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What the Constitution Means by “Duties, Imposts, and Excises”—and “Taxes” (Direct or Otherwise)

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by

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Abstract

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

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

Finally, the Article reviews the Supreme Court’s holding that the Affordable Care Act’s penalty for not acquiring insurance is a tax but not a direct tax, and concludes that if the penalty was a tax, it was direct.
“Mr King asked what was the precise meaning of direct taxation? No one answd.”

Madison’s Constitutional Convention notes

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

Future Chief Justice John Marshall
at the Virginia Ratifying Convention

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1 Bibliographical Note: This footnote collects sources cited more than once, including some
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I. INTRODUCTION

The Constitution’s Taxation Clause empowers Congress to “lay and collect Taxes, Duties, Imposts and Excises.”\(^2\) It also imposes limitations on the tax power, including the requirement that “direct Taxes” be apportioned among the states.\(^3\) To understand the intended scope of these powers and limitations—and therefore their original legal force\(^4\)—one must understand what their words meant to the people who ratified them. Yet many of those words were technical in nature or otherwise held special meaning for the founding generation.\(^5\) This Article focuses on six technical terms: “duties,” “excises,” “imposts,” and “tonnage,” “taxes,” and “direct taxes.” It also explains the reasons for the often-maligned apportionment requirement.

I undertook this investigation in part because the subject has obvious modern importance—as the Supreme Court reminded us in its ruling on the Affordable Care

\(^2\)U.S. CONST. art. I, § 8, cl. 1.

\(^3\)Id., art. I, § 1, cl. 3 & art. I, § 9, cl. 4.

\(^4\)The Constitution’s original legal force is how courts would have applied the document immediately after ratification. The original legal force of a constitutional provision is derived from how the ratifiers (not the framers) actually understood the provision. If that understanding is not recoverable or there were significant inconsistent understandings, original legal force is derived from the objective original public meaning of the provision. See Robert G. Natelson, The Founders’ Hermeneutic: The Real Original Understanding of Original Intent, 68 OHIO ST. L.J. 1239 (2007). See also Natelson, Origination Clause, supra note 2 (forthcoming).

\(^5\) I have examined several of these terms in previous work. See, e.g., Robert G. Natelson, Commerce in the Commerce Clause: A Response to Jack Balkin, 109 Mich. L. Rev. First Impressions 55 (2010) (with Dave Kopel); Robert G. Natelson, Tempering the Commerce Power, 68 Mont. L. Rev. 95 (2007); Robert G. Natelson, The Legal Meaning of “Commerce” In the Commerce Clause, 80 St. John’s L. Rev. 789 (2006); Natelson, Indian Commerce, supra note 2.

Act in *National Federation of Independent Business v. Sebelius*—and in part because I was dissatisfied with the existing scholarship: Not only is the published literature relatively sparse for such an important topic, but it tends to be marred by defects in historical method: anachronistic assumptions, reliance on material of low probative value at the expense of more-instructive primary sources, and agenda-driven conclusions. These problems are explained at greater length in Part VII.

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

Part VI explains the reasons behind the apportionment rule. Part VII discusses some of the mistakes made in prior publications on the issues addressed in this Article. Part VIII, the Conclusion, presents a brief summary.

One more point: This Article is virtually unique among legal writing on this subject in that it consults a very wide range of primary sources. These include not merely the records of the Constitution’s drafting and ratification, but also eighteenth century treatises, British and American tax statutes and other legislative documents, British and American newspaper articles, and various other materials. This Article also is unusual in that (for reasons that should be obvious but too often are not) it relies only on sources arising before the end of 1790, the

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6567 U.S. ___, 132 S.Ct 2566 (2012) (holding that a statutory penalty for failure to purchase conforming insurance was a “tax” but not a direct tax).
year Rhode Island became the thirteenth state to ratify the Constitution. Later material is too weakly probative, or not probative of all, of the ratification-era understanding.\textsuperscript{7}

\section{Inferences from the Constitutional Text}

The constitutional text offers hints as to the meaning of the terms examined in this Article. The following discussion examines that text as it stood at the time of the Constitution’s ratification, without the changes subsequently wrought by the Sixteenth Amendment\textsuperscript{8} and by court decisions.

The Constitution’s Taxation Clause empowered Congress to “lay and collect Taxes, Duties, Imposts and Excises.”\textsuperscript{9} The Commerce Clause empowered Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{10} During the founding era, both grants were understood to authorize financial exactions.\textsuperscript{11}

The Constitution also imposed limits on the extent to which Congress and the states could levy financial exactions. The limits on the states were (1) a requirement of congressional consent before a state could “lay any Duty of Tonnage”\textsuperscript{12} and (2) with one exception, a like requirement before a state could “lay any Imposts or

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

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

\textsuperscript{9}U.S. Const. art. I, § 8, cl. 1.

\textsuperscript{10}Id., art. I, § 8, cl. 3.

\textsuperscript{11}Infra Part III.

\textsuperscript{12}Id., art. I, § 10, cl. 3.
Duties on Imports or Exports.”\textsuperscript{13} The restrictions on the financial powers of Congress were more numerous. Among them were the following three:

- Revenue bills could originate only in the House of Representatives;\textsuperscript{14}
- Congress could impose no “Tax or Duty” on exports;\textsuperscript{15} and
- until 1808, Congress was prohibited from levying any “Tax or duty” on imported slaves in excess of ten dollars per person.\textsuperscript{16}

In addition to these limitations, the Constitution included several that reflected the Founders’ belief that government was a fiduciary institution, and, to the extent possible, should serve its constituents in an impartial manner.\textsuperscript{17} These limitations were as follows:

- Taxes, duties, imposts, and excises were to be levied “to pay the Debts and provide for the Common Defence and general Welfare of the United States.”\textsuperscript{18} The Supreme Court no longer treats this as much of a restriction.\textsuperscript{19} As understood by the Founders, however, this Clause limited Congress to taxes, duties, imposts, and excises imposed to raise revenue for national (“general”) purposes only rather than for regional or special-interest (“partial”) purposes.\textsuperscript{20} This provision thereby curbed

\textsuperscript{13}Id., art. I, § 10, cl. 2.
\textsuperscript{14}U.S. CONST. art. I, § 7, cl. 1.
\textsuperscript{15}Id., art. I, § 9, cl. 5.
\textsuperscript{16}Id., art. I, § 9, cl. 1.
\textsuperscript{17}Lawson, Seidman, Natelson, supra note 2.
\textsuperscript{18}U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{19}United States v. Butler, 297 U.S. 1 (1936) (stating in dicta that Congress has discretion to spend for general welfare purposes); Helvering v. Davis, 301 U.S. 619 (1937) (so holding); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (so holding).
\textsuperscript{20}See generally Natelson, General Welfare, supra note 2. The phrase “provide for” meant “to lay up provisions for.” Id. at 15-16.
congressional taxing authority even when exercised purportedly to fund projects within the scope of the federal government’s enumerated powers.

- “Duties, Imposts and Excises” were to be “uniform throughout the United States.”

- The Constitution prohibited any “Preference” . . . [being] given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.”

- Two clauses required that “Capitation[s]” and other “direct Taxes” be apportioned among the states according to their population, with the provisos that (1) Indians who did not pay taxes were excluded and (2) five slaves were to be counted as three free persons. These clauses were unamendable until 1808.

The terms examined in this Article all occurred in the grants and limitations just summarized. “Tax,” “Duty,” “Excise,” “Impost,” and “Tonnage” appeared in the Taxation Clause. Three of those five words also appeared elsewhere in conjunctive and disjunctive expressions: “Tax or duty,” “Imposts or Duties,” “Duties and Imposts.” The phrase “direct . . . Tax” was in two other locations. It is therefore reasonable to infer that, in accordance with the canon of construction against


22Id. art. I, § 9, cl. 6.

