

## **APPORTIONMENT OF DIRECT TAXES: THE FOUL-UP IN THE CORE OF THE CONSTITUTION**

Calvin H. Johnson<sup>\*</sup>

*Article I, Section 2 of the Constitution requires that direct taxes be apportioned among the states by population. The Founders defined “direct tax” broadly, usually using the term as a synonym for “internal tax” and encompassing all taxes except for customs duties. The Founders expected Congress to use direct taxes. Giving Congress the power to lay internal taxes was a major purpose of the Constitution as a whole.*

*Apportionment by population, however, turns out to be an absurd and inequitable requirement when the tax base is uneven per capita among the states.*

*With apportionment, tax rates must necessarily be higher in poorer states or in states with a smaller per capita tax base. Where the tax base is especially thin, the tax rates will be prohibitive. The Founders did not see absurdity nor intend that apportionment would hobble any tax.*

*The early Supreme Court solved the dilemma, when key Founders were still Justices, by interpreting “direct tax” strategically so that no tax was direct if apportionment was unreasonable. That solution was doctrine for one hundred years, and courts need to return to it.*

*Apportionment has no constitutional weight. Some have described apportionment as an individual right intended to protect accumulated wealth from the force of mere numbers, but that rationale misdescribes the history. Apportionment was a product of the requisition system under the Articles of Confederation, and the formula was written to reach wealth, not to protect it. Apportionment, moreover, was brought over from the Articles into the Constitution solely to help settle a dispute as to the power of the slave states in Congress. With the end of the requisition system and of slavery, apportionment lost its historical rationale and justification.*

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<sup>\*</sup> Andrews & Kurth Centennial Professor of Law, University of Texas School of Law. The author wishes to thank all those many friends and colleagues who tested the thesis and made illuminating comments. The author especially wants to thank Erik Jensen, Doug Laycock, Jack Rakove, Ted Schneyer, David Braybrooke, and the participants in his presentation of this issue before the Teaching Tax Committee of the American Bar Association Tax Section, the University of Texas Government Department, and the University of Texas School of Law.

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There are times when the Constitution, for all its sanctity, needs to be interpreted by *cy pres* or some other functional construction to avoid a literal requirement and to reach a more basic intent. The Constitution, for example, provides that direct taxes laid by Congress must be apportioned among the states according to population.<sup>1</sup> The apportionment requirement dictates, for example,

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<sup>1</sup> U.S. CONST. art. I, § 2 (requiring the apportionment of both direct taxes and representatives in the U.S. House of Representatives among the states according to their numbers, counting all free persons as one, including persons bound to service for a term of years, excluding Indians not taxed, and including three-fifths of slaves), § 9 (requiring the apportionment of direct taxes according to the required census), *amended by* U.S. CONST. amend. XIII (abolishing slavery), amend. XVI (allowing taxation of income without apportionment).

that if one state has twice the population of another, twice the amount of direct tax must be collected from within the more populous state. The Founders defined “direct taxes” broadly and they expected “direct taxes” be used.<sup>2</sup> For reasons the Founders did not foresee, however, apportionment among the states commonly turns out to be a silly requirement, “absurd[] and inequitable,”<sup>3</sup> which hobbles direct taxes and makes them impossible, in practice, to use. The Founders themselves, sitting in the early Supreme Court, solved the problem pragmatically by defining “direct taxes” creatively to avoid the apportionment requirement in cases in which apportionment would have been unreasonable.<sup>4</sup>

Constitutional provisions often represent fundamental values that deserve weight in constitutional discourse, but apportionment does not. Apportionment among the states arose in 1776, when Congress was only a collection of delegates who had no means to collect taxes, except by requisitions upon the states.<sup>5</sup> The rule was brought into the Constitution’s drafting as an ordinary continuation of the status quo and as a small piece in the compromise to give the slave states a larger share of the votes in the House of Representatives.<sup>6</sup> With the end of both the requisition system and slavery, the historical reasons for the requirement disappeared, leaving apportionment of taxes with no justifying rationale. Outside of requisitions, apportionment commonly is a terrible rule, leading to results that nobody debated and nobody intended. The apportionment requirement is a glitch, or foul-up, in the core of the Constitution; it is the kind of mistake that lawyers or analytic philosophers should have fixed, but did not.

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<sup>2</sup> See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173-74 (1797) (Chase, J.).

<sup>3</sup> *Id.* at 179 (Paterson, J.).

<sup>4</sup> *Id.* at 174 (Chase, J.).

<sup>5</sup> See *infra* Appendix I, Origin and Incorporation of the “Federal Formula.”

<sup>6</sup> *Id.*

Modern courts can avoid the apportionment requirement by using flexible definitions of “direct tax” or “income tax.” The Sixteenth Amendment, adopted in 1913, allows Congress to lay income taxes without apportionment among the states.<sup>7</sup> Even before the Amendment, only “direct taxes” needed to be apportioned. Thus today, a court can avoid apportionment by defining “income tax” broadly enough to cover the tax at issue, or by defining “direct tax” narrowly enough to exclude the tax at issue.<sup>8</sup> Still, under quite plausible historical definitions of “direct tax” and “income,” the apportionment requirement would apply broadly, as if it was a good rule with a function or policy that needs to be preserved. The apportionment requirement has had, for instance, a continually negative influence on the income tax because of a constant threat that courts will interpret the income tax amendment narrowly so as to require apportionment.<sup>9</sup>

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<sup>7</sup> U.S. CONST. amend. XVI.

<sup>8</sup> See *infra* text accompanying notes 371-77. See also Bruce Ackerman, *Wealth, Taxes, and the Constitution*, 99 COLUM. L. REV. (forthcoming 1999) (arguing that under the constitutional regime inaugurated by the New Deal, the Supreme Court should not find significant limits on Congress’ power over taxes).

<sup>9</sup> See *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (deciding that stock dividend was capital, not income); see, e.g., Leon Gabinet & Ronald J. Coffey, *The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems*, 27 CASE W. RES. L. REV. 895, 926 (1977) (arguing that apportionment prevents shareholder tax on undistributed corporate earnings); John S. Nolan, *The Merit In Conformity of Tax to Financial Accounting*, 50 TAXES 761, 767-69 (1972) (arguing that prepaid receipts are not taxable under the Constitution); Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution, Macomber, and Mark to Market*, 13 VA. TAX REV. 1 (1993) (arguing that economic improvements achieved while avoiding

There are now, moreover, high level calls to repeal the income tax amendment<sup>10</sup> and to replace the income tax with a consumption tax. Under a reasonable interpretation of original intent without *cy pres*, a broad-based consumption tax is a direct tax that needs to be apportioned among the states. Apportionment is avoidable only if courts continue to interpret “direct tax” or “income tax” creatively with the understanding that they need to avoid the terrible rule.

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incoming cash cannot be taxed constitutionally as income). *But see* JOSEPH T. SNEED, THE CONFIGURATIONS OF GROSS INCOME 125 (1967) (calling for consigning of the doctrine to the junkyard of judicial history).

<sup>10</sup> *See, e.g.*, Rep. Bill Archer, U.S. House of Representatives Comm. on Ways & Means, *W&M Schedules Hearing on Effect of Tax Reform on Small Business* (Apr. 2, 1996), 96 TAX NOTES TODAY 65-19 (Elec. ed. 1996).

This Article recommends candor in the courts. Apportionment should be avoided when its application renders absurd results, by *cy pres* or some other construction that more closely describes the basic intent of the Framers<sup>11</sup>—much as one returns too much change to a cashier or one cleans up a scrivener’s errors. In 1797, when the Supreme Court was still comprised of key Founders, the Court solved the dilemma by construing “direct tax” functionally so that a tax would not be a direct tax if the result, apportionment, would negate the power to raise the tax.<sup>12</sup> Defining “direct tax” to obliterate the apportionment requirement when apportionment is absurd is the simplest and most effective means to reach the right result.

This Article has five Parts. The first Part explains the absurd consequences of apportioning taxes among the states by population. The second Part explains that the history of the rise and incorporation of apportionment into the Constitution indicates that the Framers never intended to hobble direct taxes. Part Three of the Article rejects as ahistorical, arguments that might provide a legitimating rationale for the requirement. The Article rejects especially the argument from *Pollock v. Farmers’ Loan & Trust Co.*<sup>13</sup> that apportionment was adopted to protect individual rights or to save accumulated wealth from tax. Part Four examines the usage of the term “direct tax” at the time of the creation of the Constitution and concludes that the Founders intended the term “direct tax” to be very broad. Finally, the fifth Part argues that courts should now define “direct tax” functionally so that they will never impose apportionment when its impact would be absurd. The Appendix, “Origin and Incorporation of the ‘Federal Formula,’” explains the chronology by which the apportionment formula arose and was incorporated into the Constitution.

## I. THE NONSENSE OF APPORTIONMENT

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<sup>11</sup> *Cy pres* literally means “as near as possible” from the French for “as near” or “as close.” IV OXFORD ENGLISH DICTIONARY 198 (2d ed. 1989). *See, e.g.*, *Democratic Cent. Area Trans. Comm. of D.C. v. Washington Metro. Area Trans.*, 84 F.3d 451 (D.C. 1996) (using *cy pres* in a class action suit to deliver a settlement to current bus riders rather than prior-period bus riders who actually were hurt by the overcharge); *First Nat’l Bank of Chicago v. Elliot*, 92 N.E.2d 66, 73 (Ill. 1950) (using *cy pres* to rechannel a bequest in order to further the testator’s general intent to help orphans, when the order of nuns named in the will said that the testator’s identified intent to build an orphanage was not practical with the funds made available).

<sup>12</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1797). *See infra* text accompanying notes 331-60.

<sup>13</sup> 157 U.S. 429 (1895), *on reh’g*, 158 U.S. 601 (1895), *overruled in part by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

To illustrate the absurdity of apportionment, assume that Congress imposes a tax on carriages held for personal use or for hire. According to James Madison and John Jay, a tax on carriages is a “direct tax” that must be apportioned and their use of the term “direct tax” is consistent with a number of other contemporaneous examples.<sup>14</sup>

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<sup>14</sup> 4 ANNALS OF CONG. 729-30 (1794), *reprinted in* 3 THE FOUNDERS’ CONSTITUTION 357 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter 3 FOUNDERS] (Speaking before the House of Representatives, James Madison announced he would vote against an unapportioned tax on carriages because it was unconstitutional, and that taxing without apportionment would “break down one of the safeguards of the Constitution.”); *The Debates in the Convention of the State of New York* (John Jay), July 1, 1788, *in* 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 381 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 2 DEBATES] (arguing that a tax of twenty shillings on all coaches would be a “specific” direct tax); *accord* Oliver Wolcott, Jr., *Direct Taxes*, H.R. DOC. NO. 100-4 (1796), *in* 1 AMERICAN STATE PAPERS: CLASS III FINANCE 414, 423, 426-27, 431 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) (including Connecticut, Pennsylvania, New Jersey, and Virginia taxes on carriages in the Treasury inventory of direct taxes); *see also infra* discussion accompanying notes 206-44 (“direct taxes” includes all “internal taxes,” defined as taxes other than customs duties). The editorial explanation of *Hylton v. United States*, *in* 4 THE LAW PRACTICE OF ALEXANDER HAMILTON 297-302 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980), provides a catalogue of state taxes on carriages during the period, without settling whether the taxes were considered direct or indirect.

Assume that Virginia and New York have equal populations, counted under the apportionment formula, so that they must bear the same amount of direct tax. Carriages are useful in urban centers, but Virginia has few urban centers. Assume, therefore, that there are one thousand carriages in New York and only one hundred carriages in Virginia.<sup>15</sup> To satisfy the requirement of apportionment by population under these circumstances, Virginia carriages would have to be taxed at a rate ten times higher than the tax rate on New York carriages. The result is necessary and independent of policy. The Constitution gave Congress the power to lay taxes directly on people, transactions, or property without going through the states, and gave the broad power to choose the tax base.<sup>16</sup> There is nothing especially noxious or suspect about a tax on carriages. Tax rates must be ten times higher in Virginia solely because Virginia has so few carriages over which to spread its quota. There is no reason to punish Virginia citizens for the state's paucity of carriages. Nonetheless, the allocation requirement forces Congress to impose a higher tax rate on individuals in a state with a smaller tax base. The rule, while reasonable on the state level, is necessarily inequitable on the individual level.

Under apportionment, a state's whole quota might fall on a small group or even just one person. Assume that Vermont has no carriages as of yet. Vermont's entire quota would then float at the state line, waiting to pounce on the first poor soul who crosses over the state border with a carriage. The result is both necessary and absurd.

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<sup>15</sup> The hypothetical and explanation are from *Hylton*, 3 U.S. at 174.

<sup>16</sup> U.S. CONST. art. I, § 8 (giving Congress the power "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").



Assume, to take a more current example, that Congress decides that it wants to replace the federal income tax with a personal consumption tax. A tax on income need not be apportioned because the Sixteenth Amendment specifically allows an income tax without apportionment.<sup>17</sup> The intent behind the consumption tax, however, is to “tear out the income tax by its roots so that it can never grow back.”<sup>18</sup> The proposed consumption taxes, therefore, do not fit comfortably under the protection of such an income tax amendment.

Under usages at the time of the creation of the Constitution, a “consumption tax” was a “direct tax” because it was not a duty on imports or exports.<sup>19</sup> In the original Constitutional debates, the Founders usually used the term “direct tax” as a synonym for “internal taxes,” meaning all taxes except taxes on imports or exports. In some usages, “direct taxes” excluded “duties” and “excises;” however, “excises” and “duties” were understood narrowly and probably excluded from apportionment only stamp taxes and whiskey taxes, which were not very important revenue sources.<sup>20</sup> Moreover, any immunity from apportionment for duties and excises is problematic.<sup>21</sup> Under the original meaning of the term, a broadly based internal consumption tax would be a “direct tax” that would have to be apportioned.

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<sup>17</sup> U.S. CONST. amend. XVI.

<sup>18</sup> Rep. Bill Archer, U.S. House of Representatives Comm. on House Ways & Means, *W&M Schedules Hearing on Effect of Tax Reform on Small Business* (Apr. 2, 1996), 96 TAX NOTES TODAY 65-19 (Elec. ed. 1996) (quoting Chairman Archer’s statement during his announcement of the hearings). Under best current usage, moreover, a “consumption tax” differs from an “income tax” because a “consumption tax” will exempt either savings or return from savings from tax, but an “income tax” will tax both savings and the return from the savings. *See, e.g.*, DAVID F. BRADFORD & U.S. TREASURY TAX POLICY STAFF, *BLUEPRINTS FOR BASIC TAX REFORM* 26 (2d ed. 1984).

<sup>19</sup> *See infra* text accompanying notes 206-44.

<sup>20</sup> *See infra* text accompanying notes 273-304.

<sup>21</sup> *See infra* discussion in text accompanying notes 251-304.

Assume that Connecticut per capita consumption is twice Mississippi per capita consumption.<sup>22</sup> The apportionment formula was intended originally to allocate taxes according to a fair indicia of the relative wealth of the states.<sup>23</sup> The effect of the apportionment requirement is, however, necessarily a tax inverse to wealth; that is, the requirement results in higher tax rates in poorer states.<sup>24</sup> To satisfy apportionment, Mississippi citizens would be required to pay twice the Connecticut tax rates. Tax rates would have to be twice as high in Mississippi because Mississippi is poorer than Connecticut and has less consumption over which to spread its quota.

The Constitution, in addition, requires uniformity of tax rates among the states, at least for excise taxes, stamp taxes, and customs duties.<sup>25</sup> In their debates, the Founders considered apportionment to be a requirement parallel to the uniform tax rate requirement, which would prevent Congress from favoring citizens of one state at the expense of citizens of another.<sup>26</sup> Uniform rates among the states,

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<sup>22</sup> See, e.g., 1995 INFORMATION PLEASE ALMANAC 62 (listing 1993 per capita income for Connecticut at \$28,110 and for Mississippi at \$14,894).

<sup>23</sup> See *infra* Appendix I, text accompanying notes 21-42.

<sup>24</sup> Let  $W$  equal wealth (or income, consumption, or any other comprehensive tax base) with  $W_1$  and  $W_2$  representing wealth of State 1 and State 2, respectively. Let  $P$  equal population and let  $Q$  equal the total tax to be collected from the two states. The per capita wealth of rich state 1 is larger than the per capita wealth of poor state 2:

$$(1) \quad W_1/P_1 = k * W_2/P_2,$$

with  $k$  greater than one. In the illustration in the text,  $k$  equals 2. Apportionment by population means that:

$$(2) \quad Q_1/P_1 = Q_2/P_2,$$

where  $Q_1 + Q_2 = Q$ .

By isolating  $P_1$  in equations (1) and (2) and setting the results as equal to each other, one gets the following (left side derived from (1), right side derived from (2)):

$$(3) \quad (W_1 * P_2) / (k * W_2) = P_1 = (Q_1 * P_2) / Q_2.$$

Rearranging (3) and canceling out  $P_2$  yields the conclusion that the tax rate ( $Q/W$ ) in state 2 has to be  $k$  times higher than the tax rate in rich state 2:

$$(4) \quad Q_2/W_2 = k * Q_1/W_1.$$

With  $k = 2$ , the tax rates must be twice as high in the poorer state. The result is independent of whether the tax base is wealth or consumption.

<sup>25</sup> U.S. CONST. art. I, § 8.

<sup>26</sup> 3 ANNALS OF CONG. 378-80 (1792), reprinted in 3 FOUNDERS, *supra* note 14, at 357 (reporting Hugh Williamson's contributions to the House Debate). See also *The Debates in the Convention of the Commonwealth of Virginia* (Edmund Pendleton), June 12, 1788, in 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 300 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 3 DEBATES] (stating that by apportionment "we are to pay our equal, ratable share only"); William Grayson, *Debates in the Virginia Ratification Convention* (June 12, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA 1184-86 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 STATES] (Volume 10 of the overall set is the third of three volumes

moreover, are part of sound tax policy because they do not induce shifts in sales or production from one state to another. Apportionment, however, is not consistent with uniform tax rates if the tax base varies per capita among the states. Apportionment by population requires a higher tax rate in a state with a smaller per capita tax base.

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dealing with the Virginia ratification debates) (saying uniformity will prevent representatives from voting for taxes they pay no part of, whereas apportionment, but not uniformity, would support that result); James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), *in* 10 STATES, *supra*, at 1204; James Madison, Debates in the Virginia Ratification Convention (June 17, 1788), *in* 10 STATES, *supra*, at 1338-39, 1343 (arguing that apportionment would prevent Congress from imposing nonuniform or unequal taxes on tobacco or slaves in Northern states who would escape); THE FEDERALIST NO. 36, at 220 (Alexander Hamilton) (Mod. Lib. College ed., n.d.) (explaining that apportionment “effectually shuts the door to partiality or oppression”).

Proponents of a flat tax or consumption tax have suggested a fixed-rate or flat tax on consumption.<sup>27</sup> A flat tax on consumption, which would hold rates uniform throughout the nation, is not constitutional in strict constructionist terms, because a flat tax is an internal tax that is not allocated among the states in proportion to population. Proponents of a flat-rate consumption tax may ask for either a flat tax or strict construction of the Constitution, but not both. Conversely, an apportioned consumption tax would be constitutional even though it is a direct tax, but the tax rate then would have to be higher in the poorer states. A tax with higher rates in poorer states would not bring political credit to its proponents, at least not in Mississippi.<sup>28</sup>

A shift from income to consumption tax as the primary source of federal revenue would be a conservative shift, but the apportionment requirement is also a thorn on the other side of the political spectrum that thwarts attempts to strengthen the income tax base. The apportionment requirement is still said to prevent the taxation of capital including the taxation of unrealized appreciation.<sup>29</sup>

While the Sixteenth Amendment allows an “income” tax without apportionment, unrealized appreciation in the market value of investments is said to be not “income” but “capital” and, thus, not within the explicit allowance of the Sixteenth Amendment. Mark-to-market systems, which give the United States Treasury Department the best chance of keeping up with rapidly changing financial schemes with evenhanded rules, would be constitutionally barred under this definition of “income.”<sup>30</sup> Apportionment is a hobbling requirement, when the tax base is uneven per capita among the states, whether the tax base is wealth, which is presumably conducive to redistributive tax policy, or consumption, which presumably makes redistribution more difficult. Apportionment may thus block

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<sup>27</sup> See, e.g., James M. Bickley, *Flat Tax Proposals: An Overview* (CRS Issue Brief, Mar. 16, 1996).

<sup>28</sup> Erik M. Jensen, in *The Apportionment of Direct Taxes: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997), argues that flat-rate consumption taxes collected like sales taxes would be constitutional, but flat-rate consumption taxes collected from individual consumers would not. *But see* text accompanying *infra* notes 305-318.

<sup>29</sup> See, e.g., *supra* note 9.

<sup>30</sup> See, e.g., Paul A. Samuelson, *Tax Deductibility of Economic Depreciation to Insure Invariant Valuations*, 72 J. POL. ECON. 604 (1964) (explaining that the value of investment will be independent of the tax rate of the buyer only if the basis is held equal to fair market value); Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implementation*, 99 YALE L.J. 1817, 1821 (1990) (stating that continuous taxation of changes in wealth is ideal); Alvin C. Warren, Jr., *Financial Contract Innovation and Income Tax Policy*, 107 HARV. L. REV. 460, 474 (stating that mark to market could be a particularly effective response to financial innovation as to marketable investments).

quite sensible tax policy—no matter which direction one wants to move that policy.<sup>31</sup>

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<sup>31</sup> See, e.g., Mark P. Gergen & Paula Schmitz, *The Influence of Tax Law on Securities Innovation in the United States: 1981-1997*, 52 TAX L. REV. 101, 106 (1998) (arguing that only a general mark to market system or a consumption tax reasonably could fix discontinuities in the taxation of financial innovations). Pursuant to some arguments, neither solution taxes income and, therefore, neither solution is constitutional.

If a specific good, like cotton or carriages, is spread evenly among the states, Congress reasonably might avoid the uneven tax rates caused by apportionment, just by avoiding a tax on the good. The perversity of apportionment is not avoidable, however, when the federal tax base goes beyond taxation of specific items and rests on a wider economic tax base. One would expect, for instance, that the Connecticut per capita tax base would be more or less twice that of Mississippi, whether wealth, income, sales, value added, consumption, or any other reasonable measure of economic well being as the tax base. Given this disparity, an apportioned tax necessarily will have tax rates that are twice as high in a poorer state because a poorer state has a smaller tax base over which to spread its quota. Once it is given that the tax base is uneven among the states and that Congress will use a direct tax,<sup>32</sup> the perversity of apportionment is unavoidable and apportionment becomes a rule too unreasonable to be enforced.

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<sup>32</sup> See *infra* text accompanying notes 49-94.

The absurdity of apportionment goes beyond a question of whether it would be prudent or of good consequence to enforce the requirement.<sup>33</sup> Prudence or concern about consequence might mean we do not want the result, but the Framers did, and their intentions are binding. Constitutional mandates can be simultaneously bad policy and mandatory. Absurdity, however, is a stronger objection than prudence or concern about bad consequences. Absurdity indicates that even the Framers did not intend the results. The Founders did not see the inconsistency between uniformity and apportionment when they drafted and debated the Constitution,<sup>34</sup> or at least no one said it in a way to force the polity to come to grips with the nonsensical rule.<sup>35</sup> The Founders intended no absurdity nor hobble on Congress' power to lay direct taxes. When the Founders later realized it, they recoiled from the result.<sup>36</sup> Even within the rules of strict construction, courts should resolve a result unforeseen by the Founders by inquiry into how the Founders would have resolved it had they recognized the problem.<sup>37</sup>

It is terrible to have a botch in the core of the Constitution. Some look at the Constitution as scripture<sup>38</sup> and consider constitutional interpretation as a

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<sup>33</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE* 59 (1991) (describing prudential arguments as one of the modalities of constitutional interpretation).

<sup>34</sup> See, e.g., Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 *PAPERS OF JAMES MADISON* 449, 450 (Charles F. Hobson & Robert A. Rutland eds., 1979) (assuming in his explanation that stamp taxes must be apportioned, notwithstanding the fact that the Constitution requires stamp taxes to have a uniform tax rate throughout the states).

<sup>35</sup> "An Old Planter," who wrote in Virginia in favor of the Constitution, apparently saw the phenomenon, but did not dislike it because he was sure that Northerners would be stuck with the higher tax rates:

[B]y the constitution [lands] can only be taxed by the poll, or number of our people, so that an acre of land in Virginia will not pay a sixth of what an acre of equal land will pay in Pennsylvania or Massachusetts. Our stock of horses, cattle, &c. can only be taxed in the same proportion, so that a horse or an ox will pay three times the tax in the northern states that we shall pay in Virginia.

Letter from An Old Planter to the Planters and Farmers of Virginia (Jan. 30, 1788), in *VA. INDEP. CHRON.*, Feb. 20, 1788, reprinted in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA* 394, 396 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 *STATES*]. The "Old Planter's" statement did not mean that the point became an issue or part of the general debates.

<sup>36</sup> See *infra* text accompanying notes 331-52 (discussing *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1797)).

<sup>37</sup> Cf. IAN MACLEAN, *INTERPRETATION AND MEANING IN THE RENAISSANCE* 147 (1992).

<sup>38</sup> MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 208 (1913) (arguing that respect for the Constitution grew quickly into "worship of the constitution"); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *BASIC WRITINGS OF THOMAS JEFFERSON* 746, 750 (Philip S. Foner ed., 1944) (criticizing the view of treating the constitution with sanctimonious reverence, "like the arc of the covenant, too sacred to be touched"). See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (discussing the Constitution as a

descendent branch of theological exegesis.<sup>39</sup> If the Constitution is scripture, it should be right. The document is still binding, moreover, and paramount over legislation and court-made law. It is now immune from mere policy analysis. Yet, just as King Canute for all his majesty could not stop the tides, so the Constitution for all its authority cannot circle the square nor make the apportionment requirement any less absurd.

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civil religion).

<sup>39</sup> Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, in *THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES* 14, 23 (Gordon S. Wood ed., 1979) (questioning, however, whether constitutional law should be considered theological exegesis).



This Article advocates a functional construction of the term “direct tax” that limits apportionment to examples in which it is a reasonable and convenient requirement. The Founders intended Congress to have the power to lay direct taxes and, once a tax is laid, there is no justification nor original intent to hobble it. If Congress adopts a head tax, a requisition upon the states, or a tax base that is equal per capita among the states, then apportionment is feasible and should be required. If apportionment is not reasonable (i.e. for every other tax base), then the tax therefore is not “direct.” Apportionment then would never prevent any kind of Congressional tax, nor distort tax policy by forcing Congress to use one kind of tax and avoid another kind.<sup>40</sup> The interpretation limiting “direct taxes” to cases in which apportionment is reasonable is consistent with the Constitution under normal rules of textual construction. It is consistent with the basic intent of the Founders. It does, however, require one to ignore the lexicographic meaning given to “direct tax” by the Founders of the Constitution, and to admit that the country’s founding document includes a technical error.

## II. HISTORICAL MEANING OF THE APPORTIONMENT REQUIREMENT

Historically, the apportionment requirement arose under the Articles of Confederation as a means to apportion requisitions among the states. The Constitution incorporated apportionment as a part of the compromise by which slave states acquired additional representation in Congress. The power to lay direct taxes was the most fiercely contested issue in the ratification debates, and neither Federalists nor opponents of direct tax conceived of apportionment as a hobble on the use of direct tax. With the end of both the requisition system and slavery, the historical explanations for the apportionment requirement disappeared and left the rule literally in place, but without an underlying Constitutional purpose.<sup>41</sup>

### A. *The Historical Accident in the Origin*

Apportionment of taxes among the states arose by necessity, not by principle, as the American colonies joined to fight the Revolution.<sup>42</sup> Under the Articles of Confederation, Congress could raise revenue only by requisitions upon the states

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<sup>40</sup> Cf. Edwin B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 295 (1907) (stating that “the Constitution was not understood to be binding the nation beforehand in any particular as to the selection” of a kind of tax).

<sup>41</sup> This section summarizes the fuller history described in Appendix I, Origin and Incorporation of the “Federal Formula.”

<sup>42</sup> See *infra* Appendix I.

requiring that each state pay its quota. Each state satisfied its quota with taxes collected under its own tax law.<sup>43</sup> The Continental Congress was not a government in 1776, when the Articles of Confederation were adopted by Congress and sent out to the states. The Congress was just an assembly of delegates too thin to create the administrative system to assess and collect taxes, but burdened with the responsibility of raising revenue to wage the Revolutionary War.<sup>44</sup> There may have been unfair or fair apportionments to determine a state's quota, but at the most basic level, the absence of a central government in 1776 meant that apportionment among the states by some formula was a necessity.

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<sup>43</sup> See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 205-15 (1979); EDMOND BURNET, *THE CONTINENTAL CONGRESS* 215-20 (1941).

<sup>44</sup> For commentary on the forces that led the colonies to form a union to further the Revolution, see, for example, MERRILL JENSEN, *ARTICLES OF CONFEDERATION* 107-24 (1940); E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790* (1961). Prior to the requisitions proposed in 1776, Congress financed the Revolutionary War solely by issuing paper money. See RAKOVE, *supra* note 43; BURNET, *supra* note 43.

The formulas used under the Articles of Confederation attempted to assign each state's quota according to the relative wealth of each state. Under the original Articles proposed by Congress in July of 1776, requisitions were apportioned among the states according to the value of land and improvements within each state. That was the system by which Congress collected revenue to finance the Revolution. Setting state quotas by the value of land and improvements proved to be a manipulable, inadministrable system, however, because of the inaccuracy and difficulty of appraisals. In 1783, Congress proposed replacing the apportionment formula with a formula apportioning requisitions by population.<sup>45</sup> The states never approved the formula because of the unanimity rule in the Articles of Confederation. Congress nevertheless apportioned the last requisition under the Articles by the population formula. Apportionment by population was intended as a proxy for relative wealth of the states that would be simpler to calculate than the value of land and improvements. Per capita wealth was sufficiently equal among the states, the Founders said, so that a formula based on population would suffice as a proxy measure of wealth.<sup>46</sup>

In the Constitutional debates, many of the speakers argued or assumed that the requisition system would continue. In the later stages of the Constitutional Convention, Congress was given plenary power to raise taxes without going through the state legislatures. Still, requisitions were the familiar system, and many debaters assumed that Congress would continue to use them. The Constitutional Convention incorporated the formula for apportioning among the states into the language of the Constitution and tied the formula to votes in the new House of Representatives before even settling that Congress would be given plenary power to tax directly according to a tax base of its choice. No one debated or thought about the absurdity that would result if the tax base Congress chose should turn out not to be equal per capita among the states.

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<sup>45</sup> The history of the rise of the apportionment requirement and its incorporation into the Constitution is explained in more detail in Appendix I.

<sup>46</sup> See James Madison's Notes on Debates in the Federal Convention (George Mason, Va. & James Madison, Va.), July 11, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 578, 585 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 1 RECORDS] (debating whether population suffices as an administrable measure of wealth given the equality of wealth among the states); see *infra* Appendix I notes 23-44.

The 1783 proposal to apportion taxes by population included a provision for counting a slave as three-fifths of a person. The counting of slaves for the purpose of setting tax quotas had been a partisan issue since the 1776 Congress. The delegates considered the three-fifths fraction, called the “federal formula” in the Constitutional debates, as a reasonable compromise on the issue.<sup>47</sup> The specific formula used in the Constitution for apportionment tracks the language of the 1783 proposal.<sup>48</sup>

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<sup>47</sup> See Federal Farmer, Letter XVII (Jan. 23, 1788), in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 350, 358 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter 17 COMMENTARIES] (“federal plan”); “A Citizen of New Haven” (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 280, 280-82 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter 15 COMMENTARIES] (“federal rule”); Theodore Sedgwick, Selected Debates in Congress Involving Constitutional Principles: Direct Taxes (May 6, 1794), in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 433, 433 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 4 DEBATES] (“federal ratio”).

<sup>48</sup> The apportionment clause in the 1783 proposal provided:

[Contributions to the Congressional treasury shall be supplied by the several states] in proportion to the [whole] number of [white and other free citizens and] inhabitants of every age, sex & condition, [including those bound to servitude for a term of years, and

The Framers at the Constitutional Convention incorporated apportionment of taxes into the Constitution solely as a catalyst to help the North reach a compromise with the South concerning how to count slaves for the determination of votes in the House of Representatives. The apportionment of taxes by population, counting each slave at three-fifths of a person, was considered a benefit to the North, given so that the North could allow the South to count slaves, also at three-fifths, when determining representation. The Northern states previously had agreed, in a nonbinding committee of the whole, to count slaves at three-fifths to determine representation in the House, so that counting slaves in the apportionment of direct taxes did not have to be a very important weight to convince the North to agree.

B. *No Hobble Was Intended*

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three-fifths of all other persons not comprehended in the foregoing description,] except Indians not paying taxes in each State . . . .

24 JOURNALS OF THE CONTINENTAL CONGRESS 191 (1922). The Constitution provides:

Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amends. XIII, XVI.

By their opposition, New York and New Hampshire defeated the 1783 proposal under the rules for amendment of the Articles of Incorporation, which required unanimity. *See infra* note 85.

Some commentators have suggested, without citing any evidence, that the apportionment requirement might have been intended to make the use of direct taxes so impractical that Congress would never use them.<sup>49</sup> The Founders, however, intended to give Congress the power to lay direct taxes without hobbling the power. The Articles of Confederation allowed Congress to raise revenue only by requisitions upon the states, and the system had broken down. For the Federalists, a primary purpose of the Constitution was to give the new federal government an adequate source of revenue by allowing it to tax people or things directly without going through the states. In the ratification debates, the Federalists and Anti-Federalists fought hard over whether Congress should have the power to lay direct taxes, and the Federalists won on the issue. Neither side understood that the use of direct taxes would be impossible.

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<sup>49</sup> See Jensen, *supra* note 28, at 2356 (“Why not read the apportionment requirement as an attempt to make impractical—and thus effectively to limit, if not forbid—direct taxes . . . ?”). See OWEN M. FISS, 8 TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 93 (1993) (arguing that Congress cannot pass an apportioned direct tax without committing great inequity and injustice—practically, that Congress cannot tax the subject at all, except possibly in time of war).

