Dispelling the Fog about Direct Taxation

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ABSTRACT

A full interpretation of capitation taxes in their historical context is here used as the key to a fresh understanding of the nature and practice of apportioned direct taxation under the Constitution. Contrary to common misconceptions, it appears that none of the key elements of the Federal powers of direct taxation – capitations, other direct taxes, and apportionment – are of uncertain meaning, or no longer of any relevance because of the abolition of slavery. Evidence for these conclusions is drawn from historical studies of taxation, records of the Constitutional Convention, Federal and state tax statutes of the period, contemporaneous economic and reference works, and from legal arguments presented in Hylton v. United States (1796). The decision in Hylton is analyzed on the basis of new documentary evidence, and found wanting – especially in the matter of the oft-repeated dicta of its Justices. Some recent discussions of direct taxation are critiqued from the vantage point of recognizing both Hylton’s misconstructions and the historical contexts of state taxation within which the provisions governing Federal taxation emerged. A clarification of the implicit criteria of indirect taxation is derived from Adam Smith’s demonstrable influence on the Founders. It is then combined with a documented tripartite definition of capitation to critique recent tax proposals, as well as the controversial individual mandate penalty of the Patient Protection and Affordable Care Act of 2010. The body of the investigation is presented in four Parts, while the Introduction and Epilogue focus on the contemporary relevance of its insights.

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The title of this paper is an allusion to James Madison's comment about Alexander Hamilton's performance before the Supreme Court in *Hylton v. United States* (1796): "...the great effort of his coadjutor [Hamilton] as I learn, was to raise a fog around the subject [of direct taxation]." It is ironic that whatever fog Hamilton raised in the minds of his audience, Justice Iredell's notes of oral arguments in the case show that Hamilton (and other counsel present) knew quite a lot about what the Framers of the Constitution meant by direct taxes, and that the Justices either ignored or misinterpreted what he told them when reaching their decision. Breaking through the fog of misconstruals hovering around and streaming from *Hylton* into a fresh understanding of direct taxation asks a good deal of the reader, but the value of clear-sightedness is not just a matter of historical veracity - it challenges and changes our understanding of a number of contemporary tax issues.

As a general principle of interpretation, it is the meaning of a text for its original audience that sets the standard for all sound interpretations - or "constructions" - of the text in the future. In any such interpretive process, uncovering the original meaning of a text begins with understanding the meaning of key terms for people of that time. Thus, in the present case, knowing what "capitation" and "direct taxes" meant to the generation of the Founders is a crucial step in establishing sound criteria for applying the Constitutional language about direct taxation to modern proposals or legislation - such as the recent Flat Tax or Unlimited Savings Allowance (USA) consumption tax proposals, or the individual mandate penalty in the Patient Protection and Affordable Care Act of 2010.3

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3 Some of the more notable discussions of these contemporary issues are: Richard W. Lindholm, *The Constitutionality of a Federal Net Wealth Tax: A Socioeconomic Analysis of a Strategy Aimed at Ending the Under-Taxation of Land*, 43 Am. J. Econ. & Soc. 451 (1984); Erik M. Jensen, *The
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I. Introduction

A. Some Recent Discussions

In the case of “direct” taxes, it has often been claimed that the Founders and Ratifiers of the Constitution had a very unclear or confused notion of what was meant by the term. Perhaps the first person to claim uncertainty is Alexander Hamilton in his argument defending the federal Carriage Tax before the Supreme Court in 1796, but he is certainly not alone in his claim. In our own time for example, Robin Einhorn writes, “Everyone knew that the new Congress was stronger than the old... [but] nobody knew what “direct taxes” were, how Congress would levy them, or who would benefit from the apportionment rule.” This view seems to reflect an untested assumption that wherever there is controversy about the application of a legal term there must also be real uncertainty as to its meaning.

Evidence of uncertainty was, however, presented by Edwin Seligman a century ago in the form of five different uses he documented from the legislative ratification debates of the period: (1) “a tax on the states;” (2) “only a land tax;” (3) “[both] a land tax and a poll tax;” (4) “a poll tax together with a general assessment on property;” and (5) “a tax on land, together with the specific articles of personal property... [such as] a tax on coaches.” This is certainly evidence of diverse usages, but these are not five mutually incompatible meanings. Each one reflects a partial understanding of the term, and the first one reflects the circumstance that the last tax to be levied directly on the states by Congress as a “requisition” was basically an apportioned property tax.

As for the term “capitation,” two Justices in Hylton (writing in 1796) took it as a synonym for “poll tax” despite ample evidence of a wider meaning, and their dictums to this effect have become the stock-in-trade of virtually all commentators since then. However, Erik Jensen (writing in 1997) is much closer to grasping the usages of 1787 when he says, “A


4 Marcus, supra note 2, at 465-67.
lump-sum [head] tax is a capitation tax, but we should not assume that the term had such a limited meaning to all founders. ...[Hence], in focusing on “direct taxes,” we may have overlooked an expansive interpretation of the term “capitation taxes” ...[through] which the apportionment requirement imposes a real limitation on the taxing power.”

In fact, this same line of thought orients the present paper, which will argue that it is precisely these overlooked implications of the term “capitation” that offer a secure way of approaching the meaning of the direct tax clauses for the Founders.

Jensen also seems to be the only notable commentator on direct taxation to see the significance of some of Alexander Hamilton’s statements regarding direct taxation in the Hylton case. In his “Opinion” on the Carriage Tax of 1794 Hamilton (or his clerk) writes,

The following are presumed to be the only direct taxes.

Capitation or poll-taxes.
Taxes on lands and buildings.
General assessments, whether on the whole property
of individuals, or on their whole real or personal estate;
all else must of necessity be considered as indirect taxes.

The logic of this is apparently to say that since carriages are not the whole of the taxpayer’s personal estate, taxes levied on them are indirect by definition. But as Jensen observes, this is a peculiarly precise enumeration of what counted as direct taxes to follow close on the heels of Hamilton’s claim that “there is no general principle which can indicate the boundary between the two... [direct and indirect taxes],” so it has to be drawn by a “species of arbitration... [that involves] neither absurdity, nor inconvenience.”

Unfortunately, in the exchange of papers that followed Jensen’s publication of his observations this particular line of investigation is not taken up by anyone else.

On the other hand, the publication in 2003 of Justice Iredell’s notes on the oral arguments in Hylton puts Hamilton’s anomalous non-definition of direct taxes in better perspective. Not only did Hamilton present the definition quoted above, but after his co-counsel Randolph Lee

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7 Jensen, Apportionment of Direct Taxes, supra note 3, at 2391-93.
8 Id. at 2358.
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(the Attorney General) had introduced a definition of capitation in oral argument, he offered two linked explanations of his own. The last and fullest of these presentations was recorded by Justice Iredell as:

Capitation – 3 meanings.

1. Person merely

2. Person having reference to property. See Hamilton’s speech [the prior day].

3. [Person having reference to] profession. 3 Smith 327

What left for other Taxes –

If Land only, – why not mentioned? 10

Granted, this invaluable material was not yet available or known to the scholars exchanging views from 1997 through 2004. But it is disconcerting to observe how many times “capitation” is still taken to mean a tax on “person merely” and nothing else, simply because of what two Hylton Justices said in their dicta. Calvin Johnson in particular sees fit to follow in the footsteps of these dicta regardless of their illogic. For example, he quotes approvingly the reasoning of Justices Chase and Iredell who both (in the words of the latter) asserted that “as all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.” 11 From the examples these two Justices give in their opinions on Hylton it is clear that the criterion being used is that of not producing gross inequities in taxation when a tax is apportioned. But even so, their reasoning is patently fallacious – because it is circular:

No direct taxes are grossly unequal when apportioned.

This tax is grossly unequal when apportioned.

Therefore, this tax is not a direct tax.

Yet the same Justices believed land taxes are direct – even though it is manifestly impossible to impose an apportioned land tax that is not grossly unequal from state to state. 12 And stranger still, Calvin Johnson argues that

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10 Marcus, supra note 2, at 480, 488; 475, 481, 489.
11 Johnson, The Foul-Up, supra note 9, at 115.
12 For example, a $5,000,000 land tax could conceivably be apportioned according to the 3/5ths rule and the results of the 1790 census. Combining each territory reported in the census (those being Maine, Kentucky, Vermont and Tennessee) with population figures for their parent state a tax quota can be calculated, and then divided by the acreage of the state (plus any territories reported in the census) to give the rate of taxation. [State total by rule / aggregate of 13 states by rule = per cent of aggregate by state x amount of tax = state tax quota / total state acreage = tax rate per acre.] Taking three examples from states whose boundaries have changed little since 1790, the following rates are obtained: Connecticut, 9.4; Pennsylvania, 2.1; and South Carolina, 1.4 cents per acre. The amount seems trifling to us, though it would not have been in the 1790s; and the inequity is glaringly gross. JAMES
for this very reason no apportionment should be required of a federal land tax—despite the inclusion of land taxes in the apportioned direct tax acts of Congress in 1798 and 1813-16.

Given these anomalies, it is fair to suspect that to the degree our present understanding of direct taxation flows through the Hylton ruling and its frequently cited dicta, we are not on solid ground. Nor are we any better served by the way in which the apportionment requirement is so often tarred with the same brush as the “federal ratio” for counting slaves. Turning to Bruce Ackerman’s article on taxation in the Constitution, for example, we find him echoing Justice Iredell in saying the apportionment rule “...was, from the very beginning, understood to be a constitutional anomaly—it was part of the bargain with slavery, and should be respected as such, but ... [it] should not be extended by construction.” Calvin Johnson, however, is not willing to accord it much respect at all: “Apportionment was a chip given to the North to acquiesce in allowing the South to count its slaves in determining representation in the House. When slavery ended, so ended the historical purpose of apportionment.”

These examples could be multiplied, but to no good purpose. The basic problem with all such views is a historical one: Gouverneur Morris’ motion in the federal convention to apportion direct taxes (and representatives in the House) by population was voted separately from Edmund Randolph’s motion to incorporate the “federal ratio” of counting all free persons plus 3/5ths of slaves in the required enumeration. As the “chip” that turned the impasse of July 11th into the compromise of July 12th, the practice of apportioning direct taxation was not a novelty to the delegates, and it was adopted unanimously. Also, the changed votes that resulted in passage of the “federal ratio” were equally from North and South, which shows that the compromise appealed to both sides of the slavery question. Given the prevalence of slavery in Southern states, and its toleration in the Middle states, it was perhaps inevitable that the egalitarian principles of the Founders could be so readily compromised as to allow only fractional representation for some people. But the apportioning of direct taxation to population was a rough attempt to proportion taxes to wealth and the “ability to pay;” it may have fallen far short of its goal, but it is not just a vestigial trace of the Founders’ long-since repudiated “bargain with slavery.”

The recent dispute between Erik Jensen and Calvin Johnson regarding the purpose and effects of the apportionment requirement seems to have

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13 Johnson, The Foul-Up, supra note 9, at 112.

14 Ackerman, supra note 3, at 23.

15 Johnson, Fixing the Constitutional Absurdity, supra note 9, at 332.


17 Id. at 241, 246.
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resulted in little more than a polarization of viewpoints. Jensen stoutly maintains that apportionment is an express limitation - not on the range of things Congress may tax - but on the way it taxes certain things. Johnson maintains, to the contrary, that nothing in the Constitution was intended to “hobble” the new federal power to levy and collect direct taxes. Both sides, however, acknowledge that apportioned taxes are in fact very difficult to enact; and that the Constitution usually means what it says. So it would seem that the burden of proof lies with supporters of Johnson’s view, and that they have yet to present sufficient evidence to prevail - if only because they have failed to convince Jensen.

Nonetheless, Johnson does provide in his earlier article valuable evidence of the way in which ratification debaters assimilated the concepts of direct versus indirect taxation to the earlier Colonial distinction between “internal” and “external” taxes. Because “external” taxes were primarily customs duties on imports, the term “imposts” was used to characterize the “indirect” taxes that even Anti-Federalists agreed could readily be ceded by the states to the new federal authority. The “direct” taxes mentioned in the proposed Constitution were then naturally treated as “near synonyms” for the “internal” taxes levied by the states, which “…include poll taxes, land taxes, excises, duties on written instruments, on everything we eat, drink, or wear; they take hold of every species of property, and come home to every man’s house and packet, …[taxing] land, cattle, trades, occupations, & c. to any amount...” as dissenters to ratification in New York and Pennsylvania put the matter. These “internal” taxes were commonly apportioned, and in some states included “excise” taxes (eg. on whiskey and carriages) as well as “duties” not related to imports or exports.

There are two relevant points here: (a) the power of direct taxation covered a broad array of well-known “internal” taxes; and (b) when the Framers of the Constitution placed excises and duties in the same class as “external” imposts, they were deliberately narrowing the class of direct taxes. Bruce Ackerman chides Johnson for treating “…the mistaken usage indulged in by debaters as if it could displace the text itself;” but then goes on to heartily second Seligman’s opinion that “…land and poll taxes were considered direct taxes; but farther than that it is impossible to go.” This is simply to revert to the conclusion of the Justices in Hylton with all its anomalies, including the presumption that poll taxes are the only form of “capitation” tax. Ackerman’s preference for the tradition of judicial re-

18 This polarization is reflected in two articles published in the same issue of Constitutional Commentary in 2004: Jensen, Interpreting the Sixteenth Amendment, supra note 9 and Johnson, Fixing the Constitutional Absurdity, supra note 9.
19 Johnson, The Foul-Up, supra note 9, at 68-105.
20 Id. at 69. Readers of the sections of Johnson’s essay that follow this heading may note that the qualification of the observed synonymy as “near” is not used in the text itself.
21 Id. at 73.
22 Id. at 81, 83.
23 Ackerman, supra note 3, at 15-16 & n. 50.
straint that flows from Hylton allows him to portray direct taxes as a “relatively narrow” type of taxation, and one that should be narrowed even further: “...[because] there is no longer a constitutional point in enforcing a lapsed bargain with the slave power[, t]he express condemnation of “Capitation” taxes should be respected, but no others – not even a classical tax on land – should any longer be considered “direct” for constitutional purposes.”

So despite their opposite characterizations of direct taxes as broad or narrow, the arguments of Ackerman and Johnson come to very similar conclusions - and share two other shortcomings. First, neither is able to see the very real influence of Adam Smith’s The Wealth of Nations on the understanding of direct taxes in the Constitution; and second, they both ignore the relevance of the Direct Tax of 1798 (and other apportioned taxes enacted by Congress) to an understanding of how apportionment works. On the first point, the idea that The Wealth of Nations became influential among Americans only after its 1789 reprinting in Philadelphia is contradicted by a considerable body of evidence assembled by Samuel Fleischacker. Also, the way in which Ackerman presents Smith’s concept of direct taxes follows in the footsteps of Alexander Hamilton’s use of a misplaced emphasis during Hylton to fog what Smith actually wrote. It is indisputab-

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24 For example, the Venn diagram in Figure 1 (which Ackerman endorses) purports to clarify the meaning of “taxes” in the phrase “...to lay and collect taxes, duties, imposts and excises...” in Section I.8 of the Constitution. It presents a nameless circular set divided into two portions; one labeled “Taxes,” and a much smaller one labeled “Direct Taxes.” Id. at 14. This clarifies nothing. If the full circle is intended to represent anticipated federal revenues under the new constitution it should be labeled “Federal Revenues;” and the larger portion, “Indirect Taxes” (or “Duties, Imposts and Excises). If, however, the full circle is meant to represent the totality of wealth subject to federal taxation, it should be labeled “Tax Base;” with the larger portion now labeled “Direct Taxes,” and the much smaller one, “Indirect Taxes.”

25 Id. at 58. Joseph Dodge also holds a narrow view of direct taxation, based on giving some weight to arguments he initially characterizes as “incorrect:” namely, that the apportionment requirement (a) expired after fulfilling its initial purposes of compromise and being deleted from the representation clause, (b) was implicitly repealed in the abolition of slavery, (c) fails to find support in the Constitution for its implicit premise of state sovereignty, and (d) is either of no use because it is unfair when not redundant, or of limited use because a reasonable degree of uniformity is requisite but very difficult to achieve. Dodge, supra note 9, at 903-918. It not clear why arguments that have been shown to be wrong should be given any weight at all, nor is it clear whether Dodge views anything other than head taxes as capitations if apportionment applies only to “taxes on real estate, slaves, and states.” Id. at 903.

26 Johnson, The Foul-Up, supra note 9, at 108 & note 314.

27 Samuel Fleischacker, Adam Smith’s Reception among the American Founders, 1776-1790, LIX WM. & MARY Q. 3d Series 897 (2002). His preliminary historiographic conclusion is, “There is good evidence that Jefferson, Hamilton, Wilson, Adams, Webster, Morris, and the two James Madisons were some of Smith’s earliest readers [that is, between 1776 and 1790] and among the first to take him seriously in their own political lives.” Id. at 905.

28 Ackerman writes, “[Smith] tended to call taxes on profits and wages “direct,” despite his belief that capitalists and workers could shift them away. Instead, Smith characteristically
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ble, however, that Justice Paterson knew and respected The Wealth of Na-
tions well enough to quote from it twice in his opinion, and to use Smith’s
expenditure - revenue distinction as the primary support for his ruling.29

On the second point, it is remarkable that so little attention has been
accorded the Direct Tax Acts of Congress subsequent to the Carriage Tax
of 1794 that was so fiercely disputed in Hylton. Fortunately, Charles Bul-
lock devotes a few pages to the various enactments of apportioned direct
taxes from 1798 through 1861;30 and more recently, Robin Einhorn has
written an insightful history of the political forces at work in their for-
mation.31 The peculiar structure of the Direct Tax of 1798 – progressive
rates on houses plus poll taxes on working age slaves, with the balance of
the apportioned quota assessed on land – meant that, “The tax rate on
land in any state would depend on the yields from the taxes aimed at elites,
and there might be no land tax where the slave and house taxes met a
state’s quota. This plan favored small farmers everywhere in the coun-
try.”32 From this it would appear that apportionment in 1798 worked
across Sectional lines to protect one particular class in recognition of its
lesser “ability to pay.”33

In light of this historical observation, and Einhorn’s general position
that apportionment imposes “a limitation on the power of majorities to
decide how to tax,” it is surprising that her presentation of the Three-fifths
Compromise is based on the idea that there were “two equally plausible
interpretations of the politics of a direct tax apportionment.”34 What she
calls the “Southern Victory” gloss is purportedly a way of understanding
the rule as allowing the South to have both partial representation for slaves

used the term to denote the ease with which government could monitor the activity [ie.
transactions] it aimed to tax.” Ackerman, supra note 3, at 18-19. There are two problems
here. First, shiftability is definitely an identifying feature of indirect taxes for Smith, but
when cost of a tax can not be immediately shifted to another person involved in the taxed
transaction it falls directly on the person taxed – unless and until workers can pressure
employers to raise their wages, or capitalists can factor increased tax or wage expenses into
higher market prices without being undercut by their competitors. Second, transactions that
are legally regulated, public transfers of wealth can be “directly” taxed when they take place.
But being taxed “directly” does not make the tax fall on revenue rather than expenditure,
which is the criterion for identifying a direct tax that impressed Justice Paterson. For
Hamilton’s use of this same feint see his “Opinion” and his oral argument in Hylton.
Marcus, supra note 2, at 457, 477.
29 Hylton v. United States, 3 US (3 Dall.) 171, 181 (1796).
30 Charles J. Bullock, The Origin, Purpose and Effect of the Direct-Tax Clause of the
31 Einhorn, supra note 5, at 184-199.
32 Id. at 192.
33 Nonetheless, when this sophisticated tax – a product of the partisan struggles between
Jeffersonian “Republicans” and “Hamiltonian” Federalists – was enacted by a Federalist
majority in Congress, it sparked a dramatic shift in power to the Jeffersonian partisans in
1800. As Einhorn puts it, “For the purposes of winning votes, promises of tax equity are less
effective than promises of tax cuts.” Id. at 194.
34 Id. at 175, 198.
and lower taxes per free person. However, the figures in Table 4 that are said to illustrate this situation are in fact the tax burden per capita, not per free person.\textsuperscript{35} The effect of this mistake is, unfortunately, to obscure the way the rhetoric of Southern Federalists and Northern Anti-Federalists was focused on the productive value of labor rather than the tax liability itself. That is, by framing the debate as springing from a real ambiguity in the situation Einhorn’s interpretation inadvertently contributes to the Hamiltonian “fog” surrounding the nature of the direct taxation by apportionment.