23This referred to those Indians supporting their tribes rather than state or federal governments. Natelson, Indian Commerce, supra note 2, at 260.

24U.S. CONST. art. I, § 2, cl. 3 & art. I, §9, cl. 4.

25Id., art. V.

26U.S. CONST. art. I, § 9, cls. 1 & 5.

27Id., art. I, § 10, cl. 2.

28Id., art. I, § 10, cl. 2.

29Id., art. I, § 2, cl. 3 & art. I, § 9, cl. 4.
surplus, none of these individual terms were synonyms for others. That does not preclude the possibility the terms might overlap.

The Constitution’s usually employed the word “Duty” in the context of trade: “Duty of Tonnage,”30 duties on imported slaves,31 duties on imports and exports.32 We can deduce that at least some duties were commercial in nature and that they were subject to the requirement of uniformity of “Regulation[s] of Commerce or Revenue.”33

The constitutional text further distinguished between “direct Taxes” and other taxes. It stated outright that a “Capitation” was a direct tax, and it implied that there were other kinds of direct tax.34 Only direct taxes were to be apportioned among the states by population.35 Other taxes—presumably indirect—were not to be apportioned. The separate uniformity requirement applied to duties, imposts, and excises36 strongly suggesting that to the extent those exactions were classified as “taxes,” they were indirect.

In sum, the text appeared to distinguish between taxes and regulations of commerce; between taxes, duties, excises, and imposts; and between direct taxes and other (presumably indirect) taxes. It stated that capitations were direct and implied that there were other direct taxes as well. The Constitution imposed an apportionment rule on direct taxes and a uniformity requirement on other financial exactions. The text implied that any taxes qualifying as duties, excises, or imposts

30Id., art. I, § 10, cl. 3.
31Id., art. I, § 9, cl. 1.
32Id., art. I, § 10, cl. 2. See also id., art. I, § 9, cl. 5 “No Tax or Duty shall be laid on Articles exported from any State).
33Id. art. I, § 9, cl. 6.
34Id., art. I, § 9, cl. 4.
35Id., art. I, § 2, cl. 3 & art. I, §9, cl. 4.
36Id., art. I, § 8, cl. 1.
were indirect. It stated explicitly that “duties” included “tonnage,” and it implied that duties were associated with commerce.

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

III. IMPOSITIONS AND TAXES

In founding-era financial usage, the word *imposition* could refer to any pecuniary exaction. In the words of John Dickinson, America’s leading spokesman on the subject of taxes before the Revolution, “every ‘tax’ is an imposition, tho’ every imposition is not a ‘tax.’” A legislature might adopt an imposition purely for regulatory purposes—by, for example, levying tariffs high enough to prohibit trade. Alternatively, a legislature might enact an imposition to raise money for the expenses of government.

Contemporaneous British dictionaries often defined the word “tax” in a manner broad enough to include any imposition. Other authoritative sources, however, restricted the word to those levies that raised money for the support of government.

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37DICKINSON, *supra* note 1, at 42.

38Id.; see also 5 J. CONT’L CONG 794 (Sept. 20, 1776) (referring to “duty or imposition” on necessities brought into a fort or garrison in new Articles of War); THOMAS POWNALL, THE ADMINISTRATION OF THE BRITISH COLONIES 254 (5th ed. 1774) (labeling the monopoly in colonial trade, “an imposition, if not a direct tax, to the amount of the external balance of such trade”); 1 WILLIAM BLACKSTONE, COMMENTARIES *308 (referring to an excise as an inland imposition).

39E.g., ALLEN, *supra* note 2 (unpaginated) (defining “tax” as “a tribute imposed; an excise; duty”); JACOB, DICTIONARY, *supra* note 2 (unpaginated) (defining “tax” in part as “A tribute or imposition laid upon the subject. . .”); SHERIDAN, *supra* note 2 (unpaginated) (defining “tax” as “An impost, a tribute imposed, an excise, a tallage; charge, censure.”). For a non-dictionary British usage see DAVID HARTLEY, LETTERS ON THE AMERICAN WAR 78 (3d ed. 1778) (stating “The Stamp Act was a tax.—The Tea Act was a tax. All Acts of Parliament upon this subject have been taxes, either for regulation of trade, or for revenue.”).

4010 ENCYCLOPEDIA BRITANNICA, *supra* note 2, at 8548 (defining a “tax” as a levy “for the support of government”); 4 CHAMBERS, *supra* note 2 (unpaginated) (defining “tax” as “a
During the decade before the Revolutionary War, Americans settled on the latter usage. They did so because of their struggle over British attempts to tax the colonies. In publications promoting their cause, pamphleteers such as John Dickinson, John Adams, and James Wilson conceded the authority of the British government to regulate commerce though financial exactions—by, for example, charging fees to fund inspections and imposing prohibitory tariffs to restrict trade. But they staunchly contested efforts by Parliament to “tax” them, and they defined “tax” to mean a financial imposition for the sole purpose of raising revenue.

To be sure, by the time of the constitutional debates of 1787-90, that distinction had eroded somewhat. It was now conceded that a tax need not be for the sole purpose of raising revenue. A tariff or excise that raised significant revenue might be levied partly to protect domestic farmers or manufacturers or to suppress vice. But the core of the pre-Revolution distinction did survive: exactions certain aid, subsidy, or supply . . . paid yearly toward the expences of the government”).

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41 For the development of the American definition, see Natelson, Origination Clause, supra note 2. Nevertheless, during this period Americans sometimes imposed taxes partly for other reasons. Becker, supra note 2, at 13-14 & 80 (citing instances of taxes being imposed to promote development).

42 Dickinson, supra note 1, at 37 (“To the word ‘Tax,’ I annex that meaning which the constitution and history of England require to be annexed to it; that it is, an imposition on the subject for the sole purpose of levying money.”); see also id. at 76-77; Natelson, Origination Clause, supra note 2 (forthcoming).

43 Id.

44 E.g., N.Y. Indep. Jour., Jul. 9, 1788, reprinted in 21 Documentary History, supra note 2, at 1307-08 (claiming taxes though duties and imposts can assist domestic manufacturers); 6 Documentary History, supra note 2, at 1287 (quoting Thomas Dawes, Jr., as telling the Massachusetts ratifying convention that Americans had not taken the opportunity to use imposts to protect agriculture).

45 E.g., 1781 Mass. Resolves, supra note 2, at 525 (reciting that one purpose of an excise statute was “the Suppression of Immorality, Luxury and Extravagance in this Commonwealth”).
adopted primarily for regulatory purposes were seen as different from “taxes,” which were enacted primarily for revenue.

This distinction is reflected in several provisions of the Constitution. The House-origination requirement applied only to “Bills for raising Revenue,” not to other financial exactions. The uniformity requirement mentioned regulations of “Commerce or Revenue.” The Taxation Clause authorized only exactions for financial reasons, so the authority for regulatory exactions was the Commerce Clause.

The distinction between exactions for revenue and exactions for commerce sculpted federal power in a subtle manner. Specifically:

- If an imposition was not designed to raise significant revenue but rather to regulate domestic or foreign commerce, then it was constitutional under the Commerce Clause.
- If it raised no significant revenue and Congress had levied it to regulate an activity outside the scope of Congress’s enumerated powers (such as

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46E.g., 26 J. CONT’L CONG 270 (Apr. 22, 1784) (reproducing letter referring to “Imposts or duties” as regulations of foreign commerce); “Candidus II,” INDEP. CHRON., Dec. 20, 1787, reprinted in 5 DOCUMENTARY HISTORY, supra note 2, at 493, 497 (claiming that commercial regulations through impost and excises would assist agriculture and manufacturing); cf. “Agrippa IX,” MASS. GAZ., Dec. 28, 1787, reprinted in 5 id. at 540, 542 (conceding that an impost could aid manufacturing).