The power of Congress to lay direct taxes was plausibly the most closely and fiercely contested issue in the Constitutional debates. At the Philadelphia Convention, three separate motions were offered to deny Congress the power to lay direct taxes. All three were defeated by substantial margins.<sup>50</sup> When the debates moved from the Philadelphia Convention to the state ratification conventions, opposition to Congress' power to lay direct taxes appeared, said Madison, to be "the most popular topic among the adversaries" of the Constitution.<sup>51</sup> The Anti-Federalists proposed an amendment in the later ratification conventions that would have denied Congress the power to lay direct taxes except in a state that had defaulted on paying its quota of a Congressional requisition.<sup>52</sup> Absent state default, each state would have been left to decide how

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<sup>50</sup> First, the New Jersey Plan, proposed by William Paterson of New Jersey, would have allowed Congress only import duties and stamp taxes, and would have required Congress to requisition the separate states for the rest of its revenue. *The New Jersey Amendments to the Articles of Confederation*, June 15, 1787, ¶¶ 2-3, in 1 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787*, at 250, 251 (Merrill Jensen ed., 1976) [hereinafter 1 *DOCUMENTS & RECORDS*]. The New Jersey Plan was rejected by the Convention: seven states against, three in favor, and one state divided. See *Journal*, June 19, 1787, in 1 *RECORDS*, *supra* note 46, at 312, 313.

Secondly, Roger Sherman of Connecticut moved to limit the national government to taxes on imports. The motion lost, with two states for and eight states against it. See James Madison's Notes on Debates in the Federal Convention (Roger Sherman, Conn.), July 17, 1787, in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 25, 26 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 2 *RECORDS*].

Finally, Luther Martin, an Anti-Federalist from Maryland, moved that Congress should be able to lay direct taxes only if the states were delinquent in paying their quotas; he argued that states were the best judges of the mode of tax. Martin's motion lost without debate: one state in favor, eight against, and one state divided. See James Madison's Notes on Debates in the Federal Convention, Aug. 21, 1787, in 2 *RECORDS*, *supra* note 49, at 359.

<sup>51</sup> Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION* 332 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 *COMMENTARIES*]. See also James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), in 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA* 1142, 1142 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 *STATES*] ("The subject of direct taxation is perhaps one of the most important that can possibly engage our attention.").

<sup>52</sup> The New York Convention, for instance, told its Congressmen, as it ratified the Constitution, to pursue an amendment that would allow Congress to collect direct taxes only if import duties and excises were insufficient, and even then only if the state neglected or refused to pay its quota under a Congressional requisition. Upon delinquency of a state, Congress could itself collect that state's quota, including an added 6% annual interest, with its own agents and on the taxable objects that Congress set. *The Ratifications of the Twelve States—New York*, in 1 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 327, 329 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 1 *DEBATES*]. The Virginia version of the amendment varied slightly: it required Congress to notify

to raise its quota. A majority of seven states endorsed the anti-direct tax amendment as they ratified the Constitution and instructed their Congressmen to seek the amendment.<sup>53</sup> The anti-direct tax amendment was explicitly defeated in

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the state governor when it proposed a direct tax; and it would suspend the collection of federal tax in the state if the state then passed legislation for collection of the state's quota of tax by state-chosen means. See *The Virginia Convention*, June 27, 1788, in 10 STATES, *supra* note 26, at 1550, 1553-54.

<sup>53</sup> In chronological order, the following states endorsed the Anti-Federalist direct tax amendment: (1) Massachusetts (February 7, 1788), see 1 DEBATES, *supra* note 52, at 322, 323; (2) South Carolina (May 23, 1788), see 1 DEBATES, *supra* note 52, at 325; (3) New Hampshire (June 21, 1788), see 1 DEBATES, *supra* note 52, at 325, 326; (4) Virginia (June 27, 1788), see 10 STATES, *supra* note 26, at 1550, 1556; (5) New York (July 26, 1788), see 1 DEBATES, *supra* note 52, at 327, 329; (6) North Carolina (August 1, 1788), see 4 DEBATES, *supra* note 47, at 245; and (7) Rhode Island (May 29, 1790), see 1 DEBATES, *supra* note 52, at 336.

Four more states ratified too quickly for the Anti-Federalists to get organized enough to offer their direct tax amendment into the debate: (1) Delaware (December 7, 1787), see *The Delaware Form of Ratification*, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 110, 110 (Merrill Jensen ed., 1978) [hereinafter 3 STATES]; (2) New



only two early states—not enough to block an amendment.<sup>54</sup> Quite plausibly, under another posture or procedure, eleven states would have endorsed the amendment, more than the nine states needed to effect the amendment.<sup>55</sup>

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Jersey (December 18, 1787), see *The New Jersey Form of Ratification*, in 3 STATES, *supra* note 53, at 184; (3) Georgia (January 2, 1788), see *State of Georgia: in Convention*, in 3 STATES, *supra* note 53, at 275, 276; and (4) Connecticut (January 9, 1788), see *The Connecticut Form of Ratification*, in 3 STATES, *supra* note 53, at 560-62.

<sup>54</sup> Pennsylvania (December 12, 1787), see 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, PENNSYLVANIA 598, 624 (Merrill Jensen ed., 1976) [hereinafter 2 STATES]; Maryland (April 28, 1788), see 2 DEBATES, *supra* note 14, at 552, 553.

<sup>55</sup> U.S. CONST. art. V (explaining that amendment requires two-thirds of states) ( $2/3 * 13 = 9$ , rounded upward); art. VII (establishing that nine of original thirteen states were needed for ratification of the Constitution).

The Federalists, however, stiffened in opposition and prevented the Anti-Federalist amendment from becoming part of the Constitution.<sup>56</sup> The Federalists successfully sought to have attacks on the Constitution in the ratification conventions expressed as instructions to seek amendment to the language drafted in Philadelphia, rather than as preconditions to ratification.<sup>57</sup> Madison promised the Virginia Convention that, upon ratification of the Constitution, he would offer those amendments that were “not objectionable, or unsafe.”<sup>58</sup> Madison, in fact, offered the first ten amendments—the Bill of Rights—to the new Congress.<sup>59</sup> The Bill of Rights incorporated many of the Anti-Federalists’ objections, but not their denial of Congress’ power to lay direct tax. When the Anti-Federalists offered their anti-direct tax amendment separately from the floor of the House, it was defeated overwhelmingly by a vote of nine to thirty-nine, and was never offered to the states nor incorporated into the Constitution.<sup>60</sup>

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<sup>56</sup> See, e.g., *The Debates in the Convention of the State of New York* (Alexander Hamilton), June 28, 1788, in 2 DEBATES, *supra* note 14, at 205, 367-68 (“After having passed through the empty ceremony of a requisition, the general government can enforce all its demands, without limitation or resistance . . . It is infinitely more eligible to lay a tax originally.”).

<sup>57</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 96 (1996).

<sup>58</sup> *Ratification without Conditional Amendments*, June 24, 1788, in 11 THE PAPERS OF JAMES MADISON 172, 177 (Robert A. Rutland & Charles F. Hobson eds., 1977).

<sup>59</sup> For a description of Madison’s role, see ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 190-218 (1955); Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 476-80 (1996) (reviewing Jack Rakove, *supra* note 57) (“Madison was only the reluctant father of the Bill of Rights.”).

<sup>60</sup> 1 ANNALS OF CONGRESS 431-42, 660-65, 773-77 (Joseph Gales, Senior ed., 1789). See FERGUSON, *supra* note 44, at 291.

The Anti-Federalists argued that Congress might use a power to lay direct taxes to inconceivable excess, “swallowing up every object of taxation, and consequently plundering the several states of every means [of support].”<sup>61</sup> Direct taxes were so oppressive, the Anti-Federalists argued, “as to grind the face of the poor, and render the lives of the common people a burden to them.”<sup>62</sup> To enforce direct tax, they argued, the Congress would send the militia of some other state “to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters, and live in free quarters, until you get into a good humour, and pay all that they may think proper to ask of you.”<sup>63</sup> Robert Livingston, a Federalist, satirized the position as

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<sup>61</sup> Robert Whitehill, Speech Before the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 STATES, *supra* note 54, at 382, 393, 396.

<sup>62</sup> Letter from Brutus V to the People of the State of New York (Nov. 27, 1787), N.Y. J., Dec. 13, 1787, *reprinted in* 14 COMMENTARIES, *supra* note 51, at 422, 427.

<sup>63</sup> Letter from A Farmer and a Planter to the Farmers and Planters of Maryland (Mar. 27, 1788), in MD. J., Apr. 1, 1788, *reprinted in Essay by A Farmer and a Planter*, 5 THE COMPLETE ANTI-FEDERALIST 74, 76 (Herbert J. Storing ed., 1981). *See also The Dissent of the Minority of the Convention*, Dec. 18, 1787, in 2 STATES, *supra* note 54, at 617, 636 (“The standing army and select militia would enforce the collection [of direct taxes.]”); George Mason, Debates in the Virginia Ratification Convention (June 4, 1788), in 9 STATES, *supra* note 50, at 915, 936, 938 (deeming the power of direct tax a dangerous power that will change the Confederation into one consolidated government); James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1092, 1110 (warning that direct taxes would give the United States absolute control over all the resources of the country); John Smilie, Debates in the

arguing that direct taxation “will shut out the light of heaven, and will pick your pockets;”<sup>64</sup> but in this case, the satire did not go so far as the original Anti-Federalist expressions.

The Federalists, on their side, argued that Congress needed the power to impose direct taxes. “Money,” Hamilton argued, is

the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of [tax revenue], as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.<sup>65</sup>

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Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 STATES, *supra* note 54, at 382, 407, 408-09 (stating that if the “men who raise and appropriate the taxes . . . have unlimited power to drain the wealth of the people,” whether “by imposts” or “by direct levies,” then the system is “too formidable” for states to break).

<sup>64</sup> *The Debates in the Convention of the State of New York* (Robert R. Livingston), July 1, 1788, in 2 DEBATES, *supra* note 14, at 205, 383.

<sup>65</sup> THE FEDERALIST NO. 30, *supra* note 26, at 182-83 (Alexander Hamilton).

Congress would need direct taxes, especially in time of war. War was increasingly a matter to be settled by the purse and not the sword.<sup>66</sup> A government that could command only a fraction of its resources for revenue was “like a man with but one arm to defend himself.”<sup>67</sup> “Strike out taxation from the list of federal authorities,” Madison argued, and Virginia will be open to “surprize and devastation whenever an enemy powerful at Sea chuses to invade her.”<sup>68</sup>

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<sup>66</sup> See Oliver Ellsworth, Speech Before the Connecticut Convention (Jan. 7, 1788), in 15 COMMENTARIES, *supra* note 47, at 273, 274.

<sup>67</sup> Ellsworth, *supra* note 66, at 274. See also THE FEDERALIST NO. 36, *supra* note 26, at 223 (Alexander Hamilton) (acknowledging his aversion “to every project that is calculated to disarm the government of a single weapon, which . . . might be usefully employed for the general defence and security.”); THE FEDERALIST NO. 31, *supra* note 26, at 189-90 (Alexander Hamilton) (arguing that because federal government had unlimited responsibilities in time of war or domestic unrest, it must be granted unlimited power to fund satisfaction of its responsibilities even in ordinary times); James Madison, Debates in the Virginia Ratification Convention (June 6, 1788), in 9 STATES, *supra* note 51, at 989, 995-96 (deeming it “safe and just” to vest the federal government with direct tax, which likely would be used only in war).

<sup>68</sup> Letter from James Madison to George Thompson (Jan. 29, 1789), in 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 341, 344 (Gordon DenBoer ed., 1984) [hereinafter 2 THE FIRST FEDERAL ELECTIONS]. See also Elisha Porter, Speech Before the Massachusetts Ratification Convention (Jan. 25, 1788), in DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 319 (Brandford K. Pierce & Charles Hale eds., W. White 1856) (“To grant only an impost is to invite

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enemies to attack us, for shutting up our ports is to destroy our resources.”). “Calculation has convinced me,” Jefferson wrote from Paris, “that circumstances may arise, and probably will arise, wherein all the resources of taxation will be necessary for the safety of the state.” Letter from Thomas Jefferson to George Washington (Nov. 4, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON 328 (Julian P. Boyd ed., 1958).

Even in peacetime, Hamilton argued, giving Congress the import duties, but not internal or direct taxes, would leave to the Union only one third of the resources of the community, but the responsibility to pay for ninety to ninety-five percent of its expenses.<sup>69</sup> Madison argued before the Virginia Ratification Convention that direct taxes were necessary in peacetime to soften discrimination against the South. If Congress could raise revenue only with customs duties, the South would be taxed disproportionately, he argued, because the South had fewer manufacturers and had to import more. Give Congress the power to lay direct taxes, and Congress would mix direct taxes with imports and soften the impact of import duties.<sup>70</sup> Hamilton made the same argument in New York, except that in Hamilton's argument it was New Yorkers who would be hurt disproportionately by exclusive reliance on import duties because it was New Yorkers who had a paucity of manufacturing.<sup>71</sup> "[T]his power of imposing direct taxes," Edmund Randolph argued in Virginia, "has been proved to be essential to the very existence of the Union."<sup>72</sup> Why, in any event, the Federalists asked, would any man "choose a lame horse least a sound one should run away with him?"<sup>73</sup>

In the ratification debates, the Federalists sometimes argued that Congress would rarely, if ever, have to rely on direct taxes because taxes on imports and sale of Western land likely would be sufficient for federal needs.<sup>74</sup> The arguments

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<sup>69</sup> See THE FEDERALIST NO. 34, *supra* note 26, at 208 (Alexander Hamilton); see also A CITIZEN OF PHILADELPHIA, THE WEAKNESSES OF BRUTUS EXPOSED (1787), *reprinted in* 14 COMMENTARIES, *supra* note 51, at 63, 67 (arguing that the union could not be a success without the power of raising money); Thomas McKean, Speech Before the Pennsylvania Ratification Convention (Dec. 10, 1787), *in* 2 STATES, *supra* note 54, at 532, 544 (arguing that Congress' power of direct tax was "absolutely necessary for the salvation of the United States"); James Wilson, Speech in the State House Yard, Philadelphia (Oct. 6, 1787), *in* 2 STATES, *supra* note 54, at 167, 171 (arguing that delegation of the power of direct tax to the federal government was necessary given the broad federal duties to provide for national safety, dignity and discharge of debts).

<sup>70</sup> James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), *in* 9 STATES, *supra* note 51, at 1142, 1146.

<sup>71</sup> *The Debates in the Convention of the State of New York* (Alexander Hamilton), June 28, 1788, *in* 2 DEBATES, *supra* note 14, at 205, 369.

<sup>72</sup> *The Debates in the Convention of the Commonwealth of Virginia* (Edmund Randolph), June 7, 1788, *in* 3 DEBATES, *supra* note 26, at 1, 122.

<sup>73</sup> A Citizen of Philadelphia, Remarks on the Address of Sixteen Members (Oct. 18, 1787), *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 297, 301 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 COMMENTARIES].

<sup>74</sup> *Aristides: Remarks on the Proposed Plan of a Federal Government*, Jan. 31-Mar. 27, 1788, *in* 15 COMMENTARIES, *supra* note 47, at 517, 545 (remarking that the 5% impost is the only tax Congress intends at the present time); *The Debates in the Convention of the Commonwealth of Massachusetts* (Francis Dana), Jan. 18, 1788, *in* 2 DEBATES, *supra* note 14, at 1, 42 (arguing that

seem strategic—to calm the opposition while actually giving Congress the power to lay direct taxes should it so choose. Certainly when push came to shove, the Federalists fought for Congressional power over direct taxes.<sup>75</sup>

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Congress would not levy direct taxes unless tax on imports and excises were insufficient); DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, *supra* note 68, at 138, 141, & 310, 311 (arguing that Constitution’s approach is the best rule for the apportionment of what “little direct taxes which Congress will want” and that “Congress will have but little occasion” to impose direct taxes); Oliver Ellsworth, Debates in the Connecticut Ratification Convention (Jan. 7, 1788), *in* 3 STATES, *supra* note 53, at 547, 550 (“[T]he impost will pay the interest of the whole foreign debt and nearly satisfy these current national expenses.”); James McHenry, Speech Before the Maryland House of Delegates (Nov. 19, 1787), *in* 3 FOUNDERS, *supra* note 14, at 355 (“[The] government would seldom have recourse to direct Taxation”); James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), Aug. 7, 1787, *in* 2 RECORDS, *supra* note 50, at 196, 202 (arguing that Congress is unlikely to impose a direct tax stretching its hands directly across so vast a country because imposts and excises would be sufficient); Letter from Edward Carrington to Thomas Jefferson (Apr. 24, 1788), *in* 9 STATES, *supra* note 51, at 754, 755 (explaining that tax on imports, requisitions plus sale of Western lands would probably be sufficient in peacetime).

<sup>75</sup> See, e.g., *The Debates in the Convention of the State of New York* (Alexander Hamilton), June 27, 1788, *in* 2 DEBATES, *supra* note 14, at 344 (arguing that Congress may need direct taxes because impost and excise will not be enough); Letter from James Madison to George Thompson (Jan. 29, 1789), *in* 2 THE FIRST FEDERAL ELECTIONS, *supra* note 68, at 341, 344 (arguing that without direct tax Virginia would be open to surprise attack).



The Founders also advocated use of direct taxes, once they had the chance. In 1789, as soon as the states ratified the Constitution, Hamilton, the new Secretary of the Treasury, asked for advice as to what taxes the new federal government should use. Madison, in response, called for a direct tax on land as “an essential branch of national revenue” and advocated the tax “before a preoccupation by the States becomes an impediment.”<sup>76</sup> The new government ended up, as the Anti-Federalists objected, “vested with every species of *internal* taxation.”<sup>77</sup>

Had the Founders understood or intended apportionment of direct tax to be a hobble, they would have reflected it in the debates. The Anti-Federalist rhetoric—that the power to lay direct tax was a power to plunder the states, and abuse wives and daughters<sup>78</sup>—was a bit strong for the situation, but it does interpret the power over direct tax to be an unhobbled power that Congress would use. When the Constitution was settled, the Anti-Federalists’ rhetorical description of the power ended up as their interpretation of the provisions that are, in fact, now our Constitutional text: Congress has the awesome power to lay direct taxes.<sup>79</sup>

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<sup>76</sup> Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 THE PAPERS OF JAMES MADISON 449, 450 (Charles F. Hobson & Robert A. Rutland eds., 1979).

<sup>77</sup> *Centinel I*, INDEP. GAZETTEER, Oct. 5, 1787, reprinted in 2 STATES, *supra* note 54, at 158, 162. See also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869) (arguing that requisitions had reduced general government to impotency and that nothing is clearer than the purpose to give power of taxation of everything but exports, to its fullest extent) (holding that a tax on bank securities need not be apportioned); see also E. James Ferguson, *The Nationalists of 1781-1783 and the Economic Interpretation of the Constitution*, in THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES 1, 12 (Gordon S. Wood ed., 1979) (arguing that “[a]ll the delicate questions of state interest . . . were swept aside [by the Constitution] by the grant of unlimited power of taxation”).

<sup>78</sup> See *supra* note 63 and accompanying text.

<sup>79</sup> See *supra* note 77 and accompanying text.

The Framers' intent to allow Congress the awesome use of direct taxes also was consistent with the larger intent in the Constitution to invigorate the central, federal government. The Constitution was a pro-tax revolt, perhaps the first, and perhaps the only one. Revenue collection under the Confederation had broken down almost entirely and had left the Continental Congress unable to pay its debts.<sup>80</sup> Requisitions were, in theory, binding obligations on the states but, in practice, the states treated themselves as thirteen independent sovereigns who could regard requisitions as pleas from a beggar, often to be ignored.<sup>81</sup> The 1786 requisition, for instance, mandated that states pay \$3,800,000, but actually resulted in the collection of only \$663 in payments from the states.<sup>82</sup> "[N]othing can be more ruinous to a state or oppressive to individuals," the Federalists argued, "than a partial and dilatory collection of taxes."<sup>83</sup> The federal government might have made do in peacetime with only the revenue from a five percent impost or customs duty,<sup>84</sup> but the Imposts of 1781 and 1783 (which were customs duties) were

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<sup>80</sup> The Revolutionary War was funded with printed money, borrowing in Europe, French subsidies, and requisitions from the states. By 1787, all of those sources had dried up. When the war ended, the states stopped paying their quotas, the French stopped giving or lending money, and the Congress had no reliable resources to lend any credibility to further debt. See RICHARD B. MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 41-42 (1987) (recounting the obstinacy of Rhode Island in vetoing an impost, which left the federal government with no money, no funds, and no disposition in the people to establish funds); see also John P. Kaminski & Gaspare J. Saladino, *Editorial Note* to 9 STATES, *supra* note 51, at 1174 & nn.20-21; John P. Kaminski & Gaspare J. Saladino, *Introduction* to 13 COMMENTARIES, *supra* note 73, at 3, 12-13.

<sup>81</sup> See THE FEDERALIST NO. 15, *supra* note 26, at 89-90 (Alexander Hamilton) (arguing that the states treated requisitions as mere recommendations although requisitions were mandatory in theory); James Madison, *Debates in the Virginia Ratification Convention* (June 7, 1788), in 9 STATES, *supra* note 51, at 1028 (arguing that a government that "relies on thirteen independent sovereignties, for the means of its existence, is a solecism in theory, and a mere nullity in practice"); Edmund Randolph, *Debates in the Virginia Ratification Convention* (June 7, 1788), in 9 STATES, *supra* note 51, at 1017 (stating that Virginia taxpayers would laugh at the folly, if the Virginia Legislature could only raise revenue, as in requisitions, by earnest entreaties, humble supplications, or solicitations). Madison, in his *Preface to Debates in the Convention of 1787*, explained that no state complied with the quotas in full—some failed in practice altogether or nearly so, and New Jersey responded to a requisition by repealing the law without any compliance. See James Madison's *Notes on Debates in the Federal Convention* (James Wilson, Pa.), July 11, 1787, in 1 RECORDS, *supra* note 46, at 539, 547. Professor Rakove concludes that the Anti-Federalists' plans were destroyed by the manifest error in Congress' reliance on the voluntary compliance by the states. See RAKOVE, *supra* note 57, at 159.

<sup>82</sup> See ROGER H. BROWN, *REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION* 26 (1993) (noting that compliance with requisitions of 1784-1786 was only 23%).

<sup>83</sup> A Citizen of Philadelphia, *The Weaknesses of Brutus Exposed* (1787), reprinted in 14 COMMENTARIES, *supra* note 50, at 302.

<sup>84</sup> See Letter from Edward Carrington to Thomas Jefferson (Apr. 24, 1788), in 9 STATES, *supra*

defeated by the Articles of Confederation's requirement that the states' consent unanimously effect an amendment.<sup>85</sup>

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note 51, at 754, 755 (noting that imposts, requisitions, plus sale of Western lands would probably be sufficient in peacetime).

<sup>85</sup> See Kaminski & Saladino, *Introduction* to 13 COMMENTARIES, *supra* note 73, at 17-18 (noting the Rhode Island defeat of the 1781 impost), 37 (noting the New York defeat of the 1783 impost); see also *Editorial Note* to 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 111 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter 16 COMMENTARIES] (recounting Rhode Island's and New Hampshire's defeat of the 1783 impost).

The Confederation, deep in debt and paralyzed by a lack of revenue, could neither prevent Spain from excluding American shipping on the Mississippi River nor force the British to abandon the frontier forts as required under the Treaty of Paris.<sup>86</sup> The “imbecility” or “impoten[ce]” of the Confederation, due to the lack of revenue, was the “central impetus” for the enactment of the Constitution.<sup>87</sup> The Federalist diagnosis was that “[t]he fundamental defect [in the Articles of Confederation] [was] a want of power in Congress.”<sup>88</sup>

To solve the failure of the requisition system, Madison wrote to Jefferson (who was away from the scene as an ambassador in Paris), the Constitutional Convention chose to adopt “the alternative of a government which instead of operating, on the States, should operate without their intervention on the individuals composing them.”<sup>89</sup> The Constitution gave Congress broad power to lay taxes *directly* on people, transactions, or property without the “continual recurrence to the state legislatures.”<sup>90</sup> Without the requisition system, the new

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<sup>86</sup> THE FEDERALIST NO. 15, *supra* note 26, at 87-88 (Alexander Hamilton) (citing continuous British occupation of frontier forts and Spanish exclusion from the Mississippi, plus national humiliation from failure to pay Revolutionary War debts as forcing the need for change of the weak Confederation).

<sup>87</sup> BROWN, *supra* note 82, at 8, 155 (arguing that the breakdown in states’ hard-money tax systems and consequent failure to meet requisitions was the central impetus for the new constitution); Alexander Hamilton, *The Defence of the Funding System*, July 1795, in 19 THE PAPERS OF ALEXANDER HAMILTON 1, 22, 27 (Harold C. Syrett ed., 1973) (arguing that requisition from the states was a system of “imbecility” and “impoten[ce]”). *See also, e.g.*, THE FEDERALIST NO. 30, *supra* note 26, at 105 (Alexander Hamilton) (arguing that the requisition system was enfeebling the Union); James Madison, Speech Before the House of Representatives (Apr. 8, 1789) (first working day under the new Constitution), in 12 THE PAPERS OF JAMES MADISON 65 (Charles F. Hobson & Robert Rutland eds., 1979) (calling for a retaliatory tariff on British shipping because “[t]he union, by the establishment of more effective government, [has] recovered from [its] state of imbecility, that . . . prevented a performance of its dut[ies]”); Letter from Christopher Gore to Rufus King (June 28, 1787), *quoted in* Brown, *supra* note 82, at 261 (saying our government is “weak, languid, and inefficient to support the great objects of civil institutions,” and that one “must invent some plan to increase the circulation at the heart”); Archibald Maclaine, *Publicola: Address to the Freemen of North Carolina*, STATE GAZETTE OF N.C., Mar. 20, 1788, *reprinted in* 16 COMMENTARIES, *supra* note 85, at 435, 436 (saying Continental Congress without the power to “raise a single shilling” had been reduced to the “present state of imbecility”); James Wilson, Speech Before a Public Meeting in Philadelphia (Oct. 6, 1787), in 13 COMMENTARIES, *supra* note 73, at 337, 343 (arguing that the imbecility of the Confederation left the states with great debt); *see also supra* notes 67 & 73 and accompanying text (arguing that federal government should be neither a one armed man nor a lame horse).

<sup>88</sup> Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON 400, 401 (Harold C. Syrett ed., 1961).

<sup>89</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 270, 271 (Julian Boyd ed., 1955).

<sup>90</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 COMMENTARIES,

federal government could operate independently without the consent of the states.<sup>91</sup> The Founders opposed the Anti-Federalists' amendment, denying Congress the power to tax directly, because the grant of such power was the core purpose of the Constitution.

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*supra* note 51, at 482.

<sup>91</sup> See Letter from Antoine René Charles Mathurin de la Forest, French vice consul for the United States in New York, to Comte de Montmorin, French minister of foreign affairs and minister of marine (Sept. 28, 1787), in 13 COMMENTARIES, *supra* note 73, at 259 (“Congress will no longer need their consent for any of its operations.”).

The Founders also were not anti-tax because they expected the federal government to represent them. Daniel Boorstin argues that the Virginia planters who provided leadership for the Constitution had enjoyed positive experiences with representative government in their service to the Virginia House of Burgesses and had they envisioned the new government as a legislature like the one they knew.<sup>92</sup> Anti-Federalists in Virginia argued that state legislatures should make decisions on direct taxation because they were more “immediate representa[tives]” of the people.<sup>93</sup> John Marshall responded, on behalf of the Federalists, that Congress would represent “us.”<sup>94</sup>

At the time of the constitutional debates, moreover, apportionment would have been considered a normal way to collect taxes. Every state had an apportioned tax, and all of the Founders would have been familiar with at least one of the thirteen models. All knew the federal system, which was an apportionment system. Apportionment was the normal, status quo way to raise revenue.

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<sup>92</sup> See DANIEL BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 111, 116 (1958).

<sup>93</sup> A Virginia Planter, *Messieurs Bartgis & Co.*, WINCHESTER VA. GAZETTE, Mar. 7, 1788, reprinted in 8 STATES, *supra* note 35, at 469, 470-71; see also Letter IX from the Federal Farmer to the Republican (Jan. 4, 1788), reprinted in 17 COMMENTARIES, *supra* note 47, at 288, 295 (arguing that “in the state legislatures the body of the people will be genuinely represented, and in congress not”); A Georgian, Letter to the Editor, in GAZETTE OF THE STATE OF GA., Nov. 15, 1787, reprinted in 3 STATES, *supra* note 53, at 236, 240 (“[O]ur own legislature is the only body politic to whose management it can be trusted.”).

<sup>94</sup> John Marshall, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1092, 1118 (responding that “we were not represented in Parliament”). See also Letter from George Washington to John Jay (Aug. 15, 1786), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 207, 208 (Henry P. Johnson ed., 1971) (saying that “[t]o be fearful of vesting Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness”).

Congressional power to lay direct taxes was a fiercely contested issue. Both sides to the debate would have found it astounding that apportionment was a hobble—the Federalists because they wanted Congress to have plenary power of direct taxes, and the Anti-Federalists because they saw the power as fearsome. A hobble already intact would have made nonsense of the Anti-Federalists' anti-direct tax amendments. The best evidence of original intent comes from controversies when the issue is joined on both sides.<sup>95</sup> Both sides to the debate considered direct taxes to be feasible, and both sides fought hard over the authority to lay them. A sound interpretation of the Constitution must leave the Federalists with their victory intact; a hobble on direct taxes turns the history upside down.

*C. Three Repeals of the Meaning*

In the broad sweep of history, the meaning of the apportionment requirement has been decanted from the rule three times by Constitutional adoption and amendment, leaving the requirement empty; still literally in the text, it is devoid of any remaining rationale or historical purpose.

1. *Formation of the Constitution*

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<sup>95</sup> See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 690 (1990).

First, the Framers of the Constitution tried to end the need to apportion quotas among the states by ending the requisition system. The Constitution replaced the requisition system the Articles of Confederation by giving Congress independent and plenary authority to tax people or things directly without going through the states.<sup>96</sup> As Justice Iradell said in 1797, “the present constitution was particularly intended to affect individuals, and not states, . . . and this is the leading distinction between the articles of confederation and the present constitution.”<sup>97</sup> The apportionment formula was carried over from the Articles of Confederation into the Constitution, however, early in the Philadelphia Convention before the Convention gave Congress plenary power to tax and long before anyone knew the requisition system was dead.<sup>98</sup>

Apportionment among the states by population makes no sense outside of the requisition system. Apportionment yields such terrible results among individuals in different states<sup>99</sup> that the requirement could not have arisen under a system in which Congress had plenary power to tax individuals directly. When they required apportionment, the Framers did not have the actual experience with apportionment of a nonrequisition or direct tax that would have educated them to its perversity.<sup>100</sup>

Once the repeal of the requisition system became clear, the parchment could not be changed.

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<sup>96</sup> See U.S. CONST. art. I, § 8 (giving Congress the power “To lay and collect Taxes, Duties, Imposts and Excises”).

<sup>97</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181 (1796) (Iradell, J., concurring).

<sup>98</sup> See *infra* Appendix I (explaining the history of the rise of the apportionment requirement).

<sup>99</sup> See *supra* notes 14-24 and accompanying text.

<sup>100</sup> See *infra* Appendix I.



It is plausible that the heat of partisan battle impeded corrections by the Framers. The Federalist strategy, in the ratification process, was to give the states only a binary choice of adopting or rejecting the Philadelphia draft in full, without preconditions, and that meant the Federalists defended the existing provisions as drafted in Philadelphia.<sup>101</sup> The apportionment requirement also was imported into the Constitution as a part of the fight over slavery and slavery issues always provoked hard, emotional sectional fights.<sup>102</sup> Congress' power to lay direct tax was itself hard and emotionally fought.<sup>103</sup> Still, the debaters commonly perceived the issue of federal tax powers as the most important issue of the entire Constitutional debate.<sup>104</sup> As such, they should have recognized the absurdity and fixed it.

There is no indication in the Constitutional debates, on the other hand, that any important actor, either Anti-Federalist or Federalist, would have wanted the absurdity of apportionment—higher tax rates in the states with the smaller tax base—of any tax imposed. Nothing in the chronology of the manner in which apportionment arose and was incorporated into the Constitution and nothing in the ratification debates legitimates the perversity of apportionment when the tax bases are not equal per capita among the states.

## 2. *Slavery Repeal*

The apportionment requirement lost its remaining historical purpose with the end of slavery. The formula for apportionment was brought into the Constitution solely because the formula counted each slave as three-fifths of a person.<sup>105</sup> Apportionment of taxes, counting a slave at three-fifths, was introduced into the Constitution as a small part of the settlement between the North and the South about representation of slave states in the House of Representatives.<sup>106</sup> Apportionment of direct taxes “originated in the struggle to effect a compromise on the question of representation for the slaves. It had no basis in any rational scheme for regulating taxation, and could have had none.”<sup>107</sup>

<sup>101</sup> See RAKOVE, *supra* note 57, at 96, 114-15, 130.

<sup>102</sup> See *infra* Appendix I, text accompanying notes 65-86.

<sup>103</sup> See *infra* Appendix I.

<sup>104</sup> See *infra* Appendix I.

<sup>105</sup> See *infra* Appendix I.

<sup>106</sup> See *infra* Appendix I.

<sup>107</sup> Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution. II.*, 15 POL. SCI. Q. 452, 452 (1900). The author is grateful to Professor Erik Jensen for providing this quote. See also EDWIN R.A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 555 (2d ed. 1914) (“[I]t is clear that it was due simply and solely to the attempt to solve the difficulty connected with the maintenance of slavery.”).

The end of slavery in the Civil War concurrently ended the need to settle stalemates between slave and nonslave states over representation in the House of Representatives. When slavery ended, the historical rationale for the federal formula ended as well, but the formula remained as an allocation by population, counting every individual as one, but devoid of any remaining constitutional purpose.

### 3. *Income Tax Amendment*

The Sixteenth Amendment repealed the apportionment requirement in 1913 for all taxes then at issue by allowing a tax to be laid on income without apportionment.<sup>108</sup> The Sixteenth Amendment was a direct reaction to the 1895 decision of *Pollock v. Farmers' Loan & Trust Co.*<sup>109</sup> In *Pollock*, the Court held an income tax unconstitutional because it was not apportioned. The Sixteenth Amendment should be understood as a repeal of *Pollock* that resurrected, in full, the pre-*Pollock* doctrine that disallowed apportionment when it resulted in inequity or absurdity.<sup>110</sup>

On its face, the Sixteenth Amendment only allows a tax on income to be laid without apportionment, because the income tax was the only unsettled controversy of the times. After *Pollock* and before the Amendment, the Supreme Court had retreated to a more flexible, functional definition of “direct tax,”<sup>111</sup> much like the one that had prevailed before *Pollock*, so that only the income tax remained at issue. The Sixteenth Amendment only governed income taxes, not because it was meant to preserve some area of non-income taxes in which apportionment was thought to be of continued constitutional value, but because apportionment seemed to have been otherwise sufficiently nullified by judicial doctrine, except for the income tax.<sup>112</sup> The point of the Sixteenth Amendment at the time was to destroy what seemed to be the last vestige of apportionment and whatever

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<sup>108</sup> See U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”). The histories of *Hylton*, *Pollock*, and the Sixteenth Amendment are given in more detail, *infra*, in text accompanying notes 331-68.

