

WHAT THE CONSTITUTION MEANS  
BY “DUTIES, IMPOSTS, AND  
EXCISES”—AND “TAXES”  
(DIRECT OR OTHERWISE)

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*“Mr King asked what was the precise meaning of direct taxation?  
No one answd.”*

—Madison’s Constitutional Convention notes

*“The objects of direct taxes are well understood . . .”*

—Future Chief Justice John Marshall at the  
Virginia Ratifying Convention

ABSTRACT

This Article recreates the original definitions of the U.S. Constitution’s terms “tax,” “direct tax,” “duty,” “impost,” “excise,” and “tonnage.” It draws on a greater range of Founding-Era sources than accessed heretofore, including eighteenth-century treatises, tax statutes, and literary sources, and it corrects several errors made by courts and previous commentators. It concludes that the distinction between direct and indirect taxes was widely understood during the Founding Era and that the term “direct tax” was more expansive than commonly realized.

The Article identifies the reasons the Constitution required that direct taxes be apportioned among the states by population. It concludes that the Constitution’s “three-fifths” formula was a response to certain economic facts about slavery but that the underlying decision to apportion had little or nothing to do with slavery.

Finally, the Article reviews the Supreme Court’s holding that the Affordable Care Act’s penalty for not acquiring insurance is a tax but not a direct tax and concludes that if the penalty was a tax, it was direct.

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1. *Bibliographical Note:* This footnote collects sources cited *more than once*, including some prior work by the author.

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## INTRODUCTION

The Constitution’s Taxation Clause empowers Congress to “lay and collect Taxes, Duties, Imposts and Excises.”<sup>2</sup> It also imposes limitations on the tax power, including the requirement that “direct Taxes” be apportioned among the states.<sup>3</sup> To understand the intended scope of these powers and limitations—and, therefore, their original legal force<sup>4</sup>—one must understand what the words meant to the people who ratified them.

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Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) [hereinafter Natelson, *Indian Commerce*].

2. U.S. CONST. art. I, § 8, cl. 1.
3. *Id.* art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.
4. The Constitution’s original legal force is how courts would have applied the document immediately after ratification. The original legal force of a constitutional provision is derived from how the ratifiers (not the framers) actually understood the provision. If that understanding is not recoverable or there were significant inconsistent understandings, original legal force is derived from the objective original public meaning of the provision.

Although the Constitution’s framers usually employed language in its ordinary sense, this was not invariably true. The Constitution contains some terms that, when used in legal documents, were widely understood to have specialized meanings.<sup>5</sup> This Article focuses on six technical terms the Constitution uses in defining Congress’s financial powers: (1) duties, (2) excises, (3) imposts, (4) tonnage, (5) taxes, and (6) direct taxes. In its discussion of direct taxes, this Article also explains why the Constitution required them to be apportioned among the states.

I wrote this Article for two reasons. First, the subject has obvious modern significance—as the Supreme Court reminded us in its ruling on the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.<sup>6</sup> Second, previous scholarship addressing it seemed inadequate; it is sparse for such an important topic and often is marred by methodological defects. The methodological shortcomings are explained in Part VII.

Part I of this Article is this Introduction. Part II introduces the constitutional text and identifies hints the text offers on the meaning of the terms discussed in this Article. Part III explains how the Founders distinguished a *tax* from the broader word *imposition*. Part IV defines the meaning of the controversial phrase *direct Tax*. Part V discusses indirect taxes and defines the four kinds of indirect taxes mentioned in the Constitution: *duties*, *excises*, *imposts*, and *tonnage*. Part V further identifies the dividing line between direct and indirect taxes and concludes that the line was not fundamentally economic but based

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Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007). See also Natelson, *Origination Clause*, *supra* note 1, at 633 (“The *original legal force* of a document or provision in a document is how the courts would have applied it immediately following its adoption.”).

5. Much of my research has been devoted to uncovering the meaning of the Constitution’s technical terms. Examples include: (1) the specialized legal meaning of “Privileges and Immunities,” Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009); (2) the political meaning of “general Welfare,” Natelson, *General Welfare*, *supra* note 1; Robert G. Natelson, *Judicial Review of Special Interest Spending: the General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007); and (3) the understood legal meaning of “to regulate Commerce,” Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010); Robert G. Natelson, *Tempering the Commerce Power*, 68 MONT. L. REV. 95 (2007); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006); Natelson, *Indian Commerce*, *supra* note 1.
6. 132 S. Ct. 2566, 2599 (2012) (holding that a statutory penalty for failure to purchase conforming insurance was a “tax” but not a direct tax).

on eighteenth century Anglo-American political and moral considerations.

Part VI explains the reasons behind the apportionment rule. Part VII discusses errors occurring in previous writings on the subject, including the Supreme Court’s opinion in *Sebelius*. Part VIII, the Conclusion, presents a brief summary of what has gone before.

This study relies on a very wide range of primary sources. These include, besides the records of the Constitution’s drafting and ratification, eighteenth century treatises, contemporaneous British and American tax statutes and other legislative documents, British and American newspaper articles, and various other materials. However, for reasons that should be obvious, but to many authors apparently are not, I rely only on sources arising *before* the end of 1790, the year Rhode Island became the thirteenth state to ratify the Constitution. Later material is too weakly probative, or not probative of all, of the ratification-era understanding.<sup>7</sup>

## I. INFERENCES FROM THE CONSTITUTIONAL TEXT

The constitutional text offers hints as to the meaning of the terms examined in this study. The following discussion addresses that text as it stood at the time of the Constitution’s ratification, without the changes wrought subsequently by the Sixteenth Amendment<sup>8</sup> and by court decisions.

The Constitution imposed two limits on state financial exactions: (1) a requirement of congressional consent before a state could “lay any Duty of Tonnage”<sup>9</sup> and (2) with one exception, a like requirement before a state could “lay any Imposts or Duties on Imports or Exports.”<sup>10</sup> The Constitution also authorized Congress to impose financial exactions. The Taxation Clause empowered Congress to “lay and collect Taxes, Duties, Imposts and Excises.”<sup>11</sup> The Commerce Clause empowered Congress to “regulate Commerce with foreign Nations, and among the

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7. ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 36 (3d ed. 2014) (discussing the reasons one should not rely on post-ratification material as evidence of original legal force).

8. U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

9. *Id.* art. I, § 10, cl. 3.

10. *Id.* art. I, § 10, cl. 2.

11. *Id.* art. I, § 8, cl. 1.

several States, and with the Indian Tribes.”<sup>12</sup> During the founding era, commercial regulation was understood to entail financial impositions.<sup>13</sup>

The Constitution qualified these grants to Congress. Among the qualifications were the following three:

- “All Bills for raising Revenue” had to originate in the House of Representatives;<sup>14</sup>
- Congress could impose no “Tax or Duty” on exports;<sup>15</sup> and
- until 1808, Congress was prohibited from levying any “Tax or duty” on imported slaves in excess of ten dollars per person.<sup>16</sup>

In addition to these qualifications, the Constitution included several that reflected the Founders’ belief that government was a fiduciary institution, and, to the extent possible, should serve its constituents in an impartial manner.<sup>17</sup> These were as follows:

- Taxes, duties, impost, and excises were to be levied “to pay the Debts and provide for the Common Defence and general Welfare of the United States.”<sup>18</sup> The Supreme Court no longer treats this as much of a restriction,<sup>19</sup> but the Founders understood it to limit Congress to imposing only those taxes, etc., as would raise revenue for “general” (national) purposes rather than merely for regional or special-interest (“partial”) purposes.<sup>20</sup> This provision curbed congressional taxing authority even within the scope of Congress’s enumerated powers.

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12. *Id.* art. I, § 8, cl. 3.

13. *Infra* Part II, notes 37–48 and accompanying text.

14. U.S. CONST. art. I, § 7, cl. 1.

15. *Id.* art. I, § 9, cl. 5.

16. *Id.* art. I, § 9, cl. 1.

17. Lawson, Seidman & Natelson, *supra* note 1.

18. U.S. CONST. art. I, § 8, cl. 1.

19. *Helvering v. Davis*, 301 U.S. 619, 645 (1937) (holding that Congress has discretion to spend for general welfare purposes); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 605 (1937) (McReynolds, J., dissenting) (so noting); *United States v. Butler*, 297 U.S. 1, 65 (1936) (stating such in dicta).

20. See Natelson, *General Welfare*, *supra* note 1, at 9 (concluding that the founding fathers understood the General Welfare Clause to limit the raising of taxes for national purposes or common defense “rather than some local or special welfare”). The phrase “provide for” meant “making provision for the future.” *Id.* at 15–16.

- “Duties, Imposts and Excises” were to be “uniform throughout the United States.”<sup>21</sup>
- The Constitution prohibited any “Preference [being] given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”<sup>22</sup>
- Two clauses required that “Capitation[s]” and other “direct Taxes” be apportioned among the states according to their population, with the provisos that (1) Indians who did not pay taxes were excluded<sup>23</sup> and (2) five slaves were to be counted as three free persons.<sup>24</sup> These clauses were unamendable until 1808.<sup>25</sup>

The terms examined in this study all occurred in the grants and limitations just summarized. “Tax,” “Duty,” “Excise,” “Impost,” and “Tonnage” occurred in the Taxation Clause. Three of those five words also appeared elsewhere in conjunctive and disjunctive expressions: “Tax or duty,”<sup>26</sup> “Imposts or Duties,”<sup>27</sup> “Duties and Imposts.”<sup>28</sup> The phrase “direct . . . Taxes” appeared in two other locations.<sup>29</sup> It is therefore reasonable to infer that, in accordance with the canon of construction against surplus, none of these individual terms was a synonym for any of the others. This does not preclude the possibility of overlap.

The Constitution usually employed the word “Duty” in the context of trade: “Duty of Tonnage,”<sup>30</sup> duties on imported slaves,<sup>31</sup> duties on imports and exports.<sup>32</sup> We can deduce that at least some duties were

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21. U.S. CONST. art. I, § 8, cl. 1.

22. *Id.* art. I, § 9, cl. 6.

23. *Id.* art. I, § 8, cl. 3. This referred to those Indians who were contributing citizens of their tribes rather than of state or federal governments. Natelson, *Indian Commerce*, *supra* note 1, at 260.

24. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

25. *Id.* art. V.

26. *Id.* art. I, § 9, cl. 1; *id.* art. I, § 9, cl. 5 (“Tax or Duty”).

27. *Id.* art. I, § 10, cl. 2.

28. *Id.*

29. *Id.* art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4 (“direct, Tax”).

30. *Id.* art. I, § 10, cl. 3.

31. *Id.* art. I, § 9, cl. 1.

32. *Id.*, art. I, § 10, cl. 2. *See also id.* art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).



commercial in nature and that they were subject to the requirement of uniformity of “Regulation[s] of Commerce or Revenue.”<sup>33</sup>

The text further distinguished between “direct Taxes” and other taxes. It stated outright that a “Capitation” was a direct tax, and it implied that there were other kinds of direct tax.<sup>34</sup> Only direct taxes were to be apportioned among the states by population.<sup>35</sup> Other taxes, presumably indirect, were not to be apportioned. A different requirement—uniformity—applied to duties, imposts, and excises.<sup>36</sup> This suggests that to the extent the latter exactions were “taxes,” they were indirect.

In sum: The text appeared to distinguish between regulations of commerce and taxes (“Revenue”); between taxes, duties, excises, and imposts; and between direct taxes and other (presumably indirect) taxes. It stated that capitations were direct and implied that there were other direct taxes as well. The text further implied that taxes in the form of duties, excises, or imposts were indirect. It stated explicitly that “duties” included “tonnage,” and it implied that duties were associated with commerce. Finally, the text imposed an apportionment rule on direct taxes and a uniformity requirement on other financial exactions.

We now turn to sources of meaning outside the text of the Constitution.

## II. IMPOSITIONS AND TAXES

In founding-era financial usage, *imposition* could refer to any pecuniary exaction by the government.<sup>37</sup> A legislature might adopt an imposition purely for regulatory purposes—by, for example, levying tariffs high enough to inhibit foreign imports and thereby protect domestic producers.<sup>38</sup> Alternatively, it might enact an imposition to raise money for the expenses of government.

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33. *Id.* art. I, § 9, cl. 6.

34. *Id.* art. I, § 9, cl. 4.

35. *Id.* art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4.

36. *Id.* art. I, § 8, cl. 1.

37. *E.g.*, 5 J. CONT’L CONG. 794 (Sept. 20, 1776) (referring to “duty or imposition” on necessities brought into a fort or garrison in new Articles of War); 1 THOMAS POWNALL, THE ADMINISTRATION OF THE BRITISH COLONIES 254 (5<sup>th</sup> ed. 1774) (labeling the monopoly in colonial trade, “an imposition, if not a direct tax, to the amount of the external balance of such trade”); 1 BLACKSTONE, *supra* note 1, at \*308 (referring to an excise as an inland imposition).

38. *E.g.*, *Candidus II*, INDEP. CHRON., Dec. 20, 1787, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 493, 497 (claiming that commercial regulations through imposts and excises would assist agriculture and

Some contemporaneous British sources defined the word “tax” in a way to render it essentially a synonym for “imposition.”<sup>39</sup> Others confined “tax” to a levy that raised money for the support of government.<sup>40</sup> During the decade before the Revolutionary War, Americans settled on the latter usage.<sup>41</sup>

Americans did so in reaction to British attempts to tax the colonies. In publications arguing the American cause, pamphleteers such as Richard Bland, John Adams, James Wilson, and, most notably, John Dickinson,<sup>42</sup> conceded the authority of the British government to regulate commerce through financial exactions<sup>43</sup>—by, for example, charging fees to fund inspections and imposing prohibitory tariffs to restrict trade. In view of the history of American acceptance of British trade regulations, they could hardly do otherwise. However, the pamphleteers staunchly contested efforts by Parliament to “tax” them. They defined “tax” so as to exclude trade regulations: a financial imposition for the *sole* purpose of raising revenue.<sup>44</sup> As Dickinson

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manufacturing); *Agrippa IX*, MASS. GAZ., Dec. 28, 1787, reprinted in 5 *id.* at 540, 542 (conceding that an impost could aid manufacturing); cf. 26 J. CON’T L CONG. 270 (Apr. 22, 1784) (reproducing letter referring to “[i]mposts or duties” as regulations of foreign commerce).

39. *E.g.*, ALLEN, DICTIONARY, *supra* note 1 (defining “tax” as “a tribute imposed; an excise. A charge or censure”); JACOB, DICTIONARY, *supra* note 1 (defining “tax” in part as “[a] tribute or imposition laid upon the subject”); SHERIDAN, DICTIONARY, *supra* note 1 (defining “tax” as “[a]n impost, a tribute imposed, an excise, a tallage; charge, censure”); DAVID HARTLEY, LETTERS ON THE AMERICAN WAR 78 (3d ed. London 1778) (“The Stamp Act was a tax.—The Tea Act was a tax. All Acts of Parliament upon this subject have been taxes, either for regulation of trade, or for revenue”).
40. 10 ENCYCLOPAEDIA BRITANNICA, *supra* note 1, at 8548 (defining a “tax” as a levy “for the support of government”); 4 CHAMBERS, *supra* note 1 (defining “tax” as “a certain aid, subsidy, or supply . . . paid yearly toward the expences of the government”).
41. For the development of the American definition, see Natelson, *Origination Clause*, *supra* note 1, at 666–68.
42. On Dickinson’s career, see Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. ST. L. REV. 415 (2003).
43. DICKINSON, *supra* note 1, at 33 (“To the word ‘tax,’ I annex that meaning which the constitution and history of England require to be annexed to it; that it—that it is, an imposition on the subject, for the sole purpose of levying money.”); *see also id.* at 72–73 (“If money be raised upon us by others, without our consent, for our “defence,” those who are the judges in levying it, must also be the judges in applying it.”); Natelson, *Origination Clause*, *supra* note 1, at 666 (“Most American opinion-molders conceded that Parliament . . . had authority to impose [restrictive tariffs for regulating commerce].”).
44. Natelson, *Origination Clause*, *supra* note 1, at 667.

insisted, “every ‘tax’ being an imposition, though every imposition is not a ‘tax.’”<sup>45</sup>

By the time of the constitutional debates of 1787–90, the distinction between impositions for regulation and impositions for revenue had eroded somewhat. Americans no longer claimed that a tax must be for the *sole* purpose of raising revenue. They conceded that a tariff or excise that raised significant revenue still qualified as a tax if the legislature imposed with the incidental purpose of protecting domestic producers<sup>46</sup> or suppressing vice.<sup>47</sup> Still, during the constitutional debates Americans considered exactions adopted *primarily* for regulatory purposes to be fundamentally different from taxes, which were enacted *primarily* for revenue.

