

**WHAT FEDERAL TAXES ARE SUBJECT TO THE RULE OF  
APPORTIONMENT UNDER THE CONSTITUTION?\***

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Under the U.S. Constitution, as amended by the Sixteenth Amendment, any federal tax that is a “direct tax” (which is not an “income tax”) must be apportioned among the states in accordance with the respective populations of the various states.<sup>1</sup> The thesis of this Article is that the category of “direct tax” (subject to the apportionment requirement) is limited to requisitions, capitation taxes, and taxes on tangible property. (A “requisition” is a tax on the state, payable by the state government by whatever means it chooses.) Apportionment *among the states* “works” for requisitions, because the states themselves are the nominal taxpayers. A capitation tax is a tax on a person because of the person’s existence. Thus, apportionment among the states *by population* works easily for a capitation tax, at least if such a tax is a fixed-amount-per-person tax with no exceptions. But requisitions are a heavy-handed imposition on the states, and universal capitation taxes are (1) unpopular, (2) incapable of producing significant revenue, and (3) inequitable (as bearing no relation to ability to pay). In fact, the federal government has never imposed a requisition or capitation tax, and for all practical purposes these are “off the table.” But any “direct tax” other than a requisition or head tax would also be off the table, because apportionment mandates varying tax rates among the states, which is a facial inequity that could not be tolerated (except possibly in the case of dire national emergency).

The apportionment requirement (and the triggering category of “direct tax”) is implicated by the recent surge of interest, at least on

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<sup>1</sup> U.S. CONST. art. I, § 2, cl. 3. The Sixteenth Amendment, ratified in 1913, states that any tax on “incomes” is not subject to the apportionment requirement. U.S. CONST. amend. XVI. For a discussion of the Sixteenth Amendment, see generally Joseph M. Dodge, Murphy and the Sixteenth Amendment in Relation to the Taxation of Non-Excludable Personal Injury Awards, 8 FLA. TAX REV. 369 (2007), which addresses federal constitutional provisions concerning taxation, interpretation of the Sixteenth Amendment, and exclusionary theories.

the part of legal academia, in wealth taxes and periodic taxes on a person's aggregate property net worth.<sup>2</sup> There is also interest, at least for economic and liberal political theory, in taxes on human-capital endowment (earning capacity).<sup>3</sup> Of course, an unapportioned federal wealth tax or endowment tax would be unconstitutional if either is a "direct tax."<sup>4</sup> I argue here that both taxes, neither of which are income taxes, would be unconstitutional, the first because a tax on tangible property (especially real estate) is a direct tax, and the second because an endowment tax would be either a capitation tax or a direct tax.

The view offered herein of what "direct tax" means in the Constitution differs from that offered by recent commentators. At one end of the spectrum, Erik Jensen argues that "direct tax" means any tax not capable of being shifted, which is deemed to encompass any tax on the economic attributes of persons (including a tax on a person's aggregate consumption).<sup>5</sup> At the other end of the spectrum, Bruce Ackerman argues that the Thirteenth Amendment (abolishing slavery) effectively repealed the apportionment requirement, because the clauses containing the apportionment requirement were invented to effectuate a compromise over slavery.<sup>6</sup> Calvin Johnson goes almost as far in arguing that "direct tax" means only a tax capable (without effort) of fair apportionment among the states in accordance with population, thereby limiting that term to requisitions and universal head taxes.<sup>7</sup> My "middle of the road" position is that apportionment

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<sup>2</sup> The Spring and Summer 2000 issues of *Tax Law Review* are, in their entirety, devoted to personal wealth taxes.

<sup>3</sup> See, e.g., DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 162-66 (1986) (discussing accrual income and consumption bases for taxation); see also other authorities cited *infra* note 432.

<sup>4</sup> See Deborah H. Schenk, *Saving the Income Tax With a Wealth Tax*, 53 TAX L. REV. 423, 441-42 (2000) (opining that a wealth tax might be upheld if it were cast as a low-rate tax on the risk-free return from property).

<sup>5</sup> See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1091-107 (2001) [hereinafter Jensen, *Incomes*] (arguing that a tax on aggregate personal consumption would be subject to the apportionment requirement); Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) [hereinafter Jensen, *Consumption Taxes*] (same).

<sup>6</sup> Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 28, 58 (1999) ("Given the Reconstructionist Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power.").

<sup>7</sup> See Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 297-99 (2004) [hereinafter Johnson, *Apportionment*] (arguing that apportionment should not be a barrier to any federal tax); Calvin H. Johnson, *The Apportionment of Direct Taxes: The Foul-Up at the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 71 (1998) [hereinafter Johnson, *Foul-Up*] ("[T]he 'direct tax' should be construed

is still alive, but (apart from requisitions and capitation taxes) is confined to federal taxes on real estate and tangible personal property. This position differs from the apparent state of current doctrine, which is that “direct tax” also encompasses taxes on intangible personal property.<sup>8</sup>

My thesis is based upon (1) the constitutional text bearing on the federal taxing power, (2) its early history, (3) the ideological basis of the apportionment requirement, (4) the instrumental purposes and effects of the apportionment requirement, (5) the doctrinal evolution of “direct tax,” and (6) the policy purposes that would be best served by the apportionment requirement in the context of a federalist system.

Part I offers as background material an explanation of the operational effect of the apportionment requirement and the constitutional provisions bearing on the federal taxing power, as well as how these provisions came to be in the Constitution. Part II rejects a broad meaning of “direct tax.” Part III offers possible rationales and purposes for the direct-tax apportionment requirement. Part IV rejects various theories that view the rule of apportionment as being dead. Part V argues that “direct tax” should be interpreted so as to exclude taxes on intangible personal property. Part VI offers applications of the analysis to issues of current interest.

## I. BACKGROUND OF THE APPORTIONMENT REQUIREMENT

This Part describes how the apportionment requirement operates, its place in the constitutional text, and how it came to be in the Constitution.

### A. *The Apportionment and Uniformity Requirements*

In order to apportion a federal tax among the states according to population, the following steps must be taken. First, the revenue target must be ascertained for the nation. Second, this target amount

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functionally, but ahistorically, to refer to head taxes and requisitions from the several states, but nothing else.”).

<sup>8</sup> The last Supreme Court case that squarely faced the issue of the scope of “direct tax” was *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 480 (1895), which reaffirmed that a non-apportioned federal tax on real estate would be unconstitutional. Upon rehearing the case, the Court held that a non-apportioned tax on personal property would also be unconstitutional. *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601, 627–28 (1895).

must be allocated among the states according to population (as determined by the most recent census). The resulting “quota” for a state can be collected from the state government if the tax is in the form of a requisition, in which case the state could either pay the tax out of its treasury or lay one or more state taxes for the purpose of raising the quota. If the “direct tax” is not a requisition, the state quota must be collected (by federal officials) from people, property, or transactions within the state, but any such tax would require a subject matter (federal tax base definition) that can produce the quota amount. The third step is to divide the state’s quota by the state’s aggregate tax base to produce a tax rate for the state. If the direct tax takes the form of a universal capitation tax, the quota is divided by the population of the state to yield the per-person tax. If the tax base is determined in terms of some economic indicator (such as property values), then the state’s quota is divided by the aggregate tax base located within the state to determine the rate, which is then applied against the particular items constituting the tax base in order to determine the tax owed for each item.

Since the direct-tax apportionment formula is keyed to the population of the various states, apportionment of a universal *capitation* tax will produce a uniform national rate.<sup>9</sup> Apportionment of any other kind of (non-requisition) direct tax will necessarily result in different tax rates for different states because the specified tax base will not be found among the states in the same proportion as population (except by purest random chance). To illustrate this proposition, suppose that Maryland and Louisiana have the same population but that the aggregate amount of the subject of the direct tax (say, widget values) is twice as much in Maryland as in Louisiana. The apportionment requirement dictates that the tax quota allocable to each state must be exactly the same, because the population is the same. It follows inexorably that the tax rate (tax divided by aggregate widget values) would be twice as high in Louisiana as in Maryland. This point is illustrated in Table 1.

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<sup>9</sup> Suppose the United States consisted of three states having populations of one million, three million, and six million persons, respectively, for a total of ten million persons, and suppose the federal government lays a universal capitation tax of \$1 billion for the entire country. The quotas for each state will be \$100 million, \$300 million, and \$600 million, respectively, and the per-person tax (quota divided by population) will be \$100 per person in every state.

TABLE 1: OPERATION OF THE APPORTIONMENT REQUIREMENT

	POPULATION	QUOTA (FIXED)	AGGREGATE WIDGET VALUES	TAX RATE
<b>Maryland</b>	5 million	10 billion	100 billion	10%
<b>Louisiana</b>	5 million	10 billion	50 billion	20%

From the perspective of individuals across the nation, every conceivable kind of (non-requisition) apportioned tax (other than a universal head tax) must necessarily operate in an inequitable manner. As Table 1 illustrates, if the subject of tax is the value of widgets, then taxpayers in the poorer state (Louisiana) will pay tax at twice the rate as taxpayers in Maryland. This produces a form of inequity that nowadays would be seen as perverse, in that the higher rate is imposed on taxpayers holding the lower per-capita values.

Any federal tax not subject to the apportionment requirement is subject to the uniformity requirement. The uniformity requirement is satisfied if the same tax (same tax base, same rate schedule) is applicable, as a matter of law, throughout the United States. Thus, the federal government cannot impose a salt tax only on salt extracted within a named salt formation that exists only in Michigan and Ohio. However, the uniformity requirement is satisfied if the federal government imposes a tax on salt extracted anywhere in the United States, even though it happens that salt extraction is concentrated in a narrow geographical area.

#### *B. Constitutional Provisions Relating to the Validity of Federal Taxes*

Under Article I, Section 8, Clause 1, of the Constitution (hereinafter referred to as the “Taxing Power Clause”), Congress is granted authority to “lay and collect Taxes, Duties, Imposts, and Excises,” without limitation as to subject matter or taxpayer. It is probable that “requisitions” on states are included within “Taxes,”<sup>10</sup> although the

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<sup>10</sup> The Constitution does not expressly mention requisitions, and the Framers sometimes used “requisitions” in opposition to the word “taxes,” suggesting that “taxes” might exclude requisitions. See, e.g., The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (Governor Randolph, June 7, 1788) [hereinafter Virginia Debates], in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 114–15 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT’S DEBATES], reprinted in Appendix C. (Elliot’s *Debates* is a five-volume compilation, initially made in 1830, of Framing-period materials, including Madison’s Notes of the 1787 Constitutional Convention and notes of various state ratifying conven-

issue has never squarely arisen (as no requisition has been enacted by Congress under the Constitution).

The aforementioned Article 1, Section 8, Clause 1 goes on to state that “all Duties, Imposts and Excises shall be uniform throughout the United States.” This uniformity requirement has been construed by the courts to prohibit only patent or intentional discrimination based on geography.<sup>11</sup> Uniformity does not require flat rates without exemptions.<sup>12</sup> The uniformity requirement has been extended by judicial decision to all federal levies (including “taxes”) not subject to the apportionment requirement.<sup>13</sup>

The “direct tax” concept appears in Article I, Section 2, clause 3 (hereinafter referred to as the “Representation Clause”), which provides that both representation in the House of Representatives and direct taxes are to be apportioned among the states in accordance with population (“numbers”) as determined by a periodic census.<sup>14</sup> In tallying population, slaves were to be counted as three-fifths of a person.<sup>15</sup> The three-fifths rule became meaningless after slavery was abolished by the Thirteenth Amendment, ratified in 1866.

Article I, Section 9, clause 4 (hereinafter referred to as the “Capitation Tax Clause”), states in full: “No capitation, or other direct,

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tions.) There are persuasive arguments that requisitions are within the federal taxing power: (1) the term “requisitions” is a subcategory of “taxes,” (2) the power to lay requisitions was assumed to be so obvious as not to require explicit statement, and (3) requisitions were considered to be a viable federal taxing option in 1796. See THE FEDERALIST NO. 36, at 213–20 (Alexander Hamilton) (Clinton Rossiter ed., 2003), reprinted in Appendix B; Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355, 357 (1998); Calvin H. Johnson, *Homage to CLIO: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 486–89 (2004).

11 See *United States v. Ptasynski*, 462 U.S. 74, 85 (1983) (allowing even geographical classifications to stand if based on neutral principles); *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945) (reciting the test that a tax is uniform if it is applied the same way wherever the subject is located).

12 See *Knowlton v. Moore*, 178 U.S. 41, 83–92 (1900) (rejecting the notion that uniformity requires equal taxes or uniform rates).

13 See *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 11 (1916) (holding that the Sixteenth Amendment frees income taxes from the apportionment requirement); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173, 176, 181 (1796) (holding that all non-direct taxes avoid the apportionment requirement).

14 U.S. CONST. art. I, § 2, cl. 3. Prior to the census, which was to be taken within three years of the first meeting of Congress, representation was apportioned according to a fixed allocation. See *infra* note 288.

15 U.S. CONST. art. I, § 2, cl. 3.



Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”<sup>16</sup>

There is no definition of “direct tax” in the Constitution, and none was offered to the delegates in the 1787 Constitutional Convention.<sup>17</sup> Thus, the matter has been left to judicial construction. To make a long story short, early Supreme Court cases upheld various unapportioned federal taxes as “excises,” but the 1895 case of *Pollock v. Farmers’ Loan & Trust Co.*<sup>18</sup> invalidated the unapportioned 1894 income tax. *Pollock* was (to say the least) highly controversial both politically and legally, and two responses emerged. First, the Supreme Court reverted to its earlier propensity of holding contested unapportioned federal taxes to be excises. Second, political developments eventually resulted in the Sixteenth Amendment (proposed by Congress in 1909, and ratified in 1913), which states:

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.<sup>19</sup>

Congress enacted a personal (individual) income tax in 1913, which has continued (with numerous alterations) to the present. The Supreme Court upheld the 1913 income tax in 1916, stating that the purpose of the Sixteenth Amendment was merely to remove the apportionment requirement from federal income taxes, rather than to affect the definition of “direct tax.”<sup>20</sup>

Thus, viewing the various tax-related provisions of the Constitution together, *the apportionment requirement currently applies only to a federal direct tax that is not an income tax.*<sup>21</sup> All other federal taxes are subject only to the uniformity requirement.<sup>22</sup>

Since 1913, the “direct tax” issue has largely lain dormant, as the federal government has been able to satisfy its wants from taxes and duties that are not viewed as being subject to the apportionment requirement.

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16 U.S. CONST. art. I, § 9, cl. 4.

17 Rufus King of Massachusetts asked the 1787 Convention for the meaning of “direct tax,” but no reply was given. James Madison, Debates in the Federal Convention of 1787 (Aug. 20) [hereinafter Madison’s Notes], in 5 ELLIOT’S DEBATES, *supra* note 10, at 451.

18 157 U.S. 429 (1895).

19 U.S. CONST. amend. XVI.

20 *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

21 *See Stanton v. Baltic Mining Co.*, 240 U.S. 103, 109 (1916) (noting that the Sixteenth Amendment “exceptionally authorized” only the income tax to be free from the apportionment requirement).

22 *See Brushaber*, 240 U.S. at 18–19 (holding that the post-Sixteenth Amendment income tax, no longer having to be apportioned, is subject to the uniformity requirement).

C. *How Apportionment Found Its Way Into the Constitution*<sup>23</sup>

Under the Articles of Confederation, the federal government had only the power to lay requisitions on its constituent members, the states themselves, in proportion to the value of land and improvements thereon.<sup>24</sup> The states could, and did, refuse to comply,<sup>25</sup> and, as a result of an ineffectual taxing power,<sup>26</sup> the Confederation government was feeble. The Constitutional Convention of 1787 largely resulted from an effort (led by Virginia) to create a national government with a meaningful taxing power.<sup>27</sup> The Convention was held in Philadelphia on May 25, 1787 without a delegation from Rhode Island.<sup>28</sup> No official history was taken of the deliberations.<sup>29</sup> The ac-

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23 A more elaborate history of the taxation clauses is found in Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Constitution* (pts. 1 & 2), 15 POL. SCI. Q. 217 (1900) [hereinafter Bullock, *Part I*], 15 POL. SCI. Q. 452 (1900) [hereinafter Bullock, *Part II*].

24 ARTICLES OF CONFEDERATION art. VIII.

25 See THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 10, at 103 (noting that the states treated requisitions as “mere recommendations”); Virginia Debates, *supra* note 10, at 114–18, 121 (noting that a system of voluntary requisitions would be ineffective); Johnson, *Foul-Up*, *supra* note 7, at 13 (noting the difficulty of states undertaking honest real-estate appraisals when their self-interest commanded systematic undervaluation).

26 See ARTICLES OF CONFEDERATION art. XIII (allowing amendment of the Articles only by a unanimous vote of the states); 1 ELLIOT’S DEBATES, *supra* note 10, at 92–106 (chronicling that the Articles authorized only requisitions, and a 1783 proposal to authorize import duties was vetoed by Rhode Island).

27 See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821) (“That [the requisitions of Congress] were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system.”); Madison’s Notes, *supra* note 17, at 112 (stating that the “radical infirmity” in the Confederation was the voluntary requisition system). See generally ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION (1993) (arguing that the power of federal taxation was central to the constitutional enterprise); ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 26 (2006) (discussing the states’ failure to collect federal requisitions); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES 1–2, 43–45 (2005) (stating that one of the most important reasons for the need of the Constitution was to allow the federal government a source of revenue).

28 See Gordon Lloyd, TeachingAmericanHistory.org, *Introduction to the Constitutional Convention*, <http://teachingamericanhistory.org/convention/intro.html> (last visited March 26, 2009) (providing a brief pre-history of the convention).

29 See Madison’s Notes (May 29), *supra* note 17, at 126 (noting that there was to be no official secretary at the Convention). Nevertheless, a journal was kept of the motions and votes on those motions. The journal is published as *Journal of the Federal Convention*, in 1 ELLIOT’S DEBATES, *supra* note 10, at 139–318.

counts that have come down to us, principally James Madison's notes,<sup>30</sup> are sketchy and mainly of a narrative quality.

Governor Randolph of Virginia opened the substantive proceedings on May 29 by offering the so-called Virginia Plan (drawn up by James Madison),<sup>31</sup> which was strongly nationalist/federalist,<sup>32</sup> but which expressly mentioned taxes only in the following item:

2. Resolved, therefore, that the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.<sup>33</sup>

The foregoing only states that *representation* (in each of the two houses of the national legislature) should be proportional to *either* the requisition quotas (which, according to the Confederation rule, were then based on real property values) *or* population (excluding slaves). This provision *assumes* that significant federal taxes under the new government are to be apportioned among the states,<sup>34</sup> as was the case under the Confederation. The power to tax is not specifically mentioned, but is implicit in Article 6 of the Virginia Plan providing for the broad categorical grant of federal powers, including powers to invalidate state laws and to compel states to fulfill their duties (presumably including requisition quotas).<sup>35</sup> The Virginia Plan was re-

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<sup>30</sup> See *supra* text accompanying note 10. For an account of Madison's role in the convention, ratification, and Federalist periods, see IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800* (1950).

<sup>31</sup> See Madison's Notes (May 29), *supra* note 17, at 126-28.

<sup>32</sup> The term "Federalist" is commonly used to refer to advocates of a strong federal government (but without abolition of the states), and "Anti-Federalist" is used to refer to those who opposed ratification of the proposed Constitution.

<sup>33</sup> See Madison's Notes (May 29), *supra* note 17, at 127.

<sup>34</sup> Another plan submitted by Charles Pinckney of South Carolina has been lost, but it apparently would have given the federal government the power to lay import duties and compulsory requisitions on the states. See Am. Hist. Ass'n, *Sketch of Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735, 739 (1904) (noting that Pinckney's plan also included the power to levy duties on imports and regulate commerce more broadly). Although a plan supposedly authored by Pinckney appears in the May 29 entry to the *Journal of the Federal Convention*, Mr. Pinckney's Draft of a Federal Government, in 1 ELLIOT'S DEBATES, *supra* note 10, at 145-50, Madison later expressed doubt as to its authenticity. See Note of Mr. Madison to the Plan of Charles Pinckney, *May 29, 1787*, in 5 ELLIOT'S DEBATES, *supra* note 10, at 578-79.

<sup>35</sup> In addition to the against-the-state powers mentioned in the text, three general types of powers were listed: (1) powers vested in Congress by the Confederation, (2) powers to legislate where the states were incompetent, and (3) powers to achieve harmony among the states. At this point, the doctrine of enumerated powers had not emerged, but it surfaced on July 16, see Madison's Notes, *supra* note 17, at 317, and came into the open with the Report of the Committee on Detail of August 6, see *id.* at 378-79 (listing the powers over states that were to be vested in the legislature). On July 17, the Convention removed

ferred to the Committee of the Whole, which reported on June 13, 1787, a plan that again made no specific mention of taxes but provided for a bicameral legislature, with representation in both houses being apportioned according to population, with slaves counting as three-fifths.<sup>36</sup>

At this point, the nationalist agenda began to succumb in part to assaults first from the small states and then from the hard-core slave states, Georgia and the Carolinas. Both assaults were bottomed on a states-rights (but not Anti-Federalist) stance: the small-states agenda was to have equal representation for states,<sup>37</sup> and the deep-South agenda was to preserve slavery.<sup>38</sup> The small-state agenda was embodied in the New Jersey Plan, which would have (among other things) limited the federal taxing power to the levying of customs duties and stamp taxes, as well as to the laying of quasi-mandatory requisitions to be apportioned among the states according to population (including slaves as three-fifths).<sup>39</sup> The New Jersey Plan was rejected on June 19,<sup>40</sup> with Alexander Hamilton denouncing the idea of apportioning a major revenue source (requisitions) according to population,<sup>41</sup> but the small-states faction persisted until it was agreed that the Senate

the power, advocated by Madison, to invalidate state laws. *See id.* at 321–22. The power of taxation might have been thought to fall into category (2), because the states would not be competent to lay a federal tax. *See id.* at 257 (stating that the new government would have the power to tax the people themselves).

36 On June 11, John Rutledge of South Carolina had proposed that representation be by quotas of contribution, but this motion was amended by James Wilson of Pennsylvania and Pinckney to read as described in the text. *See id.* (June 6, 7, 11, 13) at 164, 170, 178, 181.

37 A subsidiary states-rights issue was appointment of representatives and senators by state legislatures rather than election by the people, a point of view that prevailed for the Senate. *See id.* (June 6) at 160–64. Another point advanced by the states-rights faction is that the Convention only had the authority to amend the Articles of Confederation, which was a compact among the states. *Id.* (June 16) at 193–94.

38 Slaveholding interests needed a national government to protect property, including slaves, and to force the return of escaped slaves. *See* U.S. CONST. art. IV, § 2, cl. 3.

39 A passage in the New Jersey Plan stated “that, if such requisitions be not complied with in the time specified therein, to direct the collection thereof in the non-complying states, and for that purpose to devise and pass acts directing and authorizing the same—provided, that none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least \_\_\_ states.” Madison’s Notes (June 15), *supra* note 17, at 192.

40 *See id.* (June 19) at 211–12 (postponing decision on the New Jersey Plan).

41 *See id.* (June 18) at 201 (noting that direct revenue would not be sufficient, and an attempt to acquire the balance from requisitions would fail).

would be constituted on the basis of equality among states,<sup>42</sup> with the Senators to be appointed by the state legislatures.<sup>43</sup>

As to representation in the House, the item on the table from the modified Virginia Plan still left open the issue of whether representation was to be by wealth or population.<sup>44</sup> The notion of representation according to wealth inevitably conjured up the notion that representation should be linked to taxation, or vice versa.<sup>45</sup> The wealth standard for representation was favored by the South, because slaves were wealth. The alternative possibility of linking representation to population raised the issue of how slaves should be counted.<sup>46</sup> However, on July 11, motions to count slaves in any future census to be taken to adjust representation were defeated.<sup>47</sup> At that point, the issues of wealth versus numbers and the role of slaves in each were up in the air.

This logjam was broken on July 12 by a move that formally linked representation and the taxing power.<sup>48</sup> Gouverneur Morris of Pennsylvania<sup>49</sup> opened with a motion “to add to the [Virginia Plan] clause empowering the Legislature to vary the representation according to the principles of wealth and number of inhabitants, a proviso ‘that taxation shall be in proportion to representation.’”<sup>50</sup> At this point, the Morris proposal only amounted to placing *all* taxes under the same principle of apportionment as governed representation, but the roles of population and wealth in both were still unresolved. George Mason of Virginia, a states’ rights advocate, “admitted the justice of the principle [of linking taxation and representation], but was afraid embarrassments might be occasioned to the legislature by it. It might

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42 See *id.* (June 25, July 7) at 240, 285–86 (recording discussion of Senate representation). The issue was not finally put to rest until July 16. See *id.* (July 16) at 316–17 (recording the passage of a resolution providing for the states to have an equal vote in the second branch of the legislature).

43 See U.S. CONST. art. I, § 3, cl. 1.

44 Madison’s Notes (July 9), *supra* note 17, at 288–89.

45 John Rutledge moved that representation be apportioned according to the actual tax yield from the various states. *Id.* (July 5) at 279. Although the motion was defeated, further discussion of the difficulty of valuing wealth under the Confederation requisition system again linked the topics of representation and taxation. See *id.* (July 6) at 281.

46 See *id.* (noting the difficulty of valuing the contribution of non-commercial states); *id.* (July 9) at 289 (arguing that slaves should be counted as property for apportionment); *id.* (July 11) at 296–302 (recounting argument over the “three-fifths” clause). For another account of the run-up to July 12, 1787, see Johnson, *Foul-Up*, *supra* note 7, at 92–101.

47 Madison’s Notes (July 11), *supra* note 17, at 295–301.

48 See *id.* (July 12) at 302–06, *reprinted in* Appendix A.

49 Not to be confused with Robert Morris, also of Pennsylvania.

50 Madison’s Notes (July 12), *supra* note 17, at 302, *reprinted in* Appendix A.

drive the legislature to the plan of requisitions.”<sup>51</sup> Mason’s remark indicated an awareness that apportionment of certain non-requisition taxes would be impractical, so that apportionment of *all* federal taxes could be accomplished only through a requisition system; yet, a compulsory requisition system would bring the federal government into potential armed conflict with state governments.<sup>52</sup> Morris picked up Mason’s challenge by offering an acknowledgement:

that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports* and imports, and on consumption, the rule would be inapplicable. Notwithstanding what had been said to the contrary, he was persuaded that the imports and consumption were pretty nearly equal throughout the Union.<sup>53</sup>

The statement that non-direct taxes would likely fall proportionally among the states slipped by unchallenged. Insofar as taxes on imports (imposts) were levied at the point of import—with some states having few, if any, deep-water ports—and insofar as excises on particular items (like salt and distilled spirits) were levied at the point of production, the non-direct taxes would be laid (in the formal sense) non-proportionally among the states. Thus, the reference to equality (meaning “proportionality”) must have been based on the notion that such taxes would be passed on to ultimate consumers, and that consumption would be roughly proportionate to population.<sup>54</sup> However, even assuming that such taxes would be wholly passed on, Morris’s prediction of de facto apportionment would occur only if consumption were taxed generally, but in fact the duties, imposts, and excises of the period were only imposed selectively (and at varying rates). In any event, the amended Morris resolution (“provided always that direct taxation ought to be proportioned to representation”) passed.<sup>55</sup>

The remainder of the July 12 session dealt with the formula for apportioning direct taxes and representatives. It was urged that population (including slaves) was a reasonable proxy for wealth.<sup>56</sup> James

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51 *Id.*

52 This danger had already been stressed by Governor Randolph. *See id.* (June 16) at 197–98 (recounting Randolph’s argument that Congress was a body too inadequate to take on such powers, given the amount of distrust rooted in the public of a federal government).

53 *Id.* (July 12) at 302, *reprinted in* Appendix A.

54 *See id.* (July 11) at 299 (explaining how freedom of internal commerce would tend to equalize wealth and industry).

55 *Id.* (July 12) at 302, *reprinted in* Appendix A.

56 The shift from real estate values to population as the basis of apportionment of requisitions had almost been adopted in the Confederation period, after it had become appar-

Wilson suggested that the North's objection to including slaves in representation would be ameliorated if the same rule governed taxation.<sup>57</sup> Elbridge Gerry of Massachusetts pointed out that this change would be cosmetic, because "the states were not to be taxed as states,"<sup>58</sup> presumably because the federal government could now lay taxes on foreign trade and consumption without apportionment and lay apportioned taxes on individuals, obviating the need for requisitions. At the end of the July 12 session, a resolution was passed that stated: "provided always that representation [in the House] ought to be proportioned to direct taxation,"<sup>59</sup> which in turn would be proportioned on the basis of numbers (with slaves counting as three-fifths), with the population being determined by a federal census.<sup>60</sup>

On July 26 the agreed-upon portions of the Constitution, as well as other yet-to-be-decided matters, were submitted to the Committee on Detail, which reported back on August 6 with several additional provisions relating to taxation.<sup>61</sup> Since the tide had shifted from a nationalist government having general powers to a government possessing only enumerated powers, it was necessary to provide expressly that the new government would have the plenary power to lay and collect taxes.<sup>62</sup> Also added was a clause requiring capitation taxes to be apportioned according to the census.<sup>63</sup> This provision, discussed later,<sup>64</sup> appears initially to have been intended as a kind of insurance against the possibility of a federal slave tax. A proposal to limit the power of direct taxation to instances of failed requisitions was round-

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ent that a system based on real estate appraisals controlled by the states did not work. An anti-abuse amendment was proposed to the Articles to base apportionment on the population, counting slaves as three-fifths. This amendment was supported by twelve of the states, it being generally thought that population was a reasonable index of aggregate state wealth, but the amendment failed for lack of the required unanimity. See Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), in 1 ELLIOT'S DEBATES, *supra* note 10, at 482, 484; Johnson, *Foul-Up*, *supra* note 7, at 33-35.

57 Madison's Notes (July 12), *supra* note 17, at 304, *reprinted in* Appendix A.

58 *Id.* at 305.

59 *Id.* at 302-05.

60 The reference to "wealth" in the first sentence of the Virginia Plan clause empowering the legislature to vary the representation according to the principles of wealth and number of inhabitants was taken out the next day. *Id.* (July 13) at 309.

61 The Committee on Detail had (inadvertently?) dropped the link between representation and direct taxes, but that problem was immediately fixed by amending the draft of the Representation Clause so as to refer to the direct-taxation apportionment rule, located in a different clause. See *id.* (Aug. 8) at 391.

62 The Convention approved this provision without debate. See *id.* (Aug. 16) at 434.

63 *Id.* (Aug. 6) at 378-79.

64 See *infra* text accompanying notes 285-303.

ly defeated on August 21, while the provision barring a federal tax on exports was approved.<sup>65</sup> A proposal concerning the ports, which provided that “[a]ll duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States,”<sup>66</sup> was referred to an ad hoc committee, which fashioned the present version of the Uniformity Clause, approved on August 25.

On September 12, the Committee on Style and Arrangement presented a final draft of the Constitution which merged the drafts of separate direct-tax and representation provisions into the Representation Clause, because both contained the same rule of apportionment.<sup>67</sup> The separate provision requiring apportionment of capitulation taxes was expanded by adding the reference to direct taxes.<sup>68</sup> Finally, the uniformity requirement for duties, imposts, and excises was merged with the clause empowering Congress to lay and collect taxes.<sup>69</sup>

Although the foregoing account is meant to be as objective as possible, I will offer a tentative interpretation. What started off as a nationalist project to overcome the “wicked states”<sup>70</sup> was compromised by efforts from states righters, small states, and slave-importing states.<sup>71</sup> In the area of taxation, this tension played out over the issue of apportionment of taxes. The events of July 12 resulted from a confluence of three trends: (1) the inertia of apportionment as the default rule for allocating taxes under the Confederation and the Virginia Plan, (2) a realization that requisitions could create conflict between the federal government and the states, and (3) a growing awareness that apportionment would not work for certain non-

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65 Madison’s Notes (Aug. 21), *supra* note 17, at 453, 456.

66 *See id.* (Aug. 25) at 479.

67 *Id.* (Sept. 12) at 536. For a discussion of what preceded this move, see *infra* notes 292, 294, 300 and accompanying text.

68 This change is discussed in the text accompanying *infra* notes 300–02.

69 *See* U.S. CONST. art. I, § 8, cl. 1.

70 *See* JOHNSON, *supra* note 27, at 154–55 (noting that the Anti-Federalists were particularly opposed to a direct tax).

71 Small states, slave-holding states, and states as states prevailed in the following respects, apart from taxation, relative to the Virginia Plan: (1) deleting the power to negate state laws, (2) limiting federal powers to those enumerated, (3) constituting the Senate on an equal-representation basis, (4) electing senators by state legislatures, (5) including slaves in the representation formula, (6) prohibiting a ban on the import of slaves until 1808, (7) limiting any import tax on slaves to \$10 per slave, (8) providing for the election of the President, (9) requiring all states to return fugitive slaves, and (10) providing for amending the Constitution.



requisition taxes. Thus, *apportionment was not invented on July 12 (or during the Convention), and the concept of “direct tax” was pulled out of a hat to limit, in the interests of practicality, the scope of the apportionment requirement. At no point was apportionment, as a political principle, seriously questioned on the merits. The principle of apportionment was not generated by the institution of slavery. Instead, slaves, as both wealth and persons, had to be accommodated into any apportionment formula based on wealth or population.*

Politically, apportionment of taxes was embraced by states-rights Federalists because it has the effect of treating the peoples of states as independent tax-paying communities. For slaveholding interests, apportionment of representation and taxation (counting slaves as three-fifths) was a good deal because representation was a more important issue than taxation. Apportionment was tolerated by the nationalists because the federal government ended up with a taxing power immune from state interference, and direct taxation was expected to be the rare federal practice rather than the norm; in addition, apportionment—as an acknowledgement of the role of states—would serve the cause of ratification.

## II. “DIRECT TAX” CANNOT BE BROADLY CONSTRUED

The text and history demonstrate that the apportionment requirement deserves to be taken seriously, but they do not (so far) indicate the scope of its application, which depends on the meaning of “direct tax.” Here, it is argued that “direct tax” is not to be construed broadly to encompass virtually every federal tax other than imposts. Actually, it cannot seriously be claimed that “direct tax” refers to any tax other than a property tax. An expansive view of apportionment is either not supported by, or is contrary to, the full range of approaches to constitutional interpretation: textualism, Framers’ intent, contemporaneous understanding, doctrine, functionalism, and policy. Therefore, it is not necessary to pick and choose among interpretative approaches.