<sup>109</sup> 157 U.S. 429 (1895), *on reh'g*, 158 U.S. 601 (1895).

<sup>110</sup> See *infra* notes 365-68.

<sup>111</sup> See *Flint v. Stone Tracey Co.*, 220 U.S. 107, 150 (1911) discussed *infra* notes 247-49 and accompanying text; *Knowlton v. Moore*, 178 U.S. 41, 78 (1900); *Nicol v. Ames*, 173 U.S. 509, 519 (1899).

<sup>112</sup> Accord Ackerman, *supra* note 8 (arguing that the Court’s retreat from *Pollock* “greatly weakened the ultimate language of the Sixteenth Amendment”). Cf. Whitney, *supra* note 40, at 296 (arguing that the anticipated constitutional amendment, which became the Sixteenth Amendment, should not tinker with a broken down general rule by just creating an exception from apportionment for specific taxes).

remained of the *Pollock* doctrine, much as scientists isolated and destroyed the last strongholds of the small-pox virus. The historical movement that caused the Sixteenth Amendment was not as important as either the formation of the Constitution or the Civil War, but was important; and it garnered the support of the two-thirds of both houses of Congress and the two-thirds of the states necessary for a constitutional amendment.<sup>113</sup>

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<sup>113</sup> See U.S. CONST. art. V.

The apportionment requirement still influences the tax law, however, as if the words were a curse or signified some underlying good. Taxpayers continue to argue that congressional accounting under the Internal Revenue Code is skewed as applied to their case, and would result in a tax on capital as well as income. The accounting then falls outside of the protection of the income tax amendment, the argument goes, and failure to follow the apportionment formula kills the tax assessment.<sup>114</sup> Ironically, apportionment turns and bites conservatives as well, because the apportionment rule also would kill a consumption tax proposed by conservatives as a replacement for the income tax.<sup>115</sup> “It is still more revolting,” said Oliver Wendell Holmes, Jr., “if the grounds upon which [a rule] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>116</sup> This rule is like a vampire, impossible to kill.

One ordinarily assumes that provisions of our Constitution represent fundamental values, or at least specify the structure within which policy or political disputes are to be resolved. Constitutional values ordinarily are entitled to weight, even when they conflict with other values. Constitutional values commonly reflect the “equal basic rights and liberties of citizenship that legislative majorities are to respect.”<sup>117</sup> The history of the apportionment requirement, however, leaves the requirement without a fundamental value or surviving structure to give it meaning.

Apportionment of direct tax is in the Constitution as part of the compromise by which the slave states received extra votes in the House of Representatives; but today there is no constitutional weight or value in giving slave states votes because slave states no longer exist. If Congress elected to make a requisition upon the states, the apportionment formula in Article I would be binding, but it is difficult to see any remaining weight to an agreement to have fair requisitions in the absence of any requisitions. Giving apportionment its due weight in constitutional discourse would be to give the requirement no weight.

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<sup>114</sup> See, e.g., Gabinet & Coffey, *supra* note 9 (shareholders may not be taxed on undistributed corporate earnings constitutionally); John Nolan, *supra* note 9 (prepaid receipts may not be taxed constitutionally); Henry Ordower, *supra* note 9 (unrealized appreciation may not be taxed constitutionally).

<sup>115</sup> See Jensen, *supra* note 28, at 2338.

<sup>116</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>117</sup> JOHN RAWLS, POLITICAL LIBERALISM 227 (1993).

## III. SAVING CONSTRUCTIONS?

This section rejects three possible justifications for apportionment because the arguments do not fit the history: (1) that the Founders intended apportionment to protect individual property rights or accumulated wealth from assault by Congress; (2) that they intended apportionment to force a per capita or head tax; and (3) that they intended apportionment to require continuation of the requisition system under which Congress would leave to the individual states decisions regarding how to raise their share of federal revenue.

A. *Individual Right?*

In *Pollock v. Farmers' Loan & Trust Co.*,<sup>118</sup> the Supreme Court treated apportionment as an individual or property right, much like those protected by the Bill of Rights.<sup>119</sup> The court in *Pollock* held that an income tax was a direct tax that had to be apportioned. The Court called the apportionment requirement “one of the bulwarks of *private rights* and *private property*,”<sup>120</sup> and said that it was designed “to prevent an attack upon accumulated property by mere force of numbers.”<sup>121</sup>

Charles Beard endorsed the argument in his famous 1913 book, *An Economic Interpretation of the Constitution of the United States*. Beard said that apportionment of direct taxes by population was adopted “so that numbers cannot transfer the [tax] burden to accumulated wealth.”<sup>122</sup> Beard believed the Constitution as a whole protected the property and economic interests of the Founders,<sup>123</sup> so his interpretation of the apportionment clause fits into his more general historical scheme.

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<sup>118</sup> 157 U.S. 429 (1895), *on reh'g*, 158 U.S. 601 (1895).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.* at 583 (emphasis added).

<sup>121</sup> *Id.*

<sup>122</sup> CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 176 (1913).

<sup>123</sup> *See id.* at 324-25.

More recently Owen Fiss, writing as part of the Holmes Devise history of the Supreme Court, gave surprising credence to the *Pollock* holding by arguing that the Court that decided *Pollock* was devoted to protecting its version of individual liberty.<sup>124</sup> According to Fiss, the holding in *Pollock* also ensured that the apportionment clause acted as a check on the government's ability to tax by tying political power to the tax burden, so that those represented in a vote for tax would need to bear the tax.<sup>125</sup> Fiss's grander scheme is to argue that *Pollock* and other Fuller Court interventions were precursors of the Warren Court.<sup>126</sup> Interpreting the *Pollock* court as a proto-Warren court gives legitimacy to Warren Court interventions to protect weaker groups. Thus, his interpretation of *Pollock* also fits into his more general historical scheme.

The argument that the Founders intended apportionment to protect individual wealth from tax is a post-hoc rationalization that does not fit the history of apportionment. First, the Founders adopted apportionment to channel taxes toward wealth and not to protect it from tax. The colonies and early states had relied on wealth taxes and the Founders assumed that, under the Constitution, Congress would use taxes like the taxes the states had used to satisfy requisitions.

Apportionment, secondly, does not work as an individual right and it is not a product of individual rights thinking. Apportionment, finally, is a prohibitive requirement on direct taxes, even in time of war, and the Founders intended no hobble on use of direct tax.<sup>127</sup>

### 1. *Indicia of Wealth*

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<sup>124</sup> See FISS, *supra* note 49, at 12 (1993). Fiss is an unexpected source because he starts from the premise of the legitimacy of *Brown v. Board of Education* and other interventions by liberal courts protecting weaker groups, whereas *Pollock* was an intervention by a conservative court protecting propertied groups.

<sup>125</sup> See *id.* at 92-93.

<sup>126</sup> See *id.* at 10-12.

<sup>127</sup> For other commentaries rejecting *Pollock*, see *infra* note 366.

The Founders intended the formula apportioning tax by population to be an administrable mechanism by which tax would reach wealth. The original Articles of Confederation apportioned requisitions among the states according to the value of land and improvements within each state.<sup>128</sup> Congress proposed apportionment by population to replace apportionment according to land value because the appraisals of land value proved impossible to administer.<sup>129</sup> The change from a formula based on land value to a formula based on population attempted to make the formula more easily administrable, without changing the underlying principle that apportionment was to reach the relative wealth of the states.<sup>130</sup> At the Constitutional Convention, delegates from Pennsylvania and Massachusetts said that it made little difference in their home states whether state taxes were apportioned within the state by population or by value of real property.<sup>131</sup> The Founders did not think the original states would have wide variations in wealth per capita when they debated the Constitution,<sup>132</sup> so population was the fairest feasible measure of relative wealth available to them. So long as the movement of people was unrestricted, Madison argued, population would always shift to keep the wealth and population of the states in proportion.<sup>133</sup>

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<sup>128</sup> See *infra* Appendix I.

<sup>129</sup> See *id.*

<sup>130</sup> See *infra* Appendix I, text accompanying notes 24-44.

<sup>131</sup> See James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), 1787, in 1 RECORDS, *supra* note 46, at 587 (arguing that he had seen the figures and could see little difference between apportionment by wealth and apportionment by property in the impact on apportionment of Pennsylvania tax between Philadelphia and western settlements); *Id.* (Nathaniel Gorham arguing that "the most exact proportion prevailed between the numbers & property" in allocating Massachusetts tax between Boston and other Massachusetts towns).

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

The Founders commonly argued that taxes and representation should go together.<sup>134</sup> The tie that connected taxes and representation, however, was wealth.

The connecting principle was that wealth should both control government and pay for it. “The people who own the country,” said John Jay, “ought to govern it.”<sup>135</sup>

The Convention was less democratic than is remembered now. References to wealth or property as a proper source of voting power were common in the

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<sup>134</sup> See, e.g., James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass.), July 9, 1787, in 1 RECORDS, *supra* note 46, at 559, 562; Rufus King, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, *supra* note 68, at 299 (arguing that apportionment was founded on the principal that taxation and representation should go together hand in hand).

Some of the models that the Framers worked with tied votes and contributions together. Benjamin Franklin had been the principal drafter of the Albany Plan, which arose out of a conference called in 1753 to discuss possibilities for a union of the colonies for their common defense against the French and the Iroquois. Under Franklin’s plan, each of the colonies would be represented in the central union according to the amount of money it contributed to the needs of the defense. See John P. Kaminski & Gaspare J. Saladino, *Editorial Note* to 9 STATES, *supra* note 51, at 1048 n.11 (arguing also that although neither the Crown nor the Colonies adopted the Albany Plan, the Framers knew of it through Franklin’s publications). Franklin consistently argued, during debates surrounding the Articles of Confederation, that votes should be tied to taxes. He chided Delaware for asking for votes in Congress equal to those of the larger states in the Confederation: “Certainly if we vote equally we ought to pay equally; but the smaller states will hardly purchase the privilege at this price.” *Continental Congress, Taxation and Representation* (Benjamin Franklin), July 12, 1776, in JEFFERSON AUTOBIOGRAPHY (1821), *reprinted in* 2 FOUNDERS, *infra* note 139, at 88.

The Virginia Plan, which the most important precursors to the Constitution drafted in Philadelphia, provided for the allocation of votes in the national legislature, either according to population or according to each state’s quota for requisitions, “as the one or the other rule may seem best in different cases.” James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass. & Edmund Randolph, Va.), May 30, 1787, in 1 RECORDS, *supra* note 46, at 35-36 (debating the Virginia Plan’s scheme for votes).

<sup>135</sup> Richard Hofstadter, *The Founding Fathers: An Age of Realism*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 73, 84 (Robert H. Horwitz ed., 1977) (quoting John Jay). See also James Madison’s Notes on Debates in the Federal Convention (Pierce Butler, S.C.), July 6, 1787, in 1 RECORDS, *supra* note 46, at 540, 542 (urging strenuously that property was the “only just measure of representation” because property was “the great object of Govern[men]t” and “the great means of carrying . . . on” war); James Madison’s Notes on Debates in the Federal Convention (Pierce Butler, S.C.), July 9, 1787, in 1 RECORDS, *supra* note 46, at 559, 562 (“warmly” urging the necessity of regarding wealth in the determination of representation). Other Framers were willing to give wealth its “due weight” in representation, but would determine representation by numbers of people as well. See James Madison’s Notes on Debates in the Federal Convention (Charles Pinckney, S.C.), July 10, 1787, in 1 RECORDS, *supra* note 46, at 566, 567. See *id.* (Gouverneur Morris, Pa.) (arguing that voting should come from property in part, but that population should also come into the calculation because, although the South might provide its wealth in war, the Northern states “are to spill their blood”).



Philadelphia Convention.<sup>136</sup> The Convention, on the other hand, also had important delegates who argued that people were the sole source of voting power.<sup>137</sup> The Constitutional structure that was adopted ultimately does not make votes depend on wealth.<sup>138</sup> The Founders also saw no need to resolve conflicts between basing representation in the House of Representatives on wealth or on numbers because, as Madison put it, “population and wealth” were considered to be fair “measures of each other.”<sup>139</sup> Wealth and population were each the “true, equitable rule[s] of representation,” William Samuel Johnson said, but “these two principles resolved themselves into one; population being the best measure of wealth.”<sup>140</sup>

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<sup>136</sup> See, e.g., James Madison’s Notes on Debates in the Federal Convention (George Mason, Va.), July 11, 1787, in 1 RECORDS, *supra* note 46, at 578, 581 (arguing that slaves should be included in determining representation because they are “valuable”) (emphasis added); James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 9, 1787, in 1 RECORDS, *supra* note 46, at 559, 560 (noting that the committee assigned to apportion votes among the states did not “altogether disregard” *wealth* of the state); James Madison’s Notes on Debates in the Federal Convention (Hugh Williamson, N.C.), July 11, 1787, in 1 RECORDS, *supra* note 46, at 575, 576 (proposing to allow future legislatures to change representation according to alterations of population and wealth). Cf. THE FEDERALIST NO. 54, *supra* note 26, at 357 (Alexander Hamilton or James Madison) (arguing that voting weight should be accorded to both persons and property because “[g]overnment is instituted no less for protection of the property, than of the persons, of individuals”).

<sup>137</sup> See, e.g., James Madison’s Notes on Debates in the Federal Convention (Benjamin Franklin), Aug. 7, 1787, in 2 RECORDS, *supra* note 50, at 196, 204 (praising “the virtue [and] public spirit of our common people . . . which contributed principally to” the winning of the Revolution); Luther Martin, Informational Speech to the General Assembly of the State of Maryland (1788), in 2 THE COMPLETE ANTI-FEDERALIST 27, 37 (Herbert J. Storing ed., 1981) (advocating that men who are equally free have a right to equal representation); *Continental Congress, Taxation and Representation*, July 30-Aug. 2, 1776, JEFFERSON AUTOBIOGRAPHY 1821, *reprinted in* 2 FOUNDERS, *infra* note 139, at 87, 89 (paraphrasing James Wilson’s argument that it is “the effect of magic, not of reason” that “annexing the name of ‘State’ to ten thousand men, should give them an equal right with forty thousand”).

<sup>138</sup> There is, for example, no constitutional property requirement for suffrage nor for membership of either house of Congress. The Convention considered imposing a property requirement for voting for representatives in the House, but in the end left the voting rules up to the states so as not to disenfranchise any voter eligible in the states. See James Madison’s Notes on Debates in the Federal Convention, Aug. 9, 1787, in 2 RECORDS, *supra* note 50, at 230, 239-42. Charles Beard, however, argues that a majority of the states had substantial property qualifications for suffrage, and that other states eliminated practically all who were not taxpayers so that leaving the issue to the states gave significant deference to property in suffrage. See BEARD, *supra* note 122, at 71.

<sup>139</sup> *Records of the Federal Convention* (James Madison, Va.), July 11, 1787, in 2 THE FOUNDERS’ CONSTITUTION 102, 105 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter 2 FOUNDERS].

<sup>140</sup> *Records of the Federal Convention* (William Samuel Johnson), July 12, 1787, in 2 FOUNDERS, *supra* note 139, at 106. See also *Records of the Federal Convention* (Roger Sherman),

The principle that wealth should both pay for government and control it has little modern appeal; the dominant principle now (i.e. one man, one vote) establishes population as the only source of voting power. The connection between votes and taxes makes no sense outside of the aristocratic principle that wealth should control the government. Under the one man, one vote principle, for example, even people who pay no tax, because they are poor or because they have tax shelters, still get to vote. The tie between votes and taxes has been broken.

Even if one were now to take seriously the aristocratic principle that wealth should both pay for and control government, the part of the principle applicable to tax is that wealth should pay for government. Thus, the tie between votes and taxes implies that wealth should bear tax and not be protected from tax.

The Framers also assumed that Congress would lay wealth and income taxes because the states had been laying wealth and income taxes. The Founders considered direct taxes as a replacement for the requisition system used under the Articles of Confederation.<sup>141</sup> Participants in the Constitutional debates commonly argued that Congress might continue requisitions, even when given the power to lay direct taxes<sup>142</sup> or, at least, that Congress would follow the states' lead and simply continue to tax the same items the states had taxed before.<sup>143</sup> Under the terms of the ratification debates, Congress was empowered to raise revenue directly from the people without going through the states, and it could wield its new power to employ any tax that the states had used to satisfy requisitions.

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July 11, 1787, in 2 FOUNDERS, *supra* note 139, at 104 (arguing that if the legislature were to make wealth govern votes, it would be obligated to estimate wealth by numbers).

<sup>141</sup> See, e.g., Letter from James Madison to George Thompson, (Jan. 29, 1789), in 2 THE FIRST FEDERAL ELECTIONS, *supra* note 68, at 341-44 (explaining that direct taxes were a more enforceable, fairer alternative to requisitions).

<sup>142</sup> See *infra* note 178.

<sup>143</sup> See *infra* note 180.

All of the states and colonies imposed wealth taxes and, sometimes, income taxes before the Constitution was adopted. All of the states heavily relied on taxes on real property and improvements. In one way or another, the states taxed almost everything in sight.<sup>144</sup> The states also imposed income taxes at the time of the Constitution. In 1777, for instance, Massachusetts imposed a tax on “the amount of . . . income from any profession, faculty, handicraft, trade, or employment,” and also on “the amount of all income and profits gained by trading by sea and on shore, and by means of advantages arising from the war.”<sup>145</sup> Because the Framers intended Congress to be able to lay taxes by the same means the states had used, they intended to allow taxes on wealth and on income.

The Court’s treatment of apportionment as a protection for accumulated wealth in *Pollock* thus turns the historical meaning of the apportionment formula upside down. The apportionment formula was written not to protect wealth from tax, but so that tax could reach wealth. *Pollock* added a class bias to tax in favor of a wealthy upper class that is inconsistent with its original meaning.

The Court in *Pollock* made two related arguments which also had no historical justification. In *Pollock*, the Court argued that apportionment protects wealth against the “mere force of numbers.”<sup>146</sup> In fact, however, the Founders considered the population of a state and its wealth as workable measures for each other, not as opposing forces.<sup>147</sup>

In *Pollock*, the Court also concluded that the purpose of the apportionment requirement was to prevent the imposition of tax within a single state by overall national majority: “Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States.”<sup>148</sup> This language makes no sense within the Constitutional system. An overall majority in the House and Senate can adopt federal taxes. There is no requirement that a state must agree to a federal tax for the state to be subject to the tax. The Constitution does not allow a state to gain immunity from a federal tax because a majority within that one state defeated the tax.<sup>149</sup> The

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<sup>144</sup> See *infra* notes 232-40.

<sup>145</sup> RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 4 (1954) (noting faculty taxes in other states on income from various trades or professions).

<sup>146</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 583, *on reh’g*, 158 U.S. 601 (1895).

<sup>147</sup> See *supra* notes 139-40 and accompanying text.

<sup>148</sup> *Pollock*, 157 U.S. at 582.

<sup>149</sup> Article Nine, allowing the Constitution to go into effect upon the ratification of nine states should be understood as a direct response rejecting single-state vetoes on federal taxes. The Constitution quite plausibly was required solely because Rhode Island defeated the five percent customs duty of 1781, and New York, Rhode Island, and New Hampshire defeated the same proposal of 1783. See *supra* note 85; *infra* note 211 and accompanying text.

structure and object of federal taxes are decided by a majority national vote, and the direct tax requirement does nothing to change that.

## 2. *Not an Individual Right*

Apportionment cannot be interpreted as an individual right either in structure or in history. Apportionment forces inequitable tax rates at the individual level whenever the tax base varies per capita among the states. To meet a quota determined at the state level, apportionment requires that the tax be unfair at the individual level. A system that can force nonuniform tax rates—taxes on Virginia carriages that are ten times higher than those on New York carriages, or taxes on Mississippi consumption that are twice the tax on Connecticut consumption—or can force the full burden of a state’s quota onto one person cannot be justified as an individual right or a protection for any one person’s property. Debaters thought out the rule in terms of equity among states under the requisitions. Its effect on individuals was unexpected.

Apportionment also did not arise from individual rights views. Apportionment of taxes among the states arose in 1776 under the Articles of Confederation when Congress was not a government, but only an assemblage of delegates from different states.<sup>150</sup> Congress relied on requisitions apportioned among the states not out of principle, but out of necessity to fight a Revolutionary War.<sup>151</sup> The language of the apportionment formula in Article I traces the language of a 1783 proposal for allocating requisitions under the Articles of Confederation.<sup>152</sup>

When apportionment arose, there were no arguments abroad in the polity about the need for “Madisonian rights” to protect individuals even from legislatures that fairly represented the people as a whole. Throughout the American Revolution, the Colonists’ argument was that *representation* would be the protector of a citizen’s rights. The colonies argued that citizens needed the right to representation in a legislature that affected them and the right to a trial by a representative jury of one’s local peers. Madison caused a fundamental shift in the argument over rights by arguing that individuals needed protection even from a legislature (or jury) that accurately and fairly represented the majority. When apportionment of requisitions among the states arose in 1776, or when the specific

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<sup>150</sup> See *infra* Appendix I.

<sup>151</sup> See *id.*

<sup>152</sup> See *id.*

formula and wording arose in 1783, no one was arguing that there were individual rights against a body that fairly represented the people.<sup>153</sup>

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<sup>153</sup> See RAKOVE, *supra* note 57, at 310, 330-35.

Similarly, the Framers brought the apportionment formula into the Constitution as a part of the Convention's first order of business: to decide how to determine representation in the Congress. As noted, the formula was a minor catalyst to effect a compromise between slave and nonslave states on representation in the House of Representatives.<sup>154</sup> Only later, the Convention decided what general rights the Congress would have.<sup>155</sup> The Bill of Rights, protecting individuals against the new government, arose even later. Madison proposed the individual protections in the first federal Congress only after the states had completed ratification.<sup>156</sup> Treating apportionment by the federal formula as if it were part of the Bill of Rights—protecting individuals and limiting government—is an anachronism that misplaces the intellectual development of the idea by over twenty years.

No one in the Constitutional debates treated the apportionment formula as an individual right. The Anti-Federalists wanted to limit Congressional power to lay direct taxes, but they neither generated the apportionment requirement, nor adopted it as their own. "Congress having assigned to any state its quota," the Anti-Federalists argued, "there will be nothing to prevent a system of tax laws being made, unduly to ease some descriptions of men and burden others."<sup>157</sup> The Anti-Federalists feared direct taxes, but they did not view the apportionment requirement as a notable or meaningful limitation to the power.<sup>158</sup> Had either side understood apportionment as a protection of individuals or limitation on the fearsome power, someone would have mentioned it in the debates.<sup>159</sup>

### 3. *A Hobble on Federal Taxes?*

In *Pollock*, the Court said that waiving the apportionment requirement by calling a direct tax indirect, would "fritter[] away" one of the "great landmarks" defining the boundary between the States and the Federal government.<sup>160</sup> That rationale misdescribes the history because, in giving Congress the power to lay direct taxes, the Founders assumed that Congress would be able to use direct

<sup>154</sup> See *infra* Appendix I, text accompanying notes 63-86.

<sup>155</sup> See *id.* at 54, 60, 178.

<sup>156</sup> See, e.g., RUTLAND, *supra* note 59.

<sup>157</sup> Letter IX from the Federal Farmer to the Republican (Jan. 4, 1788), reprinted in 17 COMMENTARIES, *supra* note 47, at 294.

<sup>158</sup> See, e.g., George Mason, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1338, 1342-43 (arguing that apportionment is "no security whatsoever").

<sup>159</sup> James Madison argued that the apportionment requirement would prevent Congress from imposing prohibitive taxes on slave owners. *But see* discussion *infra* text accompanying notes 171-74 (arguing that Madison's argument does not have a reasonable basis in the constitutional text).

<sup>160</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583, *on reh'g*, 158 U.S. 601 (1985).

taxes. The Anti-Federalists opposed giving the power of direct tax to the Congress so as to leave the power to designate the tax base to the states. For the Federalists, however, giving Congress the power to lay direct taxes was a core purpose of the whole Constitution and the Federalists won on the issue.

The Court in *Pollock* also argued that the purpose of the apportionment requirement was to “restrain the exercise of the power of direct taxation to extraordinary emergencies,” whereas the 1894 income tax before the Court was passed during peacetime.<sup>161</sup> Before *Pollock*, the Supreme Court previously had upheld the constitutionality of the Civil War income taxes,<sup>162</sup> so while *Pollock* does not mention its prior holdings on point, the Court may have intended the distinction between wartime and peacetime to differentiate its prior cases which allowed the wartime income tax.

The prior Supreme Court cases that allowed the income tax justified waiving the apportionment requirement because apportionment was an absurd requirement in both war and peace, not because war justified emergency measures.<sup>163</sup> A distinction between war and peacetime taxes is not well grounded in text or the debates. The Federalists sometimes did argue tactically that the federal government would not use direct taxes, at least during ordinary times, because the impost and sale of direct lands usually would be sufficient.<sup>164</sup> They also argued, however, that the federal government should have the power to lay direct taxes during peacetime;<sup>165</sup> and Madison called for a peacetime tax on real estate as soon as the states ratified the Constitution.<sup>166</sup> The adopted text made no distinction between war and peacetime, so if the Constitution required apportionment in peacetime, it would hobble the defense in time of war. The Founders were deeply worried about denying Congress the power to lay direct taxes during war.<sup>167</sup> Once it is conceded that direct taxes are necessary in war, a hobble on that tax becomes a threat to national survival. Because there is no distinction between war and peace in the Constitutional language, a tax without apportionment during peacetime follows from the necessity of a direct tax without hobble during war.

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<sup>161</sup> *Id.* at 583. *See also id.* at 574 (“[The] original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies.”).

<sup>162</sup> *See, e.g.,* *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 446 (1868); *Springer v. United States*, 102 U.S. 586, 600 (1881).

<sup>163</sup> *See infra* text accompanying notes 335-39, 353-60.

<sup>164</sup> *See supra* note 74.

<sup>165</sup> THE FEDERALIST NO. 34, *supra* note 26, at 208-09 (Alexander Hamilton) (giving federal government only the impost which would leave the federal government with 90% of the responsibilities and only one-third of the revenue sources).

<sup>166</sup> *See supra* note 76 and accompanying text.

<sup>167</sup> *See, e.g.,* Letter from James Madison to George Thompson, (Jan. 29, 1789), in 2 THE FIRST FEDERAL ELECTIONS, *supra* note 68, at 344; *see also supra* note 68 and accompanying text.

The Court's description, in *Pollock*, of the rationales for the adoption of the apportionment requirement are not accurate as a matter of history. Beard, Fiss, and the Court in *Pollock* added after-the-fact rationales for the apportionment requirement to serve their own purposes, but the rationales did not give a defensible history of the original intent.

#### B. *Head Tax?*

A capitation or head tax, which collects an equal amount of tax from each person, would avoid the perverse result of apportionment. If the tax base and the basis for apportionment are the same, apportioned tax could be uniform in rate in various states. In ignorance of history, moreover, one might guess from the text of a requirement that tax be determined by population that the drafters intended Congress would lay only a tax on population, that is, a head tax, poll tax, or similar per capita tax that requires each person to pay the same amount.

The Framers, however, did not intend the apportionment requirement to force a head tax. For example, when representatives first debated the apportionment of taxes by population in July 1776, John Adams asked that the Articles state clearly that “the numbers of people were taken by [the apportionment rule] as an index of the wealth of the state [and] not as subjects of taxation.”<sup>168</sup> Throughout the debates, population was considered to be only a measure of wealth.

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<sup>168</sup> Thomas Jefferson's Notes of Proceedings in Congress (John Adams), July 12-Aug. 1, 1776, in 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 439 (Paul H. Smith ed., 1979) [hereinafter 4 LETTERS]. See also *id.* at 438-39 (Samuel Chase, Md.) (arguing that while taxation should be always in proportion to property, the number of inhabitants within the state was a “tolerably good criterion of property,” given the difficulties of valuation); *id.* at 444 (James Wilson, Pa.) (“[T]axation should be in proportion to wealth”).



In the Constitutional debates, both Federalists and Anti-Federalists condemned head taxes on the ground that they forced the pauper to pay the same tax as the rich man. The Federalists argued that capitation was “abhorrent to the feelings of human nature,”<sup>169</sup> and they confessed their disapprobation of it,<sup>170</sup> but trusted that Congress probably never would apply it except in the direst emergency.<sup>171</sup> The Anti-Federalists attacked the capitation as an “unjust, unequal, and ruinous tax,”<sup>172</sup> falling indiscriminately on the poor and helpless who could not work.<sup>173</sup> Anti-Federalists, trying to prevent Congress from having power to lay internal taxes by any means other than requisitions, argued that their amendment was necessary to prevent the poll tax from being the only source of internal revenue for Congress.<sup>174</sup>

The Anti-Federalists differed from the Federalists only in that they were sure Congress would apply the capitation tax if allowed because it was “almost morally certain that this new government will be administered by the wealthy.”<sup>175</sup>

Reading the apportionment formula, moreover, as if it required a head tax turns the formula that the Framers wrote to reach the wealth of the nation into a formula that exempted most of the nation’s wealth from tax. Under capitation, a rich man could pay no more tax than the pauper. Given his resources, the pauper can pay only a trivial amount in tax. Hence, Congress could not ask anyone else to pay more than the pauper’s trivial amount. The entire wealth of the nation, in

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<sup>169</sup> Francis Dana, Debates in Massachusetts Ratifying Convention (Jan. 18, 1788), in 2 FOUNDERS, *supra* note 139, at 122, 125.

<sup>170</sup> THE FEDERALIST NO. 36, *supra* note 26, at 174 (Alexander Hamilton). *Accord* Alexander Hamilton, *Report on the Subject of Manufactures*, Dec. 5, 1791, in 10 THE PAPERS OF ALEXANDER HAMILTON 312, 330 (Harold C. Syrett ed., 1962) (stating that poll taxes are unfriendly to manufacture and injurious to the industrious poor); Nathaniel Gorham, DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, *supra* note 68, at 207 (calling the poll tax “a distressful tax”).

<sup>171</sup> Hamilton argued that various states had used a capitation tax, and acknowledged his aversion to “every project that is calculated to disarm the government of a single weapon, which . . . might be usefully employed for the general defence and security.” THE FEDERALIST NO. 36, *supra* note 26, at 223 (Alexander Hamilton).

<sup>172</sup> *The Debates in the Convention of the State of New York* (John Williams), June 27, 1787, in 2 DEBATES, *supra* note 14, at 18, 340.

<sup>173</sup> Anonymous letter, FREEMAN’S J. (Philadelphia), Sept. 26, 1787, *reprinted in* 2 STATES, *supra* note 54, at 146, 148.

<sup>174</sup> See James Madison’s Notes on Debates in the Federal Convention (Elbridge Gerry, Mass.), July 13, 1787, in 1 RECORDS, *supra* note 46, at 600, 603 (arguing that assessment of direct taxes on inhabitants might restrain the legislature to a poll tax, and that the Constitution should authorize requisitions on the states).

<sup>175</sup> John Williams, *The Debates in the Convention of the State of New York*, June 27, 1787, in 2 DEBATES, *supra* note 14, at 340. See STAUGHTON LYND, ANTI-FEDERALISM IN DUCHESS COUNTY, NEW YORK (1962) (arguing that both Federalist and Anti-Federalist leaders were often wealthy, but that the Anti-Federalist political base was poorer than the Federalist base).

excess of a trivial amount per person, would become tax-exempt, producing the exact opposite result of that originally intended.

As a matter of logic, moreover, apportionment could not be said to force a head tax collected from each person because the original constitutional formula required that each slave be counted as three-fifths of a person. The slaves had no control over resources to pay tax. Thus, the formula for apportionment among the states could not force a design for the kind of tax collected to satisfy the state's quota.

Thus, while the capitation might have been a logical way to avoid the perversity of nonuniform tax rates among the states, the condemnation of the head tax by both sides and the impossibility of collecting a tax from each head meant the head tax was not a necessary solution.

### C. *Continuation of Requisitions?*

A requisition system can ameliorate some of the hard contradiction between equity among states and equity among individuals because each state can meet its quota in a different way according to its different riches. To meet equal quotas or requisitions, Virginia might tax plentiful tobacco, for instance, and Massachusetts might tax cod. There would be no need to pile the whole quota upon a single carriage or individual.

Apportionment among the states arose and made sense within the requisition system, and requisitions were the only extant federal tax that the Founders knew. Many of the Framers assumed that the requisition system would continue, even after the adoption of the Constitution.<sup>176</sup> When the Philadelphia Convention adopted the apportionment requirement, the Convention had not yet given Congress the power to raise taxes directly without requisitions.<sup>177</sup> During the ratification debates, Federalist speakers commonly argued that Congress should continue the requisition system when possible, so as to leave it to each state to determine and collect its quota within the state.<sup>178</sup> Early in the ratification debates,

<sup>176</sup> See, e.g., James Madison's Notes on Debates in the Federal Convention (Oliver Ellsworth, Conn.), July 12, 1787, in 1 RECORDS, *supra* note 46, at 591, 594, 597 (describing the issue as a consideration of how "the rule of contribution by direct taxation" would be allocated, and then later saying that Congress could raise a sum allocated to a state by the same plan that a state used to raise its own taxes); Rufus King, Debate in the Senate (Mar. 1819), in 3 FOUNDERS, *supra* note 14, at 362, 363-64 (arguing that the members of the Convention agreed "that all *contributions* to the common treasury should be made according to the ability of the several states") (emphasis added).

<sup>177</sup> See RAKOVE, *supra* note 57, at 60, 64, 178 (describing the strategy to settle the formula for representation before deciding what powers the new Congress would have).

