc. *Id.* The landowners or occupiers, in their lists, were to specify "the quantity of each separate tract or lot, [and] the number, description and dimensions of all wharves and buildings thereon"—again, physical data and nothing else. *Id.* In later successfully urging repeal of the requirement to record each house's number of windows, because of popular resentment and resistance, Representative Harper explained that the information on physical characteristics of houses were viewed as "criterions" of value and that Congress had generally sought "to furnish the commissioners, who are to judge of the valuations in the last resort, with as many and as certain criterions as possible, for guiding their judgment, in respect to dwelling houses, which it is

and land parcels, the assistant assessors would "inquire after" them "by reference to any records or documents, and to any lists of assessment taken under the laws of their respective states, and by all other lawful ways and means," but this mention of records, documents, and state tax-assessment lists did not literally apply to *valuation* decisions, and even if it did, the Act did not say how this information was to be used, nor what the relevant records and documents (apart from state tax-assessment lists) might be.[373] Deeds were not expressly mentioned.

If anything, the Act made the task of valuation even more indeterminate than it needed to be, by requiring houses to be valued separately from land, for the purpose of taxing them progressively. In the case of houses attached to lots greater than two acres (such as farmhouses), this required the officials to imagine what the house would be worth if it were on its own tract separate from the farm. At an early stage of debate, when the bill still said to value houses at what they might be "sold for immediate payment in money," Gallatin pointed out that this imaginary house-land separation undermined the whole idea of seeing value in terms of market transactions: "To value [land and houses] separately would be difficult, and must be done by some arbitrary rule; for the valuation could not be made according to what each would sell for, since they never were sold apart."[374]

And yet, in a move that underscores the willingness of Congress to delegate indeterminate decisions, Gallatin proved willing to compromise in a way that accepted the method he called "arbitrary." Having voted for the Valuation and Enumeration Act despite its separate valuation of houses and land, he voted for an amendment to the Lay and Collect Act that would have taxed the two at the same rate and thereby lowered the stakes of the separate valuation, but when that failed, he offered his own amendment (that fell one vote short of adoption) to *keep* the arbitrarily separate valuation of houses and land *but* have the progressive rates on houses float upward as far as necessary to keep the lowest

absolutely impossible for them inspect individually." Valuation of Land and Dwelling Houses (Jan. 21, 1799), *in* 1 AMERICAN STATE PAPERS: FINANCE, *supra* note 82, at 601, 602. In addition, contemporaries seem to have contemplated that the assistant assessors would themselves view the houses or lands when receiving the lists from those living there. *E.g.*, FB-NY Instructions, *supra* note 191, at 2. The Act clearly authorized assistant assessors to enter a house or land if the owner or occupier failed to provide a list and to make the valuation "according to the best information which they can obtain, and on their own view." § 14, 1 Stat. at 587.

373. § 8, 1 Stat. at 585.

374. 8 ANNALS OF CONG. 1837-38 (1798) (statement of Rep. Gallatin). For further discussion, see *id.* at 1844-45, 1849.

progressive rate on houses equivalent to the flat rate on land.[375] The arbitrariness of separately valuing and taxing houses and lands did not seem to be a dealbreaker for Gallatin, so long as landowners were protected from paying too much. (He voted nay on the Lay and Collect Act only after his amendment failed.)

The same open-endedness characterized the Valuation and Enumeration Act's provisions for the district-wide mass revision of valuations by the federal boards, which had "power . . . to revise, adjust and vary, the valuations of lands and dwelling-houses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, as shall appear to be *just and equitable*."[376] The phrase "just and equitable" seems open-ended, and its contemporary use confirms that. I examined all uses of "just and equitable" in Westlaw searches of the English Reports for the period 1740-1816 and of all U.S. federal and state cases through 1816 and found nothing to suggest the phrase was a term of art implying any specific definition or method that would be applicable to valuation or taxation.[377] If anything, some prominent uses of the phrase in cases suggest it meant a decisionmaker was to make an all-things-considered judgment not bound by clear rules. Thus, in 1796, a U.S. district judge explained how to decide, under the law of nations, what compensation a ship that rescues another ship should receive:

> In our country, no special rule being established [by legislation], this court is to determine what, in such case, is equitable and right. The rule in estimation, which ought, in my opinion, to be adopted, would be to give, if possible to ascertain it, such compensation or reward as would be sufficient inducement to engage reasonable persons, to encounter the peril and expense of the undertaking; what this may be, must, in almost every case, depend on the estimation which the judge, who is to

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375. HOUSE JOURNAL, *supra* note 150, at 357-60; 8 ANNALS OF CONG. 2055, 2060 (1798).

376. V&E Act § 22, 1 Stat. at 589 (emphasis added). The phrase "just and equitable" was also the standard for valuation-related actions of other officials under the Act. Real-estate owners could appeal valuations to the principal assessor of their district, who was to decide whether the valuation at issue was "in a just relation or proportion to other valuations in the same assessment district," *id.* § 19, 1 Stat. at 588, and had "power to re-examine and equalize the valuations as shall appear just and equitable," *id.* § 20, 1 Stat. at 588. The phrase was the standard under which the surveyor in each district (who kept and updated the assessment records after the main assessment process was concluded) could apportion value if the parcel were subdivided, or "reduce the valuation" of a house "damaged or impaired" by fire or accident. *Id.* § 25, 1 Stat. at 590.

377. The nearest thing to term-of-art usage is that some (far from all) uses of the phrase imply equity in contradistinction to law, which has no particular relevance to valuation or taxes.

> decide, may make of the expense, the labour, the peril, and the actual suffering of those, by whose exertions the property is saved. And, as several of the most important of these are really mental, to which no measure of weight or capacity can be actually applied, it is probable, different persons would vary considerably in their estimation of them. It may, therefore, be a thing to be wished, that every nation would make, at least, some general rules for determining such cases: but as there are none established in this country, I am bound to exercise my own judgment, in determining what is a *just and equitable* compensation.[378]

Similar uses of "just and equitable" to connote all-things-considered judgments without hard criteria appeared in the Continental Congress's discussion of discretionary adjustments to the states' shares of war costs;[379] in state statutes of the 1780-90s regarding a county board's apportionment of the county tax burden among towns,[380] a tax assessor's judgments as to when aged or infirm persons should receive exemptions or abatements,[381] and urban commissioners' apportionment of street improvements' costs to residents who benefited;[382] and in a judicial opinion by New York's Chancellor Kent in 1814.[383]

E. Indeterminacy in Implementing the Federal Legislation of 1798

1. Secretary Wolcott's Guidance

When the federal boards implemented the Valuation and Enumeration Act, they received only loose guidance from the Treasury Department. Soon after the Act was passed, Secretary Wolcott issued a circular to the boards in August 1798 that gently suggested the use of historical sale prices, but his suggestion probably applied only to the limited category of urban homes, and Wolcott's communications more broadly underscore the subjectivity of valuation and the boards' discretion in deciding the relevant principles. His circular said:

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378. The Mary Ford, 16 F. Cas. 981, 983 (D. Mass. 1796) (emphasis added), *aff'd on other grounds*, McDonough v. Dannery, 3 U.S. 188 (1796).

379. 22 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 83-84 (Gaillard Hunt ed., 1914).

380. Act of Mar. 7, 1788, *in* 2 LAWS OF THE STATE OF NEW YORK 769, 770 (Albany, Weed Parsons & Co. 1886).

381. TAX NO. ELEVEN, *supra* note 312, at 23.

382. Act of Apr. 8, 1796, ch. 55, *in* 3 LAWS OF THE STATE OF NEW YORK 707, 709 (Albany, Weed Parsons & Co. 1887).

383. Clason v. Shotwell, 12 Johns. 31, 46-47 (N.Y. 1814) (opinion of Kent, C.).

> It is presumed that the valuation of houses in the cities and principal towns of the United States, will not be difficult, as numbers of such houses are frequently transferred, at prices which can be easily ascertained; these prices may serve as standards by which to value the remainder.—Houses in the country are however rarely sold except in connection with farms; with the respect to houses of this description, it is supposed that the increased price at which a farm would be sold in consequence of such buildings as are subject to specific taxation [that is, houses taxed at the separate progressive rate], together with the valuation of the lot on which they are erected not exceeding two acres, will afford the sum, at which a house connected with a farm ought to be valued.[384]

The first sentence suggests (but does not require) that officials value urban homes by historical sale prices, though it does not say how to find those prices—perhaps he meant deeds, or word of mouth. The second sentence, regarding houses on farms in the country, arguably contemplates that sales of farms occur more than "rarely" and might even imply that farms' historical prices can serve as useful data, but his meaning is oblique and not at all clear. When Wolcott in September 1798 issued templates for data-gathering forms for assistant assessors to use in the field, he made no suggestion to gather historical sale prices, nor any information beyond what was mentioned in the Valuation and Enumeration Act.[385] In keeping with the idea that the boards should decide principles of valuation, Wolcott said each board could delete informational categories from the forms, and he also suggested that each board could think up additional types of data to tell the assistant assessors to gather.[386] For example,

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384. WOLCOTT, *supra* note 179, at 2.

385. *See* OLIVER WOLCOTT, JR., U.S. DEP'T OF TREASURY, CIRCULAR TO THE COMMISSIONERS OF DIRECT TAX (Sept. 8, 1798), *in* CIRCULAR LETTERS OF THE SECRETARY OF THE TREASURY 1789-1838, "T" Series: Reel 1, Target 1, at 57, 62-63 (laying out Forms A and B). In a long letter explicating his view of the duties of the boards and the assessors, Wolcott still said nothing about data gathering for valuation. Letter from Oliver Wolcott, Jr. to Isaac Alexander, *supra* note 215.

386. Wolcott's instruction said

> [I]n one or more of the states, some of the columns will be found useless, and may be suppressed; perhaps the Commissioners will judge that several columns ought to be substituted in lieu of those marked 3 [i.e., the "remarks" giving the various types of physical features mentioned in the Valuation and Enumeration Act], in the forms A and B; they will, of course, decide on this point, having regard only to the principles of the system now communicated.

WOLCOTT, *supra* note 385, at 57-58.

in New York, where tenancy was relatively more common, the board told assistant assessors to include a column for rent.[387] Further—and in keeping with the boards' wide discretion—Wolcott made a nonbinding suggestion in August 1798 that each board formulate "standards" of valuation in advance for the assistant assessors:

> [I]f it shall be found practicable much advantage would in my opinion result from indications of the sentiments of the Commissioners respecting the value of different descriptions of Houses, and the value of Lands of different qualities in various parts of each division—Without some standards to which reference can be had for determining the relative value of property in distant parts of the same State, there may be danger that the opinions of the Assessors will be so variant as greatly to increase the labor of the Commissioners in equalizing the valuations, as directed by the twenty second section of the act; for a proper decision on this point, I however repose entire confidence in the judgment and discretion of the Commissioners.[388]

Note Wolcott's acknowledgment that assistant assessors were prone to have "variant" opinions on valuation, and also that he refrained from suggesting how each board should formulate its "standards" or what data it should use in doing so. In later correspondence with the federal board in South Carolina regarding a controversy over setting per-acre values for certain broad categories of land, Wolcott disclaimed any control of the boards' substantive decisionmaking about valuations.[389]

2. *The Federal Boards' Regulations and Approaches*

The regulations and instructions issued by the federal boards for the principal and/or assistant assessors—of which full copies are extant for seven boards and newspaper excerpts are extant for another two boards—show that the boards could take distinct approaches and, further, that neither historical

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387. FB-NY Instructions, *supra* note 191, at 2 ("Another column [in the form] is set apart to shew the rent of the property, where any is paid.").

388. WOLCOTT, *supra* note 179, at 3.

389. Letter from Oliver Wolcott, Jr. to Isaac Alexander, *supra* note 215 ("I do not consider myself authorized to control the decisions of the Commissioners."). Wolcott provided his view as to whether the Valuation and Enumeration Act allowed a board to decide exact per-acre values for broad categories of land, but then said: "I submit these observations to your consideration & request that they may be considered by the Board merely as my opinions. I am sensible that the decision of any question of this kind must rest with the Commissioners." *Id.*

sale prices nor any other type of hard data were widely accepted as providing a universal basis for valuation. It should be noted that nearly all the extant regulations and instructions are from northern boards: full copies are available for New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and New Jersey, plus a newspaper excerpt for Pennsylvania. For the southern boards, our only knowledge of regulations is from the one in South Carolina, and consists of newspaper excerpts of the regulations, plus a published letter regarding the board's approach.

Perhaps the most prominent distinction among the boards was that the federal board in South Carolina took up Secretary Wolcott's suggestion to give quantitative standards in advance on the value of different classes of land, while none of the eight northern boards did. According to a newspaper excerpt, regulations of the federal board in South Carolina adopted in 1799 included this language:

> The commissioners . . . recommend to the assessors to observe, in the assessment of the lands in their respective districts, the several regulations hereinafter expressed, that is to say: Class No. 1, shall contain
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> - all tidal swamp, of the first quality, not generally affected by the salts, or freshes, which shall be rated at twenty-one dollars per acre;
> - all tide swamp, of the second quality, not generally affected by the salts, or freshes, which shall be rated at fourteen dollars per acre;
> - all tide swamp of the third quality, not generally affected by the salts, or freshes, which shall be rated at six dollars per acre.[390]

It is unclear whether these classes and ratings were mandatory for the assessors. Unfortunately, almost no other text of the regulations has survived.[391] The word "recommend" suggests they were not mandatory, while the repeated phrase "shall be rated" suggests they were. A former member of the federal

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390. Robert Anderson, Letter to the Editor, CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.), Oct. 16, 1799, at [2], [2] [hereinafter Second Anderson Letter] (bullet points and linebreaks added for clarity) (dated Sept. 21, 1799).

391. There is another newspaper excerpt or paraphrase that covers these same classes plus another set of classes, but it does not shed light on whether the regulations were mandatory. Letter to the Editor, *Remarks on No. 16, of the Pieces Signed "A Republican," Relating to the Direct Tax*, CAROLINA GAZETTE (Charleston, S.C.), Oct. 16, 1800, at [4], [4] (letter from "A Carolinian") (erroneously attributing the regulation's language to the federal statute).

board stated that he viewed the regulations as mandatory,[392] while other officials apparently had a different view, though their statements were not entirely clear.[393] A published letter describing the assistant assessors' valuations once they were completed after an extraordinary delay in 1804 indicates those officers adopted inconsistent approaches,[394] suggesting that the regulations were nonmandatory or perhaps that they were rescinded sometime between 1799 and 1804. At the very least, the board in 1799 was announcing values of different land classes in advance of the frontline assessment, and it was recommending (if not requiring) that assessors follow them—something that its northern counterparts all refrained from doing. Notably, the values assigned to the classes by the federal board differed from the values assigned to the very same classes by the South Carolina state legislature in the annual state tax enacted just a few months earlier.[395] When the federal board was criticized for this divergence, a board member publicly asserted that the state legislature's class valuations sometimes did not reflect the prices at which land would actually sell, but in saying this, he cited no specific sources and seemed to rely simply on common knowledge.[396] His statement was then criticized by a former board member who said "the judgments of man, individually, respecting the value of landed property, are as various as their principles and practices in the common occurrences of life"—and that the board ought simply to have followed the state legislature's views.[397]

Putting aside the controversy over the substance of the board's standards (on which I shall say more in Section III.D), the board's choice to specify *any* standards before the frontline assessors did their work was significant because it presumably aimed to reduce (or if mandatory, negate) the discretion of the frontline officials. In her study of taxation and slavery, Robin Einhorn argues

392. Second Anderson Letter, *supra* note 390 ("[C]an any person suppose that the assessors would not have adopted these regulations. If they refused, I presume, they became liable to the penalty of the law; viz. removal from office, and a heavy fine.").

393. Another member publicly denied the assessors were under any mandatory directives, but the statement is hard to understand because it seems to ignore the regulations completely. Letter to the Editor, CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.), Sept. 4, 1799, at [2] (letter from "A Member of the Board of Commissioners," dated August 31, 1799). A letter from Secretary Wolcott seemed to suggest the mandatory reading was mistaken, though the letter is not entirely clear. Letter from Oliver Wolcott, Jr. to Isaac Alexander, *supra* note 215.

394. *See infra* note 416 and accompanying text.

395. The valuations at issue in the state legislation were the same in both 1797 and 1798. *See* 1798 S.C. Acts 3; 1797 S.C. Acts 114.

396. *See* Letter to the Editor, *supra* note 393, at [2].

397. Second Anderson Letter, *supra* note 390, at [2].

that southern state legislatures often adopted mandatory land-classification schemes to keep tax assessors from trying to gather information about individual plantations, as such nosing-around might interfere with the authority of masters over enslaved people.[398] Notably, the Connecticut state legislature also had a mandatory land-classification scheme, yet the federal board there did *not* attempt to establish any standards ex ante,[399] underscoring how much discretion each board had to imitate its corresponding state legislature, or not.

As for the eight northern federal boards that all refrained from articulating class-wide value standards prior to the assessors' frontline work, they exhibited important variation in their attitude toward historical sale prices. For a sense of this variation, consider how they responded to Secretary Wolcott's statements in his circular that urban houses are "frequently transferred" at ascertainable prices that "may serve as standards by which to value the remainder"; that "[h]ouses in the country are however rarely sold except in connection with farms"; and that a farmhouse might be valued at "the increased price at which a farm would [sell] in consequence of" the house being there.[400] In New Jersey, the board simply repeated Wolcott's statement, as part of a wholesale repetition of his circular.[401] In Massachusetts, the board similarly repeated Wolcott's statement as part of a more general repetition of his circular (which the board said it "in general adopt[ed]") except it omitted the part of the statement that said house valuation "will not be difficult."[402]

Contrast these boards' close adherence to Wolcott's cautious statement with the federal boards in Connecticut and Rhode Island, who went farther than Wolcott in asserting full-throatedly that historical price data was plentiful and usable not only for houses but also for farms. The board in Connecticut rewrote Wolcott's language to say, "Houses and house lots in the principal towns, and farms in all parts of the state, are frequently transferred at prices which

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398. *See* EINHORN, *supra* note 53, at 106.

399. *See* A. KINGSBURY, EPAPHRODITUS CHAMPION, SHUBAEL ABBE, WILLIAM HERON & JULIUS DERRING, COMM'RS, CIRCULAR TO ASSESSORS (Sept. 28, 1798) (Oliver Wolcott, Jr. Papers, Box 40, Folder 10, Connecticut Historical Society) [hereinafter CIRCULAR TO ASSESSORS (Sept. 28, 1798)]; A. KINGSBURY, EPAPHRODITUS CHAMPION, SHUBAEL ABBE, WILLIAM HERON & JULIUS DERRING, COMM'RS, CIRCULAR TO ASSESSORS (Nov. 9, 1798) (Oliver Wolcott, Jr. Papers, Box 40, Folder 10, Connecticut Historical Society).

400. WOLCOTT, *supra* note 179, at 2.

401. FB-NJ Minute Book, *supra* note 186, at unnumbered pages [23]-[24] (entry for Sept. 13, 1798).

402. AN ACT TO PROVIDE FOR THE VALUATION OF LANDS AND DWELLING-HOUSES [25], 34 (1798), Readex Early American Imprints, Series 1, no. 34704 ("Circular" attached to the act itself, giving "rules, regulations, and instructions" of the "Commissioners").

may be easily ascertained—these prices may serve as standards by which to value the remainder."[403] The board in Rhode Island announced that "the value of farms with the buildings thereon is generally known in each district by comparing sales which are frequently made."[404]

Yet other federal boards went in the opposite direction, modifying Wolcott's statement to be less sanguine than the Secretary about using historical sale prices of urban homes, to say nothing of farms. In New York, the federal board said that "[h]ouses, in large towns, are often sold: and the prices they bring, when sold *voluntarily*, sufficiently determine their value."[405] This phrasing omitted Wolcott's assertion that historical prices of some houses "may serve as standards by which to value the remainder," implying that a historical price indicated the value of the house sold but not others. The phrasing also added the qualifier "when sold *voluntarily*"—an insertion that resonated with the board's admonition later in the regulations for assessors to look critically at historical sale prices, distinguishing between *price* and the Valuation and Enumeration Act's touchstone *worth*:

> A man of great property or one who has particular occasion for a place may give far more for it than what it is worth. On the other hand, property brought to a forced market, at Sheriff's sale or by a person in distress for money, will not usually bring near so much as it is worth. Neither of these is your rule. You will seek the price which a judicious man would pay for property bought for use and bought of a person not in want.[406]

In Vermont, too, the federal board told assessors to look critically at historical sale prices, likewise positing a distinction between *price* and *worth* that could emerge not only in necessitous bargaining circumstances but also when the money supply was, in the judgment of officials, abnormal. After repeating much of Wolcott's circular,[407] the board then qualified it by saying that the

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403. A. KINGSBURY ET AL., CIRCULAR TO ASSESSORS (Sept. 28, 1798), *supra* note 399.

404. U.S. BOARD OF COMMISSIONERS FOR THE VALUATION OF LANDS & DWELLING-HOUSES (R.I.), INSTRUCTIONS FOR ASSISTANT ASSESSORS [2] (1798), Readex Early American Imprints, Series 1, no. 34452.

405. FB-NY Instructions, *supra* note 191, at 2.

406. *Id.* at 3 (emphasis omitted). Compare this to the regulations of the federal board in Massachusetts, attached to AN ACT TO PROVIDE FOR THE VALUATION OF LANDS AND DWELLING-HOUSES, *supra* note 402, at 35 (defining "worth in money" as "at what would be deemed a reasonable price between seller and buyer").

407. BOARD OF COMMISSIONERS, ABSTRACT OF AN ACT TO PROVIDE FOR THE VALUATION OF LANDS AND DWELLING HOUSES . . . TO WHICH ARE ADDED, INSTRUCTIONS AND REGULATIONS FOR

"worth in money" of houses "must not be determined merely by the price they were last sold for by an unfortunate owner, or purchased by a man to suit his fancy or convenience, or set off upon Execution, or what they would fetch in any *scarcity of current coin*; but what a prudent man, would willingly pay for them, in cash, *when a due proportion of money is in circulation*."[408] Given that farmers in the wake of the recession of 1797 "complained of a money scarcity,"[409] this opened a potentially wide field for official judgment about when the money supply was normal.

In New Hampshire, the federal board likewise seemed less sanguine than Wolcott about historical sale prices, revising his statement to omit the assertion that house valuation "will not be difficult" and stating that sale prices, instead of "serv[ing] as standards by which to value the remainder" of homes, simply "may serve to inform your judgment in fixing their value."[410]

The newspaper excerpts of the regulations of the federal board in Pennsylvania contain no language whatever about historical sale prices; these being excerpts, we cannot rule out that the full regulations did contain such language, but that is somewhat doubtful given that the excerpts are long and do contain much discourse about houses (e.g., how to distinguish them from differently taxable out-buildings).[411] Moreover, the federal board in Pennsylvania would later discover that its assistant assessors were so divergent in their approaches, even within a single district, that the commissioners felt the need to lobby Congress for what became the statute of January 1800 authorizing the board to make mass revisions at the subdivision level. Representative Harper, the chair of the Ways and Means Committee, in explaining the bill, said that "in the large states, where the assessment districts were also large, and the subdivisions of such districts numerous," it happened that, "*as different methods of assessment were taken, in those subdivisions*, in some the rates were given too high, and in others too low."[412]

THE PRINCIPAL AND ASSISTANT ASSESSORS 16 (Vergennes, G. & R. Waite 1798), Readex Early American Imprints, Series 1, no. 34708.

408. *Id.* at 23-24 (emphasis added).

409. BOUTON, *supra* note 335, at 247.

410. U.S. BOARD OF COMMISSIONERS FOR THE VALUATION OF LANDS & DWELLING-HOUSES, CIRCULAR [2] (Oct. 25, 1798), Readex Early American Imprints, Series 1, no. 49478.

411. Untitled Extracts from Instructions to Assessors in Pennsylvania, GAZETTE OF THE U.S. & PHILA. DAILY ADVERTISER, Nov. 29, 1798, at [4], [4].

412. *Congressional Register*, VERGENNES GAZETTE & VT. & N.Y. ADVERTISER, Jan. 9, 1800, at [2], [2] (detailing debates from the House of Representatives from Dec. 11, 1799) (emphasis added). On the role of the federal board in Pennsylvania in lobbying for the bill, see *By Mail; American Congress; House of Representatives*, COMMERCIAL ADVERTISER (N.Y.C.), Dec.

No federal board expressly mentioned deeds or stated how to research historical sale prices, and regulations of two of the boards made clear that consultation of any public records was at the discretion of each of the numerous assistant assessors. The board in New York told frontline officials to "enquire by all lawful means after and concerning all lands, dwelling-houses and slaves . . . for which purpose *you can, if you think proper*, consult the town and county tax lists and any public records."[413] The board in Pennsylvania said: "In all cases where the assessors or any of them *may deem it necessary* for the better ascertaining any property, they are authorized to have reference to any records or documents and to any returns or lists of assessments taken under the laws of this State, and generally by all other lawful ways and means to enquire after and concerning the same."[414]

Similarly, the federal board in South Carolina did not identify any hard data sources—on historical sale prices or anything else—nor any method for making inferences from data. When that board sent its results to the Treasury Department in 1804, years later than had all the other boards, Secretary Gallatin complained about the disordered state of some of the records.[415] A member of the board responded in a public letter in which, among other things, he described "shortly the motives and system on which the commissioners [i.e., the board] acted in making their" district-wide revisions:

> It very early appeared to our board on looking into the lists as made out and returned to us by the assessors, that they had proceeded very wide of each other in fixing their valuations of property, and that our frequent interference would be necessary to equalize districts as they related to each other; we therefore adopted the following general rule as to lands. By comparing the whole number of acres in any assessment district with the aggregate value as settled by the assessors, we discovered the average price per single acre; then by comparing the districts contiguous to each other, in the same range of the state, with equal or similar advantages of trade, &c. if we found that the average price per acre in one far exceeded that of another, an addition or deduction was made so as to equalize them as nearly as might be to each other—for example:

13, 1799, at [3]. On the statute of January 1800, see *supra* notes 216-219 and accompanying text.

413. FB-NY Instructions, *supra* note 191, at 1 (emphasis added).

414. Untitled Extracts from Instructions to Assessors in Pennsylvania, *supra* note 411, at [4] (emphasis added).

415. Letter from Albert Gallatin, Sec'y, U.S. Dep't of Treasury, to John Randolph, Chairman, House Ways & Means Comm., *supra* note 182, at [2], [2].