Several provisions in the Constitution reflected this distinction. The House-origination requirement, for example, applied only to “Bills for raising Revenue,”<sup>48</sup> not to other financial exactions. The Uniformity Clause distinguished between regulations of “Commerce or Revenue.”<sup>49</sup> The Taxation Clause<sup>50</sup> authorized only exactions for financial reasons;<sup>51</sup> the authority for regulatory exactions was the Commerce Clause.<sup>52</sup>

The distinction between exactions for revenue and exactions for commerce affected the scope of federal powers granted by the Constitution, specifically:

- If an imposition was not designed to raise significant revenue but to regulate domestic or foreign commerce, then it was constitutional under the Commerce Clause.

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45. DICKINSON, *supra* note 1, at 37.

46. *E.g.*, N.Y. INDEP. J., Jul. 9, 1788, *reprinted in* 21 DOCUMENTARY HISTORY, *supra* note 1, at 1307–08 (claiming taxes in the form of duties and imposts can assist domestic manufacturers); 6 DOCUMENTARY HISTORY, *supra* note 1, at 1287 (quoting Thomas Dawes, Jr.) (telling the Massachusetts ratifying convention that Americans had not taken the opportunity to use imposts to protect agriculture).

47. *E.g.*, 1781 MASS. RESOLVES, *supra* note 1, at 525 (reciting that one purpose of an excise statute was “the Suppression of Immorality, Luxury and Extravagance in this Commonwealth”). Of course, political discourse is never fully consistent, and even early in the Founding Era legislatures sometimes imposed “taxes” partly for nonrevenue reasons. BECKER, *supra* note 1, at 13–14, 80 (citing instances of taxes being imposed to promote development).

48. U.S. CONST. art. I, § 7, cl. 1.

49. *Id.* art. I, § 9, cl. 6.

50. *Id.* art. I, § 8, cl. 1.

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

52. U.S. CONST. art. I, § 8, cl. 3.

- If it raised no significant revenue and Congress had levied it to regulate an activity *outside* the scope of Congress’s enumerated powers (such as manufacturing was understood to be), then the imposition was outside congressional authority.<sup>53</sup>
- If, however, the imposition was designed to raise significant revenue, it could qualify as constitutional under the Taxation Clause—even if it impacted activities otherwise outside the scope of Congress’s enumerated powers.

The following three illustrations exemplify these rules:

*Illustration # 1:* Congress decides to assist the cotton trade by discouraging wool clothing. It imposes a \$1 million levy on each imported wool item. Under the Constitution’s original legal force, this imposition was probably valid as a regulation of foreign commerce, even if (as is probable) it raised no revenue.

*Illustration # 2:* In an effort to assist the cotton trade by stamping out domestic manufacture of woolen garments, Congress imposes a \$1 million levy on American manufacturers for each item of wool clothing they make. Under the Constitution’s original legal force, this exaction would not qualify as a tax because it could not raise significant revenue. Nor would it qualify as a regulation of commerce because, by the founding era understanding, manufacturing was not “commerce.”<sup>54</sup>

*Illustration #3:* In an effort to raise money and, incidentally, to assist the cotton trade, Congress imposes a ten percent retail sales levy on each item of wool clothing. Under the Constitution’s original legal force, this would be a valid “tax,” despite the incidental desire to affect behavior.

### III. DIRECT TAXES

During the founding era, the distinction between direct and indirect taxes seems not to have been obscure. Among British sources, the distinction appears in Adam Smith’s *Wealth of Nations*<sup>55</sup> (a text whose influence was greater among Americans than once believed),<sup>56</sup>

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53. Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 487–88 (2003) (explaining that regulation of manufacturing was understood to be reserved to the states).
54. Congress probably could levy such an exaction on the interstate sale of wool clothing, however, under the congressional power to “regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3.
55. SMITH, *supra* note 1.
56. Samuel Fleischacker, *Adam Smith’s Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897 (2002).

newspapers and pamphlets,<sup>57</sup> Parliamentary proceedings,<sup>58</sup> and government documents.<sup>59</sup>

American references to the distinction are, if anything, even more plentiful,<sup>60</sup> and many Americans apparently were familiar with the criteria that classified a levy as “direct” or “indirect.” As John Marshall, the future Chief Justice, observed in a speech at the Virginia ratifying convention, “The objects of direct taxes are well understood.”<sup>61</sup> Marshall listed them as “[l]ands, slaves, stock [i.e., business capital] of all kinds, and a few other articles of domestic property.”<sup>62</sup> Another future Chief Justice—Connecticut’s Oliver Ellsworth<sup>63</sup>—told his state’s ratifying convention that targets of direct taxes included (he did not say “were limited to”) the “tools of a man’s business . . . necessary utensils of his family.”<sup>64</sup> Ellsworth thus corroborated Marshall’s references to “stock” and “domestic property.” After the Pennsylvania ratifying convention, delegates in the Anti-Federalist minority issued a statement that identified the subjects of direct taxes as those on polls

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57. GAZETTEER AND NEW DAILY ADVERTISER (London), Dec. 13, 1790 (referring to “a direct Tax on Porter”); PUBLIC ADVERTISER (London), Dec. 13, 1790 (same); GRAY, *supra* note 1, at 18, 34 (pamphlet referring to taxes on land and rents as “direct”).
58. *E.g.*, 27 PARLIAMENTARY REGISTER, *supra* note 1, at 432–36 (H.C., Apr. 16, 1790) (reproducing William Fullarton’s attack on the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton pointed out that a tax indirect in form can be direct in effect. *See also* 46 H.C. JOUR. 45 (Dec. 9, 1790) (reproducing petition of John Horne Tooke, complaining of Westminster’s lack of representation in Parliament, although its citizens contribute “by direct and indirect Taxation”); *see also* 28 COBBETT, *supra* note 1, at 922 (same).
59. *E.g.*, Colonel Henderson, Remarks on the Abolition of Slavery (Feb. 16, 1788), *in* REPORT OF THE LORDS OF THE COMMITTEE OF COUNCIL APPOINTED FOR THE CONSIDERATION OF ALL MATTERS RELATING TO TRADE AND FOREIGN PLANTATIONS (1789) (referring to a duty on imported slaves as an “indirect Tax”).
60. In addition to the sources discussed *infra*, see 14 MIN. PA. EX. COUNCIL, *supra* note 1, at 335, 337 (Feb. 1, 1785) (reproducing a 1785 report by then-Pennsylvania state president John Dickinson).
61. 9 DOCUMENTARY HISTORY, *supra* note 1, at 1122.
62. *Id.*
63. Ellsworth was Connecticut’s leading lawyer, and had been a delegate at the Philadelphia convention, where he served on the committee that prepared the Constitution’s first draft. On Ellsworth, see WILLIAM GARROTT BROWN, THE LIFE OF OLIVER ELLSWORTH (1905).
64. James Wadsworth & Oliver Ellsworth, Speeches in the Conn. Convention (Jan. 7, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 275.

(as confirmed by the Constitution)<sup>65</sup> and on “land, cattle, trades, occupations, etc.”<sup>66</sup> The most highly regarded of the Anti-Federalist writers, the “Federal Farmer,” listed as objects of Congress’s power of direct taxation, “polls, lands, houses, labour, &c.”<sup>67</sup> Remarks such as these strongly suggest that direct taxes included a good deal more than, as is sometimes claimed, land levies and capitations.<sup>68</sup>

In fact, the scope of direct taxation was rather wide<sup>69</sup>—so much so that it offered the Anti-Federalists an opportunity for attack. The author signing his essay as “The Impartial Examiner” argued against granting Congress authority to levy direct taxes by pointing out that:

So different are many species of property, so various the productions, so unequal the profits arising, even from the same species of property, in different states, that no general mode of contribution can well be adopted in such a manner as at once to affect all in an equitable degree.<sup>70</sup>

The Federalist rejoinder implicitly acknowledged the wide scope of direct taxes. Federalists such as James Madison, Alexander Hamilton, and George Nicholas responded by observing that the Constitution’s uniformity requirement applied only to *indirect* levies. Therefore, as long as Congress honored the apportionment rule, Congress could tailor the subjects of direct federal taxes to fit the needs of each state.<sup>71</sup> “The most proper articles will be selected in each State,” said Madison. He

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65. U.S. CONST. art. I, § 9, cl. 4 (referring to capitations as “direct”).

66. The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents (Dec. 18, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 618, 636.

67. Letter from the Federal Farmer to the Republican No. IX (Jan. 4, 1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 288, 294 (listing as objects of Congress’s power of direct taxation, “polls, lands, houses, labour, &c.”) (“&c” means “et cetera”).

68. *See also* E. H. Ketcham, *The Direct Tax Clause of the Federal Constitution*, 4 N.C. HIST. REV. 270 (1927) (surveying the constitutional debates and concluding that direct taxes included levies on any kind of property).

69. EINHORN, *supra* note 1, at 104.

70. *The Impartial Examiner I*, VA. INDEP. CHRON., Feb. 27, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 420, 421.

71. 9 DOCUMENTARY HISTORY, *supra* note 1, at 1148–49 (quoting James Madison at the Virginia ratifying convention); THE FEDERALIST NO. 36 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 302, 304.

added that “[i]f one article in any State should be deficient, it will be laid on another article.”<sup>72</sup>

The wide range of “articles” subject to direct tax reflects not merely a theoretical view but the actual operation of Anglo-American tax systems. Both in Britain and America, direct taxes commonly were imposed by omnibus statutes that combined a range of items into an integrated base and then imposed on the base one or more rates of tax. The base and the rate had various names; in colonial Connecticut, the base was called the “ratable estate” and the rate was the “colony pound rate.”<sup>73</sup>

The valuation (or, to use the prevalent modern term, “assessment”) of each subject in the base was tailored to its nature. Head taxes varied according to the condition of the person being taxed.<sup>74</sup> Real property might be assessed by an acreage or ad valorem formula,<sup>75</sup> and personal property (such as livestock or plate) by the item or ad valorem. Income and profits usually were taxed by assessing a percentage, reflecting likely annual return, of the value of their sources. Among the sources subject to percentage assessment were interest-bearing loans (called “money at interest”),<sup>76</sup> trades and businesses,<sup>77</sup> and sometimes land.<sup>78</sup>

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72. 10 DOCUMENTARY HISTORY, *supra* note 1, at 1204 (quoting James Madison at the Virginia ratifying convention). *See also id.* at 1342 (quoting Madison) (“Had taxes been uniform it would have been universally objected to”); *id.* at, 1343 (George Mason) (“It only meant that the quantum to be raised of each State, should be in proportion to their numbers in the manner therein directed. But the General Government was not precluded from laying the proportion of any particular State on any one species of property they might think proper.”).
73. The colony pound rate was the rate per £1 of assessed value. BECKER, *supra* note 1, at 27, 150. *See infra* notes 86–87 and accompanying text for more on the Connecticut system.
74. *Infra* notes 105–119 and accompanying text.
75. EINHORN, *supra* note 1, at 29 (referring to Virginia’s acreage tax); 46 (referring to Virginia’s 1777 adoption of an ad valorem tax); 81 (referring to North Carolina’s acreage tax); 93 (referring to South Carolina’s ad valorem tax on urban land and acreage tax on rural land) & 103 (recording South Carolina’s 1784 switch to an ad valorem tax for rural land). Whether a state should tax land by the acre or ad valorem was a common matter of legislative dispute. *See also* BECKER, *supra* note 1, at 5 (“Internal taxation was anything but a marginal topic for most colonists. Colony taxes were frequently of far more immediate concern to many . . .”).
76. BECKER, *supra* note 1, at 168–69.
77. *Id.* at 11, 46 (discussing the Massachusetts faculty tax and explaining that the Pennsylvania faculty tax fell on all trades and professions based on an estimate of annual profits).
78. *Id.* at 34 (referring to land taxes calculated on annual rent).

When taxes were imposed on wealth-generating activities, they were said to be imposed on “facult[ies].”<sup>79</sup>

The belief among some judges and commentators that direct taxes were limited to levies on heads and land may be attributable in part to the practice of the British Parliament and of some American jurisdictions of labeling their omnibus tax laws as the “land tax,” even though those measures included far more than land in their assessable base. In Britain, for example, the so-called “land-tax” authorized exactions on various kinds of tangible personal property, on “money at interest,” and on government pensions, annuities and salaries.<sup>80</sup> Similarly, Pennsylvania’s “land tax” included levies on livestock, slaves, and indentured servants as well as land.<sup>81</sup> The South Carolina direct tax statute imposed levies on carriages and slaves, stock-in-trade, and occupations, as well as real estate.<sup>82</sup> A 1778 Virginia law exacted “an annual tax of ten shillings for each £100 value of all land, plate, slaves, horses and mules and ‘all salaries, and . . . the neat [sic] income of all offices of profit.’”<sup>83</sup> New Hampshire’s statute covered polls, land (including mills and wharves), livestock, and ferries.<sup>84</sup>

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79. Before the Revolution, all the New England colonies had adopted faculty taxes. *Id.* at 11.

80. 3 CHAMBERS, *supra* note 1 (stating in his entry on the Land-Tax that the tax was assessed on personalty as well as land, exempting items owned by the king; and also on income from public office or employment (“military officers in the army or navy excepted”) and on government annuities and pensions to the tune of four shillings for every twenty received). *See also* 1 BLACKSTONE, *supra* note 1, at \*302 (stating that the land tax was imposed on personal as well as real property); *but see id.* at \*315 (stating that the tax on offices and pensions was *administered* by the commissioners of the land tax, suggesting that it was technically a different levy). *See also* 13 Anne, c. 1 (1713) (setting for the text of the land tax).

*See also* 4 THOMAS B. MACAULAY, THE HISTORY OF ENGLAND, available at <http://www.gutenberg.org/files/2613/2613-h/2613-h.htm> (describing the enactment and composition of the land tax, and referring to it as “direct taxation”); Mark Pearsall, *The Land Tax 1692-1963*, 22 MAG. FRIENDS OF THE NAT’L ARCHIVES 16 (2011) (describing the tax).

81. EINHORN, *supra* note 1, at 88–89.

82. S.C. LAWS, *supra* note 1, at 436; BECKER, *supra* note 1, at 207.

83. BECKER, *supra* note 1, at 196 (quoting 1778 Virginia tax law). *See also* EINHORN, *supra* note 1, at 46–47 (describing the changes made to Virginia’s tax in 1778); Dodd, *supra* note 1, at 363 (describing Virginia’s “Revenue tax” and listing several other items).

84. 21 N.H. PAPERS, *supra* note 1, at 420–21.



After Independence, Connecticut became known for its “shockingly high taxes.”<sup>85</sup> In 1777, that state’s legislature integrated a business profits levy into its land tax code by requiring town assessors to include gross profits in the “ratable estate.” By the same technique, the legislature extended the land tax to cattle and sheep the taxpayer had loaned to others.<sup>86</sup> A 1779 Connecticut statute imposed a head tax and required that the following items be wrapped into the ratable estate: land, improvements to land, cattle, horses, swine, ships and other vessels, coaches and other vehicles, clocks and watches, silver plate, all individual net wealth exceeding £50 (!), income from interest received on loans, traders’ and shopkeepers’ inventory, the individual businesses of attorneys at law, the profits of ironworks and other enterprises, and (subject to particularly high rates) the businesses of speculators.<sup>87</sup>

As a colony, Massachusetts had imposed a faculty tax that levied on “the incomes or profits which any person or persons . . . do or shall receive from any trade, faculty, business or employment what so ever, and all profits which shall or may arise by money or commissions of profit, in their improvement.”<sup>88</sup> In 1780, the Commonwealth enacted a law imposing a unified tax on polls (males, both free and slave), land, livestock, interest income, business income, plate, “vessels of all sorts,” money on hand, business inventory,<sup>89</sup> grain and other “produce of the land, and all other property whatsoever” not specifically exempt.<sup>90</sup> The exempt items were “household furniture, wearing apparel, farming utensils, and the tools of mechanicks.”<sup>91</sup> The same statute provided for exemptions for particular professions and for the poor.<sup>92</sup>

Almost every American jurisdiction seems to have had a similar, if sometimes less elaborate, arrangement, whether or not a poll tax was part of it.<sup>93</sup>

These statutes, corroborated by additional sources, reveal that taxes were direct when levied on the following items:

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85. BECKER, *supra* note 1, at 153.
  86. 1 CONN. RECORDS, *supra* note 1, at 365–66 (reproducing statute).
  87. 2 CONN. RECORDS, *supra* note 1, at 256–63.
  88. BECKER, *supra* note 1, at 11 (quoting a Massachusetts’ faculty tax).
  89. 1780 MASS. RESOLVES, *supra* note 1, at 85. Presumably because carriages held as inventory (i.e., for sale) were taxed directly, the carriage excise (an indirect tax) was not imposed on them. 1781 MASS. RESOLVES, *supra* note 1, at 578.
  90. 1780 MASS. RESOLVES, *supra* note 1, at 85–86.
  91. *Id.* at 86.
  92. *Infra* notes 117 & 118 and accompanying text.
  93. BECKER, *supra* note 1, at 44, 46, 88, 192, 213 (discussing similar arrangements in New Jersey, Pennsylvania, Virginia, North Carolina, and Maryland).