<sup>178</sup> *The Debates in the Convention of the Commonwealth of Virginia* (James McHenry), Nov. 29, 1787, in 3 DEBATES, *supra* note 26, at 149 (arguing that Congress would not exercise its power over direct taxes if the respective states would raise their quotas in any other manner more suitable

before the Federalists stood up against the Anti-Federalist ban on direct taxes, Federalist descriptions of the Constitution portrayed the document as if the Anti-Federalist ban on direct taxes had passed, so requisitions would be the only way Congress could raise direct taxes, except when a state defaulted on payment of its quota.<sup>179</sup> In addition, the Federalists sometimes argued for a type of quasi-requisition system under which Congress would follow the lead of the states or piggy back the federal taxes on top of whatever system each state used to collect state taxes. They argued that Congress undoubtedly would collect their money within a state by looking to different goods and objects within each state, so as to minimize the damage from federal taxes.<sup>180</sup>

The assumption that requisitions would continue also is implied by the functioning of the apportionment requirement itself. Apportionment by population

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to their own inclinations); Letter from Roger Sherman and Oliver Ellsworth, Connecticut Superior Court Justices, to Samuel Huntington, Governor of Connecticut (Sept. 26, 1787), in *The Report of Connecticut's Delegates to the Constitutional Convention*, NEW HAVEN GAZETTE, Oct. 25, 1787, reprinted in 13 COMMENTARIES, *supra* note 73, at 470, 471 (arguing that the authority over direct tax need not be exercised if each state will furnish its quota); Tench Coxe, *To the Minority of the Convention of Pennsylvania A Freeman III*, PA. GAZETTE (Philadelphia), Feb. 6, 1788, reprinted in 16 COMMENTARIES, *supra* note 85, at 49, 51 (arguing that if states raise their quotas in the easiest and most expeditious way, a federal government with “the least degree of policy [, reason,] or virtue, . . . [would] never attempt to interfere”). Cf. THE FEDERALIST NO. 36, *supra* note 26, at 220 (Alexander Hamilton) (arguing that Congress’ power to tax internally will have a strong influence in giving efficacy to requisitions because the states know that the Union can apply taxes without their agency should they not pay). *But see* Letter III from the Federal Farmer to the Republican (Oct. 10, 1787), in 14 COMMENTARIES, *supra* note 51, at 30, 37 (arguing that while he heard many gentlemen get rid of objections to direct tax by asserting that Congress will have power only to make requisitions, leaving it to the states to lay and collect them, he saw “little colour for this construction”).

<sup>179</sup> “A Citizen of New Haven” (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1787, in 15 COMMENTARIES, *supra* note 47, at 524, 526 (saying that if Congress needs to go beyond the impost and sale of Western lands, then Congress shall apportion quotas, and should any state neglect to furnish its quota, Congress may then raise the quota by tax in the same manner as the state ought to have done). *See also* *The Debates in the Convention of the Commonwealth of Virginia* (James McHenry), Nov. 29, 1787, in 3 DEBATES, *supra* note 178 (stating that Congress would not use direct tax if the states raised their quotas themselves); *The Report of Connecticut's Delegates to the Constitutional Convention*, NEW HAVEN GAZETTE, Oct. 25, 1787, reprinted in 13 COMMENTARIES, *supra* note 73, at 470, 471 (reporting that Congress need not levy direct taxes if each state will furnish its quota by its own means); Tench Coxe, *supra* note 178 (asserting that Congress with “the least degree of policy[, reason,] or virtue” will never interfere if each state will collect quota by own means).

<sup>180</sup> Edmund Randolph, Debates in the Virginia Ratification Convention (June 7, 1788), in 9 STATES, *supra* note 51, at 1006, 1022 (saying that if a tax was laid on one uniform article throughout the Union, its operation would be oppressive, but that a tax will undoubtedly be laid in each state in the manner that will best accommodate the people).

would function reasonably well within the requisition system of the Articles of Confederation. The per capita wealth of the different states was roughly the same, so population fairly approximated wealth. Apportionment, however, does not work very well outside of the requisition system when Congress chooses a taxed item that is not distributed equally per capita among the states.

While apportionment works well only within a requisition system, it is invalid to let apportionment force the continuation of requisitions. Allowing repeal of requisitions was a fundamental purpose of the Constitution: The Constitution gave the new Congress the general power to raise taxes directly,<sup>181</sup> without “continual recurrence to the state legislatures.”<sup>182</sup> Without the requisition system, the new federal government could operate independently, without the consent of the states.<sup>183</sup> The Philadelphia Convention turned back the New Jersey plan, which would have allowed Congress to raise direct taxes only by requisitions.<sup>184</sup> The Convention also backed off the Virginia Plan, which would have allowed the allocation of votes in proportion to contributions,<sup>185</sup> because the federal government might collect taxes in a way in which it could not ascertain the sums drawn from each state.<sup>186</sup> The Anti-Federalist amendment prohibiting direct taxes would have continued requisitions, so that each state could decide the mode of taxation within the state;<sup>187</sup> but the Federalists defeated that amendment with strenuous effort. Gouverneur Morris, whose motion on July 12, 1787, introduced the apportionment requirement, applied apportionment only to direct taxes, so as not to “drive the Legislature to the plan of Requisitions.”<sup>188</sup> “[T]he present

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<sup>181</sup> U.S. CONST. art. 1, § 8 (giving Congress the power to “lay and collect Taxes, Duties, Imposts and Excises”).

<sup>182</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 COMMENTARIES, *supra* note 51, at 402.

<sup>183</sup> See Letter from Antoine René Charles Mathurin de la Forest, French vice consul for the United States in New York, to Comte de Montmorin, French minister of foreign affairs and minister of marine (Sept. 28, 1787), in 13 COMMENTARIES, *supra* note 73, at 259.

<sup>184</sup> The New Jersey Plan is reprinted in DOCUMENTS & RECORDS, *supra* note 50, at 250-53. The Convention rejected it: seven states against, three in favor, and one state divided. See James Madison’s Notes on Debates in the Federal Convention, June 19, 1787, in 1 RECORDS, *supra* note 46, at 312, 313.

<sup>185</sup> See FARRAND, *supra* note 38, at 225 (stating that the Virginia plan would have allocated “rights of suffrage in the National Legislature” in proportion to the quotas of contributions or to the number of free inhabitants, as may seem to be the best rule in different cases).

<sup>186</sup> See James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass.), May 30, 1787, in 1 RECORDS, *supra* note 46, at 33, 36. Madison admitted to the propriety of King’s argument and said that some other way must be used to apportion votes. *Id.*

<sup>187</sup> See, e.g., The Impartial Examiner I, VA. INDEP. CHRON., Feb. 27, 1788, reprinted in 8 STATES, *supra* note 35, at 420, 421 (arguing that each state should be left to raise its own share of the revenue, and each would be the only proper judge of the mode of taxation).

<sup>188</sup> James Madison’s Notes on Debates in the Federal Convention (James Madison, Va.), July

Constitution was particularly intended to affect individuals,” it was later said, “and not states.”<sup>189</sup>

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12, 1787, in 1 RECORDS, *supra* note 46, at 589, 592-93. James Wilson (Pennsylvania) and George Mason (Virginia) contributed to Morris’s dropping back from apportionment of all taxes to apportionment of direct tax. Mason suggested that apportionment for all taxes would drive the legislature to requisitions. Wilson said he approved of the principle but could not see how it could be carried into execution, unless restrained to direct taxes. *Id.*

<sup>189</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181 (1797) (Iradell, J.).

The Framers ended the requisition system first to make federal revenue involuntary and, hence, reliable. The Federalists argued that because the states had not paid their quotas voluntarily, they would not pay their quotas without a federal army forcing them to do so.<sup>190</sup> Requisitions without force, under the Confederation, were mere “pompous petitions for public charity.”<sup>191</sup>

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<sup>190</sup> THE FEDERALIST NO. 16, *supra* note 26, at 97 (Alexander Hamilton) (arguing that the national government would require a huge army to enforce ordinary requisitions); Henry Lee, Debates in the Virginia Ratification Convention (June 9, 1788), in 9 STATES, *supra* note 51, at 1050, 1076 (asking, “Had the Amphycyonic Council had the power [of direct taxation], would they have sent armies to levy money?”); Letter from Edmund Randolph to James Madison and George Washington (Dec. 27, 1787), in *Reasons for Not Signing the Constitution*, 8 STATES, *supra* note 35, at 260, 266 (arguing that requisitions can be enforced from the states only by armies; it is better for federal collectors to collect the quotas from citizens and be supported in the collections as ordinary taxes).

<sup>191</sup> *The Debates in the Convention of the State of New York* (Robert Livingston), June 27, 1788, in 2 DEBATES, *supra* note 14, at 342.

“[R]equisitions cannot be rendered efficient without a civil war—without great expence of money,” John Marshall argued, “and the blood of our citizens.”<sup>192</sup> To raise direct taxes only after a requisition default, the Federalists argued, merely would give the recalcitrant state “a little more time to . . . provide itself with arms and foreign alliance . . . to . . . resist federal collectors.”<sup>193</sup> Even the staunchest Anti-Federalists conceded that something had to be done about the states’ delinquencies in paying their quotas.<sup>194</sup> To overcome the “manifest ‘imbecility’ of . . . the Confederation[,] [t]he proper solution . . . was not to empower Congress to apply force . . . , but rather to create ‘a system which would operate without the intervention of the states’ [by collecting tax and acting] directly on the people.”<sup>195</sup>

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<sup>192</sup> John Marshall, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1121 (also arguing that direct tax would supply federal revenue “in a peaceable manner without irritating the minds of the people”).

<sup>193</sup> Edmund Randolph, Debates in the Virginia Ratification Convention (June 7, 1788), in 9 STATES, *supra* note 51, at 1006, 1020. *See also* Alexander Hamilton, *The Defence of the Funding System* (July 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 87, at 1, 23 (“[T]o give a clear field to the Government of the UStates was so manifestly founded in good policy, that the time must come when a man of sense would blush to dispute it.”).

<sup>194</sup> *See, e.g.*, George Mason, Debates in the Virginia Ratification Convention (June 6, 1788), in 9 STATES, *supra* note 51, at 915, 938 (“I candidly acknowledge the inefficacy of the confederation.”); Patrick Henry, *quoted in* Merrill Jensen, *Introduction to DOCUMENTS & RECORDS*, *supra* note 50, at 25 (saying that “ruin was inevitable unless something was done to give Congress a compulsory process on delinquent states”).

<sup>195</sup> RAKOVE, *supra* note 57, at 50. *See also* Letter from Antoine René Charles Mathurin de la Forest, French vice consul for the United States in New York, to Comte de Montmorin, French minister of foreign affairs and minister of marine (Sept. 28, 1787), in 13 COMMENTARIES, *supra*

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note 73, at 259 (arguing that Congress will no longer need consent of the states for the navy, army, and taxes).



As a matter of logic, it is possible to have congressionally mandated taxes that follow apportionment of a requisition system without involving petitions to the states. For instance, Congress itself might reduce the worst perversity of the apportionment requirement—piling an entire state’s quota on a few objects or taxpayers—by collecting the state’s quota from different objects in different states.<sup>196</sup> Madison argued before the Virginia Ratification Convention, for instance, that Congress could not enact prohibitive taxes on slaves because of the apportionment requirement: “The census in the Constitution was intended to introduce equality in the burdens to be laid on the community.”<sup>197</sup> Congress would maintain equality among communities while avoiding prohibitive taxes on any one item, he argued, by laying the tax in each state upon different articles.<sup>198</sup>

For instance, if Congress taxed both plentiful cod in Massachusetts and plentiful tobacco in Virginia, then both states’ quotas could be raised by a tax on that plentiful item, and neither quota would force a prohibitive tax rate on rare items within the state.

Such a quasi-requisition tax system written by Congress would have its own silliness. As a whole, the system would be an unfathomable briar patch driven by quotas, so the tax rate levied would differ for separate commodities across state lines. Different tax rates on the same commodity in neighboring states would also encourage cross-border shopping and smuggling. It would be impossible to neutralize taxes among commodities or providers in different states, so taxes would force unwanted shifts in pretax patterns beyond the revenue that they took.

An apportioned tax with diverse objects of taxation in different states could soften but not solve the absurdity of apportionment, so long as the final tax bases varied per capita among the states. The best that could be expected from taxes on

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<sup>196</sup> At the Philadelphia Convention, Elbridge Gerry, who became an Anti-Federalist, argued that apportionment of direct taxes among the states “could not be carried into execution as the States were not to be taxed as States;” and Oliver Ellsworth of Connecticut responded that “[t]he sum allocated to a State may be levied without difficulty according to the plan used by the State in raising its own supplies.” James Madison’s Notes on Debates in the Federal Convention (James Madison, Va.), July 12, 1787, in 1 RECORDS, *supra* note 46, at 591, 597.

<sup>197</sup> James Madison, Debates in the Virginia Ratification Convention (James Madison), June 12, 1788, in 10 STATES, *supra* note 26, at 1343. *See also id.* at 1204 (arguing that the most proper articles will be selected in each state, and if one article in any state should be deficient, the direct tax will be laid on another article); Rufus King, Debate in the Senate (Mar. 1819), in 3 FOUNDERS, *supra* note 14, at 362, 363 (arguing that a diversity of taxes was necessary to their equalization among the states); *see infra* note 204 and accompanying text (concluding that the Constitutional text does not protect slavery from prohibitive taxes).

<sup>198</sup> *Id.* *See also* John Taylor, Argument in the Circuit Court, in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 315, 327 (arguing that a tax once apportioned could be raised by taxing different items in each state, “selected according to the convenience or circumstances of the people in each state”).

various commodities would be a comprehensive tax base. A comprehensive tax base, whether based on consumption, expenditures, income, or wealth, would vary less among the states than would those based on regional commodities, such as cod, tobacco, or carriages. The states still vary considerably, even in per capita consumption, income, and wealth. As long as state to state variations remain, the apportioned tax would be perverse. Congress could soften, but not avoid the core silliness of requiring a higher tax rate in the states with lesser per capita tax bases.<sup>199</sup>

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<sup>199</sup> To go back to our early examples, Congress might be able to avoid a tax like the carriage tax, with rates that are ten times higher in Virginia than in New York, but it could not avoid so easily the absurdity of the consumption tax example, which imposed rates that were twice as high in poor Mississippi than in rich Connecticut.

Apportionment would not be a desirable program even if it were less absurd. For any level of revenue, a broadly based tax raised nationally without tax havens, would do less harm economically than a multitude of uncoordinated taxes.<sup>200</sup> Therefore, it is beneficial that the federal government was allowed to raise its own taxes without relying on a briar patch of differing tax systems in differing states. Hamilton argued in *The Federalist* that no formula for apportioning taxes among the states could capture equitably the wealth of the nation. The nation's wealth depends upon an infinite variety of causes, Hamilton argued: situation; soil; climate; the nature of production and government; the genius of its citizens; and many more factors "too complex, minute, or adventitious to admit of a particular specification."<sup>201</sup> Neither apportionment by land value nor by population, Hamilton thought, accurately could describe the nation's wealth.<sup>202</sup> In modern times, as wealth grows more abstract and farther removed from the land, apportionment among the states would be less and less able to capture the nation's wealth. Apportionment also would require corporate tax and any other broadly based internal taxes to be attributed to specific persons. Because people move, the tax paid by any one person would then have to be allocated, in some way, to the states through which the person moves. Any formula that attempts to apportion taxes among states is thus, as Hamilton said, a "fundamental error in the Confederation."<sup>203</sup> There is no question that some of the debaters anticipated that requisitions or quasi-requisitions would continue, but the text does not require it. Because requisitions or quasi-requisitions would be bad taxes, inferior to

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<sup>200</sup> If taxes are high on a commodity in one state, taxpayers simply could buy the commodity in another state. If tax rates are universally higher on a commodity, then taxpayers could shift into a competitive, but inferior, alternative expenditure, while suffering some loss in utility (although less than the tax that would be lost). The avoidance of tax without the production of any revenue explains the deadweight losses from a tax system; the best taxes are unavoidable. Countervailing taxes (e.g. loophole closing) can reduce even deadweight loss. See, e.g., Robin W. Boadway & David E. Wildasin, *The Measurement of the Deadweight Loss of Taxation*, in PUBLIC SECTOR ECONOMICS 387, 392 (2d ed. 1984).

<sup>201</sup> THE FEDERALIST NO. 21, *supra* note 26, at 128. See also James Madison's Notes on Debates in the Federal Convention (Rufus King, Mass.), May 30, 1787, in 1 RECORDS, *supra* note 46, at 33, 36 (observing that revenue might hereafter be collected by the general government in ways in which the sums drawn from each state would not be apparent).

<sup>202</sup> See THE FEDERALIST NO. 21, *supra* note 26, at 127 (Alexander Hamilton). See also Letter from Alexander Hamilton to Governor George Clinton (Feb. 24, 1783), in 3 THE PAPERS OF ALEXANDER HAMILTON 268, 268-69 (Harold C. Syrett ed., 1962) (noting that the Netherlands has the same population and land as Switzerland, but five times the wealth; no one factor can describe relative wealth).

<sup>203</sup> *Id.* at 100. See also 6 ANNALS OF CONG. 2702 (1796) (arguing that collecting taxes by following state systems would prevent uniform tax rates, and would prevent Congress from protecting "an object of tax by a proportional tax upon its competitor").

comprehensive taxes engineered on a nationwide basis to do the least possible harm, a requirement of requisitions should not be construed.

The text of the Constitution does not support Madison's construction that Congress would follow the states and tax different items in different states. Congress was given the power to choose the items subject to direct tax or excise.<sup>204</sup> There was no requirement that Congress choose diverse targets in different states. For instance, Congress could tax slaves alone, as the Virginia Anti-Federalists pointed out.<sup>205</sup> There is no appeal in requiring requisitions as a matter of reasonable tax policy, and there is no necessity of finding such a requirement in the Constitutional text.

#### IV. CONTEMPORANEOUS DEFINITIONS OF "DIRECT TAX"

Fortunately, apportionment is required only for "direct taxes." Unfortunately, without some creative interpretation, the term "direct tax" was used too broadly during the Constitutional debates to allow any of the unapportioned taxes upon which modern states rely. "Direct tax" was perceived as giving a broad power to Congress, not as a limitation on that power, and both proponents and opponents of congressional direct taxes interpreted "direct tax" very broadly. Commonly in the Constitutional debates, "direct tax" was usually used as a synonym for "internal tax," and the only tax excluded from the term "internal tax" was an external tax or customs duty called the "impost."

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<sup>204</sup> Hamilton, *supra* note 193, at 28 (arguing that Congress, not the states, determine direct tax even with apportionment).

<sup>205</sup> See, e.g., George Mason, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1342-43 (arguing that Federalists misconstrued the apportionment clause and that Congress could choose to enact prohibitively high tax on slaves); William Grayson, Debates in the Virginia Ratification Convention (June 12, 1788), in 9 STATES, *supra* note 51, at 1184, 1185-86 (arguing uniform rates do not prevent Northern States from laying a tax on slaves with which they do not participate); Patrick Henry, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1342 (arguing that slaves could be the sole object upon which Congress lays a state's entire quota).

At the time of the founding, definitions were determined essentially in the same way they are determined today: The “sense of a word,” said Dr. Samuel Johnson’s *Dictionary*, “may easily be collected entire from the examples,”<sup>206</sup> and lexicography today still determines meaning and change by collecting samples.<sup>207</sup>

Under the rules of strict constructionism, the meaning of the words used in the Constitution is said to be determined from their usage in the public debates over the adoption of the Constitution.<sup>208</sup> The ratification debates generated many uses of “direct tax.” While usage varied in different contexts and for different speakers, the variation is not great enough to leave the term without content.

#### A. “Direct Tax” and “Internal Tax” as Near Synonyms

The term “direct tax” usually was used in the Constitutional debates as a synonym for “internal taxes,” meaning any tax but the customs duties and taxes on exports. Many of the major actors used “direct tax” in the debates to include the term “excises.”

The only tax that clearly does not have to be apportioned as a “direct tax” according to the usages from the Constitutional debate is the “impost,” meaning customs duties. Under modern usage, “impost” is just a synonym for “imposition” or “tax,”<sup>209</sup> but in the Constitutional debates, “impost” only referred only to customs duties on imported goods.<sup>210</sup> The last proposals for new sources of federal revenue under the Articles of Confederation had been called the “Impost of 1781” and the “Impost of 1783”; they were proposals for five percent duties on imported goods.<sup>211</sup> The failure to enact the imposts generally was considered to

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<sup>206</sup> Samuel Johnson, *Preface* to the *DICTIONARY* (1755), *quoted in* Harold Whitehall, *The English Language*, in *WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE* xxxiii (College ed. 1957).

<sup>207</sup> *See, e.g., The English Language*, in *MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY* 28a-29a (10th ed. 1993) (describing using a collection of citations to ascertain meaning and changes in word meaning).

<sup>208</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 318 (1990) (instructing readers to look to the federal and ratifying conventions, the broadsides, the speeches, and the newspapers of the times); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *COLUM. L. REV.* 723, 725-27 (1988) (arguing that public statements, not private or subjective understandings, define intent).

<sup>209</sup> *WEBSTER’S NEW COLLEGIATE DICTIONARY* 571 (1981).

<sup>210</sup> WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION* 1318-19 n.4 (1953) (citing the *New York Gazette of the United States* of January 23, 1790, to the effect that the 1780s imposts apparently had considerable effect in limiting the American usage of “impost” to the customs duty, but also citing broader usages of “impost” in Connecticut and South Carolina).

<sup>211</sup> The states failed to adopt both imposts because the Articles of Confederation called for unanimity, which was absent, with Rhode Island voting against the 1781 impost and New York,

be a mistaken product of the Articles of Confederation requirement that all states confirm an amendment, and the impost was considered to be a proper source of federal revenue.

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Rhode Island, and New Hampshire voting against the 1783 impost. *See* John P. Kaminski & Gaspare J. Saladino, *Introduction* to 13 COMMENTARIES, *supra* note 73, at 3, 17-18, 37; *Editorial Note* to 16 COMMENTARIES, *supra* note 85, at 111.

The “impost” was the easiest federal tax, the Federalists argued, because Congress could collect it without interfering with the internal police of the states.<sup>212</sup> Customs duties imposed by the individual states would be difficult to enforce, Hamilton argued, because the bays, rivers, and long borders between the states made smuggling too easy. On the federal level, by contrast, Congress could collect the impost simply by guarding one side—the Atlantic.<sup>213</sup>

The Anti-Federalists generally conceded that Congress could be given the power to lay the impost or external taxes.<sup>214</sup> The Anti-Federalists, however, did

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<sup>212</sup> Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 7, 1788), in 3 STATES, *supra* note 53, at 549-50.

<sup>213</sup> THE FEDERALIST NO. 12, *supra* note 26, at 73 (Alexander Hamilton).

<sup>214</sup> Cato Uticensis, *To the Freeman of Virginia*, VA. INDEP. CHRON., Oct. 17, 1787, *reprinted* in 8 STATES, *supra* note 35, at 70, 73 (conceding imposts and allowing requisitions if imposts are not sufficient); An Old Whig, *Letter VI*, in PHILADELPHIA INDEP. GAZETTEER, Nov. 24, 1787, *reprinted* in 14 COMMENTARIES, *supra* note 51, at 215, 218; Brutus V, *Letter to the People of the State of New York*, N.Y.J. (Dec. 13, 1787), in 14 COMMENTARIES, *supra* note 50, at 422, 426-27. Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 14 COMMENTARIES, *supra* note 51, at 332 (saying that the power of taxing anything but imports appears to be the most popular topic among the adversaries).

not concede power to the opposite of the impost, internal taxes. The Anti-Federalists tended to use “direct tax” and “internal tax” as synonyms. The Anti-Federalists, as has been noted, argued that Congressional power to raise internal or direct taxes would be monstrous. “Taxes may be of various kinds,” the Anti-Federalist “Federal Farmer” argued,

but there is a strong distinction between external and internal taxes. External taxes are impost duties, which are laid on imported goods . . . . But internal taxes, as poll and land taxes, *excise*, *duties* on all written instruments, &c. may fix themselves on every person and species of property . . . [I]s it wise . . . to vest the powers of laying and collecting internal taxes in the general government . . . ?<sup>215</sup>

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Two examples of Anti-Federalist opposition to a federal impost are: James Wadsworth, Speech Before the Connecticut Convention (Jan. 7, 1788), in 15 COMMENTARIES, *supra* note 47, at 273, 274 (arguing that impost is not a proper mode of taxation); and John Smilie, Debates in the Pennsylvania Ratification Convention (Nov. 28, 1788), in 2 STATES, *supra* note 54, at 407, 408-09 (noting that if the federal government had unlimited power to drain the wealth of the people, *whether by imposts or by direct levies*, then the system was too formidable for states to break) (emphasis added). Smilie does, however, use “imposts” and “direct taxes” as opposites covering all taxes. *Id.*

<sup>215</sup> Letter III from the Federal Farmer to the Republican (Oct. 10, 1787), in 14 COMMENTARIES, *supra* note 51, at 30, 35-36 (emphasis added). See also An Old Whig, *Letter VI*, PHILADELPHIA INDEP. GAZETTEER, Nov. 24, 1787, in 14 COMMENTARIES, *supra* note 51, at 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes); THE FEDERALIST NO. 30, *supra* note 26, at 184 (Alexander Hamilton) (explaining that adversaries of the new Constitution drew a distinction between what they called “internal” and “external” taxation).



Similarly, the Anti-Federalist “Brutus” conceded that the new federal government might be given the authority to lay the impost (because smuggling and concern for the merchants would keep tax rates low), but that “the case is far otherwise with regard to *direct taxes*; these include poll taxes, land taxes, *excises*, *duties* on written instruments, on every thing we eat, drink, or wear; they take hold of every species of property, and come home to every man’s house and packet.”<sup>216</sup> To render the Congress “safe and proper,” James Monroe argued, “I would take from it one power only—I mean that of direct taxation.”<sup>217</sup>

Similarly, the Federalists commonly used “direct tax” to refer to everything but the impost. For example, James Madison attempted to convince the Virginia Ratification Convention not to deny Congress the power to lay direct taxes because

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<sup>216</sup> Letter from Brutus V to the People of the State of New York, N.Y.J. (Dec. 13, 1787), in 14 COMMENTARIES, *supra* note 51, at 422, 427 (emphasis added). See also *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, Dec. 18, 1787, in 15 COMMENTARIES, *supra* note 47, at 13, 30-31 (emphasis added):

The power of *direct taxation* will further apply to every individual as congress may tax land, cattle, trades, occupations, &c. to any amount, and every object of *internal taxation* is of that nature, that however oppressive, the people will have but this alternative, either to pay the tax, or let their property be taken, for all resistance will be in vain.

*Id.*

<sup>217</sup> James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1109. See also Address of Seceding Assemblymen Before the Pennsylvania General Assembly (Oct. 2, 1787), in 13 COMMENTARIES, *supra* note 73, at 295, 296-97 (saying that had the convention left the exercise of internal taxation to the separate states, there would be no objection to the plan of government).

otherwise, the Federal government would hurt the South by raising taxes only by the impost:

The Southern States, from having fewer manufacturers, will import and consume more. They will therefore pay more of the imposts. The more commerce is burdened, the more the disproportion will operate against them. If direct taxation be mixed with other taxes, it will be in the power of the General Government to lessen that inequality.<sup>218</sup>

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<sup>218</sup> James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), *in* 9 STATES, *supra* note 51, at 1142, 1146.

Similarly, James Wilson in Pennsylvania argued that, although the impost probably would be sufficient for federal needs, Congress needed the power of direct taxation within reach in case of emergency.<sup>219</sup> Roger Sherman, in Connecticut, argued that most federal revenue would be raised by tariffs or sale of Western land, but if there should be an occasion, Congress should be able to resort to “direct taxes.”<sup>220</sup>

In addition, Federalists consistently used “indirect tax” as a synonym for the impost. For example, “Connecticutensis” argued that “*indirect* tax[es, meaning] duties laid upon those foreign articles which are imported and sold among us,” are the easiest way to pay taxes.<sup>221</sup> George Nicholas, in Virginia, argued that Congress could raise money judiciously by imposts or *indirect* taxes.<sup>222</sup>

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<sup>219</sup> James Wilson, Speech in the State House Yard, Philadelphia (Oct. 6, 1787), in 2 STATES, *supra* note 54, at 167, 171, in 13 COMMENTARIES, *supra* note 73, at 337, 342-43 (stating that although imposts would probably be sufficient, Congress needs the power of direct taxes within reach in cases of emergency, and that there is no greater reason to fear a direct tax than an impost).

<sup>220</sup> “A Citizen of New Haven” (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, in 15 COMMENTARIES, *supra* note 47, at 280, 282. Madison observed in Virginia that if Congress would never lay direct taxes, because an impost and sale of Western land were sufficient, the power would then “remain a harmless power upon paper, and do no injury.” See James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1184, 1198.

<sup>221</sup> Connecticutensis, *To the People of Connecticut*, AM. MERCURY, Dec. 31, 1787, reprinted in 3 STATES, *supra* note 53, at 512, 513.

<sup>222</sup> George Nicholas, Debates in the Virginia Ratification Convention (June 6, 1788), in 9 STATES, *supra* note 51, at 970, 999-1000.

Thomas Jefferson was a wavering Federalist on whether Congress should have the power to lay direct taxes. He wrote from his ambassadorship in Paris that although the absence of a Bill of Rights in the proposed Constitution troubled him, he liked the power of Congress to raise taxes without a need for “continual recurrence to the state legislatures.”<sup>223</sup> The following day, however, he wrote another letter asking, “Would it not have been better to assign to Congress exclusively the article of imposts for federal purposes, [and] to have left *direct taxation* exclusively to the states?”<sup>224</sup> Four days later, he switched back by saying, “[m]any of the opposition wish to take from Congress the power of *internal taxation*,” but that “[c]alculation has convinced me this would be very

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<sup>223</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 14 COMMENTARIES, *supra* note 51, at 482. *See also* Letter from Thomas Jefferson to George Washington (Nov. 4, 1787), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 68, at 328 (endorsing a Bill of Rights but refusing to endorse the Anti-Federalist prohibition on direct taxes because “[c]alculation has convinced me that circumstances may arise . . . wherein all the resources of taxation will be necessary for the safety of the state”).

<sup>224</sup> Letter from Thomas Jefferson to Edward Carrington (Dec. 21, 1787), in 8 STATES, *supra* note 35 at 253 n.1 (emphasis added). Carrington responded that it was probable that imposts plus the sale of Western lands would cover federal needs in peacetime, but not in time of war. *See* Letter from Edward Carrington to Thomas Jefferson (Apr. 24, 1788), in 9 STATES, *supra* note 51, at 754, 755.

mischievous.”<sup>225</sup> By March of 1789, Jefferson said that he “thought at first that the [power of taxation given to Congress] might have been limited,” but that “[a] little reflection soon convinced me it ought not to be.”<sup>226</sup> Whatever his views on the issue, Jefferson was using “direct tax” in 1787-1788 as a synonym for “internal tax.”

The distinction between internal and external taxes was also part of the Revolutionary War rhetoric. Various patriots suggested that the Crown might be allowed the power to lay external taxes or customs duties even without representation, but not internal taxes such as stamp taxes.<sup>227</sup> It is plausible that some of this earlier rhetoric influenced the Constitutional debates.

### B. *State Models of Apportioned Direct Taxes*

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<sup>225</sup> Letter from Thomas Jefferson to William Carmichael (Dec. 25, 1787), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 68, at 650 (emphasis added).

<sup>226</sup> Letter from Thomas Jefferson to Francis Hopkinson (Mar. 13, 1787), in 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 68, at 650. Jefferson made a final switch when he became President by successfully calling for the repeal of all internal taxes. See Thomas Jefferson, *First Annual Message to Congress*, in 1 BASIC WRITINGS OF THOMAS JEFFERSON 335, 337 (Philip S. Foner, Ph.D., ed., 1944) (calling for dispensing with internal taxes, comprehending excises, stamp, auction, license, and carriage taxes). See generally DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805, at 100-01 (1970).

<sup>227</sup> See 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1765, at 124-127 (Bernard Bailyn ed., 1965) (describing arguments by Benjamin Franklin and others that Parliament should not impose internal taxes on the colonies).

“Direct tax” also referred to taxes like those already in existence in the states. Within the context of the ratification debate, “direct tax” stood in juxtaposition to the continuation of the requisition system.<sup>228</sup> The Constitution gave Congress the power to raise revenue without requisitions, but many assumed that requisitions would either continue, if the states were not delinquent in collecting and paying their quota,<sup>229</sup> or that Congress in its wisdom would collect federal revenue, following each state’s system of tax collection for requisitions.<sup>230</sup> Defined functionally, a “direct tax” is a tax that Congress collects by taxing people or objects directly, bypassing the states. By contrast, requisitions were only indirectly on people or objects because directly they were only mandates upon the states. The Constitution changed the status quo by giving Congress the power to lay imposts (custom duties); due to the unanimity rule for changes to the Articles of Confederation, Congress was denied the impost in 1781 and 1783.<sup>231</sup> Except for the impost, however, the public assumed Congress might continue the kinds of taxes already used to meet requisitions.

The grant of power to lay apportionable direct taxes was not intended to deprive Congress of power, but to give power, and in that context, the drafters intended to include in the term direct taxes all taxes like the then current state taxes. State taxes provided a very broad model. Each state taxed almost everything in sight, and the power to lay direct taxes was intended to give Congress a similar power.

In the Constitutional debates, the existing state taxes appeared to be the assumed model for direct taxes. In the Virginia Ratification Convention, for example, John Marshall stated that direct taxes were “well understood” to include taxes on land, slaves, stock, and “a few other articles of domestic property.”<sup>232</sup>

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<sup>228</sup> See, e.g., Letter from James Madison to George Thompson (Jan. 29, 1789), in 2 THE FIRST FEDERAL ELECTIONS, *supra* note 68, at 331-44 (arguing that a direct tax is a superior alternative to unenforceable requisitions).

<sup>229</sup> *The Debates in the Convention of the Commonwealth of Virginia* (James McHenry), Nov. 29, 1787, in 3 DEBATES, *supra* note 26; Letter from Roger Sherman and Oliver Ellsworth, Connecticut Superior Court Justices, to Samuel Huntington, Governor of Connecticut (Sept. 26, 1787), in *The Report of Connecticut’s Delegates to the Constitutional Convention*, NEW HAVEN GAZETTE, Oct. 25, 1787, reprinted in 13 COMMENTARIES, *supra* note 73, at 470, 471; Tench Coxe, *To the Minority of the Convention of Pennsylvania A Freeman III*, PA. GAZETTE (Philadelphia), Feb. 6, 1788, reprinted in 16 COMMENTARIES, *supra* note 85, at 49, 51.

<sup>230</sup> See, e.g., James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1343; Edmund Randolph, Debates in the Virginia Ratification Convention (June 7, 1788), in 9 STATES, *supra* note 51, at 1006, 1022.

<sup>231</sup> Rhode Island defeated the 1781 impost, and New York and New Hampshire defeated the 1783 impost. See *supra* notes 85, 211.

<sup>232</sup> John Marshall, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1122.