B. Some New Tax Proposals

Turning from the exegetical and historical aspect of the current discussion to matters of current relevance, a good place to begin is with Lawrence Zelenak’s critique of Erik Jensen’s constitutional objections to certain “consumption tax” proposals. Basically, Jensen holds that VAT (Value Added Taxes) and RST (Retail Sales Taxes) are excises on consumption expenditures and therefore indirect taxes, but that proposals for a Flat Tax or USA (Unlimited Savings Allowance) tax may be unconstitutional because they would impose direct taxes that do not qualify for exemption from apportionment as “income” under the 16\textsuperscript{th} Amendment.\textsuperscript{36} Zelenak, who agrees with Jensen’s views about the legitimacy of limiting direct taxation through apportionment, rejects his criterion of “avoidability” as an adequate indicator of the indirectness of a tax: “Despite their formal indirectness, [VAT and RST] taxes may be too broadly based – and thus too hard to avoid – to qualify as indirect.”\textsuperscript{37}

In this, and in his analysis of the Flat Tax as a two-part VAT, Zelenak treats “avoidability” as the sole criterion of indirectness, or at least as the only criterion which is not pragmatically satisfied by a VAT.\textsuperscript{38} But even though consumers faced with a broad-based VAT would pay a hidden tax on virtually everything, they could still “avoid” paying some particular taxes. That is, the VAT would have to be uniform in all the

\textsuperscript{35} Id. at 175-77. The formula for calculating the effect per free person of an apportioned tax incorporating the 3/5\textsuperscript{ths} ratio is “tax x (free + 3/5 slave) / free = tax per free person,” and this is what we are given in Table 3 on page 176. What Table 4, however, gives us is the results of the following calculation: “tax x (free + 3/5 slave) / (free + slave) = tax per capita.”

\textsuperscript{36} Jensen, The Apportionment of Direct Taxes, supra note 3, at 2402-19.

\textsuperscript{37} Zelenak, supra note 3, at 833. Jensen may have left himself open to this objection by focusing too exclusively on consumer choice in the passage Zelenak cites: “The tax liability falls directly on individual, with nothing hidden, no state intermediaries to buffer the effects, and no purchasing decision to serve as a protection against governmental overreaching.” However, earlier in this same article Jensen says “it is not necessarily true that an indirect tax is “shiftable,” but rather that the tax is generally passed on to a consumer. Jensen, supra note 3, at 2407, 2405, 2395.

\textsuperscript{38} Other critical features of an indirect tax are its “shiftability” from the person liable for the tax to someone else (typically, the consumer), and its “falling on expense” rather than “revenue” – to use Adam Smith’s terms.
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states, but the rate of taxation would almost certainly vary from one article of consumption to another – if only because Congress is pragmatic, and would not pass over the chance of using these taxes to influence economic activity in accordance with whatever policy objectives were currently in favor.

Regarding the proposed USA tax, Zelenak does not share Jensen’s concern that exclusion of broad categories of income from the tax base “could leave a tax base that is not income in any generally accepted sense.” 39 In its simplest form, the USA tax would exclude savings and investments from taxation as “income” – a term whose “generally accepted sense” is presumably congruent with its meaning in the 16th Amendment. 40 This feature is also found in the Flat Tax scheme, and carries with it the same difficulty in both cases: investments are treated as “savings” for purposes of exclusion from taxation. Zelenak touches on this difficulty in the Flat Tax proposal: “[when] returns to labor are taxed under the wage tax, and returns to capital are taxed under the business tax [and business investments are excluded, then] ...the flat tax only nominally taxes income from capital... [making it] more a wage tax than an income tax.” 41 But he remains confident that this throwing of the greater part of the tax burden onto workers is not problematic: since unapportioned taxes have been collected from wages for decades to fund the Social Security entitlement, he considers that such taxes are either not direct taxes at all or are presumed to be income taxes. 42 In dismissing Jensen’s reservations about the soundness of Pollock’s affirmation of unapportioned taxes on wages being constitutional, however, he apparently endorses using non-judicial opinions and the dicta of Justices in the absence of substantive holdings. 43

40 Id. at 854. The “public understanding” that broadens the meaning of taxing income to include taxing income as consumption does not, however, go so far as to assume that “net wealth, or rights to income are as readily used as a tax base as is income under the 16th Amendment.” Lindholm, supra note 3, at 453.
41 Id. at 853. Saying that this exclusion corrects current practice in which there is a double tax on invested income (on the income itself and then on the returns it generates when invested) is a facile excuse that ignores the distinction between capital and profits; between principal and interest.
42 Id. at 843-44 & n. 58.
43 The dictum Zelenak refers to from the Pollock case is described by Jensen as affirming that “a tax on income from “professions, trades, employments, or vocations” was an excise tax not subject to apportionment.” Pollock 158 US at 637. Historically, one possible source for this idea is the opinion of Treasury Secretary Oliver Wolcott in his 1796 report to Congress regarding “taxes on the profits resulting from certain employments: ...It is presumed that taxes of this nature can not be considered as of that description which the Constitution requires to be apportioned among the states....” Jensen, The Apportionment of Direct Taxes, supra note 3, at 2334, 2343 & 2370; n. 43 & 190. Or perhaps the idea flows from Justice Chase’s disavowal of such taxes being capitations – a statement he prefaced by saying, “I am inclined to think, but of this I do not give a judicial opinion....” Hylton v. United States, 3 U.S.(3 Dall.) 171, 175 (1796).
As for the USA tax scheme, Zelenak argues that excluding savings from an income tax base does not radically change its character, citing John Stuart Mill’s opinion that “[n]o income tax is really just from which savings are not exempted” as early evidence that “income” is legitimately understood more narrowly than at present.\textsuperscript{44} The problem, however, is not that portions of income are exempted from taxation (or even that large portions are exempted); the problem is that investments and savings are conflated into one exemption.\textsuperscript{45} Savings could be described as income that is held in reserve for future consumption, but income diverted into investments is being used to purchase rights to share in the profits of others. In short, these untaxed expenditures would be exemptions that favor the accumulation of wealth,\textsuperscript{46} and would thus cause the tax burden to be shifted toward those with a lesser “ability to pay.” This outcome is certainly not what the 16\textsuperscript{th} Amendment contemplated, nor is it at all likely that ratifiers of the amendment considered “income” and expenditures for consumption to be synonyms.\textsuperscript{47}

For a final example of controversy partly flowing from confusion about the nature of direct taxation, there is the yet to be resolved question of whether or not the penalty for non-compliance with the “Individual Mandate” in the Patient Protection and Affordable Care Act of 2010 is constitutional. Supporters of the mandate, such as Edward Kleinbard, argue that Congress has the authority to enact such a regulation both under the Commerce Clause and as part of its Taxing Power. Even though this provision of the Act [Section 5000A(b)] is called a “penalty,” Kleinbard argues that it can also be viewed as a tax whose primary function is to compel behavior rather than to collect revenue; and that the Court has come to recognize such regulatory taxes as valid provided they have “some reasonable relation” to the taxing powers granted to Congress by the Constitution – even when the revenue collected is “negligible.”\textsuperscript{48} He further argues that the “penalty” functions as an income tax, and that it is comparable to the private foundation excise tax penalty on undistributed wealth found in Section 4942 of the Internal Revenue Code. Those who doubt the constitutionality of the individual mandate penalty must, according to Kleinbard, demonstrate: (a) that the tax is a direct tax [and not an excise],

\textsuperscript{44} Zelenak, \textit{supra} note 3, at 851.
\textsuperscript{45} \textit{Id.} at 850. Senator Domenici, one of the USA tax’s Congressional sponsors is quoted there as saying that the USA tax proposal would “tax [all] income that is not saved or invested.”
\textsuperscript{46} These investment exemptions are in stark contrast to the “family allowance” exemptions that would be included in the USA tax to shield subsistence spending from taxation.
\textsuperscript{47} It is unfortunate that Zelenak first criticizes experts who, for the sake of political advantage, “sow confusion in claiming that the flat tax is both a consumption tax and an income tax” – even though they offer plausible defenses for using that label – and then on the very next page writes, “Although the flat tax and the USA tax may be consumption taxes, they are also income taxes.” Zelenak, \textit{supra} note 3, at 854-55.
\textsuperscript{48} Kleinbard, \textit{supra} note 3, at 759-60.
Responding to this challenge, Steven Willis and Nakku Chung have pointed out that with regard to (c), the apportionment requirement in Section I.9 of the Constitution has never been explicitly repealed, even when the 14th Amendment dropped the reference to direct taxation in Section I.2. With regard to (b) they argue that the payment is not an income tax because there is no “accession to wealth” when someone who could afford health insurance does not purchase a policy. Further, they point out that there is no certainty that any particular person – let alone everyone – who is uninsured will ever derive any economic benefits from having recourse to health care subsidized by taxes.50 This leaves only one the key issue to be addressed: is this supposed tax a direct tax, or an indirect (excise) tax? Willis and Chung contend that the penalty cannot be an excise like those imposed by Section 4942 on charitable foundations because it falls on natural persons, not on licensed legal entities.51 Nor can it be definitively rejected as a direct tax, because Hylton is inconsistent and easily misconstrued: by its own criteria – that direct taxes do not lead to absurd results when apportioned – even direct taxes on land could not be “direct” taxes.52 But further than this they do not go in trying to clarify what the purported tax really is.

Erik Jensen, however, has provided us with an insightful reflection on what the individual mandate penalty might look like if it were to be understood as a tax53 – despite his oft-repeated view that the provision is better understood as a penalty that may or may not be a legitimate exercise of Congressional authority under the Commerce Clause. If the penalty charges were nonetheless somehow found to be excise taxes, Jensen (contrary to Willis and Chung) thinks that the necessary uniformity would be established by the fact that the amount of penalty imposed is tied to a national

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49 Id. at 762.
50 Willis & Chung, supra note 3, at 725. It should also be noted that uninsured people who end up receiving Public Aid healthcare have demonstrably exhausted all of their private resources – often because of paying directly for healthcare services.
51 Id. at 732. Unfortunately, this response does not explicitly deal with Kleinbard’s use of the Murphy decision to bolster the legitimacy of treating a tax imposed directly on an individual as “an excise laid on the proceeds received from vindicating a statutory right through the medium of the legal system” (493 F.3d at 185-186), or as a transaction tax on “the [reversal of the] involuntary conversion of Murphy’s human capital.” Kleinbard, supra note 3, at 758. But since both of these reasons depend on Murphy’s having taken legal action for damages, they are not applicable to the penalty in question because (a) that penalty was imposed as a result of action rather than failure to act, and (b) the individual mandate penalty does not result from an exercise of federally mandated legal privileges for which an excise is due. See, Jensen, The Individual Mandate, supra note 3, at 11-13 & 18-24 for further discussion of the use of taxation to regulate behavior.
53 Jensen, The Individual Mandate, supra note 3, at 23-44.
average cost of the required “bronze level” coverage. More interestingly, with respect to possibly finding the penalty to be a direct tax, Jensen develops three reasons for rejecting Kleinbard’s assertion that Justice Chase’s view of capitations is “universally” accepted.  

First of all, Jensen argues that to say that “capitations” are nothing other than lump sum head taxes is to make the establishment of an apportionment rule for “capitations” superfluous, assuming (as the Constitution does) that the same people are being counted for taxation as were counted for representation. This point is one that is challenged by those who see the whole reason for the apportionment of capitations to lie in the 3/5ths ratio for counting slaves. Jensen is willing to allow that “part – but only part – of the concern was slavery,” yet the controversy is far from settled thusly. Without delving into the matter too deeply, it is still possible to point out in support of Jensen’s position that the word “capitation” was used in Section I.9 of the Constitution, rather than the more widely current term “poll tax.” If the latter term would have protected slavery just as fully, why was it not used?  

Jensen’s second point is that if exempting some people from a head tax because of certain “circumstances” makes the tax levy no longer a capitation subject to apportionment, then the rule is eviscerated – at least with respect to the “poll tax” the Founders knew and disliked. There were partial exemptions from virtually every tax in that era, and the head tax was no exception. For example, the federal head tax enacted in 1798 exempted all free persons, and of enslaved persons – the infirm, those under 12 years of age and those older than 50; but the tax was nevertheless an apportioned one. For his third point Jensen looks at a different kind of “circumstance,” saying that if a tax which reaches everyone and imposes different amounts of tax liability on statutorily defined sets of people is not a capitation in the sense of the Constitution, then Congress is at liberty to circumvent apportionment of “capitations” whenever it will.

54 Id. at 25.
55 Kleinbard, supra note 3, at 762. “But a capitation tax is universally understood as a tax imposed on an individual “without regard to property, profession or any other circumstances,” Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase J.).”
56 Jensen, The Individual Mandate, supra note 3, at 32.
57 Jensen, Interpreting the Sixteenth Amendment, supra note 9, at 372.
58 Jensen, The Individual Mandate, supra note 3, at 32-33.
59 “An act to lay and collect a direct tax in the United States,” Act of July 14, 1798, c.75 1 Stat. 597-98. For a good overview of the 1798 direct tax (and some valuable details concerning the direct taxes of 1813-1816), see Einhorn, supra note 5, at 192-193 & 196.
60 Jensen, The Individual Mandate, supra note 3, at 32-34. Jensen provides a hypothetical example to illustrate his third point. Congress has provided historical examples in its Direct Tax enactments which show that acknowledged direct taxes (a) exempted certain persons from tax because of circumstances, and (b) varied tax liability for different sets of people. For example, the Direct Tax of 1798 imposed a head tax (called a “poll tax”) of 50 cents each on slaves only, and then also exempted the infirm, those over 60 years of age, and those under the age of 12. The same tax imposed varying tax burdens on owners of houses.
Jensen uses a hypothetical tax to illustrate his point, using income levels to define two sets of people who are then liable for two different lump-sum head taxes. Here too, Congress provides an intriguing historical example of something fairly similar to Jensen’s hypothetical: in the Direct Tax of 1813 an apportioned tax of three million dollars was levied on “land, lots of ground with their improvements, dwelling houses and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors, at the rate each of them is worth in money.” Here slaves are being taxed ad valorem, so it is the circumstance of estimated market value that changes tax liability from one slave to the next. Yet the tax is not therefore something other than a capitation that is subject to apportionment. One might, of course, object to this example by arguing that the tax on slaves was not a “poll tax,” but a property tax. Yet we have to remember that slaves were 3/5ths persons, and they were taxed based on their 3/5ths of a person taxable status.

As the above example tangentially illustrates, there does not seem to be any way that property tax considerations could apply to the individual mandate charges: after all, how could someone be taxed for not having personal property in the form of healthcare insurance? So are there other things we can be fairly sure of regarding this penalty cum tax? For one thing, the purported tax liability does fall on persons—that much is certain. It also seems fair to say that (a) it is not imposed on expenditure, (b) it is not shiftable to someone else, (c) it is not an exaction on a privileged activity or transaction, (d) it is not imposed on an accession to wealth, and (e) it is not avoidable except in one prescribed way. As Jensen puts it, what Congress is saying is “Pay a tax (if the penalty will be a tax) or pay something else [equally costly]” — namely, pay for a healthcare policy on you and your dependents from a particular list of certified providers, and at no less than the “bronze” level of coverage that experts have decided will be adequate and affordable for all. Thus, it seems the healthcare mandate imposes a costly exaction “for a detailed and specified course of conduct,” a situation that the Court in Bailey v. Drexel (1922) found to be inconsistent with the proper exercise of the taxing power. In other words, the purported tax on not purchasing healthcare insurance behaves very much like a penalty, which is exactly what the legislation calls it.

At the end of his discussion of capitation, Jensen’s conclusion is that if the individual mandate penalty really is a tax and not a penalty, then “the argument that Congress has enacted an unapportioned capitation tax

depending on where their dwelling fell on a schedule of assessment rates: 0.1% on dwellings worth $100-$500; 0.2% on those in $500-$1,000 range; and so on up to those worth more than $30,000 which were to be taxed at 1.0% of assessed value. Act of July 14, 1798, c.75, 1 Stat. 585, 598.

61 Id. at § 3, 26.
62 Jensen, The Individual Mandate, supra note 3, at 38.
64 Id. at 22.
is not frivolous."\textsuperscript{65} Such an argument must rely on a deeper, more expansive and nuanced understanding of “capitation” than has been common in legal circles for a very long time. Jensen’s own appeal for a more complex understanding of direct taxation and capitation in the time of the Founders has grown stronger over the years from 1997 through 2010.\textsuperscript{66} But there is yet more that can be done – as the present essay will demonstrate by bringing fresh evidence and analysis into the arena. The body of the essay is divided into four parts: first, a review of colonial capitation taxes with particular attention to “faculty” taxes; second, a reconsideration of Hylton v. United States (1796) based on new sources and including a fresh view of Adam Smith’s influence on the Founders; third, an investigation of what the Direct Tax Act of 1798 and the Convention record reveal about the nature of apportioned direct taxation; and fourth, a full interpretation of the purposes and effects of the apportionment requirement in the wake of a reappraisal of Hylton. An Epilogue then returns the focus of the essay to contemporary issues.