### A. *The Constitutional Text*

The text of the Constitution states that duties, imposts, and excises are subject to the uniformity requirement.<sup>72</sup> The uniformity requirement is incompatible with apportionment, because apportionment, in the case of any tax other than a requisition or universal head tax, must necessarily impose different tax rates with respect to different states. A tax in which the rate structures change at state lines cannot be uniform among the states.<sup>73</sup> The only logical conclusion to be drawn is that duties, imposts, and excises cannot be subject to the apportionment requirement.

This difficulty can be overcome only if (1) the uniformity requirement tolerates different rates based on geography<sup>74</sup> or (2) the apportionment requirement trumps the uniformity requirement in case of overlap.<sup>75</sup> Neither of these propositions can be supported by logic or the text itself. Nobody in the aftermath of the 1787 Convention thought that apportionment applied to external taxes (imposts). Since duties, for example stamp taxes, and excises are subject to the same rule of uniformity under the text of the Constitution as imposts, it would be illogical to suppose that duties and excises could have been intended (or thought) to be subject to the different rule of apportionment.<sup>76</sup>

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<sup>72</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>73</sup> This interpretation of “uniformity,” discussed in text accompanying *supra* note 11, was not made up of whole cloth by the courts. The Convention history clearly shows that the uniformity requirement arose over a concern that imposts not vary from port to port. See Madison’s Notes (Aug. 28), *supra* note 17, at 483–84 (reporting a motion explicitly prohibiting that preference be given “to the ports of one state over those of another”).

<sup>74</sup> James Madison alone appears to have viewed apportionment and uniformity as being capable of harmonization: if a uniform tax on an article, such as tobacco, operated unevenly on the states, then the Constitution would *require* that other articles also be taxed (uniformly), so that the whole package would satisfy the apportionment requirement. See Virginia Debates (James Madison, June 12, 1788), *supra* note 10, at 306–07, *reprinted in* Appendix C (“[T]here is a proportion to be laid on each state, according to its population. . . . This is a constitutional scale, which is an insuperable bar against disproportion . . .”). Others contemplated that this scenario of an apportioned tax on bundled subjects would be only a maxim of practical politics: apportioned bundled taxes would be politically more palatable than single-item uniform taxes that would operate unevenly. See THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 213–20, *reprinted in* Appendix B; Virginia Debates (Governor Randolph, June 7, 1788), *supra* note 10, at 121–22, *reprinted in* Appendix C (stating that a tax must be laid on the most productive article in each state).

<sup>75</sup> The possible overlap issue is discussed in the text accompanying *infra* note 424.

<sup>76</sup> Apart from confusion as to what fell into the categories of “duty” or “excise,” and apart from those who thought that apportionment was a more equitable principle than the uniformity principle, it is not clear that any of the Framers actually thought that a single-

Both uniformity and apportionment serve the same constitutional value of preventing geographical discrimination, but do so by different means. Uniformity prohibits geographical discrimination by reason of the location of the subject of taxation within one state as opposed to being within another state. Apportionment prohibits discrimination against states as political communities. Since the subject-oriented rule is inconsistent with the community-oriented rule, the two rules must apply to different taxes.

### B. *The Legislative History*

Apportionment of taxes to political subdivisions of a superior government was an institution that existed in various times in England, the continent, and American colonies prior to the 1787 Convention.<sup>77</sup> Apportioned requisitions were the sole revenue source of the Confederation. The 1787 Convention, which was formally charged with revising the Articles of Confederation, conducted its proceedings under the rubric of considering and revising the Virginia Plan, which assumed, in its reference to “quotas of contributions,” the continuation of an apportionment system. To be sure, it is unclear if “quotas

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subject duty or excise had to be apportioned. The July 12 colloquy clearly excepts taxes on consumption—duties and excises—from apportionment on the grounds that apportionment of them is impractical. See Madison’s Notes (July 12), *supra* note 17, at 302–06, reprinted in Appendix A. Although Madison might appear to have been somewhat confused on this point, see *supra* note 74, he did not object to the non-apportionment of the whiskey tax being considered in 1791. See *infra* note 109. When the carriage tax was debated in 1794 in the House of Representatives, Madison thought it was a property tax subject to apportionment, but Fisher Ames explained that it was an excise as a tax on use. Madison voted against the tax in any event, but it could have been on the ground that the tax was against Virginia interests. See 4 ANNALS OF CONG. 730 (1794). Madison did not raise the same point in connection with other excises and stamp duties considered at the same time. In light of the foregoing, it is puzzling that Calvin Johnson insists that “direct tax” in the Constitution was understood to mean all internal taxes. See Johnson, *Foul-Up*, *supra* note 7, at 47–66.

<sup>77</sup> As to the colonies, see EINHORN, *supra* note 27, at 65 (discussing Massachusetts), and *id.* at 92 (discussing Pennsylvania). See also ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 363 (Robert Maynard Hutchins ed., Univ. of Chicago Press 1952) (1776) (describing the English land tax as a fixed levy on districts based on a one-time valuation); *id.* at 376 (describing the French taille as of 1775 as one apportioned among provinces). A fourteenth-century English tax on tangible personal property was apportioned among districts. See WILLIAM KENNEDY, ENGLISH TAXATION 1640–1799: AN ESSAY ON POLICY AND OPINION 16–18 (1913). Taxes enacted in 1642, 1643, and 1649 were also apportioned among districts. See *id.* at 39–40. The land tax of 1689 abandoned district quotas, but rates still varied among districts, and district quotas were revived in 1692. See *id.* at 44–45. This is the tax mentioned by Smith, and it appears that this tax lasted through the eighteenth century.

of contributions” was meant to refer not only to requisitions, but also to non-requisition taxes. Nevertheless, it is clear that apportionment of taxes among the states (or the collective populations of states) was assumed to be a significant feature of the landscape. The New Jersey Plan provided for only unapportioned imposts and apportioned requisitions.<sup>78</sup> Thus, apportionment was the dominant background color. On July 12, apportionment was formally approved as the norm for all federal levies, but almost immediately was then restricted to direct taxes (and, presumably, requisitions). This move can be viewed either as an “extension” of apportionment relative to a requisition-only system, or as a “cut-back” of apportionment relative to taxes in general.

In any event, in the July 12 colloquy it was explained that the term “direct tax” (subject to apportionment) was exclusive of taxes on international trade (external taxes) and internal taxes on “consumption.”<sup>79</sup> As a matter of legislative intent, it cannot be contended that “direct tax” as used in the Constitution means “all taxes” or “all internal taxes” (i.e., excluding only taxes on international trade). The July 12 motion that the Convention delegations finally voted on was clearly explained to them by the proponents as being intended to exclude at least imposts and taxes on consumption, subsequently denoted as “duties” (stamp taxes) and “excises.”<sup>80</sup>

### C. *Apportionment Is Impossible for Taxes on Transactions*

The mechanics of apportionment, described earlier, are simply incompatible with a tax on transactions, such as imposts, stamp duties, and sales taxes.<sup>81</sup> A transactional tax requires application of a known tax rate to the tax base, which, in a transaction, exists at a given point in time.<sup>82</sup> The tax rate under an apportioned tax requires that the aggregate tax base for a given state be known. However, the

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78 See *supra* text accompanying note 39.

79 Madison's Notes (July 12), *supra* note 17, at 302–06, *reprinted in* Appendix A.

80 *Id.*

81 Remarks by George Mason of Virginia and Rufus King of Massachusetts appear to recognize this point. See *id.*

82 To a very modest extent, this problem can be finessed by the mechanism of the “bonded warehouse,” whereby a taxable item is stored in a warehouse, with the unpaid tax becoming due when the item is removed. See BLACK'S LAW DICTIONARY 1615 (8th ed. 2004). However, bonding did not exist during the Framing period, and it would delay reckoning of the tax only so long as the manufacturer, merchant, importer, etc. retained custody of the item. Bonding is now standard practice in the case of excise taxes on the production of distilled spirits.

aggregate tax base for a state in the case of a transactional tax cannot be known until the end of some period of time (say, a year), at which point the sum of the relevant transactions within the state can be aggregated. By the time the tax rate can be ascertained, the taxable transaction will have become a thing of the past. Hence, the tax would not be extractable from the transaction itself or its proceeds, which is the whole point of a transaction-type tax.<sup>83</sup>

The foregoing analysis obviously does not apply to non-transaction taxes, such as poll (head) taxes<sup>84</sup> and property taxes, both of which were then common at the state level and were undoubtedly understood as being direct taxes.<sup>85</sup> In addition, it would not apply to a personal tax on the aggregate transactions attributable to a person that occur over a specified time period (say, a year), such as income taxes, wage taxes, and personal consumption taxes. These taxes are mechanically capable of apportionment because rates can be set after all the relevant facts for the taxable year are in. However, it does not follow that such taxes are direct taxes in the legal sense, as it could be claimed that aggregation does not overcome the fact that such taxes are basically imposed with respect to transactions. Aggregation does not alter the subject of the tax nor, ultimately, who pays it.

In any event, the impossibility of apportioning a transactional tax is compelling proof that internal stamp taxes and other purely transactional internal taxes could not be considered direct taxes. To im-

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83 Transaction-type taxes were the easiest of all taxes to lay and collect until modern times. See SMITH, *supra* note 77, at 383 (“The impossibility of taxing the people, in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities. The state not knowing how to tax, directly and proportionably, the revenue of its subjects, endeavours to tax it indirectly by taxing their expense, which, it is supposed, will in most cases be nearly in proportion to their revenue.”); see also James Madison, et al., Address to the States, By the United States in Congress Assembled: To Accompany the Act of April 18, 1783 (Apr. 26), in 1 ELLIOT’S DEBATES, *supra* note 10, at 96–97 (advocating that the Confederation be allowed to levy import duties on the ground that taxes on consumption, especially imported consumer items, are the “least burdensome, because they are least felt, and are borne too by those who are both willing and able to pay them”).

84 Although the meaning of the term “poll tax” after the Framing period eventually evolved towards that of a fee for the privilege of voting, during the Framing period, it simply meant a head tax or capitation tax. See EINHORN, *supra* note 27, at 30, 74.

85 Statements by some key players in the Framing period are consistent with this view. See THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 215, reprinted in Appendix B (explaining that taxes classified as “internal” may be described as direct or indirect); Virginia Debates (John Marshall, June 10, 1788), *supra* note 10, at 229, reprinted in Appendix C (stating that there are few “objects of direct taxes,” including lands, slaves, and stock).

pose an apportionment requirement on such taxes would have been embarrassing indeed!

*D. The Impracticality of Delegation in a Federal System*

Apportionment to “lower” political units was a feature of property and capitation tax administration in England (and perhaps the continent), some colonies, and the Confederation.<sup>86</sup> Apportionment makes some practical sense as a delegation of authority to local units as collection agents in cases where the local units have a superior capability of ascertaining the relevant facts than the central government. Apportionment (delegation) also makes sense under a confederation-type scenario, where the central government is merely an agent of sovereign governments. Delegation as a collection mechanism might have had initial appeal in 1787 for a fledgling federal government with no tax-collection bureaucracy.

However, the principle of delegation to local authorities makes little sense in the United States where both the federal government and the state governments are sovereign because delegation could create conflict between the federal governments and the states. This potential for conflict was recognized in the case of requisitions on state governments, but the problems of non-requisition apportionment appear to have been under-appreciated. In that setting, delegation would entail either the commandeering of local officials by the federal government (which would also raise the potential for conflict with the states) or the hiring of local officials as part-time federal tax collectors, in which case the same people would be serving two masters. If the federal government would instead be seen as having to resort to hiring local persons who were not state or local government officials, then a duplicative bureaucracy would be created, but, at the same time, apportionment (state quotas) would be pointless as part of the collection machinery.

*E. Contemporary Understanding*

An advocate of a broad meaning of “direct tax” might argue either that the meaning is (1) clear on its face or (2) ambiguous but with a meaning that emerges from contemporary understanding. Both of these attempts fizzle.

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<sup>86</sup> See *supra* note 62 and accompanying text.

1. Does “Direct Tax” Have a Clear Meaning as Text?

Initially, the term “direct tax” is incomplete, as it raises the question, “Directly on what?” It is not a term used in common, everyday speech. The term appears to have no legal relevance in the United States apart from the issue considered herein. The closest thing to a colloquial meaning of “direct tax” is that of a tax imposed directly on taxpayers, rather than intermediaries.<sup>87</sup> However, in order to avoid the useless proposition that a “direct tax” is a “tax on the payer of the tax,” it must be the case that “taxpayers” in the definition must refer to those who bear the ultimate burden of the tax, rather than those who actually pay it. This meaning accords with the only plausible literal meaning of “direct tax” as a tax paid by the same taxpayer as bears the burden of the tax. Thus, an “indirect tax” would be a tax paid by *X* that is actually suffered by *Y*, i.e., a tax that is “shifted” from one taxpayer to another, as where a sales tax that is “paid” by a merchant is “passed on” to the ultimate consumer by means of a *pro tanto* price increase. This meaning is constitutionally plausible, because the “indirect tax” categories of duties, imposts, and excises were (and are) often viewed as being taxes that are shifted.<sup>88</sup>

However, the notion of a shifted tax relies upon the discipline of economics,<sup>89</sup> and the Supreme Court, in both its textualist and originalist modes, tends to avoid ascribing term-of-art meanings to constitutional text on the theory that the Constitution and its Amendments were ratified by the people and speak to the people. Persons of ordinary comprehension<sup>90</sup> would be more likely to grasp “direct tax” as

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87 See BLACK’S LAW DICTIONARY 1496 (8th ed. 2004) (“A direct tax is presumed to be borne by the person upon whom it is assessed, and not ‘passed on’ to some other person.”).

88 The notion that import duties and taxes on consumption are “passed on” was part of the intellectual climate of the Framing period, leaving traces in the July 12 colloquy. See OLIVER WOLCOTT, JR., DIRECT TAXES, H.R. DOC. NO. 4-100, 2d Sess. (1796), in 5 AMERICAN STATE PAPERS: CLASS III FINANCE 414–41 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832) [hereinafter AMERICAN STATE PAPERS], available at <http://memory.loc.gov/ammem/amlaw/lwspink.html> (providing an overview of the taxation systems in various states); accord James Madison, *Embargoes* (May 6), in 4 ELLIOT’S DEBATES, *supra* note 10, at 433 (recording Mr. Sedgwick’s remarks that characterized luxury taxes as indirect because they “created an indirect charge on others besides the owners”); see also *supra* text accompanying notes 52–53.

89 A formalistic notion of “shifted”—that is, the amount of the tax being added on to the selling price—does not work, as imposts and some excises are not added to selling prices.

90 See *Merchants’ Loan & Trust Co. v. Smietanka*, 255 U.S. 509, 515 (1921) (discussing the “common understanding” of the term “income”); *Eisner v. Macomber*, 252 U.S. 189, 206–07 (1920) (construing the Sixteenth Amendment according to common usage); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–92 (1824) (construing “commerce” similarly).

referring to certain subject matters rather than in empirical cause and effect terms. Furthermore, legal categories can only function properly if their meaning is reasonably clear and stable. A definition of “direct tax” in terms of subject-matter categories would be far more workable than one based on empirical economics, where new research can show that accepted notions of how the world works can be incorrect.

On the merits, the “non-shifted” meaning of “direct tax” sinks into quicksand, because even “add-on” taxes might not be shifted but rather absorbed by the seller,<sup>91</sup> and, at the other end of the spectrum, taxes “directly” on persons, property, or income might be shifted if it is (realistically) assumed that markets are imperfect.<sup>92</sup> Indeed, a comprehensive Treasury Department study of taxes undertaken shortly after ratification of the Constitution concluded that head taxes would increase the price of labor, taxes on investment would increase the cost of capital, and taxes on factors of production might be passed on in either direction.<sup>93</sup> Of course, the degree (if any) of shifting is not knowable with any certainty. No legal (much less constitutional) rule can rest on so insecure a foundation. Indeed, the proponents of a broad construction of “direct tax” are well-advised to abandon the “shifting” test, because it undermines their position: since virtually any tax might be shifted, all taxes must be indirect!

Another problem with the “non-shifted” meaning of direct tax is that it does not relate to any constitutional concerns, especially of the kind to which the concept of apportionment pertains, namely, federal-state power allocations.<sup>94</sup>

In light of the foregoing, it is not surprising that the Supreme Court, after once flirting with the “no-shifting” definition of direct

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91 See The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (James Wilson, Dec. 11, 1787) [hereinafter Pennsylvania Debates], in 2 ELLIOT'S DEBATES, *supra* note 10, at 519 (expressing doubt as to whether import duties were typically borne by the consumers). The burden of excise taxes, in theory, depends on supply and demand curves. See Raymond J. Ring, Jr., *Consumers' Share and Producers' Share of the General Sales Tax*, 52 NAT'L TAX J. 79 (1999) (reporting estimates of the percentage of the general sales tax that is levied on residents' consumption spending).

92 See George R. Zodrow, *The Property Tax as a Capital Tax: A Room with Three Views*, 54 NAT'L TAX J. 139 (2001) (stating the current view that property taxes are borne by all investments); WILLIAM M. GENTRY, A REVIEW OF THE EVIDENCE ON THE INCIDENCE OF THE CORPORATE INCOME TAX (U.S. Dep't of the Treasury 2007), <http://www.treas.gov/offices/tax-policy/library/ota101.pdf> (finding that the corporate income tax is passed on in part to labor).

93 WOLCOTT, *supra* note 88, at 438–39.

94 This point is considered *infra* in the text accompanying notes 393–401.



tax,<sup>95</sup> has explicitly rejected it.<sup>96</sup> At best, it can only be concluded that a tax paid by an intermediary is a per se indirect tax, but it cannot be concluded on the basis of the “non-shifted” notion that a tax on a non-intermediary is per se a direct tax in the legal sense.

Another possible meaning for direct tax might be a tax on the thing that is the real object of a tax, as opposed to a tax on one thing as a way of taxing another thing that is hard to reach directly. This appears to be the meaning of direct tax that can be gleaned from the writings of Adam Smith, the leading authority on taxation during the period as a result of the publication in 1776 of *Wealth of Nations*. Smith’s sporadic use of the notion of “direct” was as an adverb (“directly”), not as an adjective or part of a compound noun.<sup>97</sup> Thus, stamp duties on parchment and registration of deeds are “indirect” taxes on transferred property,<sup>98</sup> and excise taxes on consumable commodities, as taxes on expense, are “indirect” taxes on personal revenue.<sup>99</sup> This usage is not very helpful even as a description, because it again appears to be mired in the tangle of incidence analysis. Thus, a capitation tax on the lower ranks of people is described by Smith as a direct tax on the wages of labor,<sup>100</sup> although it would seem to be indirect in the same way that an excise tax on consumption is an indirect tax on income. To Smith, the concept of direct tax cannot have been important: (1) the term is not defined, (2) the term is used only occasionally, and (3) the term is not given any normative significance.<sup>101</sup> It appears that Smith’s use of “direct” was not invoked in the Convention or ratification debates on the taxing power. Although Smith was occasionally invoked on other issues, it is hard to gauge his influence even among educated elites, and his influence on the rest of the population would have been negligible.

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95 See *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 158 U.S. 429 (1895) (holding that an unapportioned tax on the rents or income of real estate is a direct tax and unconstitutional).

96 *Knowlton v. Moore*, 178 U.S. 41, 82 (1900); see *Nicol v. Ames*, 173 U.S. 509, 515, 520 (1899) (emphasizing the importance of considering the “practical nature” of the tax rather than a theoretical examination of the tax).

97 See SMITH, *supra* note 77, at 381, 383.

98 See *id.* at 379 (discussing stamp duties on deeds as taxing property “indirectly”).

99 See *id.* at 383 (discussing taxes on consumable commodities).

100 See *id.* (discussing capitation taxes).

101 Smith’s normative framework was fourfold: (1) equity, (2) certainty (as opposed to leaving matters to administrative discretion), (3) convenience, and (4) administrative efficiency. See *id.* at 361–62. Smith spent a good deal of time analyzing incidence with respect to various kinds of taxes, but incidence was not what distinguished direct taxes from indirect taxes.

In sum, the meaning of “direct tax” is not clear on its face. Therefore, other interpretive methods are required to discern its meaning.

## 2. Contemporary Usage

A common technique for interpreting ambiguous text is to undertake a historical inquiry into how the term was understood at the time of enactment.<sup>102</sup> Because “direct tax” possesses only an “inside the Constitution” meaning,<sup>103</sup> its construction cannot avoid reference to historical sources emanating from the Framing/ratification period.

But historicism has its problems. The principal one is that it is susceptible to the charge of cherry-picking,<sup>104</sup> a “sin” of which the main (if lonely) proponents of an expansive scope for the apportionment requirement (the *Pollock* majorities and Erik Jensen) are the more guilty.<sup>105</sup> Statements positing a broad scope for apportion-

<sup>102</sup> The original-understanding version of originalism looks to the audience receiving the text, as opposed to statements of those creating the text. See, e.g., John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritarianism: Defending the Nexus*, 101 NW. U. L. REV. 1919, 1928–30 (2007) (describing how “Original Methods Originalism” looks to the “consensus about the constitutional provisions at the time of their enactment”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857–60 (1989) (examining the meaning of “the executive power” in Article II, Section 1 of the Constitution using originalism). Since the authors of *The Federalist Papers* and principal players in the ratification debates included Framers, the distinction between subjective and objective originalism is somewhat attenuated in this case.

<sup>103</sup> Since “direct tax” lacks any clear contemporary legal usage, it is not claimed herein that the meaning of this term has evolved over time either on account of the evolution of language or of social practices that inform language.

<sup>104</sup> The view that historical investigation can be objective has long been under attack. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 698 (1987) (“[T]he belief that history deals with objective ‘facts’ is itself a hotly disputed issue among contemporary historians.”). See generally Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court’s Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511 (2006) (arguing against competing, politically-motivated, originalist interpretations of the Eleventh Amendment).

<sup>105</sup> The majority opinion in *Pollock v. Farmers’ Loan & Trust Co. (Pollock II)*, 158 U.S. 601 (1895), is especially guilty of cherry-picking. It downgrades the *Hylton* case on the basis that it was badly reported. *Pollock II*, 158 U.S. at 626. Yet, it cites Hamilton’s private view as expressed in a compilation of letters published in 1851, Madison stating his opinion that the carriage tax was subject to apportionment, see *supra* note 76, a statement by the Anti-Federalist Gallatin (made twenty years after the fact) effectively equating “direct tax” with any tax used by the states, and usage in England but not the more limited Continental usages. *Pollock II*, 158 U.S. at 623–30; see EINHORN, *supra* note 27, at 273. None of these sources arise from the Convention or ratification debates. Similarly, Jensen downgrades the *Hylton* opinion on the grounds, inter alia, that the Supreme Court lacked jurisdiction and that the judges were Federalists (even though Paterson authored the New Jersey plan), but he fails to note Madison’s (post-1789) anti-Federalist politics. Jensen, *Consumption Taxes*, *supra* note 5, at 2351. Johnson suffers from the opposite tendency of

ment made well after ratification by supporters of Jefferson (including Madison) cannot be used as evidence of original understanding,<sup>106</sup> as an anti-tax posture helped define the Jeffersonian Republican party,<sup>107</sup> and a pro-apportionment stance aligned that party with states-rights sentiments,<sup>108</sup> as well as provided additional political cover for opposing federal excise taxes.<sup>109</sup> Although the anti-tax rhetoric of the Republicans was genuine, the accompanying pro-apportionment rhetoric should be taken with a grain of salt because their words were contradicted by their deeds. No apportioned fed-

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citing sources indiscriminately, his point being that a term that can mean almost anything must mean nothing. See Johnson, *Foul-Up*, *supra* note 7, at 46–56. Ackerman’s view is that modern history trumps older history. See Ackerman, *supra* note 6, at 51 (advising that older teachings “should be dispatched into the dustbin of constitutional history”).

- 106 See JOHNSON, *supra* note 27, at 5–8, 130–38 (arguing that the Federalists, as the winners of the major constitutional struggle over taxes, are the more reliable sources). The Republican Party that became dominant after Jefferson acceded to the presidency in 1801 included—if it was not limited to—those who opposed ratification of the Constitution. On the other hand, winning the struggle over the power to lay direct taxes does not tell us much about the scope of the apportionment requirement, because the apportionment requirement might have been part of the price to be paid for obtaining the power.
- 107 Madison and Jefferson began to gravitate away from Hamilton as early as 1791. Hamilton favored commercial interests while Jefferson and Madison favored landowning and agricultural interests. The Republicans opposed naval construction, a standing army, and internal improvements, and any other program that would occasion the imposition of significant federal taxes. For a brief discussion, see Norman Schofield, *Madison and the Founding of the Two-Party System*, in JAMES MADISON: THE PRACTICE OF REPUBLICAN GOVERNMENT 302, 322–24 (Samuel Kernell ed., 2005) [hereinafter JAMES MADISON]. Immediate points of difference were the Bank of the United States and the federal assumption of state debts incurred in the Revolutionary War.
- 108 Madison, contrary to his earlier position in the Convention, warmly supported the doctrine of enumerated powers as early as 1792, as it offered a principle with which to oppose Hamilton’s nationalistic program. James Madison, Cod Fishery Bill (James Madison, Feb. 7, 1792), in 4 ELLIOT’S DEBATES, *supra* note 10, at 427–28.
- 109 Madison’s position with respect to apportionment is not entirely clear. Despite a suggestion that uniformity and apportionment might have been compatible under some circumstances, see *supra* note 74 and accompanying text, Madison elsewhere appears to have recognized that uniformity is basically incompatible with apportionment, while preferring apportionment as the higher principle. See Virginia Debates (James Madison, June 15, 1788), *supra* note 10, at 458–59, reprinted in Appendix C. In the House, Madison appears to prefer apportioned taxes to single-item excises, seemingly as a policy matter, but accepted the non-apportioned excise on whiskey. See Gazette of the United States, 8 January 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 2791, at 229–30 (William Charles diGiacomantonio et al. eds., 1995) [hereinafter FIRST FEDERAL CONGRESS]; see also *supra* note 76 and accompanying text, which notes Madison’s position on the carriage tax that was upheld in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). It would appear that Madison’s increasing embrace of apportionment during the Federalist period was simply an aspect of the overall Republican agenda. See *infra* note 110.

eral tax was seriously advanced by them except a tax on land.<sup>110</sup> After they took power in the election of 1800, they essentially allowed all taxes other than imposts to lapse, but in connection with the War of 1812, the Madison administration basically caused Congress to renew the Federalist tax program of the 1790s, as augmented by additional excises, with again only a real estate tax being apportioned.<sup>111</sup> Even an annual “duty” on household goods, furniture, and personal effects by reason of ownership was not apportioned.<sup>112</sup>

An originalist approach to constitutional interpretation has difficulty accommodating social phenomena that did not exist during the Framing period and its immediate aftermath. Here, those phenomena would be annual personal taxes on income, aggregate consumption, or aggregate wealth, which did not then meaningfully exist,<sup>113</sup> although they were talked about to some extent.<sup>114</sup> Insofar as the originalist position leads to the conclusion that the term “direct tax” could only encompass taxes that people in the relevant period had experienced, then it would appear to be limited to the kinds of property and capitation taxes that people were then familiar with. However, perhaps the more widely-followed view is that of Chief Justice Marshall, to the effect that terms in the Constitution are broad enough to admit of applications not specifically contemplated by the Framers.<sup>115</sup> Even so, it does not follow that the term “direct tax” in-

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110 The chief financial spokesman of the Republicans in Congress during the second half of the decade of the 1790s, Albert Gallatin, actively pushed an apportioned land tax as a ploy to alienate northern farmers, who would be subject to higher rates than southern landowners. However, the apportioned tax enacted in 1798 on slaves, homes, and land was designed along lines favorable to the Federalist Party. See EINHORN, *supra* note 27, at 189–94.

111 The early history of apportioned taxes is given at *supra* Part I.C.

112 Act of Jan. 18, 1815, ch. 23, 3 Stat. 186, 186–87, *repealed by* Act of Apr. 9, 1816, ch. 41, 3 Stat. 264, 264.

113 The income tax first appeared in England in 1798 as a temporary measure to help finance continental wars. A short history of taxation from feudal times through the first English income tax is found in EDWIN R. A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 41–114 (1911).

114 Adam Smith classified a comprehensive personal income or wealth tax as a “capitation tax” but assumed that it was not practical because the taxing authorities could not obtain the necessary information without intolerable invasions of privacy. SMITH, *supra* note 77, at 382.

115 See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819) (“It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language

cludes personal income, consumption, and perhaps wealth taxes, especially since the competing term—“excises”—is similarly open-textured. Where two categories are in competition with respect to “new facts,” the matter is likely to be settled by analogy. Once “shifting” is eliminated as the distinguishing characteristic of “direct tax,” personal income and consumption taxes, being a function of transactional outcomes, more closely resemble excises than property or capitation taxes.<sup>116</sup> Another possibility is that both terms cover the same tax. In that case, it has to be decided whether apportionment or uniformity is the better operative rule.

### 3. *The Illusion of the Pseudo-Requisition*

The attempt to find the Rosetta Stone that will unlock the code to the meaning of “direct tax” is fundamentally misguided.<sup>117</sup> The present issue is not about divining the meaning of a stand-alone term, like “cruel and unusual punishment” or “high crimes and misdemeanors.” Direct taxes are subject to the apportionment requirement, whereas non-direct taxes are subject to the incompatible uniformity requirement. Therefore, the taxing provisions are a package, and Framing-period statements that show a basic misunderstanding of the package are not helpful.<sup>118</sup> Furthermore, courts, in attributing

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would have been so varied, as to exclude it, or it would have been made a special exception.”).

- 116 Courts have never adopted the view that personal income and consumption taxes are per se direct taxes on account of being imposed on individuals. See *infra* note 163 and accompanying text.
- 117 Originalism can tempt judges to subordinate precedent to the judge’s own view of the original sources, at least where the precedent does not itself have an originalist flavor. In the present case, however, the precedents from *Hylton* forward are themselves steeped in historicism: the Justices in *Hylton* (decided in 1796) were Framers, and later Supreme Court cases relied on *Hylton* and early practice by Congress and the Executive. See generally John McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007) (developing a theory for the compatibility of precedent and originalism). Thus, a judicial construction of “direct tax” based on a court’s reading of historical materials at variance with doctrine would be arrogant indeed! Additionally, judges, even with staff assistance, lack the time to do comprehensive original historical research.
- 118 Some statements are simply opaque. See The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (Chancellor Livingston, June 17, 1788) [hereinafter New York Debates], in 2 ELLIOT’S DEBATES, *supra* note 10, at 341 (“[D]irect taxes; that is, taxes on land, and specific duties.”). Others appear to assume that apportionment applies to all taxes, or to all internal taxes. See The Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Mr. Dawes, Jan. 9, 1788) [hereinafter Massachusetts Debates], in 2 ELLIOT’S DEBATES, *supra* note 10, at 59–60; Letter from Roger Sherman & Oliver Ellsworth to the

rationality to the package, would, and as it turned out, did, construe it in instrumental terms rather than in linguistic terms.<sup>119</sup>

Rampant confusion over the package appears to have been common during the Framing/ratification period, as evidenced by statements to the effect that the federal government would impose “general” apportioned taxes without any universal subject matter. Rather, it was supposed that the federal government would tax subject matters that varied from state to state according to existing state laws and practices (or federally-determined subject matters that would be tailored to the economic characteristics of various states).<sup>120</sup> Such a system is referred to herein as a “pseudo-requisition”: almost everything about it smells like a requisition, except that it would be collected by federal officials from persons rather than from states and that the federal government would ultimately control the determination of the subject matters to be specified in each state. The pseudo-requisition is illogical insofar as it incorporates duties and excises, because the uniformity of such taxes required by the Constitution would be defeated twice over, first by employing such modes of taxation in some states but not others, and second by apportionment (resulting in non-uniform rates).<sup>121</sup>

It is also significant that the pseudo-requisition idea was casually thrown out without any consistency among speakers and without specifics. The only way that a pseudo-requisition that contained duties,

Governor of Connecticut (Sept. 26, 1787), in 1 ELLIOT'S DEBATES, *supra* note 10, at 491–92; New York Debates (John Jay, June 17, 1788), *supra*, at 380–81.

119 Thus the Supreme Court, contrary to the constitutional text, has extended the uniformity requirement beyond duties, imposts, and excises to “taxes” and even to direct taxes that do not have to be apportioned on account of the Sixteenth Amendment, resulting in a situation wherein all federal taxes must be either apportioned or made uniform. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916).

120 Such a scenario was raised by Oliver Ellsworth in the July 12 Convention colloquy: “[any] sum allotted to a state [under a direct tax that was not a requisition] may be levied without difficulty according to the plan used by the state in raising its own supplies.” Madison’s Notes (July 12), *supra* note 17, at 305, *reprinted in* Appendix A. It was also a theme often trotted out by the pro-ratification faction in the Virginia Ratifying Convention. See materials *infra* Appendix C. John Jay, who was not at the 1787 Convention, also might have held this view. Hamilton, in Federalist No. 36, stated that “[t]he method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government,” but he seemed to be referring to real estate taxes involving appraisals. THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 216, *reprinted in* Appendix B.

121 This legal issue was never decided, as no such tax was ever enacted by the federal government. The tax was seen as impractical by all the Justices writing opinions in the 1796 case of *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), as well as by WOLCOTT, *supra* note 88.

imposts, and/or excises could satisfy both the apportionment and uniformity requirements would be as a tax on multiple subject matters (each subject being taxed at a uniform rate in all states) that somehow produces aggregate state yields approximating the respective state quotas. Designing such a system would be quite a feat of tax engineering, because the subjects and rates for transactional taxes would have to be set in advance on the basis of yield estimates. The estimates would often be substantially off-target, raising the problem of what to do about unfulfilled state quotas and yields in excess of state quotas. More generally, it is not clear how the federal government could adopt state laws, practices, and perhaps collection devices without becoming entangled with state institutions and politics. Finally, the incorporation of indirect (passed-on) taxes into the pseudo-requisition would undermine the purpose of apportionment to allocate the tax burden proportionately among political communities.<sup>122</sup>

The pseudo-requisition concept ends up being essentially one where “direct tax” means “a tax that is in fact apportioned,” an interpretation proposed by Johnson.<sup>123</sup> The resulting constitutional rule would then be the nonsensical “apportioned taxes shall be apportioned according to population.”<sup>124</sup> It would have been easy for the Framers to use language conforming to the Johnson interpretation, but they did not, and instead the text states that “direct taxes” and “capitation taxes” are the taxes that are required to be apportioned according to population, whereas imposts, duties, and excises are subject to the uniformity requirement. The consequence of the Johnson view is the untenable position that Congress could avoid apportionment of capitation taxes and real estate taxes simply by deciding not to apportion them.<sup>125</sup> That interpretation would amount to a delega-

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122 See 2 ANNALS OF CONG. 1842–43 (1791) (statements of Rep. Jackson) (complaining that a distilled spirits tax imposed on Northern producers would be borne mainly by Southern consumers).