“Well understood” was a bit of an overstatement; they did not know that apportionment was perverse. Marshall and his Virginia audience had a specific model before them for the discussion. Virginia collected its tax at the time, first, by requiring county commissioners to ascertain the value of property within their county and, second, by collecting taxes at fixed rates on various items including: salaries, interest, annuities, slaves, horses, carriages, mules,<sup>233</sup> and “money exceeding five pounds in the possession of one person.”<sup>234</sup> Marshall may have been vague on specifics, but his description of direct taxes fits the Virginia state tax, with some details left out.

In 1796, moreover, Congress asked the Treasury Department to determine whether direct taxes could be raised, consistent with apportionment, by collecting taxes within each state in the same manner that the various states used to raise their own taxes. The Treasury Department, in response, inventoried the various state tax systems. Its report of this inventory bore the title, *Direct Taxes*.<sup>235</sup>

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<sup>233</sup> Wolcott, *supra* note 14, at 431.

<sup>234</sup> *An Act for Raising a Supply of Money for Public Exigencies* (1783), in *THE FIRST LAWS OF THE STATE OF VIRGINIA* 58 (John D. Cushing ed., 1982).

<sup>235</sup> Wolcott, *supra* note 14, at 414.

Fairly late in the Philadelphia Convention, Rufus King of Massachusetts requested the precise meaning of “direct tax.” Madison recorded that “no one ans[w]ere[d].”<sup>236</sup> From that question, it does not seem fair to deduce that there was no known meaning to the term “direct taxes” or that the term was so devoid of content that many extra or ad hoc exemptions existed.<sup>237</sup> “Direct taxes” functionally meant, “not by requisition” or “internal tax.” The state taxes, which were the apparent models, were all very broad, but they did vary considerably. Even if someone knew enough about the details, it would have been difficult to summarize them all quickly in a sentence or two to respond to the King. The usage of the term “direct tax” was commonly synonymous with “internal tax,” and internal taxes had many guises. “Direct tax” had a model and a meaning to the Founders even if the contents and borders of the term were not sharply fixed.

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<sup>236</sup> James Madison, *Records of the Federal Convention*, Aug. 20, 1787, in 2 RECORDS, *supra* note 50, at 340, 350.

<sup>237</sup> Alexander Hamilton also argued that the meaning of direct tax was unsettled. Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States*, Feb. 25, 1795, in 7 THE WORKS OF ALEXANDER HAMILTON 845, 848 (John C. Hamilton ed., New York, Charles C. Francis & Co. 1851). Although Hamilton was preparing a brief to achieve a narrow interpretation of “direct tax,” a settled interpretation of “direct taxes” would have been undoubtedly broad.



All of the states apportioned their taxes to some extent, or at least delegated questions about taxability or value to the counties or towns within the state. All thirteen states had apportioned taxes. Sometimes the apportioned taxes delegated all decisions on rate and objects of taxation down to their political subdivisions.

For instance, New York, Rhode Island, Delaware, and Maryland simply taxed property, without further specification, and then set up a quota to be collected from each of its towns or counties, leaving it up to the local tax collectors to determine what to tax at what rate.<sup>238</sup> States, moreover, commonly listed taxable items on the state level, such as land or merchandise, but relied on local tax collectors to assess the value of those items within their jurisdiction and the rate necessary for meeting the local quota.<sup>239</sup> In addition, many states specified both the tax rates and the items to be taxed, or at least included the fixed rate taxes on selected goods. Items commonly taxed at state-set rates included sheep, cattle and horses, billiard tables, liquor, and carriages.<sup>240</sup> The Treasury's inventory included the fixed-rate taxes as "direct taxes." Both the taxes fixed in rate at the state level and the taxes collected under a quota that did not set rates were called "direct taxes" in the Treasury inventory.

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<sup>238</sup> See Wolcott, *supra* note 14, at 422 (illustrating Rhode Island's tax on "collective mass of property" with collection at town level), 425 (explaining how New York assigned quotas to counties, which redelegate the quotas to towns), 429 (stating that Maryland imposed a tax on mass of property in general, with enumerated exempt property); see also Act of 1778, ch. 59 (raising \$620,000 for federal use), reprinted in THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 118 (John D. Cushing ed., photo. reprint 1984) (1781); Act of 1779, ch. 105 (raising supplies for the year), reprinted in THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra*, at 198 (1779); Act of 1781, ch. 213 (raising additional supplies for the year), reprinted in THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra*, at 505 (1781) (showing Pennsylvania levies or requisitions quotas from Philadelphia and other named counties); Act of 1785, ch. 124b (raising 10,500 pounds for the service of the year 1785), reprinted in 2 THE FIRST LAWS OF THE STATE OF DELAWARE, pt. 1, at 823 (John D. Cushing ed., photo. reprint 1981) (1797) (stating that Delaware set quotas for its three small counties).

<sup>239</sup> Wolcott, *supra* note 14, at 420 (stating that Massachusetts listed houses, shops, merchandise, plate, cattle, etc.), 423 (stating that Connecticut listed lands, farm stock, houses, carriages, etc.), 426 (stating that New Jersey listed land, cattle, forges, carriages, slaves, etc. as taxable), 427 (stating that Pennsylvania listed horses, cattle, land, plate, carriages, breweries, etc.), 431 (stating that Virginia listed land, as valued by county), 434-35 (stating that South Carolina taxed some land by specifying a rate per acre with a different rate for various rough qualities (i.e. swamp land, prime inland, pine barrens), some by requiring local valuation, and some by adopting assessment values).

<sup>240</sup> *Id.* at 419 (stating that New Hampshire fixed different rates on orchard land, arable land, pasture land, and unimproved land on horses and cattle with different rates for different ages, and on merchandise and stock in trade), 431 (stating that Virginia imposed taxes on horses, billiard tables, and carriages at set rates), 433 (stating that North Carolina fixed tax rates on land, horses, and taverns), 434-35 (stating that South Carolina fixed tax rates per acre on land of various kinds), 435-36 (stating that Georgia fixed rates per acre on land of various kinds, on liquor and merchandise, on slaves, and on billiard tables).

Apparently, considerable delegation of discretion as to how to raise a quota made the system more administrable. In 1778, for instance, New York created a statewide tax that set rates at the state level of three pence per pound on the value of improved lands and one and one-half pennies per pound on the value of personal estates.<sup>241</sup> Collection of the New York 1778 assessment was, however, “very partial” and the Legislature replaced it in 1779 by assigning quotas to the different named counties within the state, so assessors and tax collectors with knowledge of the local circumstances and abilities would raise the tax in different ways according to local conditions.<sup>242</sup> Both the 1778 tax, which set the rate and objects of tax at the state level, and the 1779 New York tax, which merely apportioned quotas, would have been considered direct taxes if Congress had laid them.

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<sup>241</sup> Act of Mar. 2, 1779, ch. 17 (laying a duty of excise on strong liquors), *reprinted in* THE FIRST LAWS OF THE STATE OF NEW YORK 54 (John D. Cushing ed., photo. reprint 1984) (1782).

<sup>242</sup> Act of Oct. 23, 1779, ch. 27, *reprinted in* THE FIRST LAWS OF THE STATE OF NEW YORK, *supra* note 240, at 93.

Collecting taxes by setting a quota for political subdivisions seems to have been a necessary by-product of a small and weak central administration. Revenue was collected by apportioning a quota in the earliest colonial times. In 1645, for instance, the Virginia legislature required its county courts to appoint someone to list land, horses, cows, and sheep for the Virginia state tax, which was payable entirely in tobacco.<sup>243</sup> England collected taxes by apportioning quotas from medieval times. To take a legendary example, King John collected his taxes in part by telling the Sheriff of Nottingham to collect taxes in any way he could from the people around Sherwood Forest.<sup>244</sup> The apportioned state taxes undoubtedly were expected to be a useful model for a major source of revenue for the federal government, at least before anyone came to grips with the perversity of the apportionment requirement itself.

Defining “direct taxes” as “internal taxes” or like the state taxes as the Constitution was adopted meant, unfortunately, that the apportionment requirement had a very wide bite under the terms of strict construction. In one form or another, the states taxed everything. They implemented wealth taxes, income taxes, and consumption taxes, all of which would have been considered direct.

Given the need to fund the government and the absurdity of apportionment, however, there was some pressure on the states to find some narrower usages for “direct tax.” There are indeed some narrower usages of “direct tax” in the ratification arguments.

### C. *Exemption for Excise Taxes?*

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<sup>243</sup> See Act XV, reprinted in 2 COLONY LAWS OF VIRGINIA, 1619-1660, at 305-06 (John D. Cushing ed., photo. reprint 1978) (1645).

<sup>244</sup> SIDNEY KNOX MITCHELL, TAXATION IN MEDIEVAL ENGLAND 295 (Sidney Painter ed., 1951) (explaining the tax in Nottinghamshire probably was based upon “capacity to pay, for different persons or areas paid different amounts”). See also 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 309-10 (9th ed. 1978) (1783) (noting that, in 1335, “new taxations were made of every township, borough, and city in the kingdom” at the rate of one-fifteenth of the value of the township).

Under a doctrine developed by the Supreme Court, “excise taxes,” as well as the impost or customs duties, have been excluded from “direct tax,” so that they do not have to be apportioned. If an exemption from apportionment is in fact available for “excise taxes,” and if “excise taxes” can be stretched beyond the concrete examples available to the Framers, then the apportionment requirement might be narrow enough to allow the taxes that modern states need. The difficulty is that the evidence for an exemption for excise taxes in the original debates was mixed; a large number of usages in the debates allowed no exemption for excise taxes. “Excise tax,” moreover, seems to have been a very narrow term, which commonly referred only to the whiskey tax.

In *Pollock v. Farmers’ Loan & Trust Co.*,<sup>245</sup> the Supreme Court held that an income tax was a direct tax that had to be apportioned. In the period after *Pollock*, however, the Court appeared to have had second thoughts about what it later called its “mistaken theory” in *Pollock*,<sup>246</sup> and the Court found that major taxes were constitutional without apportionment on the theory that they were “excise taxes.” In 1898, three years after *Pollock*, the Court held that a trade tax on the Chicago Board of Trade was an excise tax because it was a tax on the use of a facility and not on the ownership or sale of property.<sup>247</sup> In 1900, five years after *Pollock*, the Court held that the estate tax was an excise tax because it was not concerned with the mere ownership of property, but with the passing of the property at death.<sup>248</sup> In 1906, the Court held that the corporate income tax was

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<sup>245</sup> 157 U.S. 429, *on reh’g*, 158 U.S. 601 (1895), *overruled in part by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

<sup>246</sup> *See* *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916).

<sup>247</sup> *See* *Nicol v. Ames*, 173 U.S. 509, 519 (1899).

<sup>248</sup> *See* *Knowlton v. Moore*, 178 U.S. 41, 78 (1900). The holding in *Pollock* had distinguished

an excise tax because it was not imposed on the mere ownership of property, but upon the conduction of a business in corporate form.<sup>249</sup> By 1929, the Court summarized the excise tax exemption as allowing “a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership” without apportionment.<sup>250</sup>

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the income tax from a tax on “business, privileges, or employments” which might be constitutional as an excise tax. *Pollock*, 158 U.S. at 635 (1895).

<sup>249</sup> See *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911).

<sup>250</sup> See *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) (upholding the gift tax as an excise because it was a tax only upon the exercise of a single incident of ownership—the power of giving).

The distinction apparently comes from Massachusetts representative Fisher Ames, Debate in the U.S. House of Representatives (May 1794), 4 ANNALS OF CONG. 730 (1794), reprinted in 3 FOUNDERS, *supra* note 14, at 357 (arguing that a tax on carriage was not a direct tax but an excise tax in Massachusetts, because “[t]he duty falls not on the [mere] possession, but the use”). *But see* James Madison, Debate in the U.S. House of Representatives (May 1794), 4 ANNALS OF CONG. 729-30 (1794), reprinted in 3 FOUNDERS, *supra* note 14, at 357; *supra* note 14 (stating that carriage tax is direct).

Unfortunately, the reliance on “excise taxes,” so defined, was opportunistic. There was no intellectual current or argument alive in the 1780s that would have made a distinction between single purpose use and “mere holding” viable. The state taxes in the Treasury’s 1796 inventory of direct taxes included a number of state license taxes, which were surely taxes upon the “use or exercise of a single power” and, therefore, on the wrong side of the line.<sup>251</sup> Individual wealth was always the target of the states’ taxes, so gift and estate taxes would have been considered direct, as well. In 1794, Representative Fisher Ames of Massachusetts made the argument in Congress that a tax on carriages was an excise tax because “the duty falls not on the possession, but the use,”<sup>252</sup> but Madison disagreed with his usage. Madison’s usage has greater support.<sup>253</sup> After *Pollock*,<sup>254</sup> the broad definition of excise tax to avoid the apportionment requirement seems better explained as consequence driven. It appears that the Supreme Court resolved not to hold another federal tax to be unconstitutional after *Pollock*, and it used a found exemption from apportionment for excises as the mechanism for the excuse.

The legitimacy of any exemption from apportionment for excises is ambiguous. Anti-Federalists and Federalists did indeed sometimes treat “excise tax” as outside the scope of “direct taxes.” Some versions of the Anti-Federalist’s amendment restraining Congress’ power to lay direct taxes, limited both “direct taxes” and “excises” in text.<sup>255</sup> The separate listing of “excises” indicates that

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<sup>251</sup> Wolcott, *supra* note 14, at 430 (stating that Maryland taxes licenses to marry, licenses to keep taverns or sell liquors, and licenses to practice law), 433-34 (stating that North Carolina taxes liquor licenses).

<sup>252</sup> 4 ANNALS OF CONG. 729 (1794), *reprinted in* 3 FOUNDERS, *supra* note 14, at 357.

<sup>253</sup> *See id.* at 729-30. *See supra* note 14.

<sup>254</sup> 157 U.S. 429, *reh’g granted*, 150 U.S. 601 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

<sup>255</sup> *See The Virginia Convention*, in 10 STATES, *supra* note 26, at 1550, 1553-54; *Debates in the Convention of the State of North Carolina*, in 4 DEBATES, *supra* note 47, at 1, 245, *reprinted in* 18 COMMENTARIES, *supra* note 268, at 312, 317. As passed by the New York Convention, the prohibitions on direct taxes and excises were separate paragraphs. *See Ratifications: New York*, in

some Anti-Federalist drafter did not think the term “direct tax” unambiguously covered “excises.” Lawyers commonly list a number of synonyms in legal text, just in case, so that the double mention is not very strong proof that “excise” tax clearly was separate. Still the drafters of the Anti-Federalist amendments had enough doubts that “direct tax” included “excises,” and that it was worth prohibiting them both.

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1 DEBATES, *supra* note 52, at 327, 329.

Other usages, however, clearly exclude “excises” from the term “direct tax.” On the Federalists’ side, the most important example is Gouverneur Morris’s statement in the Philadelphia Convention that “[t]he Legislature will have indefinite power to tax . . . by excises, and duties on imports [without apportionment].”<sup>256</sup> It was Morris who introduced the requirement that direct taxes be apportioned by population, counting slaves at three-fifths, so his usage is important. There are other examples. In Massachusetts and New York, the Federalists argued that the new Congress usually would rely on the impost and *excises* and, therefore, would not ordinarily need to impose *direct taxes*.<sup>257</sup>

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<sup>256</sup> James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), Aug. 8, 1787, in 2 RECORDS, *supra* note 50, at 215, 222. See also James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 12, 1787, in 1 RECORDS, *supra* note 46, at 591, 592 (stating that Morris moved to have apportionment apply to direct tax but not to “indirect taxes on . . . imports & on consumption”). The July 12 reference to indirect taxes on consumption is plausibly a second reference to excise taxes as not direct, because import taxes are listed separately; but the reference is less clear than the August 8 reference.

<sup>257</sup> *The Debates in the Convention of the Commonwealth of Massachusetts* (Robert Dawes), Jan. 17-19, 1788, in 2 DEBATES, *supra* note 14, at 1, 36-45, reprinted in 2 FOUNDERS, *supra* note 139, at 122, 124 (arguing that it is easier for Congress to resort to impost or excises than to tax wholly by direct taxes); *The Debates in the Convention of the Commonwealth of Massachusetts* (Francis Dana), Jan. 18, 1787, in 2 DEBATES, *supra* note 14, at 1, 42 (arguing that Congress would not levy direct taxes unless imposts and excises were insufficient); *The Debates in the Convention of the State of New York* (Robert Livingston), June 27, 1787, in 2 DEBATES, *supra* note 14, at 18,



Hamilton called an “excise[] on articles of consumption” an “indirect tax.”<sup>258</sup> On at least one occasion, an Anti-Federalist argued that the new Congress would impose direct taxes *in addition* to excises.<sup>259</sup>

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344 (arguing that Congress may need direct taxes because imposts and excises would not be enough).

<sup>258</sup> THE FEDERALIST NO. 36, *supra* note 26, at 218 (Alexander Hamilton) (arguing that Congress can get sufficient knowledge as to indirect taxes, including duties and excises on articles of consumption).

<sup>259</sup> Benjamin Gale, Speech Before Killingworth Town Meeting in Connecticut (Nov. 12, 1787), *in* 3 STATES, *supra* note 53, at 420, 424 (arguing that they will not only tax “by duties, impost, and excise but to levy direct taxes upon you”).

Unfortunately for the resolution of the issue, however, both sides also commonly used the term “direct taxes” to encompass “excises.”<sup>260</sup> As noted, both Federalists and Anti-Federalists used the term “direct tax” as a synonym for “internal tax,” which included everything but customs duties.<sup>261</sup> The taxpayer’s representative argued, in *Hylton v. United States*, that an apportioned tax on carriages was unconstitutional because excises and duties were direct taxes: “[Apportionment was] the most important stipulation of the whole compact,”<sup>262</sup>

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<sup>260</sup> See Cato Uticensis, *To the Freemen of Virginia*, VA. INDEP. CHRON., Oct. 17, 1787, reprinted in 8 STATES, *supra* note 35, at 70, 73 (stating that nobody but the Virginia legislature should have the power of *direct taxation* in this state if it should ever be found necessary to curse this land with hateful *excisemen*) (emphasis added); P.P., *The Impartial Examiner I*, pt. 3, Dec. 17, 1787, in VA. INDEP. CHRON., Mar. 25, 1788, reprinted in 8 STATES, *supra* note 35, at 459, 462 (“[C]onsider [the injuries] to which this country may be subjected by excise laws,—by direct taxation of every kind.”); Letter III from the Federal Farmer to the Republican (Oct. 10, 1787), in 14 COMMENTARIES, *supra* note 51, at 30, 36 (“[I]nternal taxes, as poll and land taxes, *excise*, duties on all written instruments, &c. may fix themselves on every person and species of property in the community. . . . I have heard several gentlemen . . . attempt to construe the powers relative to *direct taxes*.”) (emphasis added).

<sup>261</sup> See *supra* notes 214-27.

<sup>262</sup> Taylor, *supra* note 198, at 5, quoted in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON,

he said, and evasion of the restriction by a subterfuge of a direct duty or direct excise would leave Congress free to levy any tax without restraint.<sup>263</sup> Additionally, the Anti-Federalists hated excise taxes about as much as they hated direct taxes,<sup>264</sup> so if Anti-Federalist rhetoric defines the current scope of federal power, there should be no room for an exemption from apportionment for excises.

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*supra* note 14, at 318.

<sup>263</sup> *Id.* at 5-6.

<sup>264</sup> Patrick Henry, Debates in the Virginia Ratification Convention (June 16, 1788), in 10 STATES, *supra* note 26, at 1331 (“[e]xcisemen may come in multitudes:—For the limitation of their numbers no man knows”); Members Opposed to Ratification, Address Before the People of Maryland (Apr. 21, 1788), in *A Fragment of Facts, Disclosing the Conduct of the Maryland Convention*, 2 DEBATES, *supra* note 14, at 547, 551 (calling excises “the horror of a free people”); *Amendments of the Minority of the Maryland Convention*, Apr. 29, 1788, in 17 COMMENTARIES, *supra* note 47, at 236, 246 (arguing that the people “might also get rid of those odious taxes by excise and poll”). For the Federalist view, see THE FEDERALIST NO. 12, *supra* note 26, at 57 (Alexander Hamilton) (arguing that “excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and peremptory spirit of excise laws.”).

The Anti-Federalists offered motions in the Philadelphia Convention<sup>265</sup> and an amendment in the later ratifying conventions that would have denied Congress the power to collect direct taxes within a state, except where the state was delinquent in paying its quota under a congressional requisition.<sup>266</sup> In text, some versions of the amendment included only direct taxes in the restriction,<sup>267</sup> and some versions included both direct taxes and excises.<sup>268</sup> In debate, however, the usual call simply was to deny Congress' power as to internal taxes.<sup>269</sup> Sometimes the versions restricting both "direct tax" and "excise tax" in the formal amendment were described in the debates as restricting "direct taxes," as if "excise" was merely a minor example of "direct tax."<sup>270</sup> In the ratification debates, the

<sup>265</sup> See *supra* text accompanying note 50.

<sup>266</sup> See *supra* text accompanying notes 52-55.

<sup>267</sup> See discussion of Massachusetts, South Carolina, and New Hampshire in 1 DEBATES, *supra* note 52, at 322, 325-26; *A Fragment of Facts, Disclosing the Conduct of the Maryland Convention, on the Adoption of the Federal Constitution*, Apr. 21, 1788, in 2 DEBATES, *supra* note 14, at 547, 552-53, reprinted in 17 COMMENTARIES, *supra* note 47, at 242, 244-45.

<sup>268</sup> Virginia (June 27, 1788), see Debates in the Virginia Ratification Convention (June 27, 1788), in 10 STATES, *supra* note 26, at 1553-54; North Carolina (Aug. 2, 1788), *The Debates in the Convention of the State of North Carolina*, Aug. 1, 1788, in 4 DEBATES, *supra* note 47, at 245; see *North Carolina Convention Amendments*, Aug. 2, 1788, in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 312, 317 (John P. Kaminski & Gaspare J. Saladino eds., 1995) [hereinafter 18 COMMENTARIES]; New York (July 26, 1788), in 1 DEBATES, *supra* note 52, at 329 (reproducing the amendment as passed by the New York Convention, in which the prohibitions on direct taxes and excises were separate paragraphs). As proposed by the Anti-Federalists, the prohibitions were within a single paragraph. See Letter from George Mason to John Lamb (June 9, 1788), in 18 COMMENTARIES, *supra* note 268, at 44. In Pennsylvania, the amendment would have allowed Congress to tax only by postage stamps and customs duties, without reference to either excise or direct. *The Dissent of the Minority of the Convention*, Dec. 18, 1787, in 2 STATES, *supra* note 54, at 617, 624.

<sup>269</sup> An Old Whig, *Letter VI*, PHILADELPHIA INDEP. GAZETTEER, Nov. 24, 1787, reprinted in 14 COMMENTARIES, *supra* note 51, at 215, 218 (arguing that the true line between the powers of Congress and those of the several states is between internal and external taxes). The Pennsylvania amendment at issue only gave Congress power for an impost duty and postage stamps. *Id.*; Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), in 17 COMMENTARIES, *supra* note 47, at 350, 358 ("[C]ongress . . . ought not to raise monies by internal taxes, except in strict conformity to the federal plan; that is, . . . except where a state shall neglect, for an unreasonable time, to pay its quota."). The New York amendment would have prohibited direct taxes in one paragraph and excise in another. *Id.*

<sup>270</sup> See, e.g., John Marshall, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 STATES, *supra* note 51, at 1121 (describing the amendment as providing that if the States shall appropriate certain funds for the use of Congress, then Congress shall not lay direct taxes); James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1203 (saying that Anti-Federalists intended the power of laying direct taxes to be chimerical and impracticable). The Virginia amendment restricted both direct taxes and excises. *Id.*

distinction between “internal” and “external” taxes was the meaningful distinction, and both sides in the debate commonly used the term “direct tax” as a synonym for “internal tax.”

The Constitution requires that imposts, duties, and excises must be uniform,<sup>271</sup> and from that, an exemption from apportionment might be deduced.<sup>272</sup> The terms “imposts,” “duties,” and “excises” were used most commonly, however, to have quite specific and narrow meanings. The term “impost” referred only to the custom duties, as noted. The term “duties” appears to have been a code word, which referred only to stamp taxes. The drafters wanted to give Congress the right to impose stamp taxes on legal documents.<sup>273</sup> Opposition to the British Stamp Act, however, had been one of the precipitating causes of the Revolution,<sup>274</sup> and the drafters, as good politicians, did not want to mention too candidly the authority for stamp taxes.<sup>275</sup>

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<sup>271</sup> U.S. CONST. art. I, § 8.

<sup>272</sup> See *infra* notes 301-04 and accompanying text.

<sup>273</sup> The New Jersey Plan, at the Philadelphia Convention, for instance, was a small state plan that continued the logic of the Articles of Confederation as far as possible. The New Jersey Plan required that most federal revenue be raised by requisitions apportioned among the states by the federal ratio, but it allowed Congress to levy the impost without requisitions or apportionment. It also allowed unapportioned taxes “by Stamps on paper, vellum or parchment.” The New Jersey Amendments to the Articles of Confederation, June 15, 1787 ¶¶ 2, 3, in DOCUMENTS & RECORDS, *supra* note 50, at 250, 251. The New Jersey Plan, however, had not allowed unapportioned excise taxes.

<sup>274</sup> See ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 70-117 (1982) (recounting pre-Revolutionary opposition to the Stamp Act).

<sup>275</sup> Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, reprinted in 15 COMMENTARIES, *supra* note 47, at 374, 376. The original Stamp Tax of 1765 that precipitated the crisis had purported not to lay a tax at all, but only a duty. See Whitney, *supra* note 40, at 294.

The term “excise tax” seems to have referred in the Constitutional debates primarily to the whiskey tax. The Oxford English Dictionary cites Thomas Jefferson in 1789, and defines the term “excise” as a tax on liquor, but nothing else.<sup>276</sup> Jefferson’s definition was plausible also in states other than Massachusetts. The New York,<sup>277</sup> New Hampshire,<sup>278</sup> and Pennsylvania<sup>279</sup> taxes

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<sup>276</sup> Letter from Thomas Jefferson to Sarsfield (Apr. 3, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 25 (Julian Boyd ed., 1958). Jefferson believed that the Massachusetts definition was a perversion, and the true meaning [outside Massachusetts] was that excise was a tax on retail or wholesale goods. *Id.* His letter stated, however, that in the Massachusetts ratification debates, the liquor tax was the only excise. *Id.* Accord ROBERT A. BECKER, REVOLUTION, REFORM AND THE POLITICS OF AMERICAN TAXATION, 1763-1783, at 11-12, 120 (1980) (referring to *excise* as taxes on liquors).

<sup>277</sup> See Act of Mar. 2, 1779, ch. 17 (laying a duty of excise on strong liquors), reprinted in THE FIRST LAWS OF THE STATE OF NEW YORK, *supra* note 241, at 54; Act of Mar. 13, 1781, ch. 27 (laying another duty of excise on strong liquors), reprinted in THE FIRST LAWS OF THE STATE OF

that were called “excises” were entirely taxes on liquor. Congress proposed a number of different taxes in 1782 and 1783, including a poll tax, a tax on slaves, an impost on imported goods, and a tax on houses measured by windows, but only the tax on “spirituous liquors” was called an “excise.”<sup>280</sup> In 1792, Alexander Hamilton wrote to President Washington to extol the use of the excise law because, according to Hamilton, “[t]here is perhaps, . . . no article of more general and equal consumption than [whiskey].”<sup>281</sup> In the South, the states taxed hard

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NEW YORK, *supra* note 241, at 175; Becker, *supra* note 276, at 65-66 (explaining that the New York excise was converted in 1768 from a quota system to a twenty shilling fee to be paid by each licensed tavern).

<sup>278</sup> See Act of Dec. 26, 1778 (repealing the king’s excise on several liquors), *reprinted in* THE FIRST LAWS OF THE STATE OF NEW HAMPSHIRE 142 (John D. Cushing ed., photo. reprint 1981) (1780).

<sup>279</sup> See Act of 1777 (referring to collector of *excise* on spirituous liquors), *reprinted in* THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 238, at 29; *see also* Act of 1780, ch. 162 (rendering the revenue arising from the excise on wine and spirits), *reprinted in* THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 238, at 333-34; Act of 1781, ch. 203 (supporting an excise on wine, rum, brandy, and other spirits), *reprinted in* THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 238, at 460.

<sup>280</sup> Report of the Continental Congress, Tuesday, Mar. 11, 1783, 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 923 (Gaillard Hunt ed., 1922); Report of a Grand Committee, Wednesday, Sept. 4, 1782, 23 JOURNALS OF THE CONTINENTAL CONGRESS 545 (Gaillard Hunt ed., 1914).

<sup>281</sup> Letter from Alexander Hamilton to George Washington (Aug. 18, 1792), *reprinted in* 12 THE

liquor, but the Southern states tended to call the tax a “tax” or a “duty,” not an “excise.”<sup>282</sup>

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PAPERS OF ALEXANDER HAMILTON 228, 235 (Harold C. Syrett ed., 1967) (emphasis omitted).

<sup>282</sup> See, e.g., Act of 1777, ch. 2 (imposing a tax or duty on all spirituous liquors), *reprinted in* THE FIRST LAWS OF THE STATE OF VIRGINIA 58 (John D. Cushing ed., photo. reprint 1982) (1785); BECKER, *supra* note 276, at 77 (noting the North Carolina assembly raised liquor duties).



The term “excise” was also sometimes applied beyond the whiskey tax to include other taxes designed to discourage luxury and encourage morals. During the ratification period, Massachusetts (1781-1794), New Hampshire (1787-1791), and Rhode Island (1783-1789) had taxes “for the Suppression of Immorality, Luxury and Extravagance.” They called these taxes “excises,” and they covered taxes on gambling cards, billiard tables, and a number of luxury items in addition to liquor.<sup>283</sup> Members of the new Congress debated at length in 1792 on the issue of a tax on snuff. The tax was called an “excise” midway through the debate and thereafter called an “excise” by both opponents and proponents of the tax.<sup>284</sup> The New York Ratification Convention recommended an amendment, a variation of the standard Anti-Federalist limitations on direct tax, that would have denied Congress the right to impose excise taxes, except for excise taxes on liquor, which implied that an “excise” that was not a liquor tax did exist.<sup>285</sup> The Connecticut tax called an “excise” covered liquor, but it also extended to other luxuries, such as beaver or felt hats, coffee, and of course, chocolate.<sup>286</sup>

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<sup>283</sup> 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 302.

<sup>284</sup> 4 ANNALS OF CONG. 624-25 (1794) (Representatives Findley and John Smilie speaking against the tax, and Theodore Sedgwick speaking in favor).

<sup>285</sup> The Debates in the Convention of the State of New York (Melancton Smith & John Lansing, Jr.), *in* 2 DEBATES, *supra* note 14, at 329.

<sup>286</sup> An Act for laying an Excise on sundry Articles of Consumption within this State (1783), *reprinted in* THE FIRST LAWS OF THE STATE OF CONNECTICUT 58 (John D. Cushing ed., photo. reprint 1982) (1785). *See also* BECKER, *supra* note 276, at 144 (noting Rhode Island’s 1783 excise, in effect for less than a year, which was a tax on a long list of luxury goods, including wines and

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brandies, but also including snuff, sugar, silver, gold, coaches, jewelry, silks, and chocolate).

One Virginia participant in the debate argued that Pennsylvania had a general excise law on manufactured goods for almost one hundred years. Extract of a Letter from a well informed correspondent to his friend in this city, VA. INDEP. CHRON., Nov. 28, 1787, *reprinted in* 14 COMMENTARIES, *supra* note 51, at 242, 243. The compilation of Pennsylvania taxes covering the period before 1713 does not list that law. *See* EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713 (John D. Cushing ed., 1978). Additionally, the excise enacted in 1713 and 1780 was only a tax on liquor and hops. *Id.* at 182; Act of 1780, ch. 162, *reprinted in* THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 238, at 333. Considering the state of early colonial manufacturing, in any event, the revenue from an excise tax on manufacturing must have been quite trivial.

The meaning of “excise,” used in order to avoid apportionment, has been hemmed in by many usages of the term “direct tax” to include fixed rate taxes on selected items. The Treasury Department inventoried the “direct taxes” laid by the states in 1796.<sup>287</sup> On that inventory list were many instances of state taxes on selected goods at fixed rates, which were called “direct taxes,” not “excises.”<sup>288</sup>

Excises in Massachusetts, Rhode Island, and New Hampshire included carriage taxes, but carriages were also within the general category of taxable property or listed with a statewide fixed rate in the other states.<sup>289</sup> Major actors in the constitutional debate called fixed-rate taxes on selected goods, “direct taxes,” not “excises.” James Madison, the most important actor in those debates, argued that a tax on manufacturers was a direct tax.<sup>290</sup> He thought that a tax on tobacco, slaves, or carriages would be a direct tax.<sup>291</sup> Madison even said that a tax on

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<sup>287</sup> Wolcott, *supra* note 14.

<sup>288</sup> *Id.* at 419 (noting that New Hampshire had taxes at fixed statewide rates on various items including land, horses, cattle, stock of merchants or tradesmen, and money); *id.* at 423 (noting that Connecticut had taxes at fixed statewide rates on various objects including plates, clocks, and watches); *id.* at 431 (noting that Virginia placed taxes on horses, billiard tables, and carriages).

<sup>289</sup> See 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 300-02 (cataloguing the state taxes on carriages sometimes as general ratables, sometimes as subject to rates fixed at the state level, and sometimes as luxury items subject to excise).

<sup>290</sup> See *supra* text accompanying note 221.

<sup>291</sup> See James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1204 (arguing that taxes on tobacco or slaves are apportionable direct taxes); James Madison, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1339 (arguing that taxes on slaves were apportionable direct taxes); James Madison, Debate in U.S. House of Representatives (May 29, 1794), in 4 ANNALS OF CONG. 729-30 (1974), reprinted in 3 FOUNDERS, *supra* note 14, at 357 (arguing that a tax on carriages was unconstitutional because it was an unapportioned direct tax).

Madison was arguing plausibly that taxes on slaves were direct taxes because he believed that apportionment, not uniformity, prevented Congress from raising taxes so high as to force manumission of the slaves. See Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1304, 1338, 1342. See also George Nicholas, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1342 (stating that the apportionment requirement prevented a prohibitive tax on slaves, whereas the uniform rate requirement did not); The State Soldier, *Letter IV to the Good People of Virginia*, VA. INDEP. CHRON., Mar. 19, 1788, reprinted in 8 STATES, *supra* note 35, at 509, 511 (stating that the tax on slaves was apportionable); 1 ANNALS OF CONG. 1243 (1790) (arguing that the purpose of apportionment was to prevent any special tax on negro slaves); *Debates in the House of Representatives* (Abraham Baldwin), Feb. 12, 1790, in GAZETTE OF THE UNITED STATES, Feb. 17, 1790, reprinted in 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 302-09 (Helen E. Veit et al. eds., 1994) (arguing that a direct tax clause prevents a tax on slaves).