\section{Capitation in Its Constitutional Context}

The relevant portion of the Constitution of 1787 reads, “No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.”\textsuperscript{67} A good place to begin an inquiry into what the phrase “capitation, or other direct tax” means is with the following passage from Adam Smith’s \textit{The Wealth of Nations} (1776):

\begin{quote}
In the capitation which has been levied in France without any interruptions since the beginning of the present century, the highest orders of people are rated according to their rank by an invariable tariff; the lower orders of people, according to what is supposed to be their fortune, by an assessment which varies from year to year.\textsuperscript{68}
\end{quote}

The French capitation described above was in effect from 1695 to 1789, and Smith’s familiarity with this form of taxation creates a strong presumption that “capitation” by variable assessment of wealth was a recognized alternative to imposing a flat rate “poll tax” capitation in the 18\textsuperscript{th} century. In fact, this form of taxation – generally known as a “faculty tax” in the colonies – was a well-established practice in Massachusetts and other

\textsuperscript{65} Id. at 38.
\textsuperscript{67} U.S. CONST. art. I, § 9, cl. 4.
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parts of New England as well as in New Jersey and South Carolina. Faculty taxes were not, however, commonly imposed in most Middle and Southern colonies, and in some cases their enactment was temporary, or ended before 1780. For example, in New York and Georgia, a faculty tax was never imposed. In Virginia, Maryland, Pennsylvania and Delaware faculty taxes imposed soon before the Revolutionary War did not take root, whereas in South Carolina, Rhode Island and New Hampshire decades of usage came to an end during the War years. In New Jersey early evidence of imposition is countered by evidence of no faculty taxes later, while in Connecticut and Vermont faculty taxes modeled on those of Massachusetts were limited by exempting farmers and laborers. In Massachusetts alone did broadly imposed faculty taxes persist beyond the 1780s.

Massachusetts also had the longest history of imposing faculty taxes, the outlines of which first appeared in the Acts of 1643 and became more explicit with each iteration through 1777. The sweeping nature of the faculty tax in Massachusetts is evident from the following: in 1699 the tax act required assessment of "incomes by any trade or faculty which any persons do or shall exercise," and in 1738, taxation was imposed on "the income or profit which any person or persons (except as before excepted) do or shall receive from any trade, faculty, business or employment whatsoever, and all profits which may or shall arise by money or other estate not particularly otherwise assessed, or commissions of profit in their improvement."

The language enacting these faculty taxes describes a practice very similar to the French capitation described by Adam Smith, and that similarity would hardly have escaped the notice of anyone as interested in the problems of taxation as the drafters of the Constitution undoubtedly were. Yet the legislature of Massachusetts may not have commonly thought of its faculty tax as a "capitation."

When Massachusetts became a state in 1780, its new constitution declared that taxes were to be assessed "on polls and estates in the manner that has hitherto been practiced," thus perpetuating the colonial faculty tax as a part of the state revenue system. But there is no way of telling from this one fact whether the faculty tax was being carried over as a part of the taxes on polls (as a capitation), or on estates (as a tax on property or wealth). However, about 1821 the term "faculty" began to be replaced by "income," so that by 1836 there was no faculty tax as such in

70 Id. at 372-373 and Becker, supra note 69, at 81 & 172.
71 Seligman, supra note 69, at 373.
72 Id.
Massachusetts, but there was a tax on income which was imposed thusly: “Personal property shall, for the purpose of taxation, be construed to include ...income from any profession, trade or employment, or from an annuity.” From this it is clear that the old colonial “faculty tax” on incomes or profits was – fifty years later – considered to be a variety of property tax. So perhaps it had always been viewed thusly in Massachusetts.

If so, it appears there were at least two ways of understanding and classifying faculty taxes current (or at least implicit) at the time the Constitution was being drafted: as a variety of capitation after the French model, or as a species of property tax – as Massachusetts probably did. Both viewpoints squarely place faculty taxes in the general category of taxes on persons and estates, and were routinely considered direct taxes.

But Secretary of the Treasury Oliver Wolcott Jr. of Connecticut in his 1796 report on state taxation nonetheless described the faculty tax thusly: “Taxes on the profits resulting from certain employments.... It is presumed that taxes of this nature cannot be considered as of that description which the Constitution requires to be apportioned among the states... [because] their operation is indirect....” So opined Wolcott, a New Englander who served under the Federalist presidents Washington and Adams. He gives no reasons for his judgment; but then, he was not charged with writing his report until after the Hylton decision on March 2, 1796 had made it fairly clear that the courts were going to view the apportionment clause very narrowly indeed.

On the other hand, Albert Gallatin of Pennsylvania – Secretary of the Treasury under the Republican presidents Jefferson and Madison – writes in that same contentious year of 1796 concerning the tax revenues of the

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73 Id. at 390.

74 Calvin Johnson, supra note 9, at 69-77 emphasizes the “near synonymy” of direct taxes with internal taxes, but does not pay attention to the way in which a capitation is different from a poll tax. The phrase “capitation or poll tax,” that occurs in the writing of the period is logically ambiguous; and when it is taken to imply equivalence, needs to be understood in the context of the variations on flat poll taxes the states sometimes imposed. For example, Pennsylvania traditionally imposed a poll tax only on single free men not otherwise taxed; during the War of Independence Connecticut cut poll taxes in half for men between the ages of 16 and 21 (Becker, supra note 69, at 149); and in 1777 Virginia’s poll tax on “tithables” (free men and both men and women slaves) exempted slaves under the age of 31, who were instead rated ad valorem as property – and then in 1779 substituted an average poll tax of £5 per slave (calculated at 1.5% of average value) with discounts for those who “shall be incapable of labour, and become a charge to the owner.” Becker, supra note 69, at 182,149; Einhorn, supra note 5, at 47. This last shift illustrates the hybrid status of slaves with respect to taxation; so that when they were taxed as property, tiered or ad valorem assessments were used – as in Massachusetts, North Carolina, Maryland and New York – they were also still being implicitly taxed by the head. Einhorn, supra note 5, at 72, 81;108; Becker, supra note 69, at 162.

75 Seligman, supra note 6, at 386.

76 Dodge, supra note 9, at 872.
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United States: “The most generally received opinion, however, is that by direct taxes in the Constitution are those meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense.”

Since faculty taxes were levied in proportion to revenue in the form of profits or income, it seems inescapable that Gallatin, if queried, would have considered faculty taxes to be direct taxes, just as they were for Adam Smith, whose opinion Gallatin mirrored.

The origin of Wolcott’s concept of “indirect operation,” however, might reasonably be found in the way a tax on personal wealth was sometimes thought of as being levied “indirectly” whenever a faculty tax was imposed. In this view, the profits taxed were being used as a gauge of the total taxable value of a person’s estate or holdings, so that the tax collected would be roughly proportional to the wealth from which the tax was drawn. But this type of indirection in no way shifts the burden of the tax from wealth and profits (or, capital and revenues) onto expenditures (or, expenses) the way a straightforward excise tax does.

In support of Wolcott’s position, the tax historian Edwin Seligman asserts that colonial faculty taxes operated like land taxes that were assessed in terms of the value of the produce of the land because the actual market value of the land was unknown to the assessors. By this reasoning, the faculty tax was assessed “indirectly” on wealth, which was estimated by measuring income or profit derived from the exercise of a person’s economically productive “faculty.” But the faculty tax was levied directly on the person and paid directly out of that person’s revenues or capital, not through “expenditure” – in Adam Smith’s sense. Seligman’s comparison of faculty taxes to a particular land taxation practice is valuable evidence of the sense in which Wolcott may have meant “indirectly,” but his explanation establishes only that faculty taxes were closely associated with direct taxation of personal wealth and land.

The colonial penchant for lumping virtually all taxes other than imposts (meaning duties on imported goods) into the one category of direct internal taxes means that faculty taxes were considered just as “direct” as land, poll and excise taxes (or internal duties) were. However, the taxing provisions of the Constitution explicitly place duties and excises into the same category as imposts, so that in the new Federal scheme of taxation they also would be imposed as indirect, external taxes that must be uniform among the states. But what about faculty taxes?

When it comes to identifying what sort of common viewpoint on faculty taxes might have been shared by the drafters of the Constitution, there seems to be little explicit testimony. The Constitution itself is silent about faculty taxes: they are not named together with the “duties, imposts

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77 Albert Gallatin, A Sketch of the Finances of the United States (1796) in The Writings of Albert Gallatin, § 3.1 (1879), available at http://oll.libertyfund.org/title/1951. Gallatin’s work was printed in November 1796; Wolcott’s report was submitted to Congress in December 1796.

78 Seligman, supra note 6, at 380-81.
or excises” 79 as indirect taxes subject only to the rule of uniformity, nor are they mentioned as a species of direct tax or capitation subject to apportionment. But even if faculty taxes had been mentioned, their character would still have to be judged from the historical context, since none of the key tax terms used in the Constitution were actually defined.

Thus, when Rufus King of Massachusetts famously asked in the Convention what “the precise meaning of direct taxation” might be, James Madison Jr. of Virginia reported, “No one answered.” 80 This general reticence is often taken as a sign of how difficult a question it was to answer, but the general silence of the Convention on this point may well have been a sign that the delegates saw King’s question as an attempt to inject dispute into a matter that was clear enough already. For instance, in the Virginia ratification debates of 1788, John Marshall – the future Chief Justice – offered a confident definition of direct taxes in response to James Monroe’s discourse on their defects:

[M r. M onroe] “What are the objects of direct taxation? Will the taxes be laid on land? One gentleman has said that the United States would select out a particular object, or objects, and leave the rest to the States. Suppose land to be the object selected by Congress: examine its consequences. The landholder alone would suffer by such a selection. A very considerable part of the community would escape. Those who pursue commerce and arts would escape. It could not possibly be estimated equally. Will the taxes be laid on polls only? Would not the landholder escape in that case? How, then, will it be laid? On all property?

[M r. M arshall] The objects of direct taxes are well understood: they are but few: what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property. 81

It is noteworthy that Marshall omits mention of any kind of poll tax or capitation here, despite Monroe’s having used direct taxes on both polls and land as examples in his address. Marshall’s reply speaks only to Monroe’s very last question – perhaps because Virginia had just abolished its poll tax on free white men, transforming the traditional state tax on “tithables” into a tax on slaves only. 82 But in any case, the sort of narrow definition Marshall advanced could have been precisely what Rufus King wanted the Convention to debate and resolve upon, thereby explicitly excluding the broad range of faculty taxes collected in his home state of

79 U.S. Const. art. I, § 8, cl. 1.
80 Madison, supra note 16, at 435.
82 Einhorn, supra note 5, at 46,50. Also, faculty taxes were not part of Virginia’s tax legislation except in the form of a levy on non-military public salaries and income from “offices of profit.”
Massachusetts from the requirement of apportionment – much as Oliver Wolcott did.

Be that as it may, the Convention appears to have bypassed the whole issue, and ultimately one of the most frequently cited views of what constituted direct taxation became that formulated by Alexander Hamilton of New York in his “Opinion” of 1796, arguing that the Carriage Tax of 1794 was not a direct tax: “The following are presumed to be the only direct taxes – Capitation or Poll taxes, Taxes on lands and buildings, General assessments whether on the whole property of Individuals, or on their whole, real or personal estate. All else must of necessity be considered as indirect taxes.”

Of these three categories, the first two were widely practiced methods of taxation. The third, however, that of “general assessments” was taken directly from the tax policies of Hamilton’s home state of New York. There, in the face of war-time financial difficulties, the state legislature re-imposed in 1779 its old colonial system of apportioned tax quotas for each county, with one innovation: the elected assessors were directed to distribute the total tax burden among residents of each county “…according to the estates and other circumstances and ability of each respective person to pay taxes collectively considered.” Property, income and capital – but not expenditures – were all to be taxed as part of one general assessment that was intended to reflect each person’s ability to pay.

83 Although Madison’s secret notes are an invaluable window into the actions and ideas of the Convention, they are a partial record and inevitably selective. For instance, Robert Yates of New York took notes on some of the debates, and he records that on Thursday, June 28 Mr. Williamson of North Carolina said, as part of a longer speech: “A general government cannot exercise direct taxation. Money must be raised by duties and imposts, &c., and this will operate equally. It is impossible to tax according to numbers.” But when we look at James Madison’s report of that same speech, no reference to “direct taxation” or “duties and imposts” is to be found. Elliot, supra note 81, at § 1, The Notes of the Secret Debates of the Federal Convention of 1787, Taken By the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates From That State to the Said Convention, June 28, 1787 and The Founders’ Blog, Debates in the Federal Convention [from James Madison’s Notes], June 28, 1787, available at http://founders-blog.blogspot.com/2007/06/thursday-june-28-1787-equally-sovereign.html.

84 Marcus, supra note 2, at 467. Editors of the Documentary History of the Supreme Court series have assigned a date prior to Hamilton’s arrival in Philadelphia on February 17th for both his “Brief” and “Opinion” on the Carriage Tax. Although the “Brief” appears to be intended as an outline for Hamilton’s oral argument before the Court on February 23rd-25th, his “Opinion” may have been written afterwards. But even so, it is in a clerk’s handwriting and incomplete. Id. at 456-57, note AD.

85 Becker, supra note 69, at 159.

86 Hamilton despised this form of taxation, and worked - without success - with his fellow Federalists Livingstone and Schuyler to replace these ad valorem general taxes with simple poll taxes and acreage land taxes. Id. at 159 & 163. Hamilton’s inclusion of general assessments in his “Opinion” as a form of capitation should not divert attention from the way he presented this form of taxation to the Hylton Court: “an incompetent sign of wealth – [which] will operate inconveniently & oppressively.” Marcus, supra note 2, at 488.
In adopting “ability to pay” as the just standard for taxation, New York expressed its general approbation for the same principle Adam Smith espoused.87 His first principle of fair taxation was exactly this sort of proportionality: “The subjects of every State ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State.”88

Because the total tax levied by the State of New York was divided among the different counties in proportion to their legislative representation before being directly imposed on each resident (as a “capitation” according to Hamilton’s summary in Hylton), this pre-Convention tax system of New York could well have served as one precedent for the conjunction of direct taxation with representation in the Constitution. This possibility is strengthened by the fact that Gouverneur Morris of Pennsylvania, who proposed in the Convention that direct taxation be in proportion to representation,89 was very familiar with New York tax policies, having served in the provincial legislature as one of the principal drafters of the New York Constitution of 1777 before relocating to Pennsylvania. But as it turned out, the relative ease with which Morris’ initial resolution was first restricted to direct taxes and then adopted “nemine contradicente,” only set the stage for a protracted controversy about what was, or was not, a direct tax.

III. THE CARRIAGE TAX OF 1794 V. THE CONSTITUTION

The question of what constitutes a direct tax in the Constitution was, of course, the main point of contention in Hylton v. United States (1796). This case was one the government – acting through Tench Coxe, U.S. Commissioner of Revenue – was so eager to bring before the Supreme Court that it arranged (with the cooperation of the defendant) to stipulate that Daniel Lawrence Hylton of Virginia had refused to pay the new Carriage Tax on 124 more carriages than he actually owned – in order to meet the monetary threshold for taking cases to the Supreme Court.90 The initial case against Hylton was argued in Virginia before Cyrus Griffin and James Wilson (an Associate Justice of the Supreme Court) in 1795; and despite the split verdict, Hylton “confessed judgment” so that a pre-

87 Most of the documented evidence for early knowledge of Smith’s Wealth of Nations in America dates from the 1780s. For instance, Hamilton is reported to have written an extended commentary on it while a delegate to Congress in 1783, and to have relied on it heavily even though he “rejected its central teaching in favor of economic nationalism.” Fleischacker, supra note 27, at 901.
88 Smith, supra note 68, at 405. [Book V, Part II, Chapter 2].
90 Marcus, supra note 2, at 361.
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arranged Writ of Error could be submitted and the case be placed on the docket of the Supreme Court for 1796.

The arguments as heard by the Court in February 1796 are apparently lost to history as full texts, although their outlines can be traced in the notes Justice James Iredell took.\(^91\) Alexander Hamilton, Secretary of the Treasury, and Charles Lee, the United States Attorney General, argued the case upholding the constitutionality of the tax; Jared Ingersoll, Attorney General of Pennsylvania, and Alexander Campbell, District Attorney of Virginia, represented the tax protestor Hylton. Each set of attorneys had ready to hand the extensive arguments presented in the Virginia trial, since lively public interest in the case had moved both John Taylor (for Hylton) and John Wickham (for the United States) to publish their briefs well before the 1796 hearing took place.\(^92\)

The anticipated outcome was bemoaned by James Madison in a letter to Thomas Jefferson dated March 6, 1796: “The court has not given judgment yet on the Carriage tax. It is said the Judges will be unanimous for its constitutionality. Hamilton and Lee advocated it at the Bar against Campbell & Ingersoll. Bystanders speak highly of Campbell’s argument, as well as of Ingersoll’s. Lee did not shine, and the great effort of his coadjutor [Hamilton] as I learn, was to raise a fog around the subject, & to inculcate a respect in the Court for preceding sanctions....”\(^93\) The “fog” that Madison complains about may partly refer to Hamilton’s contention that “...there is no general principle which can indicate the boundary between the two [direct and indirect taxes].... That boundary then must be fixed by a Species of Arbitration, and ought to be such as will involve neither absurdity, nor inconvenience.”\(^94\)

This blanket statement from Hamilton’s 1796 “Opinion” was developed more fully in his oral argument before the Court.\(^95\) There he gave examples of the “absurdity” of saying that tax duties on commodities are always indirect, or that taxes on land and labor are purely direct. In each case Hamilton described how the burden of the tax may ultimately fall on a person other than the one being directly (or indirectly) taxed: the laborer passes his capitation on to his employer by asking higher wages, the landlord shifts the cost of his tax onto his tenants as higher rents and the merchant may import for his own use, so that the duty he pays is not shifted anywhere else.\(^96\) Yet Hamilton abandoned such sophistries a little later in the same discourse while setting forth Adam Smith’s position:

2. Smith... 1st proposition.

\(^{91}\) Id. at 468-90.
\(^{92}\) Id. at 383-409 & 424-36 (Taylor); and 410-24 (Wickham).
\(^{93}\) Id. at 494-95.
\(^{94}\) Id. at 466-67.
\(^{95}\) Id. at 478-81.
\(^{96}\) Id. at 78.
“Capitation Tax – goes directly to Income –

[Excise Tax – goes to] Income thru expence...
  Food – Clothing [are] Expence. Carriage tax – as an example -.
  1. payable on importation
  2. payable by the Consumer -.