123 See Calvin H. Johnson, *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162, 168 (2007) (“The inclusion of excise and duties in ‘direct tax’ and the later exclusion of excises and duties from ‘direct taxes’ show that apportionability was a necessary element of a direct tax under the original meaning.”).

124 The idea of a pseudo-requisition would have made some sense going into the 1787 Convention, when the objective was to enable the federal government to bypass state governments, and apportionment might have been assumed to be required for all federal taxes, in which case there would have been no conflicting uniformity requirement.

125 Capitation taxes must be apportioned pursuant to Article I, Section 9, Clause 4, where “capitation tax” is understood to be a subcategory of “direct tax.” If “direct tax” means nothing other than requisitions, capitation taxes, and other apportioned taxes, it would be easy enough to so state. But it is clear from the historical record that everybody

tion to Congress of the power to determine what “direct tax” means, but such a delegation would invert the hierarchy of the Constitution being supreme law. Moreover, because apportioned taxes fall inequitably on persons, are cumbersome to administer, and entail delays in collection,<sup>126</sup> they would rarely, if ever, be laid, and the apportionment requirement would have amounted to a deception.

In contrast, apportionment of poll taxes and property taxes can be implemented on an ex-post basis: the tax rates would be determined after the state-by-state inventory (and valuation, if relevant) of persons or property, and the appropriate tax bills would then be presented to the taxpayers.

#### 4. *Federalist No. 36*

Perhaps the most often-used window into original understanding is *The Federalist*.<sup>127</sup> The one essay that bears specifically on the distinction between direct and indirect taxation is Federalist No. 36, authored by Hamilton, and set forth as Appendix B of this Article. Hamilton specifically refers only to taxes on real estate in connection

thought that at least real estate taxes were direct taxes. Johnson’s position is that Congress would not apportion a tax unless the apportionment was fair and reasonable, so that any tax that Congress in fact apportioned would satisfy this standard. This interpretation is attacked at *infra* notes 336–42. Since Congress enacted apportioned real estate taxes on three occasions, the Johnson position must be that real estate taxes were direct taxes up through the Civil War, but at some point thereafter they ceased to be direct taxes. At a more abstract level, the proposition that apportioned taxes are direct taxes does not imply that all non-apportioned taxes pass constitutional muster, because Congress might simply decide that it is inconvenient to apportion a tax of the type that could be reasonably apportioned. See Johnson, *supra* note 123, at 164.

<sup>126</sup> An apportioned tax has to be administered on a state-by-state basis, even though it might be more convenient and efficient to administer the tax on a district (local) basis, as is possible with uniform taxes.

<sup>127</sup> *The Federalist* is a collection of pro-ratification essays written by Hamilton, Madison, and Jay to influence public opinion in the New York ratification effort. Whether statements from the ratification debates, including *The Federalist* itself, should be “admitted” is not without controversy. See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) (questioning textualists’ reliance on *The Federalist* but not on legislative history in constitutional decisions); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998) (suggesting that nondelegation concerns do not preclude interpretive use of *The Federalist*). A defense of using *The Federalist* as legislative history is found in Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1498 (1987). For a view that rejects the use of *The Federalist* as legislative history, but accepts it as representing the consensus understanding of the ratifiers, see Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 538–42 (2006).



with his discussion of direct taxes.<sup>128</sup> Hamilton's larger objective is to rebut the claim of the Anti-Federalists that all internal taxes are best left to the states, which have knowledge of local conditions.<sup>129</sup> He argues that the *selection of subjects* for duties and excises by federal officials requires only a general knowledge of the economy of the state.<sup>130</sup> In the case of direct taxes on real estate, the *administration* can be carried out by using the systems in place in the various states for laying and collecting real estate taxes, and any appraisers that are necessary can be hired locally.<sup>131</sup>

Hamilton was not alone in equating "direct tax" with real estate tax.<sup>132</sup> Nevertheless, this was not the only view expressed during the ratification period. The conclusion that best matches the historical data is that there was no clear consensus view of "direct tax," except that said term definitely included "real estate taxes" as well as requisitions and head taxes. Views differed on the issue of what (if anything) might be included other than real estate taxes.<sup>133</sup> This uncertainty is not surprising, as no definition of direct tax emerged from the 1787 Convention, and the link (if any) between the idea of apportionment and the concept of "direct tax" is not apparent on its face.

### 5. *Early Practice*

Another source sometimes consulted as evidence of original understanding is the early (non-judicial) practice of the federal government.<sup>134</sup> The earliest federal tax was on imports,<sup>135</sup> and no faction

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128 THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 213–20, *reprinted in* Appendix B.

129 *Id.* at 214.

130 *Id.* at 216–17.

131 *Id.* at 217.

132 See Virginia Debates (John Marshall, June 10, 1788), *supra* note 10, at 229–31, *reprinted in* Appendix C (identifying that the objects of direct taxes include domestic property); see also *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

133 See New York Debates (Chancellor Livingston, June 17, 1788), *supra* note 118, at 341 (identifying direct taxes as "taxes on land, and specific duties"); Massachusetts Debates (Mr. Dawes, Jan. 18, 1788, Jan. 21, 1788), *supra* note 118, at 42, 57 (identifying direct taxes as all taxes, including those on lands, exclusive of imposts and excises); *id.* (Mr. King, Jan. 21, 1788) at 57 ("The first revenue will be raised from the impost . . . the next from the excise; and if these are not sufficient, direct taxes must be laid.").

134 The early history of federal taxation is described in Henry Carter Adams, *Taxation in the United States, 1789–1816*, in 2 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE: INSTITUTIONS AND ECONOMICS pts. V–VI (New York, Johnson Reprint Corp. 1973) (1884). The "early practice" interpretive approach was followed in *Myers v.*

thought that imposts had to be apportioned. Non-apportioned tonnage duties on ships were also an early revenue source.<sup>136</sup> A tonnage duty, which must be paid to release the ship from port, looks like a tax on tangible personal property or the use thereof.

The whiskey tax of 1792<sup>137</sup> was not apportioned. That tax reached not only the production of distilled spirits, but also the stills themselves according to their capacity. A tax on the consumer goods output of a business falls within conventional definitions of “excise,” but a tax on an asset used in the production process can also be characterized as a tax on capital investment. In contrast to ships, stills could perhaps be attributed to states for purposes of apportionment. Nevertheless, the tax on stills was not apportioned, perhaps on the theory that the cost of stills would be passed on to consumers, but that theory would also apply to real estate used in a business. In any event, the whiskey tax was not seriously enforced, and it appears not to have been challenged in court for lack of apportionment.

The carriage tax of 1794,<sup>138</sup> which also straddled the categories of excise tax and tangible personal property tax, was likewise not apportioned. This tax was challenged on the basis of non-apportionment, but was upheld by the Supreme Court in the March, 1796 case of *Hylton v. United States*,<sup>139</sup> which will be discussed shortly.

Shortly after the *Hylton* decision, the House Ways and Means Committee, fearing that indirect taxes would be insufficient for future needs, asked Treasury Secretary Oliver Wolcott to prepare a report on direct taxes.<sup>140</sup> The Wolcott Report,<sup>141</sup> issued in December of 1796, offered three possible approaches to apportioned taxation: (1) a requisition on the states coupled with a pseudo-requisition back-up for delinquent states,<sup>142</sup> (2) an apportioned pseudo-requisition, and

*United States*, 272 U.S. 52, 175 (1926), and cases cited therein, and in at least one Supreme Court case construing “direct tax.” *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

135 The first such Act—the second law passed by Congress—was the Act of July 4, 1789, ch. 2, 1 Stat. 24, *repealed by* Act of Aug. 10, 1790, ch. 39, 1 Stat. 180. Customs duty rates varied from item to item.

136 *See, e.g.*, Act of July 20, 1789, ch. 3, 1 Stat. 27 (imposing duties on ships and vessels).

137 Act of May 8, 1792, ch. 32, 1 Stat. 267.

138 Act of June 5, 1794, 1 Stat. 373, ch. 45, *repealed by* the Act of Apr. 6, 1802, ch. 19, 2 Stat. 148.

139 3 U.S. (3 Dall.) 171 (1796).

140 5 ANNALS OF CONG. 793 (1796).

141 WOLCOTT, *supra* note 88.

142 A pseudo-requisition is described in the Wolcott Report as an apportioned federal tax “upon the same objects of taxation, and pursuant to the rules of collection by which taxes are collected in the States, respectively.” WOLCOTT, *supra* note 88, at 436.

(3) apportioned subject-specific taxes. Wolcott rejected the first two possibilities on grounds of equity, economic efficiency, and practicality.<sup>143</sup> Although the Report offers no comprehensive definition of “direct tax” and does not purport to be a legal opinion, it states that “[a] direct tax in the sense of the constitution, must necessarily include a tax on lands.”<sup>144</sup> Otherwise, there are some surprises. Taxes on homes are stated to be taxes on expenses (and, therefore, indirect taxes), and taxes on the profits of professions, merchants, and manufacture are said to be “presumed” not to be of the type required to be apportioned. The status, if any, of taxes on invested capital is unclear.<sup>145</sup> The Report is non-committal on the issue of whether such unpopular taxes as capitation taxes and taxes on the stock and produce of farms need to be apportioned.

The Wolcott Report ended up recommending an apportioned tax on slaves, homes, and lands. It is curious that the (progressive-rate) tax on homes, which the Wolcott Report opined to be not subject to apportionment, ended up being a component of an apportioned tax, but apparently there was no move to have the tax on homes invalidated on the grounds that it violated the uniformity requirement. Another possible hypothesis is that the tax on homes, as a tax on a kind of real estate, was a direct tax.

There was much subsequent debate in Congress over the general issue of whether direct (i.e., apportioned) taxes should be resorted to, or whether indirect taxation should be expanded.<sup>146</sup> Meanwhile,

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143 Wolcott recognized that apportioned taxes were inequitable from a national perspective, and sought a route that would both minimize the inequity and create as few economic distortions as possible, while still being capable of administration. The first option, requisition coupled with pseudo-requisition, was considered to be unreliable and capable of creating state-federal conflicts. As to pseudo-requisitions, Wolcott had included a detailed survey of state tax systems in his Report, and what he saw was chaos, inequity within states, and rampant economic distortions. Even taxes on lands were imposed according to varying principles: by acre, by category, by quality, and by value. These objections outweighed, in Wolcott’s view, the tailoring of the pseudo-requisition approach to “local conditions.” See generally WOLCOTT, *supra* note 88.

144 See *id.* at 439.

145 See *id.* at 440 (homes); *id.* at 439 (profits of profession and business); *id.* at 439 (invested capital, referred to as “stock employed in trade and manufactures, and on moneys loaned on interest”). The passage referring to invested capital starts off with the phrase, “[i]t is believed that direct taxes on these objects,” but this phrase does not necessarily mean that such taxes are legally subject to apportionment, and later on it is said that such taxes may end up being taxes on consumption by reason of being passed on. See *id.*

146 The debate in the House is recorded in 5 ANNALS OF CONGRESS 1850–72, 1874–1913, 1915–42 (1797). On the direct tax side, it was claimed that an increase in indirect taxation would be fruitless, because it would drive people to smuggling or evasion. Also, indirect tax revenue would dry up in time of war. Moreover, land (agriculture) was not bear-

the import of the *Hylton* decision was sinking in. The plan advanced by the Wolcott Report eventually bore fruit in the apportioned real property tax of 1798,<sup>147</sup> reaching lands, slaves, and dwelling houses.<sup>148</sup>

The Republicans under Jefferson took control in 1801 and repealed (or declined to renew) all of the Federalist-period internal taxes, including the apportioned tax.<sup>149</sup> However, when the Republicans finally had to impose internal taxes to finance the War of 1812, the only tax that was apportioned was again a real estate tax.<sup>150</sup> This tax, unlike the tax of 1798, allowed a state to satisfy its quota out of its own treasury in lieu of direct enforcement by the federal government against the state's citizens or property.<sup>151</sup> As previously mentioned,<sup>152</sup> and undoubtedly with *Hylton* in mind, an 1815 tax on household goods, furniture, and personal effects was not apportioned.

On the question of whether taxes on a person's annual aggregate income were considered to be direct taxes, the evidence, although scanty, is that they were not. An income tax, to the extent that anybody was even conscious of such a thing,<sup>153</sup> was thought in the Framing period to be impractical because of accounting and collection problems.<sup>154</sup> Nevertheless, some U.S. states had taxes on professions, merchants, and producers of goods, sometimes called "faculty" taxes, but the Wolcott Report of 1796 opined that such taxes (which were not directly implicated by the *Hylton* decision) were not subject to the

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ing its fair share. On the other, there was worry that a land tax would be apportioned unequally within a state (as would occur under a per-acre tax); the alternative of resorting to appraisals would be expensive and crude. The debaters assumed that window taxes and hearth taxes (taxes on homes) were indirect. Fairness (ability to pay) claims were made on both sides.

147 Act of July 14, 1798, ch. 75, 1 Stat. 597; see also Patrick J. Furlong, *The Origins of the House Committee of Ways and Means*, 25 WM. & MARY Q. 587, 593-94 (1968) (noting that an apportioned land tax proposed by Madison was defeated in the House in 1794).

148 Act of July 14, 1798, ch. 75, § 2, 1 Stat. 597. For a discussion of federal tax politics of the time, see EINHORN, *supra* note 27, at 188-94.

149 Act of Apr. 6, 1802, ch. 19, 1 Stat. 148.

150 Act of July 22, 1813, ch. 16, 3 Stat. 22, *repealed by* Act of Jan. 9, 1815, 3 Stat. 164, ch. 21, § 2; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53.

151 Act of Aug. 2, 1813, ch. 37, § 7, 3 Stat. 53, 71. This feature was anticipated by Madison in Federalist No. 45. THE FEDERALIST NO. 45 (James Madison).

152 See *supra* note 112. Here, the Treasury and Congress would have assumed that the 1796 *Hylton* case, discussed in the text immediately below, and which held that a tax on carriages was not a direct tax, controlled.

153 Justice Paterson mentioned taxes on income in *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180 (1796): "Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income."

154 See *supra* text accompanying note 83, which quotes SMITH, *supra* note 77, at 383.

apportionment requirement.<sup>155</sup> In 1815, Republican Treasury Secretary Alexander Dallas submitted a proposal for an income tax to Congress that was never acted upon.<sup>156</sup> Significantly, the proposed income tax was not to be apportioned.

To conclude, the apportionment requirement was narrowly construed by Congress and the Executive, with help from the Supreme Court, from the very beginning. It cannot be seriously maintained that this narrow-construction consensus was partisan, as it has continued through the present day. Except for another apportioned real estate tax laid to help finance the Civil War,<sup>157</sup> no other apportioned tax has ever been enacted by Congress. The fact is that no party or faction wanted to be responsible for a tax that came to be universally viewed as inequitable,<sup>158</sup> but that also proved to be cumbersome and inefficient.<sup>159</sup>

To conclude this section, the original-understanding approach reveals no consensus other than that real estate taxes were considered to be the core, and possibly the exclusive, embodiment of “direct tax” (excluding requisitions and capitation taxes).

#### F. Supreme Court Construction of “Direct Tax”

This Part discusses the doctrinal evolution of “direct tax” in the Supreme Court.

##### 1. “Direct Tax” Goes to Court in 1796: *The Hylton Case*

The first case addressing the scope of the apportionment requirement, decided in 1796, was *Hylton v. United States*,<sup>160</sup> which involved a non-apportioned *annual tax*<sup>161</sup> on carriages owned for personal or commercial use. The tax was a fixed dollar amount per

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<sup>155</sup> WOLCOTT, *supra* note 88, at 439. The quote by Adam Smith in *supra* note 83 suggests that excise taxes and income taxes are closely related.

<sup>156</sup> See DEP’T OF TREASURY, STATE OF THE TREASURY, H.R. DOC. NO. 4-438, 3d Sess. (1796), in 2 AMERICAN STATE PAPERS, *supra* note 88, at 885–87; Tax History Museum, 1777–1815: The Revolutionary War to the War of 1812, <http://www.tax.org/Museum/1777-1815.htm> (last visited March 26, 2009) (“Dallas assumed that such an income tax constituted an indirect tax, and would not require apportionment.”).

<sup>157</sup> Act of Aug. 5, 1861, ch. 45, 12 Stat. 292.

<sup>158</sup> The *Hylton* case had the effect of publicizing the inequitable effect of apportioned taxes, and the Republicans in the 1790s attempted to saddle the Federalists with an apportioned land tax that would alienate northern farmers. See EINHORN, *supra* note 27, at 189–94.

<sup>159</sup> See Adams, *supra* note 134, at 67–68 (noting delayed collections and low net yield).

<sup>160</sup> 3 U.S. (3 Dall.) 171 (1796).

<sup>161</sup> Act of June 5, 1794, ch. 45, 1 Stat. 373, *repealed by* Act of May 28, 1796, ch. 47, 1 Stat. 478.

carriage. The judgment was unanimous that the tax was not required to be apportioned.<sup>162</sup> Chief Justice Oliver Ellsworth, having just taken office that morning, did not participate.<sup>163</sup> Justice William Cushing, being ill for the oral arguments, voted, but did not write an opinion. Justice James Wilson, who had voted to uphold the tax in the proceeding below,<sup>164</sup> wrote only to join the judgment of the Court. That left Justices Samuel Chase, William Paterson, and James Iredell to write separate opinions, as was then the custom. Three of the Justices were prominent Framers,<sup>165</sup> and four of them played significant roles in the ratification effort.<sup>166</sup>

One Justice, Chase, expressed some deference to the Congress on the ground that it must have considered the constitutional issue.<sup>167</sup> Although the Court had not yet promulgated the doctrine of judicial

162 The taxpayer conceded that the uniformity requirement was satisfied. *Hylton*, 3 U.S. (3 Dall.) at 171, 172.

163 *Id.* at 172 n.\*.

164 The proceeding below, of which no report exists, was divided. *Id.* at 172.

165 Paterson, of New Jersey, had presented the New Jersey Plan to the 1787 Convention. Ellsworth, of Connecticut, who is often credited with the great compromise involving the composition of the House and Senate, floated the idea of a pseudo-requisition during the July 12 debate. Madison's Notes (July 12), *supra* note 17, at 302–06, *reprinted in* Appendix A. Wilson, of Pennsylvania, stated in the July 12 debate that apportionment would not work unless it was confined to direct taxes. Wilson was a member of the “Committee of Five” (the Committee on Detail) that played a crucial role in drafting the Constitution. *See supra* note 61 and accompanying text.

166 Wilson presented the case for ratification at the Pennsylvania Ratifying Convention. *See* Pennsylvania Debates, *supra* note 91, at 418–517, 518–29. Ellsworth (of Connecticut), Cushing (of Massachusetts), and Iredell (of North Carolina) favored ratification in their respective state conventions. *See* Fragment of the Debates in the Convention of the State of Connecticut, on the Adoption of the Federal Constitution [hereinafter Connecticut Debates], *in* 2 ELLIOT'S DEBATES, *supra* note 10, at 185–97 (Oliver Ellsworth, Jan. 4, 1788) (speaking in support of ratification); Massachusetts Debates, *supra* note 118, at 180 (“Hon. William Cushing, Yea.”); The Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution [hereinafter North Carolina Debates], *in* 4 ELLIOT'S DEBATES, *supra* note 10, at v–vi (listing numerous statements of Iredell). Chase was a delegate from Maryland to the Continental Congress of 1775–77, but does not appear to have played a major role in 1787–89. *See* Address to the People of Maryland, 2 ELLIOT'S DEBATES, *supra* note 10, at 547–56.

167 *Hylton*, 3 U.S. (3 Dall.) at 173 (opinion of Chase, J.). Chase was factually correct on this point. *See supra* text accompanying note 76. Chase's opinion here can be said to be an early example of the judiciary looking to the actions of the post-ratification Congress as being evidence of the contemporaneous understanding of constitutional text. *See also* *Myers v. United States*, 272 U.S. 52, 175 (1926) (“This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.”).

review,<sup>168</sup> there appears to be little foundation for the claim that the Court would then have balked at overturning an unconstitutional statute.<sup>169</sup>

All three judges agreed on the following points: (1) apportionment and uniformity were incompatible principles, and only one of them could govern any tax;<sup>170</sup> (2) a tax could be a direct tax only if it were reasonably capable of apportionment (thereby ruling out taxes with subjects that might be uncommon or non-existent in one or more states);<sup>171</sup> (3) it was unlikely that apportionment was required for anything other than real estate taxes, capitation taxes, and requisitions;<sup>172</sup> and (4) the pseudo-requisition idea made no sense.<sup>173</sup> Jus-

168 Chase's opinion pointed out that, by holding the tax to be constitutional, it was not necessary to face the as-yet undecided issue of whether the federal courts had the power to hold an act of Congress unconstitutional. *Hylton*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.).

169 None of the other Justices commented on this aspect of the case, but Justice Iredell was an advocate of judicial review. See William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 339–48 (1995) (explaining that Iredell, like many of his contemporaries, accepted the Court's power of judicial review and based it upon the sovereignty of the people, although he believed that judicial review should only be used if a statute was "unconstitutional beyond dispute").

170 See *Hylton*, 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.) (explaining that duties, imposts, and excises are governed by uniformity and that capitation and other direct taxes are governed by apportionment); *id.* at 176 (opinion of Paterson, J.) (discussing whether certain types of taxes should be laid uniformly or apportionately); *id.* at 181 (opinion of Iredell, J.) (noting that certain taxes must be apportioned and certain taxes must be uniform).

171 See *id.* at 174 (opinion of Chase, J.) (explaining that it would be unreasonable to say that Congress intended a tax to be laid by apportionment if it would "create great inequality and injustice"); *id.* at 181 (opinion of Iredell, J.) ("As all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned*."). Chase gives an example in which "[t]he owners of carriages in one state would pay *ten times* the tax of owners in the other." *Id.* at 174 (opinion of Chase, J.). Paterson was more circumspect on this point, stating that apportionment may "perhaps" be "proper" not only for capitation and land taxes but also for taxes on subjects which, "in the aggregate or mass, . . . generally pervade all the states in the Union." *Id.* at 177 (opinion of Paterson, J.). But Paterson thought this was an issue of difficulty, and declined to give an opinion on whether any tax other than a land or capitation tax could be a direct tax. *Id.* ("Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point.").

This holding of the Court raised the possibility that a tax on slaves, which were scarce in the northern states, might avoid the requirement of apportionment. However, in my view, the Supreme Court would have treated the slave tax as a "capitation tax" subject to apportionment.

172 All three judges expressed this view as explicit dictum. Chase, while stating "I do not give a judicial opinion" on the issue of what is a direct tax, opined that even personal property taxes were excluded. *Id.* at 175. Paterson stated:

[B]oth in theory and practice, a tax on land is deemed to be a direct tax. . . . It is not necessary to determine, whether a tax on the product of land be a direct or

tice Paterson went on to attack the apportionment requirement on the merits:

I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances, and relative situation of the states, naturally lead to this view of the subject. The provision was made in favor of the southern States. . . . Congress . . . might tax slaves . . . and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause to the Constitution . . . .

. . . [The apportionment principle] is radically wrong; it cannot be supported by any solid reasoning. . . .

. . . [N]umbers do not afford a just estimate or rule of wealth.

The counsel . . . have further urged, that an equal participation of the expense or burden by the several states in the Union, was the primary object . . . ; and that this object will be effected by the principle of apportionment, which is an operation upon states, and not on individuals . . . . This brings it to the old system of requisitions. . . . [I]ndividuals . . . are the objects of taxation, without reference to states . . . . The fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on states.<sup>174</sup>

If the carriage tax was not a direct tax, what was it? Iredell offered no opinion, and Chase equivocated, calling it variously a “duty,” a tax on “expense,” or an indirect tax that was not a duty, impost, or ex-

indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself. . . . Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point.

*Id.* at 176–77. Iredell stated:

There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil: Something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

. . . .

Either of these is capable of apportionment.

In regard to other articles, there may possibly be considerable doubt.

*Id.* at 183 (opinion of Iredell, J.).

173 See *id.* at 174–75 (opinion of Chase, J.) (“a tax on carriages cannot be laid by the rule of apportionment, without very great inequality”); *id.* at 179–80 (opinion of Paterson, J.) (“The thing would be absurd . . . .”); *id.* at 182 (opinion of Iredell, J.) (“This mode is too manifestly absurd . . . .”).

174 *Id.* at 177–78 (opinion of Paterson, J.).



cise.<sup>175</sup> Paterson opined that “[a]ll taxes on expences or consumption are indirect taxes,” and that “[a] tax on carriages is of this kind,” citing a passage from Adam Smith.<sup>176</sup>

## 2. Doctrinal Development Through Pollock I

After *Hylton*, the direct-tax issue was not considered by the courts, as the federal government relied mostly on imposts. The Civil War spawned various taxes that were challenged in court as being direct taxes. In *Pacific Insurance Co. v. Soule*, a non-apportioned tax on insurance company gross premiums was upheld on the authority of *Hylton*, with the Court noting the irrational consequences of apportionment that would occur if insurance companies were not dispersed among the states.<sup>177</sup> *Veazie Bank v. Fenno* upheld a non-apportioned tax on notes of state banks issued for circulation as currency.<sup>178</sup> Here, the Court noted that attempts to locate the meaning of “direct tax” in the writings of political economists were futile, and that the best source was early practice plus *Hylton*.<sup>179</sup> The Court concluded that taxes on personal property, financial instruments, and occupations were not considered to be subject to the apportionment requirement, whereas taxes on slaves were either capitation taxes or taxes on real estate.<sup>180</sup> A non-apportioned tax on the inheritance of land was upheld as a duty or excise in *Scholey v. Rew*.<sup>181</sup> Finally, an individual income tax enacted in 1861 and lasting until 1872 was upheld in

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175 See *id.* at 175 (opinion of Chase, J.) (considering both the fact that the annual tax on carriages is “within the power granted to Congress to lay duties,” and also the fact that the tax on carriages is a tax on expense and thus indirect).

176 See *id.* at 180–81 (opinion of Paterson, J.). Justice Paterson quotes Smith as follows:  
Consumable commodities, whether necessities or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which last a considerable time before they are consumed altogether, are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other: the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs of the latter.

*Id.* at 180–81 (citing SMITH, *supra* note 77, at 386).

Taxes on consumption were considered by Smith to be “indirect” taxes on income. For further comments on Smith’s literalist notion of direct tax, see *supra* notes 99–101, and accompanying text.

177 74 U.S. (7 Wall.) 433 (1868).

178 75 U.S. (8 Wall.) 533 (1869).

179 *Id.* at 541–46.

180 *Id.* at 548–49.

181 90 U.S. (23 Wall.) 331 (1874).

*Springer v. United States*,<sup>182</sup> where the Supreme Court opined that “direct tax” referred only to capitation taxes and taxes on real estate.<sup>183</sup>

An income tax was enacted in 1894, and this time the Supreme Court, in the first *Pollock* decision (*Pollock I*), held (in a 7-2 decision) that the portion of the 1894 income tax that treated rents as income was a direct tax and that such portion was invalid for want of apportionment.<sup>184</sup> After culling numerous quotes from the early history slyly intimating that an income tax may be a direct tax as such, the majority opinion abruptly aborts that tack and goes off on a different one: from the non-controversial premise that a tax on real estate was a direct tax, the majority concocted the novel rationale that a tax on rents from real estate was “in substance” a tax on the real estate itself and, therefore, also a direct tax.<sup>185</sup> It appears that the government actually conceded that a tax on rents *could* be a tax on the underlying real estate. It might have been better to argue, on the basis of *Scholey v. Rew*, that if the receipt of real estate itself by inheritance was an indirect tax, surely, a tax on rents would also be non-direct. *Springer* was distinguished by *Pollock I* on the ground that the taxpayer there had no income from property.<sup>186</sup> Apart from the tax on rents, the 1894 tax passed muster.<sup>187</sup>

Even apart from the Sixteenth Amendment (providing that a tax on incomes is not subject to apportionment), *Pollock I* is no longer of any significance on the income tax issue, as its rationale has been

182 102 U.S. 586 (1880).

183 The Court here gave great weight to early practice and interpretation. It mentioned a casual statement by Hamilton in a paper he prepared for the *Hylton* litigation that a tax on a person’s entire estate—real and/or personal—might be subject to apportionment, but the Court said that an income tax was distinguishable. *Id.* at 597–98.

184 *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429 (1895).

185 The Court stated:

An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land.

*Id.* at 581. The Court then characterized this rationale as one of elevating substance over form. *Id.*

186 *See id.* at 578–79 (explaining that the income was derived from the taxpayer’s job as an attorney and from interest on U.S. government bonds).

187 *Id.* at 586. If taxes on wages (as well as incomes from professions and gross receipts of business) are conceded to be “excises,” then a tax on investment receipts would also appear to be an excise. But if a tax on rents is also a direct tax, then there would be overlap between the two categories. However, the Constitution provides no tie-breaker. In *Hylton*, if there was indeed a tie in that case, it was broken by a realization that the apportionment principle suffered from numerous defects. The different outcome in *Pollock I* results from an unexplained move to treating apportionment as the dominant value.

clearly repudiated by subsequent cases. In *Stanton v. Baltic Mining Co.*, the reasoning of *Pollock* was flatly rejected in general terms.<sup>188</sup> In *New York ex rel. Cohen v. Graves*, the Supreme Court held that New York could tax a New York resident on rents from New Jersey property, although New York could not impose a property tax on New Jersey real estate.<sup>189</sup> In other words, a tax on rents is not a tax on the underlying property. Reinforcing that conclusion is *South Carolina v. Baker*, where the Court overruled that portion of *Pollock I* that held that a tax on state bond interest was a tax on the state itself, in violation of the Tenth Amendment.<sup>190</sup> *Pollock I* has also been rendered obsolete on the income tax issue by numerous post-*Pollock* cases that have established that a tax on gross receipts is an indirect (i.e., excise) tax, not subject to apportionment.<sup>191</sup> Since (apart from timing issues) an income tax is a tax on receipts, repeal of the Sixteenth Amendment (which removed the apportionment requirement from income taxes) would not invalidate an income tax.<sup>192</sup>

The post-*Pollock* excise tax cases effectively hold that characterization of a tax as an excise removes it from the “direct tax” category. The implicit attitude underlying these holdings is that apportionment is a weak constitutional value.<sup>193</sup>

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188 240 U.S. 103, 112–13 (1916). The court stated:

[T]he provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.

*Id.*

189 300 U.S. 308, 314 (1937).

190 485 U.S. 505 (1988).

191 There are several major post-*Pollock* cases. See *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) (holding that a corporation income tax was not a direct tax but an excise); *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397 (1904) (upholding a gross receipts tax); *Patton v. Brady*, 184 U.S. 608, 616–22 (1902) (containing perhaps the most elaborate discussion of “excise”); *Knowlton v. Moore*, 178 U.S. 41 (1900) (upholding the validity of the non-apportioned federal inheritance tax of 1898 as an indirect tax on the transmission of property); *Nicol v. Ames*, 173 U.S. 509 (1899) (upholding stamp taxes on activities of a commodities exchange).

192 See, e.g., *Murphy v. IRS*, 493 F.3d 170 (D.C. Cir. 2007); *Penn Mut. Indem. Co. v. Comm’r*, 277 F.2d 16, 19–20 (3d Cir. 1960).

193 In *Bromley v. McCaughn*, the Court upheld the federal gift tax, noting:

While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct . . . this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particu-

### 3. Pollock II Expands "Direct Tax" to a Tax on Personal Property

What's left of *Pollock I* on the direct tax issue is nothing more than an affirmation of the accepted rule that a tax on real estate is a direct tax subject to apportionment. On rehearing, a bare 5-4 majority of the Supreme Court held in *Pollock II* that a tax on personal property was a direct tax.<sup>194</sup> That holding laid the basis for the further holding that income from personal property was a direct tax that had to be apportioned.<sup>195</sup> The second holding concerning tax on investment income has been overturned both by the Sixteenth Amendment and by the post-*Pollock* excise cases referenced previously. Nevertheless, the first holding, to the effect that a tax on personal property is a direct tax, broke new ground, and has not been expressly overruled.<sup>196</sup> But, since the federal government has not laid a tax on personal property, it has not been tested either.

In Part V it is argued that *Pollock II* should be reversed on the personal property tax issue, at least insofar as intangibles are concerned.

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To summarize this Part, the apportionment requirement cannot be broadly construed for numerous reasons: (1) apportionment is incompatible with uniformity, and "direct tax" must therefore be exclusive of the specific exceptions for imposts, duties, and excises; (2) "direct tax" had no clear meaning apart from taxes on real estate and capitation taxes; (3) apportionment cannot work for taxes on transactions; (4) apportionment, in a federal system, only makes practical sense for requisitions; (5) apportionment is inequitable at the individual level; and (6) doctrine and early practice, recognizing the problems of apportionment, gave it a narrow scope.

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lar use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned . . . .

280 U.S. 124, 136 (1929) (citation omitted).

194 *Pollock v. Farmers' Loan & Trust Co. (Pollock II)*, 158 U.S. 601 (1895).

195 *Id.* Faced with a tax that was unconstitutional insofar as it encompassed virtually all investment income, the Court held that the entire 1894 income tax was fatally infected, given that the whole point of the income tax was to reach income from property. See generally Jensen, *Incomes*, *supra* note 5, at 1091-107 (providing a detailed history of the 1894 income tax and presenting the arguments that were put forward in favor of and against the tax).

196 See *Eisner v. Macomber*, 252 U.S. 189, 219 (1920) (holding that a tax on a pro rata stock dividend was an unapportioned direct tax on intangible property that was not an income tax).