George Mason replied to Madison in the Virginia ratification debates, [correctly,] that apportionment gave no security to slave holders because, while apportionment set the state’s overall quota, the federal government could choose the object of the tax and raise the entire quota by a tax

domestic liquor was a direct tax.<sup>292</sup> In the New York Convention, John Jay, who was to become the first Chief Justice, used a tax on carriages as an example of a specific direct tax.<sup>293</sup> A leading Anti-Federalist New Yorker, Melancton Smith,

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on slaves, thereby annihilating that kind of property. *See* George Mason, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1342-43. Mason is correct under the adopted text of the Constitution because if Congress had the power to choose the object of tax, it could tax slaves alone within the state.

<sup>292</sup> *Debates in the House of Representatives* (James Madison), Dec. 27, 1790, in THE GENERAL ADVERTISER, Dec. 29, 1790, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 189, 190 (William C. diGiacomantonio et al. eds., 1995). Madison voted in favor of the internal excise tax on liquor, notwithstanding the fact that he considered it to be an unapportioned direct tax, and he argued that it was a kind of “sumptuary regulation,” *id.* at 195, which indicated that Founders did not think that categorizing an unapportioned tax as direct necessarily was fatal.

<sup>293</sup> *The Debates in the Convention of the State of New York* (John Jay), July 1, 1788, in 2 DEBATES, *supra* note 14, at 381 (asking what difficulty Congress would have had in gaining enough information to impose “a tax of twenty shillings on all coaches”).

used a tax on horses to illustrate “direct tax.”<sup>294</sup> Thus, if one starts to use “excise” to refer to fixed-rate taxes on select goods, other than the tax on whiskey, then the usages come into conflict with what John Jay called “specific direct taxes.”

A general consumption tax was considered a direct tax, even by partisans who were trying to get fixed-rate taxes on selected goods out from under the apportionment requirement. In 1794, Theodore Sedgwick, a pro-Hamiltonian Federalist from Massachusetts, argued that a fixed-rate tax on a few selected goods was not direct.<sup>295</sup> Sedgwick, in 1794, had seen the perversity of apportionment, so his argument was plausibly consequence driven. Sedgwick, however, also conceded in his speech that unshiftable broad taxes on people were still direct. Even a strong pro-tax Federalist thus felt the need to concede shortly after adoption that broadly based consumption taxes were direct.<sup>296</sup>

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<sup>294</sup> *The Debates in the Convention of the State of New York* (Melancton Smith), June 27, 1788, in 2 DEBATES, *supra* note 14, at 333 (stating Congressional power to impose direct tax would mean that both state and federal government tax collectors will seek to seize or replevin the same horse). See also Letter from An Old Planter to the Planters and Farmers of Virginia, in VA. INDEP. CHRON., Feb. 20, 1788, reprinted in 8 STATES, *supra* note 35, at 394, 396 (stating that a tax on horses will be apportioned); Wolcott, *supra* note 14, at 419, 420 (including state taxes on horses in inventory of direct taxes).

<sup>295</sup> *Selected Debates in Congress involving Constitutional Principles: Direct Taxes* (Theodore Sedgwick, Mass.), May 6, 1794, in 4 DEBATES, *supra* note 47, at 433 (arguing that taxes imposed on specific articles of personal property and particular objects of luxury are indirect because they can be shifted, whereas taxes on capitation, land, property, and income generally are direct).

<sup>296</sup> Representative Sedgwick was a pro-Hamiltonian Federalist who opposed hobbling apportionment, so he wanted to find room for unapportioned taxes, not to constrict them. *Biographies of Members of the First Federal Congress: Theodore Sedgwick, Representative from Massachusetts*, in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 635 (William C. diGiacomantonio et al. eds., 1995).

Excises also would have to be apportionable under apportionment advocates' understanding of the function of the apportionment requirement. The Virginia Federalists defended the Constitution by arguing that apportionment would protect the institution of slavery. For instance, George Nicholas argued before the Virginia Ratification Convention that Congress could not tax slaves at so high a rate as to amount to emancipation because "taxation and representation were fixed according to the census established in the Constitution . . . . Had taxes been uniform it would have been universally objected to," he said, "for no one object could be selected without involving great inconveniences."<sup>297</sup> Congress could not annihilate slavery by taxation, Madison argued, because the "taxation of this State [is to be] equal only to its representation."<sup>298</sup> As argued previously, the text of the Constitution does not support Madison's and Nicholas's understanding: Congress was given the power to choose the object of tax when it was given the power to lay direct taxes, and it could choose to tax slaves as the only source of a state's quota under an apportionment requirement.<sup>299</sup> However, if Madison's and Nicholas's understanding applied, then apportionment would have to protect against prohibitively high *excise* taxes on slaves as well as prohibitive taxes of any other kind.<sup>300</sup>

One may deduce an exemption for excise taxes from the text of the Constitution, once one knows that apportionment is not consistent with uniform tax rates. Article I, Section Eight of the Constitution provides that "imposts,

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<sup>297</sup> *The Debates in the Virginia Ratification Convention* (George Nicholas), June 17, 1788, in 10 STATES, *supra* note 26, at 1342. See also Letter IV from the State Soldier to the Good People of Virginia, in VA. INDEP. CHRON., Mar. 19, 1788, reprinted in 8 STATES, *supra* note 35, at 509, 511 (arguing that Congress could not tax the slaves out of existence without ruining free people in other states).

<sup>298</sup> James Madison, Debates in the Virginia Ratification Convention (June 17, 1788), in 10 STATES, *supra* note 26, at 1338, 1339 (arguing that apportionment would prevent Congress from imposing oppressive taxes on tobacco or slaves that Northern states would escape). See also *id.* (June 12, 1788), at 1204 (arguing that "[o]ur State is secured . . . [because i]ts proportion [of tax] will be commensurate to its population"); *id.* (June 17, 1788), at 1342, 1343 (arguing that the census was intended to introduce equality into the burdens to be laid on the community); Taylor, *supra* note 198, at 20, cited in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 321 (arguing that if apportionment is not required of direct excise taxes, then "'the whole burden of government [could] be exclusively laid' on the slave-holding southern states").

<sup>299</sup> See *supra* notes 204, 291, and accompanying text.

<sup>300</sup> Madison and Nicholas' understanding functions reasonably well if one assumes first, that per capita wealth was approximately equal among the states and, second, that Congress would continue the requisition system or a quasi-requisition system under which taxes are collected and calculated on a state by state basis. Excise taxes would not be uniform among the states, but that may not matter if the decisions as to what to tax are being delegated to the state from which the federal tax is collected. See discussion accompanying *supra* notes 176-205 to the effect that continuation of the requisition system should not be implied.

duties, and excises,” must have a uniform rate across the states. Once one knows the secret (which the drafters and ratifiers did not know) that uniformity of rates and apportionment are not consistent with each other when the tax base varies per capita, it is possible to construe “direct taxes” as excluding “duties” and “excises” as well as imposts. By 1795, it seems to have been generally known that apportionment and uniform rates were not consistent, and then there were clear examples in which speakers treated “direct taxes” as excluding the “imposts, duties, and excises” that required a uniform rate.<sup>301</sup>

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<sup>301</sup> See Alexander Hamilton (Secretary of Treasury), *Defence of the Funding System* (July 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 87, at 22, 25 (“In all but direct taxes the Constitution requires *uniformity*,”); Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States*, Feb. 25, 1795, in 7 THE WORKS OF ALEXANDER HAMILTON, *supra* note 237, at 848 (arguing that duties, imports, and excises must be uniform, but other taxes must be apportioned); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.) (arguing that the Constitution created two grand schemes: uniformity for imposts, duties, and excise; and apportionment for all other taxes). *But see id.* at 174 (Chase, J.) (“I believe some taxes may be both *direct* and *indirect* at the *same* time.”).

The textual argument that direct taxes cannot include uniform taxes assumes, however, that the drafters knew that uniform rates and apportionment were inconsistent. Major actors did not seem to have seen the inconsistency of apportionment and uniform rates before 1794,<sup>302</sup> and they were willing to call taxes required to have a uniform rate under constitutional language, “direct taxes.”

For example, Madison, the most influential actor regarding the Constitution, did not believe that either excises or duties were free from apportionment. In 1789, Hamilton solicited Madison’s private advice on what federal taxes the new federal government should impose. Madison replied that he did not recommend a general stamp tax (i.e. “duties” in constitutional text), in part because it “could not be so framed as to fall in due *proportion* on the States without more information than can be speedily obtained.”<sup>303</sup> In Madison’s view, even the stamp tax required apportionment, and his view was expressed privately in a non-strategic context.

In addition, Madison called the liquor tax a “direct tax” on the floor of the new Congress without contradiction in the debate, and a liquor tax is the paradigm of an “excise.”<sup>304</sup> Madison had not yet seen that uniform rate and apportionment could not be applied simultaneously.

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<sup>302</sup> Hugh Williamson, originally a North Carolina delegate to the Constitutional Convention, argued that apportionment and uniform rates were twin safeguards. See 3 ANNALS OF CONG. 378-80 (1792), reprinted in 3 FOUNDERS, *supra* note 14, at 357; THE FEDERALIST No. 36, *supra* note 26, at 220 (Alexander Hamilton) (stating that apportionment “effectually shuts the door to partiality or oppression”).

<sup>303</sup> Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 76, at 449, 450 (emphasis added). Madison also opposed the stamp tax because it was “obnoxious to prejudice not yet worn out.” See *supra* notes 248-77 and accompanying text.

<sup>304</sup> *Debates in the House of Representatives* (James Madison), Dec. 27, 1790, in THE GENERAL ADVERTISER, Dec. 29, 1790, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 189, 190 (William C. diGiacomantonio et al. eds., 1995). While calling the liquor tax a direct tax, however, Madison did not think that the liquor tax had to be apportioned. See *also*



As a matter of lexicography, every widely accepted usage of a term becomes a definition. Sometimes one looks to the dictionary for a unique definitional answer. We might legitimately ask, for instance, for a unique yes or no answer as to whether “direct tax” excluded “excises.” The answer unfortunately is not lexicographic. Both definitions of “direct tax” to include and to exclude “excise” were used publicly in debates at the time of the Constitution without any objection by the audience or other debaters that the terms were misused. Thus, public usage in the debates cannot tell us whether excises are “direct taxes.”

D. *Shiftable Taxes?*

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Taylor, *supra* note 198 (arguing that direct excises should be apportioned).

In a recent article, Professor Erik Jensen argued that the Founders meant the term indirect taxes to describe taxes on importers or suppliers of articles of consumption that might be shifted to consumers through the price of taxed articles:<sup>305</sup>

[I]ndirect taxes give consumers a choice: an individual consumer can decide whether to buy a product and, assuming he is aware of the tax at all, whether to bear the burden of the tax. . . . [I]ndirect taxes contain their own protection against abuse: they cannot be raised too high or revenue will decrease because consumption will decline. In contrast, direct taxes hit the pocketbooks of taxpayers painfully, with little if any option to avoid paying.<sup>306</sup>

Jensen argued that a federal sales tax or value added tax would be constitutional as an indirect tax, but an unapportioned federal consumption tax that relied on personal tax returns would not be constitutional.<sup>307</sup>

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<sup>305</sup> Jensen, *supra* note 28, at 2359, 2396.

<sup>306</sup> *Id.* at 2337 (footnotes omitted).

<sup>307</sup> *Id.* at 2402-08. Jensen would hold a cash flow consumption tax or Unlimited Savings Account (“USA”) tax unconstitutional. As a practical matter, Jensen would hold unconstitutional consumption taxes that varied tax rates according to standard of living or harm from the loss of tax. Thus, under consumption taxes that Jensen would allow, the prince and the pauper would pay taxes on their consumption at the same rate.

There was some limited support for Professor Jensen's distinction in the debates. In the Connecticut Ratification Convention, Oliver Ellsworth, when called upon to rebut an argument that the impost was not an appropriate tax for the new federal government, made the argument that taxes on articles of consumption were the easiest taxes because they were paid as people were spending. To raise money by direct taxation, he argued, people must be provident by setting aside money to pay the tax. Direct taxes, he argued, would "take away the tools of a man's business or the necessary utensils of his family."<sup>308</sup> "All nations," Ellsworth said, "have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. France raises a revenue of twenty-four millions sterling per annum, and it is chiefly in this way."<sup>309</sup> Jensen's argument also draws some support from Gouverneur Morris's motion to limit apportionment to only "direct taxes," which he described as meaning that apportionment would not apply to "indirect taxes on . . . imports [and] on *consumption*."<sup>310</sup>

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<sup>308</sup> Oliver Ellsworth, Debates in the Connecticut Ratification Convention (Jan. 7, 1788), in 3 STATES, *supra* note 53, at 547, 549.

<sup>309</sup> *Id.* France, with porous borders, could not maintain viable customs duties in the face of smuggling, so the French tax system consisted of purely internal taxes.

<sup>310</sup> James Madison's Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 12, 1787, in 1 RECORDS, *supra* note 46, at 591, 592 (emphasis added). The impost commonly was considered to be a tax on consumption. *See, e.g.*, James Madison, Debate on Import Duties in the House of Representatives (Apr. 9, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 87, at 69-73, *reprinted in* 2 FOUNDERS, *supra* note 139, at 442, 443 (arguing that the impost would be in proportion to consumption); Letter from James Madison to George Thompson (Jan. 29, 1789), in 11 THE PAPERS OF JAMES MADISON 433-37, *reprinted in* 2 FOUNDERS, *supra* note 139, at 440, 441 (asking "who is it that pays duties on imports?" and answering "[t]hose only who consume them." Since impost is already listed in Morris's statement, Morris is plausibly referring to an internal excise tax.).

Similarly, there were a number of later arguments that taxes on articles that merchants could shift to consumers were indirect, but these arguments were less helpful as evidence of original intent because they were offered strategically so as to allow greater room for federal taxation. By 1794, it had become generally understood that apportionment was perverse for items that were not equal per capita among the states, and then Federalists were arguing for exceptions to the term “direct tax” just to avoid apportionment. When a tax on carriages was debated, for example, Samuel Dexter, a Federalist from Massachusetts, argued that all taxes were direct when paid by the consumer, but they were indirect when collected only by the taxpayer and borne by some other consumer.<sup>311</sup> In 1796, while holding that a tax on carriages, both for hire and for personal use, were all indirect on other grounds, Justice Paterson stated in dicta that a shiftable tax on the seller was an indirect tax.<sup>312</sup> Justice Paterson attributed the constitutional use of indirect taxes to Adam Smith’s discussion of shifting in *Wealth of Nations*,<sup>313</sup> which seems highly unlikely.<sup>314</sup> Jensen also offers more spurious evidence,<sup>315</sup> however, which did not undercut the value of the early Ellsworth and Morris usages as evidence in support of his argument.

Defining “indirect taxes” as shiftable taxes on suppliers has support, but it is also contradicted by a far larger number of important usages. For example, Madison assumed nonstrategically that “direct taxes” included shiftable taxes on producers before the Virginia Ratification Convention. Madison argued to the

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<sup>311</sup> See 4 ANNALS OF CONG. 645-46 (1794).

<sup>312</sup> See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796).

<sup>313</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 383-85 (Robert Maynard Hutchins ed., Encyclopedia Britannica, Inc. 1776) (defining direct tax). Albert Gallatin, who became Jefferson’s Secretary of the Treasury, believed the argument that the Founders adopted the definition of direct tax from Adam Smith. See HENRY CARTER ADAMS, TAXATION IN THE UNITED STATES, 1789-1816, at 21 (Johns Hopkins Univ. 1884) (citing Albert Gallatin, Sketch of United States in 1796).

<sup>314</sup> Jensen points out that *Wealth of Nations* was not reprinted in America until 1789. See JENSEN, *supra* note 28, at 2363 n.149 (citing Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 250, 283 n.1 (1907)). See also the persuasive argument by taxpayer’s counsel in *Hylton*, Edmund Pendleton (Attorney General of Virginia), in “Some Remarks on the Argument of Mr. Wicksham,” which was published in Philadelphia’s *Aurora General Advertiser* on Feb. 11, 1796, and in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 332 (arguing that constitutionality of taxes on carriages was determined, not by “recourse to foreign Lexicons, or foreign theoretical writers,” but by American custom).

<sup>315</sup> See Jensen, *supra* note 28, at 2337 n.14 & 2359 n.132 (citing THE FEDERALIST NO. 35, *supra* note 26 (Alexander Hamilton) as “endorsing shiftability”). Hamilton, in the passages cited, was arguing that New Yorkers should not endorse the Anti-Federalist amendment that would prohibit Congressional excise and direct taxes. If Congress relied on only the impost, Hamilton was arguing, the New York importers might find that the prices of their goods have risen too high to pass on to the ultimate consumer. The discussion is about imposts, which concededly were indirect.

convention that Congress had to be given the power to lay direct taxes or otherwise Congress could use only taxes on imports. If Congress did that, he argued, then the South would bear a disproportionate tax because the North supported manufacturing technology and consumed much of its own products, while the South relied exclusively on imports. “If direct taxation be mixed with other taxes,” Madison said, “it will be in the power of the General Government to lessen that inequality.”<sup>316</sup> Madison’s argument presupposed that a tax on Northern manufactured goods had to be a direct tax even though it shifted to the consumer.

Otherwise, Congress could equalize tax burdens without possessing the power over a direct tax, just by taxing Northern manufactured goods as well as Southern imports. Hamilton made the same argument in New York, only in his version of the argument it would be New Yorkers who would be helped by giving Congress the power to lay direct taxes that would be shifted to consumers.<sup>317</sup> The argument that shiftable taxes on suppliers were indirect also ignored all of John Jay’s use of specific direct taxes or fixed-rate taxes on goods<sup>318</sup> which were considered direct taxes, but which a citizen could also avoid by not buying the goods.

Ellsworth’s speech that taxes on articles of consumption were good taxes that presumably may have been imposed without apportionment, was an important part of the ratification debate, but that speech, together with all of the subsequent more strategic usages, seemed too ephemeral and too swamped by contradictory usages to govern modern tax policy. If history binds us, its message must be stronger and more consistent with some core constitutional function. Optimal tax policy in the twentieth and twenty-first centuries should not be governed by reading tea leaves or looking to such isolated eighteenth century usages.

#### E. *Only on Land?*

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<sup>316</sup> James Madison, Debates in the Virginia Ratification Convention (June 11, 1788), in 9 STATES, *supra* note 51, at 1146. *See also* James Madison, Debates in the Virginia Ratification Convention (June 12, 1788), in 10 STATES, *supra* note 26, at 1204 (noting that taxes on tobacco are apportionable direct taxes).

<sup>317</sup> *See supra* note 71 and accompanying text.

<sup>318</sup> *See supra* text accompanying notes 293-94.

In *The Federalist Papers*, Alexander Hamilton tried to define “direct taxes” as narrowly as he could, conceding only that the head tax, capitation, and a tax on land were direct taxes.<sup>319</sup> The courts picked up Hamilton’s definition.<sup>320</sup> On this issue, however, Hamilton plausibly acted, as one Anti-Federalist put it, “consistent with [his] *aim and desire of encreasing the power of the general government as far as possible.*”<sup>321</sup> By the middle of 1788, Hamilton had become “out of humour” with apportionment among the states in any shape.<sup>322</sup> No apportionment

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<sup>319</sup> See THE FEDERALIST NO. 21, *supra* note 26, at 130 (Alexander Hamilton); see also Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States*, Feb. 25, 1795, in 7 THE WORKS OF ALEXANDER HAMILTON, *supra* note 237, at 848 (arguing that only capitation or poll taxes and taxes on lands and buildings were direct taxes); 4 ANNALS OF CONG. 643-45 (1794) (arguing that direct taxes are limited to capitation and land taxes).

<sup>320</sup> See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796) (Paterson, J.) (“both in theory and practice, a tax on land is deemed to be a direct tax”). Congress, in 1861, enacted a tax on real estate and a tax on income, but only the tax on land was called a direct tax and apportioned among the states. See Act of Aug. 5, 1861, ch. 45, § 8, at 49, 12 Stat. 292, 294-96, 309. The apportioned 1861 land tax apparently was a failure. The tax intended to raise twenty million dollars a year, but the full tax was refunded in 1891, with Vermont, for instance, getting a full refund of \$179,000 of what was supposed to have been payment of \$211,000 each year for thirty years or \$6,330,000. See *id.* at § 8; Direct Tax—Payment to States, 20 OP. ATT’Y GEN. 134, 134 (1891).

<sup>321</sup> Luther Martin, *Genuine Information IV*, BALT. MD. GAZETTE, Jan. 15, 1788, *reprinted in* 15 COMMENTARIES, *supra* note 47, at 374, 378. Martin was not describing Hamilton particularly, but the description fits.

<sup>322</sup> Letter from Alexander Hamilton to James Madison (July 8, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 58, at 187.

formula, he argued, ever could capture fairly the resources of the new nation.<sup>323</sup>

On this argument, he was the first, and history only followed him later. In other people's arguments, however, the usage of "direct tax" was decidedly broader. Real estate taxes were the heart of the state tax systems at the time of the Constitution so that all speakers would have considered land taxes to be direct, but state taxes went considerably beyond land taxes and all of the state internal taxes would have been considered direct.

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<sup>323</sup> THE FEDERALIST NO. 21, *supra* note 26, at 129-30.

Even considering land tax a “direct tax” makes the apportionment requirement contrary to the more general intent. Apportionment of requisitions by population replaced apportionment by value of land within the several states, in 1783, in order to allow requisitions to be more administrable, while preserving the principle of allocations by wealth.<sup>324</sup> Madison sought a tax on land with the first federal taxes of the new government to prevent the states from occupying the field.<sup>325</sup> Thus, history especially legitimates federal tax on land and improvements. Apportionment, however, would force an inequity in the tax, as long as the value of land is not equal per capita among the states, and it would prohibit the use of the land tax as a practical political matter. The absurdity of the apportionment requirement would forbid a land tax if it were considered direct.<sup>326</sup> Once a tax is authorized, apportionment among a base that is not equal per capita among the states has no justification. The manifest intent of the Federalists to use a federal land tax implies that no prohibitive hobble—apportionment—should be required.

#### V. A FUNCTIONAL DEFINITION AND OBLITERATING CONSTRUCTION

This Article argues that the “direct tax” should be construed functionally, but ahistorically, to refer to head taxes and requisitions from the several states, but nothing else. Apportionment should be required when it is reasonable and

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<sup>324</sup> See, e.g., Samuel Chase, Debate on the Floor of Continental Congress, in THOMAS JEFFERSON AUTOBIOGRAPHY, reprinted in 2 FOUNDERS, *supra* note 139, at 87 (1987) (recording Samuel Chase’s motion that while taxation should be always in proportion to property in principle, the number of inhabitants within the state is a “tolerably good criterion of property” given the difficulties of valuation); *Debates and Proceedings in Congress*, Mar. 7, 1783, in A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION 20 (John P. Kaminski ed., 1995) (recommending shift to population for “a more convenient and certain rule of ascertaining the proportions”); Mark Antony, BOSTON INDEP. CHRON., Jan. 10, 1788, reprinted in KAMINSKI, *supra* note 324, at 79, 82. (stating that population was better measure than land given considerations of simplicity, certainty, facility, and equity). Letter from William Blount, Richard D. Spaight, and Hugh Williamson to Governor Caswell of North Carolina (Sept. 18, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 3 RECORDS] (arguing that apportionment by population was much more favorable to the South than land value because most of the Southern farms were small, and many Southerners lived in towns). Blount, Spaight, and Williamson presumed the principle that population should measure land value even while arguing that population was better for the South.

<sup>325</sup> Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 87, at 449, 450.

<sup>326</sup> Cf. Whitney, *supra* note 40, at 295-96 (reporting that the last apportioned direct tax was a failure because of the difficulties of assessment and was refunded in full to the states in 1891).



convenient, but not when apportionment would lead to perverse results. Apportionment would never make any kind of tax impossible, and Congress would then have plenary power over the subject and manner of federal tax, as the Framers originally intended. The definition preserves the grand purposes of the Constitution and prevents absurdity, sloughing off only a silly requirement.

#### A. *Textual Arguments*

The text of the Constitution can be read as consistent with the argument that apportionable direct taxes are limited to taxes, such as a head tax, that can reasonably be apportioned. The familiar legal maxim of *ejusdem generis* provides that “the list provides the meaning.”<sup>327</sup> The Constitution says that “[n]o capitation, or other direct, Tax shall be laid” without apportionment.<sup>328</sup> *Ejusdem generis* provides that “[w]here general words [like other direct tax] follow specific words [like capitation] . . . , the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>329</sup>

The common meaning of the two-element series, “capitation tax, . . . direct tax” is then that the taxes in the series can be apportioned conveniently and without perversity. Pulling rules of construction from stock to interpret the very words of the Constitution helps maintain respect for the Constitution. After all, as Joseph Story wrote, “nothing but the text [of the Constitution] was adopted by the people.”<sup>330</sup> The Latin helps a bit as well.

It is possible to conform the requirement of apportionment with the grand principle of uniformity of tax rate only by limiting apportionment to taxes in which the tax base is the same per capita among the states. The only tax base that will remain reliably the same per capita is the capitation or head tax itself. Article I, Section Nine provides that “no capitation, or other direct tax,” shall be laid without apportionment. Article I, Section Eight requires that taxes be uniform across the states. It is possible to satisfy both grand requirements of apportionment and uniformity simultaneously only with a head tax. Outside of the head tax, one must choose between uniformity and apportionment. When the choice must be made, it is clear that uniformity protects some valuable individual interest and that

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<sup>327</sup> The rule of *ejusdem generis* “limits general terms which follow specific ones to matters similar to those specified.” *Gooch v. United States*, 297 U.S. 124, 128 (1936).

<sup>328</sup> U.S. CONST. art. I, § 9.

<sup>329</sup> NORMAN J. SINGER, *SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION* § 47.17, at 188 (5th ed. 1993).

<sup>330</sup> 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 390 (Thomas Cooley ed., 4th ed. 1873). *See also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985) (stating that during the Constitutional debates lawyers understood the instrument’s intent as determined by artificial rules of judicial construction, rather than drafters’ subjective intent).

apportionment among the states gets in the way of uniformity and protects no right of any individual. In the case of conflict, the lower weight requirement (i.e. apportionment) must recede. The Constitution should be read to prevent both inconsistency and absurdity, and the proposed construction does just that.

#### B. *Hylton v. United States*

The construction that limits apportionment to the cases in which the requirement is reasonable and convenient to the collection of revenue was adopted in the early history of the Republic in the Supreme Court case of *Hylton v. United States*.<sup>331</sup> The tax before the Court in *Hylton* was a federal tax on carriages. John Jay, the first Chief Justice, had called a carriage tax a “direct tax” under the ratification debates,<sup>332</sup> and Madison had later called it a “direct tax.”<sup>333</sup> There are also a number of state carriage taxes on the Treasury’s 1796 inventory of direct taxes.<sup>334</sup> Nonetheless, the Court held that a carriage tax was not direct and did not have to be apportioned. Alexander Hamilton argued on behalf of the government in *Hylton* that the federal tax on carriages, which he had himself proposed, was not a direct tax because “no construction ought to prevail calculated to defeat the express and necessary authority of the government.”<sup>335</sup> “It would be contrary to reason,” he said, “and to every rule of sound construction, to adopt a principle for

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<sup>331</sup> 3 U.S. (3 Dall.) 171 (1796). The most complete description of the politics and arguments surrounding the case is found in 4 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 14, at 297.

For a recent argument that *Hylton* was wrongly decided, see Jensen, *supra* note 28, at 2361 (arguing that *Hylton* was a rush to judgment by Federalist judges who ignored constitutional niceties in order to build a strong federal government). Jensen argues that the intent behind apportionment was to forbid Congress from laying direct taxes by making them impracticable. *See id.* at 2356. *But see supra* text accompanying notes 49-95 (arguing that the Founders intended direct taxes to be used and that neither proponents nor opponents of Congress’ power to lay direct taxes saw apportionment as a hobble). Jensen argues that the examples of the “supposedly absurd results” of apportionment were “less than convincing.” *Id.* at 2353. *But see supra* text accompanying notes 14-40 (arguing that absurdity is more than “supposed” for any tax intended to be laid). Jensen argues that the *Hylton* decision was illegitimate because the case was a set-up, in which the minimum \$2000 jurisdictional amount was supposed to be exceeded, not merely met. *See id.* at 2351-52. *Hylton*, however, was argued energetically and capably by clearly adverse parties. The questionable jurisdictional facts were alleged by the losing taxpayer side, which had vigorously sought the decision. The losing side should not have been given the option to impeach a decision that they so vigorously sought, merely because they (properly) lost on the merits.

<sup>332</sup> *See supra* note 14.

<sup>333</sup> *See supra* note 14.

<sup>334</sup> *See supra* note 14.

<sup>335</sup> Alexander Hamilton, Law Brief on the Carriage Tax, *Hylton v. United States*, Feb. 25, 1795, in 7 THE WORKS OF ALEXANDER HAMILTON, *supra* note 237, at 846.

regulating the exercise of a clear constitutional power which would defeat the exercise of the power.”<sup>336</sup> He said that to consider the tax on carriages as a direct tax would “defeat the power of laying such a duty. This is a consequence,” he concluded, “which ought not to ensue from construction.”<sup>337</sup> The argument had been critical to Congress’ adoption of the carriage tax,<sup>338</sup> and the Supreme Court agreed with it.

In *Hylton*, the Supreme Court held that the carriage was not “direct” because it would not be reasonable to apportion the carriage tax:

The Constitution evidently contemplated no taxes as direct taxes but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.<sup>339</sup>

Alternatively stated, “[a]s all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned*.”<sup>340</sup>

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 847.

<sup>338</sup> *Selected Debates in Congress Involving Constitutional Principles: Direct Taxes* (Theodore Sedgwick, Mass.), May 6, 1794, in 4 DEBATES, *supra* note 47, at 433 (arguing that “the legislature was authorized to impose a tax on . . . carriages.” Because a tax on carriages “could not be apportioned by the constitutional ratio, it would follow, irresistibly, that such a tax, . . . was not ‘direct’”). Compare 4 ANNALS OF CONG. 729-30, *reprinted in* 3 FOUNDERS, *supra* note 14, at 357 (James Madison) (stating that a tax on carriages was unconstitutional).

<sup>339</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 174 (1796) (Chase, J.) (emphasis omitted).

<sup>340</sup> *Id.* at 181 (Iredell, J.). See also *id.* at 179 (Paterson, J.) (“A tax on carriages, if apportioned, would be oppressive and pernicious.”).

*Hylton* has a special legitimacy on both its holding and its functional perspective on constitutional construction, because of who the actors were. Alexander Hamilton, who wrote the Government's brief for *Hylton*, also wrote the Federalist Papers on tax issues which "explained America."<sup>341</sup> Only four justices participated, but the decision was unanimous and the deciders were core Framers on the apportionment and tax issues. Justice James Wilson of Pennsylvania was second only to Madison in influencing the Convention.<sup>342</sup> He represented one side of the Great Compromise and argued that votes in Congress should be apportioned strictly according to population, not weighted by state.<sup>343</sup> Justice William Paterson of New Jersey was the primary author of the New Jersey Plan which represented the other side of the Great Compromise at the Convention. He argued that votes in Congress should be weighted by state.<sup>344</sup> At the Convention, Paterson had objected both to the proposal to give the federal government power to lay direct taxes and also to the inclusion of slaves in the formula for representation.<sup>345</sup> Justice Samuel Chase participated in the debate from the beginning. He debated on the floor of the Continental Congress in July 1776 for exclusion of slaves from the formula for taxation,<sup>346</sup> and he also eloquently explained that the purpose of the apportionment of taxes was to capture wealth.<sup>347</sup> Justice James Iredell was not at the Philadelphia Convention, but his arguments at the North Carolina Ratification Convention took up almost forty percent of the pages of the Convention report,<sup>348</sup> and his pamphlet, *Answer to Mr. Mason's Objections to the New Constitution*, was important to the debates throughout the South.<sup>349</sup> The Chief Justice, Oliver Ellsworth of Connecticut, did not participate

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<sup>341</sup> See GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981).

<sup>342</sup> *James Wilson*, 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2067 (1986).

<sup>343</sup> See Thomas Jefferson's Notes of Proceedings in Congress (James Wilson, Pa.), July 12-Aug. 1, 1776, in 4 *LETTERS*, *supra* note 168, at 440.

<sup>344</sup> See Richard E. Ellis, *William Paterson*, 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1367 (1986). See also *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 546 (1870) (arguing that "it may further be taken as established upon the testimony of Paterson, [what] direct taxes" means and holding that a tax on bank securities was not direct).

<sup>345</sup> See The New Jersey Plan, proposed by William Paterson, in *DOCUMENTS & RECORDS*, *supra* note 50, at 251. James Madison's Notes on Debates in the Federal Convention (William Paterson, N.J.), July 9, 1787, in 1 *RECORDS*, *supra* note 46, at 559, 561 (arguing that one could look at slaves in no way other than as property because they were entirely at the will of their master).

<sup>346</sup> Thomas Jefferson's Notes of Proceedings in Congress (Samuel Chase, Md.), July 30, 1776, in 4 *LETTERS*, *supra* note 168, at 438-39.

<sup>347</sup> *Id.* at 438.

<sup>348</sup> 4 *DEBATES*, *supra* note 47, at 4-6, 7, 9, 10-11, 13-15, 27, 28, 32-33, 35-36, 37, 38-42, 73-75, 91-92, 95-102, 104, 106-14, 125-31, 132-34, 144-49, 164-67, 170-72, 176-80, 185, 186, 192-98, 217, 218-23, 228-31, 241-42, 247, 248-49.

<sup>349</sup> See Richard E. Ellis, *James Iredell*, 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 999, 1000 (1986).

in the opinions because he had not heard the whole of the arguments, but he probably supped and talked with the other judges.<sup>350</sup> He had been an active participant in the debate over direct taxes both in Philadelphia and in his home state.<sup>351</sup> The extraordinary actors who decided *Hylton* were the Founders, so if the constitutional construction must follow the Founders' intent, then *Hylton* represented the constitutional mandate.<sup>352</sup>

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<sup>350</sup> See Whitney, *supra* note 40, at 282 n.4.