> the situation, advantages, quality of soils, &c. of the two districts of Richland and Kershaw in the second division, were judged by the commissioners to be such, that the lands in each might be deemed of equal value, yet the assessors of Richland valued the lands thereof so much higher than those of Kershaw, that the commissioners, to equalize those two districts, added 12 ½ per centum to the lands generally of Kershaw, and so of all the rest. From the assessors' valuations of the classed dwelling-houses, &c. alterations were also made generally in like manner in many districts, founded on the commissioners' personal knowledge of the comparative stile [sic], materials, manner of building, &c. in each.[416]

This description contains no reference to historical sale prices or any other hard data source. While the letter uses the word "price," that term only refers to the assessors' average valuations per acre, not to actual real estate sales being observed. As to houses, the commissioner says he and his colleagues used their "personal knowledge of the comparative stile, materials, manner of building, &c." across different districts. As to lands, the board members went by their sense of different districts' "advantages of trade, &c.," or "the situation, advantages, quality of soils, &c." in each. The decisions seem to have turned less on the members' sense of real-estate market prices and more on their sense of lands' relative average income-producing characteristics and houses' relative average underlying quality. More broadly, the passage reflects the uncertainty of the enterprise, from how the frontline officials "had proceeded very wide of each other in fixing their valuations" to how the board equalized the districts "as nearly as might be," at least when one's valuation "far exceeded that of another" similar district. Further, the board's mode of dealing with this uncertainty was one that it understood itself to be *choosing*, not one compelled by the statute or obvious from the task: the commissioner felt the need to tell Gallatin of their "motives and system"—of how "we therefore adopted the following general rule."

3. The Connecticut Federal Board's Sale-Price Research

The experience of the federal board in Connecticut illustrates the possibilities and limits of using historical sale prices to guide valuation. We know more about this board's internal deliberations than any other's because unlike every

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416. Letter from J. Alexander, Comm'r in S.C., to Albert Gallatin, Sec'y, U.S. Dep't of Treasury (Jan. 17, 1805), *in* CITY GAZETTE (Charleston, S.C.), Feb. 7, 1805, at [2], [2]. I thank Charlotte Crane for pointing out this source to me.

other board, records of its internal deliberations (beyond the minute book) have survived. As noted above, the regulations of this board were unusually sanguine about the plenitude and usefulness of historical sale prices, and the internal records show that the board in fact put historical sale prices to substantial use—though it did not, as we shall see, make them dispositive.

Connecticut's federal board conducted research on historical sale prices. This research was not the work of the frontline officials acting in the first instance; Connecticut's federal board, like all the others, refrained from telling its assistant assessors to look up or use historical sale prices. Rather, the board members themselves undertook the research initiative, after they received the results of the frontline assessment, as part of their process for making district-wide mass revisions. The board used the initial valuations by the assistant assessors to calculate "the average value of [houses and lands] in the several Assessment Districts,"[417] of which there were 67. The board then "voted to visit about thirty districts [and] compare the valuation with the sales for a few years past."[418] The members split into pairs and traveled the state, gathering sale-price information, before meeting again one month hence,[419] and the board apparently had at least a few principal assessors look up sales in their respective localities as part of this revision-stage research.[420]

It appears that this whole research initiative was unusual and perhaps unique among the federal boards. The federal valuation in Connecticut ended up being unusually expensive and for that reason prompted unwelcome scrutiny from the Treasury Department. Amid this scrutiny, one member wrote to another that the members, as a body, should have offered more detail to the Department in explaining the high expenses of their work. Among other things, he said,

> [t]he course pursued by the Commissioners (*which was different from those in the neighboring States*) in equalizing the Assessments in the several Districts ought not to have been passed unnoticed [in our communications with the Department]; and although attended with some expense to the Public, and to themselves, with fatigue without

417. FB-CT Minute Book, *supra* note 186, at 26 (entry for Mar. 28, 1799).

418. Letter from Andrew Kingsbury, Comm'r in Conn., to Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury (Apr. 8, 1799) (Andrew Kingsbury Papers, Box 1, Folder 10, Connecticut Historical Society).

419. FB-CT Minute Book, *supra* note 186, at 27 (entry for Apr. 2, 1799).

420. *See infra* notes 425-426 and accompanying text.

> emolument; yet is productive of Salutary effects on the minds of the people.[421]

The unusual nature of the approach in Connecticut is also confirmed by the South Carolina federal commissioner's description of his board's approach, which seems to indicate no actual sale-price research.[422]

Although the research conducted by Connecticut's federal board was apparently not typical, we should consider what its members learned about historical sale prices and what they found to be the limits of that learning. At the end of their month of travels, the board members had compiled, for 29 of the state's 67 districts, a list of recent sales in each district (covering both land and houses) with prices.[423] Across the 29 districts, the total sales numbered 518, ranging from 44 in the district where they were most plentiful to 7 in the district where they were least, with a mean of 18 and a median of 16. Using this data, the board calculated, for each of the 29 districts, a ratio between (a) the total assistant-assessor valuations of the lands in the sales and (b) the actual prices of the lands in the sales. In other words, the board calculated a valuation-to-price ratio for each district. The unweighted mean of these ratios was 0.83, indicating that valuations in these districts were on average below the sale prices gathered. That in itself did not matter, because the purpose of the valuations was to determine the *relative* value of property in each district, for apportioning the state's quota among all the districts. What mattered was that the valuation-to-price ratios differed widely among the districts, from as low as 0.61 to as high as 1.05. Six districts were at 0.74 or less, while four were at 0.92 or more. We can calculate the standard deviation, which was 0.115.

In making its district-wide mass revisions, the board appears to have used these valuation-to-price ratios as a substantial factor but far from a dispositive one. Districts with lower ratios tended to be revised upward, and districts with higher ratios, downward.[424] But this was only a tendency, not an absolute principle. To see this, we can adjust the valuation-to-price ratios according to the revisions the board ultimately made. If the board cared about nothing except

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421. Letter from William Heron to Andrew Kingsbury (Sept. 23, 1799) (Andrew Kingsbury Papers, Box 1, Folder 24, Connecticut Historical Society) (emphasis added).

422. *See supra* note 416 and accompanying text.

423. See the untitled one-page table with columns headed "Districts No.," "Towns," "No. Sales," "Amount" (with subheadings "Sales" and "Valuation"), and "Valuation to Sales," in Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society [hereinafter Table]. The calculations below are based on this table.

424. *See id.* Note that the board did revisions uniformly across land and houses, which were combined indiscriminately in the sale-price research and in calculating the ratios.

the sale price data, it would have used its revision power to bring the valuation-to-price ratios perfectly into line with each other, meaning that all the postadjustment valuation-to-price ratios should be equal. But they are not. With a mean of 0.85, they range as low as 0.74 and as high as 1.00. Three districts are at 0.76 or less, while two are at 0.94 or more. The standard deviation is 0.065 (compared to 0.115 before the revision). In other words, the board reduced the variation by almost half, but that is very far from eliminating it. For example, in the district of Granby and Hartland, the board found that valuations for the sold properties were 33% below the prices, but it raised the valuations by only 10%. In the district covering Waterbury and Wolcott, it found valuations 23% below, and in the district covering Durham and Haddam, 25% below, yet it did not revise either of these districts at all.

Why didn't the board rely more upon its sale-price data? The records do not say. But they do suggest shortcomings and indeterminacies in the data that I suspect gave the board pause and helped motivate its members to agree on revisions that were not so mathematically determinate. These shortcomings and indeterminacies track those discussed in Section II.C.

First, deeds did not always give transparent and accurate prices of sales. When asked by the board to examine deed records for its revision project, the principal assessor for the district covering Suffield (which did not end up as one of the 29 districts in the study) said he could "not determine with certainty that the consideration mentioned in the deeds was the exact amt. paid for the lands."[425] The principal assessor of another district that did not end up in the study told the board he found "it difficult to make a selection from the [r]ecords of the purchasing price of land" in the district, partly because so many lands were encumbered with mortgages or dower or had seen changes in improvements.[426] The board's records include signed statements by parties to land sales saying that crops growing on the land were "part of the consideration in the deed,"[427] or explaining a credit arrangement.[428]

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425. Letter from Thaddeus Leavitt, Principal Assessor, Dist. 10, to Andrew Kingsbury, Comm'r in Conn. (Apr. 13, 1799) (Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society).

426. Letter from Oliver Mather, Principal Assessor, Dist. 13, to Andrew Kingsbury, Comm'r in Conn. (circa Apr. 1799) (Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society) (labeled as giving a "true Abstract of the Records of Lands in the Town of Windsor").

427. Elijah Hubbard, Untitled Statement (circa Apr. 1799) (Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society) (certifying the sale of a farm to John Bigelow).

428. James Kilburn, Untitled Statement (Apr. 22, 1799) (Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society).

Second, the number of sales compiled by the board is consistent with low liquidity, at least compared with today. As noted earlier, the median number of sales per district was 16, the mean 18. To get a sense of liquidity, we'd like to know the ratio between the sales in a district and all parcels in that district. For nine of the districts, there is documentation of the district's total number of parcels, and from these figures, we can calculate a median annual rate of turnover by parcel between about 0.8% and 1.2%.[429] Today, annual turnover of urban

429. The numbers of parcels by district, for nine districts, are given in a document contained in Box 40, Folder 3 of the Oliver Wolcott, Jr. Papers, Connecticut Historical Society, that has columns labeled "Districts," "N° house lists," "N° land lists," "N° house lists & land lists," etc., and first row labeled "State" and subsequent rows labeled "18th" through "26th." (The document is stuck inside a bound booklet, between the second and third pages of the booklet.) The document presents one difficulty: in cases where a house was attached to a parcel of more than two acres, the document artificially separates the parcel into two (i.e., a land parcel and an imaginarily separated house). Given this difficulty, we can calculate the sales-to-parcels ratio two ways, and the true ratio lies somewhere in between the two. First, we can take the ratio between (a) the number of sales in each district and (b) the number of land parcels listed in the document for that district (which includes parcels with no houses and parcels exceeding two acres with a house, but excludes houses on lots of two acres or less). If we calculate the ratio this way for the nine districts, the median ratio is 2.1%. Second, we can take the ratio between (a) the number of sales in each district and (b) the number of land parcels and houses in that district (which double-counts any parcel that exceeded two acres and had a house). If we calculate the ratio this way for the nine districts, the median ratio is 1.4%. So the true ratio is somewhere between 1.4% and 2.1%. (Instead of calculating ratios for individual districts and finding the median district ratio, an alternative is to calculate the ratio of total sales in all nine districts to total land in all nine districts; that method indicates a true ratio somewhere between 1.5% and 2.3%). However, the sales the board compiled for its study apparently did not occur within a single year but were drawn from a longer period, with calendar year 1798 accounting for something like 58% of the sales according to the fragmentary source material available. Thus, for the nine districts, we can roughly estimate a median *annual* rate of turnover by parcel between 58% of 1.4% and 58% of 2.1%, that is, between 0.8% and 1.2%.

I gleaned the 58% proportion from an untitled bound booklet (the first page of which says "Berlin" at the top), contained in the board's research materials, within Box 40, Folder 11 of the Oliver Wolcott, Jr. Papers, Connecticut Historical Society [hereinafter "Berlin" booklet]. The booklet includes notes on sales in 11 districts, scattered pretty widely around the state, with—crucially—the years in which the sales occurred. If we exclude the three districts for which the board apparently decided not to use any sale-price data (i.e., those for which the Table, *supra* note 423, either does not list the district or lists no sale-price data: Berlin, Mansfield/Ashford, and Pompfret), that leaves eight districts. For most of these eight, the number of sales appearing in the notes is equal to, or within one of, the number of sales listed in the Table, with two exceptions (Granby/Hartland has 23 sales in the booklet but only 10 in the Table, and New London/Montville has 23 sales in the booklet but only 18 in the Table). Looking at all the sales across these eight districts, 58% are in calendar year 1798, but 42% are in 1799 or in 1797 or earlier.

houses is on the order of 15%, and annual turnover of rural land parcels is on the order of 4%.[430]

Third, the board was examining, in each district, parcels that happened to have been sold, but these were not a random or representative sample of all land in the district, which was of course heterogeneous. To infer the value of all the district's parcels from the sale prices of the subset of parcels that were sold, one needed to know the differences in value-determining characteristics between all the land and the recently-sold subset. That is difficult even today with hedonic regression and would have been even less feasible in 1798.

Given all these data limitations, the board seems to have recognized that it could not rely exclusively on land sales but needed to consider less exact, more qualitative factors. As the board's clerk told Secretary Wolcott, it had made its revision "having previously sought for the most correct information as to the value of real Estate by referring to the records of Sales for several years past in those Districts where an equalization was contemplated, and comparing with the valuations of the same property by the Assessors, *and in such other ways as could be devised . . . .*"[431] The "other" sources of information included solicitations of qualitative opinions about the relative value of different towns from locally knowledgeable people,[432] or local persons' opinions about whether certain sale prices were thought to be too high or not.[433]

4. *Official Valuations and Population Density*

This Section's findings regarding indeterminacy in federal officials' real-estate valuations in 1798 differ in some ways from an innovative quantitative study by economic historian Frank Garmon of the 1798 federal direct-tax valuations in relation to population density. Garmon's work is an important advance in how economic historians use data collected for the tax to understand the history of national and regional economic growth and wealth distribution. In particular, Garmon does much to dispel a fear that has haunted previous economic

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430. *See supra* notes 353-354 and accompanying text.

431. Letter from John Porter, Clerk to the Bd. of Comm'rs, to Oliver Wolcott, Jr., Sec'y, U.S. Dep't of Treasury (Apr. 30, 1799) (Andrew Kingsbury Papers, Box 1, Folder 4, Connecticut Historical Society) (emphasis added).

432. *See* Letter from John Humphrey, George Humphrey & Noah A. Phelps, to Andrew Kingsbury, Comm'r in Conn. (Apr. 11, 1799) (Andrew Kingsbury Papers, Box 1, Folder 21, Connecticut Historical Society); Untitled Notes of Conversation with "Pliny Hillyer" Regarding Relative Values of New Hartford and Other Towns (circa Apr. 1799) (Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society).

433. *See* the entries under Colchester and Lebanon in "Berlin" booklet, *supra* note 429, at [1].

historians—the idea that federal officials in the South systematically undervalued real estate in a manner that could systematically distort historians' estimates of mass regional wealth.[434]

While recognizing the importance of this contribution, I have reservations about Garmon's broader statement that the direct-tax valuations of 1798, in general, provide "a very good indication of the relative value of land in each tax district."[435] The statement may be true from the perspective of economic historians studying very broad differences in national wealth over time or in wealth among the nation's large geographic regions—subjects beyond the scope of this Article. And the statement may be far closer to the mark than the view held by Garmon's interlocutors that the South was systemically undervaluing while the North was not—again, a subject outside the scope of this Article. But I do not think the statement is true in the sense that taxpayers in 1798 would have generally experienced or understood the officials' valuation decisions as objective and not involving much discretion.

On this point, Garmon argues that (a) population density is generally correlated with the market value of land,[436] (b) the Treasury Department in 1798 gave federal direct-tax officials strict, uniform instructions to gather and rely upon sale-price data to discern market value,[437] and (c) population densities of the federal tax districts nationwide explain the average valuations-per-acre assigned by officials to those districts so well as to indicate that the officials generally followed these instructions.[438] I will examine these three claims in turn.

As to the first claim, that population density generally correlates with land's market value, I agree we should expect some substantial correlation. Density

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434. Garmon elucidates, better than have previous scholars, how the direct tax's structure created no incentives for federal officials in the South to *generally* undervalue real estate, as the southern states' tax quotas were fixed by federal legislation regardless of the total valuation of land in each state. Garmon, *supra* note 65, at 4-5. Further, Garmon regresses federal tax districts' land valuations-per-acre on those districts' population densities (which are in turn correlated with a host of factors that might be thought related to value) and finds that an independent dummy variable for the allegedly undervaluing Southern states is not significant. *Id.* at 6-8. To be sure, I differ with Garmon (as discussed below) on whether the valuations' correlation with density implies a generally uniform and accurate process. But valuations did have *some* correlation with density, and the insignificance of the southern-state dummy variable, when placed in the same regression, is an innovative answer to the question of systematic Southern undervaluation and potentially a compelling one, though that question is beyond the scope of this Article.

435. *Id.* at 7.

436. *Id.* at 6.

437. *Id.* at 4, 8.

438. *Id.* at 7-8.

may reflect demand. Density would also correlate with many and perhaps most of the features that increase people's willingness to pay for land—such as fertility, proximity to water transport and to markets more generally, etc.—as those features would attract settlers to the area. And higher density might itself render public goods more feasible or economical (like roads), further increasing land's attractiveness. For any or all of these reasons, the relative density of different parts of a state can often indicate what a federal board might think was "in the ballpark" when deciding relative valuations for land in those different parts.

As to the second claim, that the Treasury Department in 1798 told officials to research sale-price data to discern market value, I think this has some evidentiary basis in the printed regulations and archivally-preserved research of the federal board in Connecticut, on which Garmon relies,[439] but I do not think we can attribute that one board's approach to federal officials across the nation or to the central national administration. As I documented above, Secretary Wolcott's circulars suggested the use of historical sale prices only as to urban houses, not farms, and even then only in a nonbinding way, with no mention of any data sources (like deeds) or particular methods;[440] Wolcott expressly disclaimed control of the boards' substantive decisionmaking on valuation;[441] the regulations of the federal boards in Connecticut and Rhode Island were unusual in their emphasis on past sale prices compared with the regulations of the seven other federal boards that are extant (with some boards expressly saying it was merely optional to consult public records);[442] the Connecticut board's market-research-intensive approach to revisions was cast as unusual by one of its own members and diverged from the South Carolina's board's description of its work;[443] and even the Connecticut board's final valuations reflected several unexplained departures from the board's own sale-price data.[444]

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439. *Id.* at 4 (stating that "[p]rinted circulars instructed assessors to base their valuations on market prices using recent land sales to serve as a standard of their estimations" and citing the Connecticut federal board).

440. *See supra* notes 384-388 and accompanying text.

441. *See supra* note 389 and accompanying text.

442. *See supra* notes 390-416 and accompanying text.

443. *See supra* notes 421-422 and accompanying text. Garmon says that Secretary Wolcott "instructed the [boards'] commissioners to scour the land records for each county or town in search of recent property sales." Garmon, *supra* note 65, at 4. I do not know of any primary sources indicating that Wolcott did this. Federal officials in Connecticut did indeed scour some land records (the only state where I have seen evidence of such activity), but I have not seen evidence that Wolcott or any other official from the national capital instigated the Connecticut board's research. The Connecticut board's correspondence says its five members "voted to" travel the state looking up sale prices, with no mention of instructions from any-

As to the third claim, that population densities explain officials' valuations-per-acre so well as to indicate that officials must have followed some uniform density-correlated method,[445] I do not find this convincing if it means a level of uniformity that would have made officials' discretion seem unimportant from the perspective of the taxpaying public. In support of this claim, Garmon relies upon a linear regression in which (a) the dependent variable is federal officials' final (that is, post-mass-revision) average valuation-per-acre of land under the 1798 tax in each of 490 assessment districts nationwide for which data are available; and (b) the independent variable is the density of each district (that is, population, as measured by the 1800 census, divided by number of acres valued).[446] Garmon finds a significant positive relationship between density and valuation. That in itself makes complete sense; relative densities could indeed indicate which relative values were considered "in the ballpark" in officials' minds. But does the relationship go beyond ballpark indications to show that officials were generally following a uniform method allowing little discretion? Garmon's regression does yield a very high R-squared value, of 0.92, meaning that districts' densities explain 92% of the variation in average valuations-per-acre that officials assigned to them. But because R-squared depends on variation, its value may be driven, to a large degree, by a small proportion of observations that are relatively extreme. That appears to be the case here, as a few of the tax districts, being relatively urban in a rural society, had densities (and average valuations-per-acre) far out of proportion to the rest. The regres-

one else. *See supra* notes 417-418 and accompanying text. The board secretary's letter to Wolcott transmitting the revised valuations and referring to the land-record research does not suggest that Wolcott was asking for that research. *See* Letter from John Porter to Oliver Wolcott, Jr., *supra* note 431. Some of the board's research materials ended up in Wolcott's papers at the Connecticut Historical Society, *see* Oliver Wolcott, Jr. Papers, Box 40, Folder 11, Connecticut Historical Society, but the materials themselves do not indicate that Wolcott asked for the research to be done or that he had any role in it. As to why Wolcott (or his descendants who donated his papers) eventually ended up in possession of the materials, it should be noted that Wolcott was a member of the Connecticut elite and that the board's first commissioner, Andrew Kingsbury, had known Wolcott for years. *See* Oliver Wolcott, Jr. Papers, Box 4, Folder 12, Connecticut Historical Society (containing correspondence between Wolcott and Kingsbury from 1791-92).

444. *See supra* notes 423-433 and accompanying text.

445. Garmon, *supra* note 65, at 8 (finding a "level of consistency" in officials' valuations' relationship to density among federal tax districts nationwide that is "remarkable" and that indicates officials must have "employed uniform assessment practices").

446. Garmon uses officials' average valuations-per-acre of "lands," defined under the tax to exclude houses above the $100 exemption level. *See also infra* note 450 (suggesting supplementation of data on lands with data on houses). District data are entirely missing for the Carolinas and Georgia.

sion line, responding powerfully to these few extreme districts, is not at all predictive of officials' valuations for the mine run of districts, at least from a taxpayer perspective. Using Garmon's dataset, which he generously shared with me, I used the intercept and slope from his regression to calculate predicted values for all 490 of the tax districts. Because most of the predicted average valuations-per-acre were negative, I sought to gauge how well they predicted officials' valuations by calculating, for each district, the absolute value of the difference between officials' average valuation-per-acre and the predicted average valuation per acre. The median of all these absolute values was $18.59, which was quite large compared with the median official average valuation-per-acre, which was $7.21. In other words, officials' figures were commonly far from what the density-based model predicts.[447] Consistent with this, the R-squared for the regression proves highly sensitive to the few densest districts. I ran the regression but excluded the districts with densities above 1.5 persons/acre (which left 476 districts, covering 95% of the original 490 districts' population), yielding R-squared of 0.59. I also tried excluding districts above 1 person/acre (leaving 475 districts, covering 95% of the 490 districts' population), yielding R-squared of 0.67. And I also tried excluding those above 0.5 person/acre (leaving 474 districts, covering 95% of the 490 districts' population), with R-squared of 0.63.

One can use logarithmic transformation to analyze data that include extreme observations, and if we apply that technique to this data, the predicted valuations become easier to compare with the officials' valuations (all being positive), but they still differ from those official valuations in substantial ways that suggest officials were not all using one uniform, objective valuation method. If we run the regression using natural logs of officials' valuations and of densities, officials' valuations depart from those predicted by the regression widely and frequently enough as not to seem generally determinate from the perspective of taxpayers. The proportion of districts departing from predicted values by more than 30% is 58% (36% of the districts being higher than pre-

447. Though not orthodox, a potential means to deal with the effect of outliers in a regression is to suppress the intercept, that is, to adjust all predicted values so that the regression line passes through the y-axis at zero (which, in this case, involves adding 16.974 to every predicted value, as the y-intercept of the original regression was -16.974). I thank Frank Garmon for pointing this out. With this adjustment, the median of the predicted values is $5.33, and the median of the absolute values of the differences between officials' values and predicted values is $2.21 (compared with a median officials' value of $7.21). But this indicates differences that are, from the taxpayer perspective, still quite important. Of the 490 districts, officials' values departed upward more than 40% from the intercept-suppressed predicted value in 250 districts and departed downward more than 40% from the intercept-suppressed predicted value in 38 districts.

dicted, and 22% lower); the proportion departing by more than 40% is 48% (30% higher, 17% lower, rounded); and the proportion departing by more than 50% is 36% (25% higher, 11% lower).[448]

To further investigate whether officials were following a relatively uniform density-correlated method, I examined how well density predicts federal officials' valuations on an intrastate basis, looking at two large states in different regions: Virginia and New York.[449] Focusing on valuations within a single state is helpful because that is the context where relative valuations mattered for determining taxpayers' liability, since Congress fixed a quota for each state, which was then distributed intrastate according to valuations. For each of the two states, I began with Garmon's data on each district's population density and its average valuation-per-acre of "lands" (which, per the 1798 legislation, excludes houses above the $100 exemption level), and I added data—drawn from Secretary Wolcott's summary abstracts—on officials' average valuation-per-acre of houses in each district. With this added data, my analysis covered officials' valuations of all real estate.[450] Then, for each state, I conducted regressions in

448. Taking the antilog of predicted ln(y) can bias the value of the predicted y. A correction for this bias is set forth in JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 207-09 (2d ed. 2003). When predictions are adjusted using that correction, departures are less frequent but still quite substantial: the proportion of districts departing from predicted values by more than 30% is 52% (14% of the districts being higher than predicted, and 38% lower); the proportion departing by more than 40% is 38% (10% higher, 28% lower); and the proportion departing by more than 50% is 26% (7% higher, 19% lower). (Additionally, if we log only the officials' valuations and not the densities (or vice versa), the departures are larger than with a log-log regression.)

449. In 1800, Virginia was the most populous state and New York the third-most. The second-most was Pennsylvania, which I did not select, because it bordered Virginia and thus might provide less of a regional contrast, and also because the Pennsylvania legislature changed the borders of counties in early 1800 in a manner that creates mismatches between direct-tax-valuation geographic districts and census-population geographic districts. *See Pennsylvania County Creation Dates and Parent Counties*, FAMILYSEARCH (Oct. 14, 2019, 9:55 AM), https://www.familysearch.org/wiki/en/Pennsylvania_County_Creation_Dates_and_Parent_Counties [https://perma.cc/6SDL-NPFQ].

450. In analyzing the relationship between population density (and/or its correlates) and officials' valuations, I think it best to look at officials' valuations of all real estate, rather than the subset (defined by statute as "lands") excluding houses worth more than $100. Focusing only on that subset means excluding a large amount of real estate's official value (about one-third in some states), and on a nonuniform, nonrandom basis. Also, focusing on the subset creates some mismatches in the data: it means using person-per-acre densities that account for all persons but not all acres (which may have an especially large impact in urban districts of small area), and it means including houses valued at less than $100 while excluding houses valued at more than that. I made these labor-intensive additions of data for only the two states covered here (Virginia and New York); adding such data for all other states—so they could be used for nationwide analysis—would be valuable in future research.

which (a) the dependent variable is federal officials' final average valuation-per-acre of all real estate (including all houses) in each of the state's federal assessment districts; and (b) the independent variable is the density of each district (population, as measured by the 1800 census, divided by number of acres valued, including all houses).

For Virginia, a linear regression produces predicted valuations that are all positive, but officials' valuations were more than 50% less than predicted for 77 of the 84 districts and between 30% and 50% less for another 4 of them. The only districts for which official valuations were not more than 30% above or below the predictions were the three most urban by far—Alexandria, Norfolk Borough, and Petersburg—which appear to be driving the regression. If we address this skew by instead using the natural logs of the officials' valuations and of densities, the fit is closer, but not close enough to suggest a determinate method: the proportion of districts departing from predicted values by more than 30% is 37% (21% higher than predicted, 15% lower); the proportion departing by more than 40% is 32% (20% higher, 12% lower); and the proportion departing by more than 50% is 23% (18% higher, 5% lower).[451] The districts with large departures were hardly inconsequential. For example, the 32% of districts departing from predictions by more than 40% accounted for 38% of the total official value of real estate across Virginia.