### III. RATIONALES AND PURPOSES OF APPORTIONMENT

A provision in the Constitution might be approached by discerning its rationales and purposes. In this case, the issue would be what the Framers were attempting to accomplish through the apportionment requirement for direct taxes.<sup>197</sup> Apportionment was part of the larger compromise over the relationships among the federal government, the states, and the people. As such, apportionment can be viewed from the angles of politics, ideology, and instrumental purposes. Economic and tax policies were not factors, however.

#### A. *The Politics of Apportionment*

The salient background feature of the constitutional project relating to the federal taxing power was the failure of the Confederation system, due largely to the exclusive reliance on voluntary requisitions. Although the initial impetus at the Convention was the pro-nationalist Virginia plan, the deck was somewhat stacked against any total triumph by the nationalist faction. First, there was no significant constituency for obliterating the states entirely or for the federal government to assert a taxing power that would preempt that of the states. In addition, the state-government orientation at the beginning was overwhelming: (1) the delegations to the 1787 Convention were selected by the state governments,<sup>198</sup> (2) the delegations in the Convention each had one vote,<sup>199</sup> (3) the “charge” to the Convention was to improve the Confederation system, and (4) the Convention product would have to be agreed to by the several states.<sup>200</sup> This system gave blocs of states (first small states and later slave-importing states) virtual veto power: the threat to pick up their marbles and go

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197 A classic example of the functional approach is Justice Holmes’s dissent in *Eisner v. Macomber*, where he states that the purpose of the Sixteenth Amendment was “to get rid of nice questions” relating to apportionment. *Id.* at 219–20 (Holmes, J., dissenting).

198 The delegates were mostly picked by the legislatures of the various states. See Credentials of Members of the Federal Convention, in 1 ELLIOT’S DEBATES, *supra* note 10, at 126–39 (setting forth the delegates’ credentials). Rhode Island did not appoint a delegation.

199 If a delegation from a state was evenly split, the state’s vote was recorded as “divided.” See, e.g., Report of Proceedings, in 1 ELLIOT’S DEBATES, *supra* note 10, at 119–20. The proposed constitution contains a “signature clause,” which recites that it was “Done in Convention, by the unanimous consent of the states present,” followed by the individual signatures grouped by states. Madison’s Notes (Sept. 17), *supra* note 17, at 558–65.

200 See Report of Proceedings, *supra* note 199, at 119–20 (calling for a “convention of delegates” appointed by the states to assemble in Philadelphia, revise the Articles of Confederation, and then confirm the changes); Madison’s Notes (May 29), *supra* note 17, at 127 (calling for the Articles of Confederation to be “corrected and enlarged”).

home.<sup>201</sup> In contrast, the nationalist state delegations were willing to compromise because they badly wanted a united national government. The final product retained a strong “compact-of-states” flavor that was weakened (if not interred) by the Civil War and its endless aftermath.<sup>202</sup>

Those who sought a balance between the federal government and the states (the “moderates”) were put somewhat in a bind when it came to taxes. In principle, the pure state-power (and Anti-Federalist) position is to favor the Confederation principle of voluntary requisitions,<sup>203</sup> but that was a proven path to impotence. A mandatory requisition system would continue to give the states the ulti-

201 See Madison’s Notes (July 12), *supra* note 17, at 302–03, *reprinted in* Appendix A (recording Mr. Davie’s statement that North Carolina “would never confederate” on the basis of any rule that did not count slaves as three-fifths for representation purposes); *id.* at 213 (noting Luther Martin of Maryland’s statement that “he could never accede” to a plan not based on equal representation of states). Martin eventually left the Convention, as did Yates and Lansing of New York (which was aligned with the small states and whose governor, George Clinton, was Anti-Federalist). See Letter from Luther Martin to State of Maryland Legislature (Jan. 27, 1788), *in* 1 ELLIOT’S DEBATES, *supra* note 10, at 344–45, 358. Davie also left the Convention, but probably for personal or business reasons, as he supported ratification. See North Carolina Debates (July 31, 1788), *supra* note 166, at 236.

202 States, in their role as states, were given a prominent constitutive role in the federal government: (1) members of the House were to be elected by citizens of states, (2) members of the Senate were to be elected by state legislatures, (3) the President was to be elected by electors appointed by state legislatures or—if no majority vote materialized—by the state delegations in the House, each delegation having one vote, (4) the Constitution was to be ratified by the people of the states by convention, and (5) amendments would require approval by three-fourths of the state legislatures or by convention. There was even strong sentiment for placing the election of House members under the control of the state legislatures, but a motion to that effect narrowly failed. Madison’s Notes (June 21), *supra* note 17, at 223–24. The phrase “We the people of the United States” in the Preamble is ambiguous because it could refer to all the people of the nation or to the collective peoples of the various states. Even the official name of the nation, “United States of America,” is ambiguous in a way that is similar to the uniting of two individuals in a marriage that can be severed by divorce. It is not necessary here to take sides on the debate whether an initial nationalist impetus at the 1789 Convention was sabotaged by state and regional interests or whether the nationalist Virginia Plan was offered as an opening bid with the expectation that it would be compromised by states-rights interests. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* (1995) (suggesting, with support from Federalist Nos. 45, 46, and 47, that Madison had states-rights inclinations all along); Rick K. Wilson, *Madison at the First Congress: Institutional Design and Lessons from the Continental Congress, 1780–1783*, *in* JAMES MADISON, *supra* note 107, at 243, 261 (suggesting that Madison was a “less than enthusiastic” nationalist). A third view is that Madison was a “selective” (economic) nationalist. See David Brian Robertson, *Constituting a National Interest: Madison Against the States’ Autonomy*, *in* JAMES MADISON, *supra* note 107, at 184.

203 See Virginia Debates (Mr. Henry, June 7, 1788), *supra* note 10, at 148–49, 166–68 (arguing that voluntary requisitions prevent the “arbitrary deprivation of . . . property” and “danger of the abuse of implied power”).

mate power over tax system design and on-the-ground enforcement. Yet it was recognized that a mandatory requisition system would undermine the states in the long run because of the potential for outright (armed) conflict<sup>204</sup> between the federal government and the state governments, in which the states would probably lose. Since control by the states through either voluntary or mandatory requisitions was not acceptable, a system had to be devised that would give the federal government control without wholly eliminating the states from the picture. Both the uniformity and apportionment principles give due recognition to the states, the first by prohibiting explicit discrimination against states as tax-base locations, and *the second by viewing the collective citizens of states as “corporate” taxpayers.*<sup>205</sup>

Despite these concessions to state interests, the nationalist faction prevailed to the extent that the federal government was empowered to lay any kind of tax whatsoever on persons and things without *having* to rely on state *governments*—although requisitions continued to be a possible option.

What the political-compromise story does not resolve is the precise scope of the apportionment requirement. Nevertheless, the express exceptions for duties, imposts, and excises was clearly understood to mean that the taxes most likely to be used by the federal government (on account of their inherent ease and convenience of collection) could be imposed without apportionment so long as they were uniform.<sup>206</sup> Therefore, the compromise regarding the role of the states in the federal taxing power is one in which the nationalists got most of what they wanted, while allowing the states-rights advo-

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204 See, e.g., Madison’s Notes (July 12), *supra* note 17, at 302, *reprinted in* Appendix A (recalling Mr. Mason’s argument that the addition of a provision making taxation proportional to representation “might drive the legislature to the plan of requisitions”); Virginia Debates (Governor Randolph, June 7, 1788), *supra* note 10, at 121–22 (stating that requisitions could lead to “the dissolution of the Union”).

205 See Madison’s Notes (June 19), *supra* note 17, at 206 (arguing that a federal—as opposed to national—plan was one in which the federal power was exercised “on the people *collectively*, on the *states*”). In Federalist No. 46, Madison posits that state sovereignty resides in the people of the states, not state governments. Thus, the people of the states simultaneously operate with two agents. Apportionment had sometimes been used within states according to the same principle. See EINHORN, *supra* note 27, at 53–78 (describing Massachusetts taxes apportioned among towns, which had elected governments; apportionment was politically negotiated and not according to any fixed formula).

206 For an exposition of the ease and revenue-yielding potential of indirect taxes, see Connecticut Debates (Oliver Ellsworth, Jan. 7, 1788), *supra* note 166, at 190, 192–94.

cates to save face. Nevertheless, saving face can be important politically.<sup>207</sup>

*B. The (Defective) Ideology of Apportionment*

The link between representation and taxation was a core theme of British political history long before the Enlightenment period,<sup>208</sup> and that link was enhanced further under Enlightenment political theory, which is based on the notion of contract or constructive consent. Taxation is legitimized by representation. Indeed, it can be said that taxation creates the need for representation, through which consent is obtained. Otherwise, taxation would be robbery under the threat of force. British taxation in the colonies without colonial representation in Parliament was a fuel that stoked the Revolution.<sup>209</sup> This link between taxation and representation was so ingrained that its expression in the Constitution was inevitable.<sup>210</sup>

Under the Confederation system, the constituents of the federal government, as well as its taxpayers, were clearly the state governments as such. The Constitution of 1787 had to deal with conflicting views of the future status for the “sovereign” states. This issue was “solved” by giving the states a range of roles to be exercised simultaneously. Thus, on the operations (spending) side, the federal government would act independently rather than through the states, but on the constitutive side (such as the Senate, the electoral college, and requisitions) the state governments would be the primary agents. To bridge the gap between the people of the nation and the governments of states, the Convention offered up the romantic notion that agency (often) resided in the *peoples* of the states, as collective bodies.<sup>211</sup> The apportionment idea exactly reflects this “collectivity” notion of sovereignty: in the case of (non-requisition) apportioned tax-

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<sup>207</sup> The apportionment requirement saves face for those appearing to balance state and federal interests, but really accomplishes little for the states other than discouraging the federal government from laying real estate taxes.

<sup>208</sup> Historically, from the thirteenth century, the King’s Council and its successor, the British Parliament, originated as a body to obtain the consent of the community of the realm to be taxed. See John Gillingham, *The Early Middle Ages (1066–1290)*, in *THE OXFORD ILLUSTRATED HISTORY OF BRITAIN* 104, 148–49 (Kenneth O. Morgan ed., 1984).

<sup>209</sup> See EINHORN, *supra* note 27, at 18–19.

<sup>210</sup> See Madison’s Notes (Aug. 7, 13), *supra* note 17, at 386, 416 (quoting Mr. Ellsworth insisting that “[t]axation and representation ought to go together,” and Mr. Gerry stating that “[t]axation and representation are strongly associated in the minds of the people”).

<sup>211</sup> See U.S. CONST. pmbl., art. V, art. VII (identifying the constituents, the amenders, and the ratifiers).



es and the House of Representatives the collective people of the state interact directly with the federal government.<sup>212</sup>

Combining the link between taxation and representation with the notion that the constituents/taxpayers of the federal government are the collective peoples of the various states yields the principle of apportionment among states according to a common formula, because burdens should be proportional to benefits (power). That taxation and representation should be apportioned under the same formula was so self-evident that it was accepted with whole-hearted approval and without debate upon Gouverneur Morris's initial motion on July 12.<sup>213</sup> The only debate was over the details of the formula, not the principle of apportionment and not with the idea that the same formula should govern both.

In addition, apportionment was probably thought by many to be fair compared to selective excises subject to the rule of uniformity. In a world without general (i.e., broad-based) excise (sales) taxes, and conceding that there was no objection to sumptuary taxes (like the tax on carriages), uniform excise taxes on region-specific items would result in geographical discrimination. Thus, if cardamom is consumed disproportionately by Georgians, a uniform tax thereon would be seen as punishing Georgians as a collectivity. Apportionment of a cardamom tax would moderate the discriminatory effect from a state perspective. This analysis is, of course, wholly superficial if the tax is

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212 See Madison's Notes (June 6), *supra* note 17, at 161 (discussing the benefits of directly electing the House of Representatives); Virginia Debates (Mr. Madison, June 15, 1787), *supra* note 10, at 458–59, *reprinted in* Appendix C (referring to equity of burdens imposed on state communities by reason of apportionment); text accompanying note 204. The Constitution does not require districts; thus, all representatives of a state could be, and sometimes were, elected at large. JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 224 (1996). Districts could not spill over state lines. It was expected that House Members from a given state would share a commonality of interest based on state culture and interests and vote as a bloc for state interests. See Madison's Notes (June 19, 25), *supra* note 17, at 211, 238–39 (suggesting that the states were culturally dissimilar).

213 Morris's motion was to amend the modified Virginia Plan (providing that representation was to be based on the principles of wealth and numbers) by adding a proviso that "taxation shall be in proportion to representation." Madison's Notes (July 12), *supra* note 17, at 302, *reprinted in* Appendix A. Various personalities across the political spectrum agreed: George Mason (states-rights advocate), General Pinckney (champion of the slaveholding deep-South aristocracy), and James Wilson (ardent nationalist). See *id.* at 302–03. The original Morris motion was amended so that only direct taxes were to be in proportion to representation, with further amendments relating to counting slaves as three-fifths and the census, and as so amended the motion passed 6-2 (with two states divided). *Id.* at 305–06. It was only on July 13 that "wealth" was deleted from the formula. Madison's Notes (July 13), *supra* note 17, at 309.

on individual consumers, because the few Rhode Islanders who purchase cardamom would be taxed at very high rates. But appeals to the notion of discrimination against states could still play well in the Framing/ratification period.<sup>214</sup>

The cardamom tax example exposes the weakness of requiring an apportionment of taxes to be paid by individual taxpayers. The “general” linkage between taxation and representation only makes sense in the case of requisitions, where the state governments, as agents of the corporate body, can spread out the tax within that body on a fair (or unfair) basis. In the case of non-requisition apportioned taxes, the corporate sovereign loses control of such allocation, and the tax rates on affected individuals can be much higher or lower than similarly-situated individuals in other states. The strong post-convention push to allow non-requisition direct taxes to be imposed only if a state failed to meet its requisition quota<sup>215</sup> can be seen (if taken at face value) as a last ditch effort to allow (if not to require) states to assert corporate control.<sup>216</sup> The pseudo-requisition notion is an even more watered-down mechanism for ceding corporate control to the states, at least to the extent that the apportioned tax would incorporate state tax rules. But neither option came to pass, in large part (and ironically) precisely because the agency of the states was seen as undermining equity at the individual taxpayer level in relation to personal ability to pay,<sup>217</sup> the dominant tax fairness norm of the late eighteenth century.<sup>218</sup> The emerging perception that tax fairness is prop-

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214 See *infra* text accompanying note 223.

215 See *infra* text accompanying note 215.

216 In the ratifying conventions, especially Virginia’s, the power of direct taxation was stressed in the arguments of the Anti-Federalists. That this was a cover for general antipathy to the Constitution is suggested by the fact that this power sailed through the Convention with virtually no opposition. Anything resembling a requisition system had virtually no support in the Convention. See Madison’s Notes (Aug. 21), *supra* note 17, at 453 (recounting how a requisition proposal was defeated by a vote of 1-8-1). After ratification, it was proposed as part of the proposed Bill of Rights that direct taxes be permitted only if states were allowed to satisfy the state quota, but the proposal was soundly defeated in the House by a vote of 9-39. See 1 ANNALS OF CONG. 773–78 (1787).

217 The Wolcott Report of 1796, rejected requisitions and pseudo-requisitions *because* the tax systems of states were internally inequitable and inequitable in relation to each other. See WOLCOTT, *supra* note 88, at 436–41. Capitation (poll) taxes were rather widespread in the colonies and states. See EINHORN, *supra* note 27, at 55, 80–81, 98, 107.

218 Smith and Montesquieu favored the ability-to-pay principle of apportioning the tax burden within a polity. See SMITH, *supra* note 77, at 361; CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 216–17 (Anne M. Cohler et al. eds. & trans., 1989) (1748); see also THE FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 219, reprinted in Appendix B (noting that he would “lament to see [poll taxes] introduced

erly determined on an individual, rather than collective, basis undermined the ideological basis of tax apportionment among states.<sup>219</sup> It was inevitable that representation (of states) and taxation (of individuals) would be divorced, and the brief marriage would fail to produce any viable progeny. The notion that citizens of states constitute a collective body turns out to be a myth when it comes to taxation.

The *method* of apportionment, according to population, is a reasonable standard for apportioning *representation* among corporate bodies, but it is not a plausible standard for apportioning *taxes* among corporate bodies (other than, perhaps, economic units, such as families). Nobody would seriously entertain the notion that the tax burden on business corporations be apportioned according to the number of shareholders or number of outstanding shares. Yet apportionment by population is the same mechanism applied to states. In the Confederation period, the relative ability to pay of states was conceived of in wealth terms, but apportionment according to wealth proved to be impractical, and apportionment of taxes *by population* came about only because of a confluence of these four factors: (1) the decision that representation and taxes were to be apportioned under the same formula, (2) the priority of the representation issue—where population was the natural index—over that of direct taxes (which would rarely be used), (3) the relative ease of taking a census (as opposed to appraisals), and (4) claims that the population of states was a plausible index of the wealth of states.<sup>220</sup> To the extent that this last claim was inaccurate,<sup>221</sup> inequity among the states and their peoples would inevitably follow.

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into practice under the national government”). See generally SELIGMAN, *supra* note 113, at 4 (claiming an evolutionary trend in history towards the notion of ability to pay).

219 See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178–80 (1796) (opinion of Paterson, J.) (arguing that apportioned taxes were unfair because they lead to different tax rates between similarly situated individuals). The Wolcott Report rejected the pseudo-requisition in large part on account of the unfairness of state systems. WOLCOTT, *supra* note 88.

220 See Madison’s Notes (July 11), *supra* note 17, at 299–300 (explaining why population was a good enough proxy for wealth in a nation where labor and capital could move freely); *id.* at 309 (July 13) (quoting a statement by Wilson that representation by population, or the “rule of numbers,” “does not differ much from the combined rule of numbers and wealth”).

221 There were doubters. See Madison’s Notes, *supra* note 17, at 201 (noting that Hamilton argued that any apportionment formula will produce inequities); *id.* at 297 (July 11) (recalling Gouverneur Morris’s argument that “the number of inhabitants was not a proper standard of wealth”).

### C. Instrumental Aims of Apportionment

This Section considers some claimed instrumental aims (effects) that might have been served by a requirement that direct taxes be apportioned among the states according to population. In many cases, the historical evidence that these effects were actually intended by the Framers is spotty.<sup>222</sup> It is probably fair to say that apportionment was primarily based on (motivated by) political compromise and an ideological principle (the linking of taxation with representation) that emerged in the early-to-mid eighteenth century, and that the ramifications of apportionment clearly emerged only after July 12, 1787. Moreover, apportionment of taxes could, at best, serve relatively minor purposes, as it was confined to taxes that were not expected to be used by the federal government except in case of emergency. Nevertheless, the various possible effects are worth examining.

#### 1. A Prophylactic Against Regional Oppression

The theory has been advanced that the apportionment and uniformity rules were designed to prevent some states from using a majority in Congress to oppress other states.<sup>223</sup> This theory has been given a strong regional flavor: the opinion of Justice Paterson (a major player at the 1787 Convention) in the *Hylton* case states that the apportionment requirement was meant to placate the South.<sup>224</sup> How-

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222 Of course, the claim that the effects of apportionment must have been intended can be true only if the Framers had a crystal ball. It would be more accurate to say that some of the effects might have been intended. See *Pollock v. Farmers' Loan and Trust Co.* (*Pollock I*), 157 U.S. 429, 582–83 (1895) (stating that the inequalities of a system of taxation based on apportionment “must . . . have been contemplated”).

223 See *Knowlton v. Moore*, 178 U.S. 41, 89 (1900) (stating that the purpose of the apportionment requirement was to prevent the states from being called upon to bear more than their fair share of the tax burden).

224 See *Hylton*, 3 U.S. (3 Dall.) at 171, 177 (opinion of Paterson, J.) (noting that the apportionment requirement “was made in favor of the southern States,” because, for example, if Congress passed a tax on slaves, who were found in large numbers in the South but not in the North, the southern States “would have been wholly at the mercy of the other states”). In 1787, the North—even excluding Delaware and Maryland—would have narrowly controlled both the House and the Senate, as it included seven of the original thirteen states, and a clear majority of the population. See Madison’s Notes (Aug. 21), *supra* note 17, at 456 (recording George Mason’s observation that the North, with interests different from those of the South, would have had control in both branches of the legislature). Going forward, the balance would be affected by the admission of new states, which itself was to be up to Congress. U.S. CONST. art. IV, § 3. The first three states ad-

ever, it could be claimed with equal plausibility that apportionment would protect small states from large states. Indeed, it would conceivably protect any minority state grouping from any majority state grouping. However, apportionment can only prevent discrimination against states as collective bodies, as opposed to discrimination against economic classes, economic interest groups, industries, and so on. Also, apportionment can operate only on direct taxes, which were not expected to be used except in a national emergency. At the same time, non-apportioned uniform excises (such as a tax on cotton or tobacco production) could adversely impact a particular region.<sup>225</sup> Thus, the “regional oppression” rationale is too general to fit the narrow reach of the apportionment requirement,<sup>226</sup> and is elsewhere served by such “process” features as a bicameral legislature, the composition of the Senate, and other aspects of the checks-and-balances system.

The question should be framed as, “What specific (Southern) interests would be served by an apportionment requirement confined

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mitted were Vermont (1791), Kentucky (1792), and Tennessee (1796), which created an even North-South balance that lasted until about 1820.

<sup>225</sup> That the uniformity requirement is a feeble protection against geographical discrimination was recognized by William Grayson at the Virginia Ratifying Convention. Virginia Debates (Mr. Grayson, June 12, 1788), *supra* note 10, at 285. Madison noted that the impost would burden the South more than the North because the South did little manufacturing. *Id.* (Mr. Madison, June 11, 1788) at 252. Insofar as excises were taxes on manufacture, they were sometimes perceived as disproportionately burdening the North. *See id.* (Mr. George Nicholas, June 10, 1788) at 243 (stating that an excise tax on manufactures would not heavily burden Virginia because of the few manufactures in that state).

<sup>226</sup> Geographical equity is too amorphous to be a workable legal standard in the abstract. Thus, a federal tax that by its terms is imposed on only the production of smoke-cured hams would not violate the uniformity requirement, even if this activity occurs only in Virginia. Yet it is not clear that such a tax would result in discrimination against Virginia as a state. If smoke-cured hams are consumed over a wide geographical area, the burden of the tax may be diffused. Even if it does operate to discriminate against Virginia, it would be improper to invalidate a tax on a narrowly-defined subject without considering the entire array of existing federal taxes. *See, e.g.,* McCray v. United States, 195 U.S. 27, 64 (1904) (holding that Congress had the power to impose a tax on oleomargarine even though it was an “oppressive” tax); State Railroad Tax Cases, 92 U.S. 575, 612 (1875) (stating that equality of taxation is unattainable, given the number and variety of possible subjects); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) (stating that oppressive taxation of a particular thing is not unconstitutional if there is a plausible basis for the tax, which in this case was regulation of the currency). On the other hand, even the broadest-based taxes might discriminate on a geographical basis. Thus, income per capita could be three times as high in Connecticut as in Mississippi. In that case, geographical discrimination would be justified on the basis of the independent norm of ability to pay.

to direct taxes?” Two such interests were identified early on.<sup>227</sup> One was to prevent an oppressive federal tax on slaves,<sup>228</sup> which would be viewed either as a tax on real property (and therefore as a direct tax) or as a capitation tax. The Capitation Tax Clause, which emerged later in the Convention, was clearly part of a package aimed to prevent oppressive taxation of slaves.<sup>229</sup> Apportionment of direct taxes and capitation taxes would have required quotas for all states in proportion to population. Under a pseudo-requisition scenario, the Northern states would have had to fulfill their quotas from a tax on one or more subjects common in these states, thereby neutralizing the impact of a slave tax. Under a slave-only-tax scenario, the full quota would have had to be borne by the handful of slave owners in Northern states, who would have strenuously opposed the tax. (However, it is equally plausible that the North would have been willing to enact such a tax either in spite of minor local opposition or in the knowledge that its quotas would go unsatisfied precisely because of the scarcity of the taxed item.)<sup>230</sup> Despite the fact that apportionment was not an airtight guarantee against a slave tax, it seemed to have worked well enough: slaves were taxed only as part of a general apportioned federal real estate tax. Without the apportionment requirement, a selective tax on slaves would have been quite feasible.

The other alleged Southern concern was to prevent a fixed-sum-per-acre federal land tax.<sup>231</sup> In the case of a state with a large area combined with a small population, a *non-apportioned* per-acre tax would fall heavily on the few. With apportionment, the state quota for such a state would be so low that it could easily be satisfied by the few. But again apportionment was not an airtight prophylactic against a per-acre tax, because an apportioned federal land tax could be laid on a per-acre basis *within* the states. Ironically, per-acre land

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227 These concerns were identified by Justice Paterson in *Hylton*, 3 U.S. (3 Dall.) 171 at 177 (opinion of Paterson, J.).

228 See Madison's Notes (Aug. 21, 22), *supra* note 17, at 457–61 (recording a proposed “prohibition or tax on the import of slaves” and the ensuing discussion of the attendees). The deep South did not attempt to immunize slaves from taxation entirely, but only a tax that would have caused the institution of slavery to wither.

229 See *infra* text accompanying notes 287–99.

230 If only a handful of slave-owners lived in New York, they might have no political clout, especially if slavery were locally unpopular. If there were no slaves in New York, New York would not be able to satisfy its quota.

231 At the Virginia Ratifying Convention, George Mason cited a letter from Robert Morris to Congress suggesting that a per-acre land tax, a notion that Mason abhorred, was allowed under the proposed constitution. Virginia Debates (Mr. George Mason, June 11, 1788), *supra* note 10, at 264–65.

taxes were the norm in the Southern states and were a device to shift tax burdens from highly-cultivated lands near the coast to lands on the frontier.<sup>232</sup>

In any event, note that both of these two “Southern” concerns were limited to taxes on real property—defined to include slaves. Apportionment would have *hurt* the South if “direct tax” were broadly construed to extend beyond real estate. *Apportionment according to population requires that poorer per-capita (i.e., Southern) states be discriminated against.*<sup>233</sup> This effect would have been compounded by the fact that slaves counted as three-fifths, resulting in an increase in the quotas of the slave states without any accompanying increase in any likely tax base (except a property tax in which slaves were counted). In sum, the regional-oppression rationale for apportionment actually favors a *narrow* concept of “direct tax” that is *limited* to taxes on real estate, plus capitation taxes and requisitions.

## 2. Preserving the Taxing Jurisdiction of the States

It is also claimed that the apportionment requirement operated to preserve the taxing jurisdiction of states against encroachment by the federal government.<sup>234</sup> However, no such theory was advanced in the Convention itself. The only motion made to limit the federal taxing power during the Convention was made by Luther Martin to the effect that the only allowable federal direct taxes would be requisitions, on the grounds that other direct taxes would be unpopular and that

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232 See EINHORN, *supra* note 27, at 40–41, 81, 93 (discussing the Virginia, North Carolina, and South Carolina tax systems). George Mason was correct in thinking (or assuming) that the apportionment requirement would not bar such a tax. See *supra* text accompanying note 231.

233 See Table 1 *supra* p. 5.

234 The majority opinions in both *Pollock* decisions claimed that the apportionment requirement was the result of a compromise in which the states surrendered their respective power to lay duties on imports or exports in return for allowing the federal government to “conditionally” lay direct taxes. See *Pollock v. Farmers’ Loan & Trust Co. (Pollock I)*, 157 U.S. 429, 583 (1895) (noting that approval of the rule of apportionment helped create the dual form of the United States government and helped ensure the ratification of the Constitution by the states); *Pollock v. Farmers’ Loan and Trust Co. (Pollock II)*, 158 U.S. 601, 620–21 (1895) (holding that the states granted apportionment as the way for the federal government to use direct taxation). However, there is no evidence that any interest bargained for the apportionment requirement at the Convention. Moreover, the formation of a national government necessarily implied that the states would no longer possess external powers. Under the Constitution, the states lost not only the power to lay external taxes, but also the power to make treaties, maintain troops in peacetime, wage war, or grant letters of marqué and reprisal. U.S. CONST. art. I, § 10.

“states would be the best judges of the mode.” This motion elicited no debate and was defeated overwhelmingly.<sup>235</sup>

In the ratification period the Anti-Federalists attacked the federal power to lay non-requisition direct taxes on the grounds that it usurped state power. The Federalists responded by insisting that no revenue source (apart from export taxes) should be denied the federal government in case of emergency. Hamilton, in Federalists 30 to 36, pointed out that state and federal taxing powers are concurrent,<sup>236</sup> and argued that tax-subject duplication would be self-defeating, either by rendering the underlying activity unprofitable or else by triggering evasion and cheating.<sup>237</sup> A move to condition ratification on an amendment that would have allowed apportioned taxes to be laid on individuals only if a state failed to meet its requisition quota failed, and the same proposal failed in the First Congress as a proposed constitutional amendment.<sup>238</sup> Thus, the Federalist position on the scope of the taxing power triumphed totally. Since the Constitution expressly gave the federal government the full taxing power, there is no room for any claim of implied limitations based on reserved state powers.<sup>239</sup>

<sup>235</sup> Only 1 and 1/2 delegations voted for it. Madison's Notes (Aug. 21), *supra* note 17, at 453.

<sup>236</sup> The Federalist No. 30 argues that the federal government should possess a taxing power that extends beyond imposts and requisitions, pointing to the failure of requisitions in the Confederation period. The Federalist No. 31 (Alexander Hamilton) argues that a federal taxing power would not usurp that of the states, which have concurrent taxing jurisdiction. The Federalist Nos. 32 and 33 demonstrate that the Constitution does not take away the state taxing power except for external taxes. The Federalist No. 34 argues that the power of federal taxation should not be limited, because the future exigencies of the federal government cannot be limited. The Federalist Nos. 35, 36 argue against limiting the federal taxing power to imposts, which would fall unequally among the states, and also argue that the plenary taxing power will not be abused, because Congress will represent the interests of landholders and commerce. THE FEDERALIST NOS. 30–36 (Alexander Hamilton).

<sup>237</sup> George Mason argued that the federal government had no particular interest in accommodating the states. *See supra* text accompanying note 230. The formal aspect of Hamilton's argument is not wholly convincing: since federal indirect taxes must be uniform, a federal excise on, say, salt cannot have an exemption for Delaware-produced salt just because Delaware happens to also tax salt production.

<sup>238</sup> *See* Johnson, *Apportionment*, *supra* note 7, at 311–15; *supra* note 215 (describing the fate of the constitutional amendment).

<sup>239</sup> The Tenth Amendment states that powers not expressly granted to the federal government are reserved to the states. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819) (noting the concurrent power of taxation, but holding invalid a state tax that interfered with a non-tax federal power). Contrary to the position taken in Jensen, *Consumption Taxes*, *supra* note 5, at 2345–50, I would not consider possible limitations on the spending and regulatory power to be restrictions on the taxing power as such, since taxation is a means rather than an end.



The apportionment requirement was produced by a Convention in which the Anti-Federalists had little say. In the ratification debates, the Anti-Federalists claimed no credit for extracting the apportionment requirement as a concession for giving the federal government the full taxation power. Anti-Federalists opposing ratification obviously did not view the apportionment requirement as a meaningful limitation on the direct-taxation power.<sup>240</sup> More moderate Anti-Federalists might have settled on a broad definition of direct tax<sup>241</sup> coupled with a requirement that direct taxes be in the form of requisitions. But, with the resounding failure of the requisition prong of their agenda, the other prong—a broad definition of “direct tax”—became meaningless.

It was only in the 1790s—as a result of the *Hylton* case, the Wolcott Report, and the experience with the 1798 apportioned real estate tax—that the apportionment requirement was widely revealed to be a mild impediment to the laying of direct taxes, other than taxes on slaves.<sup>242</sup> There is no evidence to support the proposition that the apportionment requirement was consciously advanced as a general limitation on the federal taxing power or as a subtle mechanism for accommodating state tax systems. It only turned out that way, and only with respect to real estate taxes. The rhetoric of the Anti-Federalists, who had no meaningful influence on the taxation clauses, cannot be attributed to the Framers.

Even if apportionment could be viewed as having had a state-power purpose, such purpose could relate only to the notion of duplication, and that suggests limitation to federal real estate taxes:

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<sup>240</sup> Johnson, *Apportionment*, *supra* note 7, at 312; Johnson, *supra* note 123, at 164–65, 168. For example, George Mason railed against the full taxing power, citing poll taxes and per-acre land taxes, without conceding that the apportionment requirement imposed any limitation. Virginia Debates (Mr. George Mason, June 11, 1788), *supra* note 10, at 265.

<sup>241</sup> See Letter from Brutus V to the People of the State of New York (Nov. 27, 1787), reprinted in 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 422, 427 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (defining direct tax to include “poll taxes, land taxes, excises, duties on written instruments, on every thing we eat, drink, or wear”).

<sup>242</sup> See EINHORN, *supra* note 27, at 181–94 (stating that the implications of apportionment were revealed after ratification). However, those who pushed for the Capitation Clause in the Convention must have understood that apportionment of a tax on slaves was a killer. But since it was widely thought that population and wealth were correlated, apportionment would not have been seen as much of a problem for real estate taxes, as shown by the fact that apportioned real estate taxes were enacted three times in the early history of the republic.

since real estate was universally taxed by the states,<sup>243</sup> any federal real estate tax would *necessarily* be duplicative. Other kinds of taxes would be duplicative only haphazardly. A person seriously concerned about the mere *possible* duplication of a federal tax with a state tax would—as the Anti-Federalists did—oppose *all* federal internal taxing powers.

### 3. Protection for Accumulated Wealth

The general presumption is that federal powers granted by the Constitution are to be broadly construed and limitations thereon are not to be implied.<sup>244</sup> To flip this presumption, the *Pollock* majority opinions came up with an argument that the apportionment requirement served important policy purposes. One of these was to protect “accumulated property”—property being assumed to be the subject of any direct tax that was not a requisition or capitation tax.<sup>245</sup>

Leaving aside an examination of the possible motives of a Gilded Age Supreme Court to protect wealth against the radical and populist movements of the time,<sup>246</sup> there is no merit to the wealth-protection rationale,<sup>247</sup> which is really a variation of the anti-discrimination rationale.<sup>248</sup> Apportionment only imposes state quotas for direct taxes and is not a supermajority rule, a rule limiting the subjects of federal

243 Every state had some form of real estate tax. See WOLCOTT, *supra* note 88, at 418–37 (describing taxes in each state, and summarizing what states have taxes on land); Adams, *supra* note 134, at 52. An even more detailed look at some state tax systems (especially Virginia and Massachusetts) is found in EINHORN, *supra* note 27, at 29–109.