This much more rational....

One as [going straight] to the source, the other going by a road
back to the source –.

Smith much the oracle of the Political O economists here....

Result – “Taxes [are] direct [when] applied to the elements or
sources of wealth -
  1. Tax on Land... [difficult not to include buildings] -
  2. Tax on Labour [thru] Capitation -

Land & Capitation alone [are] direct.”

Here Hamilton has evidently expounded the basic definition of direct taxes
that Justice Paterson adopted, and has done so by linking “capitation tax”
to the value of a person’s labor, rather than to sheer existence.

Hamilton’s stated goal in arbitrating the boundary between direct and
indirect taxation was to avoid unwonted “inconvenience,” as well as total
absurdity. But it seems that the primary inconvenience he wanted to avoid
was that of trying to collect a tax through apportionment.98 “It would be
contrary to reason and to every rule of sound construction to adopt a
principle for regulating the exercise of a clear constitutional power which
would defeat the exercise of the power.”99 That is, principles regulating
taxation should not “inconvenience” Congress in the exercise of that
power, so any principle that threatened to do so must be “contrary to
reason” – for just that reason. Justices Chase and Iredell apparently
adopted Hamilton’s view of the matter without hesitation.

But Hamilton’s position becomes palatable only if there is an
irresolvable uncertainty about how to understand and apply the regulatory
Constitutional principle. Hence, any new and potentially controversial
Federal taxes had to be drawn into a rhetorical fog that confused the
distinction between direct and indirect taxation. Two prime examples of

97 Id. at 80.
98 A tax on carriages was imposed by Virginia as a direct tax, and by Massachusetts as an
internal “excise” on personal property. These taxes would have been apportioned to the
Towns for collection in Massachusetts, or equalized by County in Virginia. Einhorn, supra
note 5, at 46, 49-50 ; 73-4, 77.
99 Marcus, supra note 2, at 465.
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this tactic involved illustrations tied to the Whiskey Tax of 1791 and, of course, to the Carriage Tax of 1794. The former tax was not addressed by name (at least not in Justice Iredell’s notes), but it fits Hamilton’s rhetorical pattern of questioning how an indirect excise on an article ordinarily produced for sale (such as whiskey) could also be a direct tax when the article was retained by the maker. In the case of carriages, Hamilton proposed a variation in which the tax is “Direct, as paid by the Keeper for his own use [but] Indirect, as to Hackney Coachmen [who shift the tax to their clients].” This difference he then disparaged as being “…so capricious and variant it could not be the [correct] standard.” Pace Hamilton, this distinction between taxes is quite clear and workable, but it would inconvenience Congress in its rush to impose taxes on carriages by limiting the unapportioned excise tax to coaches for hire, and blocking collection of the much more lucrative taxes on the luxury carriages of the wealthy. “Therefore” it must be absurdly wrong-headed.

In the end, what Hamilton construed as being neither absurd nor inconvenient was a simple categorization of carriages as commodities whose consumption was an expenditure that was subject to an excise tax. Being a tax incurred through an optional expenditure, the tax would fall only indirectly on the taxpayers’ income and not be a direct tax subject to apportionment. As if to prove his point that the Carriage Tax was an optional expenditure, Hamilton reportedly commented in Court, “It so happens, that I once had a Carriage myself, and found it convenient to dispense with it. But my happiness is not in the least diminished.” This personal aside showed not only how simple it could be for someone to avoid the tax, but it also affirms that it could be more “convenient” to let the Hackney Coachmen pay the tax out of the fares collected from their wealthy clientele than to pay the full annual rate by oneself. So it seems that a distinction Hamilton found too “capricious” to take seriously was nonetheless good enough reason to sell his own Coach.

Whether Hamilton’s playing with the different senses of direct and indirect was the primary cause or only a contributing factor, the Court finally did - as Madison and others had anticipated - affirm the constitutionality of the Carriage Tax by declaring it an indirect tax not requiring apportionment. Three of the four Justices hearing the case wrote fairly extensive opinions with differing dicta on what constitutes a direct tax in the Constitution. Their opinions are often quoted without taking any notice of the reservations and qualifications each contains, yet these

100 Id. at 479.
101 Carriages for husbandry and conveyances of goods were exempted from the tax of 1794, just as they were in the taxes levied by various states. Becker, supra note 69, at 144, 183, 207.
102 Marcus, supra note 2, at 490-91.
103 Hamilton’s cash book shows that he paid a ten dollar tax on the coach in question once, and then sold it for $450 - but only in April of 1796, after Hylton was decided. Id. at 491, n. 1.
features of their pronouncements are quite conspicuous and undoubtedly significant.

Thus, Justice William Paterson, a member of the Constitutional Convention from New Jersey, writes in Hylton, “I never entertained a doubt that the principal – I will not say the only – objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.”

Justice James Iredell writes, “Perhaps a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil – something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description.... Either of these is capable of apportionment. In regard to other articles there may possibly be considerable doubt.”

And Justice Samuel Chase writes, “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, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.”

The digests of Hylton frequently ignore these qualifications and reservations, and sometimes even pass down a shortened version of Justice Chase’s non-judicial opinion as authoritative. For example, James Kent’s 1826 digest of Hylton reads “The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census...[so] the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be, that the direct taxes contemplated by the Constitution were only two, viz., a capitation, or poll tax, and a tax on land.”

What is remarkable about Hylton is not just the way its dicta were passed down in the law digests, but that two of the three Justices ignored

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104 Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (emphasis added). Note that Paterson does not say “a poll tax and a tax on land” the way Iredell and Chase do, so it seems “capitation” was still a significant legal term in his mind.

105 Id. at 174 (emphasis added).

106 Id. at 174 (emphasis added). Chase here implicitly acknowledges that “capitations” could reasonably be taken to include the old “faculty” taxes as well as poll taxes. He then follows Hamilton in rejecting the use of “general assessments” such as were being levied in New York State. (For Justice Chase’s opinion online, see http://press-pubs.uchicago.edu version, not http://supreme.justia.com.)

107 JAMES KENT, COMMENTS ON AMERICAN LAW § 1, 254-255 (15th ed. 2002). The text quoted has a footnote which contains the following, somewhat relevant, comment by a later editor: “This is sustained by the language of the Supreme Court in later cases, with the possible addition of taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States. Chief Justice Salmon Chase (1864-1873) intimates that the definitions of direct taxes by political economists cannot be used satisfactorily for the purpose of construing the phrase in the Constitution (emphases added).”
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or rejected expert testimony about direct taxes, even when clearly presented by the counsels for the United States, Alexander Hamilton and Charles Lee. Most conspicuously, Justice Chase directly - though non-authoritatively - contradicted Hamilton's detailed exposition of what constituted a capitation. As we have already seen, Iredell’s notes on what Hamilton said are as follows:

Capitation - 3 meanings.

1. Person merely

2. Person having reference to property. See Hamilton’s [prior] speech

3. [Person having reference to] profession. 3 Smith [1789] 327.109

Justice Chase, however, was apparently determined to reduce “capitation” to the first of the three aspects Hamilton names, and insisted that a capitation is nothing but a poll tax on persons “simply, without regard to property, profession or any other circumstance.” On the other hand, Justice Iredell avoided using the term “capitation” at all, and diverted himself by speculating about how direct taxes, whether on polls or land, are properly levied only on something “inseparably annexed to the soil.” So of the three Justices writing opinions, it is only Paterson who retains the words “capitation tax” in tandem with “a tax on land” as the two principal kinds of direct tax. He thereby tacitly allows Hamilton’s threefold description of “capitations” to stand as a true exposition of what the Framers of the Constitution had in mind.

Another curious thing about the opinions of Justices Chase and Iredell is that both try to base their rulings on the exigencies of apportionment, perhaps because they are not confident in attributing their own narrow view of direct taxation to the authors of the Constitution. Thus, Justice Chase writes:

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could [fairly] lay in proportion to the census. The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed, must ever determine the application of the rule... [and] it appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice.”110 This argument is pure sophistry: the Constitutional rule affirms that direct taxes are fairly imposed only if they are apportioned, not that taxes are direct only if their apportionment results in fairly uniform tax obligations for individuals.111

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108 There are three places where explanations of capitation appear in Iredell’s notes; two by Hamilton and one by Lee. Marcus, supra note 2, at 475 (Lee), 481-89 (Hamilton).
111 See text accompanying note 11 supra for a demonstration of its circularity.
Yet Justice Iredell falls into the same logical error: “As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be [fairly] apportioned. If this cannot be [fairly] apportioned, it is therefore not a direct tax in the sense of the Constitution. That this tax cannot be [fairly] apportioned is evident.112

Neither Justice was willing to see that their method of interpretation made the apportionment rule meaningless and impotent.113 As Erik Jensen says, “... if apportionment applies only where the tax base is ‘equal per capita among the States’ [then] apportionment applies only when it makes no difference. ... The [Direct-Tax] Clauses should mean that, in ordinary circumstances, a direct tax aimed at a sectionally concentrated tax base (that is, a base that isn’t at least approximately proportionate to population) won’t be enacted.”114 Certainly, if the Founders did not intend the rule to restrain sectionally unfair Federal taxation, it could never have been seen as protecting Southern slaveholders from punitive capitations, and the Philadelphia Convention would have failed. That the Convention did not fail is de facto evidence that Justices Chase and Iredell are wrong in principle, and that the Founders did truly intend the direct tax rules to prevent or restrain certain possible Federal taxes.

Given the lively vocal criticism of the Carriage Tax throughout 1795, it is remarkable that two of the Justices in Hylton were apparently still unable to imagine a situation in which Congress would mistakenly enact a direct tax without providing for apportionment.115 Justice Paterson alone tries to envision the possibility of a fairly apportioned direct tax: “If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears by the practice of some of the States to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty, but as it is not before the Court, it would be improper to give any decisive opinion upon it.”116

Fittingly, it was also Justice Paterson who alone enunciated the truly decisive principle on which Hylton really turned: “All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax.”117 The basis for his distinction between direct

112 Hylton, 3 U.S.(3 Dall.) 171 at 182.
113 Or, if they did see it, nonetheless approved of gutting any troublesome restriction on taxation for partisan reasons.
114 Jensen, Interpreting the Sixteenth Amendment, supra note 9, at 372-73.
115 A modern example of the same attitude can be found in Johnson, Fixing the Constitutional Absurdity, supra note 9, at 295, 295-54. Joseph Dodge joins with Jensen in rejecting the “absurdity” test as a valid way of deciding whether or not a tax is subject to apportionment. Dodge, supra note 9, at 916-17.
116 Hylton, 3 U.S.(3 Dall.) 171 at 178.
117 Id. at 181.
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and indirect taxes is the following passage from Adam Smith’s The Wealth of Nations, which he quotes in his opinion:

The impossibility of taxing people in proportion to their revenue by any capitation seems to have given occasion to the invention of taxes upon consumable commodities; the state, not knowing how to tax directly and proportionally the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be neatly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out.\textsuperscript{118}

Thus too, when Paterson wrote that in the minds of the Founders, the principal objects of direct taxation were “a capitation tax and a tax on land,” we can be reasonably confident that it was Adam Smith’s understanding of capitation taxes that lay behind his – and their – use of the word.\textsuperscript{119}

In choosing to invoke the prestige of the economist Adam Smith, Justice Paterson was also implicitly accepting John Wickham’s rebuttal of John Taylor’s appeal to the economics of James Steuart in the Virginia Circuit Court trial. There, Taylor introduced an analysis of the types of taxes based on Steuart’s work An Inquiry into the Principles of Political Economy (1767), saying that the direct taxes of the Constitution matched the “cumulative” taxes in Steuart’s work; and that indirect taxes were the same as his “proportional” taxes on “alienations” of property.\textsuperscript{120} Wick-

\textsuperscript{118} Smith, supra note 68, at 429. Commenting on the use of the word “capitation” in the text quoted by Paterson, Albert Gallatin writes, “The remarkable coincidence of the clause of the Constitution with this passage in using the word “capitation” as a generic expression, including the different species of direct taxes, an acceptance of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from and falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.” Gallatin, supra note 77, at § 3.1 (Of the Revenues of the United States).

\textsuperscript{119} Marcus, supra note 2, at 473. Fleischacker has documented that at least five influential delegates to the Convention can be shown to have had prior knowledge of Smith’s The Wealth of Nations: Edmund Randolph (Virginia) was lent a copy by the financier Robert Morris (Pennsylvania) in December 1781; Alexander Hamilton (New York) is reported to have written a commentary on it in 1783 (see Fleischacker, supra note 27, at 901, and note 87 supra); James Madison (Virginia) put it on his 1783 list of core items for a proposed Congressional library; and James Wilson (Pennsylvania) used it to prepare for a speech on banking he gave in Philadelphia in 1783, and quoted from it at length in 1785. Fleischacker supra note 27, at 901-02.

In addition, Iredell’s notes of Hylton show that Jared Ingersoll (Pennsylvania) was quoting from the 1776 (first British) edition of Wealth of Nations. Marcus, supra note 2, at 472, n. 35. And finally, it is certain that Benjamin Franklin (Pennsylvania) knew Adam Smith personally, and that he is reported (somewhat anecdotally) to have participated in Smith’s final revisions to the first edition while in London from 1773 to 1776, many of which revisions deal with colonial or American experience. Thomas D. Eliot, The Relations Between Adam Smith and Benjamin Franklin Before 1776, 39 Pol.Sci. Q. 67, 69-73 (1924).

\textsuperscript{120} Marcus, supra note 2, at 413-14.
ham, counsel for the United States, countered persuasively by observing that the Constitution speaks of “direct” taxes - a term clearly found in Adam Smith - rather than of Steuart’s “cumulative” taxes, so we must presume it does not have Steuart’s categories in view. In arguing for Hylton before the Supreme Court, Jared Ingersoll also implicitly acknowledges the force of Wickham’s argument by citing Steuart only to point out that land and carriage taxes are classed together in his work.

Given the clear definition in Smith of indirect taxes as taxes on expense, it would seem that if the Carriage Tax were simply a tax on expenditure levied at the time of purchase, there would have been no credible grounds for Hylton’s case. But the tax was not levied at the time of purchase. At the root of Hylton’s objection, then, was the way the tax was imposed. It was levied and collected as an annual tax on personal property kept for one’s own use, as we can see from the text of the act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied, collected and paid, upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following, to wit: For and upon every coach, the yearly sum of ten dollars; – for and upon every chariot, the yearly sum of eight dollars; – for and upon every phaeton and coachee, six dollars; – for and upon every other four wheel, and every two wheel top carriage, two dollars; – and upon every other two wheel carriage, one dollar. Provided always, That nothing herein contained shall be construed to charge with a duty, any carriage usually and chiefly employed in husbandry, or for the transporting or carrying of goods, wares, merchandise, produce or commodities.

It is worth noting that the tax, enacted June 5th 1794, was originally imposed for only two years, but was repealed and re-imposed with higher rates soon after the ruling in Hylton. In the successor bill a range of duties from fifteen dollars down to two dollars was to be collected yearly from 1796 to 1801. In both cases, the provisions of the tax made it clear that any vehicle not “usually and chiefly” employed in husbandry, or for transporting merchandise, was to be proportionally rated and taxed according to its presumed market value – not its profitability as a coach for hire.

Nonetheless, in arguing for passage of the Carriage Tax in the House, Representative Ames of Massachusetts is reported to have countered Representative Madison’s opposition to the bill by saying:

...it was not to be wondered at if he [Madison], coming from so different a part of the country [Virginia], should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had been

121 Id. at 418, 418, n. 12.
122 Id. at 473.
123 Act of June 5, 1794, c. 45, 1 Stat. 373-75.
124 Id. at 375, 478-82.
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long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so. The duty falls not on the possession, but the use; and it is very easy to insert a clause to that purpose, which will satisfy the gentleman himself.\(^{125}\)

Madison was not satisfied by this distinction, which only makes good sense if the excise was being collected as a license for use of the carriage on the public roads of the State of Massachusetts. The new Federal government was in no position to make such a proprietary claim about any roads, so the distinction between use and possession was an empty one with respect to a Federal Carriage Tax.

It seemed obvious to Madison, Hylton and others that taxes levied on personal property were direct taxes just as much as taxes on a person’s land or slaves or dwellings were. In a somewhat off-handed reference to this basic concern, Justice Paterson quoted Smith yet again:

Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways: the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer.\(^{126}\)

Paterson did not elaborate on how this passage was relevant to the case at hand – nor did Hamilton.\(^{127}\) But what it does is paper over a very relevant distinction.

Smith’s concern in this passage was solely with the convenience of collecting the tax, for in English law an “excise” was virtually any tax at all; and an excise on carriages was simply a tax on a luxury that might be collected in any way the Crown chose.\(^{128}\) Collecting it in yearly payments was regarded by Smith as the better way; but he thereby inadvertently sanctioned an anomaly with respect to his own definitions – an indirect tax on consumption that falls directly on whatever annual revenue the owner of the vehicle has.

John Taylor points out this very problem, in the published version of his Virginia Circuit Court argument on behalf of Hylton: “An annual tax upon carriages, is a tax upon the use,\(^{129}\) not upon the consumption

\(^{125}\) ANNS OF CONG. 729-30 (1794).
\(^{127}\) Marcus, supra note 2, at 478, 482.
\(^{128}\) In Massachusetts the carriage excise would have been collected annually with other internal direct taxes as part of the apportioned quotas delegated to the various Town assessors. See text accompanying note 98 supra. Einhorn, supra note 5, at 73-4.
\(^{129}\) For Taylor, “use” means continual possession and utilization, or “possession for use.” Joseph Dodge, however, seems to follow Representative Ames’ view of “use,” when he maintains that the Carriage Tax was not a property tax, but rather an excise on use because it was not imposed both “periodically [and] on the [market] value of the item.” Dodge, supra note 9, at 928. These criteria are avowedly inferred from a provision in the Internal Revenue Code [I.R.C. § 164(a)(2) (2000)] and treat the tax conceptually as a license fee. But this
[through acquisition]. The use goes on, so does the tax. Consumption is an idea of unity, and one tax covers it. [Under this tax act] an imported carriage pays both species....” And in a later, more rhetorical passage Taylor says:

To what class, it may be asked would a tax imposed upon a carriage in the hands of the manufacturer, payable but once – reimbursable on alienation – and voluntarily assumed by the buyer, belong? Is such a tax of the same nature with an annual tax, imposed upon the same article – after alienation – not reimbursable – and forcibly extorted? It is admitted on all hands, that the first would be an indirect tax.... What is the second?\(^{130}\)

The principal argument against Taylor’s distinction between use and “consumption” is that of John Wickham, as published after the Virginia Circuit Court decision. Intending to follow Smith’s line of thought, Wickham contends that the yearly tax on a carriage (or other consumable commodity) is the result of “one gross sum... being divided into annual payments.”\(^{131}\) But his description was simply contrary to the facts in *Hylton*. The gross sum contemplated by the 1794 tax, enacted for two years, was twenty dollars for every “coach.” But the Carriage Tax of 1796 imposed a tax of fifteen dollars in each of six years, for a gross sum of ninety dollars levied on every “coach” that continued to be owned during that entire period.\(^{132}\) Thus it is clear that the gross sum of the tax had no fixed relationship to the market value of the coach, which is the measure of the expenditure made. The “gross sum” of Wickham’s discussion is purely hypothetical: it is in reality the sum of all yearly taxes actually collected, not a single tax levied in proportion to the expenditure and then divided into annual payments.