For New York, with 57 districts,[452] a linear regression produces predicted valuations that are nearly all negative, so I sought to gauge their predictiveness by calculating, for each district, the absolute value of the difference between officials' average valuation-per-acre and the predicted average valuation-per-acre. The median of all these absolute values was $62.95, which was very large compared with the median official average valuation-per-acre, which was $6.96. Looking at the only four districts whose predicted valuations were not negative, one is predicted at near zero (King's County, that is, Brooklyn), and the other three—comprising New York City—are positive and very high, at $500/acre or more. If we address the skew by using natural logs of the officials' valuations and of densities, the fit—as in Virginia—becomes closer but not close enough to suggest a determinate method: the proportion of districts de-

451. If we make the adjustment for antilog bias set forth in WOOLDRIDGE, *supra* note 448, the predictions, strangely, become less accurate: the proportion of districts departing from predicted values by more than 30% is 88% (2% higher than predicted, 86% lower); the proportion departing by more than 40% is 82% (2% higher, 80% lower); and the proportion departing by more than 50% is 71% (2% higher, 69% lower).

452. There were actually 63 districts. In order to make matches with available census population data, Garmon excludes four districts, combines one pair of districts into a single district, and combines another pair of districts into a single district. I follow him on this.

parting from predicted values by more than 30% is 42% (25% higher than predicted, 18% lower); the proportion departing by more than 40% is 26% (18% higher, 9% lower); and the proportion departing by more than 50% is 16% (12% higher, 4% lower).[453] As in Virginia, the districts with large departures amounted to an important fraction of the state. The 26% of districts departing from predictions by more than 40% accounted for 32% of the total official value of real estate across all districts in the state.

III. THE POLITICAL ASPECT OF THE FEDERAL BOARDS' REVISIONS

Through their broad discretionary power to revise all valuations district-wide by any amount "as shall appear to be just and equitable," the federal boards in 1798 used rulemaking to decide the relative taxable value of real estate in the different districts of their respective states, according to district boundaries the boards themselves drew. This Part shows that the federal boards' rulemakings had an important political aspect. The closest precedent for the federal boards' statewide tax-distributing power was in state governments' property taxation, but there, the high-stakes determination of how taxable value was distributed among a state's regions was something every state legislature had always kept jealously in its own hands, never delegating it to administrators as Congress did—quite innovatively—in 1798.[454] I begin this Part by examining the political struggles that occurred within the state legislatures over the geographic distribution of value-based property-tax burdens—struggles that typically pitted a state's rich, market-oriented coastal region against its poorer frontier. When Congress enacted its own property tax in 1798, it had to figure out how to manage the intrastate distributive struggles

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453. If we make the adjustment for antilog bias set forth in WOOLDRIDGE, *supra* note 448, the predictions, strangely, become less accurate: the proportion of districts departing from predicted values by more than 30% is 82% (2% higher than predicted, 81% lower, rounded); the proportion departing by more than 40% is 65% (2% higher, 63% lower); and the proportion departing by more than 50% is 53% (2% higher, 51% lower).

454. Many a state legislature would ultimately delegate the power to decide the comparative value of taxable property across the parts of the state to a state administrative agency, known as a "board of equalization," but this did not happen in any states until the 1820s or later. LUTZ, *supra* note 351, at 45-46 (listing dates at which each state legislature began establishing a board of equalization, none of which are prior to 1820; the entry for Massachusetts refers to an earlier "committee of [the] General Court," the General Court being the state legislature, not an administrative body). The federal boards of 1798 were federal forerunners to this eventual state-administrative approach. (Note that the eventual state boards of equalization were often politicized, in that "[r]epresentatives of districts [on the boards] have fought to secure a low valuation for their districts." *Id.* at 25.)

that it was inheriting from the states. There were various ways in which Congress could have made intrastate distributive choices itself, but instead it chose to delegate those choices to the federal boards. The Part concludes by showing that the federal boards were well-structured to register intrastate political disagreement and that some political controversies did arise over the boards' rulemaking decisions.

A. State Legislative Tax Politics That Federal Boards Inherited

To appreciate the political aspect of the federal boards' task in 1798, we should begin by considering the extensive work the state legislatures had done on the same subject. As of 1798, thirteen of sixteen states taxed real estate by value.[455] Four assigned statutory per-acre values to various classes of land according to its type and intrastate region: Connecticut, South Carolina, Georgia, and Kentucky.[456] In the nine remaining states—which taxed real estate using assessors' parcel-by-parcel valuations—the state legislatures never simply allowed the frontline assessors' judgments to be final as to an owner's actual tax liability, nor did they ever set up an administrative body to determine the distribution of value across the state. Instead the state legislatures *themselves* always determined the geographic distribution of the real-estate tax burden (and often of additional property taxes) across the regions of the state. In some states, particularly in New England, the state legislature micromanaged the distribution and mandated the exact sum to be raised in each town of the state.[457] In the mid-Atlantic states, the legislature asserted control of the distribution, though not at quite such a micro-level: it apportioned the tax among the counties of the state, then allowed a sub-apportionment within each county among the county's towns, conducted by a board of all the elected town supervisors, or of all the elected town assessors.[458] State legislatures farther south also made

455. On the three that did not, see *supra* note 290.

456. *See supra* note 291 and accompanying text.

457. For Massachusetts's apportionment by a large committee of the legislature among the 396 towns, see REPORT OF THE COMMITTEE ON THE VALUATION, *supra* note 315, at 322-32. For a tax levy following the apportionment, see TAX NO. ELEVEN, *supra* note 312. For New Hampshire (about 200 towns), see Act of Feb. 22, 1794, 1793 N.H. Laws 475, 475-80, which apportions taxes among towns. For Rhode Island (30 towns), see Act of June, 1795, 1795 R.I. Acts & Resolves June Adjourned Sess. 25, 25-26, which provides for a committee to propose an estimate of the towns; and Resolution of June, 1796, 1796 R.I. Acts & Resolves June Adjourned Sess. 16, 16-17, which adopts the committee's estimate.

458. For New York (twelve counties), see An Act for Raising Monies by Tax (Mar. 19, 1788), ch. 86, *supra* note 296, at 811-12, incorporating by reference the process for defraying counties' contingent charges in the county-tax statute, which is An Act for Defraying the Public and

decisions by county, but with no sub-apportionment, leaving intracounty distribution of the burden to frontline officials' valuations of individual parcels. Thus, in Delaware, the legislature apportioned its taxes among the state's three counties.[459] Maryland did something functionally equivalent: the legislature mandated an average per-acre value for each of its eighteen counties, according to which the tax valuations of individual properties within the county had to be adjusted.[460] Virginia did the same, but in a lumpier way, grouping all its counties into four clusters ("districts") and imposing a uniform average per-acre value on each cluster.[461]

The histories of several of these states reflect political struggles over the burden that property and especially real estate within one intrastate area should bear relative to others. Those struggles were most intense and salient during the period from the tail end of the revolution up to 1790. That was the period when states levied the heaviest direct taxes—prior to the new federal Congress's success in ending requisitions and assuming the states' debts.[462] When Congress resorted to direct taxation in 1798, the intrastate political tax struggles of the 1780s would have been many people's most salient memory of what the federal boards were now being asked to do.

The exact rivalries and coalitions varied by state and over time, but in each of several states there was often a struggle between, roughly speaking, two sets of areas: (1) areas that tended to be proximate to the coast, included seaports (which accounted for nearly all cities at the time), had access to waterways, had relatively productive land, were more engaged with interstate or global markets for agricultural produce, and had better access to specie and credit; and (2) areas that tended to be farther inland (the "back" country), had less pro-

Necessary Charge in the Respective Counties of this State (Mar. 7, 1788), ch. 65, *supra* note 296, at 769-70. This legislation was current as of 1798. *See* WOLCOTT REPORT, *supra* note 82, at 425; Hamilton, *supra* note 296, at n.28 (editor's footnote). For Pennsylvania (fifteen counties), see Act of Mar. 16, 1785, ch. 1137, § 12, *in* 11 PA. STATUTES, *supra* note 301, at 454, 466-67, which furnishes the quota of the state. On intracounty apportionment, see *id.* § 16, at 469. For New Jersey (thirteen counties), see Act of Feb. 17, 1794, ch. 466, § 2, 1793 N.J. Laws 1st & 2d Sitting 897, 897-98; and Act of Dec. 1, 1794, ch. 511, § 2, 1794 N.J. Laws 1st Sitting 964, 964. For the intracounty apportionment by a board of the towns' assessors, see Act of June 5, 1787, ch. 203, § 4, 1786 N.J. Laws 2d Sitting 412, 413-14, which ascertains the time and mode of laying taxes.

459. Act of Feb. 9, 1796, ch. 106, § 1, 1796 Del. Laws 1299, 1299.

460. Act of Mar. 8, 1786, ch. 53, § 2, 1785 Md. Laws Nov. Sess. (no page numbers) (ascertaining the value of land in the counties of the state). For a later amendment dividing one county into two, see Act of Dec. 22, 1792, ch. 71, 1792 Md. Laws Nov. Sess. (no page numbers).

461. Act of Oct. 21, 1782, ch. 19, §§ 1-2, 1782 Va. Acts Oct. Sess. 177, 177-78.

462. *See supra* text accompanying note 121.

ductive land, were less engaged in commerce, were less urban, and had less access to specie and credit.[463] This rough dichotomy helps describe tax struggles within Massachusetts (the commercial farming areas and ports versus the poorer areas, like much of Hampshire County),[464] New Hampshire,[465] Rhode Island,[466] New York (the city versus upstate),[467] Pennsylvania (Philadelphia and its environs versus the western counties),[468] Virginia (the large tidewater planters versus less prosperous areas),[469] and South Carolina (the rich, low-country planters versus the backcountry).[470]

At the threshold, there was bitter political struggle over whether to consider value in the taxation of real estate *at all* or tax it by a flat sum per acre,[471] but that is not of direct interest to us, since the federal boards in 1798 did not face an analogous question. Assuming the legislature did take account of value, there was the further political question of whether to crudely impose statutory per-acre values on classes of land by type and region, or instead to let administrators value parcels individually while the legislature forced some kind of mass adjustment through apportionment. Crude classification meant frontline assessors merely categorized land rather than valuing it, thus preventing individual investigations that might threaten taxpayer privacy, but such classification occasioned frequent complaints because its crude assignments of value were often implausible for at least some particular parcels.[472] It is unclear whether the federal boards in 1798 could have opted to impose crude classification schemes, using their power to make "regulations" that were "binding" on the assistant assessors. Secretary Wolcott thought not, but he said that was only his personal opinion and that he would leave the matter up to the boards.[473] Of the boards whose regulations are extant, one did adopt a classification scheme (in South

463. See generally ROBERT A. BECKER, REVOLUTION, REFORM, AND THE POLITICS OF AMERICAN TAXATION, 1763-1783 (1980), which covers state tax politics with respect to numerous issues, including valuations but also collection procedures, currency of payment, and other related issues.

464. *Id*. at 119-20.

465. *Id*. at 132-33.

466. *Id*. at 134, 137.

467. *Id*. at 155-56, 161.

468. *Id.* at 182.

469. *Id.* at 196, 200.

470. *Id.* at 206-207.

471. In Virginia and South Carolina, proponents of shifting from flat sums per acre to ad valorem taxation won out only during the late 1770s or early 1780s. *Id.* at 195-200, 209-10.

472. *See supra* notes 292-294, 398 and accompanying text.

473. Letter from Oliver Wolcott, Jr. to Isaac Alexander, *supra* note 215.

Carolina), but it is unclear whether the scheme was binding or mere guidance.[474]

But even if a federal board in 1798 could not adopt crude classifications, it surely had the power to draw the assessment districts for its state and to decide the average value (or equivalently, the total value) of real estate in each one. This power was analogous to what the state legislatures did in each of the nine states that had individualized assessor valuations. Events in several of those states reveal the contentious politics that surrounded the task. In 1783, the Continental Congress's address urging the states to abandon land valuation as the basis for allocating requisitions—reported by Madison, Hamilton, and Oliver Ellsworth and drafted by Madison—argued that "[t]he expediency, and even necessity of such a change, has been sufficiently enforced by the local injustice and discontents which have proceeded from valuations of the soil in every State where the experiment has been made" and that these discontents would be aggravated at the interstate level.[475]

One big example of intrastate struggle over real-estate tax valuation was Massachusetts. The legislature apportioned the tax burden (covering real estate and other property) to the towns repeatedly throughout the eighteenth century. The "apportionment negotiations" within the legislature "rested on data compiled in periodic colony-wide valuations," yet the negotiations were "a political process from start to finish,"[476] and one that continued into the era of independence, when the "politics of apportionment intensified."[477] The state constitution of 1780 required a statewide "valuation of estates" at least once every ten years,[478] and after the first of those valuations was completed in 1781,[479] the legislature—dominated by the more coastal commercial interests—levied substantial new taxes, which prompted numerous protest conventions and resistance by armed mobs. To quell the unrest, the legislature in August 1782 sent a top-level committee (including state house speaker Nathaniel Gorham) to meet with the protesters where they were especially concentrated, in Hampshire County. The committee confronted "an impromptu convention" of delegates from various protesting towns and spent four days hearing grievances, after which the convention voted resolutions, some of which "repeated the

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474. *See supra* notes 390-393 and accompanying text.

475. Address to the States, *supra* note 89, at 280.

476. EINHORN, *supra* note 53, at 73-74.

477. *Id.* at 76.

478. MASS. CONST. pt. 2, ch. I, § I, art. IV (original constitution of 1780 before subsequent amendments).

479. EINHORN, *supra* note 53, at 76-77.

complaint that [the towns'] quotaed taxes were disproportionately heavy, given 'the distance of [Hampshire] County from market.'"[480] Sitting through the protesters' litany in a time and place of recent armed resistance understandably made an impression on Gorham. Serving as a delegate to the Continental Congress in spring 1783, he advocated abandoning the land-valuation mandate of the Articles of Confederation. As James Madison wrote in his notes, Gorham "represented in strong terms the inequality & clamors produced by valuations of land in the State of Mas[sachuset]ts," which would be even worse among the states.[481]

Within Massachusetts, tensions were temporarily diminished by the legislature's outreach and by its willingness to make "concessions" to the angry towns and counties.[482] In particular, the legislature's customary practice of considering petitions (or "representations") from individual towns regarding valuation was put to extensive use in the next round of apportionment, which occurred in 1784. In that process, a large committee of the legislature was tasked with hammering out the towns' valuations;[483] the committee proposed a set of numbers, and 171 towns responded with petitions seeking to have their shares lowered. It "seems to have been common for each individual town to believe that its lot was harder than that of any other; to consider that its property was of less value and in a worse condition than that of its neighbors."[484] "[A]ccording to the protests, [each town's] houses were always of the poorest kind, for the most part unfinished, and hardly habitable; the same was true for land. With very few exceptions, complaint was raised that the land of the particular town was poor, worn out, unproductive and consequently overvalued . . . ."[485] Ultimately the committee did grant reductions to sixty-three of the towns.[486] With measures like these, lawmakers kept tensions under con-

480. BROWN, *supra* note 112, at 103-105 (quoting Hampshire County, Mass., convention resolutions).

481. James Madison, Notes on Debates (Mar. 27, 1783), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-06-02-0134 [https://perma.cc/TA3D-3NQ7].

482. BROWN, *supra* note 112, at 106-07.

483. On the customarily large size of the committee, see ROBERT HARVEY WHITTEN, PUBLIC ADMINISTRATION IN MASSACHUSETTS: THE RELATION OF CENTRAL TO LOCAL AUTHORITY 103 (AMS Press 1969) (1898).

484. Harold H. Burbank, The General Property Tax in Massachusetts, 1775 to 1792, with Some Consideration of Colonial and Provincial Legislation and Practices 168 (1915) (unpublished Ph.D. dissertation, Harvard University) (the Harvard University Archives).

485. *Id.* at 170-72.

486. *Id.* at 169.

trol—till 1786, when a new round of taxes and especially collection measures (distinct from valuation issues) led to Shays's Rebellion, again centered in Hampshire County.[487]

Massachusetts tax politics calmed down after 1787-89, as the new federal Congress's success in collecting import duties allowed it to end requisitions and to assume the states' debts, allowing state tax burdens to fall. In the next round of Massachusetts valuations in 1792, said one newspaper, the "rule of apportionments, always uncertain, seems to draw much less attention from all parties, since the decrease of direct taxation, than in former years, when so great burthens were to be regulated by it."[488] Even with the stakes lessened, the legislative committee did end up aggressively revising the returns of many towns, apparently mainly in terms of *quantities* of land returned that it suspected were incomplete (revisions it based on incomplete information, as noted earlier).[489] The committee's report in 1793 expressed awareness of the political sensitivity of these revisions and noted the counter-pressure it was facing:

> In exercising this Judgment your committee have felt the force of the censure naturally incident to a business of this kind, of the opposition and influence of those who would be affected by the variation from their returns, and of the careful scrutiny which their [i.e., the committee members'] doings will be subjected to, by those who will arraign their conduct to the standard of propriety . . . .[490]

The political aspect of statewide real-estate valuation was also evident in New York. The upstate rural counties had feuded with New York City over apportionment of taxes since colonial days, and this "old rivalry . . . reemerged" in the newly independent state's assembly.[491] In contrast to the Massachusetts regime in which taxable value depended on property, New York state taxation was set, under a series of statutes starting in 1779, "according to the estate and other circumstances and ability of each respective person to pay taxes collectively considered"—not just real estate, but also personal property, and more amorphous things like income from trade, which was extremely hard to gauge using sources available in the period.[492] This provision raised the question of

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487. BROWN, *supra* note 112, at 106-17.

488. *Legislature*, AM. APOLLO (Boston), vol. 1, no. 4, Jan. 27, 1982, at 43.

489. *See supra* notes 315-317 and accompanying text.

490. REPORT OF THE COMMITTEE ON THE VALUATION, *supra* note 315, at 322-23.

491. BECKER, *supra* note 463, at 155-56, 161, 222-23.

492. *Id.* at 159 (emphasis omitted) (quoting Act of Oct. 23, 1779, ch. 27, *in* 1 LAWS OF THE STATE OF NEW YORK 185, 187 (Albany, Weed, Parsons & Co. 1886)). For later statutes with similar

how the legislature, in apportioning the tax burden, should gauge the "ability . . . to pay" of each part of the state. In Hamilton's observation, the process was highly political. When the "Legislature first assesses, or quotas the several counties," he explained in 1782, "[t]he members cabal and intrigue to throw the burthen off their respective constituents. Address and influence, more than considerations of real ability [to pay] prevail. A great deal of time is lost and a great deal of expence incurred before the juggle is ended and the necessary compromises made."[493] Importantly for our purposes, Hamilton understood the legislative valuation of *real estate* within this larger ability-to-pay apportionment to be of a piece with the apportionment's general nature as a subjective political process among rival self-interested actors. As New York's delegate to the Continental Congress, Hamilton in 1783 described to New York's governor the various undesirable plans being considered for nationwide real-estate valuation under the Articles of Confederation. The "first plan proposed," said Hamilton, "was an actual valuation of each state by itself [i.e., by the legislature of the state]. This was evidently making the interested party judge in his own cause."[494] He went on: "Those who have seen the operation of this principle between the counties in the same state and the districts in the same county," he said, presumably with reference to New York, "cannot doubt a moment that the valuations on this plan would have been altogether unequal and unjust."[495]

Later, when serving in the New York legislature in early 1787, Hamilton again characterized New York's ability-to-pay tax-apportionment scheme as subjective and political:

> To begin with the legislature, what criterion could any man possibly have by which to estimate the relative abilities [to pay] of the several counties; for his part, he had thought maturely of the subject, but could find none. The whole must be either a business of honest guessing, or

provisions, see Act of Mar. 25, 1783, ch. 49, *in* 1 LAWS OF THE STATE OF NEW YORK, *supra*, at 565, 566; and Act of May 6, 1784, ch. 58, *in* 1 LAWS OF THE STATE OF NEW YORK, *supra*, at 707, 710.

493. Letter from Alexander Hamilton to Robert Morris (Aug. 13, 1782), *in* FOUNDERS ONLINE, NAT'L ARCHIVES (emphasis omitted), https://founders.archives.gov/documents/Hamilton/01-03-02-0057-0001 [https://perma.cc/FS3A-MXRN].

494. Letter from Alexander Hamilton, N.Y. Delegate, Cong. of the Confederation, to George Clinton, Governor, N.Y. (Feb. 24[-27], 1783), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-03-02-0168 [https://perma.cc/K47T-6UXM].

495. *Id.*

> interested calculations of county convenience, in which each member would endeavour to transfer the burden from his county to another.[496]

Consistent with the idea that legislative valuation of real estate was as problematically political as legislative judgments of ability to pay generally, the proposal for which Hamilton advocated in these remarks was to replace the ability-to-pay regime with a completely objective regime that didn't make judgments of value at all, instead assigning a flat sum of tax to each objective feature of every house, to each acre of certain crudely-defined categories of land (arable, pasture, woodland), and the like.[497] But the legislature refrained from adopting Hamilton's proposal in spring 1787 and stuck with the status quo.[498] After levying another round of taxes in 1788, it would abandon direct taxation until 1799.[499]

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496. *New York Assembly. Remarks on an Act for Raising Certain Yearly Taxes Within This State*, DAILY ADVERTISER (N.Y.), Feb. 21, 1787, *in* FOUNDERS ONLINE, NAT'L ARCHIVES [hereinafter *Remarks*] (emphasis omitted) (footnote omitted), https://founders.archives.gov/documents/Hamilton/01-04-02-0033 [https://perma.cc/QX95-3GB6]. Interestingly, Hamilton posited but apparently stopped short of making a nondelegation argument against New York's ability-to-pay tax regime, particularly as carried out by the county supervisors who did the subapportionment and the assessors who decided the ability-to-pay of individuals:

> > He would not say that the practice was contrary to the provisions of our constitution; but it was certainly repugnant to the genius of our government. What is the power of the supervisors and assessors, but a power to tax in detail, while the legislature taxes in gross? Is it proper to transfer so important a trust from the hands of the legislature to the officers of the particular districts?

Id. In any event, the legislature refrained from adopting his proposal and stayed with the status quo. *See infra* notes 498-499 and accompanying text.

497. Second Draft of an Act for Raising Certain Yearly Taxes Within This State (Feb. 9, 1787), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-04-02-0021-0002 [https://perma.cc/54ZL-UZ72]; Third Draft of an Act for Raising Certain Yearly Taxes Within This State (Feb. 9, 1787), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-04-02-0021-0003 [https://perma.cc/GCR3-AXAN]. Hamilton's remarks reflected that his proposal for the "land tax, in particular, may require great alterations. He had not been able to satisfy himself on this part of the plan." *Remarks*, *supra* note 496. But this could easily mean expanding the number of categories to which statutory per-acre values were assigned (e.g., South Carolina had more than fifteen categories, Act of Dec. 19, 1795, 1795 S.C. Acts 3-4), without engaging in open-ended individual valuation or county-by-county apportionment.

498. Letter from Alexander Hamilton to Theodore Sedgwick, Mass. Senator, U.S. Senate (Jan. 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-20-02-0319-0001 [https://perma.cc/AF7U-CDKA] (recalling that his plan was not adopted).

499. *See supra* note 296.

Similar to the city-upstate struggle in New York, the distribution of property taxation within Pennsylvania was "an old debate between Philadelphia and the western counties about the city's fair share."[500] As the west acquired more representation during the revolution, the legislature raised Philadelphia's quota, and Philadelphians and their allies sought repeatedly in the late 1770s and 1780s to lower it, failing on narrow, geographically divided votes.[501] In one act refusing to lower the quota in 1782, the western counties did make a concession that the quotas "would be subject to future correction by the assembly in the light of a property census,"[502] but it seems this still had not occurred by 1789, when Pennsylvania ceased levying such taxes for the next several years.[503]

Another state with fractious apportionment politics was Delaware (though its lack of a frontier and major seaports meant its divisions did not take the same coastal-versus-inland form as other states).[504] Since the colonial period, Delaware's three counties had apportioned their taxes equally, but with the leap in taxes during the revolution, "doubts" arose about whether this old apportionment, in the assembly's words, "is the just and proper quota of each county according to the present ability of its inhabitants to pay the same."[505] The legislature appointed a commission to tour the state to make a valuation of real estate. When it came time to decide the distribution of taxes, covering all property but presumably falling quite substantially on real estate, events unfolded this way:

> Once the [historic] presumption of equality among the [three] counties fell, squabbling over each county's proper share followed. In December, 1779, delegates from Sussex and Kent joined to raise New Castle's quota to 38 percent and to lower Sussex's to 28 percent. All agreed that Sussex was the poorest and should pay the least. New Castle's delegates wanted to split the remaining taxes equally with Kent, but Kent's delegates outbid New Castle's for the support of Sussex. The lowest share proposed for Sussex by New Castle's delegation was higher than the share

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500. BECKER, *supra* note 463, at 181.

501. *See id.* at 182; ROBERT LEVERE BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA: 1776-1790, at 108, 133 (1942).

502. BRUNHOUSE, *supra* note 501, at 108.

503. Act of Mar. 16, 1785, ch. 1137, § 12, *in* 11 PA. STATUTES, *supra* note 301, at 454, 466 (stating "until the quotas . . . shall be farther liquidated, regulated and established," they shall be as follows); WOLCOTT REPORT, *supra* note 82, at 427 (noting the 1785 tax was continued through 1789, then abandoned).

504. JOHN A. MUNROE, FEDERALIST DELAWARE, 1775-1815, at 67-68, 73 (1954).

505. BECKER, *supra* note 463, at 175.

> Sussex eventually paid with the support of the Kent delegation. And it was Sussex votes that enabled Kent to stop all New Castle's attempts to lower its own taxes at Kent's expense.[506]

In Virginia, a 1782 statute grouped the state's counties into four clusters ("divisions") and provided a mandatory average value for the real estate in each. This proved to be a stable long-term settlement,[507] though at its inception, it created winners and losers and provoked some dissent. The act "passed by a vote of 71 to 17. The dissenting votes came from representatives of southwestern and southern Piedmont counties, who probably felt that too high rating was given to land in their section by placing it in the second division."[508] Virginia politicians for at least thirty years after 1782 maintained a coalition in favor of leaving the average values undisturbed notwithstanding subsequent improvements, voting down "many attempts . . . for a new assessment . . . from a conviction that the first assessment was the most fair and equal" in that "the lands were assessed at their intrinsic value," that is, owners who made improvements should not be taxed on them.[509]

B. Congress's Options for Handling Intrastate Politics and Its Choice to Delegate

The intrastate mass tax valuation of real estate was politically sensitive, and when Congress enacted federal real-estate taxation in 1798, it had to choose some way of handling those intrastate politics. Congress had three options: (a) follow what the state legislatures had done for state taxes, (b) make its own hard-and-fast choices about valuations, or (c) delegate to federal boards to handle the politics in their respective states. It chose the last.