47U.S. Const. art. I, § 7, cl. 1.

48Cf. 2 FARRAND’S RECORDS, supra note 1, at 363 (Madison, Aug. 21, 1787) (reporting that George Clymer “moved as a qualification of the power of taxing Exports that it should be restrained to regulations of trade, <by inserting after the word "duty" Sect 4 art VII the words> ‘for the purpose of revenue.’”).

49Id. at art. I, § 9, cl. 6 (italics added).

50U.S. Const. art. I, § 8, cl. 1.

51Supra note 41 and accompanying text.

52U.S. Const. art. I, § 8, cl. 3.
manufacturing was understood to be), then the imposition was outside congressional authority.

- If, however, the imposition was designed to raise significant revenue, it could qualify as constitutional under the Taxation Clause—even if it affected activities otherwise outside the scope of Congress’s enumerated powers.

The following three illustrations exemplify these rules:

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

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

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

### IV. DIRECT TAXES

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54Congress probably could levy such an exaction on the interstate sale of wool clothing, however, under the congressional power to “regulate Commerce . . . among the several States”). U.S. CONST. art. I, § 8, cl. 3.
During the founding era, the distinction between direct and indirect taxes does not seem to have been obscure. Among British sources, the distinction appears in Adam Smith’s *Wealth of Nations*\(^{55}\) (a text whose influence was greater among Americans than once believed),\(^{56}\) newspapers and pamphlets,\(^{57}\) Parliamentary proceedings,\(^{58}\) and government documents.\(^{59}\)

American references to the distinction are, if anything, even more plentiful,\(^{60}\) and many were familiar with the criteria that classified a levy as “direct” or “indirect.” As John Marshall, the future Chief Justice, observed in a speech in support of the Constitution delivered at the Virginia ratifying convention, “The objects of direct taxes are well understood.”\(^{61}\) Marshall listed them as “Lands, slaves, stock [i.e., business capital] of all kinds, and a few other articles of domestic

\(^{55}\)SMITH, *supra* note 2.


\(^{57}\) GAZETTEER AND NEW DAILY ADVERTISER (London), Dec. 13, 1790 (referring to “a direct Tax on Porter”); PUBLIC ADVERTISER (London), Dec. 13, 1790 (same); GRAY, *supra* note 1, at 18 & 34 (pamphlet referring to taxes on land and rents as “direct”).

\(^{58}\) E.g., 27 PARL. REGIS. 432-36 (House of Commons, Apr. 15, 1790 (reproducing William Fullarton’s attack on the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton pointed out that a tax indirect in form can be direct in effect. See also 46 H.C. JOUR. 45 (Dec. 9, 1790) (reproducing petition of John Horne Tooke, complaining of Westminster’s lack of representation in Parliament, although its citizens contribute “by direct and indirect Taxation”); see also 28 COBBETT, *supra* note 2, at 922 (same).

\(^{59}\) E.g., Report of the Lords of the Committee of Council appointed for the Consideration of all Matters relating to Trade and Foreign Plantations, Mar. 28, 1789) (reproducing Remarks on the Abolition of Slavery by Col. Henderson, Feb. 16, 1788, referring to a duty on imported slaves as an “indirect Tax”).

\(^{60}\)In addition to the sources discussed *infra*, see 14 MIN. PA. EX. COUNCIL, *supra* note 2, at 335 & 337 (Feb. 1, 1785) (reproducing a 1785 report by Pennsylvania state president John Dickinson, who had been the leading tax theorist in the pre-revolutionary pamphlet war with Britain and who later served as an important framer and supporter of ratification). On Dickinson’s career, see Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. STATE L. REV. 415 (2003).

\(^{61}\)9 DOCUMENTARY HISTORY, *supra* note 2, at 1122.
property.”

Another future Chief Justice—Connecticut’s Oliver Ellsworth—told his state’s ratifying convention that targets of direct taxes included (he did not say “were limited to”) the “tools of a man’s business, necessary utensils of his family.” Ellsworth thus corroborated Marshall’s references to “stock” and “domestic property.” After the Pennsylvania ratifying convention, delegates in the Anti-Federalist minority issued a statement that identified the subjects of direct taxes those on polls (as confirmed by the Constitution), and on “land, cattle, and trades, occupations, etc.” The most highly regarded of the Anti-Federalist writers, the “Federal Farmer,” listed as objects of Congress’s power of direct taxation, “polls, lands, houses, labour, &c.” Remarks such as these strongly suggest that direct taxes included a good deal more than, as is sometimes claimed, land levies and capitations.

In fact, the scope of direct taxation was rather wide—so much so that it offered the Anti-Federalists an opportunity for attack. For example, the author signing his essay as “The Impartial Examiner” argued against granting Congress

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62 Id.
63 Ellsworth was Connecticut’s leading lawyer, and had been a delegate at the Philadelphia convention, where he served on the committee that prepared the Constitution’s first draft. On Ellsworth, see William Garrot Brown, The Life of Oliver Ellsworth (1905).
64 15 Documentary History, supra note 2, at 275.
65 U.S. Const. art. I, § 9, cl. 4 (referring to capitations as “direct”).
66 The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, reprinted in 2 Documentary History, supra note 2, at 618, 636.
68 See also E.H. Ketcham, The Direct Tax Clause of the Federal Constitution, 4 N.C. Hist. Rev. 270 (1927) (surveying the constitutional debates and concluding that direct taxes included levies on any kind of property).
69 Einhorn, supra note 2, at 104.
authority to levy direct taxes by pointing out that:

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

The Federalist rejoinder implicitly acknowledged the wide scope of direct taxes. Federalists such as James Madison, Alexander Hamilton, and George Nicholas responded by observing that the Constitution’s uniformity requirement applied only to indirect levies. Therefore, as long as Congress honored the apportionment rule, Congress could tailor the subjects of direct federal taxes to fit the needs of each state.71 “The most proper articles will be selected in each State,” said Madison. “If one article in any State should be deficient, it will be laid on another article.”72

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

70“The Impartial Examiner I,” VA. INDEP. CHRON., Feb. 27, 1788, reprinted in 8 DOCUMENTARY HISTORY, supra note 2, at 420, 421.

719 DOCUMENTARY HISTORY, supra note 2, at 1148-49 (quoting James Madison at the Virginia ratifying convention); The Federalist No. 36 (Alexander Hamilton), reprinted in 15 DOCUMENTARY HISTORY, supra note 2, at 302, 304.

7210 DOCUMENTARY HISTORY, supra note 2, at 1204 (quoting James Madison at the Virginia ratifying convention). See also id. at 1342 (quoting Madison) & 1343 (George Nicholas).

73The colony pound rate was the rate per £1 of assessed value. BECKER, supra note 2, at 27.
The valuation (or, to use the prevalent modern term, “assessment”) of each subject in the base was tailored to its nature. Head taxes varied according to the condition of the person being taxed.\textsuperscript{74} Real property might be assessed by an acreage or ad valorem formula,\textsuperscript{75} and personal property (such as livestock or plate) by the item or ad valorem. Income and profits usually were taxed by assessing a percentage, reflecting likely annual return, of the value of their sources. Among the sources subject to percentage assessment were interest-bearing loans (called “money at interest”),\textsuperscript{76} trades and businesses,\textsuperscript{77} and sometimes land.\textsuperscript{78} When taxes were imposed on wealth-generating activities, they were said to be imposed on “faculties.”\textsuperscript{79}

For example, in Britain the so-called “land tax” authorized not merely exactions on land, but also on various kinds of tangible personal property, on “money at interest,” and on government pensions, annuities and salaries.\textsuperscript{80}

\textit{See infra} notes 85-87 and accompanying text for more on the Connecticut system.