- *Wealth employed in business and domestic life.* Direct taxes included those imposed on land,<sup>94</sup> improvements to land,<sup>95</sup> inventory (“stock in trade”),<sup>96</sup> business equipment,<sup>97</sup> and livestock.<sup>98</sup>

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94. *E.g.*, 1780 MASS. RESOLVES, *supra* note 1, at 85 (discussing taxes on real estate). *See also* GRAY, *supra* note 1, at 18 (referring to land taxes as direct); *An Old Planter*, VA. INDEP. CHRON., Feb. 20, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 394, 396 (noting that under the Constitution taxes on land will be apportioned as direct taxes); 9 DOCUMENTARY HISTORY, *supra* note 1, at 1149 (reproducing remarks of James Madison at the Virginia ratifying convention, describing the land levies of England and Scotland as direct taxes).
95. Letter from the Federal Farmer to the Republican No. IX (Jan. 4, 1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 288, 294 (listing “houses” as a possible object of Congress’s power of direct taxation). Thus the English window tax, imposed so as to ensure that the owners of more elaborate houses paid more, was direct. DIARY; OR, WOODFALL’S REGISTER (London), Apr. 2, 1789 (calling the window light tax direct in an announcement of pamphlets by J.L. DeLolme, the well-known author of a book on the English constitution).
96. *E.g.*, 1780 MASS. RESOLVES, *supra* note 1, at 85 (including as part of a direct tax scheme, levies on “wares and merchandize, stock in trade”). BECKER, *supra* note 1, cites many examples of such stock-in-trade taxes, *e.g.*, *id.* at 81, 207 (South Carolina), 171 (New Jersey), 192 (North Carolina). An English newspaper referred to a proposed levy on ale of up to a half-penny “per pot” as “a direct Tax on Porter.” GAZETTEER AND NEW DAILY ADVERTISER (London), Dec. 13, 1790; *see also* PUBLIC ADVERTISER (London), Dec. 13, 1790 (characterizing the proposed tax similarly). A *pottle* was a jar of two quarts or four pints. JOHN PLAYFORD, VADE MECUM: OR, THE NECESSARY POCKET COMPANION 46 (22d ed., 1772); JOHNSON, DICTIONARY, *supra* note 1 (unpaginated) (defining “pottle” as four pints). The quantities assessed suggest that the levy was on inventory rather than retail sale. A Massachusetts excise statute assessed liquor by the gallon, but only as part of a formula to determine the amount *sold*. 1781 MASS. RESOLVES, *supra* note 1, at 525–26.
97. 1780 MASS. RESOLVES, *supra* note 1, at 85 (taxing “vessels of all sorts”). *See also* 21 N.H. PAPERS, *supra* note 1, at 420–21 (identifying ferries as part of the New Hampshire direct tax system).
98. *Supra* notes 62 & 66 and accompanying text (quoting John Marshall and the dissent of the Pennsylvania minority); *An Old Planter*, VA. INDEP. CHRON., Feb. 20, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 394, 396 (noting that under the Constitution taxes on livestock would be apportioned as direct taxes); 1780 MASS. RESOLVES, *supra* note 1, at 85 (taxing as part of a general direct tax scheme, “horses, oxen and cattle . . . sheep, swine”); BECKER, *supra* note 1, at 192 (referencing North Carolina’s tax on horses and cattle).

- *Personal and business income.* Direct taxes included levies on rents,<sup>99</sup> business profits,<sup>100</sup> wages,<sup>101</sup> interest,<sup>102</sup> and other income.<sup>103</sup>
- *Business enterprises.* Levies on business profits and occupational fees were direct taxes.<sup>104</sup>

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99. GRAY, *supra* note 1, at 18, 34–35 (referring to taxes on land rents as direct). Beginning in 1777, New Hampshire taxed unimproved land at the same rate as “money at interest,” thereby effectively taxing rental value. BECKER, *supra* note 1, at 130.
100. *See supra* notes 86 & 87 and accompanying text (discussing the Connecticut system).
101. SMITH, *supra* note 1, at 348–49, 353 (referring to taxes on wages as direct); 27 PARLIAMENTARY REGISTER, *supra* note 1, at 432–36 (H.C., Apr. 15, 1790) (reproducing William Fullarton’s attack on the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton pointed out that a tax indirect in form can be direct in effect. *See also* Letter from the Federal Farmer to the Republican No. IX (Jan. 4, 1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 288, 294 (listing as objects of Congress’s power of direct taxation, “polls, lands, houses, labour, &c.”).
102. 1780 MASS. RESOLVES, *supra* note 1, at 85 (directly taxing net interest received); *cf.* SMITH, *supra* note 1, at 331–32 (describing tax on interest as direct).
103. SMITH, *supra* note 1, at 350 (classifying a tax on salaries from emoluments as direct); *supra* notes 80, 83 & 87–89 and accompanying text.
104. 1780 MASS. RESOLVES, *supra* note 1, at 86 (directly taxing “income from any profession, faculty, handicraft, trade or employment; and also on the amount of all incomes and profits gained by trading by sea and on shore”); *supra* note 87 and accompanying text (describing the Connecticut system); Dodd, *supra* note 1, at 364 (describing Virginia’s occupational fees on physicians, surgeons, apothecaries, and merchants); BECKER, *supra* note 1, at 44 (summarizing New Jersey taxes on various occupations), 81 (summarizing South Carolina occupational taxes).

- *Heads*.<sup>105</sup> Poll taxes, also called head taxes or capitations,<sup>106</sup> existed in all of the New England states<sup>107</sup> and in most other states as well.<sup>108</sup> They were levied both on free persons and slaves. Capitations were the prevalent way of taxing slaves.<sup>109</sup>

Laws imposing capitations did not necessarily require the same payment from everyone. Rates often were adjusted according to the taxpayer’s circumstances, just as the capitations known as “council taxes” are graduated in Britain today.<sup>110</sup> American legislatures could,

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105. U.S. CONST. art. I, § 9, cl. 1. *See also* SMITH, *supra* note 1, at 353 (stating that “[c]apitation taxes, so far as they are levied upon the lower ranks of the people, are direct taxes upon the wages of labour”); WILLIAM R. STAPLES, *RHODE ISLAND IN THE CONTINENTAL CONGRESS 648* (Reuben Aldridge Guild, A.M. eds., Providence, Providence Press Company 1870) (quoting discussion at the Rhode Island ratifying convention that refers to a poll tax or capitation as direct).
106. Campbell, *supra* note 1, at 124 (arguing that the term “capitation” had a meaning different from “poll tax” because a capitation could be adjusted by income and other factors). I could find no persuasive evidence for this distinction. Poll taxes were often so adjusted, and contemporaneous dictionaries, to the extent that they provided a definition for capitation, define it simply as a poll tax. *E.g.*, ASH, *Dictionary*, *supra* note 1 (defining “capitation” as “[a] numeration of the people by the head, a poll tax”); PERRY, *DICTIONARY*, *supra* note 1 (defining “capitation” as “numeration by heads, a poll tax”).
107. BECKER, *supra* note 1, at 15.
108. During the colonial period there were no statewide poll taxes in New York, New Jersey, Pennsylvania and probably Delaware, although there were some local poll taxes, BECKER, *supra* note 1, at 48–49, and Pennsylvania imposed them only on single men. EINHORN, *supra* note 1, at 83, 90. During this period South Carolina imposed capitations only on slaves. *Id.* at 99. The 1776 Maryland constitution abolished poll taxes. MD. CONST. art. 13 (1776).
109. In theory, slaves could be taxed either as persons (by a head tax) or as livestock. In America, they seem to have been taxed as persons. Letter from George Nicholas (Feb. 16, 1788), in 16 DOCUMENTARY HISTORY, *supra* note 1, at 123, 126 (“A poll tax is the only tax [Congress] could impose which could affect our slaves . . .”). *See also* BECKER, *supra* note 1, at 77 (discussing the poll taxes “on all blacks, slave or free, male or female, over the age of twelve” in North Carolina); MD. STAT. 1719 ch. xvi (imposing a poll tax on black and Irish servants, a measure re-enacted from time to time); 1780 MASS. RESOLVES, *supra* note 1, at 85 (imposing poll taxes on free and enslaved males); 8 N.H. PAPERS, *supra* note 1, at 685, 849 (imposing a poll tax on slaves); 21 *id.* at 124 (proposing a poll tax on “male and female negroes and molatto [sic] Servants,” a proposal apparently was defeated, *id.* at 420); S.C. LAWS, *supra* note 1, at 159 (reproducing a statute imposing a tax on white and black males); *id.* at 496 (imposing a head tax on blacks and mixed-race people).
110. I had to pay a local capitation when residing temporarily in the City of Oxford, England. *See Who is Liable to Pay Council Tax*, OXFORD CITY

and often did, reduce or eliminate the poll tax due from the poor.<sup>111</sup> American legislatures also granted complete or partial exemptions to persons who lived in particular places,<sup>112</sup> who had reached (or not reached) a stated age,<sup>113</sup> who were married,<sup>114</sup> or who pursued particular

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COUNSEL (Jan. 4, 2012), [http://www.oxford.gov.uk/PageRender/decCB/Payment\\_occw.htm](http://www.oxford.gov.uk/PageRender/decCB/Payment_occw.htm) [<http://perma.cc/7G72-YJNM>] (describing who must pay council tax in Oxford).

111. *Jensen*, *supra* note 1, at 2392; 1780 MASS. RESOLVES, *supra* note 1, at 87 (providing for reduction of taxes on “persons who through age, infirmity or poverty are unable to pay . . . or any widows or orphans who, depending on the interest of their money for subsistence”); 2 CONN. RECORDS, *supra* note 1, at 302 (exemption for hardship and poverty); *id.* at 335 (exemption for hardship); *id.* at 484 (exemption for hardship and poverty); *id.* at 486 (same); 3 *id.* at 201 (exemption for poverty); 328 (exemption for hardship); 4 *id.* at 309 (exemption for hardship and for status as a minister); 5 *id.* at 168 (same); *id.* at 242–43 (same); 21 N.H. PAPERS, *supra* note 1, at 124 (proposed exemption for “paupers and Idiots”); BECKER, *supra* note 1, at 143 (mentioning Rhode Island’s exemption for the poor); *id.* at 176 (mentioning Delaware’s exemption for the poor, for people with many children, and for widows).

In France, a person’s capitation liability was graduated by a wide range of factors. EINHORN, *supra* note 1, at 13.

112. *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 198 (exemption of citizens of town of Union); 3 *id.* at 203 (same for the Town of Barkhemsted); *id.* at 535 (same for Town of Westmoreland); 20 MASS. RESOLVES, *supra* note 1, at 288, 387 (1778) (allowing abatement of taxes on “polls and estates” for inhabitants of two towns).
113. S.C. LAWS, *supra* note 1, at 159 (reproducing a statute imposing tax on white and black males, but exempting those under 16 years of age or over 60); 21 N.H. PAPERS, *supra* note 1, at 124 (proposed exemption for whites over 70 and servants of color over 45); 8 *id.* at 685, 849 (exempting slaves over 45); *id.* at 966 (exempting whites over 75 and blacks over 45). *See also* BECKER, *supra* note 1, at 149 (discussing a reduction in Connecticut poll tax for males aged 16 to 21).
114. BECKER, *supra* note 1, at 182–83 (mentioning Pennsylvania’s poll tax on unmarried men).

occupations—especially the military<sup>115</sup> and the clergy.<sup>116</sup> The Massachusetts legislature, for example, exempted soldiers,<sup>117</sup> the staff of Harvard College, and “settled Ministers of the Gospel [and] Grammar School-Masters.”<sup>118</sup> The Connecticut legislature exempted the president of Yale University.<sup>119</sup> Nevertheless, capitations tended to be less reflective of wealth or income than other levies, which accounts for their unpopularity.

Despite the variety among the objects of direct taxation, one can divine a unifying principle: A tax was direct if it was imposed on people’s lives, homes, or on the productive occupations by which they supported and expressed themselves. Direct taxes, in other words, were levies on living and producing.

#### IV. INDIRECT TAXES

##### A. *Indirect Taxes in General*

Indirect taxes were those taxes that were not direct. Stated more positively, indirect taxes were those “duties” imposed not principally for regulation but for the raising of revenue. The term *duty* is defined more closely below;<sup>120</sup> suffice to say for current purposes that the word encompassed, but was not limited to, excises, imposts, and tonnage.

The principal targets of indirect taxation were consumption (especially of luxuries), domestic and foreign trade, and enumerated business and official transactions.

At the Connecticut ratifying convention, Oliver Ellsworth argued that, as a rule, indirect taxes were preferable to direct taxes:

Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must be constantly laying up money to answer the demands of the collector. But you cannot make people thus provident; if you

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115. *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 182, 229, 233, 262, 526; 3 *id.* at 19, 121, 319 (exempting soldiers); 8 N.H. PAPERS, *supra* note 1, at 685, 843 (exempting soldiers and sailors); 2 *id.* at 184 (exempting certain veterans); VA. H.D. JOUR., at 9 (May 15, 1778) (exemptions for soldiers). *See also* BECKER, *supra* note 1, at 143, 196, 199.

116. 2 CONN. RECORDS, *supra* note 1, at 260; 3 *id.* at 418; 4 *id.* at 216 (exempting ministers); 20 MASS. RESOLVES, *supra* note 1, at 197–98 (1777) (exempting missionaries); 21 *id.* at 651 (1780) (same); BECKER, *supra* note 1, at 143 (reporting Rhode Island’s exemption for ministers).

117. 21 MASS. RESOLVES, *supra* note 1, at 177–78.

118. 1780 MASS. RESOLVES, *supra* note 1, at 87.

119. 2 CONN. RECORDS, *supra* note 1, at 260.

120. *Infra* Part IV.B.1.

would do any thing to purpose, you must come in when they are spending, and take a part with them. This does not take away the tools of a man’s business, or the necessary utensils of his family: It only comes in, when he is taking his pleasure, and feels generous, when he is laying out a shilling for superfluities.<sup>121</sup>

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All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. France raises a revenue of 24 Millions Sterling per annum, and it is chiefly in this way. 50 Millions of Livres they raise upon the single article of Salt. The Swiss cantons raise almost the whole of their revenue upon Salt. Those States purchase all the Salt which is to be used in the country; they sell it out to the people at an advanced price; the advance is the revenue of the country. In England, the whole public revenue is about 12 Millions Sterling per annum. The land tax amounts to about 2 Millions, the window and some other taxes to about two millions more. The other 8 Millions is raised upon articles of consumption. . . . In Holland their prodigious taxes amounting to forty shillings for each inhabitant, are levied chiefly upon articles of consumption. They excise every thing, not excepting even their houses of infamy.<sup>122</sup>

Ellsworth proceeded to offer predictions of how indirect taxes might raise revenue for the federal government.

*B. The Terminology of Indirect Taxation*

1. Duties

Eighteenth century British lay dictionaries defined “duty” widely enough to include almost any financial exaction,<sup>123</sup> and Blackstone

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121. 15 DOCUMENTARY HISTORY, *supra* note 1, at 275.

122. 15 DOCUMENTARY HISTORY, *supra* note 1, at 275. Ellsworth’s arguments were echoed by *Connecticutensis: To the People of Connecticut*, AM. MERCURY (Dec. 31, 1787), *reprinted in* 3 DOCUMENTARY HISTORY 512, 513, and by George Nicholas at the Virginia ratifying convention. 9 DOCUMENTARY HISTORY, *supra* note 1, at 999–1000. *See also* 22 J. CONT’L CONG. 441 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance stating of excises, “Of all Taxes those on the consumption of articles are most agreeable, because being mingled with the price, they are less sensible to the people”).