The first option was to follow whatever the state legislatures had been doing with their state property taxes. On the surface, this might seem like an easy way to manage intrastate politics, but in fact it wasn't. To see why, let's first recognize there were different ways for Congress to "follow the states." The most extreme was to adopt each state legislature's chosen objects of taxation,

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506. *Id.* at 176.

507. *See* EINHORN, *supra* note 53, at 50, 81.

508. Mary Travers Armentrout, A Political Study of Virginia Finance 1781-1789, at 56 (May 1, 1934) (unpublished Ph.D. dissertation, University of Virginia), PQDT No. DP14382.

509. *Direct Tax Bill*, ALEXANDRIA GAZETTE (Va.), July 12, 1813, at [3], [3] (quoting Rep. Lewis of Virginia); *see also* WOLCOTT REPORT, *supra* note 82, at 431 (referring to Virginia's lands as having received a "permanent valuation").

within that state, as the federal objects of taxation.[510] Indeed, back in the ratification debates of 1787-88, proponents of the new Constitution often predicted that Congress would choose to structure any federal direct tax in this way.[511] The idea of congressional deference to each state's choice of tax base—which continued to be advocated through the 1790s—might be sold as a response to differing economic conditions in the states (e.g., different levels of mercantile wealth), and it also had the attraction of supposedly adopting, for each state, a regime that enjoyed acceptance in the state's political environment.[512] However, Secretary Wolcott argued that varying the objects of federal direct taxation among the states was unworkable, and Gallatin (usually his adversary) agreed with him.[513] Both of these leading figures thought the tax should fall, across all states, on real estate and slaveholding. The House would ultimately vote to go along with this scheme, giving up on varying the objects of taxation by state.[514] But even if the federal direct tax was to fall upon real estate and slaveholding throughout the states, there was a less extreme way for Congress to follow the states: Congress could write the federal tax so as to adopt each state government's tax valuation *insofar as that valuation covered the objects Congress chose to tax by value*—that is, real estate. Congress could have done this for most of the states, though not all: a few state legislatures simply did not tax real estate by value (Wolcott's 1796 report cited Tennessee, and might have also cited North

510. Note the Constitution's requirement that federal taxes be uniform does not apply to direct taxes. *Compare* U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States."), *with id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . .").

511. *E.g.*, BECKER, *supra* note 463, at 226-27, 288-89 n.28; EDLING, REVOLUTION, *supra* note 113, at 188-89, 196-97, 201-02; Crane, *supra* note 63, at 19-28; Dalzell, *supra* note 66, at 53. An example is THE FEDERALIST NO. 36 (Alexander Hamilton).

512. As the Federalist chair of the House Ways and Means Committee said in 1796, in discussing the Committee's then-prevailing view that any federal direct tax should vary to imitate state arrangements, he wanted to consult "the laws and practices of the different States, so as to make the system [of federal direct taxation] most palatable to each." 5 ANNALS OF CONG. 842 (1796) (statement of Rep. Smith). For Congress to adopt "the method which has been prescribed by any one of the State Governments," said Massachusetts Republican Joseph Varnum in 1797, would "suit the circumstances and conciliate the feelings of the people of such State," though it would also go against "the prevailing opinion of the people" in the other states. 6 ANNALS OF CONG. 1880 (1797) (statement of Rep. Varnum).

513. WOLCOTT REPORT, *supra* note 82, at 436, 440-41; 5 ANNALS OF CONG. 849 (1796) (statement of Rep. Gallatin).

514. 8 ANNALS OF CONG. 1630 (1798) (recording that an amendment to eliminate the provision of uniformity among the states failed, with only 21 votes in favor).

Carolina and Vermont).[515] And while Congress theoretically could have adopted state-government real-estate valuations for the remaining states, doing so would have been obviously unfair and awkward in many cases, because such valuations would implicitly depend upon the respective state legislatures' geographic apportionment of tax value by averages or quotas for counties and towns, and, as Wolcott warned in 1796, the legislatures of some of the biggest states—including New York and Pennsylvania—had intrastate apportionments that were outdated by about a decade, meaning that only "conjectural estimate[s]" could be made for the present in the absence of "new valuations."[516] Following the states was less attractive than it might seem.

The second option was for Congress to eschew the state legislatures' handiwork and make its own hard-and-fast choices about the valuation of real estate. Congress could do this by a couple of different methods. One was for Congress to adopt its own national principles of valuation, for example, by assigning a certain dollar value per acre to each of several categories of land (something that a few state legislatures had done for state taxes), and/or assigning a specific dollar value to certain objective physical features of houses, like rooms or chimneys (as Hamilton urged in 1797). This method had the advantage of simplicity and uniformity but the disadvantage of being crude and potentially unfair for many individual owners. Another method of hard-and-fast congressional choice making would be for Congress to delegate the *relative* valuation of properties *within* a locality to low-level assessors *but* to decide the apportionment of tax value *across* a state's localities in the statute itself, through averages or totals assigned to each county or other locality—something that most states did circa 1798 and that Congress did try briefly during the War of 1812.[517] This method, too, would be crude; it was criticized as such when tried during the War of 1812 and abandoned later in that war.[518] This method was also problematic in a larger sense, because the internal tax politics of any given state was often so fraught and complex (per Section III.A above) that for a dis-

515. WOLCOTT REPORT, *supra* note 82, at 441; *see supra* note 290 and accompanying text (noting that Tennessee, North Carolina, and Vermont taxed real estate by a flat sum per acre).

516. WOLCOTT REPORT, *supra* note 82, at 440; *see also id.* at 438 (noting that while these states may have more recent valuations for county-tax purposes, these would be inappropriate for judging relative value of land in different counties). Wolcott also might have added that the existing intrastate geographic apportionments on the statute books of some of the states (e.g., Massachusetts) included forms of property that went beyond real estate and slave ownership, meaning they could not be uncontroversially plugged in to a federal tax regime covering *only* real-estate and slave ownership.

517. *See infra* Section V.D.1.

518. *See infra* Section V.D.2.

tant federal Congress to pick the winners and losers risked decisions that were out of touch with the state's internal political environment.

The third option was to delegate, and that is what Congress did. It created a geographically representative federal board in each state with open-ended authority to figure out a "just and equitable" mass statewide distribution of tax values, given the state's peculiarities. As Wolcott said, "there appears to be no necessity that the principles of valuation should be uniform in all the States."[519] The Valuation and Enumeration Act chose no such principles and left that choice to each board—a choice with a major political aspect. Although there was little discussion of the federal boards during the congressional debates of 1797-98, Gallatin at a few points touched upon them and recognized that they would be handling the kind of intrastate controversies about the geography of real-estate tax valuation that his home state (Pennsylvania) and others had experienced. The issue came up when Gallatin was proposing (as discussed earlier) that houses should not be taxed according to crude value classes—a proposal that Congress adopted.[520] If houses were simply categorized in classes, explained Gallatin, it would not be feasible for the federal boards of commissioners to raise or lower house values en masse. Gallatin said this would be bad, and in so doing, he had occasion to note the important role of the boards of commissioners. If the boards did not have effective power to adjust valuations for both houses and land, he asked, "what security would the people of Pittsburgh have that the assessors of Philadelphia would value the houses there at their full value, or upon the same principle with their own [i.e., Pittsburgh's] assessors?"[521] Gallatin believed "the assessors in each place will do relative justice to the citizens in their own district," but he warned that "no one can say that, in different places, they will adopt the same ideas as to the value of the property."[522] It was "necessary," he said, "to give a power to the Commissioners

519. WOLCOTT REPORT, *supra* note 82, at 441. He added, "It is certain that the records and documents which are known to be attainable, would exceedingly facilitate the adoption of principles, for determining the relative value of lands in different districts of the same State." *Id.* It is unclear what "records and documents" he had in mind. Most likely they were the state laws, though some would be out of date or inapplicable to the valuation at issue, and Wolcott himself had strongly opposed having federal law follow the individual state laws. Possibly he might be referring to existing state assessment rolls or recorded deeds, but it seems odd to say that these voluminous parcel-by-parcel documents would be used to "facilitate the adoption of principles."

520. *See supra* notes 138-139 and accompanying text.

521. 8 ANNALS OF CONG. 1838 (1798) (statement of Rep. Gallatin).

522. *Id.*

to regulate any variations in this respect."[523] Gallatin's view of the federal board as regulating potential divergences in the "principle[s]" or "ideas" of valuation as between Philadelphia and Pittsburgh was a reference to the struggle within Pennsylvania over property-tax apportionment between rich, urban, mercantile Philadelphia and the hardscrabble frontier western counties, described above. Gallatin represented the western counties (including Pittsburgh, then a tiny town).[524]

C. Politics and the Structure, Personnel, and Process of the Federal Boards

The federal boards were structured and staffed in a manner that suited them to reflect and manage intrastate politics, somewhat like mini state legislatures. On each board, there was to be one commissioner from each of the geographic divisions into which the Valuation and Enumeration Act divided the state. For each state, the number of divisions (and thus of commissioners) was always odd. Each board could act by majority vote.[525] It was common for commissioners to have experience as actual state legislators. In New York, for example, five of the federal board's nine seats were occupied by men who simultaneously served in the state senate during the period of the federal board's operation, and a sixth by a former member of the state assembly.[526]

A public letter from one U.S. Senator regarding nominations of commissioners provides an important congressional perspective on the role of the boards—as bodies that required expertise but were also understood as geo-

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523. *Id.*; *see also id.* at 1848-49 ("Assessors will assess in different places on different principles, and there will be no way of remedying the defect. What security should he or his constituents have that the assessors of Philadelphia will assess their houses according to their real value? Or what security have the citizens of Philadelphia that the people beyond the Alleghany mountains will assess their property according to its real value? None. Unless Commissioners were employed to adjust the various assessments which are made, no equality of taxation could be expected."). It is not clear what Gallatin meant by "real value"; the term could be used to refer to a number that an observer constructed by, say, rejecting actual market conditions as abnormal by reason of a money-supply slump, and instead imagining what land would sell for given a supposedly normal money supply. The Supreme Court, per Chief Justice Marshall, used the term in this sense in 1804. *See supra* note 327.

524. *See* THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 195 (2012).

525. *See supra* note 180 and accompanying text.

526. Board members are listed in WOLCOTT, *supra* note 222, at 7. Selah Strong, Peter Cantine, Jr., James Gordon, Samuel Haight, and Moss Kent are listed as state senators in EDGAR A. WERNER, CIVIL LIST AND CONSTITUTIONAL HISTORY OF THE COLONY AND STATE OF NEW YORK 374 (Albany, Weed, Parsons & Co. 1889), and Jacob Radcliffe (Radclift) is listed as a state representative, *id.* at 414.

graphically representative, with a political aspect. As the Valuation and Enumeration Act was becoming law in July 1798, Secretary Wolcott sought recommendations from the New Jersey congressional delegation (all Federalists) as to whom President Adams should nominate as commissioners to cover that state. The Senators and Representatives (all elected at large) conferred. They ran into trouble deciding whom to recommend for the state's second division, covering Morris County and Sussex County. Representative Mark Thomson, who was from Sussex, wanted to appoint his young and relatively unknown son-in-law. Senator John Rutherfurd, whose estate was in Morris County, disagreed. This led to a public spat between the two men, prompting Rutherfurd to write a public letter explaining his reasons. At a meeting of the lawmakers, recounted Rutherfurd, he'd told the others that, in opposing Thomson's son-in-law, "I was actuated by no other motives than a sincere wish *to secure* a district [i.e., the division covering Sussex and Morris counties] in which I had lived very happily for about ten years, in which my property chiefly lies, and to which I am much attached." Rutherfurd wrote that he "conceived [the Valuation and Enumeration Act] would require gentlemen well acquainted with business and of the first talents . . . to carry it into operation." His letter continued:

> I knew that as the lands of farmers were to be taxed, they would expect that men should be appointed, in whom they could confide, who possessed real property themselves, and who had there[to]fore acquitted themselves in offices of public trust to the satisfaction of the people; and considered that as a gentleman of the law was nominated for one of the districts [i.e., divisions], and three gentlemen who had been members of the state legislature for [the] other three districts, that a commissioner ought to be appointed for Sussex and Morris, who would be upon an equal footing in point of information, judgment and knowledge of business, with the other gentlemen at the meeting of the board of commissioners, where the relative value, situation and local circumstance of every part of New Jersey will be taken into consideration and directed on. And I was more firmly persuaded of the propriety of these sentiments and conduct, when I considered that the commissioners are authorized by law to revise, adjust, and vary the valuation of houses and lands in any assessment district . . . .[527]

527. *Copy of a Letter from the Hon. John Rutherford [Rutherfurd] to Charles Pemberton*, *supra* note 179, at [3] (emphasis added).

Rutherfurd's language captures the dual aspect of the boards. On the one hand, they were expert bodies: he wanted the board member covering his home county to have "information, judgment and knowledge of business." On the other hand, this expertise was to be deployed in a venue where the board members could be expected to act on behalf of the divisions from which they hailed: Rutherfurd had a "sincere wish to secure" Morris County—that is, to protect the county—and therefore wanted it to have a board member who stood "on an equal footing" with the other members, especially when it came to their deliberations about mass revisions.

There is indirect evidence that the decisionmaking process of the federal boards regarding district-wide mass revisions involved divided votes and compromises. To be sure, there is little direct evidence on this for 1798. Though minute books are extant for three of the federal boards (Connecticut, Rhode Island, and New Jersey), they reveal only the decisions that were made regarding each district, not anything about the procedure (by vote or otherwise) that the boards used. One manuscript valuation list for Massachusetts happens to contain an irregular note referring passingly to the federal board making a revision decision "by a subsequent vote of the commissioners," but nothing more.[528] However, for the later direct tax of 1815, the minute book is extant for one federal board (in Pennsylvania), and it is more revealing. As the two taxes were only seventeen years apart, it seems fair to assume that the procedures of the board for Pennsylvania in 1815 would not have been foreign to what at least some of the boards did in 1798. The book, though not detailed, does reveal that, for each district, the board took votes that were often divided and then had to re-vote on a different adjustment to get to a majority. Specifically, the twenty-three-member board (larger than any under the 1798 tax) took votes regarding thirty areas of the state (districts or partial districts), in turn, over the course of four days. For ten of the areas, a member made an initial proposal to raise the valuation, and, after the board rejected the first proposal, a second member made a proposal to raise the valuation by less, at which point the board approved the revision. For one area, a member initially proposed to raise the valuation. The board voted this proposal down, and then voted to leave the valuation the same. Finally, there were two areas in which the voting went to three rounds. In one of these, the board voted down a motion (by the district's own member) to reduce the district by 5%, then voted down a proposal to raise it by 10%, then adopted a motion to raise it by 2.5%.[529]

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528. NEHGS Database, *supra* note 224, at 4:464.

529. Minutes of the Pennsylvania Direct Tax Commission, 1815 (National Archives, Record Group 151, Entry 23). The book has no page numbers, but the votes were recorded under the

D. Politics and the Substantive Decisions of Federal Boards

Sources confirm the political aspect of the boards' revisions as a matter of substance. First of all, the patterns of revisions by several of the boards, noted earlier in Section I.C, seem on their face to be informed by the historic tax politics of their respective states. The board in Massachusetts seemed to focus most on Hampshire County, whose residents had long complained that valuations of their land did not take sufficient account of their distance from markets. The board in Pennsylvania focused its sole district-wide increase for land (of a very substantial 50%) on Allegheny County, one of the western counties most at odds with Philadelphia in historic tax struggles. The board in Maryland targeted the city of Baltimore for an increase of 100% on houses, thereby doubling the Baltimore house values subject to the tax's fixed progressive rates—a significant shift of the state's quota onto the shoulders of the state's mercantile elite, soon after Baltimore's yellow fever epidemic of 1797 and amid a recession that specifically hit Atlantic markets and ports and "devastated the city's commercial life" in 1797-1800,[530] perhaps giving Baltimoreans a claim to diminished home values to which other Marylanders might not give credence.

In addition to all this, the political stakes of the boards' substantive decisions become strikingly clear in a series of public letters attacking key decisions of the federal board in South Carolina, in ways that resonated with the longstanding struggle between the rich coastal planters and the poor backcountry in that state. These were published in the Charleston *City Gazette*, a Republican newspaper. The leading figure in the drama was Robert Anderson, a backcountry political leader[531] who accepted a position as commissioner on the federal board for the third division,[532] covering the Washington and Pinckney districts[533] in the extreme northwest of the state. As noted earlier, the federal board adopted regulations for the assistant assessors in spring 1799 that gave

dates Nov. 6-9, 1815. The ten areas for which the board voted down one increase and then accepted a lesser increase were the districts numbered 3, 6, 8, 9, 10, 12, 15 (limited to Fayette only), 15 (limited to Greene only), 19 (limited to McKean and Potter only), and 23. The area for which the board voted down an increase and then kept the valuation the same was the district numbered 5. The areas that went three rounds were the districts numbered 11 (limited to Cumberland only) and 21; the latter was the one for which the area's own member initially sought a decrease.

530. Chew, *supra* note 333, at 596; *see also id*. at 588, 596-99.

531. JEROME J. NADELHAFT, THE DISORDERS OF WAR: THE REVOLUTION IN SOUTH CAROLINA 106-07, 200-01, 213 (1981).

532. SENATE EXECUTIVE JOURNAL, *supra* note 177, at 288.

533. *See* V&E Act, ch. 70, § 1, 1 Stat. 580, 583 (1798) (listing which districts the divisions of South Carolina cover).

per-acre values for several classes of land, defined by type and region; it is unclear whether the regulations (now lost except for brief excerpts) were binding on the assessors or mere guidance.[534] In any event, we know the regulations tracked the categories of land that appeared in the crude classification scheme for land taxation adopted by the South Carolina state legislature that had first been adopted in 1784 and was reenacted in 1797 and again in 1798,[535] yet the federal regulations differed in the values assigned to some of the categories—a divergence that one commissioner defended as being more in line with common knowledge of current market values.[536] Anderson had been absent from the meeting at which the rest of the federal board adopted these regulations, and when he learned of how the regulations generally imitated the state legislation while departing from it ad hoc, he resigned in protest.[537] As a backcountry politician, Anderson was extremely devoted to the state legislation crudely classifying land and assigning per-acre values to the classes, because the legislation was, from the poor backcountry's point of view, an enormous improvement over South Carolina's pre-1784 tradition of taxing land by the acre without any regard to value—a regressive scheme that had favored the rich plantations near the coast. Shifting toward crude classification had been a huge political victory for the backcountry,[538] and Anderson now feared that, if federal administrators followed the state's scheme but adopted different values, their action would undermine state authority and the backcountry's hard-won victories.

Anderson criticized the regulations in three public letters that appeared in the *Gazette* between August 1799 and February 1800. The letters argued the federal board should follow state law, for both political and legal reasons.

First, let's consider Anderson's political arguments. In his first letter, he denied that recent shifts in land's prices or incomes could justify a failure to emulate the state legislature's judgments on valuations. To "say that the produce of one part of the state command a better price at market, than the produce of an-

534. *See supra* notes 390-393 and accompanying text.

535. *See* Act of Dec. 21, 1798, 1798 S.C. Acts 3; Act of Dec. 16, 1797, 1797 S.C. Acts 114. On the advent of classification in 1784, see Becker, *supra* note 463, at 209-10.

536. Letter to the Editor, *supra* note 393, at [2].

537. For a narrative of events at the board, see Robert Anderson, Letter to the Editor, CITY GAZETTE (Charleston, S.C.), Aug. 23, 1799, at [2] [hereinafter First Anderson Letter] (letter dated May 15, 1799). For a statement by Anderson of the ultimatum he gave to the board (that their regulations must imitate state law exactly, or he would not serve), see Robert Anderson, Public Letter to Secretary Wolcott, CITY GAZETTE (Charleston, S.C.), Feb. 19, 1800, at [2] [hereinafter Third Anderson Letter] (letter dated Nov. 25, 1799).

538. NADELHAFT, *supra* note 531, at 126.

other, in justification of this innovation, *cannot* avail."[539] Even "admitting our system of ad valorem valuation [i.e., the South Carolina state statute] is not *perfect*, in the opinion of some of the people, and may need alterations: *who* is to be the judge? or by *whom* are these alterations to be made? I hope not by four or five individuals," that is, the members of the federal board, "*and* because they are officers of the general government."[540] It seems Anderson understood the determination of land values to be sufficiently subjective as to raise the question of the determining power's political legitimacy, and he found the state legislature more legitimate.

In response to Anderson's argument, one of the commissioners still serving on the federal board published a letter conceding that the state legislature's statutory values were "the best general rule for direction of the assessors, yet when attempted to be made a particular rule, applicable to all cases indiscriminately, they will operate great particular wrong and injustice," and he gave several examples of types of land for which the state legislature's assigned value was out of phase with common knowledge of market values, for example, "cotton lands on the sea-islands, or contiguous to the sea-shore, rated by the state [statute] at four dollars per acre; and which, it is well known, will bring from six to eight and ten dollars, or more."[541] The commissioner was expressly referring to the need for individual assistant assessors to exercise their own judgment (implying that the federal boards' regulations were mere guidance) and was presumably also defending the regulations' departures from the state legislatures' values on at least some classes of land. In response, Anderson wrote a second letter, pointing out that

> the judgments of man, individually, respecting the value of landed property, are as various as their principles and practices in the common occurrences of life; and the law of congress contemplates an equal tax upon the fair valuation of all the lands within the United States; which rational men, when embarked in the business, would endeavour to accomplish by the most rational means, agreeably to the laws and regulations of their respective states.[542]

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539. First Anderson Letter, *supra* note 537, at [2].

540. *Id.*

541. Letter to the Editor, CITY GAZETTE, *supra* note 186, at [2].

542. Second Anderson Letter, *supra* note 390, at [2]. Anderson added that for federal officials to follow state law was to act "as directed by the law of congress under which they act"—a claim that implicates Anderson's legal argument as to what the federal statute required with respect to state law, which I discuss below.

As to the commissioner's idea that individual assistant assessors should sometimes exercise judgment on their own, Anderson insisted that individual frontline officials "could not investigate any national question [i.e., statewide question, referring to South Carolina as a nation], so as to determine judiciously; which the legislature of the state could do, when actually embodied for that purpose."[543] The collective judgment of the state legislature was better informed and more deliberate than the judgment of any other body or person, which meant it ought to be followed.

Besides these political arguments for why the federal board should emulate the state legislation, Anderson also had legal arguments for why it had to do so. These legal arguments were not always clear, coherent, or consistent, but they were nonetheless interesting. His claims were essentially statutory, although they had constitutional overtones, most obviously sounding in states' rights—and possibly in nondelegation, though only by implication (i.e., that Congress *could not* have meant to empower federal administrators to make certain kinds of departures from state legislation).

Anderson's apparent view was that Congress had required the federal boards, *if* they chose to follow the general format of state law, to follow state law exactly. At the outset, let me note that this was not a plausible reading of the federal Valuation and Enumeration Act. The Act authorized the boards to make "regulations" as "shall appear suitable and necessary, for carrying this act into effect," with no mention of state law or records.[544] The Act's only mention of state tax law or records, as noted earlier, was to say that assistant assessors might have "reference" to state tax records, without specifying what role those records were to play in the assessment process, and certainly not to say that it was mandatory for any federal officials to follow them.[545]

But while Anderson's reading of the federal Valuation and Enumeration Act was not plausible, we might understand it as driven by constitutional concerns. In his first letter, he warned that South Carolinians would rightly question the idea "that four or five of their fellow-citizens, (because they are made federal officers)"—that is, the federal board—"shall assume the power of changing [i.e., not following] so *important* a state regulation, when so *solemnly* estab-

543. *Id*.

544. V&E Act, ch. 70, § 8, 1 Stat. 580, 585 (1798).

545. See *supra* note 373 and accompanying text. During the congressional debates in 1798, the only mentions of using state tax records in federal valuation were by Gallatin, who merely said federal officials could have "recourse to the [state] documents" and have "assistance" from them, 8 ANNALS OF CONG. 1848 (1798) (statement of Rep. Gallatin), and by another member who said "he could not see that any great advantage could be derived from a reference to the State assessments." 8 ANNALS OF CONG. 1853 (1798) (statement of Rep. Sewall).

lished, and when they are not *enjoined* nor were *encouraged* to do so, by the law of congress under which they act."[546] In writing this first letter, then, Anderson understood the Valuation and Enumeration Act to *allow* the federal board to imitate state law exactly. He added that his underlying concern was states' rights: "To me, (who *strongly* suspects that the principal powers and privileges of the state governments, will finally be absorbed and swallowed up by the general government) this *assumption* of power [by the federal board] would be *truly alarming* . . . ."[547] When the current commissioner responded to Anderson's first letter, he rightly pointed out that the Valuation and Enumeration Act did not require a federal board to follow state law: "[H]ad it been the intention of congress to adopt state regulations, as to the value of property, no further system of assessment would have been necessary, except a reference to the books of the state tax collectors."[548]

In response to the commissioner, Anderson in his second letter conceded that the federal Valuation and Enumeration Act "does not enforce the observance of state regulations, but recommends them," and he said "it would have been perfectly consistent with" the federal Act if the federal board had ignored the state legislation and simply left the federal assistant assessors to their discretion, that is, "rested the valuation of each particular tract, upon the opinion, and the oath of each individual assessor throughout the state."[549] But instead, said Anderson, the federal board "over-reached the [federal Valuation and Enumeration Act], by setting up and adopting a system of valuation, of the lands throughout the state," through the regulations it issued, "upon the same principle with the [state] legislative one, but changing the value of the lands in some particular parts of the state."[550] By Anderson's reading, the Valuation and Enumeration Act meant that, *if* a federal board adopted by regulation a format of valuations similar to state law, it then had to imitate state law exactly. This elaborate reading had no basis whatever in the Act's text. But again, Anderson's real concern may have been a constitutional one about states' rights (and possibly about delegation): at another point in the letter, he said that "I deny that four or five of the citizens of Carolina, or of any other country [i.e., any federal board in any state, referring to states as countries], possess any *constitutional*

546. First Anderson Letter, *supra* note 537, at [2].

547. *Id.*

548. Letter to the Editor, CITY GAZETTE, *supra* note 186, at [2].

549. Second Anderson Letter, *supra* note 390, at [2].

550. *Id.*

power to alter it [i.e., their state legislature's valuation of property], under the assessment act of Congress."[551]

In his third letter, Anderson reiterated his claim that it would've been lawful for the federal board to ignore state legislation entirely and leave all valuations to the discretion of individual federal assessors *but* maintained that it was unlawful for the board to adopt a scheme of land classification on the model of the state legislature's while departing from any of the state legislature's particular valuations.[552] Besides attributing this set of requirements (implausibly) to the Valuation and Enumeration Act itself, he also appeared to argue (though it was not clear) that, insofar as a federal statute left discretion to federal administrators operating in a state, the *state legislature* could force those federal administrators to exercise their discretion in a certain way—and that the South Carolina legislature had (implicitly) done this for the federal board, through its enactment of statutory values for different land classes (though these were expressly aimed only at state officials administering state taxes).[553] Thus, the board "proceeded contrary to the law of Congress, under which they acted, and with great want of respect to the laws and regulations of their own state."[554] This argument was adventurous, and I have seen no suggestion that it was adopted by any federal lawmaker or other federal official.