244 See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (“[W]here a power is expressly given [by the Constitution] in general terms, it is not to be restrained to particular cases . . .”).

245 See *Pollock v. Farmers’ Loan and Trust Co. (Pollock I)*, 157 U.S. 429, 582–83 (1895) (intending to protect “accumulated property”).

246 See OWEN M. FISS, 8 TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 48–49, 92–93 (1993) (noting the crudeness of using the apportionment requirement as a weapon against economic class politics).

247 The protection-of-property rationale is extensively critiqued in Johnson, *Foul-Up*, *supra* note 7, at 28–34, and Johnson, *Apportionment*, *supra* note 7, at 337–38.

248 The crucial passage from *Pollock I* is:

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. . . . [The] inequality [resulting from apportionment] must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

157 U.S. at 582–83. This argument misfires. It is the uniformity principle that prevents discrimination against persons and property because of what state they are located in. The apportionment principle enables discrimination against persons and property in poorer states.

taxation, or a rule preventing progressive rates.<sup>249</sup> The federal government could not only tax the wealth of individuals but it could also target such wealth within each state.<sup>250</sup> The Supreme Court would have stated the matter more accurately if it had stated that the purpose of the apportionment requirement was to allow a majority of rich states to shift the tax burden to the poor states!

There was no particular concern in the Framing period with an “attack” on accumulated property by way of taxation or otherwise. Property was then taxed in all of the states.<sup>251</sup> The Framers universally deplored taxing the poor and small farmers disproportionately.<sup>252</sup> The prevailing tax fairness norm was ability to pay.<sup>253</sup> Sumptuary taxes, like the carriage tax, including most imposts, were broadly favored. Consumption taxes generally were thought of as an indirect way of reaching income.<sup>254</sup> Head taxes were widely disfavored.<sup>255</sup> Wealth was dropped from the apportionment formula not because the Framers did not want to tax wealth but only because the Conven-

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249 The 1798 apportioned real estate tax imposed a progressive rate schedule on homes.

250 The implication in *Pollock I* that taxes are inherently oppressive with respect to property is a veiled reference to the famous phrase from *McCulloch v. Maryland*: “[T]he power to tax involves the power to destroy.” 17 U.S. (4 Wheat.) 316, 431 (1819). The holding in that case is that a state has no power at all to tax an instrumentality of the federal government (the Bank of the United States), because the *natural* constraint against *oppressive* taxation (that the legislature that enacts the tax requires the consent of the taxpayers) is absent when one government taxes another. *Id.* at 428–36.

251 The *Pollock II* majority conceded as much. See *Pollock v. Farmers’ Loan and Trust Co.* (*Pollock II*) 158 U.S. 601, 621 (1895) (noting the founders expected that states would fund their operations by taxing accumulated property). The Wolcott Report is cited in *Pollock I*, 157 U.S. at 559.

252 See FEDERALIST NO. 36 (Alexander Hamilton), reprinted in Appendix B (expressing the view that the burden of taxation should accord with the general maxim of ability to pay, and should not be thrown upon the poor); see also New York Debates (Mr. Hamilton, June 28, 1788), *supra* note 118, at 360, 365; sources cited *supra* note 232.

253 See *supra* text accompanying note 217.

254 See *supra* text accompanying note 84.

255 See THE FEDERALIST NO. 36 (Alexander Hamilton), reprinted in Appendix B (expressing distaste for poll taxes); Madison’s Notes (July 12), *supra* note 17, at 305, reprinted in Appendix A (recounting Ellsworth’s prediction that there would be no federal poll tax); Massachusetts Debates (Hon. Judge Dana, Jan. 17, 1788), *supra* note 118, at 43 (“A capitation tax is abhorrent to the feelings of human nature . . . .”); New York Debates (Mr. Williams, June 27, 1788), *supra* note 118, at 340 (“[A] poll tax upon the person is indicative of despotism . . . .”); Virginia Debates (Mr. George Mason, June 11, 1788), *supra* note 10, at 264–65 “[A] poll tax . . . is of all taxes the most grievous. . . . It is most oppressive . . . .”).

tion was persuaded that population was a reasonable proxy for wealth,<sup>256</sup> which then was mostly in the form of real property.

In the Framing period, the poor were in no position to exploit the rich. The members of the Senate were not popularly elected. Apportionment of representation in the House according to population had nothing to do with suffrage. The states could—and, from the beginning, did—limit the franchise<sup>257</sup> to white male property owners, and the move to broaden the franchise coincided with the Republican ascendancy after 1801.<sup>258</sup> At the time of the Framing, the expectation was that property owners would control politics and, correspondingly, would be the appropriate class to bear the tax burden.<sup>259</sup> Concern with the political abuse of the rich by the poor emerged only in the late nineteenth century.

It is true that direct (property) taxes were expected to be used by the federal government only as a last resort,<sup>260</sup> but it was not the apportionment requirement that created this expectation; rather it was the high transaction costs of collecting such taxes<sup>261</sup> and the political risks deriving from the inconvenience and hardships occasioned by laying them.<sup>262</sup> Apportionment was not invented in 1787 to erect an

256 See Pennsylvania Debates (Mr. Wilson, Dec. 4, 1787), *supra* note 91, at 483 (noting that population is a good substitute for wealth in assessing taxes); *supra* note 59 and accompanying text. See generally Johnson, *Foul-Up*, *supra* note 7, at 30–34.

257 The states, subject to certain constraints imposed by the Fifteenth Amendment and federal statute, prescribed the qualifications for voters, even in federal elections. See U.S. CONST. art. I, § 2, cl. 1.

258 See Virginia Debates (Mr. Corbin, June 7, 1788), *supra* note 10, at 110–11 (stating that Virginia and most other states required the “possession of a freehold” to vote). The Convention of 1787 rejected a proposal that would have imposed a property requirement for the federal suffrage. Massachusetts Debates (Mr. King, Jan. 17, 1788), *supra* note 118, at 35–36. It was only with the admission of new states to the Union that the suffrage was expanded to all white males. See Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development Among New World Economies*, 3 *Economia* 41, 73–74 (2002).

259 Johnson, *Foul-Up*, *supra* note 7, at 29–39.

260 See Virginia Debates (Mr. Corbin, June 7, 1788), *supra* note 10, at 109 (giving figures to the effect that the impost would exceed the basic requirements of the federal government in peacetime).

261 See Pennsylvania Debates (Mr. Wilson, Dec. 4, 1787), *supra* note 91, at 476 (stating that tax appraisers and collectors in Pennsylvania alone numbered in excess of one thousand).

262 Property taxes are inconvenient because they have to be paid in cash out of the taxpayer’s own pocket, rather than out of the proceeds of a transaction. In the case of non-productive property, property taxes can create liquidity problems. See *id.* at 467 (explaining that imposts are preferable to property taxes because “[t]he price of the commodity is blended with the tax”). In addition, excises and imposts on particular items could be laid more efficiently by the federal government than the states, because state excise taxes and

obstacle to taxing property and the fruits thereof. The Convention on July 12, 1787, *restricted* the pre-existing rule of apportionment so that it would apply to the taxes that were *least likely to be used by the federal government for reasons unrelated to the operation of the apportionment requirement itself*.

#### 4. Did the Framers Want to Embed a Policy Preference for Indirect Taxes?

Erik Jensen argues that the Framers had a policy preference for imposts and excises, so that the apportionment requirement was erected as an obstacle to the enactment of other kinds of taxes.<sup>263</sup> Once again it is necessary to point out that apportionment was the inherited norm based on a conception of a relationship of the states to the federal government that far transcended taxation, and that there is no evidence that the Framers thought that apportionment itself was a significant obstacle to the laying of direct taxes. Apportionment was eliminated for excises and imposts because it was seen to be impractical (or in some cases impossible),<sup>264</sup> not because of any policy preference. Indeed, non-sumptuary excises were disliked more than property taxes.<sup>265</sup>

The policy preference is alleged to be based on the observation that many of the indirect taxes were imposed on luxuries (like carriages), so that the taxes could be avoided by taxpayers willing to modify their spending choices.<sup>266</sup> For starters, avoidability cannot be

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imposts could be evaded by smuggling. James Madison, Madison on the Tariff: Letter I (Sept. 18, 1828), in 4 ELLIOT'S DEBATES, *supra* note 10, at 604–05.

<sup>263</sup> See Jensen, *Incomes*, *supra* note 5, at 1075–79. Jensen misreads Adam Smith to have had a policy preference for indirect taxes. See Jensen, *Consumption Taxes*, *supra* note 5, at 2392. As previously mentioned, see *supra* text accompanying notes 97–101, Smith's use of the direct versus indirect terminology was descriptive, not normative. In fact, Smith favored free trade, and therefore was suspicious of imposts, the anticipated core of federal finance in the United States. See SMITH, *supra* note 77, at 287–88, 387–89 (discussing taxes upon consumable commodities).

<sup>264</sup> See *supra* text accompanying notes 81–83.

<sup>265</sup> Not all excises are transactional and easy to collect. Excises could also be laid on inventory and equipment, such as distilled liquors and stills. The enforcement of excises of this type was seen as oppressive by reason of violating the privacy of the home. Virginia Debates (Mr. George Mason, June 11, 1788), *supra* note 10, at 265. (The actual laying of the so-called whiskey tax by the Federalist Congress turned out very badly for their political fortunes.) Yet unpopular excises were not subject to apportionment. In contrast, real estate taxes could be assessed by inspection of the exterior (acreage, use, building footprint, number of windows or chimneys). Moreover, a high proportion of real estate produced an economic yield that could provide funds to pay the tax.

<sup>266</sup> See Jensen, *Consumption Taxes*, *supra* note 5, at 2337, 2405 (discussing how indirect taxes give consumers a choice, and how they adjust their buying habits accordingly).

a viable legal litmus test, as all taxes on things or activities (including taxes on land) can be avoided by foregoing the subject of the tax.<sup>267</sup> On the merits, the point cannot be that a “good” tax is a tax that can be avoided because such a tax would be pointless. Also, not all excises were on luxuries, and those that were not lay precisely on those items that were considered to be inelastic necessities,<sup>268</sup> so as to minimize avoidance.<sup>269</sup> Rather, the point of the observation was that excise taxes on luxuries would be a popular tax, because it would be a tax on the few, and the few that purchased luxuries with knowledge of the tax would essentially be taxing themselves.<sup>270</sup> It was not news even in 1787 that, in general, it is politically easier to enact a tax whose incidence is concealed than one whose incidence is salient.<sup>271</sup>

The rationale offered by Jensen smacks of post-Federalist historical revisionism, reading the anti-federal-tax agenda of Jefferson and his successors<sup>272</sup> back into the Framing period, where the anti-tax faction in fact lost out. Jensen actually has it upside-down when he claims that the apportionment requirement was designed as an incentive for the federal government to use avoidable taxes.<sup>273</sup> Instead, the Framers anticipated (correctly) that imposts, duties, and excises would be *naturally* favored because they are more convenient to both taxpayers and the government.<sup>274</sup> There would be no point to impos-

267 See Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833, 839 (1999) (criticizing the concept of avoidability).

268 Early excises were laid on distilled spirits, snuff, and refined sugar, as well as on auction sales on certain documents and licenses. For a discussion of early federal excises, see Adams, *supra* note 134, at 45–90. Adam Smith states that excises are usually on luxuries or such necessities as salt, soap, leather, and candles. SMITH, *supra* note 77, at 383–85.

269 See Kenneth L. Sokoloff & Eric M. Zolt, *Inequality and Taxation: Evidence from the Americas on How Inequality May Influence Tax Institutions*, 59 TAX L. REV. 167, 186–191 (2006) (comparing Latin and North American taxation, noting their similar emphasis on inelastic taxes like tariffs).

270 See Act of July 6, 1797, ch. 11, 1 Stat. 527, *repealed by* Act of Dec. 15, 1797, ch. 1, 1 Stat. 536 (enacting stamp duties on documents and licenses); Act of June 9, 1794, ch. 65, 1 Stat. 397, *repealed by* Act of Apr. 6, 1802, ch. 19, 2 Stat. 148 (enacting duties on property sold at auction); Act of June 5, 1794, ch. 45, 1 Stat. 373, *repealed by* Act of May 28, 1796, ch. 37, 1 Stat. 478 (carriages); Act of June 5, 1794, ch. 51, 1 Stat. 384, *repealed by* Act of Apr. 6, 1802, ch. 19, 2 Stat. 148 (snuff and refined sugar); Act of May 8, 1792, ch. 32, 1 Stat. 267, *repealed by* Act of Apr. 6, 1802, ch. 19, 2 Stat. 148 (distilled spirits).

271 See Madison’s Notes (Jan. 27), *supra* note 17, at 32 (recounting James Wilson’s statement which contrasted the direct manner in which taxes were laid in the United States with the manner of other countries, where taxes were felt less).

272 See *supra* text accompanying note 107.

273 See Zelenak, *supra* note 267, at 838–40 (discussing the avoidability notion).

274 See Connecticut Debates (Oliver Ellsworth, Jan. 7, 1788), *supra* note 166, at 191–94 (discussing how the easiest taxes to enforce are those that can be collected when money is

ing a constitutional barrier to the laying of taxes that Congress would put on the bottom shelf for political and administrative reasons.<sup>275</sup>

### 5. Apportionment as a “Talking Point” for Ratification

The Framers’ version of federalism, i.e., that states (or the collective citizenries of states) were both the subjects of representation and the subjects of taxation, as manifested in the proposed constitution of 1787, is theoretically incoherent,<sup>276</sup> and makes sense only as a political document that was thought to be capable of being “sold” to at least nine state ratifying conventions,<sup>277</sup> where the strongest opposition to the nationalist features of the Constitution would (and did) come from those desiring to preserve the power of state governments.<sup>278</sup> In such a context, the apportionment and uniformity requirements served the instrumental purpose of pacifying the moderate Federalists. For one thing, apportionment achieved continuity with the Confederation system. This continuity was of some concern to the legal-

spent); Virginia Debates (George Nicholas, June 16, 1788), *supra* note 10, at 99–100 (noting the difficulties of creating and enforcing direct taxes).

- 275 Gouverneur Morris, who opposed the apportionment requirement, strongly disliked real estate taxes as a policy matter, on the ground that taxes on unproductive property (which was abundant in the United States) were unfair, caused economic distortions, and elicited strong taxpayer resistance. See Letter from Gouverneur Morris to Rufus King (June 4, 1800), in 3 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 128 (Boston, Gray & Bowen 1832), available at [http://books.google.com/books?id=AuQEAAAAYAAJ&printsec=titlepage&source=gbs\\_summary\\_r&cad=0](http://books.google.com/books?id=AuQEAAAAYAAJ&printsec=titlepage&source=gbs_summary_r&cad=0) (bemoaning the difficulty for owners of wild land, should they be taxed); Letter from Gouverneur Morris to Moss Kent (Jan. 10, 1815), SPARKS, *supra*, at 327 (“[D]irect taxes fall heavily on great land-holders.”).
- 276 The prominent political theorists of the era (Locke, Montesquieu, Kant) mostly dealt with the larger issue of whether taxation in a liberal state based on individual autonomy was justified at all. Liberal theory locates sovereignty in the citizens, not political entities, and the idea of different levels of government creates a problem for the theory. At least by implication, liberal theory undercuts states-rights theories, which are based on a notion of community (or, in its most watered down version, agency). See, e.g., MONTESQUIEU, *supra* note 218.
- 277 The Framers “rigged” the ratification procedure by (1) submitting the Constitution to state ratifying conventions (representing the peoples of the states) rather than the state legislatures (whose members would have a vested interest in resisting federal power) and (2) imposing (with difficulty) an “up or down” outcome in each state that avoided the problem of conditional ratifications. U.S. CONST. art. VII.
- 278 It is worth noting that the opposition was neither regional nor attributable to the size of the state. Georgia and South Carolina ratified early. The hold-outs were North Carolina (1789) and Rhode Island (1790). The problem states (Massachusetts, New Hampshire, New York, North Carolina, Rhode Island, and Virginia) might be characterized as having an attitude of relative self-sufficiency. Five of the six had deepwater ports, and North Carolina was an insular state of small farmers.

ists, who insisted that the 1787 Convention only had the authority to “revise” the Articles of Confederation.<sup>279</sup> Second, apportionment strongly appealed to the bedrock fairness principle of linking representation and taxation. Third, it acknowledged the states as constituent entities.<sup>280</sup> Fourth, apportionment of direct and capitation taxes had some positive appeal to interests that opposed slave-only and per-acre taxes.

Not to be overlooked is the fact that the scope of “direct tax” was undefined and perhaps even obfuscated. Four of the ratifying Conventions—Massachusetts, New Hampshire, New York, and Virginia—were very closely contested.<sup>281</sup> The pro-ratification forces parried the opposition’s thrusts with the somewhat contradictory claims that: (1) direct taxes (on land and slaves) would be rarely laid, and (2) pseudo-requisitions (involving combinations of excises) would be the usual mode of internal taxation on non-luxuries. Thus, direct-tax apportionment was touted as a way of accomodating unpopular taxes with both anti-tax sentiment and a kind of equity among states.<sup>282</sup> It is not necessary to decide whether the Framers’ coyness in defining “direct tax” manifested confusion, cynicism, astute politics, or simply a

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279 Actually, the Annapolis resolution to call the Convention ambiguously stated that the Convention was “to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union,” although it went on to suggest that such revisions would be adopted through existing Confederation procedures. See Proceedings of Commissioners to Remedy Defects of the Federal Government (Sep. 14, 1786, Feb. 21, 1787), in 1 ELLIOT’S DEBATES, *supra* note 10, at 118, 120. The Virginia Resolution stated that “the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution.” Madison’s Notes (May 29), *supra* note 17, at 127. However, Governor Randolph immediately substituted more nationalist language for this provision, which carried in the Committee of the Whole. See *id.* (May 30) at 132–34.

280 See Massachusetts Debates (Mr. King, Jan. 17, 1787), *supra* note 118, at 36; New York Debates (Alexander Hamilton, June 20, 1788), *supra* note 118, at 237, 365; Virginia Debates, *supra* note 10, at 41, 121–22, 243–44, 300–01 (discussing the apportionments of representation and taxation). Additional materials from the Virginia Ratifying Convention are collected in *infra* Appendix C. See also Madison’s Notes (Aug. 13), *supra* note 17, at 416 (noting Eldridge Gerry’s argument that since the people strongly associated taxation with representation, all revenue bills should originate in the House of Representatives). In contrast, the uniformity requirement was rarely mentioned in the ratification debates.

281 The final votes: Virginia (89-78), Massachusetts (187-168), New York (30-27), and New Hampshire (57-47). See 2 ELLIOT’S DEBATES, *supra* note 10, at 178–81; 2 ELLIOT’S DEBATES, *supra* note 10, at 413; 3 ELLIOT’S DEBATES, *supra* note 10, at 654.

282 Statements by some of the leading Virginia Federalists relating to pseudo-requisitions imply (if they do not state) that apportionment would govern all internal taxes. See *infra* Appendix C.



desire to postpone resolution of a non-urgent issue.<sup>283</sup> The notion of “apportionment of direct taxes” was all things to all people.

To sum up this part, the apportionment requirement is not without rationales and purposes, but many of them seem to have been concocted after the fact, and none of them suggest that the scope of apportionment truly reaches beyond taxes on real estate, slaves, and states.

#### IV. IS APPORTIONMENT DEAD?

Below are various (incorrect) theories holding that the apportionment requirement should be treated as no longer having any force or effect whatsoever.

##### A. *The Capitation Tax Clause Has Expired, and the Representation Clause Was Repealed by the Fourteenth Amendment*

The 1789 Representation Clause stated:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, 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.<sup>284</sup>

(This sentence is followed by a requirement that a census, to determine numbers, shall be taken within three years of the meeting of the first Congress, and every ten years thereafter.)<sup>285</sup> Section 2 of the Fourteenth Amendment (1868) states: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”<sup>286</sup> It can be argued that, because of the parallel language, this sentence replaces the entirety of the equivalent sentence in the original Representation Clause, including the reference to direct taxes.

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283 Rakove cites the unanswered query by Rufus King as to the meaning of direct tax, *see supra* text accompanying note 17, as evidence that the ambiguity of “direct tax” was deliberate. RAKOVE, *supra* note 212, at 179.

284 U.S. CONST. art. I, § 2, cl. 3.

285 *Id.*

286 U.S. CONST. amend. XIV, § 2.

1. *Has the Capitation Tax Clause Expired?*

The Fourteenth Amendment repeal theory would be insufficient to support the abolition of apportionment, as the Capitation Tax Clause (“No capitation, or other direct, Tax shall be laid, except in Proportion to the Census or Enumeration herein before directed to be taken.”)<sup>287</sup> would still be left standing even if the reference to direct tax apportionment in the Representation Clause were deemed to have been repealed. The apparent redundancy of the Capitation Tax Clause to the Representation Clause is puzzling and is a likely reason for the neglect of the Capitation Tax Clause in the literature. Another reason is that the Convention narrative with respect to it is relatively bare.

The germ of the Capitation Tax Clause was a motion by Eldridge Gerry at the beginning of the July 13 session of the 1787 Convention to amend the Representation Clause so that, prior to the first census, direct taxes would be laid on the inhabitants of the states in proportion to the allotment of representation fixed for the interim period.<sup>288</sup> The Gerry motion provoked a discussion in which the accuracy of the interim representation allocation was challenged, and the motion failed to pass on a tie vote. Gerry then responded to the claim that his proposal might lead to a capitation tax<sup>289</sup> (which was universally disfavored)<sup>290</sup> by amending his own motion so that only a requisition on states could be laid according to the same rule during the interim period.<sup>291</sup> This motion passed 5-4, with one state divided.<sup>292</sup> The final resolution concerning the Representation Clause, passed on July 16 (and submitted to the Committee of Detail on July 26),<sup>293</sup> was rather

287 U.S. CONST. art. I, § 9, cl. 4.

288 Federal Convention, in 1 ELLIOT’S DEBATES, *supra* note 10, at 203. This allotment (New Hampshire, 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3) had been agreed to on July 10. *Id.* at 197–99.

289 A tax “on” persons just means a non-requisition. See Madison’s Notes (July 12), *supra* note 17, at 305, *reprinted in* Appendix A (recording Gerry’s statement that apportionment “could not be carried into execution, as the states were not to be taxed as states”).

290 See *id.* (recounting Ellsworth’s response that there probably would be no federal head tax, but that such a tax could be apportioned, as could a pseudo-requisition).

291 *Id.* (July 13) at 306–07.

292 *Id.*

293 Federal Convention, *supra* note 288, at 221–22. That version of the Representation Clause began with the interim allocation of representation and then authorized the Congress to thereafter apportion representation according to numbers, but that representation was to be “proportioned to direct taxation,” and to accomplish the latter a census was to be taken (presumably counting slaves as three-fifths), and the Congress was to propor-

convoluted, but it did not explicitly incorporate the Gerry amendment.

The Committee on Detail issued its Report on August 6.<sup>294</sup> The most conspicuous feature of the Report is its adoption of the notion that the federal government possessed only enumerated powers, including “the power to lay and collect taxes, duties, imposts, and excises.”<sup>295</sup> The Report stripped the Representation Clause of any reference to direct taxes, and created a separate clause apportioning direct taxes according to population, with the population being determined by a census (to be taken within six years), with slaves counting as three-fifths. The Report also contained a provision stating: “No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.”<sup>296</sup> There is little doubt that this clause referred to a possible tax on slaves,<sup>297</sup> and it appears to have been non-controversial, as it was approved without discussion on Au-

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tion “the direct taxation accordingly.” *Id.* Thus, there was no explicit language addressing the status of direct taxation prior to the census. *See* Madison’s Notes (July 24), *supra* note 17, at 362 (noting Daniel Carroll’s statement that he reserved the right to oppose any “direct taxation on the states” prior to the census).

<sup>294</sup> Sometimes known as the “Committee of Five,” the members were Oliver Ellsworth (Conn.), Nathaniel Gorham (Mass.), Gov. Randolph (Va.), John Rutledge (S.C.), and James Wilson (Pa.). *See* Madison’s Notes (July 24), *supra* note 17, at 363 (recording the appointment of the committee of detail). The Committee was charged not only with considering the resolutions of the Convention to date, but also the New Jersey and Pinckney Plans. *See* Madison’s Notes (Aug. 6), *supra* note 17, at 375–76. However, the Capitation Tax Clause is not found in those two plans because neither of them allowed for any capitation tax. *See supra* notes 34, 39 and accompanying text.

<sup>295</sup> This power (without the uniformity requirement) appeared in proposed Article VII, Section 1, Clause 1. Madison’s Notes (Aug. 6), *supra* note 17, at 376–82.

<sup>296</sup> *See id.* at 379. The tax clauses were then in Article VII of the proposed draft: the Direct Tax Clause was Section 3; the Clause Prohibiting Export Taxes and Import Taxes on Slaves was Section 4; and the Capitation Tax Clause was Section 5.

<sup>297</sup> That the Importation-of-Slaves Clause (now Article I, Section 9, clause 1) was viewed as a twin of the Capitation Tax clause is evidenced by the fact that, after a heated discussion of the possibility of an import tax on slaves, both clauses were referred to an ad hoc committee. *See* Madison’s Notes (Aug. 22), *supra* note 17, at 457–461. The report of this committee allowed slaves to be imported for a period and a modest duty to be imposed thereon. *See id.* (Aug. 24) at 470–71. Another indication that the two clauses were a pair (that pertained to slavery) is the fact that Article V prohibits any constitutional amendment to both of these clauses prior to 1808. U.S. CONST. art V. This prohibition was added on September 10 as a friendly amendment to Madison’s motion on the process of constitutional amendment. The two clauses in question were referred to by the mover, Mr. Rutledge, as “the articles relating to slaves.” Madison’s Notes (Sept. 10), *supra* note 17, at 532. Einhorn claims that this clause was attributable to a statement by Gen. Pinckney noting that he would vote against any constitution that did not have “some security to the Southern States against an emancipation of slaves.” *Id.* (Gen. Pinckney, July 23, 1787) at 357; EINHORN, *supra* note 27, at 175.

gust 25, after a long debate about the Importation-of-Slaves Clause.<sup>298</sup> Thus, one purpose of this clause was to assure that a slave tax, either as a property (direct) tax or as a capitation tax,<sup>299</sup> was covered (without any doubt) by the rule of apportionment. A second purpose of the clause was to require that the rule of apportionment for capitation (i.e., slave) taxes be according to the future census, and not according to the specified interim allocation of representation or any attempt by Congress to estimate the population of the states.<sup>300</sup> Thus, no capitation (slave) tax could be imposed prior to the census.

The Capitation Tax Clause was amended in the waning days of the Convention to apply also to “other direct” taxes.<sup>301</sup> The mover, George Read of Delaware, explained that the amendment’s purpose was to prevent the Confederation-period quotas from being altered by statute or made to conform to the pre-census allocation of representation.<sup>302</sup> The amendment elicited no response or debate. Thus,

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<sup>298</sup> Madison’s Notes (Aug. 25), *supra* note 17, at 478.

<sup>299</sup> Whether slaves were to be considered as persons or property was disputed. *See id.* (July 9) at 289 (recording Patterson arguing that slaves were property, and therefore not entitled to representation); *id.* (Aug. 21) at 461 (recording Sherman’s opposition to a tax on importation of slaves as implying that slaves were property).

<sup>300</sup> *Accord* SELIGMAN, *supra* note 113, at 554 (noting that Southerners feared that Congress would make an estimate of population to saddle the South with an undue share of taxation through a tax on slaves); Bullock, *Part I*, *supra* note 23, at 238–39 (same). The Representation Clause only said that direct taxation (and representation) was to be apportioned “by numbers.” Only representation was to be apportioned by the interim allocation described in *supra* note 289. Thus, the mode of apportionment of direct taxes during the interim period was left unresolved. The addition of the original version of the Capitation Clause settled that issue, but only for capitation taxes.

<sup>301</sup> *See* Madison’s Notes (Sept. 14), *supra* note 17, at 545. This move was anticipated by the following: as already noted, the Committee on Detail had split off the clause requiring apportionment of direct taxes from the Representation Clause. *See id.* (Aug. 21) at 451–53 (recounting the debate over Gerry’s proposal). The Direct Tax Clause was taken up by the Convention on August 20, and it was then that Rufus King inquired about the meaning of direct taxation (and received no answer). *Id.* Immediately following, Gerry again proposed that from the time of the first meeting of Congress until the first census, direct taxes should be apportioned according to the number of representatives specified for the House prior to the census. *Id.* It was again doubted that this interim allocation accorded with population, and the motion again failed. *Id.* at 453. Failure of this motion left unresolved the apportionment scheme for pre-census direct taxes.

<sup>302</sup> In proposing this amendment, Read stated that he “was afraid that some liberty might otherwise be taken to saddle the states with a readjustment, by this rule, of past requisitions of Congress.” *See id.* (Sept. 14), *supra* note 17, at 545. In the absence of the amendment, direct taxes (other than capitation taxes) might have been apportionable according to an *estimate by Congress of state populations* (“numbers”). The Confederation-period statutes imposing the requisitions were based on the 1775 estimation of state populations, and apparently Read thought that those quotas could be changed by statute or by a new estimate of numbers. *See* EINHORN, *supra* note 27, at 169. (This fear seems mis-

the final version of the Capitation Tax Clause turned the original Gerry amendment on its head by effectively prohibiting the laying of all direct taxes—including capitation taxes and requisitions—during the pre-census period.<sup>303</sup>

On the basis of the foregoing, it must be the case that the Capitation Tax Clause has “expired” because all of its purposes have been fulfilled. First, its principal purpose with respect to a tax on slaves terminated with the abolition of slavery by the Thirteenth Amendment.<sup>304</sup> Second, the purpose relating to the laying of capitation and direct taxes prior to the census expired with the taking of the census (thereafter, apportionment of representatives *and* direct taxes is required by the Representation Clause to be according to the census). The third purpose of making sure that a capitation tax (especially a slave tax) was considered to be a form of direct tax was, at most, merely for emphasis, as capitation taxes were always considered to be direct taxes.<sup>305</sup> The fourth purpose of precluding the re-adjustment of Confederation requisition quotas has long expired.

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placed in light of an earlier discussion on the inherent invalidity of retroactive legislation. *See* Madison’s Notes (Aug. 22), *supra* note 17, at 462–63 (recording James Wilson’s statements and others)). Ackerman views Read’s motion as protecting Delaware by making the apportionment principle retroactive. Ackerman, *supra* note 6, at 13. This reading is contradicted by Read’s statement that he was opposing “readjustments” of prior requisitions. Before Read’s amendment, the Capitation Tax Clause prevented only a capitation tax during the interim period. After the Read amendment, no direct tax could be imposed during this period. Thus, whatever the true aim of Read might have been, it surely expired after the census was taken.

<sup>303</sup> *See* Dunlap’s American Daily Advertiser, 14 January 1791, *reprinted in* 14 FIRST FEDERAL CONGRESS, *supra* note 109, at 237 (reporting House debate of January 6, 1791, in which Madison doubted that a direct tax can be laid prior to the first census).

<sup>304</sup> Einhorn (astonishingly) claims that this clause abolished the three-fifths rule for direct taxes (including capitation taxes). EINHORN, *supra* note 27, at 169. This appears incorrect on several grounds. First, the clause itself refers to the “Census or enumeration herein before directed to be taken,” U.S. CONST. art. I, § 9, cl. 4, which is a cross-reference to the entire scheme of determining “numbers” (including the three-fifths rule). Second, the Representation Clause containing the three-fifths rule for direct taxes was retained. It is implausible to suppose that the Convention intended to have contradictory rules in the same document. Third, the stated rationale for extending the capitation tax rule to direct taxes only pertained to readjusting Confederation-period requisition quotas prior to the taking of the census. Fourth, it is unlikely that a motion to undo an important deal would have provoked no discussion whatsoever. In any event, this purpose (if it existed) also expired with the ratification of the Thirteenth Amendment.

<sup>305</sup> *See* Madison’s Notes (July 12), *supra* note 17, at 305, *reprinted in* Appendix A (recording Mr. Ellsworth’s assumption that poll taxes are direct taxes). All three of the Justices writing in *Hylton v. United States* express the view that a capitation tax (being capable of apportionment) is a “direct tax” without regard to the Capitation Tax Clause. 3 U.S. (3 Dall.) 171 (1796).

2. *Did the Fourteenth Amendment Repeal the Original Representation Clause?*

Assuming that there is such a thing as a doctrine of “expiration” of a constitutional provision, the Capitation Tax Clause would now be considered to be “out of the way,” and, it would follow that any actual repeal of the Representation Clause by Section 2 of the Fourteenth Amendment would have had the effect of wiping the Constitution clean of any tax apportionment requirement. Unfortunately, this two-step argument appears to have never been made, and it is too late to make it now. No branch of government has ever treated the apportionment requirement as having expired or having been abolished. The Thirteenth Amendment effectively eliminated the three-fifths rule, but that had the ironic effect of increasing the representation (upon re-admission to the Union) of former slave states. The first sentence of Section 2 of the Fourteenth Amendment merely codifies the effect of the Thirteenth Amendment upon the issue of representation in the House. That sentence overrides the equivalent sentence in the Representation Clause only to the extent the two are inconsistent, namely, with respect to the three-fifths rule. There is no inconsistency with respect to direct-tax apportionment itself, since Section 2 of the Fourteenth Amendment makes no reference to direct taxes. The main purpose of Section 2 is found in the second sentence, which conditions such (expanded) representation upon the states’ extending the franchise to ex-slaves, without taking control over the franchise away from the states.<sup>306</sup>

The discussion in Congress of the proposed Section 2 negates any implication that the direct-tax apportionment requirement was being abolished.<sup>307</sup> In 1909, the framers of the Sixteenth (income tax)

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<sup>306</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 141–42 (1866). The initial version of this provision was moved by Representative Blaine on January 8, 1866. Senator Sumner objected to its references to race. *Id.* at 673. Senator Fessenden complained that it intruded too much on the power of states over suffrage. *Id.* at 703. The Blaine version was not accepted by the Senate, and the current “compromise” version was crafted with an eye on the obtaining of ratification. *Id.* at 2459–60.