123. ASH, DICTIONARY, *supra* note 1 (defining “Duty” as a “tax, impost”); PERRY, DICTIONARY, *supra* note 1 (defining “Duty” as a “tax”); 1 SHERIDAN, DICTIONARY, *supra* note 1 (defining “Duty” as a “tax, impost, custom, toll”). *Cf.* 4 CHAMBERS, *supra* note 1 (referring in an entry on “tax” to the direct tax on houses and windows as a “duty”). For the window tax as direct, *see*

employed the term the same way.<sup>124</sup> However, commercial treatises used the word more narrowly. For example, Giles Jacob in his *Lex Mercatoria*, defined “duty” to encompass “Customs, Subsidies, Tolls, Imposts, and other Duties upon Commodities imported or exported.”<sup>125</sup> By 1787, Americans had developed their own usage, employing the word “duty” specifically to mean any financial exaction that did not qualify as a direct tax.<sup>126</sup> Therefore, not all duties were taxes: Some were imposed not for revenue but merely to regulate (or effectively prohibit) trade in particular articles.<sup>127</sup>

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DIARY; OR, WOODFALL’S REGISTER (London), Apr. 2, 1789 (calling the window light tax direct in an announcement of pamphlets by J.L. DeLolme).

124. *E.g.*, 1 BLACKSTONE, *supra* note 1, at \*311 (referring to the “duty for the carriage of letters”); *Id.* at \*313 (referring to the “duty on houses and windows”); *Id.* at \*315 (referring to the “duty on offices and pensions”).
125. JACOB, *LEX MERCATORIA*, *supra* note 1, at 116 (italics added). *See also* ROLT, *DICTIONARY*, *supra* note 1 (defining “Duty” as including “an impost or tax . . . on merchandises, and commodities, either exported from their own country, imported from abroad, or consumed at home, towards supporting the expenses of the government”).
126. *E.g.*, *A Farmer*, PHILA. FREEMAN’S J., Apr. 16 & 23, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 133, 139–40 (“Under the term duties, every species of indirect taxes is included”). *See also infra* for citations on the uses of “duty,” “excise,” “impost,” and “tonnage.” Many are from the congressional journals issued between 1774 and 1790, and are illustrative only. Citation of all references would yield an unwieldy result.
127. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1 (referring to duties imposed on commerce among states); 1 ANNALS OF CONG. 194–95 (1789) (Joseph Gales ed., 1834) (quoting Jeremiah Wadsworth as referring to the use of protective duties to encourage manufactures). At the federal convention, George Clymer sought to limit export “duties” to those for regulatory purposes only. 2 FARRAND’S RECORDS, *supra* note 1, at 363 (reporting that George Clymer “moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade, <by inserting after the word ‘duty’ Sect 4 art VII the words> ‘for the purpose of revenue.’”). James Madison was a supporter of using financial exactions to create trade preferences. 1 ANNALS OF CONG. 193–94, 196–97 (reporting Madison’s argument).



In America, the word “duties” included levies on imports<sup>128</sup> and exports,<sup>129</sup> whether imposed for revenue or to regulate commerce. Duties imposed on imports and exports also were called *customs*,<sup>130</sup> although the latter word seems to have been less common in America than in Britain. An example of a custom was the specialized levy called *tonnage*.<sup>131</sup>

An excise was also a kind of duty.<sup>132</sup> Other duties included ad hoc impositions on specific transactions or events, such as fees imposed on

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128. *E.g.*, 1 J. CONT'L CONG. 79 (Oct. 20, 1774) (referring to duties on tea, wine and other articles imported); *id.* at 85 (Oct. 21, 1774) (reproducing letter of Congress referring to import duty on tea); 13 *id.* at 220 (Feb. 22, 1779) (reproducing a plan for a treaty with Holland referring to “duties or imposts” on goods coming into the United States); 18 *id.* at 1161 (Dec. 18, 1780) (referring to duties on imports; duties on exports and tonnage); 14 MIN. PA. EX COUNCIL, *supra* note 1, at 334 (Feb. 1, 1785) (reproducing report of the state president, John Dickinson, referring to “duties upon importations”); 1 ANNALS OF CONG. 77 (reporting a bill pertaining to “duties imposed by law on the tonnage of ships or vessels and on goods, wares, and merchandises imported into the United States”); *id.* at 106 (listing salt among other subjects of proposed import duties); 5 CONN. RECORDS, *supra* note 1, at 328–38 (reproducing statute imposing import duties); VA. SEN. JOUR. at 87 (Jan. 8, 1787) (referring to a duty on imports). *See also id.* at 75 (Jan. 2, 1788) (discussing duties on both imports and exports).
129. 5 J. CONT'L CONG. 580 (July 18, 1776) (referring to duties on exports in a draft treaty); 23 *id.* at 807 (Dec. 16, 1782) (referring to “[d]uties on exports”); *A Freeholder*, VA. INDEP. CHRON., *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 1, at 719, 724 (referring to an export duty on tobacco); VA. SEN. JOUR. at 58 (Dec. 22, 1786) (referring to a duty on exported tobacco). *See also id.* at 75 (Jan. 2, 1788) (discussing duties on both imports and exports).
130. EINHORN, *supra* note 1, at 14; PERRY, DICTIONARY *supra* note 1 (defining “Custom” as the “king’s duties on imports and exports”); ROLT, DICTIONARY, *supra* note 1 (defining “customs” as “the dues, duties, tolls, or tax, paid by merchants to the King, or state, for carrying out and bringing in of merchandises; which, in Great Britain, are duties, certain and perpetual, payable to the crown for goods exported and imported”); 1 BLACKSTONE, *supra* note 1, at \*303 (providing a similar definition).
131. JACOB, DICTIONARY, *supra* note 1 (referring to tonnage as “a custom”).
132. 1781 MASS. RESOLVES, *supra* note 1, at 525 (reciting in an excise statute the payment of excise “duties”); 1786 MASS. RESOLVES, *supra* note 1, 132 (referring to “excise duties”); *id.* at 135 (“excise duty”); 1801 N.Y. LAWS 439–43 (reproducing statute imposing a “duty of excise” on strong drink); 15 MIN. PA. EX. COUNCIL, *supra* note 1, at 305 (Oct. 26, 1787) (reproducing letter from Pennsylvania state president Benjamin Franklin referring to “excise duties”). *See also Candidus II*, INDEP. CHRON., Dec. 20, 1787, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 493, 497 (referring to both imposts and excises as duties).

goods brought into a fort or garrison,<sup>133</sup> fees on vessels for using public wharves,<sup>134</sup> fees on auction sales,<sup>135</sup> fees on legal proceedings,<sup>136</sup> and charges on certain written documents.<sup>137</sup> The notorious pre-Revolution Stamp Tax was a kind of duty.<sup>138</sup> It was imposed on court orders, ship clearances, deeds, mortgages, licenses, pamphlets, newspapers, gambling supplies, and even college diplomas.<sup>139</sup>

## 2. Imposts

English dictionaries often defined “impost” very broadly. Johnson’s *Dictionary*, for example, described it as “[a] tax; a toll; a custom paid.”<sup>140</sup> However, Giles Jacob’s *New Law-Dictionary*, the most popular work of its kind in America,<sup>141</sup> limited the term to only exactions on

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133. 5 J. CONT’L CONG. 794 (Sept. 20, 1776) (referring to “duty or imposition” on necessities brought into a fort or garrison).

134. VA. SEN. JOUR. at 56 (Dec. 9, 1789) (referring to a proposed duty “vessels coming to, or using the public wharves”).

135. 15 MIN. PA. EX COUNCIL, *supra* note 1, at 152 (Jan. 23, 1787).

136. 5 CONN. RECORDS, *supra* note 1, at 339–40 (reproducing statute).

137. Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 374, 376; *A Farmer*, PHILA. FREEMAN’S J., Apr. 16 & 23, 1788, *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 133, 139–40 (“Under the term duties, every species of indirect taxes is included, but it especially means the power of levying money upon printed books and written instruments”); Letter from the Federal Farmer to the Republican No. III (Oct. 10, 1787), *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 1, at 218, 224–25 (referring to duties on written instruments).

138. *See* 1 BLACKSTONE, *supra* note 1, at \*312, \*313 (explaining stamp duties).

139. EINHORN, *supra* note 1, at 18.

140. JOHNSON, DICTIONARY, *supra* note 1. *Cf.* ALLEN, DICTIONARY, *supra* note 1 (defining “impost” as “a toll; custom paid for goods or merchandize”).

There is no linguistic connection between “impost” and “import.” The prefix in “impost” (as in “imposition”) means “on”—from the Latin *imponere* (*imponere*, to place on); the like prefix in “import” means “into:” *in-portare* (*importare*, to carry into).

141. *See generally* HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700–1799, at 59–64 (1978) (discussing the popularity in America of law treatises, including Jacob’s *Dictionary*).

imports,<sup>142</sup> which necessarily rendered an impost a kind of duty.<sup>143</sup> Americans seem to have adopted that usage almost exclusively.<sup>144</sup> Thus, Massachusetts called its import duty an impost.<sup>145</sup> The Confederation Congress made repeated attempts to induce the states to approve a five percent “impost” on imports, including the import of foreign prizes.<sup>146</sup>

In founding era discourse, one could speak of a “duty” being imposed on either imports or exports.<sup>147</sup> It also was common to couple the word “imposts” on imports with “duties” on exports.<sup>148</sup>

### 3. Tonnage

Tonnage (originally “tunnage”) had begun as a Medieval import duty on “tuns” (casks) of wine.<sup>149</sup> By the time of the Founding, the

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142. JACOB, DICTIONARY, *supra* note 1 (stating in its entry for “Impost,” that it “Signifieth the tax received by the Prince, for such merchandize as are brought into any haven within his dominions from foreign nations. It may in some sort be distinguished from *custom*, because *custom* is rather that profit the prince maketh of wares shipped out; yet they are frequently confounded.”). *See also* ROLT, DICTIONARY, *supra* note 1 (adopting the same limitations in defining “impost”).

143. *E.g.*, 20 N.H. PAPERS, *supra* note 1, at 157 (“Impost Duty”), 198 (same).

144. *E.g.*, 1782 MASS. RESOLVES, *supra* note 1, at 152 (laying an “Impost” “at the Time and Place of Importation”); 18 J. CONT’L CONG. 1164 (Dec. 18, 1780) (referring to imposts on imports); 22 *id.* at 439 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance referring to “an excise of one eighth of dollar per gallon” on liquor and to 5% impost on imports and prizes of war); 1 ANNALS OF CONG. 193–94 (1789) (Joseph Gales ed., 1834) (quoting Madison as treating as an impost a duty on the import of Madeira); *id.* at 196 (quoting Thomas Fitzsimmons as referring to an import duty on rum as an impost and distinguishing it from “excise or direct taxes”). *Cf.* ARTICLES OF CONFEDERATION of 1781, art. VI, para. 3 (referring to imposts and duties in treaties). *But see* 16 J. CONT’L CONG. 261 (Mar. 18, 1780) (reproducing motion by Thomas Burke for an “impost” on exports and imports).

145. EINHORN, *supra* note 1, at 55.

146. *E.g.*, 18 J. CONT’L CONG. 1035 (Nov. 8, 1780) (reproducing a draft Congressional recommendation for a five percent impost on foreign prizes).

147. *Supra* notes 128 & 129.

148. *E.g.*, ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1 (referring to imposts and duties on foreigners and on importation and exportation); *Brutus VII*, N.Y. J., Jan. 3, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 234, 239.

149. It should be contrasted with “poundage,” an ad valorem tax on all imported and exported goods. *Tonnage and Poundage*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/tonnage-and-poundage> [<http://perma.cc/J93G-37P9>]. *See also* WALTER PHELPS HALL & ROBERT GREENHALGH ALBION, A HISTORY OF ENGLAND AND THE BRITISH EMPIRE 151 (2<sup>nd</sup> ed. 1946) (stating that initially a duty of two shillings per ton

term had broadened into any duty<sup>150</sup> levied on the carrying capacity of ships.<sup>151</sup> It could be imposed on ships either importing or exporting. In 1787, for example, Virginia imposed a tonnage duty of six shillings per ton on all vessels entering and clearing the harbors of that state.<sup>152</sup>

#### 4. Excises

An excise was a species of duty.<sup>153</sup> Excises sometimes were referred to as “inland impositions”<sup>154</sup> because they were the domestic equivalent of duties on imports and exports.<sup>155</sup> They were imposed in Britain<sup>156</sup> and in various American states.<sup>157</sup>

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(“tun”) on a cask of foreign wine was called “tunnage,” while a duty of one penny for each pound’s worth of merchandize was “poundage”).

150. U.S. CONST. art. I, § 10, cl. 3 (“Duty of Tonnage”). *See also* 18 J. CONT’L CONG. 1161 (Dec. 18, 1780) (referring to duties on tonnage); 1 ANNALS OF CONG. 75 (1789) (Joseph Gales ed., 1834) (quoting a bill title referring to “duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandises imported into the United States”); *id.* at 176 (reporting a motion for a “duty” of 6 cents per ton on citizens owning vessels); *id.* at 177 (quoting John Lawrance [erroneously spelled “Lawrence”] referring to a “duty on tonnage”); VA. H.D. JOUR. at 61 (Jun. 17, 1784) (referring to “duties payable upon tonnage”).
151. JACOB, DICTIONARY, *supra* note 1 (defining tonnage as “a custom or impost paid to the King for merchandize carried out, or brought in ships, or such like vessels, according to a certain rate upon every ton”).
152. Dodd, *supra* note 1, at 363. *See also* 1 ANNALS OF CONG. 185–86 (quoting John Lawrance [erroneously spelled “Lawrence”] as claiming a duty of tonnage on exports would raise prices and be in effect an unconstitutional tax on exports).
153. *Supra* note 132 and accompanying text.
154. 4 CHAMBERS, *supra* note 1 (stating, in entry on “tax”, that “the excise-duty . . . an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption”); 1 BLACKSTONE, *supra* note 1, at \*308 (calling an excise an inland imposition paid on consumption and frequently on retail sale).
155. 25 J. CONT’L CONG. 881 (Jan. 29, 1783) (reporting James Wilson as referring to an “impost on trade” but an “excise” on wine, spirits, and coffee).
156. ROLT, DICTIONARY, *supra* note 1 (defining “excise” as specifically referring to “[a] duty, or imposition, charged on beer, ale, cyder, and other malt-liquors made for sale, within the kingdom . . .” but adding that other British excises included levies on salt, sweets, wine, candles, paper, vellum and parchment, and paper).
157. *E.g.*, BECKER, *supra* note 1, at 11–12 (referring to colonial Massachusetts excise); *id.* at 126 (post-Independence Massachusetts excise); *id.* at 46 (referring to the New York excise); *id.* at 65 (referring to the Pennsylvania excise); *id.* at 144 (referring to a temporary Rhode Island excise). *See also infra* notes 191–196 and accompanying text (discussing the Connecticut excise).