Besides this episode in South Carolina, some additional light on the politics of federal board decisions comes from Connecticut, where, after the federal board's revisions of individual districts became known, the New London *Bee*, a paper edited by the well-known Republican Charles Holt (who was prosecuted under the Sedition Act), made this criticism in September 1799:

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551. *Id.* (emphasis added).

552. Third Anderson Letter, *supra* note 537, at [2] ("[I]f the commissioners had chosen to set aside the [state] legislative valuation of the lands, and had rested the valuation of each particular tract upon the opinion, and oath, of the respective assessors throughout the state, they would have been perfectly justifiable . . . But they were pleased to adopt a different measure—to reject the legislative valuation in part, and to trust nothing to the assessors. In fact, they were pleased to adopt a system of their own, lessening the valuation of the lands in one part of the state, and leaving the other as fixed by the state legislature . . . .").

553. *Id.* (stating that "[u]nder the law of congress, to provide for the valuation of lands, &c., I presume the commissioners were amply authorized to adopt the legislative valuation, only deducting the lots, on which buildings were erected, not exceeding two acres; and as citizens of the state, they were bound to respect so important a state regulation; and not wantonly to trample it under foot"; and arguing that the federal act's reference to inquiring after property by "all other lawful ways and means" must refer to a state's statutory law on valuation).

554. *Id.*

> The Board of Commissioners, we understand, generally raised the assessments returned to them, adding to the returns from some towns 20 or 30 per cent. This power in the Commissioners of arbitrarily altering the valuation of lands from what is established by the laws of the state, is viewed by many as a palpable encroachment upon the sovereignty of the states, by the federal government, whose design, it is believed from various and authentic grounds, is to swallow up all the powers and rights of the state governments in a general consolidation. Robert Anderson, esq.[,] one of the Commissioners for South Carolina, after some proceedings of the Board, became so well convinced of this that he resigned his place . . . .[555]

The *Bee* was misinformed, at least in part. While the federal board in Connecticut had indeed increased certain districts' valuations by up to thirty percent, the baseline from which the board was making these increases was *not* the state-law valuation (as the *Bee* implied). Rather, it was the federal assistant assessors' first-instance valuations, which had been governed by the federal board's regulations. But in a larger sense, the *Bee* was correct that the federal board had deliberately refrained from following state law. Connecticut state legislation used a crude classification system of the same type as in South Carolina,[556] whereas Connecticut's federal board issued regulations for the federal frontline assessors that made no classification whatever and were unusually sanguine about using market values ad hoc—market values the Connecticut state legislation notoriously did *not* track.[557] Thus, the *Bee*'s editorial is another example of political disagreement about how the federal boards should exercise power. It also raises a constitutional warning similar to that of Anderson's letters, about "consolidation" of the states, and possibly an implicit concern about delegation (in criticizing the administrators for "arbitrarily" exercising power).

As one other example of intrastate political controversy over federal board decisions, we may consider an episode from Delaware under the federal direct tax of 1815, which had a very similar administrative structure to the 1798 tax.[558] The background politics require a bit of explanation. Whereas Delaware had never experienced the usual division of commercial versus frontier sectors of the 1780s, by the 1810s the state was dividing along a new and modern type of fault line, between rural, agrarian polities in the lower counties of Kent and

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555. *Federal Land-Tax*, BEE (New London, Conn.), Sept. 11, 1799, at [3], [3].

556. *See supra* note 291 and accompanying text.

557. *See supra* notes 399, 403 and accompanying text.

558. *See infra* Section V.D.2.

Sussex (dominated by the Federalist party) and urbanizing, industrializing polities with growing immigrant populations in the northern county of New Castle (dominated by the Republicans).[559] Since the end of the crisis of the 1780s, state taxes had been low, and although New Castle's 38% share of the longstanding state assessment was perceived to be increasingly outstripped by its growing share of the state's real-estate value, taxes weren't high enough for people to care enough to try to amend it.[560] That situation changed with the War of 1812, which brought tax increases, both federal and state. In 1815, the state legislature, dominated by an alliance between Federalist Kent and Sussex, apportioned property taxes so as to increase New Castle's share to 62%, with the other two counties at only 19% each.[561] Meanwhile, the prerevision valuation totals for real estate and enslaved persons under Congress's new wartime federal direct tax had likewise been 62% for New Castle and 19% for the other two[562] (indeed it appears the state legislature based its reapportionment on the prerevision federal valuations). However, as the three-member federal board for Delaware under the 1815 federal direct tax made its revisions, a different alliance formed than had operated in the state legislature: in the words of angry Kent political leaders, the federal-board members "of New-Castle and Sussex joining together against the [member] of Kent . . . greatly oppressed Kent county in laying upon her more than her share of the tax."[563] In particular, the federal board meant to revise the valuations so that New Castle had only 40% and Sussex 25%—but Kent 34%, far higher than its share of the state legislature's valuation.[564] Of course, amid the inevitable uncertainty of mass real-

559. MUNROE, *supra* note 504, at 206-07, 213, 220, 225, 233-41.

560. *See* JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF DELAWARE, AT A SESSION OF THE GENERAL ASSEMBLY, COMMENCED AND HELD AT DOVER, ON TUESDAY THE SECOND DAY OF JANUARY, IN THE YEAR OF OUR LORD, ONE THOUSAND EIGHT HUNDRED AND SIXTEEN 116-17 (Wilmington, Del., M. Bradford 1816) [hereinafter DEL. HOUSE JOURNAL].

561. Calculations are based on Letter to the Editor, WKLY. AURORA (Phila.), May 15, 1816, at 114 [sic] (attributed to "a Citizen of New Castle County").

562. DEL. HOUSE JOURNAL, *supra* note 560, at 117-18. These proportions technically refer to the postrevision valuation numbers, but it is clear (given the board's technical error to be explained below) that these are actually the prerevision numbers, which the board meant to revise but failed to (making the error of doing its adjustment only on the eventual tax liabilities, not on the valuations as it was supposed to).

563. H.M. Ridgely, Robert Dill & J. Gordon Brinckle, *To the Federalists of the State of Delaware*, DEL. PATRIOT & EASTERN SHORE ADVERTISER (Wilmington), Sept. 17, 1816, at [1], [1].

564. DEL. HOUSE JOURNAL, *supra* note 560, at 117-18. These proportions technically refer to the tax liabilities, but they are what the board meant to be the postrevision numbers, and its failure to lay out these proportions at the valuation-revision phase (rather than at the later stage of calculating tax liability) is what got it into legal trouble.

estate valuation, residents of New Castle believed it was the state legislature's apportionment that was oppressive, to which the federal board's revision was a welcome remedy. In the words of one pro-New Castle newspaper essay, "there never was a more fallacious and unfounded valuation of property" than the state legislative valuation: "The amount of property in New Castle county has been most unfairly swelled, and in the other two counties as unfairly diminished, for the most unjust and designing purposes"; in particular, the legislature had been wrong about the relative productivity of land in the three counties and had attributed too much additional value to the fact that "the air and water of New Castle county are more pure and healthful than in the other counties."[565] Given this perceived oppression, officials in New Castle had refused to collect the state tax![566]

Yet the federal-board members, in dealing a victory to New Castle, made a technical blunder: rather than adjust the valuations themselves, as the federal statute of 1815 required, they made their revisions only to the resulting tax liabilities of the counties[567]—a legal irregularity that gave Kent and Sussex an opening to petition Congress to intervene.[568] Because Federalist Kent and Sussex outnumbered New Castle, they were able to elect Federalist allies to both the state's U.S. Senate seats and to both its at-large U.S. House seats. Thus, Delaware's all-Federalist congressional delegation beseeched Congress to amend the 1815 direct-tax legislation to force a rollback of New Castle's victory in the board. Some federal lawmakers objected (understandably) that the error was merely formal and could be corrected by the administrators themselves,[569] but Congress ultimately passed an act to force a do-over of the federal valuation,[570] which one imagines allowed for a new level of scrutiny and political pressure on the "swing" board member from Sussex. Congress's intervention,

565. Letter to the Editor, *supra* note 561, at 114.

566. *Id.*

567. For a description of the error, see DEL. HOUSE JOURNAL, *supra* note 560, at 117-18. Instead of revising the valuations through section 20 of the act and then calculating the tax, the board left the valuations as they were and purported to make a valuation-based adjustment in how the tax itself was calculated, through section 21, which the statute clearly did not allow. *See* Act of Jan. 9, 1815, ch. 21, §§ 20-21, 3 Stat. 164, 171-72.

568. For the legislature's petition to Congress, see DEL. HOUSE JOURNAL, *supra* note 560, at 178-80, 214.

569. 29 ANNALS OF CONG. 317-18, 1412-13 (1816); *New Apportionment*, DEL. GAZETTE (Wilmington), Apr. 25, 1816, at [3], [3].

570. Act of Apr. 26, 1816, ch. 82, § 19, 3 Stat. 302, 305-06 (telling the board to revise the valuations "as shall render the valuation of the said counties relatively equal according to the present actual ready money value of the property assessed and contained in the said lists of valuation").

groused the pro-New Castle newspaper essay, was "a political measure, artfully calculated to secure to the faction which now rules Delaware, a perpetuity in power, by heaping upon New Castle the burden of taxation and thereby relieving the other two counties, whose interest it becomes to unite upon this point."[571]

IV. NO JUDICIAL REVIEW OF THE FEDERAL BOARDS' REVISIONS

The federal boards' district-wide mass revisions—laden with discretion and inevitably informed by politics—were final, in that no judicial review was available of those revisions, nor of any determinations that officials under the direct tax of 1798 made about the value of real estate. To be sure, after the assistant assessors made their *initial* valuations of real estate, owners had the right to make "appeals" of those valuations to the principal assessor for the district, who could decide the appeals "in a summary way, according to law and right," deciding "whether the valuation complained of be, or be not, in a just relation or proportion to other valuations in the same assessment district."[572] But this was an appeal to an administrative official, not to a court. And the disposition of all such appeals occurred *before* the federal board covering the state received the valuations from each district and made district-wide mass revisions.[573] After that stage, the legislation mentioned no review, administrative or judicial. Nor did either of the direct-tax acts (the Valuation and Enumeration Act and Lay and Collect Act) say anything else about judicial review, even though Congress was quite capable of expressly providing for judicial review of tax administration if it wanted to.[574] Furthermore, it does not appear that there were any other, nonstatutory means of obtaining judicial review of valuation decisions of the assistant assessors, principal assessors, or boards of commissioners. It was possible to obtain nonstatutory judicial review on more categorical questions—like whether one's property was taxable at all—but not of assessors' determinations of what real estate was "worth in money," nor of the federal boards' "just and equitable" adjustments of those determinations.

Below, I consider the various potential avenues for judicial review of administrative action that existed circa 1798-1815 (to encompass not only the 1798 tax but also its sequels in the War of 1812), and I find that none of these ave-

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571. Letter to the Editor, *supra* note 561, at 114.

572. V&E Act, ch. 70, § 19, 1 Stat. 580, 588 (1798).

573. *Id.* § 22, 1 Stat. at 589.

574. For example, see the express provision for judicial review with regard to the carriage tax, Act of May 28, 1796, ch. 37, § 9, 1 Stat. 478, 481.

nues was available to challenge the tax valuation of real estate.[575] Some of the sources will be English cases, on which American lawyers often depended in the 1790s, given that home-grown American law reporting was barely getting started at that time.

A. Equity?

The regime of judicial review of federal agency action that we have today under the Administrative Procedure Act originates largely from judge-made equitable remedies (especially injunctive ones) fashioned in the late nineteenth and early twentieth centuries.[576] But before that time, equity had little role to play in review of English or American government action.[577] So there is little reason to think it would have played any role in reviewing federal tax matters circa 1798-1815, and it apparently did not.[578]

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575. Hamburger briefly addresses this same question with respect to judicial review of federal direct-tax adjudications (though not of rulemakings) and finds, similarly to me, that although judicial review was available as to "whether a particular piece of . . . property was taxable under a statute," "assessments generally could not easily be challenged in the courts for overstating the value of taxable property," meaning the direct tax "may thus seem a precedent, at least in tax matters, for a type of binding administrative adjudication." HAMBURGER, *supra* note 40, at 209-10.

576. *See* MASHAW, *supra* note 40, at 245-50, 274-75; John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-30 (1998); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946-59 (2011).

577. James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1278-79, 1324-25 (2020).

578. In South Carolina, where assessment and collection of the 1798 tax were delayed years later than in the other states, see *infra* notes 683-690 and accompanying text, William Smith, a former member of Congress, sought an injunction in U.S. district court in late 1806 or early 1807 against the federal-revenue supervisor covering the state, "for the purpose of stopping all proceedings in the collection of the direct tax." Letter from Albert Gallatin, Treasury Sec'y, to Thomas Jefferson, President (Jan. 6, 1807), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/99-01-02-4815 [https://perma.cc/93SB-SFG8]. Consistent with the conventional understanding that injunctions were not a means to constrain government administration, Secretary Gallatin wrote to President Jefferson that "[t]his is quite a new proceeding" and noted "the novelty of the attempt." *Id.* Jefferson replied that Smith's "application" for an injunction was "the most extraordinary one I have ever known" and that the tax was not to "be subject to the dilatory process of the courts." Letter from Thomas Jefferson, President, to Albert Gallatin, Treasury Sec'y, (Jan. 7, 1807), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/99-01-02-4821 [https://perma.cc/SY26-43TQ]. Jefferson added that "it is impossible that [J]udge Bee [the district judge] should sustain the injunction" and that, if he did, the "remedies" would include "impeachment." *Id.* It appears the judge never granted the injunction.

B. Writ of Error?

The writ of error was a device commonly used by courts in England and America to review the decisions of other courts.[579] But administrative bodies were not amenable to review by writ of error.[580] This was certainly true of the English land tax, which was enacted by Parliament each year from the late 1600s through the 1700s. The English tax was analogous to the U.S. federal direct tax in that every English county had, for administering the tax, its own locally embedded yet nationally appointed board of commissioners, plus a corps of frontline assessors.[581] The "safeguard" of the writ of error "was not one to which the taxpayer could have recourse in relation to proceedings of the local tax tribunals," as "none of the tax tribunals was a court of common law."[582]

C. Certiorari?

The writ of certiorari was a device whereby the English Court of King's Bench, in its role as supervisor of inferior jurisdictions, reviewed the proceedings of other decisionmaking bodies, many of which we would consider administrative.[583] The King's Bench could use certiorari to quash the proceedings of another body if that body acted in excess of its jurisdiction, made an error "apparent on the face of the record" of its action (usually a legal error, often of statutory interpretation), or acted contrary to natural justice (as by allowing a decisionmaker with a pecuniary interest in the matter to decide it).[584] Certiora-

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Doing so would have caused a furor, which would have left some trace in the historiography, of which I see none. A search of Readex's database *America's Historical Newspapers* for the term "direct tax" covering South Carolina from December 1, 1806, through December 1, 1807, turns up 108 items, including numerous announcements throughout the period of upcoming land sales to forcibly collect the direct tax, for example, *Direct Tax, Collection District No. 13*, *in* S.C. STATE GAZETTE (Columbia, S.C.), Feb. 21, 1807, at [1], but no items about such collection being enjoined.

579. JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 146-48 (5th ed. 2019).

580. *Id.* at 153-54; CHANTAL STEBBINGS, LEGAL FOUNDATIONS OF TRIBUNALS IN NINETEENTH-CENTURY ENGLAND 251-52 (2006).

581. J.V. Beckett, *Land Tax Administration at the Local Level, 1693-1798*, *in* LAND AND PROPERTY: THE ENGLISH LAND TAX, 1692-1832, at 161 (Michael Turner & Dennis Mills eds., 1986).

582. CHANTAL STEBBINGS, THE VICTORIAN TAXPAYER AND THE LAW: A STUDY IN CONSTITUTIONAL CONFLICT 37 (2009).

583. *See* STEBBINGS, *supra* note 580, at 253-64; Pfander & Wentzel, *supra* note 577, at 1277-79, 1292-1305.

584. STEBBINGS, *supra* note 580, at 259-61; BAKER, *supra* note 579, at 160.

ri applied to decisions that were discretionary in nature, whereas ministerial functions were covered by mandamus (discussed below).[585]

Had certiorari been employed to review the decisions of direct-tax officials, it could only have been employed by the *federal* courts—the state courts could not possibly have claimed to occupy a position with respect to federal administrative bodies as the King's Bench occupied with respect to the inferior English jurisdictions that it supervised. And yet, in fact, the federal courts never used certiorari to review federal administrative action.[586]

Nonetheless, we might still ask whether a reasonable federal lawmaker in 1798 would have predicted (contrary to subsequent events) that federal courts *would* employ certiorari to review the decisions of federal direct-tax officials. The answer is no. The reason is that, in England, the King's Bench did not feel it could use certiorari to review the decisions of the land-tax officials, because certiorari required the body under review to be understood as a "court" of some kind. According to Chantal Stebbings, a historian of English administrative law and taxation, "[s]ince the tax tribunals were not, in juridical terms, courts at all, the application of the writ [of certiorari] to the tax tribunals was not legally possible in 1837," that is, in the years leading up to 1837.[587] By contrast, certiorari *was* employed to review the decisions that justices of the peace sitting at Quarter Sessions made to confirm parish officials' laying of local taxes for support of the poor, but that is because the justices of the peace were more court-like—"legal officers with predominantly judicial duties."[588] Federal direct-tax

585. Pfander & Wentzel, *supra* note 577, at 1301; BAKER, *supra* note 579, at 160.

586. Degge v. Hitchcock, 229 U.S. 162, 169-70 (1913) ("This case is the first instance, so far as we can find, in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States Government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers."); *see also* Merrill, *supra* note 576, at 949; Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 801-04 (1986).

587. STEBBINGS, *supra* note 582, at 140. Only in the latter half of the 1800s was certiorari applied to land-tax officials. *Id.* at 142-44. On the similar trajectory from initial narrowness to later expansion for non-court-like administrators more generally, see STEBBINGS, *supra* note 580, at 253-64; and BAKER, *supra* note 579, at 160.

588. STEBBINGS, *supra* note 582, at 143. The amenability of Quarter Sessions to certiorari by reason of the judicial status of the justices of the peace—combined with the frequent willingness of the justices of the peace to voluntarily expand the aspects of their decisions open to King's Bench review by giving more information on the face of the record than they were required to give (a mechanism known as a "special case")—meant that a thick case law developed in the King's Bench on the administration of local taxes for the poor. *See* Kevin Costello, *"More Equitable than the Judgment of the Justices of the Peace": The King's Bench and the Poor Law, 1630-1800*, 35 J. LEGAL HIST. 3 (2014).

officials had no duties besides taxation and were far more analogous to English land-tax commissioners than to justices of the peace.

Nor does it appear that the courts of the colonies or states gave observers in circa 1798-1815 reason to think American courts would somehow depart from English practice and expand certiorari to nonjudicial tax officials' decisions. Robert Becker's in-depth study of tax controversies in each of the early independent states never mentions judicial review by certiorari or anything like it.[589] A recent study focusing partly on certiorari turns up five American state cases applying certiorari to administrators prior to 1820, but most of these pertain to court-like bodies, and none to taxation.[590] While American state courts did eventually use certiorari expansively to review actions of *state* administrators even in tax matters, it appears that, at least in the early years, they did this for categorical legal questions, not for judgments of property value. Thus, the New York Supreme Court in 1823 reviewed administrators' assessment of property owners' benefits from construction of a sewer, under a statutory "just and equitable" standard, but the court only decided *what category of persons* could be assessed, while conceding that the administrators had unreviewable discretion to decide the quantum of the various persons' benefits.[591]

D. Mandamus?

The writ of mandamus was a device that the Court of King's Bench could use to order any official, including a nonjudicial administrator, to perform a ministerial (nondiscretionary) duty.[592] Unlike certiorari, mandamus could be applied to English land-tax commissioners, as in a 1786 case ordering one board of commissioners to elect a clerk.[593] And unlike certiorari, mandamus could be employed by federal courts against federal officials, as famously recognized in *Marbury v. Madison*.[594] Yet mandamus could only compel adminis-

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589. BECKER, *supra* note 463.

590. Pfander & Wentzel, *supra* note 577, at 1311-14 (*citing* Commonwealth v. Coombs, 2 Mass. (1 Tyng) 489 (1807) (court of sessions); Commonwealth v. Peters, 2 Mass. (1 Tyng) 125 (1806) (court of sessions); Lawton v. Comm'rs of Highways, 2 Cai. 179 (N.Y. Sup. Ct. 1804) (court of common pleas); State v. Justices of Middlesex Cty., 1 N.J.L. 244, 255 (1794) (board of justices and freeholders)). The one case not directed at a court is *State v. Corp. of New Brunswick*, 1 N.J.L. 393 (1795) (holding that certiorari lies to decide the validity of a by-law of a municipal corporation).

591. Le Roy v. City of New York, 20 Johns. 430, 438-39 (N.Y. Sup. Ct. 1823).

592. Pfander & Wentzel, *supra* note 577, at 1301.

593. STEBBINGS, *supra* note 580, at 268.

594. 5 U.S. 137 (1803).

trative action, not serve as a vehicle to review action already taken.[595] Most importantly, the King's Bench had found administrative decisions about the distribution of the land-tax burden to be discretionary and thus beyond the reach of mandamus, in contrast to (say) officials' general refusal to assess the tax *at all*, which was subject to mandamus. In *Butler v. Cobbet*, concerning the land-tax commissioners, Chief Justice Holt explained that "a mandamus was not a proper remedy for an unequal taxation; but the proper remedy is by an appeal to the commissioners," that is, an administrative appeal created by act of parliament. Holt added that "perhaps if the assessors refuse to tax any part" of a taxable jurisdiction, then "a mandamus lies."[596] And Justice Powell said "it was usual to grant *mandamus's* to overseers [of the poor in a parish], when they will make no taxation; but not upon suggestion that they intend to make an unequal tax."[597] *Butler* was cited in American litigation prior to 1798.[598] Similarly, when asked to review the decisions of justices of the peace or parish officials in laying local taxes for the poor, the King's Bench made a similar distinction between officials' general refusal to impose a tax at all (subject to mandamus) and the equality or inequality of officials' distribution of the tax (not subject to it).[599]

E. Judicial Review Through Enforcement by Distress, or After?

The Lay and Collect Act of 1798 provided that, if taxes were not paid by a certain date, the collector was "to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent."[600] "Distress and sale" was a remedy whereby certain creditors could seize personal property of their debtors to pay a debt. Governments commonly used the remedy in

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595. Pfander & Wentzel, *supra* note 577, at 1299.

596. Butler v. Cobbet (1709) 88 Eng. Rep. 1023, 1023 (KB).

597. *Id.*

598. State v. Justices of Middlesex, 1 N.J.L. 244, 250 (1794) (argument of counsel).

599. Rex v. Canterbury (1769) 98 Eng. Rep. 195, 196-97 (KB); King and the Inhabitants of Barnstable (1728) 94 Eng. Rep. 95, 95-96 (KB).

600. Lay and Collect Act, ch. 75, § 9, 1 Stat. 597, 600 (1798); *see also* § 10, 1 Stat. at 600 ("[A]ll goods, chattels and personal effects whatever, being or remaining on lands, subject to the said tax; and all grass, or produce of farms, standing and growing thereon, shall and may be taken and sold for the payment of the said tax, under such regulations as have been or may be made for the sale of goods or effects taken and sold by distress."). It is unclear what the phrase "such regulations" refers to, whether Treasury Department regulations or the law of the state where the distress occurred. On the idea of state law applying, see *infra* notes 604-605, 616-618 and accompanying text.

their capacity as creditors for taxes. In English private law, distress could be conducted by the creditor or creditor's agent, and the sale by a sheriff, without any judicial process.[601] Under the English land tax in particular, "the distress and sale was not authorized by any judicial order or law suit, but by a precept from the local commissioners," that is, the nationally appointed officials in charge of administering the land tax in each English county.[602] The federal legislation of 1798 did not expressly say whether federal direct-tax officials, like English private creditors or English land-tax commissioners, could authorize distress and sale unilaterally, though one provision of the legislation appears to contemplate that they could.[603]

But even if we assume an implicit understanding that federal collectors were to seek authorization for distress and sale through any state-court judicial process that existed under the law of the state where the distress occurred,[604] it would be surprising if that process provided an avenue for taxpayers to get judicial review of any aspect of their tax liability (to say nothing of the valuation of their property), as it was common—if not universal—for the states to allow tax-enforcing officials to distrain and sell goods either with no judicial process or through a summary, ex parte process that didn't call for the taxpayer's participation.[605]

There *was* a well-known nonstatutory avenue for judicial review *after* the tax collector distrained the taxpayer's goods: a suit for damages by the taxpayer at common law, against the collector, for taking the goods unlawfully (normally in state court, even against a federal defendant). There were a few possible forms of action, including trespass.[606] But as documented by Roger Kirst, in the literature's most extensive treatment of these actions, they were limited in a way that kept them from touching official judgments of value. In the English

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601. JAMES BRADBY, A TREATISE ON THE LAW OF DISTRESSES 1, 216-30 (N.Y.C., Isaac Riley 1808).

602. Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1316 (1978). For more background, see *id*. at 1315, 1320.

603. Lay and Collect Act § 19, 1 Stat. at 603 ("[N]o *collector* shall receive the said allowance, for, or in respect to any sum for which a *warrant of distress shall have been issued by him*." (emphasis added)).

604. Note the statute's cryptic reference to "regulations." *See supra* note 600.

605. *See, e.g.*, Gladney v. Deavors, 11 Ga. 79, 82-83 (1852); Bergen v. Clarkson, 6 N.J.L. 352, 365 (1796); Charge of Judge Hopkinson, Livingston's Lessee v. Moore (1833), *in* 7 RICHARD PETERS, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES 653, 669 (Phila., Desilver Jr. & Thomas 1833) [hereinafter Charge of Judge Hopkinson]. For a suggestion of no prior judicial process whatsoever, see, for example, *Harris v. Wood*, 22 Ky. (6 T.B. Mon.) 641, 643 (1828).