<sup>351</sup> Ellsworth moved to apportion taxes by the three-fifths federal formula on July 12, 1787 when apportionment of tax was brought into the Constitution. See *infra* Appendix I, note 79. In the Constitutional debates, Ellsworth assumed that Congress would continue the requisition system, or at least would leave it to the states to determine the selection of the objects of tax. See *supra* notes 178, 196. Ellsworth argued that taxes on articles in the supplier's hands were indirect taxes. See *supra* notes 308-09. Ellsworth argued that the federal government would probably not need direct taxes. See *supra* note 226. Insofar as Ellsworth's nonparticipation represents even a passive or reluctant acquiescence in the result, considering his original position, his role in *Hylton* showed that the definition of direct tax became much more flexible in consideration of the consequences.

<sup>352</sup> See generally RAKOVE, *supra* note 57, at 8-9 (1996) (stating that early interpretations of the Constitution must be viewed as authoritative because of their propinquity to the deliberations of 1787-1788).

The Founders were also pragmatists. The decision on apportionment did not start and end by looking up “direct tax” in some great constitutional dictionary. The definition of “direct tax” was shaped by its consequences to create a functional system of law. The Founders looked at the merits of the end result before they finished the defining “direct tax.” James Madison had argued against the carriage tax at issue in *Hylton* because it was an unapportioned direct tax,<sup>353</sup> so it might be argued that he was at least loyal to the Constitution, knew the meaning of “direct tax,” and that it had to be apportioned. In 1790, however, Madison argued that an excise tax on liquor made within the states was a direct tax, but he then argued in favor of the tax, even though it was not apportioned, because the tax could be viewed as a kind of “sumptuary regulation.”<sup>354</sup> Constitutional analysis was not a mindless or formal exercise in lexicography when the Constitution was young and flexible.

The case before the Court in *Hylton* was only about a carriage tax, but the Court applied the case’s functional-definition rationale much further in the hundred years after *Hylton*. Under the *Hylton* logic, the Court held that a number of taxes, including the income tax, were not direct. In 1868, the Supreme Court held that a Civil War tax on the income of insurance companies was constitutional although not apportioned.<sup>355</sup> The tax was not direct because the consequence of finding that apportionment was required was unacceptable:

The consequences which would follow the apportionment of the tax . . . , in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where [insurance] corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned,

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<sup>353</sup> 4 ANNALS OF CONG. 729-30 (1794), reprinted in 3 FOUNDERS, *supra* note 14, at 357 (arguing that a tax on carriages was unconstitutional because it was an unapportioned direct tax).

<sup>354</sup> *Debates in the House of Representatives* (James Madison), Dec. 17, 1790, in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 190, 195 (William C. diGiacomantonio et al. eds., 1995).

<sup>355</sup> *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1868).

the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.<sup>356</sup>

In 1875, in *Scholey v. Rew*,<sup>357</sup> the Court held on the same logic that a tax on succession by death was not direct because

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<sup>356</sup> *Id.* at 446.

<sup>357</sup> 90 U.S. (23 Wall.) 331 (1875) (upholding an unapportioned successions tax).

[i]f all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes, and the taxing power would be . . . crippled; for no Congress would dare to apportion, for instance, the income tax.<sup>358</sup>

Finally, in *Springer v. United States*<sup>359</sup> in 1881, the Court held that Civil War income tax on individuals was not direct on the logic and authority of *Hylton*:

It was well held [in *Hylton*] that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the [income] tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive.<sup>360</sup>

C. *Pollock v. Farmers' Loan & Trust Co. and the Sixteenth Amendment*

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<sup>358</sup> *Id.* at 343.

<sup>359</sup> 102 U.S. 586 (1881).

<sup>360</sup> *Id.* at 600.



While the functional construction of *Hylton* was sound doctrine for a hundred years, *Hylton* was overruled by the Supreme Court in 1895 by *Pollock v. Farmers' Loan & Trust Co.*<sup>361</sup> *Pollock* held that an income tax was unconstitutional without apportionment because the income tax was a direct tax. The key to the decision was that a tax on rent from real estate was necessarily a tax on the real estate itself and that a tax on income from personal property was necessarily a tax on personal property<sup>362</sup> (i.e. that the income tax was indirectly a direct tax). *Pollock* was in turn reversed on its facts by the Sixteenth Amendment, which allowed a tax on income without apportionment,<sup>363</sup> and the public understood the Sixteenth Amendment to be a recall of the *Pollock* decision which restored what had gone before.<sup>364</sup> On its core logic that a tax on income can be indirectly a tax on the source, *Pollock* was overruled by the modern Supreme Court in *South Carolina v. Baker*,<sup>365</sup> at least as to whether a tax on income received from a state was a tax on the state. Under the rationale of *Baker*, a tax on income from land cannot be indirectly a direct tax on land, leaving *Pollock* rotted at its core. Therefore, *Hylton* is and should be resurrected.

*Pollock*, in fact, illegitimately overruled *Hylton* in the first place.<sup>366</sup> Justice Harlan properly described *Pollock* as the "decision [that] will become as hateful with the American people as the Dred Scott case was when it was decided."<sup>367</sup> The original intent was that Congress should have the power to lay direct taxes without a hobble. The *Pollock* court overruled that intent for reasons private to the judges and not legitimated by constitutional policy.<sup>368</sup> Two hundred years ago,

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<sup>361</sup> 157 U.S. 429, *on reh'g*, 158 U.S. 601 (1895).

<sup>362</sup> 158 U.S. at 618 (holding that a tax on rents from real estate was direct). *Id.* at 628 (stating that a tax on income from personal property was direct). See BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS 1-17, 17 n.20 (2d ed. 1989) (arguing that a tax on the income is tantamount to a tax on the property).

<sup>363</sup> U.S. CONST. amend. XVI. For a short history of the origins of the Sixteenth Amendment, see BITTKER & LOKKEN, *supra* note 362, ¶ 1.13, at 1-6. See also STAFF OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, COMMENTARIES ON THE JUDICIARY, 99TH CONG., 1ST SESS., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 41-42 (Comm. Print 1985).

<sup>364</sup> Thomas Reed Powell, *Stock Dividends, Direct Taxes and the Sixteenth Amendment*, 20 COLUM. L. REV. 536, 538 (1920).

<sup>365</sup> 485 U.S. 505 (1988) (holding that a nondiscriminatory tax on a municipal bond interest would not be unconstitutional), *rev'g* 157 U.S. 429, 586 (holding that a tax on interest from state bonds was directly on the state).

<sup>366</sup> ARNOLD PAUL, CONSERVATIVE CRISIS 170, 185 (1960); Seligman, *supra* note 107, at 556-89 (both arguing eloquently that *Pollock* was an illegitimate decision).

<sup>367</sup> *Id.* at 589. See also Letter from Justice Harlan to His Sons (May 24, 1895), *quoted in* David G. Ferrule, *Justice Harlan's Dissent in the Pollock Case*, 24 S. CAL. L. REV. 175, 180 (1951).

<sup>368</sup> See *supra* text accompanying notes 118-167.

when the Constitution was young and vital, the Supreme Court got the issue right in *Hylton*. It is to *Hylton* that one should return.

D. *Apportionment and Constitutional Interpretation*

Construing the term “direct tax” as limited to those taxes that can be reasonably apportioned among the states by population construes the terms of the Constitution in order to be more faithful to its more fundamental meaning. No framer or founder saw or wanted the absurdities of apportionment when the tax base was not equal per capita among the states. Merely to set forth the proposition that a tax on Virginia carriages should be ten times the rate on New York carriages, or that rates on Mississippi consumption or wealth should be twice that on Connecticut consumption or wealth, is to rebut the propositions. The requirement was absurd, although the necessary consequence of apportionment was not seen at the time. *Cy pres*<sup>369</sup> and *ejusdem generis*<sup>370</sup> are both quite acceptable rules of interpretation that give due homage to the text and original intent behind Constitution, and they must be called forth here to save the Constitution from its foul-up.

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<sup>369</sup> See *supra* note 11.

<sup>370</sup> See *supra* note 327.

Current law *generally* avoids the apportionment requirement either by interpreting income broadly within the meaning of the Sixteenth Amendment<sup>371</sup> or by finding an exemption from apportionment for excise taxes and then interpreting “excise” very broadly.<sup>372</sup> The broad definitions for “income” and “excise” should be applauded. Any port in a storm is a good one, and apportionment is a terrible storm. The available definitions of “income” and “excise” are elastic enough and the general attitude of courts toward Congress is deferential enough that no court should have real difficulty in protecting any tax from apportionment, using one safe harbor or the other.<sup>373</sup> The difficulty is that “income” and “excise” are both words with content and historical usages, and some judge may take the terms seriously and ask whether this or that tax is “really” an excise as the Founders meant the term, or was “really” “income” as used in common speech when the Sixteenth Amendment was adopted.<sup>374</sup> Congress has avoided taxes on unrealized but economically real gains, apparently in fear of the constitutional impediment to taxing unrealized amounts.<sup>375</sup> Unfortunately, some commentators call for defining “income” with some fundamental content, so that the definition will not float freely.<sup>376</sup> The history of the income tax is, with similar malfortune, littered with cases in which the courts have decided that the item in question was capital and not income and that the Sixteenth Amendment should not be “extended by loose construction.”<sup>377</sup> “Loose construction” is, of course, exactly what is called for. Narrow definitions of “excise” or “income” serve only to revive the sleeping monster of apportionment for no conceivable public

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<sup>371</sup> See, e.g., *Sokol v. Commissioner*, 67 T.C. 986, 991, *aff'd by* 574 F.2d 694, 699, *cert. denied* 439 U.S. 859 (1978) (holding that petitioner’s claim that lapse of forfeiture restriction on compensatory stock was not income came from “long abandoned” effort by Supreme Court to define Sixteenth Amendment income); *Neeman v. Commissioner*, 26 T.C. 864 (1956), *aff'd. per curiam* 255 F.2d 841 (2d Cir. 1958) (emphasizing that alimony is income within Sixteenth Amendment, although Supreme Court had held that alimony was not income under statutory construction).

<sup>372</sup> See, e.g., *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) (stating that gift tax was excise); *Flint v. Stone Tracey Co.*, 220 U.S. 107, 150 (1906) (holding that corporate income tax was excise); *Knowlton v. Moore*, 178 U.S. 41, 78-79 (1900) (establishing that estate tax was excise).

<sup>373</sup> See, e.g., *Pennsylvania Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960) (holding that tax on gross receipts was constitutional either as income or as excise).

<sup>374</sup> *United States v. Safety Car Heating Co.*, 297 U.S. 88 (1936) (holding that income under the Sixteenth Amendment was usually income as used in common speech).

<sup>375</sup> See, e.g., *Helvering v. Independent Life Ins. Co.*, 292 U.S. 371 (1934) (“The rental value of a building used by the owner does not constitute income within the meaning of the Sixteenth Amendment.”).

<sup>376</sup> Jensen, *supra* note 28, at 1397-99; Gabinet & Coffey, *supra* note 9, at 919, 944.

<sup>377</sup> *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) (establishing that stock dividend was capital, not income). See also *Edwards v. Cuba R.R. Co.*, 268 U.S. 628, 632 (1925) (holding that a government subsidy to a railroad was capital, not income within the Sixteenth Amendment); *Miles v. Safe Deposit Co.*, 259 U.S. 247, 252 (1922) (stating that a stock option could not be income).

purpose. Still, so long as judges pull their jurisprudence from a dictionary, we can expect the monster of apportionment to be revived from time to time. The broad definitions of “excise” and “income” were always just bridges to reach a just result. It is far better to be candid. A functional definition of “direct tax” such as *Hylton* adopted is needed, under which *any* tax that cannot be conveniently apportioned is, in consequence, indirect.

Construing the term “direct tax,” as advocated here, to mean requisitions, head taxes, and other cases that are equal per capita among the states, is not meant to be an endorsement of a per capita or head tax.<sup>378</sup> There are numerous cases in which “direct tax” is used to include capitation or head taxes in the Constitutional debates, but never in a way that would make capitation the only direct tax.<sup>379</sup> Even if a direct tax, defined as a capitation or a requisition from the states, is never used again by the federal government, the construction is sound. A null case for an absurd requirement is a perfectly acceptable result.

In other circumstances, courts refuse to enforce terms that are like apportionment too silly to have been intended. In the 1658 case of *James v. Morgan*,<sup>380</sup> for instance, Morgan agreed to buy a horse from James for the

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<sup>378</sup> See *supra* discussion accompanying notes 168-75.

<sup>379</sup> See James Madison’s Notes on Debates in the Federal Convention (Elbridge Gerry, Mass.), July 13, 1787, in 1 RECORDS, *supra* note 46, at 600 (arguing that assessment on the inhabitants of the state might restrain the legislature to a poll tax); Cato Uticensis, *Letter VI*, N.Y.J., Dec. 13, 1787, reprinted in 14 COMMENTARIES, *supra* note 51, at 428, 430-31 (arguing that apportionment by population will be the basis for an odious poll tax); Letter from Brutus V to the People of the State of New York (Nov. 27, 1787), N.Y.J., Dec. 13, 1787, reprinted in 14 COMMENTARIES, *supra* note 50, at 427 (stating that direct taxes include poll taxes); Letter from a Gentleman from Massachusetts (Oct. 17, 1787), in 2 FOUNDERS, *supra* note 139, at 114 (asking why two-fifths of the slaves are excluded from capitation); Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, in 15 COMMENTARIES, *supra* note 47, at 374, 377 (referring to “direct taxes by capitation or assessment”).

<sup>380</sup> *James v. Morgan*, 83 Eng. Rep. 323 (1658).

consideration of one grain of barley per nail, doubling it for every nail in the horse's hooves. The horse turned out to have thirty-two nails and two hundred thirty-two was over four billion grains or the harvest from five hundred quarters. The Court directed Morgan to pay for the horse, but only for the fair value of the horse as determined by the jury. Morgan should be presumed to have intended the natural consequences of the words of the contract. With fewer nails in the hooves, the contract might have been enforceable on its literal terms. Still, at some point with a number of nails, the contract became too silly to be enforced. Apportionment is, like Morgan's bailey-corn contract, too silly to be enforced.

Avoidance of apportionment is loyal to the Founder's most fundamental intent—to give Congress a viable power to lay direct taxes—but it does require a definition of the term “direct tax” that is much narrower than that which would be drawn from usages in the Constitutional debates. The kind of constitutional construction that works worst here is to make a “fortress out of a dictionary.”<sup>381</sup>

The term “direct tax” was used quite broadly in the Constitutional debates, commonly applied to every tax except for taxes on imports and exports. Yet construing the term literally is like the story of the man who told his babysitter to teach his children some games.<sup>382</sup> When he returned, he found the baby sitter had taught knife-throwing games and strip poker to his child. May the babysitter defend his actions by pointing to a dictionary or list of games in which poker and mumblety-peg are listed? Does the father need to have thought of excluding mumblety-peg? Words are not magic and should not force nonsense. The meaning must arise from the context or function to which the terms are put.

In arguing that the apportionment requirement should be construed tightly so as to amount almost to repeal, this Article does not mean to suggest here or in general, that conservatives or liberals can pick and choose among the Constitution's provisions, adopting the rights and powers they like and erasing the parts or history they do not. It would be highly illegitimate, for example, to choose which taxes are direct by whether the proposed tax would redistribute the tax burden upward or downward. Given the original purpose of apportionment to capture wealth, it would be highly illegitimate to hold that taxes on capital are direct taxes, while flat taxes on consumption are only indirect. By defining direct tax narrowly by relying on textual arguments without the historical usages, this

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<sup>381</sup> Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd* by 326 U.S. 404 (1945) (Hand, J.) (“[I]t is one of the surest indexes of a mature and developed jurisprudence *not* to make a fortress out of the dictionary.”) (emphasis added).

<sup>382</sup> LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 53 (1958).

Article does not mean generally to praise a style of interpretation that looks to the face of the text ahistorically, divorcing the words from history, original usages, context, or structure. Here, however, a facially textual interpretation can accomplish the results, so this Article favors it. The United States needs to free itself from a two hundred year-old glitch.

The Author is very sympathetic to the Realists' basic agenda: "Where the reason endeth, so endeth the rule."<sup>383</sup> The Author sympathizes with what has been praised as "the American habit of supplying shortcomings in the Constitution by construction rather than outright amendment."<sup>384</sup> Constitutions should grow as the nation grows and the man should not be forced to continue to wear the boy's coat, as Jefferson noted.<sup>385</sup> Still, one should not have to go very far down that road of functional construction to fix a mistake, identified as a mistake by its internal absurdity. Not every mistake in the Constitution can be fixed by interpretation. Slavery and malapportionment in the Senate were intended too deeply to fix, as if they were scrivener's errors. Even so, one can take the Constitution quite seriously across the board,<sup>386</sup> while fixing up the apportionment requirement by interpretation. Three tries at Constitutional repeal are quite enough for one absurd little rule, and it is time now to get rid of the thing once and for all by obliterating construction.

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<sup>383</sup> See Holmes, *quoted in text accompanying supra* note 116. See also Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 206 (1931) (arguing that there is no escaping responsibility of law to morality or to the service of the good life); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960) ("Of all of these things, only 'see it fresh,' 'see it clean' and 'come back to make sure' are of the essence.").

<sup>384</sup> Corwin, *supra* note 39, at 23.

<sup>385</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON 37, 42 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899).

<sup>386</sup> Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981) (book review); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1224-25 (1995) (arguing that constitutional interpretation is not mere language for expressing one's personal preferences). For a fine recent defense of the role of court-made doctrine in constitutional interpretation, see Boris Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9 (1995).

**APPENDIX I:  
ORIGIN AND INCORPORATION OF THE  
“FEDERAL FORMULA”<sup>1</sup>**

The main text of this Article describes the apportionment requirement of the Constitution, organized around the argument that the requirement is a mistake, which even the Framers really did not intend, and that the requirement should be avoided by construction. This Appendix organizes the history chronologically, explaining how the apportionment requirement arose and came to be incorporated into the Constitution.

Article I of the Constitution requires that both direct taxes and votes in the United States House of Representatives be allocated among the states according to population, counting slaves at a ratio of three-fifths of one free man:

Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, [but including] three fifths of all other Persons.<sup>2</sup>

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<sup>1</sup> EDWIN R. A. SELIGMAN, *THE INCOME TAX: THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 540-71 (2d ed. 1914) (1911) is an early but sound description of the subject matter covered in this Appendix. The history related here generally is consistent with Seligman’s account, although new sources are now available that Seligman was not able to use.

<sup>2</sup> U.S. CONST. art. I, §2. Subsequently, of course, the Thirteenth Amendment abolished slavery. Amendment XIV, § 2 now provides that representatives shall be apportioned by “counting the whole number of persons in each state, excluding Indians not taxed.” U.S. CONST. amend. XIV, §2.

The “all other persons” in the clause are the slaves.<sup>3</sup> The formula for apportionment by population including three-fifths of the slaves was known as the “federal formula” or “federal ratio” in the Constitutional debates.<sup>4</sup> The formula arose under the Articles of Confederation and was brought over intact into the Constitution as a tactical move when the Constitutional Convention was deciding the manner in which voting in Congress should be determined.

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<sup>3</sup> See 25 JOURNALS OF THE CONTINENTAL CONGRESS 952 (April 1, 1783) (Gaillard Hunt ed., 1922) [hereinafter 25 JOURNALS]; James Madison’s Notes on Debates in the Federal Convention (James Wilson, Pa.), June 11, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 1 RECORDS]; James Madison’s Notes on Debates in the Federal Convention (William Paterson, N.J.), July 9, 1787, in 1 RECORDS, *supra* at 561; James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass.), July 9, 1787, in 1 RECORDS, *supra* at 562; *Massachusetts Ratification Convention Debates* (Rufus King), Jan. 17, 1787, in A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION 84 (John P. Kaminski ed., 1995) [hereinafter A NECESSARY EVIL?].

<sup>4</sup> See Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 350, 358 (John P. Kaminski & Gaspare J. Saldino eds., 1995) (“federal plan”) [hereinafter 17 COMMENTARIES]; “A Citizen of New Haven” (Roger Sherman), *Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 280, 282 (John P. Kaminski & Gaspare J. Saldino eds., 1984) (“federal rule”) [hereinafter 15 COMMENTARIES]; *Selected Debates in Congress Involving Constitutional Principles: Direct Taxes* (Theodore Sedgwick, Mass.), May 6, 1794, in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 433 (Jonathan Elliot ed., Ayer Co. 1987) (1888) (“federal ratio”) [hereinafter 4 DEBATES].



## I. ORIGIN OF THE FEDERAL RATIO UNDER THE ARTICLES OF CONFEDERATION

The formula used in Article I of the Constitution arose under the Articles of Confederation as a proposal for determining a state's share or quota of a federal requisition.<sup>5</sup> Under the Articles, the only national government was a unicameral body, "the united states in congress assembled."<sup>6</sup> The term "congress" originally meant only an assembly of diplomats and not a governing body.<sup>7</sup> Under the Articles, Congress had no power to tax anything directly and it could raise revenue for the war against the British, or for any general purpose, only by requisitions or quotas instructing the legislatures of the individual states to supply money. Each state legislature was required to meet its quota by adopting and collecting tax under its own state law and then paying the money to the Congressional treasury.

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<sup>5</sup> The Articles of Confederation were not approved by all of the thirteen original states until 1781, but they were drafted by a committee of the Continental Congress in 1776 and approved by that body in 1778. The Articles served as the constitutional framework for the new nation throughout the Revolutionary War. *See* MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 2 (1913). The Articles were not formally replaced until the Constitution became effective in 1788. *See* *CONSTITUTIONS OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* xv-xxi (Johnny H. Killian & George A. Costello eds., 1992).

<sup>6</sup> Articles of Confederation art. VIII, *in* FARRAND, *supra* note 5, at 216.

<sup>7</sup> *See* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 206 (1996).

Before the requisitions set forth in the Articles of Confederation in 1776, Congress financed the Revolutionary War solely by issuing paper money. Congress adopted the strategy of issuing paper money in 1775, while George Washington was organizing the Continental Army. Apparently, the Continental Congress anticipated that each state would redeem the paper money in proportion to its population.<sup>8</sup>

Apportionment of taxes among the states arose by necessity because the central or federal government was no more than an assemblage of delegates. In 1698, William Penn proposed a plan for an annual congress of delegates from the colonies, and his plan would have permitted congress to set quotas for contributions of men and money by the colonies to be used for their common safety.<sup>9</sup> Raising revenue by apportioning the common burden among the states was as necessary to the 1776 Congress as it would have been to a congress in 1698.

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<sup>8</sup> See EDMOND BURNET, *THE CONTINENTAL CONGRESS* 215-20 (1941); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS* 205-15 (1979).

<sup>9</sup> See 1 *SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS: NATIONAL DOCUMENTS* 1492-1800, at 138 (William F. Swindler ed., 1982).

The Articles of Confederation allocated requisitions among the states in proportion to the value of land and improvements within each state.<sup>10</sup> Appraisal of the value of land and improvements was to follow such a mode as Congress should appoint.<sup>11</sup> When the Articles were first considered in the Continental Congress in July of 1776, just after the signing of the Declaration of Independence, the committee charged with the responsibility for drafting the Articles proposed determining state quotas by the population of each state. They suggested counting the “number of Inhabitants of every Age, Sex and Quality, except Indians not paying Taxes.”<sup>12</sup> The Congress could not agree, however, as to how to account for the slaves, it adopted instead an allocation of quotas by value of land and improvements.<sup>13</sup>

Allocating quotas by value of land did not work very well though, primarily because of the difficulty of obtaining acceptable appraisals. As the North Carolina delegates explained, writing home to their governor:

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<sup>10</sup> See Articles of Confederation art. VIII, in FARRAND, *supra* note 5, at 216.

<sup>11</sup> See *id.*

<sup>12</sup> Draft of the Articles of Confederation art. XI (July 12, 1776), in 5 JOURNALS OF THE CONTINENTAL CONGRESS 546, 548 (Worthington Chauncey Ford ed., 1906) [hereinafter 5 JOURNALS]. See also subsequent draft of the Articles of Confederation art. XI (Aug. 20, 1776), *id.* at 678.

<sup>13</sup> See Debates in the Continental Congress (James Wilson, Pa.), Mar. 28 1783, in 25 JOURNALS, *supra* note 3, at 948 (recalling that he was in Congress in 1776 and that he saw that the allocation of requisitions by the Articles of Confederation according to land value was agreed upon because it was impossible for the Eastern and slave states to agree on how slaves should be counted).

We have been attempting with much pains to fix on some mode by which the quota of the several States might be determined according to the 8th Article of the Confederation, i.e. according to the value of located Lands [and] their improvements. The Rule is good and plain but the question is extremely difficult; How shall the value be fixed? Let the appropriated Lands and their improvements be valued by the Inhabitants of the respective States and we have great reason to believe, from proofs before us, that the valuation would be unequal and unjust; for instance, The average value of lands as they are now rated for the purpose of taxation in the State of Virginia is one third higher than the value of Lands as they are rated in Pennsylvania though it is certain that the Lands in Pennsylvania are at an average worth one third more than the Lands in Virginia. If such valuation should be made in fixing the continental Quota, Pennsylvania when compared with Virginia would not pay quite half the sum she ought to pay. . . . It is presumed that the valuation would be more uniform and just if it was made by a Set of Commissioners who should view all the lands and buildings in the United States. But there is reason to believe that such process, like estates entailed, would be perpetual and, it would be an even chance which would come first The fixing [of] the quotas or the day of Judgment.<sup>14</sup>

The Continental Congress itself had manipulated land appraisals to maintain revenue

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<sup>14</sup> Report of the North Carolina Congressional Delegates to Governor Alexander Martin (Mar. 24, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 90 (Paul H. Smith ed., 1993) [hereinafter 20 LETTERS]. Note that the Continental Congress always had the formal authority to estimate land values under Article VIII of the Articles of Confederation, so that the Congress was not bound formally by any state's underappraisals. See Articles of Confederation art. VIII, in FARRAND, *supra* note 5, at 216.

for the war effort. The states varied in their willingness to pay their “mandatory” quotas and Congress appraised land values highest in those states that displayed a willingness to pay their quotas.<sup>15</sup> Valuation of land and improvements, it was said, generated “contentions,” “clamors,” and “jealousies” among the states.<sup>16</sup>

In 1783, the Continental Congress proposed amending the Articles of Confederation to replace the apportionment of requisitions by land values with an apportionment based on population, counting slaves at three-fifths:

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<sup>15</sup> See FARRAND, *supra* note 5, at 4.

<sup>16</sup> See Debates in the Continental Congress (James Madison, Va.), Mar. 27, 1783, in 25 JOURNALS, *supra* note 3, at 948 (“contentions”); Debates in the Continental Congress (Nathaniel Gorham, Mass.) Mar. 27, 1783, in 25 JOURNALS, *supra* note 3, at 948 (“clamors” in Massachusetts, especially since the War ended); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1797) (Paterson, J., concurring) (stating that unequal contributions both engendered discontent and fomented “jealousies”).

[Contributions to the Congressional treasury shall be supplied by the states], in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State.<sup>17</sup>

The phrase “all other persons” referred to the slaves. The delegates “had been ashamed to use the term ‘Slaves’ [and] had substituted a description.”<sup>18</sup>

The 1783 formula for apportionment was never adopted under the Articles of Confederation. The Articles required unanimity for amendment and both New York and New Hampshire refused adoption.<sup>19</sup> Nonetheless, the delegates to the Constitutional Convention considered the formula legitimate, in part because eleven of

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<sup>17</sup> Debates in the Continental Congress, April 18, 1783, in 24 JOURNALS OF THE CONTINENTAL CONGRESS 260 (April 18, 1783), (Galliard Hunt ed., 1922) [hereinafter 24 JOURNALS]. As reported by committee, contributions were to be “in proportion to the number of inhabitants of every age, sex [and] condition, except Indians not paying taxes.” Debates in the Continental Congress, Mar. 7, 1783, in 25 JOURNALS, *supra* note 3, at 922.

<sup>18</sup> James Madison’s Notes on Debates in the Federal Convention (William Paterson, N.J.), July 9, 1787, in 1 RECORDS, *supra* note 3, at 561.

<sup>19</sup> See FARRAND, *supra* note 5, at 5; ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 23-24 (1993); Articles of Confederation art. XIII, in FARRAND, *supra* note 5, at 223.

the thirteen states had accepted it.<sup>20</sup> The formula was used in the 1786 requisitions, it was called the “federal formula” or “federal plan” in the Constitutional debates<sup>21</sup> and, without substantive change in language, it became the apportionment formula for direct taxes and votes in Article I of the Constitution.

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<sup>20</sup> See, e.g., James Madison’s Notes on Debates in the Federal Convention (James Wilson, Pa.), June 11, 1787, in 1 RECORDS, *supra* note 3, at 201; James Madison’s Notes on Debates in the Federal Convention (William Paterson, N.J.), July 9, 1787, in 1 RECORDS, *supra* note 3, at 561; James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass.), July 9, 1787, in 1 RECORDS, *supra* note 3, at 562 (arguing that the federal ratio was legitimate because eleven of thirteen states had approved it); *Massachusetts Ratification Convention Debates* (Rufus King), Jan. 17, 1787, in A NECESSARY EVIL?, *supra* note 3, at 84; Nathaniel Gorham, *id.* at 85.

<sup>21</sup> See *The Confederation Congress and the Population Amendment of 1783*, in A NECESSARY EVIL?, *supra* note 3, at 19.

Requisitions, in theory, were mandatory under the Articles of Confederation but, in practice, the states commonly treated them as mere legislative recommendations to reject or accept according to the independent wills of their individual legislatures. It was the failure of the states to pay their requisitions that led to the financial crisis that instigated the Constitutional Convention.<sup>22</sup>

A. *Apportionment Was by Wealth*

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<sup>22</sup> See THE FEDERALIST NO. 15, at 89-90 (Alexander Hamilton) (Mod. Lib. College ed. n.d.) (asserting that states treated requisitions as mere recommendations although, in theory, they were mandatory); James Madison, Debates in the Virginia Ratification Convention (June 7, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, VIRGINIA 1028 (John P. Kaminski & Gaspare J. Saldino eds., 1993) [hereinafter 9 STATES] (“A Government which relies on thirteen independent sovereignties, for the means of its existence, is a solecism in theory, and a mere nullity in practice.”); Edmund Randolph, Debates in the Virginia Ratification Convention (June 7, 1788), in 9 STATES, *supra*, at 1017 (stating that Virginia taxpayers would laugh at the government’s folly if Virginia only could raise revenue, as in requisitions, by earnest entreaties or humble supplications or solicitations). James Madison, in what often is called the “Preface to the Constitution,” explained that none of the States complied with the quotas in full, some failed altogether or nearly so, and New Jersey responded to a quota simply by repealing the law, without any compliance. See James Madison’s Notes on Debates in the Federal Convention, July 6, 1787, in 1 RECORDS, *supra* note 3, at 547.



The apportionment of taxes by population was treated, throughout the debates, as merely an administratively efficient way to base taxation upon the relative wealth of the states. When the Articles of Confederation were proposed in 1776 in the Continental Congress, John Adams argued that, given the impracticability of land appraisals, population was an acceptable “index of wealth” of the various states.<sup>23</sup> Samuel Chase of Maryland argued that although taxation always should be in proportion to property, in practice property never could be estimated justly and equally. Some other measure of wealth therefore must be devised, he said, which would be simpler. Given the difficulty of land valuations, the number of inhabitants within a state was a “tolerably good criterion of property.”<sup>24</sup> James Wilson of Pennsylvania also argued in 1776 that “taxation should be in proportion to wealth.”<sup>25</sup> When Congress proposed, in 1783, to move from apportionment by land value to apportionment by population, the shift was justified solely as a shift to “a more convenient and certain rule of ascertaining” quotas,<sup>26</sup> and not as an alteration of the underlying principle that requisitions should be

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<sup>23</sup> See Thomas Jefferson’s Notes of Proceedings in Congress (John Adams, Mass.), July 12, 1776, in 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 439 (Paul H. Smith ed., 1979) [hereinafter 4 LETTERS].

<sup>24</sup> *Id.* at 438. Samuel Chase later wrote the lead opinion in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1797), holding that a tax on carriages was not direct because it did not tax either people or real property. See also THE FEDERALIST NO. 21, *supra* note 22, at 130 (Alexander Hamilton) (arguing that apportionment either by population or by land value was acceptable as a standard, although apportionment by population was much easier to administer).

<sup>25</sup> Thomas Jefferson’s Notes of Proceedings in Congress (James Wilson, Pa.), July 12, 1776, in 4 LETTERS, *supra* note 23, at 444.

<sup>26</sup> *Report of the Committee on Revenue*, Mar. 7, 1783, in 25 JOURNALS, *supra* note 3, at 922. See also Debates in the Continental Congress (James Madison, Va.), March 28, 1783, in 25 JOURNALS, *supra* note 3, at 949 (arguing for the necessity of a simple and practicable rule); Debates in the Continental Congress (Nathaniel Gorham, Mass.), Mar. 27, 1783, in 25

allocated by the relative wealth of the states.

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JOURNALS, *supra* note 3, at 948 (favoring the shift to apportionment by population because of the clamors produced over valuations of land in Massachusetts).

Similarly, in the Constitutional debates, delegates from both the North and South treated apportionment by population as a way to measure the relative wealth of the states. At the Philadelphia Convention, James Madison argued that because the states' governments, laws, and manners were similar, population was a sufficiently accurate measure of the relative wealth of the states.<sup>27</sup> William Samuel Johnson of Connecticut argued that "population [was] the best measure of wealth."<sup>28</sup> Charles Pinckney of South Carolina argued for a rule for determining votes in Congress that included slaves, contending that free laborers added to the Northern states' wealth in the same way that slaves added to the wealth of the Southern states.<sup>29</sup> Oliver Ellsworth of Connecticut proposed an amendment to accept apportionment by population "until some other rule that shall more accurately ascertain the wealth of the several states can be devised."<sup>30</sup>

James Wilson of Pennsylvania argued that the number of inhabitants of a state was a fair measure of wealth.<sup>31</sup> George Mason of Virginia urged that, while numbers were not always a precise standard of wealth, they were sufficiently so for every substantial purpose.<sup>32</sup>

When the issue emerged in the state ratification debates, delegates treated population only as a measurement of each state's wealth. In New York, "Publius"

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<sup>27</sup> See James Madison's Notes on Debates in the Federal Convention (James Madison), July 11, 1787, in 1 RECORDS, *supra* note 3, at 585. See also *The Debates in the Convention of the State of Pennsylvania* (James Wilson), Dec. 4, 1787, in 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 483 (Jonathan Elliot ed., Ayer Co. 1987) (1888) [hereinafter 2 DEBATES] (arguing that population is an exact measure of comparison among the provinces only when they have nearly equal resources, but of all objects which may be subjected to a determined and positive calculation, population approaches nearest to the truth); Rufus King, *Speech to the Senate: Article 1, § 9, Cl. 4, No. 16* (Mar. 1819), reprinted in 3 THE FOUNDERS' CONSTITUTION 362-63 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter 3 FOUNDERS] ("[I]n states, in the circumstances of the United States, whose institutions, laws and employments are so much alike, the rule of number is probably as nearly equal as any other simple and practical rule can be expected to be . . .").