In both British and American usage, an excise was a domestic tax on the consumption of commodities,<sup>158</sup> especially manufactured goods.<sup>159</sup> An excise might be imposed on all goods of a particular character or only on foreign goods of that character—such as foreign watches or clocks.<sup>160</sup> What rendered the latter an excise rather than an impost is that it was not levied at the time of import but upon consumption within the jurisdiction. If the product was re-exported rather than consumed within the jurisdiction, no excise was imposed.<sup>161</sup>

Although an excise might be levied either to regulate commerce or raise revenue, usually the primary motivation was to raise revenue. Often, however, there was a subsidiary interest in discouraging consumption of the items excised.<sup>162</sup>

One commentator has argued that excises were direct taxes or at least were widely seen as direct,<sup>163</sup> but support for that conclusion is very slender.<sup>164</sup> The overwhelming weight of the evidence is that excises

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158. ASH, *DICTIONARY*, *supra* note 1 (defining “Excise” as “An imposition or tax laid on a commodity by act of parliament”); SHERIDAN, *DICTIONARY*, *supra* note 1 (defining “excise” as “An inland tax levied upon commodities”).
159. *The Impartial Examiner I*, VA. INDEP. CHRON., Feb. 27, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 1, at 420, 421 (referring to excises as taxes “arising out of manufactures”); 9 DOCUMENTARY HISTORY, *supra* note 1, at 1133 (quoting George Nicholas at the Virginia ratifying convention describing excises as “a kind of tax on manufactures”); THE FEDERALIST NO. 33 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 268, 269 (stating that “the proper objects” of excises “particular kinds of manufactures”); 22 DOCUMENTARY HISTORY, *supra* note 1, at 1998 (quoting John Lansing, Jr., referring to “excises on all articles of American manufacture”).
160. JACOB, *LEX MERCATORIA*, *supra* note 1, at 120 (referring to “an Excise or Impost upon foreign Beer”); 1786 MASS. RESOLVES, *supra* note 1, at 131 (excising imported watches and clocks at retail).
161. 1786 MASS. RESOLVES, *supra* note 1, at 137 (exempting excised foreign articles if exported from the state).
162. 22 J. CONT’L CONG. 439, 442 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance suggesting “an excise of one eighth of dollar per gallon” on liquor and stating that “[t]he Tax will be a means of compelling vice to support the cause of virtue”); 1781 MASS. RESOLVES, *supra* note 1, at 525 (reciting in an excise statute that one purpose was “*the Suppression of Immorality, Luxury and Extravagance in this Commonwealth*”).
163. Johnson, *Fixing*, *supra* note 1, at 316–17.
164. Professor Johnson relies on three passages from the ratification debates. Two of these simply do not support his conclusion. The other passage is *Brutus V*, N.Y. J., Dec. 13, 1787, *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 1, at 410, 415 (stating that “direct taxes . . . include poll taxes, land taxes, excises, duties on written instruments”). There are two reasons for not crediting that passage. First, it stands alone against massive testimony to the contrary. *Supra* note 29. Second, the context is a discussion

were seen as a category distinct from direct taxes.<sup>165</sup> This is also implied by the Constitution’s text.<sup>166</sup> A similar argument—that the Constitution’s framers were excluding excises from direct taxes for the first time<sup>167</sup>—is disproved by the preamble to a Massachusetts excise statute, adopted a year *before* the Constitution was written, reciting that the excise was adopted in part “to ease the people as much as possible of direct taxation.”<sup>168</sup>

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of external vs. internal taxes. After addressing external taxes, Brutus turns to internal taxes (which an excise certainly is) but called them “direct” rather than “internal” by what was probably an inadvertent error.

165. 1786 MASS. RESOLVES, *supra* note 1, at 130 (reciting that excises were being imposed to avoid direct taxes); *Agrippa XVII*, MASS. GAZETTE, Feb. 5, 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 1, at 863, 865 (reciting direct taxes and excises separately); 6 DOCUMENTARY HISTORY, *supra* note 1, at 1245–46 (quoting Thomas Dawes, Jr. at the Massachusetts ratifying convention, distinguishing between direct taxes, imposts, and excises); *id.* at 1290 (quoting Theodore Sedgwick making the same distinction at the Massachusetts ratifying convention); *id.* at 1313 (quoting Partridgefield Peirce for the same); James Monroe, *Some Observations on the Constitution*, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 1, at 844, 868 (referring to “direct taxation and excise”); *id.* at 875 (same); Letter from the Federal Farmer to the Republican No. XVII (Jan. 23, 1788), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 1, at 350, 357 (referring to “excises and direct taxes”); 22 DOCUMENTARY HISTORY, *supra* note 1, at 1942 (quoting Robert R. Livingston at the New York ratifying convention as distinguishing imposts and excises from direct taxes); *id.* at 1998 (quoting John Lansing, Jr., making the same distinction). For statements in the First Federal Congress, see 1 ANNALS OF CONG. 163 (1789) (Joseph Gales ed., 1834) (reporting James Madison as saying of a proposed duty on imported articles, “and will they submit to a direct tax, if they murmur at so light a one on salt? Will they submit to an excise?”); *id.* at 302 (reporting Madison as saying that alternatives to duties are excises and direct taxes); *id.* at 334 (reporting Elbridge Gerry as stating that if duties are insufficient, additional revenue must be obtained by a direct tax or excise); *id.* at 360 (reporting Alexander White as distinguishing between an excise and direct taxes); *id.* at 773 (quoting a proposed constitutional amendment providing that a direct tax might be imposed only if duties, imposts, and excises prove insufficient).

166. *Supra* Part II.

167. Campbell, *supra* note 1, at 115.

168. 1786 MASS. RESOLVES, *supra* note 1, at 130.

The most commonly excised goods were alcoholic beverages,<sup>169</sup> but there were many others.<sup>170</sup> A 1783 Connecticut law imposed excises on sale or consumption of alcoholic beverages, snuff, coffee, tea, sugar, chocolate, and certain luxury clothes and utensils.<sup>171</sup> Rates were higher for some imported goods than for those of domestic manufacture<sup>172</sup> and subsequent amendment strengthened the preference for domestic articles.<sup>173</sup> The 1786 Massachusetts statute excised rum, tea, coffee, cocoa, sugar, raisins, tobacco, imported clocks, imported watches, coaches and chariots<sup>174</sup> (on an annual basis), and other transportation devices (also annual).<sup>175</sup> During the ratification debates, “Brutus” (probably Robert Yates of New York), assailed the Constitution in colorful language depicting federal excises imposed initially on alcoholic beverages but thence proliferating to a long list of other goods.<sup>176</sup>

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169. In Britain the tax on malt (used to make ale and beer) was a duty of six pence per bushel and a proportional sum was levied on certain liquors such as “cyder and perry.” 6 ENCYCLOPAEDIA BRITANNICA, *supra* note 1, at 4408 (stating also that the malt tax was “no other than the annual excise”). See also 4 CHAMBERS, *supra* note 1 (discussing the same subject in its entry on “tax”). For American examples, see 8 N.H. STATE PAPERS, *supra* note 1, at 60 (Jan. 26, 1776) (recording that the New Hampshire house of representatives had adopted an excise on spirituous liquor) and 1801 N.Y. Laws 439–43 (reproducing a statute imposing a “duty of excise” on strong drink). The Confederation Congress was, of course, aware of state excises. 22 J. CONT’L CONG. 177 (Apr. 10, 1782) (referring to states that had liquor excises). And the Confederation Congress tried to induce them to approve a congressional excise on alcoholic beverages. *Id.* at 439 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance referring to “an excise of one eighth of dollar per gallon” on liquor).
170. 1 BLACKSTONE, *supra* note 1, at \*310 (listing British excises); see also EINHORN, *supra* note 1, at 14 (listing British excises).
171. 5 CONN. RECORDS, *supra* note 1, at 15–19 (reproducing statute).
172. 5 CONN. RECORDS, *supra* note 1, at 16 (listing higher rates for imported than for domestic sugar and chocolate).
173. 5 CONN. RECORDS, *supra* note 1, at 116–17, 338–39.
174. A chariot was a kind of town carriage. 1 WILLIAM FELTON, A TREATISE ON CARRIAGES 26 (London 1794).
175. 1786 MASS. RESOLVES, *supra* note 1, at 131. For earlier statutory versions, see 1781 *id.* at 525–33 (reproducing an earlier Massachusetts excise that also imposed annual fees on vehicles); 1782 *id.* at 91 (same).
176. *Brutus VI*, N.Y. J., Dec. 27, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 110, 113–14. See also Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 1, at 374, 377 (listing possible targets for excises).

Most excises were laid at the point of sale,<sup>177</sup> but some were not.<sup>178</sup> A New York excise was levied on tavern owners in advance of expected sales.<sup>179</sup> Use of large and expensive luxury goods—such as horses<sup>180</sup> and carriages—was excised on a periodic, usually annual, basis. The 1786 Massachusetts excise statute charged owners of coaches and chariots £8 yearly and taxed other transportation devices annually as well.<sup>181</sup>

A few “excises” looked much like direct taxes. For example, Massachusetts imposed excises on tavern owners’ inventory of alcoholic beverages, although as part of a formula to calculate sales.<sup>182</sup> Even closer to the line was the Massachusetts excise on the total annual production of cider mills.<sup>183</sup> Although the legislature probably expected all of that production to be consumed, the absence of any offset for surplus created a levy closely resembling a direct tax on production. Similarly, the Commonwealth’s annual “excise” on vehicles resembled a direct levy on personal property.<sup>184</sup> This kinship between some excises and direct taxes helps explain the difficulty presented in *Hylton v. United States*,<sup>185</sup> in which the Supreme Court addressed the issue of whether an exaction on carriages for (allegedly) domestic use was direct or indirect. The difficulty of the case was all the greater because everyone knew, despite stipulations to the contrary, that some of the taxed carriages were actually capital assets of a rental business.<sup>186</sup>

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177. *E.g.*, 1786 MASS. RESOLVES, *supra* note 1, at 138–39 (imposing retail excise payable by tavern owners).

178. 1 BLACKSTONE, *supra* note 1, at \*310 (listing the points of collection of various British excises); 4 CHAMBERS, *supra* note 1 (stating that an excise was levied “sometimes upon the consumption of the commodity, or frequently upon the retail sale”).

179. 1788 N.Y. Laws 283–88 (reproducing statute imposing an excise).

180. AN ENQUIRY INTO THE CAUSES OF THE PRESENT HIGH PRICE OF PROVISIONS 51–52 (London 1767) (advocating a tax on horses because of their luxury character) [hereinafter AN ENQUIRY]. *See also id.* at 206 (describing as an “indirect tax” one levied “upon horses used in coaches, &c.”).

181. 1786 MASS. RESOLVES, *supra* note 1, at 131.

182. 1781 MASS. RESOLVES, *supra* note 1, at 525–26; *see also id.* at 578 (exempting carriages held for sale from excise).

183. 1782 MASS. RESOLVES, *supra* note 1, at 100.

184. 1786 MASS. RESOLVES, *supra* note 1, at 131.

185. 3 U.S. (3 Dall.) 171 (1796).

186. *Id.* at 171–72 (stipulating “[t]hat the Defendant, on the 5th of *June*, 1794, and therefrom to the last day of *September* following, owned, possessed, and kept, 125 chariots for the conveyance of persons, and no more: that the chariots were kept exclusively for the Defendant’s own private use, and not to let out to hire, or for the conveyance of persons for hire”). However, the truth of the allegation that 125 carriages were kept for one



One other point of vocabulary: Eighteenth century commentators sometimes applied variations on the word “excise” to concepts technically unrelated. Thus, the word “exciseman” could refer to any assessor, even of a direct tax. Oliver Ellsworth said that the Dutch “excised” even their “houses of infamy,” although the Dutch tax was imposed on services rather than commodities, and technically was a non-excise duty.

*C. The Political and Moral Bases of the Direct Tax/  
Indirect Tax Distinction*

Direct taxes encompassed a wide range of levies, but their common characteristic was that they were exactions on existing and producing. Indirect taxes were levies on consuming, on boundary crossings, and on certain special transactions.<sup>187</sup>

Some other criteria that might seem relevant to the distinction between direct and indirect taxes actually were not. Before the Revolution there had been much discussion of the difference between “internal” taxes (levies imposed within jurisdictional boundaries) and “external” taxes (levies on foreign trade).<sup>188</sup> That was not the same as the difference among direct and indirect taxes, however. Although all direct taxes were internal, some indirect taxes—excises and other domestic duties—also were internal.<sup>189</sup>

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family’s private use is very unlikely. On this aspect of the case, see Jensen, *supra* note 1, at 2351–52 and Campbell, *supra* note 1, at 130.

187. *Supra* Parts III & IV.

188. *E.g.*, DICKINSON, *supra* note 1, at 37, 42–45 (discussing the distinction).

189. THE FEDERALIST NO. 36 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 302, 304 (“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.”); Letter from the Federal Farmer to the Republican No. III (Oct. 10, 1787), *reprinted in* 19 DOCUMENTARY HISTORY, *supra* note 1, at 218, 224–25 (referring to impost duties as external and poll and land taxes and duties on written instruments as internal); Letter from the Federal Farmer to the Republican No. XVII (Jan. 23, 1788), *reprinted in* 17 DOCUMENTARY HISTORY, *supra* note 1, at 350, 358 (referring to duties, excises, and direct taxes as internal). Admittedly, there are Founding-Era records that may reflect some confusion on this point. *E.g.*, 2 DOCUMENTARY HISTORY, *supra* note 1, at 557 (reporting speech of James Wilson at the Pennsylvania ratifying convention referring to “internal taxes or excises,” it not being clear whether Wilson meant to communicate that those items were mutually exclusive); *Georgian, GAZETTE ST. GA.*, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 1, at 236, 237 (mentioning “internal taxation and excises,” as if the two were separate). But there was not much uncertainty: Participants in the constitutional debates generally identified excises as “internal.” *E.g.*, THE FEDERALIST NO. 36 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 302, 304; 2 DOCUMENTARY HISTORY, *supra* note

Nor did incidence of the levy define the distinction between direct and indirect taxes. Contemporaneous writers recognized that the incidence of direct taxes might fall on either the taxpayer or be passed on to others.<sup>190</sup> To be sure, many asserted that the burden of *indirect* taxes usually fell on consumers,<sup>191</sup> but commentators also acknowledged that in some market conditions the burden of an indirect tax could settle on the merchant or producer instead.<sup>192</sup>

Nor was the line governed (as I once believed) by whether the exaction was imposed at the time of an item was bought or sold. Import and export duties were levied when an item entered or left the country irrespective of whether there was a change of ownership. Excises on high-cost luxuries (such as carriages) typically were levied annually rather than on sale; the annual fee might bear no relation to the sale price.<sup>193</sup> New York imposed a “Duty of Excise” on tavern owners apparently calculated on prospective sales volume, but paid in advance.<sup>194</sup>

The fundamental distinction between direct and indirect taxes seems not to have been economic, but political and moral. The political aspect derived from popular distaste for the levies on persons and production traditionally embodied in omnibus tax statutes and the greater popular acceptance of excises and other duties. The moral aspect was threefold: First, most people deemed it better for society

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1, at 445 (reporting speech by William Findley, an Anti-Federalist, at the Pennsylvania ratifying convention).

190. *E.g.*, SMITH, *supra* note 1, at 288–89 (claiming that a direct tax on labor causes the price of labor to rise accordingly, ultimately to the cost of the consumer). *See also* AN ENQUIRY, *supra* note 180, at 49 (stating “[t]he general tendency of taxes of all kinds to enhance the price of every thing [sic] brought to market is too obvious to need a proof”).

191. *E.g.*, 1 ANNALS OF CONG. 184–85 (1789) (Joseph Gales ed. 1834) (quoting John Lawrance [erroneously spelled “Lawrence”] as stating that tonnage on exports will raise price and is in effect a prohibited tax on exports); *Plain Truth*, INDEP. GAZETTER, Nov. 10, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 216, 218 (claiming imposts will be included in the price); *Connecticutensus, To the People of Connecticut*, AM. MERCURY, Dec. 31, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 1, at 512, 514 (claiming that the consumer ultimately pays the cost of duties on imported goods).

192. *E.g.*, THE FEDERALIST NO. 33 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 268; DICKINSON, *supra* note 1, at 59–61 (stating that the incidence of an import duty raised the price to the consumer, but also acknowledging it could fall on the merchant by restricting his trade); *see also id.* at 72 (explaining that the incidence of a duty depends on conditions).

193. Campbell, *supra* note 1, at 140.

194. 1788 N.Y. Laws 283–88.

and for the development of individual character to impose burdens on consumption, particularly non-essential consumption, than on living or producing.<sup>195</sup> Second, they deemed it morally preferable to lay burdens on well-to-do people who dealt in luxuries rather than on the thrifty and productive or on the poor and “middling folk.”<sup>196</sup> Third, they thought it preferable to tax (and thereby discourage) the use of products, such as alcoholic beverages, that weakened individual character or offered marginal or negative social value.<sup>197</sup>

The moral aspects the direct/indirect distinction are illustrated by legislative labeling as “excises” (and therefore indirect) annual impositions on expensive luxury items such as carriages. They are illustrated further by the common political technique of opposing a regulation or an indirect tax by assailing it as a form of immoral direct tax.<sup>198</sup>

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195. *E.g.*, TEMPERATE, UNBORROWED ANIMADVERSIONS, ON THE PAMPHLET LATELY PUBLISHED BY RICHARD BISHOP OF CLOYNE, ON THE SUBJECT OF TYTHES 17 (Dublin, J. M. Davis, No. 8, Skinner-Row 1787) (stating that “every Tax on honest Industry is in its Nature execrable in Society”); *id.* at 39 (“A Mode of Tything which is manifestly a Tax or Check on Agriculture (that honest Industry which of all others is the most natural and the most conducive to publick Prosperity”) cannot be advisable); *id.* at 40 (“[B]ut a direct crippling Tax on such an Industry as Tillage . . . appears to us to have Something horrid on the Face of it.”). *See also supra* text accompanying note 63 (reproducing remarks by Oliver Ellsworth at the Connecticut ratifying convention).

196. AN ENQUIRY, *supra* note 180, at 50 (stating that “[i]t is universally allowed, that taxes upon luxury are of all others the most equitable, because the least prejudicial to the body of the people.”).