\textsuperscript{74}\textit{Infra} notes 110-119 and accompanying text.

\textsuperscript{75}\textsc{Einhorn, supra} note 2, at 29 (referring to Virginia’s acreage tax); 46 (referring to Virginia’s 1777 adoption of an ad valorem tax); 81 (referring to North Carolina’s acreage tax); 93 (referring to South Carolina’s ad valorem tax on urban land and acreage tax on rural land) & 103 (recording South Carolina’s 1784 switch to an ad valorem tax for rural land). Whether a state should tax land by the acre or ad valorem was a common matter of legislative dispute. \textit{See generally Becker, supra note 2}.

\textsuperscript{76}\textsc{Becker, supra} note 2, at 168-69.

\textsuperscript{77}\textsc{Becker, supra} note 2, at 11 (discussing the Massachusetts faculty tax) & 46 (explaining that the Pennsylvania faculty tax fell on all trades and professions based on an estimate of annual profits).

\textsuperscript{78}\textsc{Becker, supra} note 2, at 34 (referring to land taxes calculated on annual rent).

\textsuperscript{79}Before the Revolution, all the New England colonies had adopted faculty taxes. \textsc{Becker, supra} note 2, at 11.

\textsuperscript{80}3 \textsc{Chambers, supra} note 2 (unpaginated) stated in his entry on the Land-Tax that the tax was assessed on personality as well as land, exempting items owned by the king; and also on income from public office or employment (“military officers in the army and navy excepted”) and on government annuities and pensions to the tune of four shillings for every twenty
Similarly, Pennsylvania’s “land tax” included levies on livestock, slaves, and indentured servants as well as land. The South Carolina direct tax statute imposed levies on carriages and slaves, stock-in-trade, and occupations, as well as real estate. A 1778 Virginia law imposed “an annual tax of ten shillings for each £100 value of all land, plate, slaves, horses and mules and ‘all salaries, and . . . the neat [sic] income of all offices of profit.’” New Hampshire’s statute covered polls, land (including mills and wharves), livestock, and ferries.

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

received. See also 1 WILLIAM BLACKSTONE, COMMENTARIES *302 (stating that the land tax was imposed on personal as well as real property); but see id. at *315 (stating that the tax on offices and pensions was administered by the commissioners of the land tax, suggesting that it was technically a different levy).

81EINHORN, supra note 2, at 88-89.
82S.C. LAWS, supra note 2, at 436; BECKER, supra note 2, at 207.
83BECKER, supra note 2, at 196; EINHORN, supra note 2, at 46-47; see also Dodd, supra note 2, at 363 (describing Virginia’s “Revenue Tax” and listing several other items).
8421 N.H. PAPERS, supra note 2, at 420-21.
85BECKER, supra note 2, at 153.
861 CONN. RECORDS, supra note 2, at 365-66 (reproducing statute).
and other enterprises, and (subject to particularly high rates) the businesses of speculators.\textsuperscript{87}

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

Almost every American jurisdiction seems to have had a similar, if sometimes less elaborate, arrangement, whether or not a poll tax was part of it.\textsuperscript{93}

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

- \textit{Wealth employed in business and domestic life}. Direct taxes included those imposed on land,\textsuperscript{94} improvements to land,\textsuperscript{95} inventory (“stock in trade”),\textsuperscript{96}

\textsuperscript{87}2 CONN. RECORDS, \textit{supra} note 2, at 256-63.

\textsuperscript{88}BECKER, \textit{supra} note 2, at 11.

\textsuperscript{89}Presumably because carriages held for sale were taxed directly, the carriage excise (an indirect tax) was not imposed on them. 1781 MASS. RESOLVES, \textit{supra} note 2, at 578.

\textsuperscript{90}1780 MASS. RESOLVES, \textit{supra} note 2, at 85-86.

\textsuperscript{91}1780 MASS. RESOLVES, \textit{supra} note 2, at 85-86.

\textsuperscript{92}\textit{Infra} notes 117 & 118 and accompanying text.

\textsuperscript{93}BECKER, \textit{supra} note 2, at 44 (New Jersey), 46 (Pennsylvania), 88 (Virginia), 192 (North Carolina) & 213 (Maryland).

\textsuperscript{94}\textit{E.g.}, 1780 MASS. RESOLVES, \textit{supra} note 2, at 85. \textit{See also} GRAY, \textit{supra} note 2, at 18.
business equipment,97 and livestock.98

- **Personal and business income.** Direct taxes included levies on rents,99

(Referring to land taxes as direct); “An Old Planter,” VA. INDEP. CHRON., Feb. 20, 1788, reprinted in 8 DOCUMENTARY HISTORY, supra note 2, at 394, 396 (noting that under the Constitution taxes on land will be apportioned as direct taxes); 9 DOCUMENTARY HISTORY, supra note 2, at 1149 (reproducing remarks of James Madison at the Virginia ratifying convention, describing the land levies of England and Scotland as direct taxes).

“Federal Farmer,” Letter IX, Jan. 4, 1788, reprinted in 17 DOCUMENTARY HISTORY, supra note 2, at 288, 294 (listing as “houses” a possible object of Congress’s power of direct taxation). Thus the English window tax, imposed so as to ensure that the owners of more elaborate houses paid more, was direct. DIARY OR WOODFALL’S REGISTER (London, England), Apr. 2, 1789 (calling the window light tax direct in an announcement of pamphlets by J.L. DeLolme, the well-known author of a book on the English constitution).

E.g., 1780 MASS. RESOLVES, supra note 2, at 85 (including as part of a direct tax scheme, levies on “wares and merchandize, stock in trade”). BECKER, supra note 2, cites many examples of such stock-in-trade taxes. E.g., id. at 81 & 207 (South Carolina), 171 (New Jersey), & 192 (North Carolina).

An English newspaper referred to a proposed levy on ale of up to a half-penny “per pot” as “a direct Tax on Porter.” GAZETTEER AND NEW DAILY ADVERTISER (London), Dec. 13, 1790; see also PUBLIC ADVERTISER (London), Dec. 13, 1790 (characterizing the proposed tax similarly). A *pottle* was a jar of two quarts or four pints. JOHN PLAYFORD, VADE MECUM: OR, THE NECESSARY POCKET COMPANION 46 (22d ed., 1772); JOHNSON, supra note 2 (unpaginated) (defining “pottle” as four pints). The quantities assessed suggest that the levy was on inventory rather than retail sale. A Massachusetts excise statute assessed liquor by the gallon, but only as part of a formula to determine the amount sold. 1781 MASS. RESOLVES, supra note 2, at 525-26.

1780 MASS. RESOLVES, supra note 2, at 85 (taxing “vessels of all sorts”); NJ JOURNAL, 10/31/88 (referring to a direct tax on ferries). See also supra note 84 (identifying ferries as part of the New Hampshire direct tax system).

Supra notes 62 & 66 and accompanying text (quoting John Marshall and the dissent of the Pennsylvania minority); “An Old Planter,” VA. INDEP. CHRON., Feb. 20, 1788, reprinted in 8 DOCUMENTARY HISTORY, supra note 2, at 394, 396 (noting that under the Constitution taxes on livestock will be apportioned as direct taxes); 1780 MASS. RESOLVES, supra note 2, at 85 (taxing as part of a general direct tax scheme, “horses, oxen, cattle . . . sheep, swine”); BECKER, supra note 2, at 192 (referencing North Carolina’s tax on horses and cattle).

GRAY, supra note 2, at 34, 35 & 49 (referring to taxes on land rents as direct). Beginning in 1777, New Hampshire taxed unimproved land at the same rate as “money at interest,” thereby effectively taxing rental value. BECKER, supra note 2, at 130.
business profits, wages, interest, and other income.

• Business enterprises. Levies on business profits and occupational fees were direct taxes.