606. Kirst, *supra* note 602, at 1319-20.

cases, explains Kirst, "[a]n official was not liable for an error in exercising jurisdiction actually granted, but the injured citizen could win if the official had exceeded his jurisdiction."[607] In particular, the plaintiff could prevail if the officials had taxed an object that wasn't legally taxable at all, but "the common law actions were not available to challenge the *amount* of an assessment or tax"; the doctrine "did not make the officials liable for an erroneous assessment [i.e., an assessment of an erroneous amount], because such a mistake would have been an error in exercising a granted jurisdiction and not an attempt to exercise jurisdiction beyond that granted."[608] Kirst finds that this doctrine was generally adopted in American courts.[609] And I find, in reading the twenty-nine cases that he cites across many American jurisdictions over the period 1803-36, that none involved judicial review of the valuation of taxable objects (nor even, say, choice of methods of valuation), as distinct from more categorical issues like whether the object was taxable at all.[610]

As an illustration, consider an action in the New York Supreme Court involving the 1798 federal direct tax, decided in 1803.[611] Federal officials categorized a certain theater as a "house," apparently believing someone lived in it, and subjected it to the direct tax's rate for houses. In fact, nobody lived there, meaning the officials should have taxed it at the rate for "land," which was lower. In a trespass action by the taxpayer against the collector for unlawful distress, the question was whether miscategorizing the property and subjecting it to the wrong tax rate was in excess of jurisdiction, or a mere mistake within jurisdiction. The court split 3-2 on this question, in favor of the collector, with Justice James Kent giving the most extensive opinion, finding that

> [the] assessors had jurisdiction of the subject matter: they were bound to assess that building in the one view or the other [as a house or as land], and in the exercise of that duty, it is alleged and admitted that they did not exercise their judgment duly. But this is very different from

607. *Id.* at 1318.

608. *Id.* at 1319-20 (emphasis added).

609. *Id.* at 1329-31.

610. For the cited cases, see *id.* at 1330-31 nn.236-45. My reading is consistent with Kirst's statement that "[o]ther reported cases from many states show that the tax collector was generally subject to common law liability if the taxpayer alleged no tax had been owed." *Id.* at 1331 n.245. Kirst finds departures from these limits on review later on, but only in 1836, *id.* at 1332-33, and even at that time, review was had only for incorrect categorization of the taxable object (subjecting it to the wrong tax rate), not for an error of valuation.

611. Henderson v. Brown, 1 Cai. 92 (N.Y. Sup. Ct. 1803).

> the case in which they were not to exercise any judgment at all over the subject.[612]

If assessing the wrong tax was viewed as a mere error of judgment within the officials' jurisdiction, it is evident that a supposed error in valuation of property would've been even more clearly insulated from judicial scrutiny. The former was a borderline case in favor of the collector (by vote of 3-2), but the latter would presumably be an easy case in his favor.

F. Judicial Review Through Enforcement by Sale of Land, or After?

Although English common law did not allow the crown to seize taxpayers' land for delinquent taxes,[613] the government could acquire that power by statute. And indeed, Congress in the Lay and Collect Act of 1798 required the federal collectors, in the event that the tax on real estate remained unpaid for one year and could not be collected through distress of goods, "to sell at public sale . . . either the dwelling house, or so much of the tract of land, (as the case may be) as may be necessary to satisfy the taxes due thereon."[614] The Act made no reference to any judicial process prior to the sale. In a case before the federal circuit court for Tennessee in 1813, involving the validity of a title acquired by a sale to enforce the 1798 federal direct tax, the judge referred to a direct-tax enforcement sale as "a proceeding by which a man's property is to be taken from him *without the interference of a court*."[615] Even if we assume that the Lay and Collect Act was somehow understood to require federal officials to follow whatever process was required for tax-enforcement sales by the state in which the land was located, there would often still be no prior judicial process. In the early republic, it was common if not universal for state law to allow officials to sell land to enforce taxes without prior judicial authorization, or through a summary, ex parte process. This is confirmed by judicial opinions from multiple states during the early republic, or looking back on the early republic.[616] It

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612. *Id.* at 102-03 (opinion of Kent, J.).

613. ROBERT S. BLACKWELL, A PRACTICAL TREATISE ON THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES ASSESSED THEREON 4-5, 45-46 (Chi., D.B. Cooke & Co. 1855).

614. Lay and Collect Act, ch. 75, § 13, 1 Stat. 597, 601 (1798).

615. Rule v. Parker, 20 F. Cas. 1336, 1336 (C.C.D. Tenn. 1813), *aff'd*, 13 U.S. (9 Cranch) 64 (1815) (emphasis added).

616. For absence of prior judicial authorization, see Charge of Judge Hopkinson, *supra* note 605, at 669; *Johnston v. Thompson*, 9 Va. (5 Call) 248, 255 (1804) (argument of counsel); and *id.* at 259 (opinion of Tucker, J.). For ex parte process, see *M'Carroll's Lessee v. Weeks*, 6 Tenn. (Cooke) 246, 254-55 (1814).

is also confirmed by what appears to be the earliest treatise on tax sales of land, a 750-page tome published by Chicago lawyer Robert S. Blackwell in 1855. Blackwell argued vociferously that the Constitution should be read to require full judicial process prior to any tax sale, yet he had no cases to cite in favor of his reading of the Constitution, and he acknowledged contrary cases that invoked the "immemorial usage" of *not* affording such process before such sales.[617] Given his agenda, Blackwell surely would have cited any source he could find to deny this immemorial usage, but he had none. Consistent with this, an opinion of the Illinois Supreme Court in 1845 referred to that state's legislative provision "requiring a judgment before the delinquent tax payer can be divested of the title to his land" as "new" and "novel," adopted by only one other state out of the twenty the court surveyed.[618]

That said, it was possible to obtain a kind of judicial review of taxation *after* a tax sale had occurred, in litigation (usually in state court) between competing claimants to the land, in which one party asserted title premised on a tax sale, while the other contested that title. If officials had not acted according to law (at least on certain points that were reviewable, such as failure to conform to procedures about publicizing the tax sale), then the title was not valid.[619] This kind of litigation did not directly touch the taxing government or its officials, but we might imagine that, if officials violated the law in a way that undermined tax titles, and such violations became notorious, this would reduce the prices the government could command in tax sales.

However, the issues subject to judicial review in tax title litigation apparently did not include official judgments about the valuation of property. Again, consider the 1855 treatise by Blackwell, which was extremely skeptical of tax titles in general. Blackwell asserted that "to make a complete and perfect list, the land must be valued in the manner and upon the principles prescribed by law."[620] Yet the cases Blackwell cited all involved official violations that turned on relatively objective statutory requirements, not discretionary judgments of the kind that federal assessors made in individual valuations or that federal

617. BLACKWELL, *supra* note 613, at 37-41; *see also id.* at 217 ("[I]n *some* of the states, the power to sell land for the non-payment of taxes, does not arise until the delinquency of the owner has been judicially ascertained." (emphasis added)).

618. Rhinehart v. Schuyler, 7 Ill. (2 Gilm.) 473, 522 (1845).

619. For two U.S. Supreme Court cases along these lines involving the 1798 federal direct tax, see *Williams v. Peyton's Lessee*, 17 U.S. (4 Cranch) 77, 78 (1819); and *Parker v. Rule's Lessee*, 13 U.S. (9 Cranch) 64, 66 (1815). For a state-court case involving a tax sale under the federal direct tax of 1815, see *Eastman v. Little*, 5 N.H. 290, 292-93 (1830).

620. BLACKWELL, *supra* note 613, at 178.

boards made in district-wide revisions of valuations.[621] The violations in Blackwell's cases concerned officials' failure to follow a statutory procedure requiring the assessor to consult two nearby property owners regarding valuation,[622] failure to follow the statutory requirement to value improvements as part of the land,[623] or failure to write the statutorily-required descriptions and categorizations of land *at all*.[624] Blackwell said, "It may be laid down as a general rule, that a valuation being essential, the statute must be strictly pursued in making and returning it, or the proceedings based upon it will be illegal and void."[625] But the cases he cited (dating to 1807 and 1823) were about objective, categorical problems: officials' failure to make the statutorily-required itemization of the taxpayer's property,[626] and the officials' violation of the statute's requirement that taxes for the state, county, and town be assessed separately.[627] The only case cited by Blackwell that even remotely approaches a question about the substance of valuation was a Massachusetts high-court case of 1824 holding that parish assessors violated the statute when, instead of doing the valuations themselves, they simply submitted a "duplicate" of prior valuations by a different set of officials (the town assessors) instead of basing the valuations on their own opinions.[628]

G. Conclusion: Statutes as the Sole Source of Review of Valuations

Overall, it appears that circa 1798-1815 there was no nonstatutory means of obtaining judicial review of real-estate valuation, including the mass revisions of valuations made by the federal boards. Review of valuation, whether administrative or judicial, had to come from statutes. This is confirmed by Secretary Wolcott's 1796 report on the states' tax systems, in which he frequently *did* cite

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621. I omit from this discussion Blackwell's citations regarding constitutional challenges claiming that a state statute's method or definition of valuation failed to conform to the state constitution's requirement that land be taxed by value or be taxed equally or uniformly.

622. BLACKWELL, *supra* note 613, at 178.

623. *Id.*

624. *Id.* at 180-83. This passage in Blackwell is not entirely clear, but the key cases in the line he is citing show there was a complete failure on the part of officials to make the required descriptions and categorizations. *See* Graves v. Bruen, 11 Ill. 431, 439-41 (1849); Tibbetts v. Job, 11 Ill. 453, 460-61 (1849).

625. BLACKWELL, *supra* note 613, at 183.

626. Thurston v. Little, 3 Mass. (1 Tyng) 429, 432-33 (1807).

627. Thayer v. Stearns, 18 Mass. (1 Pick.) 482, 490-91 (1823).

628. Granger v. Parsons, 19 Mass. (2 Pick.) 392, 418 (1824) (cited in BLACKWELL, *supra* note 613, at 183).

means for taxpayers to contest the substance of their valuations—all of which turn out to be created by state legislation, not the common law or any sort of judge-made law. For six of the states, Wolcott's report referred to a means of seeking review of valuations that was obviously statutory and administrative, in that review was said to occur before an administrative body or official, or before a body composed at least in part of administrative officials.[629] For four of the states, the report referred to a means of seeking review of valuations before a judicial body, but it turns out that each such body's power to review valuations was created by state legislation.[630] (For the remaining six states, the report mentioned no means of review, judicial or administrative.)

The absence of nonstatutory judicial review indicates that taxpayers seeking to contest their federal direct-tax valuations could take advantage of the administrative appeals to the principal assessors provided for by Congress—and that was all. There would have been no judicial review of the substance of the feder-

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629. These were:

- Vermont, WOLCOTT REPORT, *supra* note 82, at 418-19 (occurring before a body of justices of the peace and two town selectmen);
- Connecticut, *id.* at 423-24 (occurring before a body of two justices of the peace and three town selectmen);
- New Jersey, *id.* at 426-27 (occurring before a body of three or more judicious freeholders per township; on this body, see N.J. CONST. of 1776, art. XIV);
- Pennsylvania, *id.* at 427-28 (occurring before county commissioners);
- Delaware, *id.* at 429 (occurring before commissioners of the levy court and court of appeals for the county, which was a single body, *see* Act of Jan. 29, 1791 § 1, 1791 Del. Laws 1014, 1014-15, whose power to remedy tax complaints was created by statute, *see* Act of Feb. 9, 1796 § 28, 1796 Del. Laws 1247, 1260-61); and
- Maryland, *id.* at 430 (occurring before commissioners of the tax for the county).

630. These were:

- New Hampshire, *id.* at 419 (occurring before a court of sessions of the peace for the county, pursuant to Act of Feb. 8, 1791, *in* CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE 213, 215 (Dover, Samuel Bragg 1805));
- Massachusetts, *id.* at 421 (occurring before a court of general sessions of the peace for the county, pursuant to Act of Feb. 20, 1786 § 10, *in* 1 THE GENERAL LAWS OF MASSACHUSETTS 217, 222-23 (Bos., Wells & Lilly, Cummings & Hilliard 1823); *see also* Osborn v. Inhabitants of Danvers, 23 Mass. (6 Pick.) 98, 100 (1828) (referring to this review as a "new right" created by the Act));
- Rhode Island, *id.* at 422-23 (occurring before a court of general sessions of the peace of the county, pursuant to An Act Regulating the Assessing and Collecting of Taxes § 3, *in* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 407, 408-09 (Providence, Carter & Wilkinson 1798)); and
- Kentucky, *id.* at 433 (occurring before county courts, pursuant to Act of Dec. 21, 1793 § 6, 1793 Ky. Acts 19, 20).

al boards' revisions to valuations, which were subsequent to those administrative appeals.

V. CONSTITUTIONAL ACCEPTANCE OF THE FEDERAL BOARDS' REVISION POWER, 1798-1861

For all the power vested in the federal boards in 1798, their authority received bipartisan, enduring acceptance at a constitutional level. The direct-tax legislation of 1798, in contrast to the Alien and Sedition Acts of that same congressional session, received nearly all Federalist votes and a majority of Republican votes and was not subject to constitutional objections recorded in the *Annals of Congress* or in the famous Virginia and Kentucky Resolutions that attacked the work of the Fifth Congress. Attacks on the direct tax in the press appear to have been overwhelmingly at a political level, with only scattered and oblique references to constitutional issues. Though the tax proved politically unpopular and contributed to the victory of the Jeffersonian Republicans in the election of 1800, Jefferson himself made no constitutional objections to the delegations to the federal boards. And while the outgoing Federalist Congress in winter 1800-01 repealed certain record-keeping provisions of the tax, it kept in place the mandate that assessments and collections be completed nationwide. President Jefferson and the Republican Congress further took affirmative measures to ensure that the tax was administered, to the point of filling vacancies on the federal boards that were still finishing their work and getting extra funding to keep them operating and help implement their mass revisions. When the Jeffersonians enacted their own direct taxes to prosecute the War of 1812, they initially decreased administrative power to make en masse revisions to valuations compared to the 1798 regime, but their recorded reasons for decreasing the power were prudential rather than constitutional, and ultimately they restored the power later in the war, making it as far-reaching and discretionary as it had been in 1798. Altogether, this bipartisan, enduring acceptance of administrative rulemaking through the Constitution's early decades is indirect evidence of the Constitution's original meaning and also embodies a process by which the Constitution's meaning was liquidated to allow for this kind of delegation.[631]

631. On liquidation, see *supra* note 41.

A. Acceptance of the Federal Boards' Rulemaking Discretion in 1797-1800

To appreciate the boards' acceptance at the time they were first established, we can begin with the meaningful if not dispositive indicator that the direct-tax legislation of 1798 garnered broad support, in contrast to narrower support for contemporaneous acts of more dubious constitutionality. As discussed earlier, the two legislative components of the tax passed Congress with large bipartisan majorities. The Valuation and Enumeration Act passed the House 69-19, with more yeas than nays even from the Republican minority, and it passed the Senate 22-0.[632] The Lay and Collect Act passed the House 62-18, again with more yeas than nays even from the Republicans, and passed the Senate without a recorded vote.[633] Contrast the Alien Act, which passed the House 46-40 and the Senate 16-7,[634] or the Sedition Act, which passed the House 44-41 and the Senate 18-6.[635]

This broad bipartisan support was coupled with an absence of recorded constitutional objections. The standard source for lawmakers' views about legislation in this period is the *Annals of Congress*. To be sure, the *Annals* are incomplete. Compiled retrospectively from contemporary newspaper accounts,[636] they usually give nothing of substance as to the Senate and have many gaps as to the House, reflecting how contemporary newspapers ignored the Senate and only incompletely covered the House.[637] Indeed, the debates on direct taxation in 1797 and 1798 indicate on their face that they have gaps in recording.[638]

Still, the *Annals* do record the debates on direct taxation extensively if not fully, and they are devoid of constitutional doubts about the powers delegated to the federal boards. Debates on the direct tax of 1798—covering the debate on the original bill and then the debates on the Valuation and Enumeration Act

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632. *See supra* notes 146, 149 and accompanying text.

633. *See supra* notes 159, 162 and accompanying text.

634. 7 ANNALS OF CONG. 575 (1798) (Senate vote); 8 ANNALS OF CONG. 2028 (1798) (House vote).

635. 7 ANNALS OF CONG. 599 (1798) (Senate vote); 8 ANNALS OF CONG. 2171 (1798) (House vote).

636. Elizabeth Gregory McPherson, *Major Publications of Gales and Seaton*, 31 Q.J. SPEECH 430, 435-36 (1945).

637. DONALD A. RITCHIE, PRESS GALLERY: CONGRESS AND THE WASHINGTON CORRESPONDENTS 9-10 (1991); McPherson, *supra* note 636, at 436.

638. *See, e.g.*, 8 ANNALS OF CONG. 1897, 2057-58 (1798) (noting that debates occurred but not describing them because they were of "little importance"); 6 ANNALS OF CONG. 1931 (1797) (describing how the House took action "[a]fter a variety of observations from several members").

and the Lay and Collect Act—run to thirty-seven double-columned pages of the *Annals*, and they contain no objection to the federal boards' powers, to say nothing of any constitutional objection to them.[639] On the contrary, the important salutary effect of the boards' mass-revision power was noted by Gallatin, the leader of the House Republicans, who supported the Valuation and Enumeration Act.[640] The absence of recorded objection is more striking considering that the debates in the *Annals* do include much criticism of the direct-tax bills, on diverse grounds, and several divided votes on them—and also considering that the *Annals* record Gallatin near-simultaneously making nondelegation objections to the entirely separate bill empowering President Adams to raise a provisional army.[641] In addition, debates on direct taxation in 1797—which concerned a general resolution on the subject preliminary to any actual bill but occurred at a time when lawmakers knew of Secretary Wolcott's plan to use boards of commissioners to apportion the tax within the states[642]—run to 47 double-columned pages of the *Annals*. Again, they contain no objection to powers like those ultimately conferred upon the boards, to say nothing of constitutional objections, despite diverse criticisms of direct taxation from other angles.[643] Moreover, the *Annals* of 1797-98 do include discussions of constitutional questions about direct taxation *other than* powers of the federal boards, particularly the apportionment of direct taxation among the states,[644] and especially the constitutional role of the census in such apportionment.[645] The only comment that sounds even vaguely like a nondelegation objection in all these direct-tax debates concerns whether Congress should defer to the Treasury Secretary's judgment in designing legislation,[646] not whether to delegate power by legislation to any officials, including the federal boards.

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639. 8 ANNALS OF CONG. 1595-1611, 1613-30, 1837-54, 1893-96, 1898-99, 1917-25, 2049-61 (1798). Note that numbers in the *Annals* refer to columns, not to pages.

640. *Id*. at 1838, 1848-49 (1798) (statements of Rep. Gallatin).

641. *Id*. at 1538-39, 1631-32, 1655 (1798) (statements of Rep. Gallatin).

642. 6 ANNALS OF CONG. 1926 (1797) (statement of Rep. Gallatin) (noting that valuation "was proposed by the Secretary of the Treasury to be done by means of Commissioners instead of the Legislature, and he believed that would be the best way").

643. *Id.* at 1843-71, 1874-1913, 1915-42 (1797).

644. 8 ANNALS OF CONG. 2060-61 (1798).

645. *See id.* at 1596-1601; 6 ANNALS OF CONG. 1915-27 (1797).

646. 8 ANNALS OF CONG. 2054 (1798) (statement of Rep. Venable). Later, regarding an amendment to the direct tax the year after its enactment, one member made an objection (not necessarily constitutional) to the conferral of discretion on the Treasury Secretary to decide the pay of assessors. 9 ANNALS OF CONG. 2818 (1799) (statement of Rep. T. Claiborne). The objection failed, receiving only five votes. *Id.*

In winter 1798-99, when Congress received various petitions seeking repeal of the Alien and Sedition Acts, the military buildup, and the direct tax, the House's recorded response suggested that it was facing more pressure and controversy on the Alien and Sedition Acts (especially regarding their constitutionality) than on the direct tax. A House committee in early 1799 reported resolutions against repealing any of the legislation.[647] The committee's report (reproduced in its entirety in the *Annals*) included extensive constitutional defenses of the Alien and Sedition Acts against various stated objections to their constitutionality,[648] but it defended the direct tax for only a paragraph and mentioned no constitutional objections to it.[649] The House's eventual votes against repealing the Alien and Sedition Acts were close (52-48 on both acts), less so against repealing the direct tax (61 votes against repeal, with the vote covering not only the direct tax but all the military-buildup measures, which were lumped with it for purpose of the vote).[650]

The famous Virginia and Kentucky Resolutions, passed by the legislatures of those two states after being drafted respectively by Madison and Jefferson, made vociferous constitutional objections to recent congressional legislation, *but not* to the direct tax. To be sure, the Virginia Resolutions included general objections to increased taxes and to the growth of the federal officialdom (apparently covering both excises and direct taxes, which it did not specify), but these objections were not made in expressly constitutional terms (as the objections to the Alien and Sedition Acts were), and they said nothing about the constitutionality of delegating legislative power to administrators.[651] Madison's long report on the Virginia Resolutions made extensive constitutional objections to the Alien and Sedition Acts, including a nondelegation argument against the Alien Act,[652] and it briefly noted constitutional objections to the creation of the Bank of the United States and to the carriage tax,[653] but said

647. 9 ANNALS OF CONG. 2992-93 (1799).

648. For the report, see *id.* at 2985-93.

649. *Id.* at 2991.

650. *Id.* at 3016-17.

651. *Virginia Resolutions of 1798*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 327, at 528, 531-32 (objecting to "swarms of officers, civil and military, who can inculcate political tenets tending to consolidation and monarchy, both by indulgences and severities, and can act as spies over the free exercise of human reason" and asking God "to prevent the laborer and husbandman from being harassed by taxes and imposts").

652. *Madison's Report on the Virginia Resolutions*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 327, at 546, 559-60.

653. *Id.* at 550.

nothing about the direct tax. (The report read the Virginia Resolutions as not covering "laws which have been objected to rather as varying the constitutional distribution of powers in the federal government, than as an absolute enlargement of" those powers, leaving open the possibility that other unmentioned statutes could be subject to separation-of-powers objections, but also suggesting the Virginia legislature hadn't actually objected to them.[654]) As for the Kentucky Resolutions, they too leveled express constitutional objections mainly at the Alien and Sedition Acts. They never mentioned the direct tax. The Resolutions did note that other recent "proceedings of the general government, under color of" the taxing power, the spending power, and the Necessary and Proper Clause, "will be a fit and necessary subject for revisal and correction at a time of greater tranquility, while those specified in the preceding resolutions [i.e., the Alien and Sedition Acts] call for immediate redress."[655] Yet these secondary constitutional concerns appear to have pertained to contemporaneously recorded constitutional controversies in Congress on the carriage tax and on the spending power,[656] not the direct tax.

As for the press, constitutional objections to delegation to the federal boards were oblique and scattered—nothing approaching a mainstream opposition argument. My own research has turned up only two statements that even approach constitutional questioning of the delegation to the federal boards, both discussed earlier: former commissioner Robert Anderson's public letters in South Carolina and the New London *Bee*'s brief objection to the Connecticut federal board's actions, which invoked Anderson.[657] But as noted earlier, Anderson purported merely to construe the Valuation and Enumeration Act, not to question its constitutionality, and the constitutional overtones of his argument implicated nondelegation issues at most implicitly (and were more explicit as to states' rights), while the New London *Bee* likewise spoke only of states' rights and raised delegation at most impliedly. Furthermore, even these oblique references to delegation issues do not appear to have been common. Donald H. Stewart, in his classic 900-page tome on the opposition press of the 1790s, concludes simply that "Jeffersonian editors reluctantly conceded the constitutionality of the [direct] tax," instead attacking it politically.[658] I have

654. *Id.*

655. *Kentucky Resolutions of 1798 and 1799*, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 327, at 540, 542.

656. On constitutional controversy in Congress on general-welfare spending, see CURRIE, *supra* note 47, at 168-69, 188-89, 222, 224-25. On constitutional controversy in Congress on the carriage tax, see *id.* at 185.

657. *See supra* notes 531-557 and accompanying text.

658. DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 91 (1969).

found express criticisms in the press of the direct tax's administration, but those criticisms are of a nonconstitutional nature. In particular, they allege that the tax allowed the Adams Administration to increase the number of patronage appointees and thus artificially increase political support for the Administration.[659] Also, the press at times criticized Congress for not allowing the state legislatures or state officers to administer the tax, but this was a call for a *more* radical type of delegation.[660]

Nor is there is any basis for questioning the constitutionality of the direct tax's administration by reason of Fries's Rebellion. This was a local disturbance "in Northampton County, Pennsylvania, and in several adjoining townships in Berks, Bucks, and Montgomery Counties."[661] German American militiamen intimidated some assessment officials, and when some of the militiamen were arrested and detained by a U.S. marshal, a group of 150 militiamen led by John Fries showed up at the jail and intimidated the marshal into freeing them.[662] As historians have noted, the resisters at times said the direct tax was unconstitutional. But for the most part, they made this claim in a loose way, simply on the ground that federal taxation of property (especially of houses) was oppressive as a matter of substance; to the limited extent they invoked actual provisions of the Constitution, these did not include the separation of powers or anything about delegation to administrators.[663] The resisters were engaged in a kind of "popular constitutionalism," and even a sympathetic historian recognizes that their "constitutional logic may not have been legally precise."[664] Further, the re-

659. *See, e.g.*, *The Direct Tax*, TIMES & D.C. DAILY ADVERTISER (Alexandria, Va.), Oct. 15, 1800, at [2], [2]; *Political Miscellany*, CONST. TELEGRAPHE (Bos.), Sept. 24, 1800, at [1], [1]; [Untitled], TELEGRAPHE & DAILY ADVERTISER (Balt.), Aug. 6, 1800, at [2], [2].

660. One public letter noted that the "Assistant Assessors are to make the valuation lists, after which, they are liable to as many alterations as the Parson's wig" and that first "the principal Assessors, and then the Commissioners, have a right to model them to their liking," but then concluded: "If Congress want [sic] two millions of dollars, why do they not call on the authority of this Commonwealth [Massachusetts] for our proportion, and let us assess and collect it in our own way?" Letter to the Editor, MASS. SPY (Worcester, Mass.), Sept. 5, 1798, at [1], [1] (submitted by "A Farmer"). *See also The Direct Tax*, *supra* note 659, at [1] (making various objections to the tax); Letter to the Editor, *Observations on the Direct Tax*, VILLAGE MESSENGER (Amherst, N.H.), Sept. 22, 1798, at [2], [2] (same).

661. Robert H. Churchill, *Popular Nullification, Fries' Rebellion, and the Waning of Radical Republicanism, 1798-1801*, 67 PA. HIST. 105, 115 (2000).

662. *Id.* at 105-06.

663. *Id.* at 121-22; *see also* NEWMAN, *supra* note 66, at 38-39 (noting that if the resistance was linked to specific constitutional provisions, it was to the rights to free speech, bear arms, and jury trial).