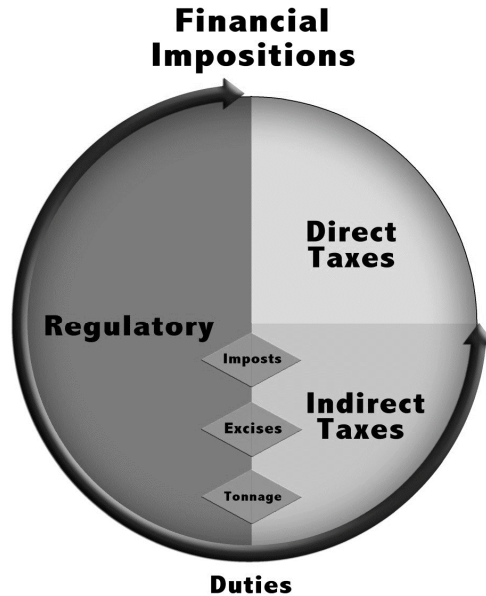
197. *E.g.*, *supra* note 162 and accompanying text.

198. For parliamentary speeches, see 43 H.C. JOUR. 167 (Feb. 4, 1788) (reporting petition of John Wilkinson complaining of the poor rates [property taxes] on his iron smelting business: “Buildings that are the necessary Instruments of his Trade, and which therefore, like the most ruinous of the Imposts of France, operate as a direct Tax upon Industry”); 27 PARLIAMENTARY REGISTER, *supra* note 1, at 432–36 (Apr. 16, 1790) (quoting William Fullarton opposing the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton’s speech also is reported at 28 COBBETT, *supra* note 1, at 684. It addressed Richard Brinsley Sheridan’s bill against the tobacco excise. *See* 28 COBBETT, *supra* note 1, at 649 (addressing the tobacco excise tax).

For newspaper articles, see GAZETTEER AND NEW DAILY ADVERTISER (London), Dec. 13, 1790 (assailing a proposed tax on porter [ale] as “directly and solely a local tax upon labour and poverty”); GAZETTEER AND NEW DAILY ADVERTISER (London), Oct. 30, 1789 (printing a letter opposing the tobacco excise as effectively “a direct tax to the value of three days labour”); GAZETTEER AND NEW DAILY ADVERTISER (London), Nov. 6, 1789 (opposing an election regulation on the grounds that “it shall be necessary to pay a direct tax, not less than the local price of ten days labour”).

For other writings, see SECOND REPORT, COMMITTEE APPOINTED TO ENQUIRE IN THE STATE OF THE BRITISH FISHERIES 5–7 (1785) (arguing that the duties on herring for home consumption operated as a “direct

What has been said thus far about how the founding generation classified impositions and taxes can be summarized in the following chart.



Graphic by Sarah Bouma  
Independence Institute

## V. THE APPORTIONMENT RULE

### A. *Reasons for Apportionment of Direct Taxes*

The framers’ representation, uniformity, and apportionment clauses were the product of compromise.<sup>199</sup> But they were not merely the

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Tax upon Subsistence”); CONSIDERATIONS ON THE POLICY, COMMERCE AND CIRCUMSTANCES OF THE KINGDOM 168 (London 1771) (arguing that “the payment of the bounties . . . has not only been a direct tax on the people to their whole amount, but also an indirect tax, in the prices of those commodities for their consumption, to the full of the differences between market and shipping rates”).

199. *Mark Antony*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 672, 673–74, 676 (describing the apportionment rule as a compromise). The apportionment rule appears at U.S. CONST. art I, § 2, cl. 3, art. I, § 9, cl. 4.

product of compromise.<sup>200</sup> Unifying principles can guide group decision-making, and that was the case here. In wading through the back-and-forth discussion on these topics at the Constitutional Convention, one should not let details distract from the unifying principles at work. Or, to resort to a stock market analogy, one should not permit seemingly-random fluctuations to distract from underlying trends.

In this context, the most basic unifying principle was that, at least in the lower legislative chamber, taxation should be coupled with representation.<sup>201</sup> This principle had been a justification for the Revolution and no one at the Philadelphia convention seems to have overtly disagreed with it. The framers saw the practical application of this principle as an apportionment rule that tailored each state’s tax burden to its congressional representation.

In addition to the taxation/representation principle, there were at least two other considerations behind the decision to apportion direct taxes. One was that apportionment was the prevailing custom: England apportioned direct taxes by counties and other local entities,<sup>202</sup> and

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200. Cf. Jensen, *supra* note 1, at 2385 (noting that “it is absurd to conclude that, because the apportionment rule was part of a compromise, it was a meaningless requirement”).

201. 1 FARRAND’S RECORDS, *supra* note 1, at 562 (quoting Rufus King as saying, “Eleven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and Representation ought to go together.”); 6 DOCUMENTARY HISTORY, *supra* note 1, at 1241 (quoting Rufus King at the Massachusetts ratifying convention); Albany Federal Committee, *An Impartial Address*, Apr. 20, 1788, reprinted in 21 DOCUMENTARY HISTORY, *supra* note 1 at 1388, 1390 (defending the inclusion of slaves in the apportionment rule because “[a]greeable to the New System, taxation and representation must go together”).

202. See, e.g., 13 Anne, c. 1 (1713) (apportioning, in a direct tax statute, taxes among counties and other local entities); 1 BLACKSTONE, *supra* note 1, at \*302 (stating that the method of raising the land tax in England was “by charging a particular sum upon each county, according to the valuation given in, A.D. 1692”, and then assessing and raising that sum from individuals). The valuation of 1692 remained unchanged throughout the eighteenth century. EINHORN, *supra* note 1, at 16.

most, if not all, states similarly allocated them by towns<sup>203</sup> or by counties.<sup>204</sup> The Articles of Confederation allocated requisitions by state land values.<sup>205</sup>

Another consideration lay in values of public trust. As I have explained elsewhere, the Founders were heavily imbued with the idea that government was a public trust and should be conducted on fiduciary principles.<sup>206</sup> They particularly emphasized the duty of *impartiality*—that is, equal treatment in equal circumstances of those served.<sup>207</sup> Indeed, the apportionment rule is only one of several constitutional provisions designed to assure impartial treatment of both individuals and states.<sup>208</sup> Without the apportionment rule, a congressional majority from one group of states might vote to extract a disproportionate share of revenue from the rest. The Founders had witnessed this political vice,<sup>209</sup> which in modern times was captured in the late Senator Russell Long’s epigram, “Don’t tax you, don’t tax me, tax that man behind the tree.”<sup>210</sup> An apportionment rule would curb discriminatory tax legislation. Although the interests of individuals and states

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203. *See, e.g.*, 1780 MASS. RESOLVES, *supra* note 1, at 91-104. Other apportionment formulae appear at 1781 *id.* at 503-18, 547-60; 1784 *id.* at 62-76; and 1785 *id.* at 580-97. A 1784 statute provided for a re-evaluation of taxable items. 1784 *id.* at 57-60.
204. *E.g.*, BECKER, *supra* note 1, at 67-69, 240 (New Jersey); *id.* at 155 (New York); *id.* at 174-76 (Delaware); EINHORN, *supra* note 1, at 82 (Delaware); *id.* at 92 (Pennsylvania); *id.* at 94 (South Carolina, by parishes, the local equivalent of counties).
205. ARTICLES OF CONFEDERATION of 1781, art. VIII (“All charges of war, and all other expenses . . . shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state . . . as such land and the buildings and improvements thereon shall be estimated, according to such mode as the united states, in congress assembled, shall, from time to time, direct and appoint.”).
206. Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1178 (2004).
207. *See* Lawson, Seidman & Natelson, *supra* note 1, at 441 (“[E]xecutive and judicial actors . . . are bound to exercise their discretionary authority with care, loyalty, and impartiality.”).
208. *E.g.*, U.S. CONST. art. I, § 8, cl. 1 (uniformity in imposts and excises); *id.* art. I, § 9, cl. 6 (no preference given to particular states in revenue or commerce); *id.* art. IV, § 2, cl. 1 (protecting citizens visiting other states from certain forms of discrimination); *id.* art. IV, § 3 (protecting states from unwanted divisions and combinations); *id.* art. V. (protecting state equality in the Senate).
209. *E.g.*, BECKER, *supra* note 1, at 20-27 (discussing tax law manipulation in Rhode Island).
210. John H. Cushman, *Russell B. Long, 84, Senator Who Influenced Tax Laws*, N.Y. TIMES (May 11, 2003), <http://www.nytimes.com/2003/05/11/>

sometimes conflicted,<sup>211</sup> as a general proposition protecting states from disproportionate federal tax burdens would protect individuals as well.

Apportionment came at a cost, however. It was administratively clumsy, and could work injustice among similarly-situated individuals who happened to reside in different states. So there was an argument for limiting its scope. The manner in which the framers did so was to apply the apportionment rule to direct taxes only. For indirect taxes, the framers substituted a ban on federal taxation of exports<sup>212</sup> and a requirement that indirect taxes<sup>213</sup> and “Regulation of Commerce or Revenue” be uniform throughout the nation.<sup>214</sup> These provisions reduced the chances that a congressional majority might play favorites among sections of the country by imposing heavier exactions in some places than in others.

Why limit apportionment only to direct taxes? There were at least three reasons. First, the apportionment rule was problematic when applied to import and export customs because accidents of geography resulted in much higher import and export activity in some states than in others.<sup>215</sup> Second, the protection offered by apportionment was more crucial for direct than for indirect levies. Some direct taxes, such as capitations and exactions on property, were “dry taxes”<sup>216</sup>—that is,

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us/russell-b-long-84-senator-who-influenced-tax-laws.html [http://perma.cc/UE8H-EQFE].

211. Cf. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 3, cl. 1 (resolving the conflict by using different representation rules in House and Senate).
212. *Id.* art. I, § 9, cl. 5. See 1 FARRAND’S RECORDS, *supra* note 1, at 592 (quoting Charles C. Pinckney as stating, “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.”).
213. U.S. CONST. art I, § 8, cl. 1.
214. *Id.* art. I, § 9, cl. 6.
215. 1 FARRAND’S RECORDS, *supra* note 1, at 197 (reporting Rufus King as stating, “If the *actual* contributions were to be the rule the non-importing States, as Cont. & N. Jersey, wd. be in a bad situation indeed. It might so happen that they wd. have no representation.”); *id.* at 592 (“Mr. Wilson approved the principle, but could not see how it could be carried into execution; unless restrained to direct taxation.”). *But see id.* (reporting that Gouverneur Morris supported different rules for direct and indirect taxes, but “[n]otwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union.”).
216. Letter from James Sullivan to Rufus King (Sept. 28, 1787), *reprinted in 4 DOCUMENTARY HISTORY, supra* note 1, at 21 (referring to “dry taxes, a tax on polls & Estates by a census”). See also MASS. GAZETTE, Oct. 9, 1787,

imposed on status rather than on transactions. It could be difficult even for well-to-do people to pay oppressive “dry taxes” if their wealth was in illiquid form. The impoverished faced even greater potential hardship.<sup>217</sup> The poor could usually avoid indirect levies by avoiding luxuries<sup>218</sup>—in fact, some people even claimed indirect levies were “voluntary”<sup>219</sup>—but abstinence did not enable one to evade most direct taxes. Although some of the latter were adjusted according to means,<sup>220</sup> many were not.

Third, limiting apportionment to direct taxes likely would restrict it to taxes rarely imposed. The framers expected the new federal government to rely, at least in times of peace, almost exclusively on indirect levies. This was partly because indirect levies were easier to collect. Duties on imports, at least, could be gathered at discrete locations, particularly seaports; but as Benjamin Franklin observed, “Direct taxes are not so easily levied on the scantily settled inhabitants of our wide extended country.”<sup>221</sup>

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*reprinted in 4 DOCUMENTARY HISTORY, supra note 1, at 61 (“No state will be able to pay its debts otherwise than by a dry tax”); Vox Populi, MASS. GAZETTE, Nov. 13, 1787, reprinted in 4 DOCUMENTARY HISTORY, supra note 1, at 222, 224 (referring to “a dry tax on polls and estates”); Agrippa IX, MASS. GAZETTE, Dec. 28, 1787, reprinted in 5 DOCUMENTARY HISTORY, supra note 1, at 540, 542 (referring to a “dry tax”).*

217. Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), *reprinted in 4 DOCUMENTARY HISTORY, supra note 1, at 72, 73* (stating that direct taxes “tend to oppress the poor people”); 9 DOCUMENTARY HISTORY, *supra note 1, at 1156* (quoting George Mason at the Virginia ratifying convention, noting that a capitation “falls light on the rich, and heavy on the poor”); Hugh Williamson, *Speech at Edenton, N.C.*, N.Y. DAILY ADVERTISER, Feb. 25–27, 1788, *reprinted in 16 DOCUMENTARY HISTORY, supra note 1, at 201, 206* (stating that taxes on lands and heads “cannot fail to grind the face of the poor”). Williamson had represented North Carolina at the Constitutional Convention.
218. *Plain Truth: Reply to an Officer of the Late Continental Army*, INDEP. GAZETTER, Nov. 10, 1787, *reprinted in 2 DOCUMENTARY HISTORY, supra note 1, at 216, 218* (arguing that “every man will have the power of refusal [to pay duties] by not consuming the taxed luxuries”); 2 DOCUMENTARY HISTORY, *supra note 1, at 481* (reporting speech of James Wilson at the Pennsylvania ratifying convention).
219. *Philanthrop, To the People*, AM. MERCURY, Nov. 19, 1787, *reprinted in 3 Documentary History, supra note 1, at 467, 469* (describing the duty on imports as a “voluntary tax”).
220. *Supra note 111 and accompanying text.*
221. Letter from Benjamin Franklin to Louis-Guillaume Le Veillard (Feb. 17, 1788), *reprinted in 16 DOCUMENTARY HISTORY, supra note 1, at 135, 136. See also supra note 122, at 275 and accompanying text.*



The other reason the framers expected the new government to rely principally on indirect taxes was that direct taxes were profoundly unpopular. This unpopularity prevailed in every part of the country.<sup>222</sup> Because some commentators seem to assume that apportionment was merely an accommodation to the South, it may be worthwhile to detail the breadth and depth of the anti-direct tax sentiment behind the apportionment rule.

Direct taxes already were unpopular by 1776. That year, Maryland's new Declaration of Rights proclaimed that “levying taxes by the poll is grievous and oppressive, and ought to be abolished.”<sup>223</sup> During the subsequent war the states imposed massive direct tax burdens to finance military actions, and after the war they continued to do so to finance debt repayment.<sup>224</sup> Not just the level of taxation, but the methods of impositions were widely viewed as unfair.<sup>225</sup> Thus, in 1786 the Massachusetts general court (legislature) adopted an excise statute reciting that its indirect levies would “ease the people as much as possible of direct taxes.”<sup>226</sup> The following year, popular complaint induced Virginia to repeal its poll tax.<sup>227</sup>

During the ratification process (1787-90) many people objected to granting Congress *any* power to lay direct taxes.<sup>228</sup> They feared that

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222. Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 72, 73 (stating that direct taxes “are always extremely unpopular”); *A Dialogue Between Mr. Schism and Mr. Cutbrush*, BOS. GAZETTE, Oct. 29, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 162, 164 (“[D]ry Taxes are held in mortal detestation now a-days.”); 6 DOCUMENTARY HISTORY, *supra* note 1, at 1245 (quoting Thomas Dawes, Jr., at the Massachusetts ratifying convention as saying, “[t]here is a prejudice . . . against direct taxation”).

223. MD. CONST. art. 13 (1776). During the Constitutional Convention, Maryland's Luther Martin sought a rule making Congress's power to lay direct taxes contingent on failure of previous requisitions. Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 1, at 374, 377-78.

224. BECKER, *supra* note 1, at 219-27.

225. *See generally* BECKER, *supra* note 1 (describing various views on the imposition of taxes).

226. 1786 MASS. RESOLVES, *supra* note 1, at 130.

227. Dodd, *supra* note 1, at 362. *See also* VA. H.D. JOUR. at 12 (Nov. 4, 1777) (reproducing petition to repeal poll tax); *id.* at 190, Dec. 13, 1777 (reproducing recommendation of the committee of the whole for repeal of the poll tax).