• Heads. Poll taxes, also called head taxes or capitations, existed in all of the New England states and in most other states as well. They were

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100 Supra notes 85 & 86 and accompanying text (discussing the Connecticut system).
101 SMITH, supra note 2, at 288-89 & 295 (referring to taxes on wages as direct); 27 PARL. REGIS. 432-36 (House of Commons, Apr. 15, 1790 (reproducing William Fullarton’s attack on the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton pointed out that a tax indirect in form can be direct in effect. See also “Federal Farmer,” Letter IX, Jan. 4, 1788, reprinted in 17 DOCUMENTARY HISTORY, supra note 2, at 288, 294 (listing as objects of Congress’s power of direct taxation, “polls, lands, houses, labour, & c.”).
102 1780 MASS. RESOLVES, supra note 2, at 85-86 (directly taxing net interest received); cf. SMITH, supra note 2, at 275 (describing tax on interest as direct).
103 SMITH, supra note 2, at 290 (classifying a tax on salaries from emoluments as direct); supra notes 80, 83 & 87 and accompanying text.
104 1780 MASS. RESOLVES, supra note 2, at 85-86 (directly taxing “income from any profession, faculty, handicraft, trade or employment; and also on the amount of all incomes and profits gained by trading by sea and on shore”); supra note 87 and accompanying text (describing the Connecticut system); Dodd, supra note 2, at 364 (describing Virginia’s occupational fees on physicians, surgeons, apothecaries, and merchants); BECKER, supra note 2, at 44 (summarizing New Jersey taxes on various occupations) & 81 (summarizing South Carolina occupational taxes).
105 U.S. CONST., art. I, § 9, cl. 1. See also SMITH, supra note 2, at 292 (stating that capitation taxes “so far as they are levied upon the lower ranks of the people, are direct taxes upon the wages of labour”); WILLIAM R. STAPLES, RHODE ISLAND IN THE CONTINENTAL CONGRESS 648 (1870) (quoting discussion at the Rhode Island ratifying convention that refers to a poll tax or capitation as direct).
106 Campbell, supra note 2, at 124 argues that the term “capitation” had a meaning different than poll tax in that a capitation could be adjusted by income and other factors. I could find no persuasive evidence for this. Poll taxes were often so adjusted, and contemporaneous dictionaries, to the extent that they provided a definition for capitation, define it simply as a poll tax. E.g., ASH, supra note 2 (unpaginated) (defining “capitation” as “A numeration of the people by the head, a poll tax”); PERRY, supra note 2 (unpaginated) (defining “capitation” as “numeration by heads; a poll tax”).
107 BECKER, supra note 2, at 15.
levied both on free persons and slaves. Capitations were the prevalent way of taxing slaves.\textsuperscript{109}

Laws imposing capitations did not necessarily require the same payment from everyone. Rates often were adjusted according to the taxpayer’s circumstances, just as the capitations known as “council taxes” are graduated in Britain today.\textsuperscript{110} American legislatures could, and often did, reduce or eliminate the poll tax due from the poor.\textsuperscript{111} American legislatures also granted complete or partial exemptions to

\textsuperscript{108}During the colonial period there were no general poll taxes in New York, New Jersey, Pennsylvania and probably Delaware, although there were some local poll taxes, BECKER, supra note 2, at 48-49 and Pennsylvania imposed them on single men. EINHORN, supra note 2, at 83 & 90. During this period South Carolina imposed capitations only on slaves. Id. at 98. The 1776 Maryland constitution abolished poll taxes. Md. Const. (1776) (Declaration of Rights).

\textsuperscript{109}In theory, slaves could be taxed either as persons (by a head tax) or as livestock. In America, they seem to have been taxed as persons. George Nicholas, Letter, Feb. 16, 1788, \textit{reprinted in} 16 DOCUMENTARY HISTORY, supra note 2, at 123, 126 (stating, “A poll tax is the only tax [Congress] could impose which could affect our slaves”). \textit{See also} BECKER, supra note 2, at 77; Md. Stat. 1719 c. xvi (imposing a poll tax on black and Irish servants, a measure re-enacted from time to time); 1780 Mass. Resolves, supra note 2, at 85 (imposing poll taxes on free and enslaved males); 8 N.H. Papers, supra note 2, at 685 & 849 (imposing a poll tax on slaves); 21 id. at 124 (proposing a poll tax on “male and female negro and molatto [sic] Servants,” but the proposal apparently was defeated, id. at 420); S.C. Laws, supra note 2, at 159 (reproducing a statute imposing a tax on white and black males); id. at 496 (imposing a head tax on blacks and mixed-race people).

\textsuperscript{110}I had to pay a local capitation when residing temporarily in the City of Oxford, England. \textit{See} http://www.oxford.gov.uk/PageRender/decCB/Payment_occw.htm.

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

In France, a person’s capitation liability was graduated by a wide range of factors. EINHORN, supra note 2, at 13.
persons who lived in particular places,\textsuperscript{112} who had reached (or not reached) a stated age,\textsuperscript{113} who were married,\textsuperscript{114} or who pursued particular occupations—especially the military\textsuperscript{115} and the clergy.\textsuperscript{116} The Massachusetts legislature, for example, exempted soldiers\textsuperscript{117} and the staff of Harvard College and “settled Ministers of the Gospel [and] Grammar School-Masters.”\textsuperscript{118} The Connecticut legislature exempted the president of Yale University.\textsuperscript{119} Nevertheless, capitations tended to be less reflective of wealth or income than other levies, which accounts for their unpopularity.

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112}\textit{E.g.}, 2 CONN. RECORDS, \textit{supra} note 2, at 198 (exemption of citizens of Town of Union); 3 \textit{id.} at 203 (same for the Town of Barkhemsted) & \textit{id.} at 535 (same for Town of Westmoreland); 20 MASS. RESOLVES, \textit{supra} note 2, at 288 & 387 (1778) (allowing abatement of taxes on “polls and estate” for inhabitants of two towns).
\item \textsuperscript{113}S.C. LAWS, \textit{supra} note 2, at 159 (reproducing a statute imposing tax on white and black males, but exempting those under 16 years of age or over 60); 21 N.H. PAPERS, \textit{supra} note 2, at 124 (proposed exemption for whites over 70 and servants of color over 45); 8 \textit{id.} 685 & 849 (exempting slaves over 45) & \textit{id.} at 966 (exempting whites over 75 and blacks over 45). \textit{See also} BECKER, \textit{supra} note 2, at 149 (discussing a reduction in Connecticut poll tax for males aged 16 to 21).
\item \textsuperscript{114}BECKER, \textit{supra} note 2, at 46 & 182-83 (mentioning Pennsylvania’s poll tax on unmarried men).
\item \textsuperscript{115}\textit{E.g.}, 2 CONN. RECORDS, \textit{supra} note 2, at 471 & 534; 2 \textit{id.} at 182, 229, 233, 262 & 526, 3 \textit{id.} at 19, 121 & 319 (exempting soldiers); 8 N.H. PAPERS, \textit{supra} note 2, at 685 & 843 (exempting soldiers and sailors); 2 \textit{id.} at 184 (exempting certain veterans); VA. H.D. JOUR., May 15, 1778 (exemptions for soldiers). \textit{See also} BECKER, \textit{supra} note 2, at 143, 196 &199.
\item \textsuperscript{116}\textsuperscript{2} CONN. RECORDS, \textit{supra} note 2, at 260; 3 \textit{id.} at 418; 4 \textit{id.} at 216 (exempting ministers); 20 MASS. RESOLVES, \textit{supra} note 2, at 197-98 (1777) (exempting missionaries); 21 \textit{id.} at 651 (1780) (same); BECKER, \textit{supra} note 2, at 143 (reporting Rhode Island’s exemption for ministers).
\item \textsuperscript{117}21 MASS. RESOLVES, \textit{supra} note 2, at 177-78 (1779).
\item \textsuperscript{118}1780 MASS. RESOLVES, \textit{supra} note 2, at 87.
\item \textsuperscript{119}\textsuperscript{2} CONN. RECORDS, \textit{supra} note 2, at 260.
\end{enumerate}
\end{footnotesize}
V. INDIRECT TAXES

A. Indirect Taxes in General

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

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

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

Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must constantly be laying up money to answer the demands of the collector. But you cannot make people thus provident. If you would do any thing to the purpose, you must come in when they are spending, and take a part with them. This does not take away the tools of a man's business, or the necessary utensils of his family: it only comes in when he is taking his pleasure, and feels generous; when he is laying out a shilling for superfluities . . .