It is also clear from the provisions of the Carriage Tax that the obligation to pay the tax had nothing to do with when the expenditure was actually made. Hence, it is wrong to think of the yearly tax as an installment payment on the gross tax due at purchase. Further, when the gross sum to be collected is indefinite, the convenience of paying yearly is offset by the strong possibility that the buyer would end by paying more over the life of the carriage than the sum initially proposed – say, twenty dollars for each coach – because there was no limit to extensions of the yearly tax payments.

Taylor’s key point was that the law taxed simple “possession for use” of a carriage, and not expenditure for a carriage; but his point is apparently mentioned only once in Justice Iredell’s notes on *Hylton*. There it appears as a part of Ingersoll’s introductory exposition on types of taxes ra-

\(^{130}\) Marcus, supra note 2, at 430 & 433-34.

\(^{131}\) Id. at 421.

\(^{132}\) Act of May 28, 1796, c. 37 1 Stat. § 1, 478-482.
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ther than as a key element of his summation.133 Yet on this point the whole weight of Smith’s relevance to how the tax was being collected rested: if Taylor’s observation was cogent, the Carriage Tax was clearly a direct tax according to Smith’s own criteria. Justice Paterson, however, passed over all such considerations by simply quoting Smith’s opinion on collection of excises as authoritative, and thereby implicitly adopted Hamilton’s cursory, “whatever” view of the matter.134

IV. Directive Taxes by Apportionment as per the Constitution

A. Apportionment and the Direct Tax of 1798

Having missed in the fog of Hamilton’s oral argumentation the crucial distinction between possession for use and expenditure for acquisition, Justice Paterson went even farther afield to join his fellow Justices in rehashing the absurdity and inconvenience of trying to impose a Carriage Tax through apportionment by the “federal ratio” – a provision of the Constitution for which he exhibited little sympathy.

The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. ... [The Constitution] was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule therefore ought not to be extended by construction.135

Opponents of the Carriage Tax, however, saw a great principle at work within the requirement of apportionment – namely, restraint of the Federal powers of direct taxation. For example, John Taylor in his “Argument Respecting the Constitutionality of the Carriage Tax” wrote

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133 “Tax on property in possession - part of stock of State.” Marcus, supra note 2, at 469.
134 Id. at 478.
135 Hylton v. United States, 3 U.S.(3 Dall.) 171, 178-79 (1796). Paterson, a delegate from New Jersey at the Convention, regarded slaves purely as property. His objection was to the $3/5$ths rule, not to the principle of apportionment itself. That is, slaves should not be represented in Congress at all, but should all be fully subject to federal taxation. This helps us understand why in Convention on July 12, 1787 his delegation voted “No” on Randolph’s compromise motion to give $3/5$ths weight to slaves when allotting representatives in the House and for calculating apportioned direct taxes, and also rejected Pinckney’s proposed amendment to that motion making “blacks equal to whites in the ratio of representation.” Madison, supra note 16, at 245-246.
The purpose of the Constitution is to bestow upon each State a substantial security against oppression by means of any species of taxation. ...The Constitution, according to my construction, is not providing for an equality of [direct] taxation among individuals, in proportion to their revenue, but for an equality of taxation between States in proportion to numbers.\footnote{Marcus, supra note 2, at 432-34.}

Edmund Pendleton, in his brief essay “Some Remarks on the Argument of Mr. Wickham” made the same point: “The great object, therefore, in the Federal terms, was to preserve to each State, according to its numbers, its due share in Representation, and to fix the like proportion of the public burthens; to prevent partial combinations, for favour, or injury to particular States.”\footnote{Id. at 452.} James Madison commended Pendleton’s presentation of the case,\footnote{In a letter of February 7, 1796 he wrote to Pendleton, saying the latter’s essay was “unquestionably a most simple & lucid view of the subject, and well deserving the attention of the Court which is to determine on it.” Id. at 450.} so it is clear that in the minds of some of the more knowledgeable and influential of the founding generation the apportionment of direct taxation was seen as protections for all the states. Not only were the slave-holding Southern states protected from selectively unfair direct taxation of slaves by the rule of apportionment, but protection was also extended to the abundance of taxable buildings in the Northern states, and to the extensive but sparsely settled holdings of land in the Western territories.

When Congress did deliberately impose an apportioned Direct Tax in 1798, it was acknowledged on all sides as Constitutional, and was not levied on any one taxable object: assessments on dwellings, slaves and land were combined so as to achieve a legislatively acceptable parity in the tax burden falling on each state. The tax statute, designed by Wolcott, describes the way in which a total sum of two million dollars was to be raised:

\begin{quote}
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a direct tax of two millions of dollars shall be, and hereby is laid upon the United States, and apportioned to the States respectively \cite{Act of July 14, 1798, c.75, 1 Stat. 597-98.}...and shall be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act.

...And the whole amount of the sums so to be assessed upon dwelling houses and slaves within each State respectively, shall be deducted from the sum hereby apportioned to such State, and the remainder of the said sum shall be assessed upon the lands within such State according to the valuations to be made pursuant to the act aforesaid, and at such rate per centum as will be sufficient to produce the said remainder.\footnote{Act of July 14, 1798, c.75, 1 Stat. 597-98.}
\end{quote}
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Apportionment as mandated in this Act has four general features: (1) no one species of property bore all the burden, (2) a graduated scale of taxation was applied to market value assessments of dwellings and land, (3) only a limited class of slaves was taxed “by the head” at a flat rate, and (4) rates of land taxation were set by assessors so as to supply the balance due after other portions of the tax had been collected. One reason for these features - which clearly set this tax apart from the disputed Carriage Tax - lies in what one might call the politics of apportionment. Because no one taxable object was uniformly distributed throughout the states, and nowhere was wealth equally distributed among taxpayers, the only way a representative assembly could agree on what to do was by negotiating a composite tax scheme. The Tax of 1798 was just such a composite: it was enacted and collected, but not reiterated; and this was arguably just what the Founders had intended.

As it turned out, only one provision of the Tax of 1798 was hotly contested, and it was not the tax on slaves. It was the inclusion of an enumeration of each dwelling’s windows in the assessment of its taxable value. Popular resentment of counting windows was most likely rooted in the conviction that doing so resulted in an unfairly high tax on humbler dwellings; and popular revulsion at this practice was strong enough to induce Congress to repeal that provision of the Tax in early 1799. Although the Direct Tax of 1798 precipitated the Federalist loss of the Presidency and control of Congress in the 1800 elections, no Constitutional challenges were mounted against its provisions.

The existence of widespread popular aversion to direct taxation was something proponents of the new Federal Constitution did not ignore in their arguments for ratification. Alexander Hamilton, the Federalist defender of the Carriage Tax, was eloquent about why a Federal power of direct taxation was needed, and in what circumstances it could justifiably be exercised. In the New York State ratification debates Hamilton said:

Sir, it has been said that a poll tax is a tyrannical tax; but the legislature of this State [New York] can lay it, whenever they please. Does, then, our Constitution authorize tyranny? I am as much opposed to capitation as any man. Yet who can deny that there may exist certain circumstances which will render this tax necessary? In the course of a war, it may be necessary to lay hold of every resource; and for a certain period,

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140 This method of collecting an apportioned tax quota was routinely used in Massachusetts, where assessors collected poll taxes first, and then set the rates for land so as to complete the quota due. Einhorn, supra note 5, at 74.
141 Act of July 14, 1798, c.75, 1 Stat. 626.
142 Since we know from his argumentation in Hylton that Hamilton did not think poll taxes were the only form of capitation, this passage from eight years earlier should not be read as implying the two were synonymous in his mind. See text accompanying notes 10 & 108 supra. If capitation meant nothing but poll tax, Hamilton’s saying he was “as opposed to capitations as any man” would have been ludicrous, given his well-known political stance in favor of levying poll taxes in New York State.
the people may submit to it. But on removal of the danger, or the return of peace, the general sense of the community would abolish it.\footnote{Elliot, supra note 81, at § 3 (June 28, 1788).}

The Direct Tax of 1798 was just such a tax even though it was not a poll tax on everyone. It was enacted for a specific purpose – to raise two million dollars for what looked like an impending war with France – and not for the ordinary operating expenses of the new Federal government. Once that sum was collected, the tax ended. This then, was in line with what proponents of ratification had envisioned.

Hamilton was not alone in presenting this sort of justification for the Constitutional provision authorizing direct taxation; his view was echoed in the record of ratification debates in both Massachusetts and Virginia:

\begin{quote}
[In Massachusetts, Judge Dana spoke] ...urging the necessity of Congress being vested with power to levy direct taxes on the States, and it was not to be supposed that they would levy such, unless the impost and excise should be found insufficient in case of a war ...
\end{quote}

\begin{quote}
[In Virginia, Mr. John Marshall]: We are told by the gentleman who spoke last [Mr. Monroe], that direct taxation is unnecessary, because we are not involved in war. This admits the propriety of recurring to direct taxation if we were engaged in war.\footnote{Id. at § 3 (June 10, 1788).}
\end{quote}

Hamilton’s position on poll taxes in his home state also calls attention to a fact of considerable relevance to the practice of direct Federal taxation: that all the states routinely used a variety of forms of direct taxation, and relied heavily on the revenues such taxes produced. Hence, no state could be expected to look kindly upon sweeping or long-term intrusions of the Federal tax collectors into this source of revenue; and all state politicians would see the value of apportionment as a prudent restraint on such taxations. That is, the difficulty of passing an apportioned direct tax would limit – but not forbid – adding Federal capitations and property taxes to those already imposed by the several states, each in its own way.

The strength of this general desire to restrain direct Federal taxation is visible in the record of the Convention itself, where it is noteworthy that the provision for apportionment of direct taxation according to a census was approved before the issue of how to enumerate slaves was finally settled. On July 12th an apportionment resolution was introduced by Gouverneur Morris, amended with the assistance of James Wilson and then accepted unanimously in the form “provided always that direct taxation ought to be proportioned to representation.”\footnote{Madison, supra note 16, at 242. On that date, and the day before, only ten states had delegates present: Rhode Island, New Hampshire and New York were absent from the deliberations.} In the ensuing debate over the necessary census, a resolution for adopting the 3/5ths rule, or “federal ratio,” for enumerating slaves was introduced by Edmund Randolph, and
eventually adopted with six states in favor, two opposed and two with di-
vided delegations.\footnote{147 Id. at 242-45. This ratio was proposed in the Congressional Resolution of April, 1783; but could not be implemented because it was not ratified by all the states.}

It has often been noted that a resolution proposing a \(\frac{3}{5}\)ths ratio for enumeration of slaves in the census determining representation had failed the day before, after very acrimonious disputes over slavery erupted.\footnote{148 For example, Lynd, supra note 155, at 204-05; Finkelman, supra note 154, at 201-05; Jensen Apportionment of Direct Taxes, supra note 3, at 2386; Johnson, The Foul-up, supra note 9, at 153; Einhorn, supra note 5, at 164-65; Ackerman, supra note 3, at 9; and Bullock, supra note 30, at § I, 233.} But once direct taxation was tied to representation, the \(\frac{3}{5}\)ths ratio immediately became an acceptable compromise. When we look more deeply into this remarkable change, two things have to be kept in mind: (a) it was the \(\frac{3}{5}\)ths rule that was controversial, not apportionment of taxation, and (b) the delegates who switched from voting “no” on July 11th to voting “ay” on July 12th were equally from Northern and Southern states.

First off, apportioning Federal taxation by population was simply not controversial. Calvin Johnson, for example, describes how one of the driving forces of the Philadelphia Convention was a determination to form a federal government with powers of taxation that could not be flouted the way Congressional requisitions were, or blocked by the vetoes of one or two states. In particular, delegates had in view the proposal for a general Federal tariff that Rhode Island had vetoed in 1781; and the 1783 proposal for apportioning by population the property tax requisitions Congress imposed on the states, a reform that New York and New Hampshire had vetoed.\footnote{149 Of these three “wicked states,” Rhode Island never sent any delegates to Convention, and attendance by the delegates from New York and New Hampshire was spotty enough that they both missed the July votes on taxation and representation. This absence left only delegates from states that had approved the measures of 1781 and 1783 on the floor and in control of the Convention – with predictable results. Further, the idea that apportioned taxation should apply only to direct taxes and capitations was part of Charles Pinckney’s written proposal for a new plan of government submitted on May 29th, and thus constituted...} Of these three “wicked states,” Rhode Island never sent any delegates to Convention, and attendance by the delegates from New York and New Hampshire was spotty enough that they both missed the July votes on taxation and representation. This absence left only delegates from states that had approved the measures of 1781 and 1783 on the floor and in control of the Convention – with predictable results.

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\footnote{149 See CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION (2005). Although it is reasonable to see tax reform as one primary motive for seeking a new constitution, Johnson goes so far as to say: “Factors other than tax and the welled-up anger [at the delinquent states] are not significant contributory causes to adoption of the Constitution... [which] was not written to limit the national government, but to get it to run.” Id. at 277. Common sense, however, would see the matter differently: if government is like a vehicle, one that runs but has no brakes belongs in a garage.}

\footnote{150 These two stymied tax reform measures were the work of Robert Morris, Superintendent of Finance of the United States from 1781 to 1784 and delegate from Pennsylvania to the Convention – the same Robert Morris who lent a copy of Wealth of Nations to Edmund Randolph in 1781. See text accompanying note 119 supra.}
a reservoir of ideas that could be mined by any delegate at any time. Pinckney’s plan provided that “The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description,” and that there be no “capitation tax, but in proportion to the census before directed.” Because Pinckney was a delegate from South Carolina, his proposals could be presumed to be generally acceptable to the Southern states, and it would have been of particular interest to delegates casting about for ways to keep the Convention from dissolving over the slavery issue. It is not likely that Gouverneur Morris had Pinckney’s language in mind when he first made his proposal, if only because he had to add the word “direct” during discussion on the floor. However, it is likely that Morris had the basic framework of the Act of 1783 in mind, but had failed to take into account the fact that the Congressional “requisitions” in question were property taxes, and were therefore quite distinct from the unapportioned “imposts” that were the objects of the federal tax proposed in 1781.

With regard to the voting on the 3/5ths rule, the record shows a good deal more than a simple reversal. The tallies are presented in Table 1 below, arranged for comparison.

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151 That it was not forgotten is shown by its consideration being one of the major responsibilities explicitly delegated to the Committee of Detail. Elliot, supra note 81, at § 1 Journal of the Federal Convention, July 24, 1787.
152 Id. at May 29, 1787.
Dispelling the Fog About Direct Taxation

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Table 1: Votes on 3/5ths Enumeration

Not only have Pennsylvania and Maryland reversed their votes, but Massachusetts and South Carolina — the archetypal foes in the North-South rivalry — no longer have consensus in their delegations. The "no" votes, however, are also revealing: Delaware consistently voted against any scheme in which Congressional votes were determined by population, and New Jersey consistently voted against any resolution that treated slaves as anything other than property. So the only firm vote against the 3/5ths rule per se was that of New Jersey, and of Justice Paterson as a member of its delegation in Convention.

With these factual points in mind, it becomes easier to see what sorts of things lay behind the Three-fifths Compromise. First of all, Staughton Lynd pointed out decades ago that key agreements about the contentious Northwest Ordinance were reached by Congressional conferences in New York City within the same week that Convention delegates in Philadelphia reached and resolved the crisis over slave representation. His investigations led him to assert that it was at least possible that essential features of the Northwest Ordinance could have been known by enough delegates to influence the voting on July 12th thru the 14th in the Philadelphia Conven-

With confidence that the new states in the Northwest would be free of slavery and few in number, Northern delegates could feel that their Senate majority was protected and the spread of slavery curtailed. But the Southern states could look at the Ordinance’s fugitive slave law, and its implicit acceptance of slavery South of the Ohio River as protections for the western expansion of a slave-based economy and society. Thus, each side of the slavery question might well feel more confident in striking a bargain with the other.

A second line of interpretation follows from the simple observation that the rejected Congressional Act of 1783 contained the $\frac{3}{5}$ths “federal ratio” for counting slaves, as well as the basic idea of using population-based apportionment for Federal property tax “requisitions.” This 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.” The implicit reasoning here is that the market price for labor is an adequate measure of the value of labor, and therefore of the economic productivity of workers – who are, naturally enough, persons. Doing this effectively assumes and validates the humanity of slaves as laborers, and makes it an anomaly to tax them as property.

The apportionment rule for direct taxation lumps property taxes, poll taxes and capitations all together, without distinction. By itself, apportionment did not mandate treating slaves as persons or as property, and this was acceptable to even the staunchest opponents of recognizing the personhood of slaves. But for someone like Justice Paterson, who was firmly convinced that slaves are in law nothing but property, the $\frac{3}{5}$ths ratio was unacceptable in two respects: not only did it implicitly attribute a modicum of humanity to slaves, but it also – contrary to the Convention’s original decision that only persons would be represented in Congress, and not property – gave slave owners the right to have some of their property count toward electoral representation. Consequently, the Constitutional compromise of which Justice Paterson said “it is radically wrong; it cannot be supported by any solid reasoning” was necessarily the provision regarding $\frac{3}{5}$ths enumeration, and not the general requirement for apportionment of direct taxation.

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155 Staughton Lynd, *The Compromise of 1787*, in *CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS* 210-213 (1967). The possible, but conjectural, link Lynd describes focuses on the arrival of Manasseh Cutler (principal drafter of the Ordinance) in Philadelphia on July 12th, and his meetings with various delegates including Alexander Hamilton (who was in town, but not attending the Convention) and Hamilton’s good friend Gouverneur Morris.

156 Johnson, *Fixing the Constitutional Absurdity*, supra note 9, at 304-05.

157 Once it is accepted that *Wealth of Nations* was known to American intellectuals well before its 1789 reprinting in Philadelphia and New York, it becomes possible that having recourse to market price as the most adequate measure of the value of labor is a sign of Smith’s growing influence in American politics. See text accompanying note 119 supra.