<sup>28</sup> James Madison's Notes on Debates in the Federal Convention (William Samuel Johnson, Conn.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 593.

<sup>29</sup> See James Madison's Notes on Debates in the Federal Convention (Charles Pinckney, S.C.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 596-97.

<sup>30</sup> James Madison's Notes on Debates in the Federal Convention (Oliver Ellsworth, Conn.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 594.

<sup>31</sup> See James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 587. See also James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), June 9, 1787, in 1 RECORDS, *supra* note 3, at 176 (arguing that, in districts as large as the States, the number of people was the best measure of their comparative wealth).

<sup>32</sup> See James Madison's Notes on Debates in the Federal Convention (George Mason, Va.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 579.

described the function of apportionment by population as a “reference to the proportion of wealth.”<sup>33</sup> In the Massachusetts Convention, Thomas Davies argued that the rule for apportionment was the best that could be obtained for comparative measurement of wealth.<sup>34</sup> In South Carolina, Charles Cotesworth Pinckney praised the formula because “the productive labour of its inhabitants was the best rule for ascertaining” the wealth of a state.<sup>35</sup>

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<sup>33</sup> THE FEDERALIST NO. 54, *supra* note 22, at 354 (Alexander Hamilton or James Madison).

<sup>34</sup> See The Debates in the Convention of the Commonwealth of Massachusetts (Thomas Davies), Jan. 18, 1788, in 2 DEBATES, *supra* note 27, at 42.

<sup>35</sup> Charles Cotesworth Pinckney, *Debate in the South Carolina House of Representatives: Calling the South Carolina Convention to Ratify the Constitution* (Jan. 17, 1788), in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 509 (John P. Kaminski & Gaspare J. Saldino eds., 1986) [hereinafter 16 COMMENTARIES]. See also Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne of the French Foreign Office (Feb. 2, 1788), in 16 COMMENTARIES, *supra*, at 12 (arguing that the wealth of a state best was calculated only by the work of its inhabitants); James Madison’s Notes on Debates in the Federal Convention (James Madison, Va.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 585 (arguing that the value of labor might be considered the principal criterion of wealth and ability to pay tax).

There was, to be sure, considerable controversy as to how accurately population measured relative wealth. At the Constitutional Convention, Gouverneur Morris of Pennsylvania objected that the number of a state's inhabitants was not a proper standard for measuring wealth. The differences between the population and wealth in different countries, Morris argued, was extraordinary. Population might better measure military strength than wealth, but the victories of Great Britain against its many enemies disproved even that rule.<sup>36</sup> The other delegates, however, defended the sufficiency of using population to measure wealth. James Wilson, Morris's colleague from Pennsylvania, stated that he had seen the figures from Pennsylvania's western settlements, had compared them to Philadelphia, and could see little difference between apportionment by wealth and apportionment by property in the impact on apportioned state tax.<sup>37</sup> Nathaniel Gorham of Massachusetts said that estimates of population and property value had been made for the towns in Massachusetts, including Boston, and

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<sup>36</sup> See James Madison's Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 583-84. See also James Madison's Notes on Debates in the Federal Convention (Rufus King, Mass.), July 6, 1787, in 1 RECORDS, *supra* note 3, at 541 (arguing that population was not "the proper index of ability and wealth" upon which votes should be set, because Congress was going to form new states out of the Northwest Territories as soon as a Territory had a population equal to the lowest population of any existing state). King's argument seems most persuasive with respect to the issue of giving two Senate seats to the new states, but not especially persuasive when considering why population in the new states might not measure relative wealth. Still, King did join Morris in expressing skepticism that population would measure wealth.

<sup>37</sup> See James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 587.

that, “the most exact proportion prevailed between numbers [and] property.”<sup>38</sup> James Madison argued that, when intercourse among the states became easy and free, then movement between the states would destroy any inequality in population, industry and the value of labor. The value of labor, therefore, “might be considered as the principal criterion of wealth and ability to support taxes.”<sup>39</sup>

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<sup>38</sup> James Madison’s Notes on Debates in the Federal Convention (Nathaniel Gorham, Mass.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 587.

<sup>39</sup> James Madison’s Notes on Debates in the Federal Convention (James Madison, Va.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 585. *See also* Letter XI from The Landholder to the Citizens of New Hampshire (Mar. 10, 1788), in CONN. COURANT, *reprinted in* 16 COMMENTARIES, *supra* note 35, at 368 (arguing that “the population and fertility in any tract of country will be proportioned to each other”).

When the Constitution was ratified, Southerners celebrated the shift from allocation by value of land to allocation by population, and understood the shift to be very much in their favor. A Virginia federalist argued that Virginia would get a tax cut because, under the Articles of Confederation, Virginia paid more tax than Massachusetts, “whose number of white inhabitants is nearly double.”<sup>40</sup> The North Carolina delegates to the Philadelphia Convention wrote home in jubilation that the formula “must be greatly in our favor for as most of their Farms are small [and] many of them live in Towns[,] we certainly have . . . land of twice the value that they possess.”<sup>41</sup> The South, a French observer said, “would pay more if the contributions were proportional to the extent and to the fertility of the land.”<sup>42</sup> On the other hand, at least one Southern Anti-Federalist was not convinced that population measured wealth because “[t]he inhabitants of some states may be numerous and poor, and those of another, few and wealthy.”<sup>43</sup> Still, debaters who thought that population was an

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<sup>40</sup> A Native of Virginia, *Observations upon the Proposed Plan of Federal Government* (Apr. 2, 1788), reprinted in 9 STATES, *supra* note 22, at 663.

<sup>41</sup> Letter from William Blount, Richard D. Spaight, and Hugh Williamson to Governor Caswell of North Carolina (Sept. 18, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION ON 1787, at 83 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 3 RECORDS].

<sup>42</sup> Letter from Gaspard Joseph Amand Ducher to Comte de la Luzerne of the French Foreign Office (Feb. 2, 1788), in 16 COMMENTARIES, *supra* note 35, at 12.

<sup>43</sup> A Federal Republican, *A Review of the Constitution Proposed by the Late Convention Held at Philadelphia* (Nov. 28, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 255, 273 (John P. Kaminski & Gaspare J. Saldino eds., 1983) [hereinafter 14 COMMENTARIES]. See also Thomas Davies, Speech Before the Massachusetts Ratifying Convention (Jan. 18, 1788), in 3 FOUNDERS, *supra* note 27, at 356 (arguing in defense of

inaccurate measure of wealth nonetheless agreed that the use of population was intended to measure wealth for apportionment purposes.

Population could have been quite inaccurate and still have been the best measure of wealth under the circumstances. The states did not have dramatic disparities in per capita wealth, and establishing valuations of land had proved impractical. Therefore, considering the “combined advantages of simplicity, certainty, facility and equity,” a New England Federalist argued, “probably [no criterion could] be found more eligible” for assessing taxes than apportionment by population.<sup>44</sup>

B. *The Problem of Counting Slaves*

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Constitution that population is a better measure of wealth than quantity of land).

<sup>44</sup> *Mark Antony*, BOSTON INDEP. CHRON., Jan. 10, 1788, reprinted in *A NECESSARY EVIL?*, *supra* note 3, at 80; THE FEDERALIST NO. 54., *supra* note 22, at 353-54 (Alexander Hamilton or James Madison) (arguing that population was the least exceptionable among the practicable rules).



While a consensus developed that allocation of taxes among the states should follow wealth, and that population would sufficiently measure the relative wealth of the states, there was no consensus on how to count slaves. In July of 1776, when the Articles of Confederation were first being considered, the South wanted slaves to be excluded entirely from the computation of taxes. Samuel Chase of Maryland, speaking for the South, argued that including slaves in the formula for state quotas was double counting, taxing the Southern states “according to their numbers [and] their wealth conjunctly.”<sup>45</sup> When a Northern farmer achieved a surplus, Chase argued, he would invest in cattle and horses; a Southern farmer, with the same surplus, would invest in slaves.<sup>46</sup> Slaves should not be counted in the population, Chase said, any more than cattle.<sup>47</sup>

Northern delegates, by contrast, argued that slaves should be included in the census for establishing the tax quotas because slaves were like peasants, or freemen. In some countries, John Adams argued, the laboring poor were called freemen, in others they were called slaves, but the difference was imaginary only. Ten laborers added as much wealth annually to a state whether they were freemen or slaves, Adams asserted.<sup>48</sup> James Wilson of Pennsylvania argued, similarly, that farmers in the Southern colonies ordinarily paid poll taxes upon each of their laborers, whether free or slave: “Dismiss your slaves [and] freemen will take their places.”<sup>49</sup> Slaves were even more valuable, Wilson claimed, because nonslave women generally were exempted from labor, but slave women were not.<sup>50</sup>

The first proposed compromise between the slave and nonslave states, offered in 1776, proposed including one-half of all slaves in the count for tax quotas. Benjamin Harrison of Virginia argued for the compromise because of the relative price of labor in the North and South: the cost of a laborer in the Southern colonies was between eight and twelve pounds per year, while in the Northern colonies the cost was about twenty-four pounds per year.<sup>51</sup> The North rejected the compromise in 1776,<sup>52</sup> and the Articles

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<sup>45</sup> Thomas Jefferson’s Notes of Proceedings in Congress (Samuel Chase, Md.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 439. *See also* John Adams, Notes of Debate (Thomas Lynch, S.C.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 568-69 (arguing that slaves should not be taxed any more than sheep and horses).

<sup>46</sup> *See* Thomas Jefferson’s Notes of Proceedings in Congress (Samuel Chase, Md.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 439.

<sup>47</sup> *See id.*

<sup>48</sup> *See* Thomas Jefferson’s Notes of Proceedings in Congress (John Adams, Mass.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 339-40.

<sup>49</sup> Thomas Jefferson’s Notes of Proceedings in Congress (James Wilson, Pa.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 440.

<sup>50</sup> *See id.*

<sup>51</sup> *See* Thomas Jefferson’s Notes of Proceedings in Congress (Benjamin Harrison, Va.), July 30, 1776, in 4 LETTERS, *supra* note 23, at 440.

of Confederation ultimately set the allocation of requisitions by the value of land instead.

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<sup>52</sup> See Debates in the Continental Congress (Edward Clarke, N.J.), Mar. 27, 1783, in 25 JOURNALS, *supra* note 3, at 948 (reporting that the South had been willing to accept slaves at one-half).

In 1783, when the Continental Congress proposed to move from apportionment by land value to apportionment by population, the report of the Congressional Committee on Revenue in charge of the issue proposed to allocate quotas in “proportion to the number of inhabitants of every age, sex [and] condition, except Indians not paying taxes,” and excluding slaves of below some then undetermined age, with the assumption that excluding slaves below age sixteen would exclude one-half the slaves.<sup>53</sup> Nonslave children were not excluded from the population count, although they made no immediate contribution to wealth, so the exclusion clearly was intended as an accommodation to the South. Writing home, the North Carolina delegation described the political situation as follows:

The eastern States, who consider the valuation Scheme as impracticable, talk much of fixing the quota's [sic] according to the number of Inhabitants, making considerable allowance for slaves. Some of them propose to exclude all Slaves under 16 Years, which would be rating two slaves for one free man. We presume that the Southern States would meet them upon this ground or even upon ground somewhat lower [higher?] for the sake of preventing Jealousies, a Contention and delay but we fear that if an attempt should be made to alter or amend the mode of fixing the quota, those very men would again talk of a Slave being equal to a white man.<sup>54</sup>

Congress, taking up the report of the committee, preferred an exclusion of an established fraction of the slaves instead of an exclusion by age. The North proposed counting three-fourths (seventy-five percent) of the slaves. A motion for counting slaves at two-thirds (sixty-six percent) lost on a deadlocked vote of five states for and five states against, with the South providing four of the five votes against the motion. With some delay and on the motion of Alexander Hamilton of New York, the Congress voted to count three-fifths of the slaves (sixty percent) in the requisition formula. The vote was unanimous, with “despair on both sides of a more favorable rate of the slaves.”<sup>55</sup> This compromise in 1783 became the formula for apportionment in Article

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<sup>53</sup> *Report of the Committee on Revenue*, Mar. 7, 1783, in 25 JOURNALS, *supra* note 3, at 922.

<sup>54</sup> Report of the North Carolina Congressional Delegates to Governor Alexander Martin (Mar. 24, 1783), in 20 LETTERS, *supra* note 14, at 90-91.

<sup>55</sup> 25 JOURNALS, *supra* note 3, at 952 (April 1, 1783).

I of the Constitution.

Allocation of taxes according to population generally was accepted in both the North and the South as a measure of wealth, but the three-fifths clause was not. The exclusion of forty percent of the slaves must have contributed to the fatal rejection of the 1783 requisition by New York and New Hampshire; the Massachusetts legislature had expressed opposition to any exclusion of slaves, although it ultimately approved the 1783 requisition.<sup>56</sup> In the ratification debate in Massachusetts in 1788, anti-federalists complained that under the constitutional apportionment for taxes, “three Massachusetts infants will increase the tax equal to five sturdy, full grown negroes of theirs.”<sup>57</sup>

The South considered the ratio to be a victory. The French delegation in North Carolina wrote home that the allocation of tax was decidedly in the South’s favor: “[W]ill not *five* negroes who work *the entire year* in the southern states give more territorial wealth, than [three] Whites whose work is halted by the winter during at least [four] months of the year?”<sup>58</sup>

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<sup>56</sup> See James Madison’s Notes on Debates in the Federal Convention (Nathaniel Gorham, Mass.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 587 (saying that when the Continental Congress’ 1783 proposal for changing the apportionment formula was before the Massachusetts legislature, the only objection was that slaves should be counted in full in taxation, instead of being counted at the ratio of three-fifths).

<sup>57</sup> Consider Arms, Malachi Maynard, and Samuel Field, *Dissent to the Massachusetts Convention* (Apr. 9, 1788), in NORTHAMPTON HAMPSHIRE GAZETTE, April 16, 1788, reprinted in 17 COMMENTARIES, *supra* note 4, at 43-44; *Debates in Massachusetts Ratification Convention* (Samuel Nasson), Jan. 17, 1787, in A NECESSARY EVIL?, *supra* note 3, at 86 (saying that Southern states will pay as much tax for five “hearty working Negro men” as Northern states will pay for “three children in the cradle”).

<sup>58</sup> Letter from Joseph Amand Ducher to Comte de la Luzerne of the French Foreign Office (Feb. 2, 1787), in 16 COMMENTARIES, *supra* note 35, at 12.

By the time of the ratification debates, however, representatives from each region had conflicting motivations because votes in the proposed House of Representatives, as well as taxes, were to be allocated by the three-fifths rule. These conflicting motivations often confused the debaters and frequently caused Northerners and Southerners to switch rhetorical posture when going from the issue of representation to the issue of taxation. For the purpose of representation in the House, the North wanted to exclude slaves and the South wanted to include them at full count—yet each region took precisely the opposite position with respect to the issue of taxation. Neither side was always logically consistent in its line of argument, each side appropriated the other’s metaphors. Thus, Southern delegates argued that slaves were just like peasants and laboring freemen, and should be included in full to determine votes in Congress.<sup>59</sup> That slaves did not vote did not matter, the South argued, because nonslave women and children also did not vote but nonetheless increased representation. Conversely, Northern representatives argued that slaves should be excluded because they were property, just like cattle or horses.<sup>60</sup>

The North had a logically consistent argument for excluding slaves from representation but not from tax determinations: Slaves added to wealth and taxes were to be allocated solely on the basis of a state’s wealth. Slaves were held entirely at the will of their master, however, so counting them for the purpose of representation would do nothing more than increase the voting power of their masters who did not represent them.<sup>61</sup> “Publius” argued that the North should accept the three-fifths clause in the

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<sup>59</sup> See James Madison’s Notes on Debates in the Federal Convention (Pierce Butler, S.C.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 580 (arguing that the labor of a slave in the South was as valuable as that of a freeman in the North; slaves were the peasants of the South).

<sup>60</sup> See James Madison’s Notes on Debates in the Federal Convention (Elbridge Gerry, Mass.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 201 (asking why slaves who were property in the South should affect the rule of representation any more than cattle and horses in the North); “Brutus,” *To the Citizens of the State of New York*, N.Y.J., Nov. 15, 1787, reprinted in 14 COMMENTARIES, *supra* note 43, at 120-121 (arguing that if slaves are included in vote determination, then the oxen and horses in other states also should increase votes).

<sup>61</sup> See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 635, 641 (Thomas Cooley ed., 4th ed. 1833) (arguing that slaves should be included in tax formula but not in representation formula); James Madison’s Notes on Debates in the Federal Convention (William Paterson, N.J.), July 9, 1787, in 1 RECORDS, *supra* note 3, at 561 (stating that he could look at slaves in no way other than as property because they were entirely at the will of their master); James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), August 8, 1787, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 222 (Max Farrand ed., rev. ed. 1937) (1911) [hereinafter 2 RECORDS] (arguing that Southern owners could increase voting power by vile slave raids and importation of slaves); Luther Martin, Speech Before the Maryland House of Delegates by Maryland Representatives to the Constitutional Convention (Nov. 29, 1787), in 14 COMMENTARIES, *supra* note 43, at 289 (opining that slaves should be included in taxation but not in representation).

spirit of compromise.<sup>62</sup> A strong argument can be made, however, that both excluding two-fifths of the slaves from the tax-base formula and including three-fifths of the slaves in the representation formula were unprincipled, pro-South adjustments and not compromises.

## II. APPORTIONMENT OF DIRECT TAXES BY THE FEDERAL FORMULA

The Framers brought the Federal Formula for apportionment of direct taxes among the states into the Constitution on July 12, 1787. Apportionment of taxes was adopted only because the formula for apportionment counted slaves at three-fifths. Adoption of the apportionment requirement for direct taxes can be explained as a short term, largely cosmetic gambit that made sense only in a transient situation. The adoption of the apportionment requirement, however, also can be traced to more enduring factors: (a) in the eighteenth century it was considered reasonably legitimate to tie both votes and taxes to a formula measuring wealth; (b) apportionment of taxes among the states had a long history and was the status-quo under the Articles of Confederation; and (c) the temporary political conditions under which the formula was brought into the Constitution reflected intense, long term disputes between slave and nonslave states.

### A. *The Short-Term Focus*

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<sup>62</sup> See THE FEDERALIST NO. 54, *supra* note 22, at 357 (Alexander Hamilton or James Madison) (“Let the compromising expedient of the Constitution be mutually adopted . . . which regards the *slave* as divested of two fifths of the *man*.”).

Apportionment of direct taxes by the federal formula was brought into the Constitution in the context of the Constitutional Convention's consideration of representation in the proposed House of Representatives. Following Madison's suggestion, the Convention first attacked the problem of how to determine votes in the new Congress, deferring until later consideration of what powers the new government would have.<sup>63</sup> The issue of apportionment of direct taxes did not arise in the consideration of Congress' tax powers, nor did it arise during consideration of what personal or property rights would limit Congressional actions.

The Philadelphia Convention had before it two competing theories for representation in Congress. One theory came from the Articles of Confederation, which allocated votes per state, giving each state one vote "in Congress assembled."<sup>64</sup>

Under the Articles of Confederation, the Congress was much like a meeting room of representatives from different sovereigns. When the Constitution was drafted, the existing rule was to allocate votes so that each state had the same number of votes. The rule was favorable to small states, so they defended the status quo.<sup>65</sup>

The competing theory was that the Congress should represent people and not states. It was "the effect of magic, not of reason," argued James Wilson of Pennsylvania, that "annexing the name of 'State' to ten thousand men, should give them an equal right with forty thousand."<sup>66</sup>

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<sup>63</sup> See RAKOVE, *supra* note 7, at 54, 60, 178.

<sup>64</sup> Articles of Confederation art. V, in FARRAND, *supra* note 5, at 213.

<sup>65</sup> "While the large-state spokesmen vindicated their position on its theoretical merits—or literally its justice—the central challenge confronting the small states was simply to retain a privilege which they already enjoyed. In this endeavor consistency was useful but not always necessary." RAKOVE, *supra* note 7, at 66.

<sup>66</sup> Thomas Jefferson's Notes of Proceedings in Congress (James Wilson, Pa.), July 12, 1776, in 4 LETTERS, *supra* note 23, at 440. See also James Madison's Notes on Debates in the Federal Convention (Alexander Hamilton, N.Y.) (Richard Spaight, N.C.), May 30, 1787, in 1 RECORDS, *supra* note 3, at 36 (moving and seconding that the votes in the national legislature ought to be apportioned according to the number of free inhabitants).

On this issue, the delegates who thought that votes should follow wealth were aligned with the delegates who thought that votes should follow population. As noted previously, the debaters agreed that population was a fair index of the wealth of a state.

Rufus King of Massachusetts, for example, argued that property was the primary object of society, and that votes in Congress therefore should follow wealth.<sup>67</sup>

The Constitutional Convention struggled with the conflict between the two basic voting rules, by fits and starts, from the end of May through the beginning of July 1787. From early in the debates, the Convention appeared to be willing to apportion votes in the House of Representatives by population, counting slaves at three-fifths.

On May 30, the Convention seemed ready to adopt a rule—it was “generally relished”<sup>68</sup>—that would have abandoned the “one vote per state” rule of the Confederation. Votes in the Congress were to have been apportioned according to people or property instead. Delaware, however, insisted that it would need to withdraw if the “equal vote per state” principle was abandoned, and the issue therefore was postponed.<sup>69</sup>

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<sup>67</sup> See, e.g., James Madison’s Notes on Debates in the Federal Convention (Rufus King, Mass.), July 6, 1787, in 1 RECORDS, *supra* note 3, at 541; see also *id.* at 562 (arguing that representation should follow property because property was the primary object of society); James Madison’s Notes on Debates in the Federal Convention (Pierce Butler, S.C.), July 6, 1787, in 1 RECORDS, *supra* note 3, at 542 (arguing that property was the only just measure of representation because it was the “great object of Govern[men]t”); James Madison’s Notes on Debates in the Federal Convention (William Samuel Johnson, Conn.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 593 (arguing that wealth and population were the true equitable rules of representation).

<sup>68</sup> James Madison’s Notes on Debates in the Federal Convention, May 30, 1787, in 1 RECORDS, *supra* note 3, at 36.

<sup>69</sup> See *id.* at 33-38.



On June 11, 1787, James Wilson moved that votes be apportioned by population, counting slaves at three-fifths.<sup>70</sup> Wilson argued that this was the rule agreed to by eleven states for apportioning quotas for federal requisitions under the Confederation.<sup>71</sup>

The motion passed by a vote of nine states to two, with only Delaware and New Jersey holding out for one vote per state.<sup>72</sup> The Convention, however, was meeting informally as a Committee of the Whole solely for discussion; the nine-to-two vote, therefore, had no binding effect. On July 5, a "Grand Committee," consisting of one delegate from each state and chaired by the venerated Benjamin Franklin, recommended that the House of Representatives be determined by population, counting the slaves at three-fifths.<sup>73</sup>

On July 11, however, the apparent consensus around the federal formula came apart. A second committee, meeting in secrecy apart from the Convention as a whole, had allocated votes in the House to various states without setting out the principle underlying the allocation; the committee's allocation seemed acceptable to no one. The Southern states responded to the committee report with the firm assertion that they wanted a mandatory principle of allocating votes in which all slaves would be counted, at one hundred percent per slave, with respect to representation in the House. The Northern states responded that they wanted no slaves at all in the count. The motion to count slaves at three-fifths was defeated on July 11, by a vote of four states to six states with all of the Northern states except Connecticut now voting against the three-fifths formula and all of the Southern states except South Carolina voting in favor.<sup>74</sup>

The following morning, July 12, 1787, Gouverneur Morris of Pennsylvania moved that taxes also should be allocated in proportion to votes in the House.<sup>75</sup> Until that time, the entire debate had been about the allocation of votes. George Mason of Virginia liked Morris's proposition but was afraid that it might drive the Congress to requisitions.<sup>76</sup> James Wilson of Pennsylvania also approved of the proposition, but could not understand how it could be executed unless restricted to direct taxes.<sup>77</sup> Acceding, Gouverneur Morris amended his motion by inserting "direct" so that only

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<sup>70</sup> See James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), June 11, 1787, in 1 RECORDS, *supra* note 3, at 201.

<sup>71</sup> *Id.*

<sup>72</sup> See James Madison's Notes on Debates in the Federal Convention, June 11, 1787, in 1 RECORDS, *supra* note 3, at 201.

<sup>73</sup> See James Madison's Notes on Debates in the Federal Convention, July 5, 1787, in 1 RECORDS, *supra* note 3, at 526.

<sup>74</sup> See James Madison's Notes on Debates in the Federal Convention, July 11, 1787, in 1 RECORDS, *supra* note 3, at 586-88.

<sup>75</sup> See James Madison's Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 592.

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

direct taxes would be apportioned by population.<sup>78</sup> Oliver Ellsworth of Connecticut and Edmund Randolph of Virginia both moved to count slaves at three-fifths for both taxation and votes.<sup>79</sup> By the end of the day, the apportionment of both votes in the House and direct taxes by the federal formula had passed by a margin of six to two with two other states divided.<sup>80</sup>

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<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 594.

<sup>80</sup> *See id.* at 596.

In comparison with the four-to-six defeat on the issue of apportionment of votes (counting slaves at three-fifths) only the day before,<sup>81</sup> Pennsylvania and Maryland had changed their votes from “no” to “yes” and Massachusetts had changed its vote from “no” to divided.<sup>82</sup> The inclusion of taxes in the formula changed the minds of the delegates from two states and reduced the opposition in Massachusetts. Including taxes also reduced South Carolina’s opposition—South Carolina had been the only Southern state in opposition on July 11, ultimately becoming a divided state on July 12—but the impact was largely on Northern votes.

Gouverneur Morris’s motion, which was responsible for the apportionment of direct taxes in the Constitution, was nothing more than a tactical move. He later explained that he “only meant it as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed.”<sup>83</sup> Later, he argued that he doubted that the new government would ever lay an apportioned direct tax “stretch[ing] its hand directly into the pockets of the people scattered over so vast a Country” and would rely instead solely on import and excise taxes.<sup>84</sup> The proponent of the apportionment requirement for direct taxes thus considered the value of the requirement merely as a bargaining chip.

The tactic of apportioning taxes as well as votes was directed primarily toward the North—that is, if one can discern the motive by its primary effect. The tactic also was directed toward Northern feelings. The North had been willing to count slaves at three-fifths for representation all along—in the June 11 Committee of the Whole vote, for example. But, responding to Southern demands that one hundred percent of the slaves be counted for voting purposes, most Northern states voted against the three-fifths rule on July 11; thus, it was primarily Northern votes that were switched on July 12. Among the Northern delegates who spoke in favor of the rule, James Wilson of Pennsylvania suggested a purely political motive: The North would protest less

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<sup>81</sup> *See id.* at 588.

<sup>82</sup> *See id.* at 588, 597.

<sup>83</sup> James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 24, 1787, in 2 RECORDS, *supra* note 61, at 106. The motion to remove the apportionment of direct taxes, however, was defeated. *Id.*

<sup>84</sup> James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), August 8, 1787, in 2 RECORDS, *supra* note 61, at 223.

vigorously against including slaves to establish representation in the House if it was presented publicly that the slaves had been included in tax, and then brought over into representation only because representation was to be proportioned according to taxation.<sup>85</sup> Wilson's explanation was inaccurate because it reversed the chronology of the steps: representation was debated first and taxation was the excuse.

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<sup>85</sup> See James Madison's Notes on Debates in the Federal Convention (James Wilson, Pa.), July 12, 1787, in 1 RECORDS, *supra* note 3, at 595.

Allocating taxes and votes together also reduced Northern concerns about Southerners increasing the number of their slaves. The day before his motion, Gouverneur Morris had spoken against including slaves in any fraction in the apportionment of votes: “He could never agree to give such encouragement to the slave trade as would be given by allowing them a representation for their [slaves].”<sup>86</sup> Morris’s motion to rest direct taxes on slaves reduced his own July 11 objections by providing an offsetting disincentive for Southerners to increase the number of their slaves.

The apportionment of taxes by population does not seem to have been a very valuable bargaining chip in the Constitutional Convention’s political market. On June 11, the North had been willing to count slaves at three-fifths for votes in the House. The vote against counting slaves at three-fifths, one month later on July 11, seems to have been a temporary reaction, which quickly subsided. It did not take much to change the minds of the Northern delegates again. If the bargaining reveals the intrinsic value of the apportionment rule, then the apportionment rule was of fleeting value indeed—merely enough to overcome a short-term pique.

The adoption of the federal ratio in tax was a catalyst to help disparate parties compromise on the representation issue, because the motives of the parties were different on the two issues. Allocation of taxes by the federal ratio had no independent significance other than as a catalyst for a truce between the North and South due to the thorny problem of slavery.

### B. *Deeper Currents*

Although apportionment by the federal ratio came into the Constitution for transient reasons and as an arbitrary rule, apportionment fit well into older and deeper historical currents. Apportionment was a familiar system and had existed since the middle ages. Tying both taxes and votes to wealth seemed natural to many delegates. The specific fraction for slaves, three-fifths, came from a prior settlement. Slavery remained a deeply divisive issue, and any discussion reopening the prior compromise would have required hard work to settle.

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<sup>86</sup> James Madison’s Notes on Debates in the Federal Convention (Gouverneur Morris, Pa.), July 11, 1787, in 1 RECORDS, *supra* note 3, at 588.

First, tying both the apportionment of taxes and the apportionment of votes to wealth was deeply rooted in the political culture in which the Framers participated. The Framers were less democratic than they often are imagined to have been. They commonly said that taxes should be collected from wealth, but many of them also thought that votes should be apportioned according to wealth as well.<sup>87</sup> In the Virginia Plan, offered at the beginning of the Philadelphia Convention,<sup>88</sup> and in Benjamin Franklin's proposal for the union of the colonies in 1753,<sup>89</sup> representation was, or at least could be, determined by looking to the contributions of each of the states.<sup>90</sup> It would not have been difficult for many of the Framers to have agreed to tie votes and taxes together without independent motivation.

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<sup>87</sup> See *supra* text accompanying note 67.

<sup>88</sup> See FARRAND, *supra* note 5, at 225.

<sup>89</sup> In 1753, the colonies met in Albany to discuss the problem of defense against the French and Iroquois and adopted a plan of union which was largely the work of Benjamin Franklin. Each colony would be represented according to its financial contribution to the general treasury. Neither the Crown nor the colonies adopted the Albany plan, but it was known to the Framers through Franklin's publications; see Debates in the Virginia Ratification Convention (June 7, 1788), in 9 STATES, *supra* note 22, at 1048 n.11. See also Thomas Jefferson, *Autobiography*, reprinted in 3 FOUNDERS, *supra* note 27, at 89 (reporting Benjamin Franklin's argument that votes under the Articles of Confederation should be by population and that "[c]ertainly if we vote equally we ought to pay equally").

<sup>90</sup> See The Virginia Plan, in FARRAND, *supra* note 5, at 225 (allocating the "right[s] of suffrage . . . in the national Legislature" in proportion to the quotas of contributions or to the number of free inhabitants, as may seem to be the best rule in different cases).

Secondly, it would not have been very difficult to convince the Framers to apportion taxes among the states. Apportionment was the tax system with which they were familiar, and apportionment by the federal ratio was the status quo for taxation under the Articles of Confederation.<sup>91</sup> The Articles had failed, not primarily because they had apportioned requisitions among the states, but because requisitions proved not to be mandatory. Adopting changes to make requisitions mandatory or easier to administer would not necessarily have meant abandoning apportionments. In addition, the states raised most of their revenue by taxes apportioned among their own cities and counties; the Framers, of course, were well acquainted with the states' internal apportionment of taxes.<sup>92</sup> The system of raising taxes by directing political subdivisions to raise their requisite quotas, each in its own way, also had roots going back at least to the Middle Ages.<sup>93</sup>

Finally, the shift in sentiment from July 11, 1787 (voting against counting slaves at three-fifths for representation) to July 12 (voting in favor of the same formula when direct taxes were attached) seems to reflect the exigencies of a transient political situation. The fight between slave and nonslave states, however, had been the worst

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<sup>91</sup> Paul Finkelman, in *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188, 197-98 (Richard Beeman et al. eds., 1987), argues against the "traditional view" that the three-fifths clause was a legacy from the Congress of 1783. Finkelman contends that giving the South votes based on three-fifths of their slaves in June 1787 at the Philadelphia convention gave the South enormous political leverage without any quid pro quo. He also argues that the three-fifths clause of 1783 was "rejected by the entire nation." *Id.* at 198.

Finkelman is stretching to make a point on slavery that the Constitution was "a covenant with death." First, the 1781 and 1783 tariffs were rejected not by "the entire nation" but only by Rhode Island (1781), New York (1783), and New Hampshire (1783). The one or two state vetoes were considered insufficient in the debates; approval by eleven of thirteen states was considered a proof of legitimacy of the formula in the debates. *See supra* notes 19-20. The Constitution itself required the approval of nine states, not unanimous approval for both adoption and amendment. The rejection of the impost of 1781 and 1783 by one and two states, moreover, provided the single best explanation of why the Articles of Confederation failed and the Constitutional revolution was needed.

Second, in disapproving of apportionment by population because of the three-fifths clause, Finkelman does not describe the failure of apportionment by appraisal of value of land or the prior attempts at compromise over counting slaves. There was an inevitability to both the apportionment by population and settlement at three-fifths. These rules were not just pulled out of a hat for venal reasons at the Convention.

Finally, the three-fifths rule, while an imported rule for determining representation, fundamentally was a tax rule. Using the status quo rule for new taxes was not an unnatural compromise. The status quo is always a natural compromise and no venality was required.

<sup>92</sup> *See supra* main Article, text accompanying notes 228-244.

<sup>93</sup> *See supra* main Article, text accompanying note 244.

division of the Convention and it would continue to split the nation until General Robert E. Lee surrendered to General Ulysses S. Grant at the Appomatox Courthouse on April 9, 1865, three-quarters of a century later. Thus, while the dispute settled by direct apportionment of taxes may have been temporary, the dispute over slavery more generally was like riding on top of a tiger.

In none of the history surrounding the Constitutional debates was there any apparent appreciation of the fact that the apportionment of taxes among the states was an absurd rule, necessarily leading to inequity because the tax base was unequal among the states. Higher effective tax rates on the citizens of a state with a smaller per capita tax base clearly is inequitable. A rule putting all of a state's quota on a single carriage or other object or on a few or on one individual was not debated in the history and is not legitimated by that history.