664. NEWMAN, *supra* note 66, at 10, 123.

sisters of Northampton County and environs were outliers; the literature turns up no other examples of organized popular resistance. In general, resistance to the direct tax of 1798 "was more sporadic" than to the whiskey excise, which had produced the Whiskey Rebellion of 1794 in western Pennsylvania, compared to which the Fries incident was "a minor affair."[665]

To be sure, the direct tax appears to have become politically unpopular, to the detriment of the Federalists who pushed the military buildup that the tax helped finance. Though adding to their congressional majorities in 1798, the Federalists lost the House, Senate, and Presidency in 1800. While there have been no quantitative studies, historians generally think the direct tax contributed to the Federalists' defeat.[666] But of course legislation can be politically unpopular without being unconstitutional.

The writings of Jefferson himself, leader of the victorious opposition to the Federalists, do not suggest the unconstitutionality of congressional delegation to the federal boards. In general, Jefferson was not averse to a direct tax per se—a stance in keeping with his top ally Madison's years-long advocacy for such a tax.[667] In 1797, before French relations reached a crisis, Jefferson was "suggesting" to several associates that Congress should adopt a "land tax," with an option for each state legislature to raise the money for its state's quota by any means the legislature chose, though if state lawmakers "fail, the federal collectors will go on of course to make their collection."[668] Even after the French crisis came and the Federalists successfully pushed the direct tax, Jefferson did not make any objection to the delegation to the federal boards, constitutional or otherwise, even in his private writings. To be sure, in his private letters, he sometimes lumped the direct tax in with the larger military preparations that it helped finance (and sometimes also with the recent stamp tax and the increase of public debt) and described the whole package as inconsistent with the Constitution, in the sense of being unrepublican.[669] But these objections did not

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665. Dalzell, *supra* note 66, at 333; *see also* FORSYTHE, *supra* note 66, at 54-56 (making similar points).

666. EDLING, REVOLUTION, *supra* note 113, at 216; Dalzell, *supra* note 66, at 332-34, 337.

667. See *supra* note 123 and accompanying text.

668. Letter from Thomas Jefferson, Vice President, U.S., to Peregrine Fitzhugh (June 4, 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-29-02-0328 [https://perma.cc/AR8C-Z94L].

669. An examination of the standard edited collection of Jefferson's papers, guided by the detailed indexes of the volumes, reveals three references to the direct tax along these lines. *See* Letter from Thomas Jefferson, Vice President, U.S., to Edmund Pendleton, Chief Justice, Supreme Court of Appeals of Va. (Jan. 29, 1799), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-30-02-0458 [https://perma.cc/CL93-

specify anything about the direct tax's administration as a problem,[670] and their logic swept broadly to cover any unnecessary military preparation, in keeping

DCM4] ("[I]f the understanding of the people could be rallied to the truth on this subject, by exposing the dupery practised on them there are so many other things about to bear on them favorably for the resurrection of their republican spirit, that a reduction of the administration to constitutional principles cannot fail to be the effect. [T]hese are the Alien [and] Sedition laws, the vexations of the stamp act, *the disgusting particularities of the direct tax*, the additional army without an enemy [and] recruiting officers lounging at every court house, a navy of 50. ships, 5. millions to be raised to build it on the usurious interest of 8. per cent, the perseverance in war on our part, when the French government shew such an anxious desire to keep at peace with us, taxes of 10. millions now paid by 4. millions of people and yet a necessity in a year or two of raising 5. millions more for annual expence." (emphasis added)); Letter from Thomas Jefferson, Vice President, U.S., to James Madison (Jan. 16, 1799), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-30-02-0432 [https://perma.cc/XV26-YBQX] ("[P]ublish your [notes of the] debates of the [Constitutional] Convention. [T]hat these [recent] measures of the army, navy [and] *direct tax* will bring about a revulsion of public sentiment is thought certain. [And] that the constitution will then receive a different explanation. [C]ould those debates be ready to appear critically, their effect would be decisive.") (emphasis added); Letter from Thomas Jefferson, Vice President, U.S., to John Taylor, Delegate, Va. House of Delegates (June 4, 1798), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-30-02-0280 [https://perma.cc/66T5-2RMJ] ("[T]he body of our countrymen is substantially republican through every part of the union. [I]t was the irresistible influence [and] popularity of Genl. Washington played off by the cunning of Hamilton which turned the government over to antirepublican hands, or turned the republican members chosen by the people into anti-republicans. [H]e delivered it over to his successor in this state, and very untoward events since, improved with great artifice, have produced on the public mind the impression we see. [B]ut still, I repeat it, this is not the natural state. [T]ime alone would bring round an order of things more correspondent to the sentiments of our constituents. [B]ut are there not events impending which will do it within a few months? [T]he invasion of England, the public and authentic avowal of sentiments hostile to the leading principles of our constitution. [T]he prospect of a war in which we shall stand alone, *landtax*, stamp-tax, increase of public debt &c." (emphasis added) (footnote omitted)) .

670. Jefferson's nearest statement to a comment on administration of the direct tax came in a letter to Madison before any direct-tax bill had passed the House, in which Jefferson said the Federalists in Congress wanted eventually to tax houses by an indirect tax, "to avoid the quotaing [i.e., apportionment among states by population] of which they cannot bear the idea. [R]ogueries under a quota-ing law can only shift the burthen from one part to another of the same state; but relieve them from the bridle of the quota, and all rogueries go to the relief of the state." Letter from Thomas Jefferson, Vice President, U.S., to James Madison (June 7, 1798), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-30-02-0284 [https://perma.cc/R4YT-8QHE]. In other words, a tax not apportioned among the states by population could be designed to fall more lightly on Federalist states. Jefferson did not specify what "rogueries" might occur intrastate, nor is it clear he had any specific intrastate rogueries in mind; recall he said this before the tax was enacted.

with Jefferson's well-known ideology that was averse to the whole fiscal-military apparatus of traditional European states.[671]

B. Repeal of the Record-Updating Provisions, 1800-1801

Peace with France, officially concluded in October 1800, and the related resurgence in import duties meant there was no need for further direct taxes,[672] and the Republican defeat of the Federalists in the 1800 elections further confirmed that no new direct taxes would be enacted for the foreseeable future. But at the same time, there was apparently no movement to repeal the 1798 direct tax itself (that is, the Lay and Collect Act). It was self-limiting anyway, levied for a finite sum. Much of that sum was collected over the course of the year 1800,[673] and it appears that no lawmakers advocated ceasing implementation of the tax before the rest was collected (if for no other reason, one assumes, than that incomplete collection would be inequitable).

That said, Congress in the lame-duck winter of 1800-01 did repeal certain provisions of the Valuation and Enumeration Act, though not ones regarding the federal boards (which had mostly finished their work and expired anyway), nor in a way that suggested doubt as to the Act's constitutionality. The Act provided for the valuation records of lands and houses to be continually updated by a federal "surveyor" situated in each district, to reflect transfers, damage to the property, loss of exempt status, etc.[674] In December 1800, William Cooper, the New York frontier congressman and land developer, proposed repealing the Valuation and Enumeration Act, but with a proviso allowing for the current di-

671. On Republicans' ideology in 1798, see LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY 257-64 (1978). Sometimes Jefferson would attack the military buildup as unconstitutional without mentioning the direct tax. *See, e.g.*, Letter from Thomas Jefferson, Vice President, U.S., to Edmund Pendleton, Chief Justice, Supreme Court of Appeals of Va. (Feb. 14, 1799), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-31-02-0024 [https://perma.cc/KWV3-9KK4].

672. *See* From Robert Goodloe Harper (Mar. 5, 1801), *in* 1 CIRCULAR LETTERS OF CONGRESSMEN TO THEIR CONSTITUENTS 1789-1829, at 247, 259-64 (Noble E. Cunningham, Jr. ed., 1978) [hereinafter CIRCULAR LETTERS OF CONGRESSMEN].

673. The assessments had been finalized and sent by the Treasury Secretary to collection officials in eight states by the end of 1799, plus another four states by May 1800. *See supra* note 216. Receipts from the direct tax during the year 1800 totaled more than $730,000 of the $2 million levied. GALLATIN, *supra* note 120, at 319.

674. V&E Act, ch. 70, §§ 24-26, 1 Stat. 580, 589-90 (1798). See also the related provision in the Lay and Collect Act, ch. 75, § 5, 1 Stat. 597, 599 (1798), which set forth additional provisions pertaining to the federal "surveyor" situated in each district.

rect tax to be fully assessed and collected (assessments had been slow and were still incomplete in the Carolinas and Georgia). Cooper thought the updating task was "impracticable" in sparsely populated areas, like western Pennsylvania or his own upstate New York. "It is not proper to keep alive a law, wholly useless to the government, and which is troublesome and disgusting to the people," said Cooper, noting the government's lack of fiscal need. It was, he thought, "best to repeal the law, as it subjects the people to such expense and trouble and renders no service to government."[675] The House Ways and Means Committee recommended against repealing the Act, noting that a well-updated valuation could provide a basis for future direct taxes if needed.[676] After debate that is largely unrecorded,[677] the House voted down a proposal to repeal the Valuation and Enumeration Act (and even that proposal had a proviso to complete the assessment in the states where it was still unfinished).[678] Congress ultimately repealed only that part of the Act providing for the surveyors to update the valuations.[679]

C. *The Jeffersonians' Continuing Implementation of the 1798 Direct Tax, 1801-05*

In terms of tax reform, President Jefferson mainly concerned himself with the indirect internal taxes, which were not self-limiting, unlike the direct tax. In particular, Jefferson urged Congress to repeal all the indirect internal taxes in December 1801, though without questioning their constitutionality.[680] The Republican Congress agreed and abolished all those taxes in spring 1802, along with the offices for administering them (some of which were involved in the postassessment collection of the direct tax), but Congress also provided for the temporary continuation of those offices until taxes due prior to the abolition date were collected, "together with the collection of the direct tax."[681] The Re-

675. *Congress of the United States: House of Representatives*, CITY GAZETTE (Charleston, S.C.), Dec. 30, 1800, at [2], [2].

676. ROGER GRISWOLD, HOUSE COMM. ON WAYS & MEANS, VALUATION OF LANDS AND DWELLING HOUSES (1800), *in* 1 AMERICAN STATE PAPERS: FINANCE, *supra* note 82, at 688.

677. 10 ANNALS OF CONG. 978, 1007 (1801).

678. *Congress of the United States: House of Representatives*, CITY GAZETTE (Charleston, S.C.), Feb. 23, 1801, at [2], [2].

679. Act of Feb. 27, 1801, ch. 33, § 2, 2 Stat. 124, 124-25.

680. Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-36-02-0034-0003 [https://perma.cc/K9QE-FUY5].

681. Act of Apr. 6, 1802, ch. 19, § 2, 2 Stat. 148, 149.

publicans succeeded in funding the government using import duties alone. In his second inaugural address of 1805, Jefferson proudly recounted the abolition of all internal taxes, though in political rather than constitutional terms.[682]

In keeping with a view that the direct tax was constitutional, President Jefferson, Treasury Secretary Gallatin, and the Jeffersonian Congress all took affirmative measures to ensure the valuation and assessment for the tax were completed—including revisions by the federal boards—in the few states where they were still incomplete when Jefferson took office. The process was especially delayed in South Carolina, "principally . . . by the difficulty of obtaining a commissioner" to cover the first division (comprised of Charleston and Georgetown, on the coast): from 1798 through 1803, eight persons successively took the job, but each of them ended up dying, resigning, or refusing to act.[683] Jefferson viewed it as his duty to fill the office and complete the federal board so the valuation and assessment could be finished. In July 1801, he sent a blank commission to the Republican governor of South Carolina and asked him to find someone to fill it,[684] which the governor did.[685] In spring 1802, on Gallatin's "particular suggestion, and with a view to the completion of the assess-

682. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/99-01-02-1302 [https://perma.cc/BX8K-GVSR] ("[T]he suppression of unnecessary offices, of useless establishments and expences [sic], enabled us to discontinue our internal taxes. [T]hese covering our land with officers, [and] opening our doors to their intrusions, had already begun that process of domiciliary vexation, which, once entered, is scarcely to be restrained from reaching successively every article of property [and] produce."). Because the federal government was financing itself solely by import duties collected in the ports, "it may be the pleasure and the pride of an American to ask [w]hat farmer, what mechanic, what labourer ever sees a tax-gatherer of the US.?" *Id.*

683. ALBERT GALLATIN, ARREARS OF DIRECT TAXES (1803), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 30; ALBERT GALLATIN, DIRECT TAX (1803), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 65.

684. The request is in Jefferson's letter to Governor John Drayton on July 15, 1801, which is strangely not included in the standard collection of Jefferson's papers but is quoted in the editorial notes of a different letter from Albert Gallatin to Thomas Jefferson. *See* Letter from Albert Gallatin, Sec'y, U.S. Dep't of Treasury, to Thomas Jefferson, President, U.S. (July 11, 1801), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-34-02-0417 [https://perma.cc/4662-NQSZ].

685. Letter from John Drayton, Governor, S.C., to Thomas Jefferson, President, U.S. (July 29, 1801), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-34-02-0513 [https://perma.cc/2KQV-TLCV]; *see also* Letter from John Drayton, Governor, S.C., to Thomas Jefferson, President, U.S. (Feb. 22, 1802), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-36-02-0411 [https://perma.cc/ZB4R-PL9V] (concerning filling a later vacancy in the same office).

ment in South Carolina,"[686] the Republican Congress authorized increased compensation for the direct tax's federal boards and assessors.[687] The federal board in South Carolina at last completed its several district-wide revisions and sent them to Gallatin in July 1804.[688] Gallatin then asked for more new legislation from Congress to help the Treasury Department to fix errors that would otherwise complicate applying the revisions to individual tax assessments.[689] Congress obliged in early 1805, appropriating over $13,000 for administering the fix.[690]

D. Jeffersonian Direct Taxes in the War of 1812

While the Federalists undertook only military preparations and an undeclared naval war with France in 1798-1800, the Jeffersonians prosecuted a full-scale declared war against Britain in 1812-15, and they used direct taxation to further that cause. Congress enacted a one-shot direct tax of $3 million in summer 1813.[691] Later, when the military and fiscal situation worsened in the fall and winter of 1814 to 1815, it enacted a permanent annual direct tax of $6 million per year in January 1815.[692] At that time, Congress believed the war to be ongoing, as news of U.S. diplomats' negotiation of a peace settlement had not yet reached the United States.[693] The permanent tax was collected for one year, that is, for $6 million, after which Congress in spring 1816 ceased the permanent annual levy and imposed one more one-shot direct tax of $3 million.[694] Thus, direct taxes for a total of $12 million were enacted to help pay for

686. Letter from Albert Gallatin, Sec'y, U.S. Dep't of Treasury, to Thomas Jefferson, President, U.S. (Apr. 8, 1802), *in* FOUNDERS ONLINE, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-37-02-0164 [https://perma.cc/AF76-KYN6].

687. Act of Mar. 16, 1802, ch. 12, § 7, 2 Stat. 138, 139.

688. Untitled Letter from J. Alexander, Agent for Comm'rs of Direct Tax, to Albert Gallatin, Sec'y, U.S. Dep't of Treasury (July 11, 1804), *in* CITY GAZETTE (Charleston, S.C.), Dec. 29, 1804, at [2], [2].

689. Letter from Albert Gallatin, Sec'y, U.S. Dep't of Treasury, to John Randolph, Chair, House Ways & Means Comm. (Nov. 24, 1804), *in* CITY GAZETTE (Charleston, S.C.), Dec. 29, 1804, at [2], [2].

690. Act of Jan. 30, 1805, ch. 11, §§ 1, 6, 2 Stat. 311, 311-13.

691. Act of Aug. 2, 1813, ch. 37, § 1, 3 Stat. 53, 53.

692. Act of Jan. 9, 1815, ch. 21, §§ 1, 23, 3 Stat. 164, 164, 186.

693. EDLING, *supra* note 112, at 133.

694. Act of Mar. 5, 1816, ch. 24, §§ 1-2, 3 Stat. 255, 255. The delineation of the three waves of taxation is clear from S.H. SMITH, DIRECT TAX AND INTERNAL DUTIES (1817), *in* 3 AMERICAN STATE PAPERS: FINANCE 215, 215, 219-20 (D.C., Gales & Seaton 1836).

the war. (Compared with about $130 million in federal spending over the period 1813-16,[695] direct taxation was a significant but not primary source of revenue.)

1. *The Initial Tax of 1813: Reducing Rulemaking Discretion, for Nonconstitutional Reasons*

The first of the War of 1812 direct taxes, the one-shot $3 million tax of 1813, reduced rulemaking discretion compared with 1798, but did so for prudential rather than constitutional reasons. First, some mechanics about the tax. It consisted of two interlocking statutes, enacted eleven days apart in summer 1813.[696] Like the Federalists' direct tax of 1798, this tax was apportioned among the states according to free population plus three-fifths of slave population,[697] and it was levied on slave ownership and real estate. But rather than tax slaveholders at a flat sum per enslaved person, it taxed them according to the monetary value of the people they held in slavery. And rather than value houses and lands separately, the tax simply valued each parcel of real estate as one unit (with all improvements, including houses).[698] The tax rate was therefore a uniform ad valorem rate applied to all real-estate and slave ownership in the same geographic area.

In terms of frontline administration, the legislation divided each state into "collection districts" (ranging from three in Rhode Island to twenty-eight in New York), for each of which there was to be appointed one principal assessor (who had to be a resident of the district).[699] Each principal assessor was to divide his district into a "convenient number" of "assessment districts" and to appoint one assistant assessor for each.[700] The assistant assessors did initial valuations, and the principal assessors heard and decided administrative appeals from property owners.[701] Enforcement by distress, or sale of land, re-

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695. Calculations based on John Joseph Wallis, *Government Finance and Employment*, *in* HSUS, *supra* note 182, at 5-80 ser. Ea584-Ea585.

696. Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of July 22, 1813, ch. 16, 3 Stat. 22 (repealed 1815). The provision that interlocks them is Act of Aug. 2, 1813 § 4, 3 Stat. at 71.

697. Indeed, it was also subapportioned by statute to individual counties. *See infra* note 712 and accompanying text.

698. Act of July 22, 1813 § 5, 3 Stat. at 26.

699. *Id.* §§ 1-2, 3 Stat. at 22-26.

700. *Id.* § 3, 3 Stat. at 26.

701. *Id.* §§ 13-14, 3 Stat. at 28-29.

mained as in 1798.[702] Each state legislature was given the option to pay its state's quota itself, by whatever means it chose, with a discount of 10% or 15% (depending on time of payment), to account for states' cost of collection.[703] In fact, seven of the eighteen states took this option,[704] while the remaining states were subject to the federal tax administered by federal officials.

In terms of how to define and discern value for real estate, the legislation of 1813 was no more specific than its 1798 predecessor. Parcels were to be valued according to what each was "worth in money."[705] The Treasury Department regulations said the assistant assessors should "attend upon" the principal assessor, "for the purpose of explaining the principles upon which they have made the valuations"[706]—language that seemed to acknowledge the principles were not obvious or uniform. As to data gathering, much as in the 1798 Act, assessors in 1813 were to "inquire after" taxable lands "by reference . . . to any lists of assessment or collection taken under the laws of the respective states, as to

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702. *Id.* §§ 21–22, 3 Stat. at 30–31.

703. Act of Aug. 2, 1813, ch. 37, § 7, 3 Stat. 53, 71.

704. These were New Jersey, Pennsylvania, Virginia, South Carolina, Georgia, Ohio, and Kentucky. SAMUEL H. SMITH, DIRECT TAX AND INTERNAL DUTIES (1814), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 855, 856.

705. Act of July 22, 1813 § 5, 3 Stat. at 26. The Treasury Department, using its power to make "binding" regulations for the assessors, § 4, 3 Stat. at 26, said that, "[i]n determining this value, the only proper rule by which to avoid inequalities and injustice to individuals, is to estimate every species of property at what it is fairly worth in money; at what it would bring on a free and voluntary transfer, and not at a forced sale," REGULATIONS FOR ASSISTANT ASSESSORS IN THE EXECUTION OF THEIR DUTY, UNDER THE ACT OF JULY 22D, 1813, "FOR THE ASSESSMENT AND COLLECTION OF DIRECT TAXES AND INTERNAL DUTIES" [2] (1814), Readex Early American Imprints, Series 2, no. 33398 [hereinafter TREASURY CIRCULAR TO AAS 1813]. Insofar as this language added any clarity, it was clarity added by administrative rulemaking, not by legislation. The regulation added that

> [t]his consideration may perhaps prevent a disposition frequently prevalent among the best and most honest men appointed to value property for the purpose of taxation, of estimating it, on that particular occasion, at less than it is really worth; and often, at much less than it may have been immediately before sold for.

Id. This language is so qualified as to raise doubt as to what it even means (e.g., "may perhaps prevent," "at much less").

706. UNTITLED CIRCULAR, WITH FORMS, RELATIVE TO THE ASSESSMENT AND COLLECTION OF DIRECT TAXES AND INTERNAL DUTIES, UNDER THE ACTS OF JULY 22, 1813, AND AUG. 2, 1813 [2] (1814), Readex Early American Imprints, Series 2, no. 33221 [hereinafter TREASURY CIRCULAR TO PAS 1813] (containing instructions to the principal assessors). For a similar provision, see TREASURY CIRCULAR TO AAS 1813, *supra* note 705, at [3] (stipulating that the assistant assessor "will attend . . . upon the principal assessor, for the purpose of giving any explanations or affording any information which the latter may require as to the principle on which he made the valuations").

any other records or documents, and by all other lawful ways and means."[707] The one difference was that the 1813 Act suggested making more use of state-assessment data, but not in a way that added much clarity. In requiring lists from the owners and occupiers of property, the 1813 legislation omitted the 1798 Act's specifications of physical data and just said the lists "shall be made in such manner as may be directed by the principal assessor" (in that sense, making the legislation even *less* specific than in 1798), but it then added that the lists should be made "as far as practicable, conformably to those which may be required for the same purpose, under the authority of the respective states"[708]—yet the state legislatures in 1813 did not necessarily specify any information to be gathered for this purpose beyond quantity and value,[709] and in any event, the phrase "as far as practicable" left discretion with the federal officials. Another provision of the 1813 federal legislation said that, when assistant assessors sent principal assessors their lists of taxpayers with items of property that were objects of taxation, these lists were to include, "whenever so required by the principal assessor, the amount of direct tax, payable by each [taxpayer] on such objects under the state laws imposing direct taxes."[710] Yet this added data gathering was merely optional with the principal assessors, and the Treasury Department regulations advised the principal assessors *not* to ask the assistant assessors for this information, at least not in "every instance," because providing such data "may occasion great trouble to the assistant assessor; a trouble, not to be compensated probably by its utility."[711]

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707. Act of July 22, 1813 § 4, 3 Stat. at 26; *accord* V&E Act, ch. 70, § 8, 1 Stat. 580, 585 (1798) (requiring the assessors to "inquire after" taxable lands "by reference to any records or documents, and to any lists of assessment taken under the laws of their respective states, and by all other lawful ways and means"). Much as in 1798, if the owner or occupier of land failed to provide a list of the property, the assessor could "enter into" the property and value it "according to the best information which he can obtain, and on his own view and information." Act of July 22, 1813 § 10, 3 Stat. at 27; *accord* V&E Act § 14, 1 Stat. at 587.

708. *Compare* Act of July 22, 1813 § 6, 3 Stat. at 26-27, *with* V&E Act § 9, 1 Stat. at 585-86.

709. The largest state, New York, specified no data to be generally delivered to, or taken down by, assessors for real estate other than its quantity and value. Act of Apr. 5, 1813, ch. 52, § 2, *in* 2 LAWS OF THE STATE OF NEW-YORK, REVISED AND PASSED AT THE THIRTY-SIXTH SESSION OF THE LEGISLATURE 509-10 (Albany, H.C. Southwick, & Co. 1813) [hereinafter LAWS]. New York did specify that the assessors were to value land "at the value they would appraise such estate in payment of a bona fide debt due from a solvent debtor," but without further definition. *Id.* § 42, at 521-22. It does not even seem this payment-of-debt language would be applicable to the *making of lists* by owners and occupiers, which was the issue for which the federal act of 1813 said to try to follow state forms.

710. Act of July 22, 1813 § 13, 3 Stat. at 28.

711. TREASURY CIRCULAR TO PAS 1813, *supra* note 706, at [2].

The 1813 tax's most important difference from the 1798 tax, for our purposes, was that Congress in 1813 greatly reduced (but did not eliminate) administrative discretion to make en masse revisions of real-estate values. The legislation apportioned the sum to be raised not only by state, but by *each county within each state*—in Massachusetts, $26,433 for Middlesex County, $14,478 for Plymouth County, and so on, for every county in every state across the nation.[712] Each state legislature was given the option to vary the county-by-county apportionment if it chose.[713] In contrast to the 1798 Act, there was no mechanism for *federal administrators* to adjust the relative taxable values or tax burdens across the different parts of the state.

Though this was a major reduction in administrative-rulemaking discretion, it does not appear to have arisen from any constitutional concern about congressional delegation of such discretion. I reach this conclusion for two reasons.

First, if lawmakers in 1813 rejected mass administrative revisions of valuations between different parts of a state out of a constitutional objection to rulemaking governing domestic private rights, one might expect them to reject *all* such mass administrative revisions categorically, even those over a narrow geographic expanse—and yet they did not. Under the 1813 legislation, the principal assessor covering a *county* containing multiple assessment districts had power "to revise, adjust, and equalise the valuations" of real estate and enslaved persons "between such assessment districts [within the county], by deducting from or adding to either such a rate per centum as shall *appear just and equitable*"—the same open-ended standard as from the 1798 legislation.[714] And remember that the principal assessor decided the number and boundaries of assessment districts within his bailiwick, meaning he could define the areas between which he would redistribute.[715] At least some counties must have triggered this power, simply because they were so large that they must have required more than one assistant assessor and thus more than one assessment district, probably several. Examples would include New York City and County (that is, Manhattan, population in 1810 over 96,000), Philadelphia City (population in 1810 over 53,000), and Baltimore City and County (population in 1810 over 46,000).[716] Consistent with the breadth of the power, the Treasury De-

712. Act of Aug. 2, 1813, ch. 37, § 2, 3 Stat. 53, 54-70.

713. *Id.* § 6, 3 Stat. at 71.

714. Act of July 22, 1813 § 15, 3 Stat. at 29 (emphasis added).

715. *Id.* § 3, 3 Stat. at 26.

716. Each was treated as one unit for apportionment by county in Act of Aug. 2, 1813 § 2, 3 Stat. at 56-58. For populations, see Gibson, *supra* note 231, tbl.4.

partment regulations said the principal assessor's "equaliz[ation]" of valuations among assessment districts within a county was "delicate and important."[717] The Department told each principal assessor to revise the valuations if "you should be *of opinion* that the valuations, as made generally in any of those assessment districts, should be relatively higher or lower than the valuations of the other assessment districts composing the county," and to revise at "such a rate per cent as will make those valuations relatively equal to those of the other assessment districts contained in the same county."[718] The Department gave no further guidance on how to do the task.