228. *See, e.g.*, Letter from David Redick to William Irvine (Sept. 24, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 135 (expressing reservations about the direct tax power); FREEMAN'S J., Sept. 26, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 146-48 (objecting to the Constitution's failure to ban capitations); 3 DOCUMENTARY

Congress might raise the overall burden and undo whatever progress toward equity states had achieved during the war.<sup>229</sup> At least nine state conventions considered motions for constitutional amendments restricting the federal direct-tax power. These motions lost in Pennsylvania<sup>230</sup> and Maryland,<sup>231</sup> but they prevailed in Massachusetts,<sup>232</sup> Rhode Island,<sup>233</sup> New Hampshire,<sup>234</sup> New York,<sup>235</sup> Virginia,<sup>236</sup> North Carolina,<sup>237</sup> and South Carolina.<sup>238</sup> Anti-direct-tax sentiment was evident even in the first session (1789) of the heavily Federalist First Congress. Although that session ultimately failed to propose a direct-tax constitutional amendment,<sup>239</sup> its records show members straining to avoid direct levies.<sup>240</sup> When North Carolina and Rhode Island joined the union

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HISTORY, *supra* note 1, at 438, 440 (reprinting statement of the Connecticut town of Preston objecting to the direct tax power).

229. BECKER, *supra* note 1, at 225–26.
230. 2 DOCUMENTARY HISTORY, *supra* note 1, at 598 (reproducing a proposed amendment that “no taxes, except impost and duties upon goods imported and exported, and postage on letters shall be levied by the authority of Congress”).
231. *Amendments Proposed by William Paca in the Maryland Convention*, MD. J., Apr. 29, 1788, reprinted in 17 DOCUMENTARY HISTORY, *supra* note 1, at 240, 241 (“That Congress shall not lay direct Taxes on Land, or other Property, without a previous Requisition of the respective Quotas of the States, and a failing, within a Limited Time, to comply therewith”). See also 17 DOCUMENTARY HISTORY, *supra* note 1, at 244–45 (discussing a similar amendment).
232. 6 DOCUMENTARY HISTORY, *supra* note 1, at 1469 (demanding amendment that “Congress do not lay direct Taxes but when the Monies arising from the Impost & Excise are insufficient” and requisitions first have been attempted).
233. 26 DOCUMENTARY HISTORY, *supra* note 1, at 1000, 1001 (seventh, eighth, and ninth items).
234. 18 DOCUMENTARY HISTORY, *supra* note 1, at 186, 188 (fourth item).
235. 18 DOCUMENTARY HISTORY, *supra* note 1, at 297, 300–301 (statement of understanding); *id.* at 301–02, 303 (proposed amendment).
236. 18 DOCUMENTARY HISTORY, *supra* note 1, at 203 (third item).
237. 18 DOCUMENTARY HISTORY, *supra* note 1, at 317.
238. 18 DOCUMENTARY HISTORY, *supra* note 1, at 72.
239. Congress did consider such an amendment. 1 ANNALS OF CONG 76 (1789) (Joseph Gales ed., 1834) (reproducing proposed amendment that direct taxes not be imposed “but where the moneys arising from the duties, impost, and excise are insufficient,” and even then only after unsuccessful requisitions).
240. *E.g.*, 1 ANNALS OF CONG. 281; *id.* at 285 (quoting John Page as distinguishing a duty of tonnage from direct taxes and supported a tonnage law to avoid direct taxes); *id.* at 342 (reporting Roger Sherman as stating that a duty is an alternative to direct taxes and arguing for

after the first congressional session, both of their legislatures voted to instruct their Senators to oppose all direct taxes.<sup>241</sup>

To secure the Constitution’s ratification, its promoters assured the public that Congress would enact direct taxes only as a last resort.<sup>242</sup> They contended further that congressional taxes would reduce the state burden on a dollar-per-dollar basis.<sup>243</sup> They must have been grateful that, to bolster those unconvincing arguments, they could reassure the public that, if direct taxes did prove necessary, every state would bear only its fair share of the burden.<sup>244</sup> Without this reassurance, the Constitution might not have been ratified.

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imposts rather than direct taxes). The sentiment against direct taxes was not unanimous. *See id.* at 314 (reporting James Jackson as stating that direct taxes would be more equitable than an impost).

241. 21 MINUTES OF THE N.C. HOUSE OF COMMONS 1029 (Dec. 10, 1790), <http://docsouth.unc.edu/csr/index.html/document/csr21-0208> [<http://perma.cc/2CXX-Z9GZ>]; 10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 409 (Providence, Providence Press Co., John Russell Bartlett ed., 1863–65). *See also* Letter from Senators Stanton and Foster to His Excellency the Governor of Rhode Island (Feb. 17, 1791), *in* 10 RECORDS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND at 422, 424 (Providence, Providence Press Co., John Russell Bartlett ed., 1863–65) (reproducing the response from the Senators, stating “those who are elected to serve in the next Congress are strongly opposed in principle, to levying direct taxes, or land taxes”).
242. *E.g.*, James Wilson, Speech in the State House Yard (Oct. 6, 1787), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 167, 171 (“[T]he objects of direct taxation should be within reach in all cases of emergency”); 2 DOCUMENTARY HISTORY, *supra* note 1, at 558 (reporting speech by James Wilson at the Pennsylvania ratifying convention); 6 *id.* at 1250 (quoting Francis Dana at the Massachusetts ratifying convention); *A Native of Virginia: Observations upon the Proposed Plan of Federal Government*, Apr. 2, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 1, at 655, 663 (stating that revenues from imposts and the post office would be sufficient). *Cf. Fabius*, ALBANY FED. HERALD, Mar. 17, 1788, *reprinted in* 20 DOCUMENTARY HISTORY, *supra* note 1, at 862–63 (arguing that direct taxes are necessary in time of war).
243. *E.g.*, 2 DOCUMENTARY HISTORY, *supra* note 1, at 481 (reporting speech of James Wilson at the Pennsylvania ratifying convention); *Philanthrop, To the People*, AM. MERCURY, Nov. 19, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 1, at 467, 469; 9 DOCUMENTARY HISTORY, *supra* note 1, at 999 (quoting George Nicholas at the Virginia ratifying convention).
244. 2 DOCUMENTARY HISTORY, *supra* note 1, at 538 (reporting speech of Thomas McKean, a Federalist, at the Pennsylvania ratifying convention, observing that a direct tax law “must equally affect every state”); Hugh Williamson, *Speech at Edenton, N.C.*, N.Y. DAILY ADVERTISER, Feb. 25–27, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 1, at 201, 207 (stating, “if a poll-tax, or a land-tax shall ever become necessary, the

B. *Adoption of an Apportionment Formula*

Agreeing on the general principle of apportionment was less difficult than settling on a formula applying it. The Confederation system of allocating requisitions by state land values had proved impractical.<sup>245</sup> Apportionment by actual taxes paid seemed to be likewise unworkable.<sup>246</sup> A new formula was needed.

The starting point in the search was collective agreement that each state’s contribution in federal taxes would be a function of (1) the state’s population<sup>247</sup> (2) and its wealth.<sup>248</sup> Fortunately, experience strongly suggested that, for the most part, wealth followed population. In other words, population usually was a good proxy for wealth.

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weight must press equally on every part of the Union. For in all cases, such taxes must be according to the number of inhabitants.”).

245. 1 FARRAND’S RECORDS, *supra* note 1, at 542 (reporting that “Mr. Pinkney [said that] . . . [t]he value of land had been found on full investigation to be an impracticable rule”); 2 DOCUMENTARY HISTORY, *supra* note 1, at 462 (reporting James Wilson at the Pennsylvania ratifying convention as saying, “[a]fter trying [the Confederation method] for a number of years, it was found on all hands, to be a mode that could not be carried into execution”); *Mark Antony*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 1, at 672–73 (confirming the same); 6 DOCUMENTARY HISTORY, *supra* note 1, at 1245–46 (quoting Thomas Dawes, Jr. as affirming the same).
246. 1 FARRAND’S RECORDS, *supra* note 1, at 36 (“Mr. King observed that the quotas of contribution which would alone remain as the measure of representation, would not answer; because waving every other view of the matter, the revenue might hereafter be so collected by the general Govt. that the sums respectively drawn from the States would <not> appear; and would besides be continually varying. <Mr. Madison admitted the propriety of the observation, and that some better rule ought to be found.”). *See also id.* at 542 (“Mr. Pinkney [said that] . . . [t]he contributions of revenue including imports & exports, must be too changeable in their amount; too difficult to be adjusted; and too injurious to the non-commercial States. The number of inhabitants appeared to him the only just & practicable rule.”).
247. *Id.* at 561 (quoting William Paterson) (“What is the true principle of Representation? It is an expedient by which an assembly of certain individuals. [sic] chosen by the people is substituted in place of the inconvenient meeting of the people themselves.”); *id.* at 582 (“Mr. Sherman thought the number of people alone the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.”).
248. *E.g., id.* at 567 (“Genl. Pinkney urged the reduction, dwelt on the superior wealth of the Southern States, and insisted on its having its due weight in the Government.”). *See also id.* at 582 (“Mr. Rutledge [sic] contended for the admission of wealth in the estimate by which Representation should be regulated. The Western States will not be able to contribute in proportion to their numbers, they shd. not therefore be represented in that proportion.”).

Madison reported Connecticut’s William Samuel Johnson as telling the Constitutional Convention that “wealth and population were the true, equitable rule of representation; but . . . these two principles resolved themselves into one; population being the best measure of wealth.”<sup>249</sup>

What was true in general, however, was not true *always*. Slavery created a valuation problem. Although few of the framers thought slavery was a good thing, slavery was a fact and they had to address the conundrum it created. The conundrum was this:

- Slaves contributed to a state’s wealth, so if one of two similar states with the same free population also contained slaves, then the state containing slaves would produce more tax revenue, but
- although slaves produced wealth, they did not produce *as much wealth* as an equal number of free people. This was because slaves could not sell their labor or talents in the free market, where incentives for production were strongest and labor and talents fully valued. Thus, given two similar and equally-populous states, one entirely free and the other slaveholding, the state entirely free would produce more tax revenue.<sup>250</sup>

To attune state representation to projected tax contributions, therefore, the framers needed to calculate the tax productivity of each

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249. *Id.* at 593; *see also id.* at 179–80 (reporting that William Paterson, “observed that in districts as large as the States, the number of people was the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same.”); *id.* at 587 (“Mr. Ghorum. supported the propriety of establishing numbers as the rule. He said that in Massts. estimates had been taken in the different towns, and that persons had been curious enough to compare these estimates with the respective numbers of people; and it had been found even including Boston, that the most exact proportion prevailed between numbers & property.”); *id.* at 587–88 (reporting James Wilson as making a comparable observation).

250. Thus, Thomas Jefferson quoted Homer’s aphorism, written of white slaves, “*Jove fix’d it certain, that whatever day, Makes man a slave, takes half his worth away.*” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Merrill D. Peterson ed., 1984), available at <http://web.archive.org/web/20110221130550/http://etext.lib.virginia.edu/etcbin/toccer-new?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all> [<http://perma.cc/KY27-A7JL>]. At the Constitutional Convention, Pierce Butler of South Carolina argued that slaves were as productive as freemen, 1 FARRAND’S RECORDS, *supra* note 1, at 580, but the convention disagreed. *Cf. id.* (reporting disagreement with Butler by Nathaniel Gorham of Massachusetts) and *id.* at 581 (reporting remarks of George Mason to the effect that slaves “were useful to the community at large” and so “they ought not to be excluded from the estimate of Representation,” but arguing that he “could not however regard them as equal to freemen and could not vote for them as such.”).

slave as some fraction of the tax productivity of each free person. As it happened, the Confederation Congress already had estimated this fraction as three-fifths.<sup>251</sup> This resulted in a formula of

$$T = P_f + (3/5 \times P_s)$$

where  $T$  was a state’s tax burden,  $P_f$  the state’s free population and  $P_s$  the state’s slave population.

The three-fifths formula is sometimes said to be the product of pure racism,<sup>252</sup> but the record does not support that. Madison’s summary of the 1783 congressional debates that produced the formula show that the considerations leading to it were purely economic. They included the respective imports and exports from states relying or not relying on slavery; the effect of climate differences on productivity; the levels of consumption of free and unfree persons; and, most importantly, the fact that slaves did not have the same positive incentives to produce that motivated free people.<sup>253</sup> During the deliberations, moreover, the term

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251. 1 FARRAND’S RECORDS, *supra* note 1, at 580 (quoting Nathaniel Gorham) (“This ratio was fixed by Congs. as a rule of taxation . . . . The arguments on ye. former occasion had convinced him that 3/5 was pretty near the just proportion and he should vote according to the same opinion now”). Gorham had served as president of Congress. National Archives, *The Founding Fathers: Massachusetts*, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_massachusetts.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_massachusetts.html) [<http://perma.cc/3YLJ-2KDA>] (last visited Nov. 19, 2015). *See also* Campbell, *supra* note 1, at 148 (quoting Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295, 304–305 (2004)) (pointing out that the ratio had been “painfully worked out during the years 1776 to 1783 as a rough expression of ‘the relative price of slave and free labor’”).

252. Richard Stengel, *One Document, Under Seige*, Time Mag. (June 23, 2011), <http://content.time.com/time/nation/article/0,8599,2079445,00.html> [<http://perma.cc/8NF6-XLBS>] (“The framers . . . gave us the idea that a black person was three-fifths of a human being . . .”).

253. 25 J. CONT’L CONG. 949 (Mar. 28, 1783) (Madison’s notes state “The arguments used by those who were for rating slaves high were, that the expence of feeding & cloathing them was as far below that incident to freemen as their industry & ingenuity were below those of freemen; and that the warm climate within w<sup>ch</sup> the States having slaves lay, compared w<sup>th</sup> the rigorous climate & inferior fertility of the others, ought to have great weight in the case & that the exports of the former States were greater than of the latter. On the other side it was said that Slaves were not put to labour as young as the children of laboring families—that, having no interest in their labor, they did as little as possible, & omitted every exertion of thought requisite to facilitate & expedite it; that if the exports of the States having slaves exceeded those of the others, their imports were in proportion, slaves being employed wholly in agriculture, not in manufactures; & that in fact the balance of trade formerly was much more ag<sup>st</sup> the S<sup>o</sup> States than the others.”).

“free white inhabitants” was altered to drop the word “white,”<sup>254</sup> thereby including at full parity the 60,000 free African Americans then living in the United States.<sup>255</sup> Also included at full parity were Indians who paid taxes—that is, those subject to direct state rather than tribal authority.<sup>256</sup>

American slavery was the product of racism (among other causes), but the three fifths rule was not. Rather, it was an acknowledgment that people—of any race—produce more wealth, and therefore more tax revenue, when they operate in free markets rather than under conditions of command and control.

The framers adopted the apportionment rule unanimously and the three-fifths formula with equal votes from the North and South.<sup>257</sup>

#### VI. THE COURTS AND COMMENTATORS (INCLUDING NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS)

The conclusions arrived at in this study differ from assertions appearing in several Supreme Court cases and scholarly examinations, particularly on the scope of the phrase “direct tax.” The cases culminate, of course, in Chief Justice Roberts’ holding that the Affordable Care Act’s individual insurance penalty was a “tax,” but not a “direct” one.<sup>258</sup> The scholarly examinations are referenced in the bibliographical footnote and throughout this Article.<sup>259</sup>

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254. *Id.* at 215 (Mar. 28, 1783).

255. Campbell Gibson & Kay Jung, *Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States*, at A-1 (U.S. Census Bureau, Population Div., Working Paper No. 76, 2005), <https://www.census.gov/population/www/documentation/twps0076/twps0076.pdf> [<http://perma.cc/3HT3-9USX>].

256. Natelson, *Indian Commerce*, *supra* note 1, at 260.

257. Campbell, *supra* note 1, at 114.

258. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

259. One contribution I do not discuss here is Charlotte Crane, Reclaiming the Meaning of ‘Direct Tax’ (Feb. 15, 2010) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1553230](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553230) [<http://perma.cc/64T8-8UWU>]. This paper has never been published, which suggests that the author considers it unfinished. (An e-mail inquiring as to the reason for non-publication went unanswered.) In it she argues that, “[b]y direct taxes, the drafters [of the Constitution] had in mind the prior practices of the states in imposing what we would now call property taxes, as opposed to taxes on commercial transactions.” *Id.* at 3. She buttresses her conclusion with citations to founding-era tax statutes. Her direct reliance on founding-era statutes explains why her conclusion is closer to

In this Part, I list nine of those assertions. The first two were advanced shortly after the Constitution was ratified; the rest came later. After each, I set forth how my conclusion differs. Then I explain the principal reasons I believe the earlier assertions were in error. To be sure, the value of previous writings varies greatly, so these reasons apply with more force to some than to others.<sup>260</sup>

The assertions, contrasted with my own findings, are as follows:

Assertion #1: *Direct taxes comprised only capitations and land levies.*<sup>261</sup> This claim seems based, in part, on the practice of referring to omnibus tax statutes as the “land tax,” even though they levied on many other objects as well. In fact, direct taxes encompassed a broad spectrum of impositions on personal property, income, profits, and enterprise.<sup>262</sup>

Assertion #2: *Apportionment of direct taxes was a surrender to the slave states.*<sup>263</sup> Actually, the apportionment decision had little or nothing to do with slavery, and the valuation formula was a purely economic estimate supported equally by North and South.<sup>264</sup>

Assertion #3: *The apportionment formula was designed to discourage slavery.*<sup>265</sup> There seems to be little evidence for this.