* * * *

All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. France

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120 *Infra* Part IV.B.1.

121 15 DOCUMENTARY HISTORY, *supra* note 2, at 275.
raises a revenue of twenty-four millions sterling per annum; and it is chiefly in this way. Fifty millions of livres they raise upon the single article of salt. The Swiss cantons raise almost the whole of their revenue upon salt. Those states purchase all the salt which is to be used in the country; they sell it out to the people at an advanced price; the advance is the revenue of the country. In England, the whole public revenue is about twelve millions sterling per annum; The land tax amounts to about two millions; the window and some other taxes, to about two millions more. The other eight millions are raised upon articles of consumption. . . . In Holland, their prodigious taxes, amounting to forty shillings for each inhabitant, are levied chiefly upon articles of consumption. They excise every thing, not excepting even their houses of infamy.122

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

B. The Terminology of Indirect Taxation

1. Duties

Eighteenth century British lay dictionaries defined “duty” widely enough to include almost any financial exaction,123 and Blackstone employed the term the
same way. However, commercial treatises used the word more narrowly. For example, Giles Jacob in his *Lex Mercatoria*, defined “duty” to encompass “Customs, Subsidies, Tolls, Imposts; and other Duties upon Commodities imported or exported.” By 1787, Americans had developed their own usage, employing the word “duty” specifically to mean any financial exaction that did not qualify as a direct tax. Therefore, not all duties were taxes: Some were imposed not for revenue but merely to regulate (or effectively prohibit) trade in particular articles.

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

An excise was also a kind of duty. Other duties included ad hoc impositions

1295 J. CONT’L CONG 580 (July 18, 1776) (referring to duties on exports in a draft treaty); 21 id. at 792 (Jul. 27, 1781) (referring in a proposed treaty to “duties on exportation”); 23 id. at 807 (Dec. 16, 1782) (referring to “duties on exports”); “A Freeholder,” VA. INDEP. CHRON., reprinted in 9 DOCUMENTARY HISTORY, supra note 2, at 719, 724 (referring to an export duty on tobacco); VA. SEN. JOUR., supra note 2, Oct. 1786 Session, at 58 (Dec. 22, 1786) (referring to a duty on exported tobacco). See also id. (Oct. 1787 Session), at 75 (Jan. 2, 1788) for duties on both imports and exports.

130EINHORN, supra note 2, at 14; PERRY, supra note 2 (unpaginated) (defining “Custom” as the “king’s duties on imports and exports”); ROLT, supra note 2 (unpaginated) (defining “customs” as “the dues, duties, tolls, or tax, paid by merchants to the King, or state, for carrying out and bringing in of merchandises, which in Great Britain, are duties, certain and perpetual, payable to the crown for goods exported and imported. . . .”); 1 WILLIAM BLACKSTONE, COMMENTARIES *303 (similar definition).

Some authorities limited the term only to duties on exports. JACOB, DICTIONARY, supra note 2 (unpaginated) (“custom is rather profit the prince maketh of wares shipped out; yet they are frequently confounded.”).

131JACOB, DICTIONARY, supra note 2 (unpaginated) (referring to tonnage as “a custom”).

1321781 MASS. RESOLVES, supra note 2, at 525 (reciting in an excise statute the payment of excise “duties”); 1786 MASS. RESOLVES, supra note 2, 132 (referring to “excise duties”); id. at135 (“excise duty”); MASS. H.R. JOUR, supra note 2, at 84 (same); 2 N.Y. LAWS, supra note 2, at 283-88 (reproducing statute imposing a “Duty of Excise” on strong drink); 15 MIN. PA. EX. COUNCIL, supra note 2, at 305 (Oct. 26, 1787) (reproducing letter from Pennsylvania state president Benjamin Franklin referring to “excise duties”).

See also “Candidus II,” INDEP. CHRON., Dec. 20, 1787, reprinted in 5 DOCUMENTARY HISTORY, supra note 2, at 493, 497 (referring to both imposts and excises as duties).
on specific transactions or events, such as fees imposed on goods brought into a fort or garrison,\footnote{J. CONT'L CONG 794 (Sept. 20, 1776) (referring to “duty or imposition” on necessities brought into a fort or garrison).} fees on vessels for using public wharves,\footnote{VA. SEN. JOUR., supra note 2 (Oct. 1789 Session), at 56 (Dec. 9, 1789) (referring to a proposed duty “vessels coming to, or using the public wharves”).} fees on auction sales,\footnote{15 MIN. PA. EX COUNCIL, supra note 2, at 152 (Jan. 23, 1787).} fees on legal proceedings,\footnote{5 CONN. RECORDS, supra note 2, at 339-40 (reproducing statute).} and charges on certain written documents.\footnote{Luther Martin, “Genuine Information VI,” BALTIMORE MD. GAZ., Jan. 15, 1788), reprinted in 15 DOCUMENTARY HISTORY, supra note 2, at 374, 376; “A Farmer,” PHILA. FREEMAN’S J., Apr. 16 & 23, 1788, reprinted in 17 DOCUMENTARY HISTORY, supra note 2, at 133, 139-40 (“Under the term duties, every species of indirect tax is included, but it especially means the power of levying money upon printed books and written instruments”); “Federal Farmer,” Letter III, Oct. 10, 1787, reprinted in 19 DOCUMENTARY HISTORY, supra note 2, at 218, 224-25 (referring to duties on written instruments).} The notorious pre-Revolution Stamp Tax was a kind of duty.\footnote{EINHORN, supra note 2, at 18.} It was imposed on court orders, ship clearances, deeds, mortgages, licenses, pamphlets, newspapers, gambling supplies, and even college diplomas.\footnote{JOHNSTON, supra note 2 (unpaginated) (defining “impost”). Cf. ALLEN, supra note 2 (unpaginated) (defining “impost” as “a toll; custom paid for goods or merchandize”).}

2. Imposts

English dictionaries often defined “impost” very broadly. Johnson’s Dictionary, for example, described it as “a tribute imposed; an excise; a tallage.”\footnote{JOHNSON, supra note 2 (unpaginated) (defining “impost”). Cf. ALLEN, supra note 2 (unpaginated) (defining “impost” as “a toll; custom paid for goods or merchandize”).} However, Giles Jacob’s New Law-Dictionary, the most popular work of its kind in

There is no linguistic connection between “impost” and “import.” The prefix in “impost” (as in “imposition”) means “on”—from the Latin in-ponere (imponere, to place on); the like prefix in “import” means “into.” in-portare (importare, to carry into).
America,\textsuperscript{141} limited the term to only exactions on imports,\textsuperscript{142} which necessarily rendered an impost a kind of duty.\textsuperscript{143} Americans seem to have adopted that usage almost exclusively.\textsuperscript{144} Thus, Massachusetts called its import duty an impost.\textsuperscript{145} The Confederation Congress made repeated attempts to induce the states to approve a five percent “impost” on imports, including the import of foreign prizes.\textsuperscript{146}

In founding era discourse, one could speak of a “duty” being imposed on either imports or exports;\textsuperscript{147} it also was very common to couple the word “imposts” on imports with “duties” on exports.\textsuperscript{148}

\textsuperscript{141}On the popularity in America of law treatises, including Jacob’s Dictionary, see HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799, at 59-64 (1978).