<sup>307</sup> See *id.* at 961. Senator Buckalew noted that the draft of section two of the Fourteenth Amendment did not affect the rule of apportionment of direct taxes. Senator Henderson expressed a preference for the apportionment of taxes by wealth, but viewed section two of the proposed amendment as continuing the old formula. *Id.* at 3033. Senator Doolittle noted that amendments offered to section two would have apportioned direct taxes according to property rather than population. *Id.* at 2942. This would imply that appor-

Amendment operated under the same assumption, and expressly declined the opportunity to wholly repeal the apportionment requirement.<sup>308</sup> Neither the executive nor the judiciary has ever questioned the continued existence of the apportionment rule for direct taxes.<sup>309</sup>

*B. Did the Abolition of Slavery Operate as an Implied Repeal of the Apportionment Requirement?*

Bruce Ackerman has argued that the abolition of slavery in 1865 by the Thirteenth Amendment should be viewed as an implied repeal of the apportionment requirement.<sup>310</sup> Ackerman, along with Robin Einhorn and Calvin Johnson,<sup>311</sup> assert that direct-tax apportionment was introduced on July 12 solely to resolve the dispute over the inclusion of slaves in the representation formula. Therefore, Ackerman argues, the abolition of slavery removed the sole purpose of the apportionment rule.<sup>312</sup>

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tionment would otherwise continue to be in proportion to population. Other discussion of section two is wholly devoid of references to direct-tax apportionment. *See id.* at 2459, 2462, 2464, 2467, 2468, 2502, 2511, 2530, 2535, 2538, 2539, 2542–43, 2766–67, 2700, 2939, 2986–87, 3026 (Representatives Stevens, Garfield, Thayer, Boyer, Kelley, Raymond, Elliot, Randall, Eckley, Rogers, Farnsworth, and Bingham, and Senators Howard, Stewart, Hendricks, Sherman, and Johnson). On this point, the legislative history speaks with one voice.

308 *See* Ackerman, *supra* note 6, at 33–38.

309 *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18 (1916) (noting that the purpose of Sixteenth Amendment was to abolish the apportionment requirement for income taxes). The most recent case of note was *Murphy v. IRS*, 493 F.3d 170, 186 (D.C. Cir. 2007), where the court held that treating emotional harm awards as gross income was valid as an indirect tax, even if such awards were not “income.”

310 *See* Ackerman, *supra* note 6. This argument was made earlier in Bullock, *Part I*, *supra* note 23, but only for the purpose of discrediting the rationales offered up by the majority opinions in *Pollock*.

311 EINHORN, *supra* note 27, at 164–66 (seconding the historical claim without drawing any legal conclusion); JOHNSON, *supra* note 123, at 168. Einhorn argues that the uniformity requirements in state constitutions originated in a desire to avoid a tax on slaves, and hints that the uniformity principle in the federal Constitution has a similar purpose. EINHORN, *supra* note 27, at 202–04. But the link cannot be made, because the federal uniformity requirement does not apply to taxes and slaves and does not bar different rates for different subjects. Instead, it only barred different rates for different ports. Indeed, import duties from the beginning of the Republic have been rife with this kind of subject-matter discrimination.

312 Ackerman, *supra* note 6. The argument that the purpose of the apportionment requirement related to slavery does not necessarily lead to the conclusion of implied repeal.

Courts are very reluctant to entertain implied-repeal arguments,<sup>313</sup> especially where (as here) the later enactment dealt with a different subject matter. In the federal-taxing-power area, the Sixteenth Amendment, which *did* deal with an issue arising under the apportionment rule, has never been held to abolish the rule itself.<sup>314</sup> Here, all the objections to the actual-repeal argument, discussed *supra*, can be raised again. Even if the implied-repeal argument were allowed, it would be persuasive only if slavery were the *sole* motivation for adopting the apportionment requirement. But (to sing the refrain) apportionment was not conjured up on July 12, 1787;<sup>315</sup> it was there all along.<sup>316</sup> It is true that, prior to July 12, the Virginia Plan had been amended so as to eliminate the reference to “quotas of contribution,” but that move was made only because it was thought that actual tax revenues were too uncertain and variable standard for fixing representation.<sup>317</sup> The plausible candidates for apportioning representa-

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313 See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2532–33 (2007). Courts would be less likely to apply such a doctrine to the Constitution, which is supposed to be “permanent” until amended by the stipulated procedure therein.

314 See *supra* notes 306 and 308 and accompanying text.

315 See EINHORN, *supra* note 27, at 165–66. Einhorn’s version of the story is that everybody thought that the new government would subsist only on imposts, so that apportioned taxes would not be necessary. Thus, apportionment of direct taxes is viewed as being a new feature introduced on July 12. *Id.* However, at no point was the ambition to empower the federal government to only lay imposts. The tax power was always intended to be plenary, first implicitly under the Virginia Plan, and later explicitly under the report of the Committee on Detail. There was no serious debate in the Convention over the scope of the taxing power. See Madison’s Notes (Aug. 21), *supra* note 17, at 453 (indicating that Luther Martin’s motion to restrict direct taxation only to requisitions was not debated and was defeated, with only one state in favor and one state divided). In the ratifying conventions, the proponents of ratification were unyielding on this point. See, e.g., FEDERALIST NO. 36 (Alexander Hamilton), *supra* note 10, at 213–20, *reprinted in* Appendix B.

316 See *supra* text accompanying note 71. The only alternative to formula apportionment would have been a rule providing that states, as equals, should pay equal taxes, a notion that apparently had one or two adherents. See Letter of Luther Martin to the State of Maryland Legislature (Jan. 27, 1787), *in* 1 ELLIOT’S DEBATES, *supra* note 10, at 344, 365.

317 The Virginia Plan had proposed that representation be proportioned to the “quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.” See Madison’s Notes (May 29), *supra* note 17, at 127. Rufus King, of Massachusetts, stated that the revenue (i.e., from imposts and excises) might not be traceable to particular states and, even if it could be, it would not be proportional to population or wealth. Madison agreed. There seemed then to be an emerging consensus that representation be equitably proportioned, but George Read, favoring a one state/one vote rule, threatened a walk-out of the Delaware delegation, at which point the issue was postponed. See *id.* (May 30) at 134–35. The issue was later re-opened, King repeated his earlier point, and a vague equitable-ratio motion then passed. See *id.* (June 11) at 178–81. The equitable-ratio principle (shorn of any reference to taxes) was revisited in



tion, wealth and population, happened to be the twin candidates for apportionment of taxes under the Confederation system.<sup>318</sup> The initial Morris motion of July 12 only stated that taxation should be apportioned according to representation (to be determined by the legislature according to wealth and numbers), which reversed the Virginia Plan provision that representation should accord with tax contributions. The Morris motion was immediately amended so as to apply only to “direct taxes,” because it was understood that imposts, duties, and excises were not really capable of geographical apportionment. There was no motion, on July 12 or thereafter, to remove the apportionment rule altogether.<sup>319</sup>

The Morris motion left open the issue of whether representation (and direct taxes) were to be apportioned according to wealth or population. Since slaves would *automatically* have been included in assessments of wealth, it is understandable that, once population was decided upon as the apportionment principle, the South would insist that slaves be included in the enumeration, especially as the enumeration was being advanced as a proxy for wealth. Moreover, counting slaves as three-fifths for *taxation* purposes had already been agreed on in principle as early as 1783, and the same rule had been agreed to for representation purposes as early as June 11, 1787.<sup>320</sup> The move before July 12 of counting slaves *only* for *representation* purposes had irked the North, but counting slaves for *both* purposes was enough to get the North to sign onto the final deal concerning rep-

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July, and a committee presented (on July 9) an interim allocation coupled with a grant of power to the legislature to apportion representation according to wealth and numbers. Objections were made to the interim allocation, the indecision over wealth versus numbers, and leaving it up to the legislature. A mandatory allocation according to the census was advanced on July 7, and it was at this point that the controversy arose over counting slaves, and that in turn raised the wealth versus numbers issue). *See id.* (July 9–11) at 287–302.

318 The Confederation rule referred to wealth, but apportionment according to population was the more favored option (agreed to by eleven states), and failed of adoption only because of the unanimity rule for amending the Articles of Confederation. Johnson, *Apportionment*, *supra* note 7, at 302–03.

319 An argument to the contrary is dealt with in *infra* text accompanying note 321. Eldridge Gerry did note that “the principle of it [apportionment] could not be carried into execution, as the states were not to be taxed as states.” Oliver Ellsworth followed by stating that poll-taxes could be apportioned, although there probably would be none, and that otherwise state quotas would be levied “according to the plan used by the state in raising its own supplies.” *See* Madison’s Notes (July 12), *supra* note 17, at 305, *reprinted in* Appendix A.

320 Madison’s Notes (June 11), *supra* note 17, at 181.

resentation.<sup>321</sup> In sum, the events of July 12 and the succeeding days only forged together various fragments that were already at hand; neither apportionment of taxes nor counting slaves as three-fifths were at all new.

Supporters of the thesis that apportionment was introduced on July 12 only to deal with the problem of slaves cite a statement by Gouverneur Morris on July 24 expressing the wish to strike out the clause proportioning direct taxation to representation on the ground that he had introduced the motion only for the purpose of overcoming the earlier dispute over representation.<sup>322</sup> It is highly likely that Morris (a strong nationalist) personally did not favor apportionment (or, for that matter, any kind of deference to the states), but the fact is that Morris's personal view did not prevail. Indeed, the fact that Morris's statement was neither supported nor debated in the Convention is far more significant than the fact that Morris made the statement. Morris's wish as expressed on July 24 was likewise ignored by the Committee on Detail, which (having been constituted immediately following Morris's remark) produced separate clauses apportioning representation and taxes.<sup>323</sup> In addition, the dispute over representation was multifaceted, and (apart from slaves) implicated the issues of wealth versus population, the role of the legislature, the method of determining numbers, the interim (i.e., pre-census) allocation, and the length of the interim period. The Morris motion did not mention slaves. It only reestablished the link between taxation and representation as a prod for moving the Convention towards resolving the representation issue.

Morris was involved in another colloquy regarding direct taxes in the Convention on September 13. An understanding of this colloquy requires some background. On August 8, the Representation Clause as drafted by the Committee on Detail was amended so as to cross-reference the apportionment formula contained in the separate di-

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321 See Johnson, *Foul-Up*, *supra* note 7, at 89–92 (noting the awkwardness of treating slaves as “inhabitants” for tax purposes).

322 See EINHORN, *supra* note 27, at 168–69 (arguing the same general idea). The full entry in Madison's Notes (July 24), *supra* note 17, at 362–63, is: “Mr. Gouverneur Morris hoped the committee [on detail, about to be constituted] would strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulf: having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections.” (footnote omitted).

323 See *infra* text accompanying notes 294 and 300.

rect-tax clause.<sup>324</sup> The entire draft constitution was eventually sent to the Committee on Style, which presented a near-final version on September 12.<sup>325</sup> It was the Committee on Style that re-combined the representation and direct tax apportionment rules into what is now the Representation Clause. (The Capitation Tax Clause remained separate, and did not then refer to “other direct” taxes.) On September 13, a motion was made to drop the reference in the Representation Clause to direct taxes on the ground that the subject did not belong in a provision dealing with representation.<sup>326</sup> Morris made a remark to the effect that the insertion was made to counter the impression that “negroes” were to be counted *only* for purposes of representation.<sup>327</sup> Immediately the question was put, and the motion failed.<sup>328</sup>

It might be claimed that Morris’s September 13 remark demonstrates that the apportionment requirement for direct taxes was “inserted” only to deal with the slavery issue. This reading is not only wrong on the merits, since Morris’s July 12 motion said nothing about the formula for apportionment, but it also ignores the September 13 context. All of the important decisions had been made prior to referral to the Committee on Style. The Convention proceedings on September 13 and the days following dealt only with style, and not substance (which had already been agreed on). The September 13 motion was simply to move the apportionment rule for direct taxes out of the section dealing with representation, not to remove it altogether. (The latter motion would have been out of order.)<sup>329</sup> Morris’s remarks are in explanation of the Committee on

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324 Madison’s Notes (Aug. 8), *supra* note 17, at 391.

325 *Id.* (Sept. 12) at 536.

326 *See id.* (Sept. 13) at 540 (“Mr. DICKINSON and Mr. WILSON moved to strike out ‘and direct taxes’ from article 1, sect. 2, as improperly placed in a clause relating merely to the constitution of the House of Representatives.”).

327 *See id.* (“The insertion here was in consequence of what had passed on this point; in order to exclude the appearance of counting the negroes in the *representation*. The including of them may now be referred to the object of direct taxes, and incidentally only to that of representation.”) Although this statement is not a model of clarity, it would seem to refer to what had transpired on August 8. *See* Madison’s Notes (Aug. 8), *supra* note 17, at 391. The original resolution (that originated on July 12) provided that representation should be proportioned to direct taxation, and the apportionment formula was located in the direct tax clause. The same organization appears in the Report of the Committee on Detail, as amended on August 8. In both cases the aim (presumably) was to emphasize the *burden* (to the South) of counting slaves as three-fifths, rather than the benefits. The Committee on Style basically combined what had theretofore been separate clauses.

328 Madison’s Notes (Sept. 13), *supra* note 17, at 540.

329 *See id.* (“The report from the committee of style and arrangement was taken up . . . to receive the final corrections and sanction of the Convention.”).

Style's decision. Morris was not only a member of this five-man committee, but was the principal author of its product, and would have defended its actions.<sup>330</sup> Morris's remarks were in *opposition* to the motion, as is demonstrated by the fact that Morris's comment closed the debate, and the motion thereupon failed by a wide margin. Moreover, Morris's comment here related only to the counting of slaves in the apportionment formula, not the principle of apportionment itself as it applied to taxes. If Morris opposed apportionment of taxes in principle, at this point he was reconciled to defeat.

*C. Is Apportionment Dead Because Its Premises Are Obsolete?*

The argument considered here is that the apportionment requirement should be considered obsolete, except for requisitions, because its premises have been seriously eroded, if not completely washed away. The premise is that states, either as governments or as collectivities of inhabitants, are the subjects both of representation in, and of taxation by, the federal government. This premise was over-sold from the beginning<sup>331</sup> and subsequently diluted by the following: (1) the practice of electing U.S. representatives by districts; (2) the total abstinence from the laying of requisitions; (3) the abandonment of apportioned direct taxes after the Civil War (and rare prior use); (4) the view that the federal government is "of" the people of the nation and not the states;<sup>332</sup> (5) the outcome of the Civil War (denying the states the right to secede from the Union); (6) the Civil War amendments to the Constitution (abolishing slavery and limiting the power of states over the franchise); (7) the Sixteenth Amendment (removing income taxes from the apportionment requirement); (8) the Seventeenth Amendment (providing for direct election of U.S. senators); (9) the Nineteenth Amendment (prohibiting the federal government and the states from denying women the right to vote); (10) the Twenty-Fourth Amendment (denying the states the power to impose poll taxes as a condition for exercising the franchise); (11)

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330 The other members were Hamilton, Madison, Rufus King, and William Samuel Johnston. Journal of the Federal Convention, *supra* note 29, at 295; see also Letter from James Madison to Mr. Sparks (Apr. 8, 1831), in 1 ELLIOT'S DEBATES, *supra* note 10, at 507 (noting that Morris was the author of the final draft). Morris participated in discussions of virtually every issue raised by the report from the committee of style.

331 See Madison's Notes (June 28), *supra* note 17, at 253 (recording Wilson's argument ridiculing the notion of the representation of corporate bodies).

332 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402-05 (1819) (noting that the ratification was by conventions, not by state legislatures).

the unanimous practice among states of choosing presidential electors by popular vote; (12) the unanimous practice among states of eliminating property ownership as a qualification for voting; and (13) the decision by the Supreme Court invalidating all fees and financial qualifications for state elections.<sup>333</sup> About all that is left of the states in the manner of their representation (as states) in the federal government is: (1) the (largely unexercised) power of state governments in the procedure for the election of the President;<sup>334</sup> (2) the remaining power of state governments over the federal franchise (which is basically the power to determine, within limits, the boundaries of House Districts or to abolish districting altogether);<sup>335</sup> and (3) the practice whereby U.S. senators are elected by the voters of an entire state.

It is conceivable that there may be some residual attachment to the view that the states are (to some extent) political constituents of the federal government, although it would be hard for a pollster to frame this question in a way that would eliminate partisan and interest-group calculation. At the same time, it is inconceivable that anybody would think of states (or state populations as quasi-corporate bodies) as federal taxpayers. Requisitions have been extinct for over 200 years. The notion of “no taxation without representation” does not require any intermediation by states on the taxation side of the equation. It is hard to imagine that anyone would think that their *federal* tax rates should depend on their state of residence.

Notwithstanding the aforesaid, it is hard to imagine that the courts would limit the apportionment requirement to requisitions and capitation taxes on the grounds that its underlying assumptions are now passé. There is no doctrine stating that legislative or constitutional text is void because it is based on obsolete or defective ideological premises.<sup>336</sup> Legal text survives flawed origins.

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<sup>333</sup> See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that a state’s conditioning of the right to vote on the payment of a fee or tax violates the Equal Protection Clause of the Fourteenth Amendment).

<sup>334</sup> U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII.

<sup>335</sup> For restrictions on districting generally, see LAWRENCE H. TRIBE, 2 *AMERICAN CONSTITUTIONAL LAW* §§ 13-7, -8, -9 (3d ed. 2000) (discussing restrictions on districting).

<sup>336</sup> Guido Calabresi has argued that courts should entertain the possibility that statutory text can become obsolete with the passage of time and changing conditions, but, to my knowledge, this invitation has not been accepted by the judiciary. Even Calabresi does not argue that a doctrine of statutory obsolescence should be carried over to constitutional interpretation. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Of course, this point would also apply to the argument concerning the “expiration” of the Capitation Tax clause. See *supra* text accompanying notes 303–04.

*D. Is Apportionment Dead on the Ground that Nothing Is Reasonably Capable of Apportionment?*

Calvin Johnson argues that only requisitions and capitation taxes can be direct taxes, because they are the only taxes that are “reasonably capable of apportionment”—which is the test allegedly set out in *Hylton*.<sup>337</sup> According to Johnson, even an *ad valorem* real estate tax would flunk the “reasonably capable” test, because the tax rate would be different in different states (and the higher rates would apply to the poorer states).<sup>338</sup>

Johnson’s position is not a correct distillation of the *Hylton* opinions. The Chase opinion cites a situation where the rates bear a ratio of ten to one.<sup>339</sup> The Iredell opinion cites the situation where the subject of the tax might not exist at all in one or more states.<sup>340</sup> The Paterson opinion, although expressing the view that apportionment only made conceptual sense for requisitions, conceded the possibility that any broad-based tax might be reasonably capable of apportionment.<sup>341</sup> All three opinions flatly stated that real estate taxes were direct taxes, and all three views of apportionment would accommodate such taxes.

If *Hylton* is interpreted to mean that any tax not reasonably capable of apportionment does not need to be apportioned, then it would have followed that a tax on slaves was not required to be apportioned because slaves were non-existent or scarce in Northern states. But such an interpretation would have been contrary to the understanding of everybody. The “reasonably capable of apportionment” idea simply restates the reason for excluding the kinds of imposts, duties, and excises familiar to the Framers from the requirement of apportionment. It does not erase the terms “capitation tax” or “direct tax” from the Constitution.

The phrase “reasonably capable of apportionment” is not the same as Johnson’s mutated version thereof, which essentially is a

<sup>337</sup> Johnson, *Apportionment*, *supra* note 7. My view of *Hylton*, as an excise tax case, is set forth in *infra* Part V.E.

<sup>338</sup> See Johnson, *Apportionment*, *supra* note 7, at 309–14, 351 (“*Hylton* got it right: a tax that cannot reasonably or naturally be apportioned is not a direct tax because apportionment is the defining characteristic of direct tax.”).

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

<sup>340</sup> *Id.* at 182 (opinion of Iredell, J.).

<sup>341</sup> *Id.* at 177–80 (opinion of Paterson, J.); cf. *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 439–40, 446 (1868) (upholding a tax on insurance company gross premiums and invoking the *Hylton* test in a hypothetical that assumed that some states might have no resident insurance companies).

principle of fair apportionment. A tax is minimally “capable” of apportionment if the subject(s) can be located in every state. Any tax on the economic attributes of a person (e.g., a wealth tax or an income tax) is “capable” of apportionment among the states in accordance with population because the economic qualities that are attributed to a person can be attributed to the state in which the person resides.

Johnson unjustifiably views “reasonably” as requiring near-uniform rates across the nation. That cannot be right, because “uniformity” is necessarily defeated by “apportionment according to population.” The kind of national consciousness that underlies the uniformity principle only originated during the Framing period. As a political document, the aim was to achieve equity among the states (or the people, taken collectively, of the various states), and an apportioned tax would certainly have been seen as fair according to that perspective. Moreover, taxation of the states was explicitly linked to representation of states. In sum, the norm of fairness among individuals across the nation cannot underlie the apportionment requirement, because apportionment is explicitly based on the different and incompatible concept of fairness among states (or state populations).<sup>342</sup> Apportionment was anything but a “mistake.”<sup>343</sup> It was merely an error of judgment.

#### V. CONFINING APPORTIONMENT TO TAXES ON TANGIBLE PROPERTY

The arguments made so far, although not sufficient to eliminate the apportionment requirement altogether, are arguments for construing it narrowly. This part argues, from various angles, that “direct tax” (apart from requisitions and capitation taxes) should be limited to taxes on real estate and tangible personal property. Adoption of this position would mark a change in the current doctrinal under-

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<sup>342</sup> George Nicholas of Virginia clearly understood how the apportionment requirement operated, but from his point of view the national-perspective inequity was a good thing because favorable to Virginia (a richer state). *Virginia Debates* (Mr. Nicholas, June 10, 1788), *supra* note 10, at 243, *reprinted in* Appendix C. George Mason observed, *id.* (Mr. George Mason, June 15, 1788) at 457–58, that apportionment would result in inequity at the individual level if the specified subject of the tax were narrow.

<sup>343</sup> Curiously, a book on constitutional mistakes, with forty-one contributing authors, makes no suggestion that the apportionment requirement was a mistake. *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson, eds. 1998). Perhaps this omission only reflects the myopia of constitutional scholars when it comes to taxes.

standing, which is that all property taxes are subject to apportionment.

#### A. *A Critique of Pollock II*

There is unanimous agreement in historical sources, legislative and executive practice, and judicial doctrine that “direct tax” encompasses taxes on real estate. The only plausible instrumental motives for apportionment relate only to real estate (including slaves). As to what, apart from real estate, might be subject to apportionment, there are only scattered statements and opinions, often based on conflicting principles, principles that cannot be dispositive, or no principles at all.<sup>344</sup> The only exception is the five to four majority opinion in *Pollock II*, which held that a tax on personal property is subject to apportionment:

Nor can we perceive any ground why the same reasoning [that treats a tax on income as a tax on the underlying property] does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. . . . The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, “upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed.”

Personal property of some kind is of general distribution . . . .

The Congress of the Confederation found the limitation of the sources of the contributions of the States to “land, and the buildings and improvements thereon,” . . . so objectionable that the article was amended April 28, 1783, so that the taxation should be apportioned in proportion to [population] . . . .<sup>345</sup>

The reasons given in *Pollock II* for extending “direct tax” to a tax on intangible personal property are not persuasive, given a century of settled understanding that the term referred only to taxes on real estate (and perhaps related tangible personal property).<sup>346</sup> Because *Hylton* (1796) had upheld an unapportioned tax on tangible personal property as a non-direct tax, *Pollock II* would appear to have overruled

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<sup>344</sup> It is hard to discern any principle of what should be apportioned from the WOLCOTT, *supra* note 88.

<sup>345</sup> 158 U.S. 601, 628 (1895).

<sup>346</sup> See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 541–44 (1868) (stating that “direct tax” does not include a tax on personal property).



*Hylton*. But the majority opinion in *Pollock II* dismisses *Hylton* as being “badly reported” and distinguishes it as having only held that the carriage tax was an excise.<sup>347</sup> Although a court is allowed to recharacterize its prior decisions, it should be pointed out that none of the judges in *Hylton* unequivocally stated that the carriage tax was an excise.<sup>348</sup>

For starters, framing the issue as being one of defining “direct tax” begs the question, because the issue of what taxes are subject to apportionment cannot be answered without also asking the question of what taxes are exempt from apportionment, namely, imposts, duties, and excises, and possibly other indirect taxes. At least *Hylton* was on the right track in posing the issue as one of apportionment. Since the carriage tax in *Hylton* looks like a property tax in having been an annual tax (as opposed to a transactional tax), the *Pollock II* majority opinion should have explained why it was not a property tax. If the carriage tax was a property tax, then the *Pollock II* majority needed to explain how a tax on intangible investment property was distinguishable from a tax on tangible business or personal-use property, or, for that matter,<sup>349</sup> how a tax on such property might differ from a real estate tax.

The first portion of the quoted passage from *Pollock II* relies on the position advanced by *Pollock I*, namely, that a tax on income is a tax on the underlying property.<sup>350</sup> One cannot deploy the “income” concept to determine what kind of property falls under the rubric of “direct tax,” a term that predated any income tax and pre-dated the widespread availability of income-producing intangible personal property. Here, the *Pollock II* majority arbitrarily selects a feature of property that unites some real estate and some personal property, while ignoring features that differentiate them, such as mobility or use. Decisively, this rationale for *Pollock II* has since been repudiated by the Supreme Court<sup>351</sup> and leaves the status of non-income-producing property in limbo.

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<sup>347</sup> *Pollock II*, 158 U.S. at 623–27.

<sup>348</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

<sup>349</sup> The Framers might have thought that real estate taxes were sui generis, as the Physiocrats and Locke—both influential in the eighteenth century—thought that all wealth derived from land and its fruits. Ackerman, *supra* note 6, at 16–18.

<sup>350</sup> *Pollock II*, 158 U.S. at 628.

<sup>351</sup> See *supra* note 188 and accompanying text. A related problem is that the carriage tax in *Hylton* was on carriages held either for personal use or for hire. Although the taxpayer in *Hylton* owned only personal-use carriages, it is hard to imagine that the result would have been different if he had owned carriages for hire, because the unanimous rationale was

The second point made in the quoted passage is that the Framers could have specified a tax on “real estate,” but did not. However, the Framers could equally have specified a tax on “property,” but did not. In either case, “direct tax” extends to the non-property modes of requisitions and capitation taxes, and, as argued below, to taxes on tangible personal property as well. However, it appears that the distinctions between tangible and intangible, and among business, investment, and personal-use property, were not current in the late eighteenth and early nineteenth centuries.<sup>352</sup> Thus, the Framers lacked an appropriate vocabulary with which to encapsulate their intention. Any specific reference to “real estate,” “lands,” or “property” might, at worst, have been inaccurate expressions of intention, and, at best, would have raised further issues as to what was encompassed within such terms.<sup>353</sup> Moreover, the Framers had a difficult enough time dealing with representation and taxation and would have had no appetite to haggle further over the precise meaning of terminology that was inherently vague and not of pressing importance.<sup>354</sup>

The Gallatin statement quoted by the *Pollock II* majority was made twenty-five years after the framing of the Constitution. Gallatin did not attend the 1787 Convention, and his acceptance of the proposed constitution was lukewarm at best.<sup>355</sup> He supported the Whisky Rebellion of 1791 to 1794, which resisted collection of the 1791 excise tax on whisky.<sup>356</sup> Eventually, Gallatin became Secretary of the Treasury from 1801 to 1814 under Jefferson (and later Madison), and in that capacity Gallatin opposed all internal taxes. However, Gallatin can

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that apportionment would not make sense on account of concerns about geographical distribution. Thus, the carriage tax (on income-producing tangible property) would appear, from the perspective of the *Pollock II* Justices, to be indistinguishable from a tax on intangible investment property.

<sup>352</sup> Adam Smith uses the term “stock” to include all property and money deployed in a profit-seeking activity. See SMITH, *supra* note 77, at 372–75. The Wolcott Report basically follows Smith’s terminology. See WOLCOTT, *supra* note 88, at 439.

<sup>353</sup> It would have been debatable whether a tax on homes, farm animals, unharvested crops, and/or farm implements would have been required to be apportioned. A related issue would be whether state law definitions of “real property” would control.

<sup>354</sup> The term “direct tax” appeared spontaneously on July 12 as a floor amendment by Morris to his own motion. Madison’s Notes (July 12), *supra* note 17, at 302, *reprinted in* Appendix A. Rakove, on the basis of a failure to answer a query on this point, opines that the ambiguity was deliberate. RAKOVE, *supra* note 212, at 179.

<sup>355</sup> Gallatin signed the Harrisburg petition of Sept. 3, 1788, that proposed numerous weakening amendments, including one that direct taxes could be used only as a back-up to an unfilled requisition quota. Pennsylvania Debates (Sept. 3, 1788), *supra* note 91, at 545.

<sup>356</sup> EINHORN, *supra* note 27, at 188–94 (recounting Gallatin’s role in federal tax politics before becoming Treasury Secretary).

hardly be viewed as a spokesman for the Framers or the original understanding of “direct tax.” Moreover, the term “direct tax” in the state context (denoting all internal taxes) cannot be defined in the constitutional sense (as being expressly exclusive of duties, imposts, and excises). Tax modes that the states would use to fulfill requisition quotas do not become direct taxes if used by the federal government just because the requisitions themselves are direct taxes. The few casual statements made during the ratification period that might appear to lend support to *Pollock II* do not really do so.<sup>357</sup>

The switch in the apportionment formula (noted in the second paragraph of the quoted passage)<sup>358</sup> from land values to population was made only because population was viewed as a proxy for real estate wealth, which had been the Confederation rule of apportionment.<sup>359</sup> The dissatisfaction with using property wealth as the index of apportionment stemmed solely from problems of administration. The switch to population (as a proxy for wealth) was an administrative shortcut, but the principle was the same. The Framers even had an economic theory for correlating real property wealth with population, namely, that free migration would increase demand (and prices) for low-value property.<sup>360</sup> The theory does not work with respect to personal property because prices (values) are independent of geography. Thus, there is no reason to think that the value of debt obligations, for example, would correlate with state populations. The *Pollock II* majority feebly attempted to deal with that issue by the

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<sup>357</sup> See Virginia Debates (Mr. Monroe, June 10, 1788), *supra* note 10, at 215–16 (suggesting that a tax on “all property” would be a direct tax). Monroe was an Anti-Federalist, who opposed federal taxes other than imposts and requisitions. A speech by Alexander Hamilton at the New York Ratifying Convention begins with a statement that “a poll tax is a tyrannical tax,” continues with the observation that in time of war the government might need “to lay hold of every resource,” cited an example where “[t]he United Netherlands were obliged, on an emergency, to give up one twentieth of their property to the government,” and continued with sundry other observations about the exercise of a taxing power, including the constraints of apportionment and politics. New York Debates (Mr. Hamilton, June 28, 1788), *supra* note 118, at 364–65. This passage might be construed to imply that Hamilton thought that a comprehensive wealth tax was either a capitation tax or a direct tax, but it could also be interpreted as only offering an example (in addition to a poll tax) of an unpopular emergency tax that would be rescinded when the emergency had ended. In any event, a wealth tax would include real estate in the tax base, and therefore would be subject to apportionment.

<sup>358</sup> *Pollock v. Farmers’ Loan and Trust Co. (Pollock II)*, 158 U.S. 601, 628 (1895).

<sup>359</sup> Many Framers held the view that population was a reasonably accurate index of the private wealth within a state, but this view was not undisputed. See Johnson, *Foul-Up*, *supra* note 7, at 33–34.

<sup>360</sup> See Madison’s Notes (July 11), *supra* note 17, at 299–300 (explaining why population was a good enough proxy for wealth in a nation where labor and capital could move freely).

throwaway line at the end of the first quoted paragraph to the effect that personal property was of general distribution.<sup>361</sup> This may be true, but the 1894 income tax only implicated income-producing personal property, which might not have been of general distribution in 1895 (and probably was less so from 1787 to 1789). But at least attention can now be focused on the crux of the matter, namely, the relation of property to geography (states).

B. “Direct Tax” as a Tax on the Thing Itself Because of Its Geographical Location

Can “direct tax” be given a meaning, compatible with ordinary usage,<sup>362</sup> that encompasses requisitions, head taxes, and taxes on real estate, while excluding duties, imposts, and excises? *The key is to link “direct tax” to its legal consequences, namely, apportionment among the states. Apportionment among states requires that any item subject to the tax have a definite geographical location in a state, because the tax rate for a state is the state’s quota divided by the value (or quantity) of the subject of the tax within the state. A definition that fits all of the necessary requirements is this: a direct tax is a tax directly on objects having geographical locations. Capitation taxes, requisitions, and taxes on tangible property all satisfy this definition, because in all three cases, the subjects are taxed because they are “there” (as opposed to because of what they do), and all are geographically located.*

It might be objected to that the proposed definition of direct tax is formalistic and without substance. However, competing definitions of direct tax are either equally formalistic<sup>363</sup> or unworkable.<sup>364</sup> Indeed, formalism is necessary in distinguishing modes of taxation from one another, since the boundaries among them are blurry as a matter of substance. The carriage tax in *Hylton* can be viewed as either an “excise” or a “personal property tax.”<sup>365</sup> If “excise” refers to “personal use,” then taxes on homes, collectibles, pets, vehicles, and so on are

361 *Pollock II*, 158 U.S. at 628.

362 See cases cited *supra* note 90.

363 Formalistic definitions include “internal taxes” and “tax on a person.”

364 As previously mentioned in the text accompanying notes 88–96, “not able to be passed on” is unworkable. “General distribution” is also unworkable, because there is no standard of how proportional to population the distribution must be.