Dispelling the Fog About Direct Taxation

For these reasons, the view that apportionment was originally - and therefore remains - solely relevant to the issue of how to protect slaveholders from discriminatory taxation is wrong. And further, it follows that to whatever degree a particular Justice’s decision in Hylton was based on this misconception, it becomes to that same degree dubious. For example, Justice Paterson, who based his decision primarily on Adam Smith’s definitions, derives from his misconstrual of apportionment mainly a refusal to “extend” its application from taxes on slaves to taxes on carriages. On its face his reluctance looks reasonable, but it shows how little sustained attention he gave to the nature of capitation; and how doggedly he resisted any implementation of the 3/5ths ratio, even when it did not involve in any direct way the legal status of slaves as property or persons.

B. APPORTIONMENT AND THE CONVENTION

When slaves were finally taxed directly in 1798, the difference between such a tax and a luxury tax on carriages is evident; and the way the tax was crafted is also very revealing. The Act does indeed apportion each state’s tax burden according to a census modified by counting only three out of every five slaves reported. But the uniform tax of fifty cents per slave was not simply a head tax, because only those slaves capable of productive and/or reproductive labor were to be counted. Those who were infirm, over the age of fifty, or under the age of twelve were excluded from taxation.

Further evidence of how strongly taxes on slaves were tied to productive capacity in the minds of people during the 1780’s and 90’s comes from the post-revolutionary tax history of South Carolina. In Charleston, artisans who employed skilled slaves in their trades nonetheless sought from 1783 on to prohibit “Jobbing Negro Tradesmen” from working “at any mechanical occupation except under the direction of some White Mechanic.” Although the white artisans did not entirely succeed in this effort, after 1796 the owner of any skilled negro in Charleston who was not working under an artisan was taxed three dollars a year, and if more than six slaves

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159 Two contemporary advocates of this mistaken view of apportionment are, of course, Calvin Johnson and Bruce Ackerman. See Ackerman, supra note 3, at 2-6 and Johnson, Apportionment of Direct Taxes: The Foul-up, supra note 9, at 2-3. A more judicious view is that of Jack Rakove, who writes “The three-fifths clause, then, was neither a coefficient of racial hierarchy nor a portent of the racist thinking of the next century. It was rather the closest approximation in the Constitution to the principle of one person, one vote – even if in its origins it was only a formula for apportioning representation among, as opposed to within, states; and even if it violated the principle of equality by overvaluing the suffrage of the free male population of the slave states.” Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 74 (1996).

160 Act of July 14, 1798, c.75 1 Stat. 585.
were thus employed the owner had to pay a triple tax. Thus, during the
same years that a slave’s unskilled labor was being federally taxed at fifty
cents each, that of a skilled slave was taxed at six times that rate through
Charleston’s licensing ordinance.

The importance of this kind of consideration was highlighted during
the ratification debates in Massachusetts where the labor value of slaves
was explicitly a concern:

[Judge Dana] observed, that the negroes of the Southern States work no
longer than when the eye of the driver is on them. Can, asked he, that
land flourish like this, which is cultivated by the hands of freemen? And
are not three of these independent freemen of more real advantage to a
State than five of those poor slaves?

So the Act of 1798, by taxing the potential labor value of slaves in-
stead of their sheer existence, effectively transformed the slave tax into a
capitation levied on “person with reference to profession” – as Hamilton
phrased the matter in Hylton. For it was the owner who was taxed, not the
slave; and because of the 3/5ths ratio, the slaveholder was in effect taxed
only on that part of his property in slaves that was acknowledged to aug-
ment his yearly revenue. Thus, what sounded like a head tax, or property
tax, operated substantially like a faculty tax on the employment of slave
labor.

The Federal flat tax on productive slaves (unlike those imposed by the
states) operated within an apportioned tax levy that was diminished by
two-fifths of all slaves reported on the 1790 census for that state. In slave-
holding states taxpayers also benefited in one or both of the following
ways from the complex structure of the tax: (1) each slave owner was
taxed only for productive slaves – whose numbers were some fraction of
the actual numbers owned and provided with some simulacrum of subsist-
ence; and (2) because land was the only elastic category of taxation, land
taxes were significantly lowered for all landowners by the large collection
of poll taxes on slaves. For taxpayers in states with few or no slaves, the
non-elastic portion of the apportioned tax quota fell on dwellings, and
worked to lighten the tax burden on rural landowners in states having cen-
ters of concentrated urban development. Thus, as Einhorn perceptively
points out, “This plan favored small farmers everywhere in the country”
because in it Wolcott “had figured out how to exploit the within-state ef-
fects of the apportionment rule.” The within-state effects coincided with
a particular class interest that cut across state boundaries and sectional
divisions, and even found common ground within slave state and free state
factions.

161 Richard Walsh, Charleston’s Sons of Liberty: A Study of the Artisans, 1763-
162 Elliot, supra note 81, at § 2 (January17, 1788).
163 Einhorn, supra note 5, at 192.
But was this possible despite apportionment, or because of it? In theory it would certainly be possible for Congress to impose a uniform national land tax that set lower rates for rural land than for commercial or plantation land. But rural lands are sparsely settled and would command relatively few votes in the House of Representatives, where tax bills originate. If this minority of “agrarian” representatives tried to function as a swing vote they would have to align with one of the two major power blocks—either the commercial interests of the North or the slaveholding interests of the South. But this would only be possible if the slave and free members of the agrarian vote could agree on which one to favor, which is something the major powers blocks would do their best to prevent. It has been said that apportionment of direct taxes is absurdly difficult, even though it has been done a few times. But it would seem that “favoring”—or better, protecting—the interests of minority classes is virtually impossible in a representative system of government unless some sort of Constitutional restraint is placed on the power of the majority. This is exactly the point of having a Bill of Rights, and it is also the purpose of the apportionment requirement.

The basic scenario of conflicting sectional interests had been touched on during the ratification debates in Virginia, where explicit concerns over the possible use of direct taxation to impoverish slaveholders were answered by pointing out how the apportionment requirement worked to ensure direct taxes were imposed on a range of taxable objects:

[M r. George Mason] “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...[and thereby] they might totally annihilate that kind of property [eg. slaves].

[M r. Madison] “No gentleman [at the Convention] objected to laying duties, imposts, and excises, uniformly. But uniformity of [direct] taxes would be subversive of the principles of equality; for it was not possible to select any article which would be easy for one State but what would be heavy for another; [instead, it was agreed] that, the proportion of each State being ascertained, it would be raised by the general government in the most convenient manner for the people, and not by the selection of any one particular object....”

Apportionment, therefore, was understood as being designed to make Congress negotiate its selection of the most appropriate objects of direct taxation without ignoring the integrity of each self-constituting state polity, and in 1798 it did so. In order for such negotiations to work it is necessary that each state’s interest be adequately represented in the process of passing a direct tax, so that the resulting compromise legislation distributes the tax burden among the states more fairly than a uniform tax on one particular object would. The relative strength of each state in tax debates would be determined by how many representatives it had seated in the House, where tax bills originate. Since both a state’s representation and its direct tax

164 Elliot, supra note 81, at § 3, June 15, 1788 [Emphases added].
burden were to be based on the same enumeration, a rough parity of legislative power with a population-based estimate of ability to pay direct taxes was the rational end in view when apportionment was mandated. And this same reasoning continues to apply long after the 3/5ths federal ratio became a dead letter, and was removed by the 14th Amendment.

As for the fairness of linking taxation to population, Hamilton contended that, “Neither the value of lands, nor the numbers of the people ... has any pretension to being a just representative [of national wealth].” He wanted the new Federal government to raise most of its revenue through indirect taxation because “Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them.” Nonetheless, with the full range of national wealth being taxed in reasonably fair proportion to the individual’s ability to pay - as reflected in expenditures - Hamilton was willing to let direct taxes be apportioned by enumeration. Advocating ratification of the Constitution, he conceded that:

[Impositions] of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard. The state of agriculture and the populousness of a country have been considered as nearly connected with each other. And, as a rule, for the purpose intended, numbers, in the view of simplicity and certainty, are entitled to a preference.166

Enumeration, though relatively certain,167 was nevertheless complicated by the institution of slavery. Fortunately, dispute over the taxation of slaves under the Articles of Confederation had resulted in a three-fifths compromise rule for enumerating slaves that could be presumed to have broad support. On a deeper level, however, it was because of one shared economic idea that the three-fifths compromise was possible: property in slaves was generally valued in terms of the productive capacity of forced, unskilled labor compared to free, unskilled labor. That is, a slave’s taxable value as a member of the polity was entirely determined by an estimate of their recognized capacity to produce wealth for their owners. Given their knowledge and experience of political economy, the Framers of the Constitution necessarily recognized that any universal poll tax would become in effect a proportional tax on productive capacity once enumeration following the three-fifths rule was adopted. Hence, their choice of language in the Constitution was not arbitrary. The term “capitation” clearly included

166 Id. at 80.
167 As Federalist 54 (by Hamilton or Madison) notes, “By extending the rule [of enumeration] to both objects [representation and direct taxation], the States will have opposite interests [in exaggerating or minimizing the enumeration] which will control and balance each other, and produce the requisite impartiality.” Id. at 172.
such proportional taxations of productivity within its ambit; therefore it – or the even broader category of “direct” tax – was conspicuously used in preference to the much narrower term “poll tax.”

In fact, the term “capitation” was common enough in American jurisprudence of that era to find a place in the first edition of Bouvier’s Law Dictionary (1839): “Capitation: A poll-tax; an imposition which is yearly laid on each person according to his estate and ability.”168 The extended title of this respected and influential dictionary says it is “Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union;” and Bouvier’s preface describes his work as an earnest effort to compile “that knowledge which his elder brethren of the bar seemed to possess” but was not to be found in English legal works.169 This older generation would have been that of the Founders, and Bouvier’s fidelity to their usages is attested by the way his definition of “capitation” matches point for point the one Hamilton presented in Hylton. Justices Chase and Iredell continued to press for reducing the word’s meaning to “poll tax,” but despite their preference for a simplified popular meaning, it was not until almost a century after the time of the Founders that the full meaning of “capitation” disappeared from the legal lexicons.170

Even more troublesome (to some) is the fact that the word has not disappeared from the Constitution; so it is fair to ask how it got there in the first place. “Capitation” appears only once in the text of the finished document, and is first presented on the floor of the Convention in the report of

168 JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW § I, 154 (1st ed. 1839). This valuable resource for determining the late 18th century meaning of “capitation” is not mentioned in the scholarly work surveyed, but its sixth edition is cited in recent tax protestor literature. For example, Phil Hart cites it, but only to completely misread it as excluding taxes on persons according to estate and ability. PHIL HART, CONSTITUTIONAL INCOME: DO YOU HAVE ANY? 235 (3d ed. 2005). Peter Hendrickson, however, cites the same sixth edition of Bouvier without mistaking its meaning, but evidently has no interest in the earlier editions, or their significance for understanding the direct tax clauses. PETER ERIC HENDRICKSON, CRACKING THE CODE: THE FASCINATING TRUTH ABOUT TAXATION IN AMERICA 2 (2003).
169 By 1828 the relevant popular meaning of “capitation” was given by Webster’s Dictionary as, “2. A tax, or imposition upon each head or person; a poll-tax.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The absence of the more nuanced part of Bouvier’s definition gave Justices Chase and Iredell the meaning they preferred, but the legal definition remained intact in Bouvier’s 1856 edition. BOUVIER, A LAW DICTIONARY (1856). It was not until the 15th edition of Bouvier in 1883 – under the editorial hand of Francis Rawle – that the definition was shorn of the decisive phrase “according to his estate and ability.” JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION, FIFTEENTH EDITION, THOROUGHLY REVISED AND GREATLY ENLARGED § I, 283 (FRANCIS RAWLE ED. 1883).
the Committee of Detail on August 6th. There, it is the key term in one of the express limitations of the powers of Congress: “Article VII, Sect. 5. No capitation tax shall be laid, unless in proportion to the Census hereinbefore directed to be taken.”\(^ {171}\) John Rutledge of South Carolina chaired this committee,\(^ {172}\) and evidently drew extensively from Charles Pinckney’s plan of federation, which was presented on May 29th but had yet to be discussed on the floor. In fact, Pinckney’s language is virtually identical to that reported out of Rutledge’s committee.\(^ {173}\) From the extant records it appears that there was no dissention about this provision, probably because it mirrored the earlier decision to require direct taxation to be apportioned according to a census. Capitations were clearly considered to be direct taxes, so there was not much to discuss.

Toward the end of the Convention, however, George Read of Delaware moved to add the phrase “or other direct tax” to the “no capitation” clause, which was still in the form reported out of the Committee of Detail. When we look for the reason this motion was introduced, Madison reports only that “He was afraid that some liberty might otherwise be taken to saddle the states, with a readjustment by this rule, of past requisitions of Congress – and that his amendment by giving another cast to the meaning would take away the pretext.”\(^ {174}\) That is, in order to prevent the new Federal government from directly taxing the States with balances due from its past requisitions,\(^ {175}\) Read’s amendment classed such forced requisitions together with capitations levied directly on persons and requiring apportionment. But more importantly perhaps, the phrase explicitly tied direct taxes on land, dwellings, slaves, stock and luxury items\(^ {176}\) to the apportionment requirement. There is no record of any contentious debate on this change, which was moved and adopted on September 14th.

Nor does the record reflect any serious attention being given to rectifying a curious omission of the report from Rutledge’s committee. Some-

\(^ {171}\) Einhorn, supra note 5, at 167. This text appears as Article VII, Section 5 of the committee report. See also at http://founders-blog.blogspot.com/2007/08/monday-august-6-1787-report-of.html.

\(^ {172}\) The other members were Edmund Randolph (Virginia), James Wilson (Pennsylvania), Oliver Ellsworth (Connecticut), and Nathaniel Gorham (Massachusetts). Of these, Rutledge, Randolph and Wilson were arguably the prime movers. Probably the best evidence of Rutledge’s acting as chair is that the two surviving working documents – an outline by Randolph and a second draft by Wilson – were both edited by Rutledge. DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 164, 168 (2007).

\(^ {173}\) Elliot, supra note 81, at § 1, Journal of the Federal Convention, May 29, 1787. See also text accompanying note 152 supra.

\(^ {174}\) Madison, supra note 16, at 566.

\(^ {175}\) Delaware might well have been anxious about this possibility since it had paid only 39% of the amounts requisitioned from it by Congress. Ackerman, supra note 3, at 47.

\(^ {176}\) It seems likely that what John Marshall meant by direct taxes on “a few other articles of domestic property” were taxes on luxury items like plate and silverware, which some states levied – including Connecticut, New York, Pennsylvania and Virginia. Becker, supra note 69, at 149-62, 183. Einhorn, supra note 5, at 46.
how it came about that no mention was made of “direct taxation” in the representation clause. The error was corrected sometime before the Committee on Style, chaired by Gouverneur Morris of Pennsylvania, presented their work on September 12th.\(^\text{177}\) In the absence of any record of how the omission and its correction happened, two very different interpretations are possible. If “capitation” was taken as covering all direct taxes, the Committee of Detail was simply eliminating a redundancy. The Convention, however, if only in the guise of the Committee on Style, chose to restore the “direct taxation” language. Doing so might have (1) been motivated by nothing more than a prudent concern to preserve the exact language of a crucial resolution, or (2) the reversion might have also meant key delegates did not view “capitations” as the only possible direct taxes.

Since Rutledge's committee was obviously using Pinckney's draft plan, it may be worthwhile to look briefly at the tax milieu of South Carolina, the home state of both Pinckney and Rutledge. In South Carolina there was a tradition of imposing ad valorem property and faculty taxes in the town of Charleston, but collecting only flat land taxes outside the city. Reform efforts began in the 1760s and found expression in the tax acts of 1778 through 1784, which nominally imposed the same ad valorem rate on towns and land.\(^\text{178}\) The statute levying taxes in 1784 imposes these new rates in two parts. Article I establishes nine tiers (with a total of 22 categories) of land taxes based on the type of terrain, with each flat rate set at roughly 1% of value per acre. Article II then lumps a number of other taxes together: namely, a poll tax on slaves, free negroes, and a tax on each wheel of a carriage (all set at 9sh 4p each), together with taxes on town real estate, stock in trade, and the profits of faculties and professions (all rated at 1% ad valorem).\(^\text{179}\) This taxing regimen is noteworthy especially because all of the taxes in Article II are capitations; and they are clearly separated from the land taxes in Article I. Given this tax tradition, it is not realistic to think delegates from South Carolina took capitations to include land taxes; and it is therefore very unlikely that Rutledge's committee omitted the “direct taxation” phrase because they thought it was redundant.

But what could possibly be the point of trying to exclude land taxes from the apportionment requirement? In general, flat acreage taxes - even when modified to reflect the potential productivity of different terrains - favor relatively small territories with relatively dense populations. On the face of it, then, excluding land from apportionment would benefit smaller

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\(^{177}\) The other members of this committee were Alexander Hamilton (New York), James Madison (Virginia), Rufus King (Massachusetts) and William Samuel Johnson (Connecticut). Rakove, supra note 159, at 90.