\textsuperscript{142}JACOB, DICTIONARY, supra note 2 (unpaginated) (stating in its entry for “Impost,” that it “Signifieth the tax received by the Prince, for such merchandize as are brought into any haven within his dominions from foreign nations. It may in some sort be distinguished from custom, because custom is rather profit the prince maketh of wares shipped out; yet they are frequently confounded.”). See also ROLT, supra note 2 (unpaginated) (adopting the same limitations in defining “impost”).

\textsuperscript{143}E.g., 20 N.H. PAPERS, supra note 2, at 157 (H.R. Jour., Nov. 11, 1784) (“impost duty”) & 198 (Feb. 16, 1785) (same).

\textsuperscript{144}E.g., 1783 MASS. RESOLVES, supra note 2, at 152 (laying an “impost” “at the Time and Place of Importation”); 18 J. CONT’L CONG 1164 (Dec. 18, 1780) (referring to impost on imports); 17 id. at 439 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance referring to “an excise of one eighth of dollar per gallon” on liquor and to 5% impost on imports and prizes of war); 1 ANNALS OF CONG., supra note 1, at 202 (Apr. 24, 1789) (quoting Madison as treating as an impost a duty on the import of Madeira); id. at 204 (Apr. 24, 1789) (quoting Thomas Fitzsimmons as referring to an import duty on rum as an impost and distinguishing it from “excise or direct taxes”). Cf. ARTS. CONFED., art. VI (referring to imposts and duties in treaties).

But see 16 J. CONT’L CONG 261 (Mar. 18, 1780) (reproducing motion by Thomas Burke for an “impost” on exports and imports).

\textsuperscript{145}EINHORN, supra note 2, at 55.

\textsuperscript{146}17 J. CONT’L CONG 1035 (Nov. 8, 1780) (reproducing a draft Congressional recommendation for a five percent impost on foreign prizes).

\textsuperscript{147}Supra notes 128 & 129.

\textsuperscript{148}E.g., ART. CONFED., art. IX (referring to imposts and duties on foreigners and on
3. **Tonnage**

Tonnage was a duty\(^{149}\) levied on the carrying capacity of ships.\(^{150}\) It could be imposed on ships either importing or exporting. In 1787, for example, Virginia imposed a tonnage duty of six shillings per ton on all vessels entering and clearing the harbors of that state.\(^{151}\)

4. **Excises**

An excise was a species of duty.\(^{152}\) Excises sometimes were referred to as “inland impositions,”\(^{153}\) because they were the domestic equivalent of duties on imports and exports.\(^{154}\) They were imposed in Britain\(^{155}\) and in various American importation and exportation); “Brutus VII,” N.Y. JOUR., Jan. 3, 1788, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 2, at 234, 239.

\(^{149}\)U.S. CONST. art. I, § 10, cl. 3 (“Duty of Tonnage”). *See also* 18 J. CONT’L CONG 1161 (Dec. 18, 1780) (referring to duties on tonnage); 1 ANNALS OF CONG., *supra* note 1, at 77 (Sept. 7, 1789) (quoting a bill title referring to “duties imposed by law on the tonnage of ships and on goods, wares, and merchandises imported into the United States”); *id.* at 183 (Apr. 21, 1789) (reporting a motion for a “duty” of 6 cents per ton on citizens owning vessels); *id.* at 184 (Apr. 21, 1789) (quoting John Lawrance [erroneously spelled “Lawrence”] referring to a “duty on tonnage”); VA. H.D. JOUR., *supra* note 2 (May, 1784 Session) at 61 (Jun. 17, 1784) (referring to “duties payable upon tonnage”).

\(^{150}\)JACOB, DICTIONARY, *supra* note 2 (unpaginated) (defining tonnage as “a custom or impost paid to the King for merchandize carried out, or brought in ships, or such like vessels, according to a certain rate upon every ton”).

\(^{151}\)Dodd, *supra* note 2, at 363. *See also* 1 ANNALS OF CONG., *supra* note 1, at 185-85 (Apr. 21, 1789) (quoting John Lawrance [erroneously spelled “Lawrence”] as claiming a duty of tonnage on exports would raise prices and be in effect an unconstitutional tax on exports).

\(^{152}\)Supra note 132 and accompanying text.

\(^{153}\)CHAMBERS, *supra* note 2 (unpaginated) (stating, in entry on “tax”, that “the EXCISE-duty. . . an inland imposition, is paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before consumption”); 1 WILLIAM BLACKSTONE, COMMENTARIES *308* (calling an excise an inland imposition paid on consumption and frequently on retail sale).
In both British and American usage, an excise was a domestic tax on the consumption of commodities, especially manufactured goods. An excise might be imposed on all goods of a particular character, or only on foreign goods of that character—such as foreign watches or clocks. What rendered the latter an excise rather than an impost is that it was not levied at the time of import, but upon consumption within the jurisdiction. If the product was re-exported rather than consumed within the jurisdiction, no excise was imposed.
Although an excise might be levied either to regulate commerce or raise revenue, usually the primary motivation was to raise revenue. Often, however, there was a subsidiary interest in discouraging consumption of the items excised.\footnote{22 J. CONT’L CONG 439 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance suggesting “an excise of one eighth of dollar per gallon” on liquor and stating, \textit{id.} at 442, that “The Tax will be a means of compelling vice to support the cause of virtue”); 1781 MASS. RESOLVES, \textit{supra} note 2, at 525 (reciting in an excise statute that one purpose was “for the Suppression of Immorality, Luxury and Extravagance in this Commonwealth”).}

One commentator has argued that excises were direct taxes or at least were widely seen as direct, but support for that conclusion is slender.\footnote{Johnson, \textit{Fixing}, \textit{supra} note 2, at 316-17 relies on three passages from the ratification debates. Two of these do not support the conclusion that excises were seen as direct taxes. The other is “Brutus V,” N.Y.J., Dec. 13, 1787, \textit{reprinted in 19 DOCUMENTARY HISTORY, \textit{supra} note 2, at 410, 415 (stating that “direct taxes . . . include poll taxes, land taxes, excises, duties on written instruments”). Even that source is suspect: A few lines earlier “Brutus” had been discussing the class of \textit{internal} taxes, and his later substitution of “direct” for “internal” may have been erroneous.}

The overwhelming weight of the evidence is that excises were seen as a category distinct from direct taxes.\footnote{1786 MASS. RESOLVES, \textit{supra} note 2, at 130 (reciting that excises were being imposed to avoid direct taxes); “Agrippa XVII,” MASS. GAZ., Feb. 5, 1788, \textit{reprinted in 5 DOCUMENTARY HISTORY, \textit{supra} note 2, at 863, 865 (reciting direct taxes and excises separately); 6 \textit{id.} at 1245-46 (quoting Thomas Dawes, Jr. at the Massachusetts ratifying convention, distinguishing between direct taxes, imposts, and excises); \textit{id.} at 1290 (quoting Theodore Sedgwick making the same distinction at the Massachusetts ratifying convention); \textit{id.} at 1313 (quoting Partridgefield Peirce for the same); James Monroe, \textit{Some Observations on the Constitution, reprinted in 9 id.} at 844, 868 (referring to “direct taxation and excise”); \textit{id.} at 875 (same); “Federal Farmer,” Letter XVII, Jan. 23, 1788, \textit{reprinted in 17 id.} at 350, 357 (referring to “excises and direct taxes”); 22 \textit{id.} at 1942 (quoting Robert R. Livingston at the New York ratifying convention as distinguishing imposts and excises from direct taxes); \textit{id.} at 1998 (quoting John Lansing, Jr., making the same distinction).}

This also is implied by the Constitution’s text.\footnote{For statements in the First Federal Congress, see 1 ANNALS OF CONG. \textit{supra} note 1, at 170 (Apr. 17, 1789) (reporting James Madison as saying of a proposed duty on imported articles, “and will they submit to a direct tax, if they murmur at so light a one on salt? Would they submit to an excise?”); \textit{id.} at 314 (May 9, 1789) (reporting Madison as saying that alternatives to duties are excises and direct taxes) & 348 (May 12, 1789) (reporting Elbridge Gerry as stating that if duties are insufficient, additional revenue must be obtained by a direct tax or excise); \textit{id.} at 375 (May 16, 1789) (reporting Alexander White as stating that if duties are insufficient, additional revenue must be obtained by a direct tax or excise).} A similar
argument—that the Constitution’s framers were excluding excises from direct taxes for the first time—is disproved by the preamble to a Massachusetts excise statute, adopted a year before the Constitution was written, reciting that the excise was adopted in part “to ease the people as much as possible of direct taxation.