Second, although lawmakers in 1813 certainly reduced rulemaking discretion from its 1798 level (by narrowing the revision power from intrastate to intracounty), the recorded reasons why they did so were prudential in nature, not constitutional. As historians have noted, the congressional tax program of the War of 1812, including the direct tax, was to a large degree patterned after war-finance plans devised by Treasury Secretary Gallatin in early 1812.[719] Gallatin's plan for a wartime direct tax of $3 million urged statutory apportionment at the county level and appears to have inspired Congress's choice to structure the 1813 tax that way. Gallatin's rationale was prudential, not constitutional. "The attempt made," he said, "under the former direct tax of the United States [in 1798], to equalise the tax by authorizing a Board of Commissioners, in each State, to correct the valuations made by the local assessors, was attended with considerable expense, and productive of great delay."[720] Gallatin was quite right about the fact of delay: recall that several federal boards did not finish until 1800, and the one in South Carolina not until 1804.[721] "In order to obviate this inconvenience," Gallatin proposed, Congress itself should apportion the tax by county: for states whose governments had direct taxes currently in force, Congress ought to follow the county-level apportionments for those state taxes; for other states, it should use "the best information and materials which can be obtained."[722] The House Ways and Means Committee, reporting the bill following Gallatin's plan that ultimately became law, identified eleven states with state taxes of statewide scope for which the proportion paid by each county was

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717. TREASURY CIRCULAR TO PAS 1813, *supra* note 706, at [2]-[3].

718. *Id.* (emphasis added).

719. EDLING, *supra* note 112, at 124-25; EINHORN, *supra* note 53, at 195-96; Cachia-Riedl, *supra* note 132, at 492-94, 515.

720. ALBERT GALLATIN, U.S. DEP'T OF TREASURY, INCREASE OF REVENUE (1812), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 523, 525.

721. *See supra* notes 216, 683-690 and accompanying text.

722. GALLATIN, *supra* note 720, at 525.

known, and for each of these, the Committee used each county's proportion of the state tax to determine its share of the state's federal quota.[723] For the remaining seven states (including New York and Pennsylvania), the Committee—very crudely—began with each county's proportion of the 1798 federal direct tax, then multiplied that proportion by the ratio between (a) the county's share of the state's population in the 1810 census and (b) the county's share of the state's population in the 1800 census.[724] The Committee conceded that it had not attained "mathematical accuracy," but it included a provision authorizing state legislatures to vary county-by-county allocations, "securing the people of every part of the country from an unfair or oppressive bearing of the tax upon them."[725]

The bill went to the House floor, where the substantive debates recorded in the *Annals*, though incomplete,[726] do span 42 double-columned pages (albeit often skipping around among the direct tax and other types of taxes), and they do not indicate that the House's abandonment of statewide administrative valuation revisions arose from any constitutional objection.[727] If anything, they suggest that some members opposed Gallatin's crude, antidiscretion approach and that the reasons for the shift toward that approach were prudential. According to one summary passage in the *Annals*, the House on June 25, 1813, debated "whether, as proposed by the bill, the amount of direct tax to be paid by each county should be arbitrarily fixed, or whether the operation of the system should be delayed by a new valuation and assessment, which would apportion the taxes more equitably. An amendment going to change this feature of the bill was proposed, discussed, and negatived."[728] On June 26, Representative Montgomery of Kentucky proposed deciding each county's share according to the upcoming federal assessment, based on each county's proportion of its state's total federal valuation (with nobody to do revision or equalization),[729]

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723. JOHN WAYLES EPPES, HOUSE WAYS & MEANS COMM., INCREASE OF REVENUE (1813) *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 627, 628.

724. *Id.*

725. *Id.*

726. Obvious gaps appear in, for example, 26 ANNALS OF CONG. 312, 314, 383 (1813).

727. For the debates, see *id.* at 312, 314, 317, 319-32, 351-413, 421-29 (1813). For earlier deliberations on direct taxation that also contain no such constitutional objections, see 23 ANNALS OF CONG. 1152-55 (1812); and EZEKIEL BACON, HOUSE COMM. ON WAYS & MEANS, PLAN FOR INCREASING THE REVENUE (1812), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 539, 541.

728. 26 ANNALS OF CONG. 317 (1813).

729. *Id.* at 317, 319-28.

which the House voted down, 101-60.[730] On July 6, some members of the Virginia delegation sought to alter the bill's apportionment among that state's counties, and they succeeded, splitting their own delegation in what seemed to be an intra-Virginia political fight.[731] As one Virginia member opposing the change said, "gentlemen are governed, not so much by what might be considered the most fair and equitable mode of assessment, as by the manner in which it would affect their individual districts."[732] On July 7, Representative Harris of Tennessee made a similar proposal to the earlier one by Representative Montgomery: instead of the bill's crude apportionments, Congress ought to determine each county's share by its percentage of the state's total valuation in the upcoming federal assessment.[733] Harris's proposal likewise failed.[734] Though the debates are incompletely recorded in the *Annals*, a letter from Harris to his constituents has survived that details the arguments that proved decisive against his proposal—prudential arguments about delay and obstruction that would apply a fortiori to any proposal for a statewide federal administrative body to revise valuations district-wide:

> It was acknowledged on all sides, that the only plan by which all the counties could have equal justice done them—would be to wait till the property, subject to a direct tax in each county, was assessed [by federal officials]—and apportion the state[']s quota among the counties according to their [i.e., the counties'] wealth [as so assessed]. But it was contended that this could not be done with safety, because the assessments would all have to be returned to one place, before such apportionment could be made;—And that if there should be a failure on the part of any assessor to make his return, it might defeat the collection of the tax for the whole state.—It was further suggested that there were some sections of the union opposed to the prosecution of the war—and that the failure to make return on the part of an assistant assessor, might take place through design—and thereby defeat the collection of the tax throughout the whole of that state.—Whereas by making the apportionments here now [i.e., in Congress], among the counties, a failure to make return from a particular assessment district, will not

730. *Id.* at 330.

731. *Id.* at 394-95.

732. *Direct Tax Bill*, *supra* note 509, at [3] (quoting Representative Lewis).

733. 26 ANNALS OF CONG. 396-400 (1813).

734. *Id.*

> prevent the collection of the taxes from all the other parts of the state, but that in which the failure happens.[735]

It appears Harris initially succeeded in getting the House to adopt his alternative approach in Tennessee, and that lawmakers from other states jumped on the bandwagon and tried to get his approach applied to their states, as well, but then a majority of the House halted and rolled back these changes through a procedural maneuver.[736]

In all the recorded discourse on the 1813 legislation, the nearest thing to a constitutional or nondelegation objection to administrative mass revision was an oblique reference in remarks by Representative Montgomery, defending his proposal before the House voted it down. Montgomery was proposing simply to set each county's share according to its proportion of the federal assessors' valuations for the state in the upcoming federal assessment, with no statewide body to make revisions as in 1798.[737] His proposal was subject to the obvious objection that it would invite assessors to competitively undervalue their respective counties without constraining them from doing so—an objection that was made and to which Montgomery had no strong answer.[738] But Montgomery also acknowledged another objection: "It has been very emphatically objected, that a new officer is to be created with vast powers."[739] Montgomery responded that the objection was premised on a misunderstanding of his proposal (as indeed it was): he was only proposing that an officer add up the federal valuations of each county and calculate the ratio of each county's sum to the state as a whole—an arithmetic exercise, not a discretionary one. However, the objection itself is not recorded, only Montgomery's one-sentence summary of it and his response to it. Thus, we do not know whether the objection to "a new officer . . . with vast powers" was constitutional in nature or not, nor do we know how many members made or shared the objection. And although Montgomery's proposal was defeated, its defeat is no evidence that the House shared the objection, since (a) the objection was based on a misunderstanding of Montgomery's proposal and (b) there were other, cogent, nonconstitutional objections to his proposal, most notably that it invited competitive undervaluation.

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735. THOMAS K. HARRIS, TO THE PEOPLE OF THE THIRD CONGRESSIONAL DISTRICT IN THE STATE OF TENNESSEE, *in* 2 CIRCULAR LETTERS OF CONGRESSMEN, *supra* note 672, at 835, 836.

736. *"Previous Question,"* FED. REPUBLICAN (Georgetown), July 9, 1813, at [2], [3].

737. 26 ANNALS OF CONG. 319-21 (1813) (statement of Rep. Montgomery).

738. *Id*. at 326.

739. *Id*. at 327.

2. *The Permanent Tax of 1815: Increasing Rulemaking Discretion Back to the 1798 Level*

When Congress faced more dire needs in winter 1814-15 and enacted a permanent direct tax levying $6 million annually,[740] it abandoned statutory apportionment by county and reinstituted federal boards in each state with broad rulemaking power to allocate the intrastate tax burden, very similar to the 1798 tax.

The reinstatement of federal boards with statewide power was the main departure from the 1813 legislation; in other respects, the 1815 Act followed the pattern of 1813. After apportionment among the states by free population and three-fifths slave population, the tax was levied on slave ownership and real estate, all taxed uniformly according to value within a given state, as in 1813.[741] The frontline structure was the same as in 1813: Congress retained the statutorily-drawn collection districts, each with a principal assessor resident therein, who was to divide his collection district into assessments districts, with one assistant assessor for each,[742] and hear appeals of assistant assessors' valuations.[743] Enforcement was again by distress of goods, then sale of land.[744] And Congress continued to offer each state legislature an option to fill its state's quota itself, by whatever means it chose, with a discount,[745] though in 1815 only four of the eighteen states took up this option,[746] while the federal officialdom operated in all the others. As for the meaning of value, the 1815 Act kept

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740. Act of Jan. 9, 1815, ch. 21, § 1, 3 Stat. 164, 164.

741. *Id.* § 5, 3 Stat. at 166.

742. *Id.* §§ 2-3, 3 Stat. at 165-66.

743. *Id.* § 14, 3 Stat. at 169-70.

744. *Id.* §§ 26-27, 3 Stat. at 173-75.

745. *Id.* § 40, 3 Stat. at 179.

746. These were New York, South Carolina, Georgia, and Ohio. WILLIAM H. CRAWFORD, 15TH CONG., DIRECT TAX AND INTERNAL DUTIES: COMMUNICATED TO THE SENATE, DECEMBER 8, 1817, *in* 3 AMERICAN STATE PAPERS: FINANCE, *supra* note 694, at 215, 219-20.

the usual vague "worth in money" definition,[747] and the provisions on data gathering were virtually identical to those of 1813, which is to say, loose.[748]

The 1815 Act provided for a federal board, in every state, to revise all valuations in any county en masse, thereby redistributing the tax burden across the whole state. Each board was composed of all the principal assessors in the state.[749] The principal assessors thus did double duty: each one supervised the assistant assessors in his own collection district and heard taxpayer appeals therein, but also served as a member of the federal board for the state and had a vote in its collective decisionmaking. Because each principal assessor was resident in his collection district, the federal board was geographically representative of the state.

That said, the exact mission of each federal board varied somewhat depending on the history of the state where it operated. If the state was one of the seven in which the state legislature had taken the option to fill the quota itself under the 1813 tax, the 1815 Act contemplated a new full-blown federal assessment of the state, with the federal board doing its mass revisions as the conclusion of that federal assessment.[750] If the state was one of the eleven whose legislature hadn't taken the option to fill the quota itself in 1813, that meant a federal assessment had already been completed under the 1813 law, and the 1815

747. Act of Jan. 9, 1815 § 5, 3 Stat. at 166. Treasury Department regulations said, as in 1813, that the assistant assessors should "attend upon" the principal assessors "for the purpose of explaining the principles upon which they have made the valuations." U.S. DEP'T OF TREASURY, CIRCULAR TO THE PRINCIPAL ASSESSORS, IN THE STATES OF NEW JERSEY, PENNSYLVANIA, VIRGINIA, SOUTH CAROLINA, GEORGIA, OHIO & KENTUCKY (Mar. 10, 1815), *in* CIRCULAR LETTERS OF THE SECRETARY OF THE TREASURY, *supra* note 385, "T" Series: Reel 1, Target 1, at 390 [hereinafter TREASURY CIRCULAR FOR NOT-PREVIOUSLY-ASSESSED STATES 1815].

748. On valuation if the owner or occupier fails to give a list, note the similarity between Act of Jan. 9, 1815 § 10, 3 Stat. at 168 and Act of July 22, 1813, ch. 16, § 10, 3 Stat. 22, 27 (repealed 1815). On assessors' obligation to "inquire after" lands, etc., "by reference to" state assessment lists and other records (unspecified), note the similarity between § 4, 3 Stat. at 166 and § 4, 3 Stat. at 26. On the formatting of lists submitted by taxpayers to be "as far as practicable, conformabl[e] to those" required under state direct taxes, note the similarity between § 6, 3 Stat. at 166-67 and § 6, 3 Stat. at 26-27. On the principal assessor's option to have assistant assessors report state direct-tax liability when objects of taxation are the same, note the similarity between § 13, 3 Stat. at 169 and § 13, 3 Stat. at 28. As in 1813, the Treasury Department continued to caution principal assessors against exercising this option. TREASURY CIRCULAR FOR NOT-PREVIOUSLY-ASSESSED STATES 1815, *supra* note 747, at 390.

749. Act of Jan. 9, 1815 § 16, 3 Stat. at 170.

750. For these states, Congress empowered the principal assessor (as in 1813) to make mass revisions of the assessment districts within the collection district under the "just and equitable" standard. § 15, 3 Stat. at 170. As in 1813, the Treasury Department said this task was "delicate and important." TREASURY CIRCULAR FOR NOT-PREVIOUSLY-ASSESSED STATES 1815, *supra* note 747, at 390.

law contemplated that the recent federal assessments would "be and remain the valuations and assessment" for the state, "subject only to" the revision that was now to be done by the new federal board.[751]

Still, it bears emphasis that for *both* categories of states—both "the states which have been heretofore assessed" and "the states which have not been heretofore assessed"—the federal board of principal assessors had "power to revise, adjust and equalize the valuation of property in any county or state district, by adding thereto or deducting therefrom such a rate per centum, as shall render the valuation of the several counties and state districts *just and equitable*."[752] As the Treasury Department regulations of 1815 acknowledged, the federal board was to make revisions when they were "necessary, *in the opinion of the board*, to produce an equality of the valuations throughout the state."[753] One state legislature, in a memorial to Congress regarding federal board revisions, stated that some of the federal board's powers under the act "were purely ministerial" but recognized that the board "had a discretion" in the process by which "the valuations of the several counties were adjusted and equalised."[754] Because valuation-based taxation under the 1815 Act covered not only real estate but also slave ownership, the federal board's power to make mass revisions extended to the valuation of enslaved persons (as it had not in 1798).[755]

Notably, the option for state legislatures to vary the apportionment of the federal tax by county, which was offered in the 1813 legislation, was absent in 1815: allocating the intrastate federal burden now rested exclusively with federal administrators. Once the valuations had been revised by the federal boards

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751. Act of Jan. 9, 1815 § 6, 3 Stat. at 166-67.

752. *Id.* § 20, 3 Stat. at 171 (emphasis added). The statute said "state districts" because South Carolina referred to its principal internal subdivisions by that label, not "county."

753. For the Department's circular to the federal boards in the previously-assessed states, see U.S. DEP'T OF TREASURY, CIRCULAR TO THE PRINCIPAL ASSESSORS IN THE STATES OF MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, VERMONT, CONNECTICUT, NEW YORK, DELAWARE, MARYLAND, NORTH CAROLINA, TENNESSEE (Mar. 10, 1815), *in* CIRCULAR LETTERS OF THE SECRETARY OF THE TREASURY 1789-1838, *supra* note 385, "T" Series: Reel 1, Target 1, at 366 (emphasis added). The same wording was used in the circular addressed to the boards in the other states. TREASURY CIRCULAR FOR NOT-PREVIOUSLY-ASSESSED STATES 1815, *supra* note 747, at 393.

754. DEL. HOUSE JOURNAL, *supra* note 560, at 179. For adoption of the language, see *id.* at 214.

755. This is briefly confirmed by Einhorn, who notes that a principal assessor in Virginia, writing to the Treasury Department to explain his lateness in finalizing assessments, said he had trouble with the arithmetic after he "was told" at the "equalization meeting" to "raise his slave valuations by 15 percent." EINHORN, *supra* note 53, at 307 n.75.

for both sets of states, said Congress, those valuations would remain in place indefinitely for each annual iteration of the permanent tax.[756]

Whereas Congress in 1813 had eschewed federal board rulemaking out of prudential fears that it might delay implementation of the tax or even invite obstruction, Congress in 1815 solved this problem by relying even more heavily on federal-board power: the act provided that, if any principal assessor failed to send the requisite assessment for a county to the federal board on time, the board was empowered to assign any valuation to the recalcitrant county that it considered "just and right," which "shall be final."[757] The federal officials embedded in each county had to get with the program, and promptly, or leave their neighbors at the mercy of the *other* federal administrators in the state.

The debates recorded in the *Annals* on the 1815 tax are unfortunately sparse and incomplete,[758] but what is extant contains no constitutional objections (indeed no objections at all) to delegations to administrators.[759] And the tax itself passed by wide margins: 106-53 in the House, 23-7 in the Senate.[760] The increased delegation of the 1815 legislation was apparently understood to make the direct tax's intrastate distribution more equitable than the 1813 legislation had. For example, two weeks after the 1815 law was enacted, the House Ways and Means Committee recommended against a special act for Tennessee that would have redressed alleged inequity in the distribution of the 1813 federal direct-tax burden within that state, in particular, an allegedly disproportionate burden on Hickman and Dixon Counties. In explaining why the special act wasn't worth passing, the Committee noted that "[b]y the direct tax bill recent-

756. Act of Jan. 9, 1815 § 21, 3 Stat. at 171-72. Each board had power to make "such rules and regulations, as to them shall appear necessary for carrying" the "purposes" of the act "into effect." *Id.* § 16, 3 Stat. at 170. This was in addition to the Act's authorization of the Treasury Secretary to "establish regulations suitable and necessary for carrying this act into effect," to be "binding on each principal assessor and his assistants." *Id.* § 4, 3 Stat. at 166.

757. *Id.* § 19, 3 Stat. at 171.

758. For facially incomplete recording, see, for example, 28 ANNALS OF CONG. 952, 960-62 (1814).

759. For the pages covering the House debate on the 1815 direct tax, see *id.* at 419-81, 491-512, 958-71 (1814), but note that many of these pages mainly concern other taxes that were part of a larger legislative package. Consider also the committee report on the tax package that included the 1815 direct tax. JOHN WAYLES EPPES, HOUSE WAYS & MEANS COMM., STATE OF THE FINANCES (1814), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 854-55 (also printed in 28 ANNALS OF CONG. 378-81 (1814)). To check that no widely covered news about the deliberations was being missed, I searched *Readex*'s database *America's Historical Newspapers* for all items containing the phrase "direct tax" in the newspapers of Maryland, Virginia, and Washington, D.C., from December 19, 1815, when House floor deliberations on the act began, through December 29, 1815, that is, seven days after the House passed the bill. This produced 42 entries, with no objections to administrative power.

760. 28 ANNALS OF CONG. 971-72 (1814) (House); 28 ANNALS OF CONG. 160 (1815) (Senate).

ly passed, provision is made for an equalization of the tax; this will afford ample relief for the counties of Hickman and Dixon, against the *future* operation of the inequality complained of."[761] Expressing a similar view, the Delaware state legislature, in an 1816 memorial to Congress seeking redress of alleged errors by the federal board in that state, articulated its understanding of the 1815 legislation: "[B]y departing from [statutory county-by-county] proportions, prescribed by the three millions act [of 1813], it is evident that Congress intended that a new and more just rule should be established, which depending upon the valuation of property, would most certainly impose on all an equal share of the tax."[762]

3. The Peacetime Pullback of 1816

The permanent direct tax of 1815 passed in January of that year, but a few weeks later, news arrived in Washington that U.S. diplomats in Europe had negotiated peace. With the permanent tax's first annual haul of $6 million coming in, Congress in early 1816 voted to cease the permanent tax and levy just one additional one-shot tax of $3 million, to be allocated intrastate based on the 1815 assessment, including whatever revisions the federal boards had made.[763] Recorded deliberations on this peacetime fiscal pullback do not contain any questioning of the federal boards' powers.[764]

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761. JOHN WAYLES EPPES, HOUSE WAYS & MEANS COMM., UNEQUAL OPERATION OF THE ACT IMPOSING A DIRECT TAX (1815), *in* 2 AMERICAN STATE PAPERS: FINANCE, *supra* note 120, at 890, 890 (emphasis added).

762. DEL. HOUSE JOURNAL, *supra* note 560, at 119.

763. Act of Mar. 5, 1816, ch. 24, §§ 1-2, 3 Stat. 255, 255; *see also* Act of Apr. 26, 1816, ch. 82, §§ 1-2, 3 Stat. 302, 302-303 (providing that, for any future direct taxes, the assessment under the 1815 Act—which included the boards' revisions—will remain in place, but with a mechanism for individual adjustments for reasons such as transfer, destruction of buildings, changes in exemption, or "such other cases as the Secretary of the Treasury may find it necessary in the furtherance of justice specially to authorize"). The 1816 tax included the usual option for state legislatures to pay their states' quotas, which four out of eighteen states did. WILLIAM H. CRAWFORD, U.S. DEP'T OF TREASURY, STATE OF THE FINANCES (1817), *in* 3 AMERICAN STATE PAPERS, *supra* note 694, at 220, 223.

764. For substantive deliberations on the 1816 Act, which are interspersed with those on much other tax legislation, see 29 ANNALS OF CONG. 158-67, 515, 516-22, 675-94, 719-875, 899-970 (1816). Some of the debate is facially incomplete. *E.g.*, *id.* at 840, 884, 900. The debates included criticisms of the use of administrators, but none that go to constitutional problems with delegation of rulemaking power to the federal boards. *See id.* at 752 (statement of Rep. Hardin) (stating the "real object" of direct tax is "to strengthen the Executive by the additional means of distributing offices"); *id.* at 756 (same); *id.* at 774 (statement of Rep. Parris) (critiquing the direct tax for being too expensive and using too many officers not chosen lo-

E. The Civil War Direct Tax, 1861

In contrast to (say) the Alien and Sedition Acts, Americans over the course of the nineteenth century seem not to have remembered the federal boards' powers under the direct-tax acts of 1798 or 1815 as suspect. Perhaps the best evidence of this absence of regretful constitutional memory is that when Congress in 1861 returned to taxing real estate to help finance the Civil War, lawmakers rapidly adopted the direct-tax act of 1815 as a model for how to do the administration.[765] The 1861 Act apportioned a sum of $20 million by state (not by county),[766] and it adopted the usual vague "worth in money" definition of value,[767] plus the usual loose provisions on data gathering.[768] And, after providing that the President could divide each state into collection districts with an "assessor" for each,[769] who could hear appeals from taxpayers,[770] it empowered the board of all assessors in the state to "revise, adjust, and equalize" the value of real estate in each of the collection districts within the state "as shall appear just and equitable."[771] To be sure, this direct tax proved to be only a small component of Civil War finance.[772] And in contrast to the taxes of 1813 and 1815, the 1861 tax's option for the state legislatures to pay the quotas themselves *was* taken up, by nearly every state, so the federal boards hardly ever needed to operate.[773] Still, Congress's willingness to provide for the boards re-

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cally); *id.* at 902 (statement of Rep. Atherton) (saying the direct tax entails a "standing army" of about 3,000 officers, which increases "Executive influence" and is too expensive); *id.* at 1134 (rejecting "without a voice in its favor" a motion to give the President "a discretionary power" to suspend assessment of the direct tax in cases where a state promises to assume it but fails to pay).

765. Charles F. Dunbar, *The Direct Tax of 1861*, 3 Q.J. ECON. 436, 444 (1889).

766. Act of Aug. 5, 1861, ch. 45, § 8, 12 Stat. 292, 294-96.

767. *Id.* § 13, 12 Stat. at 297. The provision added, vaguely, that officials should take "due regard" of state tax valuations. *Id.*

768. *Id.* §§ 12, 14, 18, 21, 12 Stat. at 297-99.

769. *Id.* § 9, 12 Stat. at 296.

770. *Id.* § 22, 12 Stat. at 299.

771. *Id.* § 23, 12 Stat. at 300. The board could also make mass revisions of values as between counties, again under a "just and equitable" standard. § 28, 12 Stat. at 301. Enforcement of the tax was by distress of goods, then sale of land, as with its predecessors. §§ 35-36, 12 Stat. at 292, 303-04.

772. Dunbar, *supra* note 765, at 444, 446 (noting that although the 1861 tax was annual, Congress soon after limited it to only one year's worth of collections).

773. The state option is in Act of Aug. 5, 1861 § 53, 12 Stat. at 311-12. On its uptake, see Dunbar *supra* note 765, at 446. The failure to collect the tax in the rebel states (initially due to the rebellion itself, and then, after the war, due to resistance and economic devastation) created a

flects enduring acceptance of their rulemaking power, over domestic private rights, at a constitutional level.

CONCLUSION

Originalist scholars and judges skeptical of the constitutionality of domestic coercive rulemaking paint an image of Founding-era administration that was narrow and ministerial insofar as it touched private rights. Yes, presidents and administrators of the Constitution's first decade may have exercised delegated power to make sweeping general rules affecting many individuals—deciding the scale of all disabled soldiers' benefits, imposing any regulations they chose on anyone trading with Native Americans, structuring the program to repurchase federal debt, deciding the locations of all post offices and the frequency of all mail in a world where many had no other way to communicate, cutting off any or all international trade, deciding whether to double the size of the army, choosing eligibility criteria for merchant sailors to get government money and medical care[774]—but these many examples, say the skeptics, are all exceptional because none are both domestic in focus and coercive in how they touch private rights. Yet the power of the federal direct-tax boards to decide the mass distribution of taxable property values and therefore the liabilities of thousands of landowners at a stroke—exercised under a vague statutory mandate to make decisions "as shall appear to be just and equitable," facing methodological indeterminacy and empirical uncertainty, suffused with politics, and unconstrained by judicial review—achieved wide, enduring, bipartisan acceptance from 1798 onward. The willingness of the Constitution's earliest lawmakers to rely upon administrators for rulemaking encompassed not only the international and military realm but also the domestic one—not only the realm of benefits and privileges, but also the realm of private rights. Foreign or domestic, public or private, rulemaking has been with us since the beginning.

problem of equity among taxpayers, which prompted Congress, decades after the war, to refund the money that had been paid. *See* Act of Mar. 2, 1891, ch. 496, 26 Stat. 822; Dunbar, *supra* note 765, at 453, 457.

774. For all these examples, see *supra* note 48.