\(^{178}\) Einhorn, supra note 5, at 100, 103

\(^{179}\) THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA, § 4, 628 (1838). Exceptions to the nominal uniformity of the ad valorem tax regimen were as follows: there was no poll tax on free white men; free negroes and mulattos under 10 and over 60 years of age were tax exempt; the wheels of wagons, carts and drays were not taxed; and clergy, schoolmasters and schoolmistress were exempted from the faculty tax.
states like Massachusetts and Connecticut and burden larger ones like Pennsylvania or Virginia, with a state like South Carolina perhaps benefiting slightly because of its limited size and the concentration of productive slave labor on its plantations. Perhaps, too, the Committee of Detail felt that since the motion to limit apportionment to direct taxation had worked well, limiting it to nothing but capitations could almost be taken for granted.\footnote{Also, it is not unheard of for parties in negotiation to “overlook” errors in the record when it is to their advantage to do so.}

That the Convention was vigilant and persistent in this regard shows that restraining direct taxation by means of apportionment was something of real significance for many delegates. Hence, when Gouverneur Morris wanted to remove the tax apportionment “bridge” to the Three-fifths Compromise, he was apparently unable to spark any debate that Madison felt worthy of being recorded. But why did Morris change his mind? We know that Morris was a good friend of Alexander Hamilton, and had in 1783 helped draft a proposal for levying a national land tax.\footnote{Lynd, supra note 155, at 211. Einhorn, supra note 5, at 166.} So perhaps he was by July 24\textsuperscript{th} beginning to feel that he and Wilson had cast the net of apportionment too widely on July 12\textsuperscript{th}. These conjectures about the motives of Rutledge and Morris could provide starting points for further research, but the real importance of 1784 South Carolina tax policy for understanding the language of what is now the only remaining tax apportionment clause in the Constitution is to help establish what the phrase “no capitation” meant to delegates at the Convention. Pinckney and Rutledge introduced a specific tax term into the draft text of the Constitution, a term which closely reflects the South Carolina tax law of their time. In that tax law (a) poll taxes, taxes on real and personal property, and faculty taxes together comprised one type of tax, and (b) those capitation taxes were clearly distinguished from land taxes. These facts establish not only that Pinckney chose to use a tax term found in the writings of political economists, including The Wealth of Nations; but also that just prior to the Convention Pinckney and Rutledge were acquainted with the same three-part understanding of capitations that Hamilton described to the Supreme Court in 1796. It is also significant that when the Convention was given chances to modify its stance on apportionment of direct taxes by Rutledge, Morris and Read, it chose to adopt the only change that strengthened the original provision by ensuring that land taxes and requisitions would also have to be apportioned. Taken all in all, the Convention delegates consistently maintained their resolve to apportion every direct tax – acting for all the world as if they knew what “capitation” and “direct taxation” meant.
Turning again to Hylton, it is very doubtful the case could ever have been rightly decided given the Justices' manifest lack of interest in the nature of capitation taxes and the broader significance of apportionment. Even so, thanks to Justice Paterson the Court did settle on a clear way to distinguish between direct and indirect taxes, and based its view on the same economic viewpoint the Framers implicitly adopted – namely, that of Adam Smith. In retrospect, and despite his dismissive and misleading position on the value of apportionment, Paterson arguably based his decision entirely on Smith's distinction between direct and indirect taxes as he understood it. This principle was, and remains, a sound legal touchstone for identifying taxes subject to apportionment under the Constitution, even though Justice Paterson himself failed to apply it rigorously enough in Hylton.

Curiously, Smith's seminal distinction is clearly presented in John Wickham's published brief defending the Carriage Tax in Virginia Circuit Court, but not used at all in Hylton's written “Opinion.” Wickham writes, “I shall contend that, long before the Constitution of the United States was framed a tax upon the revenue or income of individuals, was considered and well understood to be a direct tax, [and] a tax upon their expences, or consumption an indirect tax; [so] that this is a tax on expence or consumption, and therefore an indirect tax.” Although it is likely that some or all of the Justices in Hylton were familiar with Wickham's published argument, it is clear from Justice Iredell's notes that Smith's distinction was introduced into oral argument at least three times: by Jared Ingersoll for Hylton, and by both Charles Lee and Alexander Hamilton for the Defendant. Also, Wickham's observation about the greater relevance of Adam Smith than James Steuart for understanding the meaning of the Constitutional tax terms seems to lie behind Hamilton's oral argument in one place.

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183 Marcus, supra note 2, at 476-82, 489-90, 465-68.
184 Or, dating at least from the enthusiastic reception of Smith’s Wealth of Nations in the former colonies, which evidently began as early as 1780 in response to imported copies of the 1776 edition. In addition to the members of the Philadelphia Convention who knew the work, (See notes 118 & 119 supra), Fleischacker cites evidence that Thomas Pownall’s 1780 “Memorial” paraphrased several sections Smith’s work, which were then summarized in a letter by John Adams to Congress in that same year; that the James Madison who presided over the College of William and Mary added Wealth of Nations to its curriculum in 1784; and that Noah Webster is reported to have read the book avidly in 1784 and used it throughout his life as an authority on economics. Fleischacker, supra note 27, at 901-02.
185 Marcus, supra note 2, at 413.
186 Id. at 474-75, 489.
187 Id. at 480-481. From these preliminary observations it seems very likely that Hamilton’s “Opinion” is not a thorough presentation of his position. Further evidence of inadequacy is
As a formal distinction, Smith’s view of the difference between direct and indirect taxes was quite adequate, but it was made with no knowledge of the peculiarly American requirement of apportionment. As we have seen, the inadequacy of following Smith completely stems from his further description of how to collect such indirect excise taxes. In the context of English law, Smith is correct in saying that it is simply a matter of preference whether the excise is collected at the point of sale from the seller, or collected as an “annual sum” from the buyer. But in the context of the Constitution, where capitations are direct taxes, any tax collected from a person “with respect to property” is a capitation – and therefore subject to apportionment.

It is also not clear that the “annual sum” Smith mentions was limited by anything other than the actual serviceable life of the commodity being taxed, so the total sum raised by such an annual collection might be noticeably more (or sometimes less) than a simple excise fee assessed on the value of that commodity at the time of sale. Because the term of the tax is not fixed and the total collected is not necessarily equivalent to any fairly assessed excise tax, it is a real stretch to say that both ways of collecting the money really tax the acquisition of the commodity rather than its possession. This is especially true in the case of the Carriage Tax of 1794, which taxed all carriages of the luxury class, not just those acquired after passage of the Act.

As we may recall, Justice Chase believed that “...some taxes may be both direct and indirect, at the same time,” thus introducing a Hamiltonian principle of equivocation which could legitimate seemingly direct annual taxes as also being indirect enough to escape apportionment. But neither of the other Justices took this tack. Consequently, Hylton set the pattern for later Court decisions on direct taxation – like Pollock v. Farmers’ Loan & Trust (1895) – that presume all possible taxes are either direct or indirect, and follow Justice Paterson’s construal of Adam Smith’s distinction.

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its assertion “The only known source of the distinction between direct and indirect taxes is in the doctrine of the French Oeconomists, Locke and other speculative writers who affirm that all taxes fall ultimately upon land.” Id. at 466. Yet Hamilton’s oral argument contains a description of how the two great Funds, Land and Labor, are related in Smith’s theory: “One as the source, the other going by a road back to the source – Smith much the Oracle of the Political Oeconomists here.” Id. at 480. Thus, it seems that one of the “other speculative writers” who presumably had little or no influence on the wording of the Constitution turns out to be the author of Wealth of Nations.

188 Smith, supra note 68, at 432. Hylton v. United States, 3 U.S. (3 Dall.) 171, 181 (1796). Smith is substantively “correct” only if the total tax collection is roughly equal in the two methods.

189 Hence, in the taxing of slaves it makes no difference whether the tax is thought of as a capitation on person with respect to property in slaves, or person with respect to profession as an employer of slave labor, the apportionment requirement still stands.

190 Act of June 5, 1794, c. 45, 1 Stat. 373-75

191 See Hylton, 3 U.S. (3 Dall.) 171, at 174.
Dispelling the Fog About Direct Taxation

In fact, from Hylton on the legal debate turns on the issue of direct versus indirect taxation to the virtual exclusion of discussion about what constitutes a capitation. This is a remarkable oversight considering the range of taxes considered to be capitations by Hamilton and others of his generation.

Although it is clear that a tax on luxury carriages was in no way a Federal requisition on the states or a tax on land or slaves, it is also clear that in its mode of operation the Carriage Tax functioned as a capitation on persons “with respect to property.” The mandate of the Act was to tax one particular class of luxury commodity in proportion to its market value; and thereby to adopt for Federal use a “tax on the rich” that was fairly popular in States that had imposed it. As to intent, it was to be a luxury “excise” tax designed to fall on the wealthy and exempt others; and in that it succeeded. But in its operation it became a direct tax drawing indifferently from whatever revenue the owner enjoyed, not from the expenditure made in acquiring a carriage. Because the way the Carriage Tax was imposed and collected was either ignored or misunderstood, even Justice Paterson’s opinion ultimately fails to give a cogent reason for his ruling.

Justices Iredell and Chase agreed with Justice Paterson’s ruling without explicitly citing Adam Smith’s criterion for distinguishing direct from indirect taxes. Instead, both Justices base their decision on the same two inadequate grounds: (a) that only taxes on land or polls are direct taxes, and (b) taxes that are not uniform after apportionment are not direct taxes. Of the two, the latter is astonishingly inept. It takes the politically expedient position that Constitutional restraint of direct taxation was intended as a license for virtually unlimited taxation by uniform “excises.” And even worse, it ignores how the impossibility of taxing land uniformly through apportionment renders (a) and (b) mutually contradictory. Logically speaking, one of the two grounds for their rulings should have been discarded, and the better choice would have been to abandon (b) entirely.

But that would have meant that (a) would have to stand alone, and neither Justice was ready or willing to unreservedly assert that his narrow understanding of “capitation or other direct tax” was binding. Why was that? Perhaps part of the reason lies in a tendency to project the systems of taxation that each Justice was most familiar with onto the new system of

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192 Chief Justice Fuller, writing for the majority in Pollock says, “And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words “duties, imposts and excises,” such a tax, for more than one hundred years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.” Pollock v. Farmers’ Loan & Trust Co., 157 US 429, 557-58 (1895).
193 Carriage taxes were being collected by several states prior to the Federal tax of 1794: Massachusetts [1782], Connecticut [1779], New York [1781], New Jersey [1778], Pennsylvania [1780], South Carolina [1778] and Georgia [c.1770]. Becker, supra note 69, at 126, 149, 162, 171, 183, 207, 212.
194 See Hylton, 3 U.S. (3 Dall.) 171, at 174, 177, 183.
Federal taxation. Thus, Justice Iredell would not have been well acquainted with faculty taxes because none were imposed in North Carolina, and all taxes were tied to the per acre tax on 300 acres of land (as a flat tax or “modified” ad valorem tax). The state poll tax on each “tithable,” whether slave or free, and each £100 value of urban real estate were equivalent to that one key assessment. So when Iredell says “perhaps a direct tax... [is] nothing by a tax on something inseparably annexed to the soil,” what he may be doing is trying to read North Carolina’s land-centric tax system into the Constitution. Certainly his main position here is indefensible, if only because free persons are not “inseparably annexed to the soil” and yet they are taxed by direct capitations – including poll taxes on “tithables.” Recognizing this, Iredell protects himself from ridicule by inserting a “perhaps.”

Conversely, Justice Chase would have been well accustomed to faculty taxes, and to the taxing of real estate and slaves ad valorem after the poll tax on “tithables” was abolished by Maryland’s Constitution of 1776. Slaves were taxed purely as property in a four-tiered system of valuation with proportional rates at the margins of average productivity, buildings were taxed separately from the land on which they rested, and everyone’s real and personal property was taxed in proportion to its value. So when Chase tried to confine direct taxation to poll taxes and taxes on land it is as though he were looking at the Constitution through the eyes of the wealthy “country party” leaders like Charles Carroll who feared the leveling motives of the new state constitution and hoped for eventual relief from the tax burden they carried under a universal capitation without poll taxes. That is, by taxing only polls and land, all real and personal property – including improvements to land – would be exempted. Yet Chase, too, is very guarded in reading his ideal into the federal Constitution, prefacing his view with “but of this I do not give a judicial opinion.” But even this caution is judicially irresponsible, since Chase simply overrides the expert testimony of both counsels regarding the nature of capitations, and does so without introducing any fresh evidence or reasoning to support his non-judicial dictum.

Justices Paterson and Wilson were in somewhat identical situations. New Jersey relied on a faculty tax that levied 2sh per £ on everyone’s estate, measured by its annual income, and assessed so as to be proportionate to taxes on land. Pennsylvania had long imposed a broad faculty tax, as well as a land tax that included livestock and slaves – all rated by “yearly value” of the estate or trade. The only major difference between the two states seems to have been the method of assessment and collection: Pennsylvania apportioned its taxes to local assessors, while New Jersey used

195 See Hylton, 3 U.S. (3 Dall.) 171, at 183 (emphasis added).
196 Becker, supra note 69, at 213
197 Id. at 213-14.
198 See Hylton, 3 U.S. (3 Dall.) 171, at 174 (emphasis added).
Dispelling the Fog About Direct Taxation

state-appointed assessors. Justice Paterson’s reasons for rejecting the 3/5ths rule have already been discussed, as well as his indebtedness to Adam Smith’s distinction between direct and indirect taxes. Justice Wilson, the only other Justice to actually hear the arguments in Hylton, had already ruled on the matter in the Virginia Circuit Court and did not feel it necessary to write an opinion adding anything to the reasons adduced by Justices Chase, Iredell and Paterson — perhaps because he and Paterson (both delegates to the Convention) shared the same view, at least so far as the Carriage Tax itself was concerned. After all, a tax on luxury carriages was routine in New Jersey, much as the tax on “pleasurable carriages” was in Pennsylvania. So long as it looked like expenditure was being taxed, each felt justified in helping the Federalists assert their newly won powers of taxation.

In the end, we are left with a ruling based on the misconstruals and logical errors of three Justices. But even so, enough material has been preserved in the arguments and other historical documents to construct a clear idea of what the Founders meant by the words “no capitation or other direct tax,” and to understand why they subjected such taxes to apportionment.

To recapitulate, two major points have emerged concerning the terms themselves. First, the direct taxes the Founders subjected to apportionment were three in number: (1) capitations, (2) land taxes, and (3) taxes on the states. Capitation taxes were commonly recognized as being of three kinds: poll taxes, personal property taxes, and faculty taxes. Each of these forms of capitation was known through colonial and state tax impositions, and each type of tax was clearly recognized by the generation of the Founders as a form of tax levied directly on the person of the taxpayer. Land taxes were commonly imposed by the future states of the Union either on acreage or by ad valorem assessment. Such land taxes were recognized as direct taxation along with taxes on dwellings, slaves, livestock, “and a few other articles of domestic property” [such as plate and silverware]. Where slaves were not included in a poll tax on “tithables,” they were commonly rolled into land taxes along with the owner’s livestock – being seen as “inseparably connected with the land,” as Justice Iredell would have understood it.

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199 Becker, supra note 69, at 171-72 & 183. Einhorn, supra note 5, at 85.
200 See text accompanying note 117 supra.
201 See Hylton, 3 U.S.(3 Dall.) 171 at 184.
202 See text accompanying note 117 supra.
203 Becker, supra note 69, at 171, 183.
204 Seligman, supra note 6, at 367-81.
206 Seligman, supra note 6, at 380-81. For a synopsis of the post-Revolutionary tax situation, with vacillation over how to tax land being particularly clear in the contrast between the practices of North and South Carolina, see Becker, supra note 69, at 219-29.
207 Elliot, supra note 81, at § 3, June 10, 1788. For references to actual taxes, see note 176 supra.
have it. And as for possible Federal taxes on the states and their revenue, it
is clear from the record of the Convention itself that such were regarded as
the same as the old “requisitions” by Congress on the States, and were to be
apportioned as direct taxes if ever imposed.207

Secondly, the implicit economic distinction between direct taxes and
indirect taxes in the Constitution was taken by the Founders directly from
Adam Smith’s work: a tax that falls on a person’s revenue is a direct tax; a
tax that falls on a person’s expenditure is an indirect tax.208 Further, it was
accepted that an indirect tax was ordinarily collected from expenditures on
commodities, and from the seller of the goods – who was expected to rou-
tinely pass the cost of the tax on to the purchaser as part of the price of the
commodity.209 Thus, the prevailing rate of taxation was expected to be lim-
ited by diminished consumption of goods whose price was inflated by ex-
cessive exactions.

And it is from the different elements of Smith’s account that the three
classic criteria of indirect taxation are derived: (1) the tax burden falls on
expenditure, not revenue; (2) the tax burden is shiftable, meaning the per-
son from whom it is collected routinely passes its cost on to someone else
through a relatively immediate transaction; and (3) payment of the tax,
being folded into expenditures for consumption, is either (a) avoidable en-
tirely through substitution, and without being relegated to poverty levels of
consumption, or (b) so variable in its operation that the consumer has sig-
nificant discretion regarding how much is expended on taxes. A direct tax,
however, would be collected from the incoming revenues of a person, re-
gardless of their source – whether “from the rent of their land, from the
profits of their stock, or from the wages of their labour,” as Adam Smith
put it.210 The person being taxed paid directly, having no one to immedi-
ately pass the burden on to through a transaction.211

With this understanding of what direct taxes were for the Founders,
we can better understand what the apportionment requirement was intend-
ed to achieve. Apportionment was mandated for three basic purposes, for
each of which we have direct evidence in the writings of that eminent Fed-
eralist, Alexander Hamilton. First, apportionment was intended to protect
state and regional economies from discriminatory Federal taxes on any
particular taxable object. Property in slaves was, as the Justices in Hylton point out repeatedly, the most conspicuous case in point. But land and dwellings - not to mention capitations of various kinds - were also matters of concern for the Framers of the Constitution. Hamilton put the matter this way in The Federalist: “A nation can not long exist without revenues.... Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land.”

However, when Hamilton advocates limiting Federal taxes on land he is not necessarily referring to a flat per acre tax, but most likely had in view the fairly common practice of taxing land through an assessment of its general capacity of generating wealth - that is, together with its dwellings and livestock, including slaves. In evaluating possible sources of revenue for the new Federal government, Hamilton is quite forthright about the need be wary of taxing the farmers’ “houses and lands,” and wanted to eschew capitations on personal property altogether:

In America, it is evident that we must a long time depend for the means of revenue chiefly on such duties [on imported articles]. In most parts of it, excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and preemptory spirit of excise laws. The pockets of the farmers, on the other hand, will reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.

Nor were the capitations that Hamilton did not want to see the Federal government collect limited to head taxes on slaves:

As to poll-taxes, I, without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those States [the New England States - Publius] which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government.

Second, apportionment was intended to restrict imposition of Federal direct taxes to exceptional circumstances, and thereby to prevent such taxes from being levied routinely and permanently. Thus, Hamilton concludes

212 See Madison’s reply to Mason: “...and not by the selection of any one particular object,” supra note 16, at 159.
213 Hamilton, supra note 165, at 58 [Federalist 12].
214 Id. at 57.
215 This brief footnote by the author of Federalist 36 refers to the way in which Massachusetts, for example, relied on poll taxes for 30% to 40% of their tax revenue. Einhorn, supra note 5, at 74. These poll taxes were imposed on the same set of tithable persons that Virginia and North Carolina taxed, and placed a disproportionate part of the tax burden on those with the least ability to pay, and who benefited the least from the state’s protection of property rights.
216 Hamilton, supra note 165, at 117 [Federalist 36].
his above repudiation of poll taxes with this observation: “But does it follow because there is a power to lay them, that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice.”\textsuperscript{217} That is, the power to impose capitations of this form was one he thought and hoped would seldom be exercised. But what were the grounds for his hope? In the New York ratification debates he appeals to a “general sense of the community” as the final guarantor of liberty from such taxation:

Sir, it has been said that a poll tax is a tyrannical tax; but... in the course of a war, it may be necessary to lay hold of every resource; and for a certain period, the people may submit to it. But on removal of the danger, or the return of peace, the general sense of the community would abolish it.\textsuperscript{218}

Looking at the early history of direct taxes, the expectation that apportioned direct taxes would be imposed only in time of war or threat of war seems fulfilled. The direct tax levies of 1798 and 1813-1816 all conformed to this expectation, and each was apportioned much along the lines of the tax of 1798.\textsuperscript{219} The major innovation of the three later tax acts is that the states were allowed to “assume their quota” and collect the revenue as though it had been requisitioned - and even offered a 15% discount if they did.\textsuperscript{220} In 1817, after the end of the War of 1812, all such direct taxation was repealed, so once again the expectation of the Founders seems to be justified: the general repugnance toward this kind of tax quickly put an end to direct federal taxation once the nation was no longer at war.