365 *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); see BLACK’S LAW DICTIONARY 672–73 (4th ed. 1952) (citing old authority—including Blackstone—emphasizing the “personal use” aspect of excises); *supra* text accompanying notes 344–45.

excises.<sup>366</sup> If “excise” refers to “any use,” then virtually all taxes are excises. If an excise is defined by a subject having a finite duration, then it includes taxes on buildings, non-renewable natural resources, livestock, tools of the trade, and intellectual property. The one essential characteristic of a property tax would appear to be periodicity (taxing the same thing annually),<sup>367</sup> but the carriage tax that was upheld in *Hylton* was a periodic tax.<sup>368</sup> If one takes the position that the essential characteristic of a property tax is valuation,<sup>369</sup> then a low-rate tax on investment property is hard to distinguish from an income tax,<sup>370</sup> because the market value of property can be described in terms of the present value of its future net yield. Similarly, a tax on personal-use property can be described as an excise tax, because the market value of personal-use property is the present discounted value of future net use.<sup>371</sup> The only difference between an income tax and a tax on aggregate personal consumption relates to differences in accounting for capital expenditures and borrowing.<sup>372</sup> The only difference between a classic excise, like a retail sales tax on personal consumption items, and a consumption tax, or between a property tax and a wealth tax, is aggregation and the resulting possibility of a progressive rate structure. Finally, the distinction between a tax on the property itself and a tax on the person who owns such property is

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366 The Wolcott Report treated a tax on homes as an excise, WOLCOTT, *supra* note 88, at 440, but the 1798 apportioned federal tax on real estate included a progressive tax on dwelling houses. Act of July 14, 1798, ch. 75, § 2, 1 Stat. 597, 598.

367 Cf. Treas. Reg. § 1.164-3(c) (2007) (defining “personal property tax” as a tax imposed annually).

368 *Hylton*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.) (noting that the tax was imposed annually).

369 Cf. I.R.C. § 164(b)(1) (2000) (defining “personal property tax” as an ad valorem tax). Whether valuation is a legal litmus test is unclear because no non-apportioned federal ad valorem tax has been passed upon by the Supreme Court. I propose that valuation be a litmus test only for tangible personal property. See *infra* Part V.E.

370 See SMITH, *supra* note 77, at 377 (stating that periodic property taxes are really taxes on income from property).

371 *Pollock I* equated a tax on property income with a tax on the property itself, but not on the basis of present-value analysis as such. Nevertheless, *Pollock I* may simply have applied a cruder (non-mathematical) version of present-value analysis, as the Court stated that property has no real value apart from its economic yield. See *Pollock v. Farmers’ Loan and Trust Co. (Pollock I)*, 157 U.S. 429, 580–81 (1895). The Court later had to recant the substance-over-form approach of *Pollock*. See *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 314 (1937) (discussing the difference between property tax and tax on income from property).

372 See Zelenak, *supra* note 267, at 845–55 (arguing that broad-based consumption taxes are modified income taxes).

meaningless in terms of substance, because in either case the owner has to pay the tax or lose the property.<sup>373</sup>

Formalism has its upside in the present context, because it posits a relatively clear definition of “direct tax” that does not radically undermine long-standing doctrine or practice and cannot be perverted by legislation.

### C. Real Estate Taxes and Geography

The “inherently attributable to states” test is clearly satisfied by real estate taxes, whether the tax base is determined by value or by some other quantitative measure, such as number of acres. Land is immovable and “there” for all to see. Slaves were legally considered to be real estate by reason of being “attached to the land.” Buildings are relatively fixed. If they are movable at all, the costs of doing so are substantial.

Attributing “real estate tax” as the hard-core meaning of “direct tax” makes good sense. First, since the value of real estate is largely a function of population density, tax rates would tend to equalize across states. The lower the population density in a given geographical area, the lower the per-acre value would tend to be.<sup>374</sup> Thus, suppose that, as of 1787, Pennsylvania and South Carolina had the same geographical area, but Pennsylvania had twice the population (and twice the apportionment quota) as for South Carolina. But if the per-acre price in Pennsylvania is twice that of South Carolina, the tax rates would be the same.<sup>375</sup> This analysis underlays the widely-held assumption in the Framing period that population was a reasonable, if not perfect, proxy for land values.<sup>376</sup> Even if rate differentials would

<sup>373</sup> See *Crane v. Comm’r*, 331 U.S. 1 (1947) (finding no meaningful distinction between recourse and nonrecourse acquisition debt).

<sup>374</sup> Land values are not necessarily rock-bottom in low-population large-area states such as Alaska, Montana, New Mexico, Wyoming, and Nevada, as large amounts of land are government-owned or set aside as Indian reservations.

<sup>375</sup> Suppose the state’s quota is \$1 billion for every 2.5 million inhabitants:

TABLE 2: APPORTIONMENT AND LAND VALUES

	Population	Quota	Acres	Value/p.a.	Total Value	Tax Rate
Pennsylvania	10 million	4 billion	100 million	\$100	1000 billion	4%
South Carolina	5 million	2 billion	100 million	\$50	500 billion	4%

<sup>376</sup> See *supra* notes 356–57 and accompanying text.

exist under an apportioned federal real estate tax,<sup>377</sup> such differentials would not have been perceived as being grossly inequitable. State property taxes are not considered to be inherently “unfair” just because of state-to-state differences in rates. An apportioned federal real estate tax can be made to look like a state tax in every respect but the identity of its collectors. In addition, rates on property taxes are so low (usually below 1 percent) that rate differentials are hardly perceptible. Any unpopularity of the early federal apportioned real estate taxes does not appear to have been on account of the inequities of rates among states but rather on account of inconvenience and high transaction costs.<sup>378</sup>

Second, apportioned federal real estate taxes can also be fair *within* states,<sup>379</sup> as the rates determined for a state can be applied uniformly within a state. In contrast, state real estate taxes often suffer from inequities resulting from different rates being set by different political subdivisions.

Third, in contrast to apportioned excises where an the entire state’s quota could be borne by a few *non-wealthy* individuals,<sup>380</sup> a fed-

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<sup>377</sup> See EINHORN, *supra* note 27, at 159 (noting that apportionment of an *income* tax according to state populations would have resulted in a maximum rate differential of 9.2% (Connecticut, the richest) to 17.9% (Mississippi, the poorest)). If the four highest and lowest states were thrown out, the range would be a tolerable 11.1% to 16.2%. Einhorn does not attempt a similar exercise for an *ad valorem* property tax, as one would need to know aggregate state real estate values. This would be extremely difficult, as no apportioned federal real estate tax has been laid since the Civil War, and state property tax regimes use different valuation systems.

<sup>378</sup> Henry Carter Adams does not attribute the unpopularity of these taxes to the rate inequities (which was a concern more of the Treasury). Adams, *supra* note 134, at 54–59, 64–68. The debates of the ratification period demonstrated that such taxes were unpopular without reference to inter-state inequities, partly because such taxes had to be paid out of the property owner’s own pocket, partly because the administration was cumbersome, and partly because a federal real estate tax was perceived as encroaching on state “turf.” Charles J. Bullock’s study of direct taxes provides figures on the inequitable operation of the 1861 apportioned property tax. Bullock, *Part II*, *supra* note 23, at 464–80. By then, discrepancies among states in per-capita land values had actually widened (relative to the 1789–1916 period), and Adams (along with other commentators cited therein) bemoaned the inequities resulting from apportionment. However, it is not claimed that the inequities as such were a cause of unpopularity in the poorer states that suffered by reason of the apportionment rule.

<sup>379</sup> A tax structure in which the entire burden is borne by only one person (or a handful of persons) resembles (in a structural sense) a “taking” more than a “tax.” See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967) (discussing what a “taking” is).

<sup>380</sup> The Justices in *Hylton v. United States* invoked scenarios in which the subject of the tax was either nonexistent in a state or present in small quantities relative to population. 3 U.S. (3 Dall.) 171 (1796).

eral *ad valorem* real estate tax would impact as many persons as there are landowners. Even in a state where there are very few landowners, they would be sufficiently wealthy (on account of the landholdings themselves) that the tax would not be disproportionate to ability to pay.<sup>381</sup>

#### D. Intangible Property and Geography

The proposed definition of direct taxes excludes acknowledged non-direct taxes, that is, taxes on receipts, transfers, uses, privileges, immunities, enjoyment, or activities. It happens that the locations of the subjects of indirect taxes are geographically ambiguous. Thus, a transaction (or other subject of an indirect tax) could be sourced to any of: (1) the location of the seller, (2) the location of the buyer, (3) the location of the owner, (4) the location (if any) of the thing, (5) the location of an intermediary, (6) the place where title is legally transferred or registered, or (7) the place stipulated in a contract or other governing instrument. The mere *possibility* that a subject could be assigned to geography is not sufficient to characterize a tax thereon as a “direct tax,” *because the operative rules—that would dictate the end results—would be produced only by implementing legislation and not by the Constitution itself*. A rule that would be so subject to manipulation provides no guarantee or certainty, and therefore defeats the entire purpose of placing it in the Constitution.<sup>382</sup>

Intangible property has no inherent location in the same ways that the subjects of non-direct taxes lack inherent location. Any assignment of an intangible to a state can only occur pursuant to a legislative rule, since no such rules exist in nature or under the Constitution. Shares of stock, for example, could be sourced to any of: (a) the state of incorporation,<sup>383</sup> (b) the state of the owner, (c) the state of the location of the stock-certificate, or (d) the state of the location of the transfer agent. (Actually, some or all of these locations could be outside of the United States.) Patent rights and copyrights cannot be assigned to states at all, because the legal rights inherent in them

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381 The Constitution does not require that an apportioned real estate tax be based on values or applied uniformly across states or uniformly within states. However, these possible deformities would raise strong political opposition.

382 There were several comments that the enumeration be done through a precise standard (the census) rather than being left to the legislature, and a motion to that effect was adopted. Madison’s Notes (July 11), *supra* note 17, at 294–95, 297, 298.

383 *Cf.* I.R.C. § 861(a)(2) (2000) (sourcing dividends by nationality of corporation).



are granted by the federal government. Apportionment can work only if the same item cannot be “counted” in more than one state.

*E. Tangible Personal Property and Geography; Hylton Reconsidered*

Like real estate and individuals, tangible personal property, although sometimes moveable, has a single location at any point in time by reason of its physical existence. Tangible personal property can be hidden, but that goes only to the administrative difficulty of enforcing any such tax.

Treating a tax on tangible personal property as being subject to apportionment eliminates the problem of what constitutes a real estate tax. Thus, any tax (imposed periodically by reason of ownership and according to value) on farm equipment, livestock, minerals, crops, and timber, whether or not harvested or extracted, would be subject to apportionment.<sup>384</sup>

The federal tax on carriages that was held exempt from the rule of apportionment might be characterized as either a tangible personal property tax or as an excise tax by reason of being a tax on use.<sup>385</sup> If *Hylton* is characterized as having upheld a tangible personal property tax, then its holding is incompatible with the thesis that such a tax should be subject to apportionment.

The 1796 carriage tax at issue in *Hylton* was an annual tax but not an *ad valorem* tax: the tax amount was keyed to the physical characteristics of the carriage. The tax was imposed only on carriages subject to certain uses,<sup>386</sup> as opposed to ownership per se. Imposing the tax on use rather than ownership appears to have been done precisely to overcome constitutional objection.<sup>387</sup> Today such a tax is

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<sup>384</sup> Compare Virginia Debates (Mr. John Marshall, June 10, 1788) *supra* note 10, at 229–31, reprinted in Appendix C (stating that a tax on farm equipment and livestock was a direct tax), with *supra* text accompanying note 172 (Justice Paterson expressing doubt on this point and Justice Iredell suggesting that “direct tax” is limited to taxes on real estate or things “affixed to the land”).

<sup>385</sup> See sources cited *supra* notes 159–61. Only Justice Paterson stressed the excise-tax point, quoting Adam Smith. See *Hylton*, 3 U.S. (3 Dall.) at 180–81.

<sup>386</sup> The uses were personal use, being let out for hire, or for the conveying of passengers. Farm use and carrying goods and wares were excluded uses. Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373, 374, repealed by Act of May 28, 1796, ch. 37, 1 Stat. 478.

<sup>387</sup> See *supra* text accompanying note 76 (colloquy between Madison and Fisher Ames in the House).

called a license fee, and license fees (as taxes on uses) are considered to be excises,<sup>388</sup> which are expressly exempt from apportionment.

Since tangible personal property is a human artifact produced for use, there is inherent difficulty in deciding whether such taxes are property taxes or excise taxes. A test to resolve this problem that is simple and easy to apply is this: a tax on tangible personal property is a “property” tax if it is imposed *periodically on the value of the item*. Since the carriage tax in *Hylton* was not imposed according to valuation, it was an excise (rather than a tangible personal property tax) under this test. This “excise” interpretation of *Hylton* is paralleled in the regulations under section 164 of the Internal Revenue Code, which define “personal property taxes” (but not “real property taxes”) as requiring valuation.<sup>389</sup> In contrast, valuation need not be a requirement for real estate taxes. Real estate is easy to identify on account of being immovable. Real estate taxes of necessity are capable of reaching unimproved land that is not used for anything, because such land exists in nature and is not a human artifact. Under this approach, a per-acre land tax would still be subject to apportionment by reason of being a real estate tax, as the Framers intended, despite the absence of valuation.

The “reasonably capable” test of direct tax that is commonly attributed to *Hylton* is not suitable as a legal principle, unless it is taken to refer the ability to unequivocally locate the tax subjects in states. If, as actually used in *Hylton*, it refers to the inequity of state rate differentials caused by an erratic distribution of the item, then the test refers to matters of degree,<sup>390</sup> not kind.<sup>391</sup> Courts are not well-equipped to apply this kind of test. Carriages were not so erratically distributed among the states relative to population that a handful of person would be subject to astronomical tax rates in one or more

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388 See *Nicol v. Ames*, 173 U.S. 509, 515 (1899) (discussing the privilege of making sales and trades).

389 I.R.C. § 164(a)(2) (2000) allows a deduction for state and local personal property taxes, but an automobile license fee is not viewed as a personal property tax unless it is assessed according to value. Treas. Reg. § 1.164-3(c) (2007). Interestingly, the definition of real property taxes in subsection b of the same regulation does not require valuation. *Id.* § 1.164-3(b).

390 Compare *supra* note 374, with *supra* note 389, which list rate differentials for the 1798 carriage tax and the 2000 income tax, if both had to be apportioned.

391 Apportionment would be impossible only if there is at least one state in which the item is not found at all.

states.<sup>392</sup> Does *Hylton* mean that any single-item tax would flunk the reasonably-capable test? What if the class were broad enough, such as business-use property, inventory, or home furnishings, so that distribution in relation to population were not expected to be erratic?<sup>393</sup> The “reasonably capable” test also raises the issue of the role of fact-finding: would the litigants in a case challenging such a tax have to introduce evidence concerning the distribution of the item? It would seem that the rule would require it, but no case has relied on such a fact-finding, and developing the facts on a case-by-case basis would be very costly. In contrast, requiring apportionment of *ad valorem* tangible personal property taxes would be an easy rule to apply, as no fact-finding would be required.

This reinterpretation of *Hylton*<sup>394</sup> as an excise tax case is virtually cost-free to the federal government, which is wholly ill-equipped to administer *ad valorem* tangible personal property taxes in any event. It appears that no existing federal tax would be affected. For example, the federal taxes on alcoholic beverages include per-gallon taxes and occupational-license taxes, and none of these are subject to the rule of apportionment.<sup>395</sup>

#### F. Geography, Federalism, and Taxes

The apportionment requirement for direct taxes has operated to institutionalize a *modus operandi* under which the federal government, in practice, cedes “jurisdiction” to the states to tax *real estate (and, in my view, tangible personal property)*, subject to an exception for cases of national emergency. The cession is institutionalized by giving states a political interest—pro or con—in the federal use of apportioned taxes. The interest resides in the tax rates applicable in any state relative to the rates applicable in other states. The justification for this cession is that, as a matter of both fairness and administration, it is pru-

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392 Einhorn used the actual yield of the carriage tax in 1796 to construct a table in which the per-carriage rates ranged from \$0.73 (Delaware) to \$5.69 (Georgia). EINHORN, *supra* note 27, at 161.

393 See note 380.

394 Jensen, *Consumption Taxes*, *supra* note 5, at 2362–63, also interprets *Hylton* as an excise tax case, as did *Pollock II*, 158 U.S. 601, 623–27 (1895).

395 See I.R.C. §§ 5001, 5041, 5051 (2000) (imposing a tax on distilled spirits, wine, and beer). These are one-time taxes on production or importation. Occupational taxes are assessed at a fixed annual amount on producers, etc. See *id.* §§ 5081, 5111, 5121 (imposing a tax on alcohol proprietors). The federal excise tax on tobacco products is a one-time tax by weight. See *id.* §§ 5701, 5703(b) (laying out the rates of the tobacco tax).

dent for the federal government not to encroach on matters that are inherently local and state-connected.

The state-connectedness of real estate, and taxes thereon, is indicated foremost by the fact that the real estate in a state is coterminous with the territory and legal jurisdiction of the state. Second, real estate located in one state cannot be located in any other state, nor can it be moved to another state, and real estate markets tend to be local. Third, real estate is considered inherently local for all legal purposes apart from taxation.<sup>396</sup> Fourth, all states had experience with real estate taxes.<sup>397</sup> Fifth, real estate taxes are typically administered according to appraisals, and appraisals require knowledge of local conditions.<sup>398</sup> Sixth, a person is likely to gauge the fairness of a real estate tax by how his neighbors are taxed with respect to the same subject, not by how real estate is taxed in another state. Seventh, real estate taxes can be collected from the property itself by levy and execution, and identification of and jurisdiction over the owner is not necessary.

The apportionment requirement can find policy support in the notion of comparative advantage, which can be approached by asking, “Which tax modes are best tailored to the position of states, as opposed to the federal government?” The chief problem facing the states, vis-à-vis other states, is the dilution of their tax base by the shifting of economic activity into lower-tax jurisdictions. Taxes on real estate are immune to mobility. Head taxes are the next best taxes from this angle, as the monetary and psychological costs of changing residence are high compared to that of moving economic activity. The most easily avoided state taxes by far are taxes on intangibles,<sup>399</sup> and

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<sup>396</sup> It is hornbook law that the situs of real estate determines the law to be applied to questions concerning its ownership, succession, and disposition. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 223, 277, 278 (1971) (land conveyances and land trusts).

<sup>397</sup> The various kinds of real estate taxes used by the states are listed in WOLCOTT, *supra* note 88, at 437.

<sup>398</sup> See THE FEDERALIST NO. 36 (Alexander Hamilton), reprinted in Appendix B; Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (opinion of Paterson, J.). However, appraisals did not become universal until the nineteenth century. For a brief history of state property taxation, see generally Glenn W. Fisher, *History of Property Taxes in the United States*, EH.NET ENCYCLOPEDIA, Sept. 30, 2002, <http://eh.net/encyclopedia/article/fisher.property.tax.history.us>.

<sup>399</sup> Adam Smith recognized this crucial distinction between real estate taxes and intangibles. SMITH, *supra* note 77, at 373; see also Kirk J. Stark, *State Tax Shelters and U.S. Fiscal Federalism*, 26 VA. TAX REV. 789 (2007) (discussing income from intangibles under state corporate income taxes). The ability to move intangible investments offshore is a major problem for international taxation generally. See I.R.C. §§ 951(a), 954(c), 1291–1297 (2000) (setting forth the taxation of foreign passive income of U.S. citizens and residents); see *al-*

here it would be the federal government that would possess a clear comparative advantage, just as it does with personal taxes on annual income or consumption, because (1) source or situs is not a legal constraint on federal taxing jurisdiction,<sup>400</sup> and (2) the lack of geographical location is not much of a practical constraint on administration.<sup>401</sup> The federal government would also have a comparative advantage with respect to transactional excises on big-ticket items<sup>402</sup> because state taxes of this type are easily avoided.<sup>403</sup>

Tangible personal property, although movable, is mostly bound to such locations as homes and business premises. Although wholesalers can stockpile inventory (and collectors can stash collectibles) in states with low (or no) tangibles taxes, the situs states would be able to tax such property if they so desired. A tangibles tax requires a bureaucracy that can enter business premises and warehouses. States will want to make judgment calls as to what kinds of tangibles are worth taxing given the administrative and political costs. The federal government labors under a comparative disadvantage in this area relative to the states.

The relative comparative advantages are reflected in the fact that all states impose real estate taxes,<sup>404</sup> but practically none impose taxes on intangibles.<sup>405</sup> State taxes on tangible personal property (other than household goods) are fairly common, but they vary considerably from state to state.

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*so id.* § 871(a) (conceding virtual impossibility of trying to tax non-real-estate capital gains of non-resident aliens). In contrast, the *situs* country can effectively tax real estate income and capital gains of owners who are non-resident aliens. *See id.* § 897 (taxing gains on real property interests located in the United States).

400 *See* *Cook v. Tait*, 265 U.S. 47, 56 (1924) (holding that Congress had power to tax U.S. citizen residing in Mexico on foreign-source income).

401 For example, stocks and bonds are mostly registered as to ownership. *See, e.g.*, I.R.C. § 163(f) (2000) (denying interest deductions on certain unregistered bonds).

402 It is unlikely that people would go to serious efforts to avoid sales taxes on routine consumer purchases.

403 Sales of goods are exempt from situs-state sales tax if the buyer is out-of-state, and use taxes (on buyers) imposed by the state of residence are not enforced because enforcement would entail invasion of the home. (Use taxes are similar to tangible personal property taxes on personal-use items in this respect.) Even if the situs state could tax all sales, sales could be shifted to lower-tax states, as occurs in international taxation. *See* I.R.C. §§ 861(a)(6), 865 (2000) (giving sellers considerable ability to choose from where their sales income will be sourced).

404 *See generally* SUSAN PACE HAMILL, *AS CERTAIN AS DEATH: A FIFTY-STATE SURVEY OF STATE AND LOCAL TAX LAWS* (2007) (describing revenue sources for all states).

405 It appears that only Mississippi and Pennsylvania attempt to tax intangibles to any significant degree. *See id.* at 262, 414.

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To conclude this Part, apportionment should be required of taxes on real and personal tangible property only, excluding taxes on intangible property. Treating federal taxes on tangible personal property as direct taxes would be inconsequential because such taxes can easily be structured as excises, as was the case with the 1794 carriage tax.

## VII. APPLICATIONS

Apportionment of a federal tax is required only for a direct tax that is not an income tax. Limiting “direct tax” to requisitions, capitation taxes, and taxes on tangible property (real and personal) does not solve all issues of current interest.

### A. *Can Ad Valorem Property Taxes Be Characterized as Income Taxes?*

It has been suggested that, notwithstanding all that has been said to this point, a federal *ad valorem* property tax is valid under the Sixteenth Amendment as an “income tax,” the theory being that a tax on the value of the property that is less than the “natural interest rate” is in substance a tax on the income yield from the property.<sup>406</sup> However, substance-over-form arguments generally do not work under the taxing clauses of the Constitution because then, as noted earlier, all distinctions collapse.<sup>407</sup> In addition, the Supreme Court after *Pollock* has acknowledged that income and property taxes are not the same in substance.<sup>408</sup> An income tax—especially a “realization” income tax—is a tax on economic outcomes and requires accounting for actual (relevant) events, namely, receipts and costs.<sup>409</sup> A property tax, even

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406 See GEORGE COOPER, TAKING WEALTH TAXATION SERIOUSLY 29 (Ass’n of the Bar of the City of N.Y. 1979); Schenk, *supra* note 4, at 441 (“To pass constitutional muster, the wealth tax proposed here easily could be reframed as an income tax with a base equal to the risk-free return to certain assets.”).

407 See *supra* text accompanying notes 362–69.

408 See sources cited *supra* notes 189–90.

409 Cf. Treas. Reg. § 1.901-2(a)(3), (b)(2) (2008) (stating that “income tax” for purposes of the foreign tax credit entails realizations and receipts). Incidentally, a mark-to-market income tax would probably be valid under the Sixteenth Amendment as embodying a particular means of accounting for receipts and costs. The Supreme Court has consistently given Congress broad discretion over income tax accounting issues. See *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 365 (1931) (explaining that the Sixteenth Amendment does not require Congress to adopt a certain income tax scheme); *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554 (1991) (deferring to the Commissioner’s reasonable regulatory in-

under the proffered analysis, is (at best) a tax on the *potential* earnings of a *hypothetical* amount of capital (equal to the value of the property) that *might be* invested so as to produce a certain minimum net cash yield.

### B. Personal Wealth Taxes

According to the analysis heretofore, a personal wealth tax would be unconstitutional at least to the extent that the value of real estate and tangible property is included in the tax base.<sup>410</sup> A possible argument against this result might be that such a tax is really an excise tax on the privilege of property ownership. The Supreme Court has held on various occasions that a federal tax on a “privilege” is an “excise” not subject to apportionment.<sup>411</sup> However, the kinds of privileges involved in these cases involve discrete positive-law benefits conferred by government, such as licenses, charters, limited liability, immunities, and rights of succession. Extending the concept to “basic” rights

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terpretation of the Internal Revenue Code because power had been delegated to him by Congress).

<sup>410</sup> Jensen appears to argue that all personal taxes are capitation taxes or direct taxes by reason of the aggregation of economic attributes to the person. See Jensen, *Consumption Taxes*, *supra* note 5, at 2392–93, 2407. Adam Smith included personal wealth taxes in the category of “capitation” taxes, but he used them to refer only to certain taxes paid out of pocket, as opposed to taxes payable out of rents, profits, or wages. See SMITH, *supra* note 77, at 382. However, Smith attached no particular consequence to this terminology. Most property taxes in Smith’s scheme were not capitation taxes but taxes on cash or in-kind rents. See *id.* at 362–72. There is no evidence that the Framers used “capitation tax” in the way Smith used it. References to capitation taxes in the Convention and ratification debates were uniformly to head taxes (poll taxes). See sources cited *supra* note 232 (explaining why these kinds of taxes were relatively common in the colonies); see also *supra* note 216 and accompanying text. “Capitation tax” in Article I, Section 9, Clause 4, was clearly meant to cover a tax on slaves and poll taxes. Although the Wolcott Report of 1796 observed that four states had primitive personal wealth taxes, that Report did not refer to them as “capitation taxes.” Taxes on trades and professions (which were forerunners of income taxes and taxes on wages) were likewise not considered capitation taxes either by Smith or in the colonies, nor apportionable direct taxes by the Wolcott Report. WOLCOTT, *supra* note 88, at 439. See generally BLACK’S LAW DICTIONARY 223 (8th ed. 2004) (cross-referencing capitation tax with “poll tax,” which means fixed per-person tax). The categorization of any tax should not be altered simply on the basis of aggregating economic attributes to the person. Aggregation is only relevant as an accounting device that renders graduated rate schedules possible. Rate schedules have nothing to do with what is a “direct tax.”

<sup>411</sup> See, e.g., *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) (holding an income tax on the privilege of doing business as a corporation as an excise); *Knowlton v. Moore*, 178 U.S. 41 (1900) (holding a tax on the privilege of succession as an excise); *Nicol v. Ames*, 173 U.S. 509 (1899) (holding a tax on the privilege of making sales and trades on an exchange as an excise).

held by everyone would open up the “excise” concept to the point where all other tax categories (except possibly requisitions and capitation taxes) would be swallowed up. Since “excises” stands besides “imposts,” “duties,” and “direct taxes” in the constitutional text, such a view is untenable.

Ackerman concedes that a federal real estate tax might be a “direct tax” but contends that a tax on a person’s aggregate net wealth would not be a direct tax<sup>412</sup> on the ground that a personal wealth tax (unlike a classic property tax) would be net of liabilities.<sup>413</sup> However, possible subtractions from a tax base<sup>414</sup> do not define the tax.<sup>415</sup> For example, per-person fixed-dollar exemptions under any tax do not convert the tax into a capitation tax. In addition, subtractions are simply the negative (mirror) of the gross tax base. Negative wealth would be subtracted only because the tax base is initially constituted by positive wealth. Only positive net tax bases matter.

### C. Taxing Imputed Income

The term “imputed income” has traditionally been used to refer to the rental value of an asset owned by the taxpayer that is held for personal use. Many commentators argue that net imputed income from homes should be taxed like other investments,<sup>416</sup> and taxes of

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412 See Ackerman, *supra* note 6, at 56.

413 See *id.* at 56–57. The other reason offered by Ackerman is that the *Hylton* justices “self-consciously” refused to define direct tax as a comprehensive wealth tax. But why take on an irrelevant issue? It was enough for the *Hylton* justices to distinguish the carriage tax from a real estate tax.

414 Allowing liabilities to reduce the tax base would open up tax-avoidance possibilities, such as the incurring of phantom debt or debt used to purchase cash or assets that can be readily concealed. Thus, it is likely that any wealth tax would contain rules disallowing deductions for certain liabilities. Indeed, allowing deductions for liabilities is no more an inevitability under a wealth tax as it would be under a property tax.

415 Deductions and exemptions did not cause any problem for the *Pollock* holdings that taxes on rents and investment income were direct taxes. In a similar vein, I argue that an “income tax” (at least under the Sixteenth Amendment) is a tax on gross receipts. See Joseph M. Dodge, Murphy and the Sixteenth Amendment in Relation to the Taxation of Non-Excludible Personal Injury Awards, 8 FLA. TAX REV. 369, 391–407 (2007); Zelenak, *supra* note 267, at 847–55 (arguing persuasively that a cash-flow consumption tax cannot be distinguished from an income tax on the basis of tax treatment of borrowing and capital expenditures).

416 See RICHARD GOODE, THE INDIVIDUAL INCOME TAX 139–43 (2d ed. 1976) (analyzing the tax exemption for interest on government-issued bonds); HENRY C. SIMONS, PERSONAL INCOME TAXATION, 110–24 (1938) (discussing the pros and cons of non-taxation of home ownership).



this type are not unprecedented.<sup>417</sup> The constitutionality of such a tax could be a meaningful issue. Unfortunately, the answer is not clear.

Although economists refer to such a tax as being on “income,” the benefits obtained from home ownership are not income in a tax sense. Economists sometimes define “income” as a flow of psychic satisfactions or the power to obtain such a flow,<sup>418</sup> but pure psychic enjoyment is not income in the tax sense, and pure psychic pain is not negative income. Although home ownership allows one to avoid the costs of paying rent, the avoidance of costs is also not income in the tax sense, especially since the amount of foregone rent is uncertain. Income in the tax sense means an increase in material wealth (cash, property received in kind), or the equivalent thereof.<sup>419</sup>

However, a provision of the income tax that imposes a (non-apportioned) tax on non-income is valid if the effect of the provision is to impose an indirect tax.<sup>420</sup> A tax on the “imputed income” from owner-occupied homes could be valid as an excise on the ground that it is a tax on “use,” rather than ownership, and many early authorities can be cited for such a proposition.<sup>421</sup> Also, the Wolcott Report (although not a legal opinion) considered a “homes tax” to be outside of the apportionment requirement.<sup>422</sup>

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417 See SIMONS, *supra* note 416, at 112 n.3, 116–17 (citing examples from several countries).

418 See Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, reprinted in 4 READINGS IN THE ECONOMICS OF TAXATION 59 (Richard A. Musgrave & Carl Shoup eds., 1959).

419 See *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (citing “accession to wealth” as the core of the gross income concept); accord Thomas Chancellor, *Imputed Income and the Ideal Income Tax*, 67 OR. L. REV. 561 (1988). Positive income tax law generally taxes consumption by disallowing deductions for consumption outlays. See I.R.C. § 165(c) (2000) (limiting deductions to trade or business losses, losses in profit-seeking activity, and certain casualty losses); *id.* § 167(a) (disallowing depreciation deductions on personal-use property); *id.* § 262 (denying a deduction for personal expenses). Consumption received in-kind is taxed only in cases (such as employee fringe benefits and prizes) where the transaction as a whole can be viewed as the receipt of cash followed by the spending of the cash. Otherwise, psychic benefits and intangible economic benefits are not taxed. See *United States v. Gotcher*, 401 F.2d 118, 121 (5th Cir. 1968) (noting that for something to be considered income, “[t]here must be an economic gain”). Finally, the consumption attributable to homes *is* taxed: the purchase price (present value of future net use value) is taxed by never being deductible. Those who advocate taxing imputed income really want consumer durables to be taxed the same as income-producing investments.

420 See cases cited *supra* note 192.

421 See SMITH, *supra* note 77, at 370 (equating a tax on habitations as a tax on consumption); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Paterson, J.) (viewing a tax on use as an excise); *supra* note 61 (Representative Fisher Ames in debating the 1794 carriage tax in the House).

422 WOLCOTT, *supra* note 88, at 440.

A tax on imputed income from homes might also be considered a property tax. The apportioned federal tax of 1798 was on homes, as well as on lands and slaves.<sup>423</sup> A tax on a percentage of a property item's value has been held to be a direct tax not only by lower courts<sup>424</sup> but also by the Supreme Court, if without discussion, in the famous case of *Eisner v. Macomber*.<sup>425</sup> The Supreme Court has stated in dictum that an unapportioned federal tax on imputed income is not valid.<sup>426</sup> The *Hylton* case is not clearly to the contrary, since the carriage tax was not assessed on the basis of value.

It is awkward to view a tax as being both an excise tax and a direct tax, because a tax cannot satisfy the uniformity and apportionment requirements at the same time and because there is no constitutional tie-breaker.<sup>427</sup> If "direct tax" and "excise" are defined independently of each other<sup>428</sup> there could be gaps (as well as overlaps) in the constitutional scheme,<sup>429</sup> but that would lie contrary to the settled doctrine

423 Act of July 14, 1798, ch. 75, 1 Stat. 597.

424 *Indep. Life Ins. Co. of Am. v. Comm'r*, 17 B.T.A. 757 (1929), *aff'd*, 67 F.2d 470 (6th Cir. 1933), *rev'd on other grounds sub nom.*, *Helvering v. Indep. Life Ins. Co.*, 292 U.S. 371 (1934).

425 252 U.S. 189, 217–19 (1920) (holding that a tax on a pro-rata stock dividend, which is a tax on a percentage of the value of the taxpayer's stock ownership in a company, is an unapportioned direct tax).

426 *Helvering v. Independent Life Insurance Co.* considered a provision relating to the taxation of insurance companies that disallowed certain deductions relating to real estate unless the taxpayer included in gross income an amount equal to four percent of its value. 292 U.S. 371, 375 (1934). The Board of Tax Appeals held that imputed income was not "income" under the Sixteenth Amendment, and that a tax on a percentage of the value of real property is a direct tax. *See Indep. Life Ins. Co. of Am. v. Comm'r*, 17 B.T.A. 757 (1929), *aff'd*, 67 F.2d 470 (6th Cir. 1933). The Supreme Court, although assuming that a tax on a percentage of the value of the property would be a direct tax, reversed on the ground that the provision in question was essentially a deduction-disallowance rule (akin to I.R.C. § 265(a)), and therefore valid. 252 U.S. at 380–81. Thus, it can be said that the Supreme Court has not directly considered the excise tax theory.