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my own than those of commentators who do not reference such sources. However, the primary focus of her paper is on the *Hylton* case. *Id.* at 5.

260. For example, my conclusions on direct taxes differ only slightly with those in Jensen, *supra* note 1, which I attribute to the fact that that study also was characterized by careful use of a relatively wide range of sources.

261. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796). *See also* *Springer v. United States*, 102 U.S. 586, 599 (1880) (surveying earlier cases and holding that direct taxes consist only of capitations and others on land).

262. *See supra* Part III.

263. EINHORN, *supra* note 1 (arguing that the direct/indirect distinction and apportionment were preeminently the products of slavery); *id.* at 118–20 (claiming the impost was adopted to avoid discussing slavery); *id.* at 158, 161, 172 (claiming the apportionment rule “was intended to prevent the tax debates that would politicize slavery”); Jensen, *supra* note 1, at 2385 (citing, although disagreeing with, claims that the apportionment rule was designed to accommodate slavery). The story that apportionment was imposed merely to accommodate slavery may have originated with Alexander Baldwin, a framer who served in the First Federal Congress. 2 ANNALS OF CONG. 1201 (1790) (reporting Alexander Baldwin as saying that apportionment was imposed to prevent “any special tax upon negro slaves”).

264. *See supra* Part V(B).

265. Johnson, *Fixing*, *supra* note 1, at 296 (claiming that the purpose of apportionment was to discourage slavery).



Assertion #4: *The direct/indirect distinction was largely indeterminate.*<sup>266</sup> In point of fact, the distinction was widely understood among the founding generation.<sup>267</sup>

Assertion #5: *The distinction was a mere creation of French economists who got their economics wrong.*<sup>268</sup> Actually, the distinction owed more to Anglo-American politics and morality, with some further popularization by Adam Smith.<sup>269</sup>

Assertion #6: *The distinction depended on the incidence of the tax.*<sup>270</sup> Although some founding-era writers believed an indirect tax was more likely to be paid by the consumer, the fundamental distinction was independent of the incidence of the tax.<sup>271</sup>

Assertion #7: *A direct tax was merely a levy that could practically be apportioned.*<sup>272</sup> In fact, political and moral factors seem to have been more important to the classification.<sup>273</sup>

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266. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 860 (2009); Stephanie Hunter McMahon, *A Law With A Life of Its Own: The Development of the Federal Income Tax Statutes Through World War I*, 7 PITT. TAX REV. 1, 7 (2009); EINHORN, *supra* note 1, at 165, 183 (making this claim, despite having earlier surveyed state direct tax systems). *See also* Jensen, *supra* note 1, at 2377–78 (explaining how writers have used a comment by Rufus King as evidence of indeterminacy).

267. *See supra* Part III.

268. Ackerman, *supra* note 1, at 17–18 (ascribing the origin of the direct/indirect distinction to French physiocrats such as Baron Turgot). Although this origin is not impossible, any connection with France must have been highly attenuated. It seems unlikely that the authors of the popular unrest that led to the 1786 Massachusetts excise law or the 1787 Virginia repeal legislation took their terminology from Turgot. Also, the physiocrats *promoted* direct taxes—an attitude distinctly at war with views in Britain and America. MARQUIS OF CONDORCET, *THE LIFE OF M. TURGOT* 145–47 (1787) (reporting that Baron Turgot favored direct tax to replace scores of indirect taxes—that is, tolls and market duties on transactions such as “*sales, leases, transfers, and engagements*”). Turgot argued that a “direct tax upon the net produce of land” would be the best way of assuring equity. *Id.* at 357.

The influence of Adam Smith’s direct/indirect distinction was probably greater than that of the physiocrats. *See supra* note 56.

269. *See supra* Part III.C.

270. *E.g.*, Erik M. Jensen, *Direct Taxes*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 160 (stating that the burden of indirect taxes was thought to be shifted to consumers while the burden of direct taxes could not be shifted).

271. *See supra* Part III.

272. *See* Johnson, *Fixing*, *supra* note 1.

273. *See supra* Part III.C.

Assertion #8: *Direct taxes meant the same thing as “internal” taxes.*<sup>274</sup> Although all direct taxes were internal, excises and many other duties were also internal.<sup>275</sup>

Assertion #9: *Indirect taxes were imposed on transactions and direct taxes were not.*<sup>276</sup> In fact, direct taxes sometimes fell on transactions and indirect taxes sometimes did not.<sup>277</sup>

Several factors led to these wrong turns. In some instances, the writer’s preferences have gotten in the way. For example, the justices deciding *Hylton* seem to have been hostile to apportionment,<sup>278</sup> and several distinguished modern commentators clearly have been writing in service of pre-fixed agendas.<sup>279</sup> In other instances, the historical record has been misunderstood. For example, in the eighteenth century, capitations were common, land was the most important capital asset, and direct tax statutes that actually levied on a range of items often were referred to as the “land tax”—hence capitations and land levies often were presented as examples of direct taxes.<sup>280</sup> Presumably this contributed to the notion that capitations and land levies were the *only* direct taxes.

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274. *E.g.*, Johnson, *Apportionment*, *supra* note 1 (arguing that a direct was the same as an internal tax and included excises); Jensen, *supra* note 1, at 2360 (stating that indirect taxes were those based on transfers of goods and services).

275. *See supra* Part III.C.

276. Jensen, *supra* note 1, at 2390 (“Direct taxes are those taxes that are not indirect, and indirect taxes are generally those consumption taxes imposed on transfers of goods and services.”). At one time I adhered to this view.

277. *See supra* Parts III & IV.

278. Jensen, *supra* note 1, at 2354 (noting that the views of the justices in *Hylton* may have been colored by their dislike of apportionment).

279. *E.g.*, Ackerman, *supra* note 1 (promoting a wealth tax and, therefore, arguing that only capitations should be recognized as direct); Johnson, *Fixing*, *supra* note 1 (promoting greater federal taxing flexibility and arguing that apportionment is absurd and should be avoided); *see also* Johnson, *Apportionment*, *supra* note 1. Particularly striking is the statement of Robin Einhorn of her “main findings . . . [that] the antigovernment rhetoric that continues to saturate our political life is rooted in slavery rather than liberty. The American mistrust of government is not part of our democratic heritage. It comes from slaveholding elites . . . .” EINHORN, *supra* note 1, at 7. Einhorn comes nowhere near adequately supporting this thesis. Unlike some other agenda-driven authors, however, she collects much useful information along the way.

280. *E.g.*, 22 DOCUMENTARY HISTORY, *supra* note 1, at 1940 (quoting Robert R. Livingston at the New York ratifying convention as saying “direct taxes, that is, taxes on land”).

Anachronistic assumptions also may be at work: Today we often define taxes by whether they are affixed to a transaction, where their incidence falls, and whether they are progressive or redistributive. But that was not how the Founders thought.

Most writers have based their conclusions on poor selection of evidence. Sometimes the selection has been both too narrow (for example, relying heavily on the constitutional debates while neglecting contemporaneous tax statutes)<sup>281</sup> and sometimes too broad (crediting a great deal of nonprobative material).<sup>282</sup> An illustration of a range too narrow is Justice Cardozo’s *ipse dixit* for the Court in *Steward Machine Co. v. Davis*<sup>283</sup> holding that the Social Security imposition on employers is an “excise.”<sup>284</sup> An instance of inclusion of non-probative material has been the credit some writers give to events, such as the *Hylton* case and the 1798 Direct Tax Act,<sup>285</sup> which could not have been part of the ratification bargain because they arose several years afterward. The focus on *Hylton* has been particularly misplaced because the contending arguments were, of course, generated for the litigation; because the justices’ dicta were unreliable, inconsistent,<sup>286</sup> and hedged with qualifiers,<sup>287</sup> and because the dicta were substantially contradicted both by Alexander Hamilton’s pre-case opinion (admittedly, itself suspect,

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281. *E.g.*, Johnson, *Fixing*, *supra* note 1, at 7 (relying primarily on the Constitutional Convention); Springer v. United States, 102 U.S. 586, 597 (1880) (“The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists . . .”).

282. *E.g.*, Ackerman, *supra* note 1, at 17–18 (relying on post-ratification material, including a comment by Alexander Hamilton). On Hamilton’s unreliability at this juncture, see Jensen, *supra* note 1, at 2357. Hamilton’s views seem to have been colored by his former position as continental collector for New York. BECKER, *supra* note 1, at 162–65, 223.

283. 301 U.S. 548 (1937).

284. *Id.* at 583. The Court cited three examples of “duties” (not excises), one of which was a duty on specific transactions and two of which were capitations. *Id.* at 579–80. The Court did not examine the classification of general business taxes.

285. *See, e.g.*, Campbell, *supra* note 1 (discussing both pre-ratification and post-ratification events, including the Direct Tax Act and discussion of *Hylton*).

286. Jensen, *supra* note 1, at 2354 (explaining why the dicta were unreliable and inconsistent).

287. Campbell, *supra* note 1, at 134 (reproducing the qualifiers).

because Hamilton represented a party), and by Justice Iredell’s recently-discovered notes.<sup>288</sup>

Evidentiary problems may have played a significant role in the Supreme Court’s holding, in *National Federation of Independent Business v. Sebelius* (*Sebelius*),<sup>289</sup> that the ACA penalty for not purchasing health insurance is a “tax.” Founding-era history tells us that an exaction designed principally for regulation rather than revenue is not a “tax” as the Constitution employs the term.<sup>290</sup> In other words, to be valid such an exaction must be authorized by some constitutional provision other than the Taxation Clause. On the other hand, the ACA penalty certainly qualified as a regulatory exaction: Like a prohibitory tariff, it could serve its principal purpose only if it raised relative little revenue.<sup>291</sup> The portion of the Court’s opinion discussing this issue, however, cited no independent evidence of original meaning.<sup>292</sup>

A similar lack of evidence seems to have led to the Court’s finding that the proclaimed “tax” was not “direct.” The historical record informs us of the nature of the direct/indirect distinction,<sup>293</sup> but the Court suggested it might be unknowable: “Even when the Direct Tax Clause was written,” Chief Justice Roberts wrote, “it was unclear what else, other than a capitation . . . might be a direct tax.”<sup>294</sup> For this proposition, the Court referenced *Springer v. United States*,<sup>295</sup> a case based in part on the erroneous belief that the ratification debates did not address the subject.<sup>296</sup>

After a very short summary of post-founding case law, the *Sebelius* Court concluded its discussion of the tax issue in these words:

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or *any other circumstance*.” *Hylton, supra*, at 175 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific

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288. Campbell, *supra* note 1, at 112–13 (mentioning the discovery of the notes in 2003 and quoting from them).

289. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

290. See *supra* Part II.

291. See *supra* Part II.

292. *Sebelius*, 132 S. Ct. at 2598.

293. See *supra* Part IV.

294. *Sebelius*, 132 S. Ct. at 2598.

295. 102 U.S. 586 (1881).

296. *Id.* at 596–98.

circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.<sup>297</sup>

In citing Justice Chase’s dictum on capitations, the *Sebelius* Court failed to acknowledge that Chase had advanced his definition only tentatively: “I am inclined to think, but of this *I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax . . . and a tax on LAND.”<sup>298</sup> Beyond that, the citation is further evidence of lack of evidence. The historical record, after all, tells us that Chase’s supposition was unquestionably false: In the real world, capitations frequently were adjusted or waived for all sorts of circumstances.<sup>299</sup>

Particularly striking about the *Sebelius* opinion is that the Court never addressed the question of whether the penalty might be an *indirect* tax. This is peculiar, since the Supreme Court had stated previously that direct and indirect taxes are mutually-exclusive categories,<sup>300</sup> so a natural part of the process of determining that the penalty was *not direct* should have been determining whether it was *indirect*. Examination of the founding-era record would have informed the Court that a penalty for “going without health insurance does not fall within any recognized category”<sup>301</sup> of *indirect* tax. The penalty was not tonnage, for it was not imposed on the cargoes of ships. It was not an excise, for it was imposed on the non-consumption of services rather than on the consumption of commodities. It was not an impost, for it was not a tax on imports. Nor was it any other kind of duty, for it was not levied on a transaction or event.

On the contrary, the penalty, assuming it was a tax at all, was a classic direct or “dry” tax. That is, it was imposed on citizens not for anything they had consumed or done, but for merely living and (arguably) for producing. Since it was imposed by the head (or “poll”) and not on property or “faculties,” it is most plausibly categorized as a capitation. The fact that it was adjusted for income and other circumstances did not disqualify it as such. Such gradation simply rendered it akin to the many other founding-era capitations scaled by ability to pay and by other circumstances.<sup>302</sup>

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297. *Sebelius*, 132 S.Ct. at 2599.

298. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (emphasis added).

299. *See supra* Part III.

300. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 557 (1895).

301. *Sebelius*, 132 S. Ct. at 2599.

302. *Supra* notes 111–116 and accompanying text; Campbell, *supra* note 1, at 171.

So if the penalty truly was a tax, Congress should have apportioned it.

### CONCLUSION

The original legal force of the Constitution is how courts and lawyers would have applied the document immediately after its ratification. In the language of the time, any financial exaction was called an *imposition*. An imposition could be imposed principally to raise revenue or principally for regulatory purposes. A *tax* was an imposition principally to raise revenue. Taxes were authorized by Article I, Section 8, Clause 1—the Taxation Clause. Regulatory impositions had to be grounded in some other congressional power, such as the Commerce Clause. A regulatory imposition outside Congress’s enumerated powers was not constitutional.

According to the Constitution’s original legal force, a tax was *direct* if laid on one’s status or on one’s living or livelihood—i.e., on production. Direct taxes encompassed capitations, taxes on property and wealth, taxes on businesses and trades, and taxes on personal and business income and profit of all kinds. *Indirect* taxes were impositions for revenue levied on the consumption of goods and services and on certain specific transactions, such as importing and exporting and creating legal documents. The distinction between direct and indirect levies was primarily political and moral rather than economic.

A *duty* was any imposition (whether regulatory or for revenue) that was not a direct tax. Duties included, but were not limited to, excises, imposts, and tonnage. *Excises* were duties on the consumption of commodities, usually manufactured goods. Excises often were levied at the point of sale, but if tied to consumption, they might be payable at other times. *Imposts* were duties on imports, whether or not import was accompanied by a sale or ownership transfer. *Tonnage* was a duty on ships entering or leaving harbors, assessed by cargo capacity. Duties that were not excises, imposts, or tonnage included fees for specific transactions, such as those on exports and the execution of legal documents or the delivery of specific services.

The framers decided to adopt the apportionment rule for at least three reasons, none of them related to slavery. They were (1) to ensure that taxation was linked with representation, (2) to comply with custom, and (3) to comply with the public trust standard of impartiality by preventing unfair treatment of politically weak states.

The administrative complexity of the apportionment rule made it desirable to limit its scope. The line of limitation selected was the boundary between direct and indirect taxes. Apportionment was restricted to direct taxes partly because of the difficulty of apportioning indirect levies and partly because the collection difficulties and

universal unpopularity of direct taxes suggested that the federal government was less likely to impose them.

The three-fifths apportionment formula was designed to approximate taxation and representation. Population figures were sufficient for most purposes, but slavery presented a special problem because slaves increased a state’s tax production, but less so than an equal number of free citizens. The three-fifths formula was an economic calculation previously arrived at by the Confederation Congress. It was not an independent statement of racism, nor was it designed to promote or discourage slavery.

Previous treatments of the terms examined in this Article have suffered from a number of methodological problems, leading to some inaccurate conclusions. The best known recent example is the Supreme Court’s holdings in *Sebelius* that a penalty adopted for regulatory purposes was a “tax” but not a direct one. According to the Constitution’s original meaning, the penalty was not a tax. If categorized as a tax, however, it was direct—most plausibly a capitation—and should have been apportioned.