Calvin Johnson, however, seems to feel that direct taxation was abandoned because it was unworkable. He maintains that, “Because there is no distinction between war and peace in the Constitutional language, a tax without apportionment during peacetime follows from the necessity of a direct tax without hobble during war.”\textsuperscript{221} Setting aside the wishful thinking here, Johnson’s basic claim seems to be that apportionment “hobbles” taxation in a way that endangers the nation in war. But is this so? When wartime collection of the apportioned direct taxes of 1813-1816 was reviewed

\textsuperscript{217} Maryland abolished its poll taxes in 1776, and Virginia followed suite (on the state level only) in 1787. Einhorn, \textit{ supra} note 5, at 107 & 50. Pennsylvania, however, levied a poll tax only on “single freemen not in the army and not paying other taxes,” which was collected from so few people that it was in effect a penalty for being an unmarried civilian exempt from other taxes. Becker, \textit{ supra} note 69, at 182-83. Einhorn, \textit{ supra} note 5, at 88.

\textsuperscript{218} Elliot, \textit{ supra} note 81, at § 2, June 28, 1788.

\textsuperscript{219} In the tax of 1815, however, excises were laid on the manufacture of a range of goods, and an annual tax on watches and furniture. The latter imposed a scale of flat rates on all furniture not made at home whenever a household had furnishings totaling more than $200 in value. In this feature, the Federalist enacted Carriage Tax of 1794 reappears as a precedent that was seized upon by a Republican Congress desperate for money. Einhorn, \textit{ supra} note 5, at 196.

\textsuperscript{220} Id. at 158.

\textsuperscript{221} Johnson, \textit{The Foul-Up}, \textit{ supra} note 9, at 55.
by Charles Bullock, the overall collection rate was 87% as of 1817.\footnote{Bullock, supra note 30, at 472.} The shortfall was 13\% of the total tax imposed, but that figure has to be seen in light of the fact that a few states took advantage the discounts offered for “assuming” their quotas. Indeed, by setting the discount rate at 15\% Congress had already pegged its collection costs at that figure, and therefore could not have been counting on realizing more than 85\% of the imposed tax anyway. But there is an even more sobering consideration to keep in mind: when a 13\% shortfall is compared to the 23.5\% shortfall reported for collections of the Federal Income Tax for 2001,\footnote{The tax gap reported by the IRS for 2001 was 345 billion, of which 55 billion was recovered through later collections, leaving a shortfall of 290 billion. Initial collections for 2001 amounted to 888 billion after tax credits, to which 55 billion in late payments and the 290 billion shortfall can be added, to arrive at a total tax due figure of 1,233 billion. So the ratio of shortfall to total tax was 290 / [888+55+290] = 290 / 1,233 = 23.5\%. IRS tax information for 2001 is available at http://www.irs.gov/newsroom/article/0,,id=154496,00.html & http://www.taxfoundation.org/news/show/250.html#table4.} apportioned direct taxes begin to look quite workable. So we are left once again with public repugnance – or “the general sense of the community” – as the most probable reason apportioned direct taxation is not a staple of Federal tax legislation in peacetime.

Third, apportionment was intended to distribute direct tax burdens according to the measure of voting power in the House and thereby prevent majority coalitions of states from imposing excessive taxes on the minority. The inherent effect of linking both direct taxation and House representation to enumeration was to force those states with enough votes to impose taxes to also bear the brunt of the tax burden. As Hamilton put it:

> Let it be recollected that the proportion of these [direct] taxes is not to be left to the discretion of the national legislature... [but] an actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems [therefore] to have been provided against [in the Constitution] with guarded circumspection.\footnote{Hamilton, supra note 166, at 116 [Federalist 36]. That tax bills originate in the House of Representatives where population determines representation is something Joseph Dodge overlooks when he opines that a majority of rich states could shift tax burdens to a minority poor states by means of apportionment. Dodge, supra note 9, at 897. Even so, Dodge admits apportionment could still “operate to preserve liberty” by partially sheltering personal endowments (like “wage-earning capacity”) from Federal taxation. Id. at 939. What Dodge seems to be describing here is essentially a faculty tax, or “capitation.”}

In this way too, the generally accepted principle of matching taxes to one’s “ability to pay” was given expression through apportionment of taxes among the states by census, based as it was on the idea that population was an adequate, though very approximate, general measure of wealth in a primarily agricultural economy.\footnote{Id. at 80 [Federalist 21].}
What is not so commonly recognized, however, is that apportionment also restrains direct taxes enacted by a political coalition drawn from many states. Thus, if the Federalist coalition that passed the Carriage Tax Act had been constrained to apportion that tax, the amount collected from owners of carriages in different states would indubitably have been disparate, and therefore politically awkward. Justice Iredell develops this point in some detail:

If this [tax] cannot be apportioned, it is therefore not a direct tax in the sense of the Constitution. That this tax cannot be apportioned is evident. Suppose $10 contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at 105, the number of Representatives in Congress. This would produce in the whole $1,050. The share of Virginia being 19/105 parts would be $190. The share of Connecticut being 7/105 parts would be $70. Then suppose Virginia had 50 carriages, Connecticut 2. The share of Virginia being $190, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage $3.80. The share of Connecticut being $70, each carriage would pay $35. If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.

Granted an apportioned mode of taxation is not perfectly uniform for taxpayers, but is it therefore too “absurd” to be enacted? The likelihood of any state having no carriages is just about zero, and the variance in taxes paid by carriage owners in different states would very probably be much less than in Iredell’s example. Further, residents of different states were accustomed to paying more or less tax on a particular item than their counterparts across state lines. There is, of course, a potential legislative difficulty. But just as it is certain that Virginia’s nineteen votes would outweigh Connecticut’s seven, it is also certain that large states with many carriages could outvote small states with few carriages any time they chose - at least in the House of Representatives. The vote in the Senate would be more uncertain, yet the fact that the Federalist majority was able to pass the highly controversial Carriage Tax – and the Whiskey Tax before it – gives us some idea of the strength of its coalition among Senators, particularly when the tax bill in question did not strike at any vital economic interest in the majority of states.

So why did the Federalist majority coalition decide not to propose the Carriage Tax as an apportioned tax? There are at least three political reasons that come to mind: (1) a direct, apportioned tax would have to specify its total imposition, making it impossible for revenue collection to grow from year to year without repeated enactments of ever larger sums; (2) imposing a tax on carriages under the uniformity rule set a precedent for widening the scope of Federal direct taxation to more closely match that of the

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226 See Hylton, 3 U.S. (3 Dall.) 171, at 182.
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states; and (3) given the deep hostility to direct taxes in many sectors of colonial society, imposing an apportioned tax would openly acknowledge its being a new direct tax, and that very admission could well end the political dominance of the Federalist coalition – as the enactment of the Direct Tax of 1798 arguably did.

Thus, it was politically expedient for any Federalist Justice on the Court hearing Hylton – that is, for all six Justices of the Ellsworth Court – to dismiss the apportionment requirement as irrelevant and unworkable. Given the illogicality of the Justices’ preserved opinions in Hylton, it is very likely that political allegiances were being (somewhat openly) tested by means of the case. However, what the Federalist line of political pragmatism in the courts also reveals is that the apportionment requirement does in fact limit the ability of a majority coalition formed across Sectional boundaries to openly impose direct Federal taxes. Therefore apportionment had to be gotten around somehow, and Hylton was the method adopted. That the Federalists were able to impose a direct tax without apportionment for several years is unfortunate, and – again unfortunately – it is not just a historical anomaly.

That such a thing could happen at all showed that diversity of interests alone was not enough to preclude abuse of Constitutional rights – even for the wealthy minority subjected to the federal tax on carriages. Madison had argued in Federalist 51 that abuses of minority rights were virtually impossible because of diversity of interests. “In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.” However, when the Justices in Hylton ruled wrongly on the Carriage Tax so early in the history of the republic, the validity of the principle itself was brought into question, and an avenue for future abuses was opened.

On the level of tax law, Hylton set a precedent not only for taxing personal property without apportionment, but also for tolerating four fundamental legal and logical errors. First, the ruling in Hylton treats the form of the legislative Act as more decisive than its substance, or actual effect. Second, the apportionment requirement in the Constitution is misconstrued and prevented from exercising its intended restraint on direct Federal taxation. Third, the nature of direct taxation is obscured by not treating the way in which a tax is collected as relevant to its nature. And fourth, with

227 Because the Carriage Tax was only imposed upon a wealthy minority it was therefore a fairly popular tax with other classes, and opposition to it was primarily rhetorical and legal. That opposition failed with the Hylton decision, but the tax itself did not outlast the Federalist party’s dominance in Congress. The Whiskey Tax of 1794, however, which directly affected relatively poor minorities localized in rural regions, created vocal and violent popular resistance.

228 Hamilton, supra note 165, at 164 [Federalist 51]. The argument here closely follows the analysis of Federalist 10, which is attributed entirely to Madison.
Hylton the meaning of the Constitutional term “capitation” begins to slip away into a fog of expedient misconstrual from which it has yet to fully escape.

Even so, Hylton v. United States clearly enunciates one valid principle for distinguishing direct from indirect taxes: direct taxes are drawn from revenues, and indirect from expenditures. This principle has rightly been influential in tax law, even though it has yet to be applied coherently, or used to thoroughly review case law depending in error on Hylton. And, even more significantly for our understanding and evaluation of later decisions of the Court about direct taxation, Hylton gives us – through Justice Iredell’s notes – a privileged window into the full meaning of the term “capitation” as used in the Constitution.

VI. EPILOGUE: DEFOGGING TAX INNOVATIONS

Once we restore “capitation” to its full meaning, the constitutionality of various innovative tax proposals can be more cogently evaluated. So, for example, if we analyze the three tax innovations229 discussed in the introduction according to the criteria for indirect taxation and with respect to all types of capitation, a coherent critique emerges. Looking at the USA tax proposal first, it clearly would not be an excise or other form of indirect tax: it would not be shiftable – nor avoidable except by exemption; and it would not fall on expenditure as part of particular transactions. Would it then be an income tax? If “income” is understood simply as “an accession to wealth,” then the USA tax would not be an income tax because it would fall on consumption rather than revenue. One could say it would in effect tax all income above a subsistence level that is not saved or invested, because the same effect could be achieved within the present income tax structure by exempting ordinary savings and investments from adjusted gross income. But doing that would make the present income tax in effect a direct tax on consumption. So, the USA tax – taken as a purported income tax – would be irretreivably deficient as to form.

By process of elimination, then, it becomes apparent that the proposed USA tax would be some sort of direct tax on consumption. But what would it be in constitutional language? It would be a “capitation with respect to property” – to use Hamilton’s phase. More exactly, it could be described as a tax levied on a person’s aggregate wealth above a defined subsistence level, excepting only that held in reserve (as savings) or employed as capital (investment), and measured by annual income. Such a tax is on wealth, and not really on consumption or expenditure, for at least two reasons: first, it taxes things like gifts of money as though they were

229 For discussion of the USA and Flat Tax proposals, see text accompanying notes 36-47 supra; for discussion of the Individual Mandate “penalty,” see text accompanying notes 48-66 supra.
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expenditures for consumption; and second, it pointedly exempts expenditures for capital acquisition, which is a primary form of wealth. Hence, the effect of the proposed shift from taxing income to taxing consumption seems to be to shift tax burdens away from the accumulation of wealth and onto the enjoyment of wealth; that is, shifting the brunt of taxation from very wealthy persons to moderately prosperous ones.230

Analyzing the Flat Tax proposal along the same lines is complicated by the way the tax is to be divided into a business and a wage portion. Lawrence Zelenak draws attention to the way combining both portions gives a tax base similar to that of a VAT,231 but it’s not clear how that presumptive similarity has any relevance for characterizing the separate taxes. Applying the criteria of indirect taxation to the business portion first, we can determine that the proposed tax (a) would be collected based on business profits (less investments), but the cost would be shifted to others, (b) those bearing the costs would presumably do so through their expenditures, and (c) the tax burden would be somewhat avoidable - that is, it could be mitigated - if the rates of taxation for different products varied significantly, while still being geographically uniform. So far, the business portion of the flat tax is looking a lot like an excise on value added, measured as profits. But there are serious problems here: the exclusion of investments from profits compromises the accuracy of the measure; avoidability has to be crafted into the tax, not being inherent,232 and it seems possible that costs of taxation can and may be shifted on to employees in a covert way - by not passing all the profits realized on value added by labor on to the workers as wages. As an excise on business profits, then, a Flat Tax could be problematic; but if we try to justify it as an income tax, it fails as to form: it would be imposed as a tax on the aggregate value added by transactions, measured by profits; and that is not a “tax on income.”

Turning to the employee or wage portion of the Flat Tax proposal, even more problems get in the way of thinking of it as some kind of VAT, or excise tax. The tax collected from employee wages is not shiftable by them onto others - unless those others are their employers, who then shift the cost on to customers; but that is realistically not an immediate part of payroll transactions, for it presupposes that a protracted course of negotiated pay adjustments has been completed. The wage portion of the tax is not avoidable by employees who earn more than the subsistence level exemption, and it can not be mitigated without undertaking the significant hardship of changing jobs - and even that move is effective only if other

230 The rates of taxation would range from 19% to 40%. Zelenak, supra note 3, at 836. This seems a relatively narrow and low range, especially when investment expenditures are being excluded.

231 Id. at 836-837.

232 Without some significant degree of variation in tax rates among products subject to a universal Flat Tax, the tax no longer really falls on expenditures as such but on the fact of being in the market at all – something that every member of a society does to some degree simply because of the sheer fact of being in that society.
comparable jobs are taxed less. Having met none of the criteria for an indirect tax, does it then qualify as an income tax? It is collected from wages, and wages are routinely taxed as income to their recipients, so the tax burden falls on the revenue stream of employees in the form of a “tax on incomes.” But the wages are taxed as an aggregate being paid out, and are used to measure the value being added by labor to particular products. What is really being taxed is productivity, so the wage portion of the Flat Tax is not in substance or in effect an income tax.

Nor does comparison of the Flat Tax on wages to Social Security taxation clarify the character of the tax, despite Zelenak’s assertion that the existing unapportioned social security tax on wages is either “not a direct tax (following [a dictum in] Pollock), or it qualifies as an income tax under the 16th Amendment, or both.” But as Erik Jensen has pointed out, the Supreme Court has never said Social Security taxes are excises, nor that they are income taxes – though the latter “... has generally been assumed to be the case.” So the question seems to be still unsettled. But regardless of how Social Security taxes relate to the taxing power of Congress, the wage portion of a Flat Tax would not share a couple of essential features with Social Security taxes. That is, the flat wage tax would not be credited to individual employees as any sort of future entitlement, and it would not receive a matching contribution from the employer. The business portion of a Flat Tax would presumably have the same rate of taxation that wages do, but no part of the business payment is credited to the wage portion of the tax. So what would the wage tax be, standing on its own? In Constitutional language, it could be described as a capitation imposed on a set of persons with respect to their productivity as measured through wages above a specified subsistence threshold.

With all these problematical features, what is the point of the Flat Tax innovation? Zelenak contends that when a bifurcated flat tax is compared to a subtraction-method VAT, “the only substantive difference is the flat tax’s exemption for subsistence wages.” Yet we have already seen that the exemption of investments from the profits used to measure the business portion’s tax liability is a very significant feature of the proposal; and one that arguably shifts the value added tax burden away from profits and onto wages.

The third “tax innovation” to be analyzed is the Individual Healthcare Mandate and its penalty for non-compliance. Thanks to Erik Jensen’s detailed analysis (which is briefly discussed above in the Introduc-

233 Id. at 843-844.
234 Jensen, The Individual Mandate, supra note 3, at 43.
235 Zelenak, supra note 3, at 840. To his credit, Zelenak also points out that a standard VAT coupled with a subsistence level rebate to workers could have the same effect as a wage exemption, and would avoid all the troubles bifurcation brings with it.
236 Zelenak, supra note 3, at 853. It is curious that the political sponsors of the Flat Tax are generally conservative; and of the USA tax, liberal. Yet both tax innovations favor capital formation at the expense of livelihoods.
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tion, § 2) it is possible to apply the various criteria in a fairly summary fashion. Assuming that the mandated payment is not a penalty that can be sustained under the Commerce Clause, it must be either a direct or indirect tax. As for the latter, the payment is not shiftable in any way, it is not part of some other expenditure (being in fact levied on non-consumption) and it is avoidable only by means of an equal or greater expenditure on healthcare insurance. So the payment does not have the character of an indirect tax in either its form or its substance. But if it is therefore a direct tax, it must be an income tax if it is to escape apportionment; and yet there is no “accession to wealth” present to be taxed because of a failure to buy healthcare insurance.

Then if the “penalty” is a tax, what kind of a tax would it be? It would be a capitation: that is, a tax on persons with respect to a lack of property in healthcare insurance – as Hamilton might put it. Another way of putting it might be to say that the “penalty” is a regulatory tax that functions by taxing everyone “by the head” according to a series of rates, excepting only those living below federal poverty level or who own healthcare insurance from designated providers and pay for a mandated level of coverage. This kind of regulatory “tax” verges on being a penalty in the guise of a tax, as well as a tax on sheer existence. But the alternative way of viewing it – as a capitation on lack of property – makes it out to be both counter-intuitive and subject to apportionment. So perhaps it would be best to just expunge it from the tax rolls altogether.

Writing with reference to the Individual Mandate penalty, Jensen says “...we ignore the meaning of “capitation” or “capitation tax” at our peril.” What peril? Naturally enough, the immediate peril is that of misconstruing the Constitution both as to the form and substance of taxation. In principle, we thereby also run the peril of jeopardizing the rule of law it-
self. For law to rule, and not money or mob, the power that flows through society must respect and sustain both the form and substance of its laws. Otherwise, we are in peril because - to paraphrase Paul Tillich: power that is without the form of justice and the substance of love degenerates into a coercive force that destroys itself and the politics based on it.\textsuperscript{242}

\textsuperscript{242} \textsc{Paul Tillich, Love, Power, and Justice: Ontological Analyses and Ethical Applications} 8 (1954).