427 Since apportionment and uniformity are incompatible, it has to be decided, for any given tax, which one of these principles controls.

428 It appears that no Supreme Court case has held an excise to be also a direct tax. Justice Chase's opinion in *Hylton* suggested the possibility of both overlap and non-coverage, *Pollock I* hints at a priority for direct-tax characterization in case of overlap, and *Flint v. Stone Tracy Co.* hints at just the opposite, but ultimately the doctrine has settled on the proposition that an excise cannot also be a direct tax and vice versa. *See* 220 U.S. 107 (1911) (upholding unapportioned corporate income tax as an excise).

429 Overlap is avoided only if (a) one category includes all taxes (with the other category being a subset)—an untenable position here—or (b) one category is the negative of the other. Otherwise, the two categories would be defined independently of each other, resulting in overlaps and gaps.

that all federal taxes should be subject to one geographic non-discrimination principle or the other.<sup>430</sup>

If “use” were determinative of excise status, then about the only clear direct tax would be one on unused land, contrary to the intent of the Framers. In addition, “use” is a poor legal test, because it requires fact-finding, and would create incentives for fraud and perjury. A much cleaner approach (that avoids any fact-finding) is that which limits “direct tax” to requisitions, capitation taxes, and tangible property taxes. The definitions of “real estate tax” and “tangible personal property tax” offered earlier are not dependent on the concept of use: the touchstone for real estate taxes is attachment to the land, and the touchstone for tangible personal property taxes is valuation and periodic imposition. Moreover, ownership is prior to use, because use derives from, and is an incident of, ownership. Although the “legislative history” of “direct tax” excludes taxes on “consumption,”<sup>431</sup> that term was probably used by the Framers as a shorthand term that would encompass imposts, duties, and excises. In any event, an annual tax on a percentage of the value of property is not a tax on actual consumption, but only on a hypothetical monetary return. Treating imputed income as consumption would erase the significance of ownership, whereas viewing imputed income as an incident of ownership would not erode the concept of taxable consumption, which can be easily reached by one-time taxes on spending for consumption and in-kind consumption benefits received from third parties.

Therefore, I conclude that a tax on imputed income from tangible property should be treated as being subject to the rule of apportionment. Such a proposition is of negligible consequence, since a political system that cannot swallow a tax on the unrealized appreciation of publicly-traded securities would hardly have an appetite for a tax on hypothetical income from non-liquid tangible assets. Moreover, apportionment can be avoided by license fees not keyed to value, as was the case in *Hylton*.

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430 See *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1 (1916) (holding that all non-direct taxes are subject to the uniformity requirement).

431 See text accompanying *supra* note 52, reprinted in Appendix A; THE FEDERALIST NO. 36 (Alexander Hamilton), reprinted in Appendix B.

#### D. Taxing Personal Endowment

An endowment tax, as distinguished from a wealth tax, is a tax on a person's human capital, or wage-earning capacity.<sup>432</sup>

There being, apparently, no authority or even speculation on the constitutional status of a federal endowment tax, the issue will be approached indirectly by examining whether endowment taxes are closer to excises or taxes on tangible property. Like a property tax, a tax on personal endowment is a tax on income-producing potential, as opposed to economic uses or outcomes. A person can allow human capital to lie fallow just as in the case of real estate. In both cases, the subject of the tax is not intrinsically linked to the means of paying it. Like property taxes, a tax on personal endowment as such is a tax on "being" rather than "becoming," "potentiality" rather than "actualization," and "existence" rather than "use." Personal endowment resembles property in that its possessor has the right to exclusive use. Also, it is viewed as "capital" that, if used, produces income. Although property is inherently transferable and human capital is not, this difference only describes an added barrier to liquidity in the case of an endowment tax. In Smithian terms, an endowment tax is not a means of indirectly taxing some other economic attribute, such as income, wealth, or consumption, nor is its incidence shiftable.

Approaching the matter from the notion of apportionment, a tax on human capital is capable of apportionment because of the fact that personal endowment is attached to individuals and because individuals can be geographically linked to states. Moreover, human capital is probably allocated among states in rough proportion to population because genetic endowment, education, and family status, which are major components of human capital, are likely to be randomly distributed among population groups, so that such a tax would be "reasonably" capable of apportionment among the states in accordance with population.

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<sup>432</sup> Discussion of taxation of endowment is found in David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057 (2007); Daniel Shavero, *Endowment and Inequality*, in TAX JUSTICE: THE ONGOING DEBATE 123 (Joseph J. Thorndike & Dennis J. Ventry, Jr, eds., 2002); Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation*, 18 CANADIAN J.L. & JURISPRUDENCE 47 (2005); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145 (2006) (critiquing earning-capacity concept of endowment as too narrow); Linda Sugin, *Let the Beachcomber Drown: Why Taxing Endowment Is Unjust* (Fordham Legal Studies Research Paper, No. 959710, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1102370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1102370).

Thus, although it is hard to discern any state interest or capability to be served by the apportionment of an endowment tax, it cannot simply be assumed that such a tax, if enacted, would be exempt from the rule of apportionment. But even if a personal endowment tax were held to be a direct tax, the revenue-raising ability of the federal government would not be seriously disabled, because various components of endowment are reachable under taxes that would not need to be apportioned. For example, occupational license fees are clearly excises, as are taxes on inherited wealth. From the big-picture perspective, the constitutional values of individual liberty and autonomy are undermined by a personal endowment tax,<sup>433</sup> and, if apportionment were to render such a tax more difficult to enact at the federal level, then (ironically) the apportionment requirement, deemed to be useful in preserving that one social institution that wholly negated liberty, would operate to preserve liberty.<sup>434</sup>

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433 The tax would force one to work or, if the tax were high enough, to force one to work at a job she would dislike. See LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 123 (2002) (explaining that endowment taxation restricts one's choices of work); Sugin, *supra* note 432, at 36–37.

434 *Harper v. Virginia Board of Elections* invalidated payment of a slight, but universal, head tax as a qualification for voting on the grounds that payment of a head tax bore no rational relation to voting qualifications. 383 U.S. 663 (1966). Similarly, an endowment-type capitation tax could be invalidated if it were found to impinge on one's liberty interest of shaping one's vocational life plan. See generally TRIBE, *supra* note 335, at § 15-14 (discussing right to pursue a vocation). Because an endowment tax operates without regard to specific taxpayer actions or economic outcomes, it amounts to a penalty on "status" or "selfhood." Cf. *Robinson v. California*, 370 U.S. 660, 667 (1962) (invalidating as cruel and unusual punishment a criminal conviction for the status of being a drug addict). A policy of curbing a fundamental right in itself cannot count as a valid government interest, and the government interest in raising revenue can be satisfied by other means that are less intrusive on liberty interests. See Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) (explaining the less-restrictive-alternative principle and advocating for its expanded use by the Supreme Court).

## APPENDIX A

THE DEBATES IN THE FEDERAL CONVENTION OF 1787<sup>435</sup>  
BY JAMES MADISON

THURSDAY, JULY 12. IN CONVENTION

M<sup>r</sup>. GOV<sup>r</sup>. MORRIS moved to add to the clause empowering the Legislature to vary the Representation according to the principles of wealth & number of inhabts. a “proviso that taxation shall be in proportion to Representation.”

M<sup>r</sup>. BUTLER contended again that Representation Sd.. be according to the full number of inhabts. including all the blacks; admitting the justice of Mr. Govr. Morris’s motion.

M<sup>r</sup>. MASON also admitted the justice of the principle, but was afraid embarrassments might be occasioned to the Legislature by it. It might drive the Legislature to the plan of Requisitions.

M<sup>r</sup>. GOV<sup>r</sup>. MORRIS, admitted that some objections lay agst. his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on *exports* & imports & on consumption, the rule would be inapplicable. Notwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union.

General PINKNEY liked the idea. He thought it so just that it could not be objected to. But foresaw that if the revision of the census was left to the discretion of the Legislature, it would never be carried into execution. The rule must be fixed, and the execution of it enforced by the Constitution. He was alarmed at what was said yesterday, concerning the negroes. He was now again alarmed at what had been thrown out concerning the taxing of exports. S. Carola. has in one year exported to the amount of £600,000 Sterling all which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system, restraining the Legislature from taxing Exports.

M<sup>r</sup>. WILSON approved the principle, but could not see how it could be carried into execution; unless restrained to direct taxation.

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<sup>435</sup> Madison’s Notes (July 12), *supra* note 17, at 302–06 (footnotes omitted). There was no Rhode Island delegation, and the delegations from New Hampshire and New York were absent on this date.

M<sup>r</sup>. GOV<sup>r</sup>. MORRIS having so varied his Motion by inserting the word “direct.” It passd. nem. con. as follows—”provided the always that direct taxation ought to be proportioned to representation.”

M<sup>r</sup>. DAVIE, said it was high time now to speak out. He saw that it was meant by some gentlemen to deprive the Southern States of any share of Representation for their blacks. He was sure that N. Carola. would never confederate on any terms that did not rate them at least as 3/5 . If the Eastern States meant therefore to exclude them altogether the business was at an end.

D<sup>r</sup>. JOHNSON, thought that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth. He concluded therefore that ye. number of people ought to be established as the rule, and that all descriptions including blacks *equally* with the whites, ought to fall within the computation. As various opinions had been expressed on the subject, he would move that a Committee might be appointed to take them into consideration and report thereon.

M<sup>r</sup>. GOV<sup>r</sup>. MORRIS. It has been said that it is high time to speak out, as one member, he would candidly do so. He came here to form a compact for the good of America. He was ready to do so with all the States. He hoped & believed that all would enter into such a Compact. If they would not he was ready to join with any States that would. But as the Compact was to be voluntary, it is in vain for the Eastern States to insist on what the Southn. States will never agree to. It is equally vain for the latter to require what the other States can never admit; and he verily believed the people of Pena. will never agree to a representation of Negroes. What can be desired by these States more than has been already proposed; that the Legislature shall from time to time regulate Representation according to population & wealth.

Gen. PINKNEY desired that the rule of wealth should be ascertained and not left to the pleasure of the Legislature; and that property in slaves should not be exposed to danger under a Govr. instituted for the protection of property.

The first clause in the Report of the first Grand Committee was postponed.

M<sup>r</sup>. ELSEWORTH. In order to carry into effect the principle established, moved to add to the last clause adopted by the House the words following “and that the rule of contribution by direct taxation for the support of the Government of the U. States shall be the number of white inhabitants, and three fifths of every other description in

the several States, until some other rule that shall more accurately ascertain the wealth of the several States can be devised and adopted by the Legislature.”

M<sup>r</sup>. BUTLER seconded the motion in order that it might be committed.

M<sup>r</sup>. RANDOLPH was not satisfied with the motion. The danger will be revived that the ingenuity of the Legislature may evade or pervert the rule so as to perpetuate the power where it shall be lodged in the first instance. He proposed in lieu of Mr. Elsworth’s motion, “that in order to ascertain the alterations in Representation that may be required from time to time by changes in the relative circumstances of the States, a census shall be taken within two years from the 1st. meeting of the Genl. Legislature of the U.S., and once within the term of every year afterwards, of all the inhabitants in the manner & according to the ratio recommended by Congress in their resolution of the 18th day of Apl. 1783; [rating the blacks at 3/5 of their number] and, that the Legislature of the U.S. shall arrange the Representation accordingly.”—He urged strenuously that express security ought to be provided for including slaves in the ratio of Representation. He lamented that such a species of property existed. But as it did exist the holders of it would require this security. It was perceived that the design was entertained by some of excluding slaves altogether; the Legislature therefore ought not to be left at liberty.

M<sup>r</sup>. ELSEWORTH withdraws his motion & seconds that of Mr. Randolph.

M<sup>r</sup>. WILSON observed that less umbrage would perhaps be taken agst. an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation: and as representation was to be according to taxation, the end would be equally attained. He accordingly moved & was 2ded. so to alter the last clause adopted by the House, that together with the amendment proposed the whole should read as follows—provided always that the representation ought to be proportioned according to direct taxation, and in order to ascertain the alterations in the direct taxation which may be required from time to time by the changes in the relative circumstances of the States. Resolved that a census be taken within two years from the first meeting of the Legislature of the U. States, and once within the term of every years afterwards of all the inhabitants of the U.S. in the manner and according to the ratio recommended by Congress in their Resolution of April 18.1783; and



that the Legislature of the U. S. shall proportion the direct taxation accordingly.”

M<sup>r</sup>. KING. Altho’ this amendment varies the aspect somewhat, he had still two powerful objections agst. tying down the Legislature to the rule of numbers. 1. they were at this time an uncertain index of the relative wealth of the States. 2. if they were a just index at this time it can not be supposed always to continue so. He was far from wishing to retain any unjust advantage whatever in one part of the Republic. If justice was not the basis of the connection it could not be of long duration. He must be shortsighted indeed who does not foresee that whenever the Southern States shall be more numerous than the Northern, they can & will hold a language that will awe them into justice. If they threaten to separate now in case injury shall be done them, will their threats be less urgent or effectual, when force shall back their demands. Even in the intervening period, there will no point of time at which they will not be able to say, do us justice or we will separate. He urged the necessity of placing confidence to a certain degree in every Govt. and did not conceive that the proposed confidence as to a periodical readjustment, of the representation exceeded that degree.

M<sup>r</sup>. PINKNEY moved to amend Mr. Randolph’s motion so as to make “blacks equal to the whites in the ratio of representation.” This he urged was nothing more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equally to the wealth, and considering money as the sinew of war, to the strength of the nation. It will also be politic with regard to the Northern States, as taxation is to keep pace with Representation.

Gen<sup>l</sup>. PINKNEY moves to insert 6 years instead of two, as the period computing from 1st. meeting of ye. Legis—within which the first census should be taken. On this question for inserting six instead of “two” in the proposition of Mr. Wilson, it passed in the affirmative

Masts. no. Ct. ay. N. J. ay. Pa. ay. Del. Divd. Md. ay. Va. no. N.C. no. S.C. ay. Geo. no.

On a question for filling the blank for ye. periodical census with 20 years, it passed in the negative.

Masts. no. Ct. ay. N. J. ay. P. ay. Del. no. Md. no. Va. no. N.C. no. S.C. no. Geo. no.

On a question for 10 years, it passed in the affirmative.

Mas. ay. Cont. no. N. J. no. P. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo. ay.

On Mr. Pinkney's motion for rating blacks as equal to Whites instead of as  $\frac{3}{5}$ —

Mas.no. Cont.no. [Dr Johnson ay] N.J.no. Pa.no. [3 agst. 2.]  
Del.no. Md.no. Va.no. N.C.no. S.C.ay. Geo—ay.

M<sup>r</sup>. RANDOLPH's proposition as varied by Mr. Wilson being read for question on the whole.

M<sup>r</sup>. GERRY, urged that the principle of it could not be carried into execution as the States were not to be taxed as States. With regard to taxes in imports, he conceived they would be more productive. Where there were no slaves than where there were; the consumption being greater—

M<sup>r</sup>. ELSEWORTH. In case of a poll tax there wd. be no difficulty. But there wd. probably be none. The sum allotted to a State may be levied without difficulty according to the plan used by the State in raising its own supplies. On the question on ye. whole proposition; as proportioning representation to direct taxation & both to the white &  $\frac{3}{5}$  of black inhabitants, & requiring a Census within six years—& within every ten years afterwards.

Mas.divd. Cont.ay. N.J.no. Pa.ay. Del.no. Md.ay. Va.ay. N.C.ay.  
S.C.divd. Geo.ay.

## APPENDIX B

## EXCERPT FROM: FEDERALIST NO. 36

Concerning the General Power of Taxation. Tuesday January 8, 1788.

HAMILTON To the People of the State of New York:

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. . . It has been asserted that a power of internal taxation in the national legislature could never be exercised with advantage, as well from the want of a sufficient knowledge of local circumstances, as from an interference between the revenue laws of the Union and of the particular States. The supposition of a want of proper knowledge seems to be entirely destitute of foundation. If any question is depending in a State legislature respecting one of the counties, which demands a knowledge of local details, how is it acquired? No doubt from the information of the members of the county. Cannot the like knowledge be obtained in the national legislature from the representatives of each State? And is it not to be presumed that the men who will generally be sent there will be possessed of the necessary degree of intelligence to be able to communicate that information? Is the knowledge of local circumstances, as applied to taxation, a minute topographical acquaintance with all the mountains, rivers, streams, highways, and bypaths in each State; or is it a general acquaintance with its situation and resources, with the state of its agriculture, commerce, manufactures, with the nature of its products and consumptions, with the different degrees and kinds of its wealth, property, and industry?

Nations in general, even under governments of the more popular kind, usually commit the administration of their finances to single men or to boards composed of a few individuals, who digest and prepare, in the first instance, the plans of taxation, which are afterwards passed into laws by the authority of the sovereign or legislature.

Inquisitive and enlightened statesmen are deemed everywhere best qualified to make a judicious selection of the objects proper for revenue; which is a clear indication, as far as the sense of mankind can have weight in the question, of the species of knowledge of local circumstances requisite to the purposes of taxation.

The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the DIRECT

and those of the INDIRECT kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended. The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself, or can easily be procured from any well-informed man, especially of the mercantile class. The circumstances that may distinguish its situation in one State from its situation in another must be few, simple, and easy to be comprehended. The principal thing to be attended to, would be to avoid those articles which had been previously appropriated to the use of a particular State; and there could be no difficulty in ascertaining the revenue system of each. This could always be known from the respective codes of laws, as well as from the information of the members from the several States.

The objection, when applied to real property or to houses and lands, appears to have, at first sight, more foundation, but even in this view it will not bear a close examination. Land taxes are commonly laid in one of two modes, either by ACTUAL valuations, permanent or periodical, or by OCCASIONAL assessments, at the discretion, or according to the best judgment, of certain officers whose duty it is to make them. In either case, the EXECUTION of the business, which alone requires the knowledge of local details, must be devolved upon discreet persons in the character of commissioners or assessors, elected by the people or appointed by the government for the purpose. All that the law can do must be to name the persons or to prescribe the manner of their election or appointment, to fix their numbers and qualifications and to draw the general outlines of their powers and duties. And what is there in all this that cannot as well be performed by the national legislature as by a State legislature? The attention of either can only reach to general principles; local details, as already observed, must be referred to those who are to execute the plan.

But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the SYSTEM OF EACH STATE WITHIN THAT STATE. The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government.

Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be deter-

mined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection. In addition to the precaution just mentioned, there is a provision that "all duties, imposts, and excises shall be UNIFORM throughout the United States."

It has been very properly observed by different speakers and writers on the side of the Constitution, that if the exercise of the power of internal taxation by the Union should be discovered on experiment to be really inconvenient, the federal government may then forbear the use of it, and have recourse to requisitions in its stead. By way of answer to this, it has been triumphantly asked, Why not in the first instance omit that ambiguous power, and rely upon the latter resource? Two solid answers may be given. The first is, that the exercise of that power, if convenient, will be preferable, because it will be more effectual; and it is impossible to prove in theory, or otherwise than by the experiment, that it cannot be advantageously exercised. The contrary, indeed, appears most probable. The second answer is, that the existence of such a power in the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part.

As to the interference of the revenue laws of the Union, and of its members, we have already seen that there can be no clashing or repugnancy of authority. The laws cannot, therefore, in a legal sense, interfere with each other; and it is far from impossible to avoid an interference even in the policy of their different systems. An effectual expedient for this purpose will be, mutually, to abstain from those objects which either side may have first had recourse to. As neither can CONTROL the other, each will have an obvious and sensible interest in this reciprocal forbearance. And where there is an IMMEDIATE common interest, we may safely count upon its operation. When the particular debts of the States are done away, and their expenses come to be limited within their natural compass, the possibility almost of interference will vanish. A small land tax will answer the purpose of the States, and will be their most simple and most fit resource.

Many spectres have been raised out of this power of internal taxation, to excite the apprehensions of the people: double sets of revenue officers, a duplication of their burdens by double taxations, and

the frightful forms of odious and oppressive poll-taxes, have been played off with all the ingenious dexterity of political legerdemain.

As to the first point, there are two cases in which there can be no room for double sets of officers: one, where the right of imposing the tax is exclusively vested in the Union, which applies to the duties on imports; the other, where the object has not fallen under any State regulation or provision, which may be applicable to a variety of objects. In other cases, the probability is that the United States will either wholly abstain from the objects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people. At all events, here is a practicable expedient for avoiding such an inconvenience; and nothing more can be required than to show that evils predicted to not necessarily result from the plan.

As to any argument derived from a supposed system of influence, it is a sufficient answer to say that it ought not to be presumed; but the supposition is susceptible of a more precise answer. If such a spirit should infest the councils of the Union, the most certain road to the accomplishment of its aim would be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government, instead of making federal influence flow in an opposite and adverse current. But all suppositions of this kind are invidious, and ought to be banished from the consideration of the great question before the people. They can answer no other end than to cast a mist over the truth.

As to the suggestion of double taxation, the answer is plain. The wants of the Union are to be supplied in one way or another; if to be done by the authority of the federal government, it will not be to be done by that of the State government. The quantity of taxes to be paid by the community must be the same in either case; with this advantage, if the provision is to be made by the Union that the capital resource of commercial imposts, which is the most convenient branch of revenue, can be prudently improved to a much greater extent under federal than under State regulation, and of course will render it less necessary to recur to more inconvenient methods; and with this further advantage, that as far as there may be any real difficulty in the exercise of the power of internal taxation, it will impose a disposition to greater care in the choice and arrangement of the means; and must naturally tend to make it a fixed point of policy in

the national administration to go as far as may be practicable in making the luxury of the rich tributary to the public treasury, in order to diminish the necessity of those impositions which might create dissatisfaction in the poorer and most numerous classes of the society. Happy it is when the interest which the government has in the preservation of its own power, coincides with a proper distribution of the public burdens, and tends to guard the least wealthy part of the community from oppression!

As to poll taxes, I, without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those [New England] States which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government. But does it follow because there is a power to lay them that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice. Are the State governments to be stigmatized as tyrannies, because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption? As little friendly as I am to the species of imposition, I still feel a thorough conviction that the power of having recourse to it ought to exist in the federal government. There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them. The real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself, for not abridging the discretion of the national councils in this respect. There may exist certain critical and tempestuous conjunctures of the State, in which a poll tax may become an inestimable resource. And as I know nothing to exempt this portion of the globe from the common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security.

## APPENDIX C

*EXCERPTS FROM DEBATES IN THE VIRGINIA RATIFYING  
CONVENTION (1788) [Emphasis added.]*

Gov. Randolph (June 7)<sup>436</sup>:

The difficulty of justly apportioning the taxes among the states, under the present system, has been complained of; the rule of apportionment being the value of all lands and improvements within the states. *The inequality between the rich lands of James River and the barrens of Massachusetts has been thought to militate against Virginia. If taxes could be laid according to the real value, no inconvenience could follow; but, from a variety of reasons, this value was very difficult to be ascertained; and an error in the estimation must necessarily have been oppressive to a part of the community. But in this new Constitution, there is a more just and equitable rule fixed—a limitation beyond which they cannot go. Representatives and taxes go hand in hand: according to the one will the other be regulated. The number of representatives is determined by the number of inhabitants; they have nothing to do but to lay taxes accordingly. I will illustrate it by a familiar example. At present, before the population is actually numbered, the number of representatives is sixty-five. Of this number, Virginia has a right to send ten; consequently she will have to pay ten parts out of sixty-five parts of any sum that may be necessary to be raised by Congress. This, sir, is the line. Can Congress go beyond the bounds prescribed in the Constitution? Has Congress a power to say that she shall pay fifteen parts out of sixty-five parts? Were they to assume such a power, it would be a usurpation so glaring, that rebellion would be the immediate consequence. Congress is only to say on what subject the tax is to be laid. It is a matter of very little consequence how it will be imposed, since it must be clearly laid on the most productive article in each particular state. I am surprised that such strong objections should have been made to, and such fears and alarms excited by, this power of direct taxation, since experience shows daily that it is neither inconvenient nor oppressive. A collector goes to a man's house; the man pays him with freedom, or makes an apology for his inability to do it then: at a future day, if payment be not made, distress is made, and acquiesced in by the party. What difference is there between this and a tax imposed by Congress? Is it nor*

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<sup>436</sup> Virginia Debates, *supra* note 10, at 121–22.



*done by lawful authority? The distinction is between a Virginian and Continental authority. Yet, in both cases, it is imposed by ourselves, through the medium of our representatives. When a tax will come to be laid by Congress, the collector will apply in like manner, and in the same manner receive payment, or an apology; at a future day, likewise, the same consequences will result from a failure. I presume, sir, there is a manifest similarity between the two cases. When gentlemen complain of the novelty, they ought to advert to the singular one that must be the consequence of the requisitions—an army sent into your country to force you to comply. Will not this be the dissolution of the Union, if ever it takes effect? Let us be candid on this subject: let us see if the criterion here fixed be not equal and just. Were the tax laid on one uniform article through the Union, its operation would be oppressive on a considerable part of the people. When any sum is necessary for the general government, every state will immediately know its exact proportion of it, from the number of their people and representatives; nor can it be doubted that the tax will be laid on each state, in the manner that will best accommodate the people of such state, as thereby it will be raised with more facility; for an oppressive mode can never be so productive as the most easy for the people.*

John Marshall (June 10)<sup>437</sup>:

The objects of direct taxes are well understood: they are but few: what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property. Can you believe that ten men selected from all parts of the state, chosen because they know the situation of the people, will be unable to determine so as to make the tax equal on, and convenient for, the people at large? Does any man believe that they would lay the tax without the aid of other information besides their own knowledge, when they know that the very object for which they are elected is to lay the taxes in a judicious and convenient manner? If they wish to retain the affections of the people at large, will they not inform themselves of every circumstance that can throw light on the subject? Have they but one source of information? Besides their own experience—their knowledge of what will suit their constituents—they will have the benefit of the knowledge and experience of the state legislature. They will see in what manner the legislature of Virginia collects its taxes. Will they be unable to follow their example? The gentlemen who shall be delegated to Congress will

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<sup>437</sup> *Id.* at 229–31.

have every source of information that the legislatures of the states can have, and can lay the taxes as equally on the people, and with as little oppression, as they can. If, then, it be admitted that they can understand how to lay them equally and conveniently, are we to admit that they will not do it, but that, in violation of every principle that ought to govern men, they will lay them so as to oppress us? What benefit will they have by it? Will it be promotive of their reëlection? Will it be by wantonly imposing hardships and difficulties on the people at large, that they will promote their own interest, and secure their reëlection? To me it appears incontrovertible that they will settle them in such a manner as to be easy for the people. Is the system so organized as to make taxation dangerous? I shall not go to the various checks of the government, but examine whether the immediate representation of the people be well constructed. I conceive its organization to be sufficiently satisfactory to the warmest friend of freedom. No tax can be laid without the consent of the House of Representatives. If there, be no impropriety in the mode of electing the representatives, can any danger be apprehended? . . . To procure their reëlection, it will be necessary for them to confer with the people at large, and convince them that the taxes laid are for their good. If I am able to judge on the subject, the power of taxation now before us is wisely conceded, and the representatives are wisely elected.

George Nicholas (June 10)<sup>438</sup>:

The gentleman relies much on the force of requisitions. I shall mention two examples which will show their inutility. They are fruitless without the coercion of arms. If large states refuse, a complete civil war, or dissolution of the confederacy, will result. If small states refuse, they will be destroyed, or Obliged to comply. From the history of the United Netherlands, the inutility of requisitions, without recurring to force, may be proved. The small provinces refused to comply, Holland, the most powerful, marched into their territories with an army, and compelled them to pay. The other example is from the New England confederacy. Massachusetts, the most wealthy and populous state, refused to contribute her share. The rest were unable to compel her, and the league was dissolved. Attend to a resolution of the Assembly of Virginia in the year 1784.

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<sup>438</sup> *Id.* at 242–43.

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We are next terrified with the thought of excises. In some countries excises are terrible. In others, they are not only harmless, but useful. In our sister states, they are excised without any inconvenience. They are a kind of tax on manufactures. Our manufactures are few in proportion to those of other states. We may be assured that Congress will make such regulations as shall make excises convenient and easy for the people.

Another argument made use of is, that ours is the largest state, and must pay in proportion to the other states. How does that appear? The proportion of taxes are fixed by the number of inhabitants, and not regulated by the extent of territory, or fertility of soil. *If we be wealthier, in proportion, than other states, it will fall lighter upon us than upon poorer states. They must fix the taxes so that the poorest states can pay; and Virginia, being richer, will bear it easier.*

Madison (June 11)<sup>439</sup>:

Let us consider the alternatives proposed by gentlemen, instead of the power of laying direct taxes. After the states shall have refused to comply, weigh the consequences of the exercise of this power by Congress. When it comes in the form of a punishment, great clamors will be raised among the people against the government; hatred will be excited against it. It will be considered as an ignominious stigma on the state. . . . The general government, to avoid those disappointments which I first described, and to avoid the contentions and embarrassments which I last described, will, in all probability, throw the public burdens on those branches of revenue which will be more in their power. They will be continually necessitated to augment the imposts. If we throw a disproportion of the burdens on that side, shall we not discourage commerce and suffer many political evils? Shall we not increase that disproportion on the Southern States, which for some time will operate against us? The Southern States, from having fewer manufactures, 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. But this inequality

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439 *Id.* at 251–56.

will be increased to the utmost extent, if the general government have not this power.

There is another point of view in which this subject affords us instruction. The imports will decrease in time of war. . . . At present, our importations bear a full proportion to the full amount of our sales, and to the number of our inhabitants; but when we have inhabitants enough, our imposts will decrease, and as the national demands will increase with our population, our resources will increase as our wants increase. The other consideration which I will submit on this part of the subject is this: I believe that it will be found, in practice, that those who fix the public burdens will feel a greater degree of responsibility, when they are to impose them on the citizens immediately than if they were to say what sum should be paid by the states. If they exceed the limits of propriety, universal discontent and clamor will arise. Let us suppose they were to collect the taxes from the citizens of America; would they not consider their circumstances? Would they not attentively consider what could be done by the citizens at large? Were they to exceed, in their demands, what were reasonable burdens, the people would impute it to the right source, and look on the imposers as odious.

It has been said that ten men deputed from this state, and others in proportion from other states, will not be able to adjust direct taxes, so as to accommodate the various citizens in thirteen states.

. . . My honorable friend over the way, (Mr. Monroe,) yesterday, seemed to conceive, as an insuperable objection, that, if land were made the particular object of taxation, it would be unjust, as it would exonerate the commercial part of the community; that, if it were laid on trade, it would be unjust, in discharging the landholders; and that any exclusive selection would be unequal and unfair. If the general government were tied down to one object, I confess the objection would have some force in it. But if this be not the case, it can have no weight. If it should have a general power of taxation, they could select the most proper objects, and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each state, and they must raise it in the most convenient and satisfactory manner to the public.

The honorable member considered it as another insuperable objection, that uniform laws could not be made for thirteen states, and that dissonance would produce inconvenience and oppression. Perhaps it may not be found, on due inquiry, to be so impracticable as he supposes. But were it so, where is the evil for different states to

raise money for the general government? Where is the evil of such laws? There are instances in other countries of different laws operating in different parts of the Country, without producing any kind of opposition. . . . There is a land tax in England, and a land tax in Scotland; but the laws concerning them are not the same. It is much heavier, in proportion, in the former than in the latter. The mode of collection is different; yet this is not productive of any national inconvenience. . . .

I will make another observation on the objection of my honorable friend. He seemed to conclude that concurrent collections under different authorities were not reducible to practice. I agree that, were they independent of the people, the argument would be good. But they must serve one common master. They must act in concert, or the defaulting party must bring on itself the resentment of the people. If the general government be so constructed that it will not dare to impose such burdens as will distress the people, where is the evil of its having a power of taxation concurrent with the states? The people would not support it, were it to impose oppressive burdens. Let me make one more comparison of the state governments to this plan. Do not the states impose taxes for local purposes? Does the concurrent collection of taxes, imposed by the legislatures for general purposes, and of levies laid by the counties for parochial and county purposes, produce any inconvenience or oppression? The collection of these taxes is perfectly practicable, and consistent with the views of both parties. The people at large are the common superior of the state governments and the general government. It is reasonable to conclude that they will avoid interferences, for two causes—to avoid public oppression, and to render the collections more productive.

Madison (June 12)<sup>440</sup>:

He compares resistance of the people to collectors to refusal of requisitions. This goes against all government. It is as much as to urge that there should be no legislature. The gentlemen, who favored us with their observations on this subject, seemed to reason on a supposition that the general government was confined, by the paper on your table, to lay general, uniform taxes. *Is it necessary that there should be a tax on any given article throughout the United States? It is*

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440 *Id.* at 306–07.

*represented to be oppressive, that the states which have slaves, and make tobacco, should pay taxes on these for federal wants, when other states, which have them not, would escape. But does the Constitution on the table admit of this? On the contrary, there is a proportion to be hid on each state, according to its population. The most proper articles will be selected in each state. If one article, in any state, should be deficient, it will be laid on another article. Our state is secured on this foundation. Its proportion will be commensurate to its population.* This is a constitutional scale, which is an insuperable bar against disproportion, and ought to satisfy all reasonable minds. If the taxes be not uniform, and the representatives of some states contribute to lay a tax of which they bear no proportion, is not this principle reciprocal? Does not the same principle hold in our state government in some degree? It has been found inconvenient to fix on uniform objects of taxation in this state, as the back parts are not circumstanced like the lower parts of the country. In both cases, the reciprocity of the principle will prevent a disposition in one part to oppress the other.

Madison (June 15)<sup>441</sup>:

The census in the Constitution was intended to introduce equality in the burdens to be laid on the community. No gentleman objected to laying duties, imposts, and excises, uniformly. But uniformity of taxes would be subversive of the principles of equality; for it was not possible to select any article which would be easy for one state but what would be heavy for another; that, the proportion of each state being ascertained, it would be raised by the general government in the most convenient manner for the people, and not by the selection of any one particular object; that there must be some degree of confidence put in agents, or else we must reject a state of civil society altogether.

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441 *Id.* at 458–59.