The most commonly excised goods were alcoholic beverages, but there were many others. A 1783 Connecticut law imposed excises on sale or consumption of alcoholic beverages, snuff, coffee, tea, sugar, chocolate, and certain luxury clothes and utensils. Rates were higher for some imported goods than for those of domestic manufacture, and subsequent amendment strengthened the preference distinguishing between an excise and direct taxes); id. at 803 (Aug. 22, 1789) (quoting a proposed constitutional amendment providing that a direct tax might be imposed only if duties, imposts, and excises prove insufficient).

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164 Supra Part II.
165 Campbell, supra note 2, at 115.
166 1786 MASS. RESOLVES, supra note 2, at 130.
167 In Britain the malt tax was a duty of six pence per bushel and a proportional sum on certain liquors such as “cyder and perry.” 6 ENCYCLOPAEDIA BRITANNICA, supra note 2, at 4408 (stating also that the malt tax was “no other than the annual excise”). See also 4 CHAMBERS, supra note 2 (unpaginated) (discussing the same subject in its entry on “tax”).

American examples include 8 N.H. STATE PAPERS, supra note 2, at 60 (Jan. 26, 1776) (recording that the New Hampshire house of representatives had adopted an excise on spirituous liquor) and 2 N.Y. LAWS, supra note 2, at 283-88 (reproducing a statute imposing a “Duty of Excise” on strong drink). The Confederation Congress was, of course, aware of state excises, 22 J. CONT’L CONG 177 (Apr. 10, 1782) (referring to states that had liquor excises), and tried to induce them to approve a congressional excise on alcoholic beverages. 22 id. at 439 (Aug. 5, 1782) (reproducing a report of the Confederation Office of Finance referring to “an excise of one eighth of dollar per gallon” on liquor).

168 1 WILLIAM BLACKSTONE, COMMENTARIES *310 (listing British excises); see also EINHORN, supra note 2, at 14 (same).
169 5 CONN. RECORDS, supra note 2, at 15-19 (reproducing statute).
170 5 CONN. RECORDS, supra note 2, at 16. The rates were higher for imported sugar and chocolate than for the domestic variety.
for domestic articles.\textsuperscript{171} The 1786 Massachusetts statute excised rum, tea, coffee, cocoa, sugar, raisins, tobacco, imported clocks, imported watches, coaches and chariots\textsuperscript{172} (on an annual basis), and other transportation devices (also annual).\textsuperscript{173} During the ratification debates, “Brutus” (probably Robert Yates of New York), assailed the Constitution in colorful language depicting federal excises imposed initially on alcoholic beverages but thence proliferating to a long list of other goods.\textsuperscript{174}

Most excises were laid at the point of sale,\textsuperscript{175} but some were not.\textsuperscript{176} A New York excise was levied on tavern owners in advance of expected sales.\textsuperscript{177} Use of large and expensive luxury goods—such as horses\textsuperscript{178} and carriages—was excised on a periodic, usually annual, basis. The 1786 Massachusetts excise statute charged owners of coaches and chariots £8 yearly and taxed other transportation devices annually as well.\textsuperscript{179}

\textsuperscript{171}CONN. RECORDS, supra note 2, at 116-17 & 338-39.

\textsuperscript{172}A chariot was a kind of town carriage. 1 WILLIAM FELTON, A TREATISE ON CARRIAGES 26 (2d ed. 1794).

\textsuperscript{173}1786 MASS. RESOLVES, supra note 2, at 131. For earlier statutory versions, see 1781 id. at 525-33 (reproducing an earlier Massachusetts excise that also imposed annual fees on vehicles); 1782 id. at 91.

\textsuperscript{174}“Brutus VI,” N.Y. JOUR., Dec. 27, 1787, reprinted in 15 DOCUMENTARY HISTORY, supra note 2, at 110, 113-14. See also Luther Martin, “Genuine Information VI,” BALTIMORE MD. GAZ., Jan. 15, 1788), reprinted in id. at 374, 377.

\textsuperscript{175}E.g., 1786 MASS. RESOLVES, supra note 2, at 138-39 (imposing retail excise payable by tavern owners).

\textsuperscript{176}WILLIAM BLACKSTONE, COMMENTARIES *310 (listing the points of collection of various British excises).

\textsuperscript{177}N.Y. LAWS, supra note 2, at 283-88 (reproducing statute imposing an excise).

\textsuperscript{178}ANONYMOUS, AN ENQUIRY INTO THE CAUSES OF THE PRESENT HIGH PRICE OF PROVISIONS 51-52 (1767) (advocating a tax on horses because of their luxury character). See also id. at 206 (describing as an “indirect tax” one levied “upon horses used in coaches, &c.”).

\textsuperscript{179}1786 MASS. RESOLVES, supra note 2, at 131.
A few “excises” looked much like direct taxes. For example, Massachusetts imposed excises on tavern owners’ inventory of alcoholic beverages, although as part of a formula to calculate sales.\(^{180}\) Even closer to the line was the Massachusetts excise on the total annual production of cider mills:\(^{181}\) Although the legislature probably expected all of that production to be consumed, the absence of any offset for surplus created a levy closely resembling a direct tax on production. Similarly, the Commonwealth’s annual “excise” on vehicles resembled a direct levy on personal property.\(^{182}\) This kinship between some excises and direct taxes helps explain the difficulty presented in *Hylton v. United States*,\(^ {183}\) in which the Supreme Court addressed the issue of whether an exaction on carriages for (allegedly) domestic use was direct or indirect. The difficulty of the case was all the greater because everyone knew, despite stipulations to the contrary,\(^ {184}\) that some of the taxed carriages actually were capital assets of a rental business.\(^ {185}\)

One other point of vocabulary: Eighteenth century commentators sometimes applied variations on the word “excise” to concepts technically unrelated. Thus, the word “exciseman” could refer to any assessor, even of a direct tax. Oliver Ellsworth

\(^{180}\)1781 MASS. RESOLVES, *supra* note 2, at 525-26; *see also id.* at 578 (exempting carriages held for sale from excise).

\(^{181}\)1782 MASS. RESOLVES, *supra* note 2, at 100.

\(^{182}\)1786 MASS. RESOLVES, *supra* note 2, at 131.

\(^{183}\)3 U.S. (3 Dall.) 171 (1796).

\(^{184}\)The parties stipulated that:

‘That the Defendant, on the 5th of June, 1794, and therefrom to the last day of September following, owned, possessed, and kept, 125 chariots for the conveyance of persons, and no more: that the chariots were kept exclusively for the Defendant’s own private use, and not to let out to hire, or for the conveyance of persons for hire . . . .

3 U.S. 171-72.

\(^{185}\)The truth of the allegation that 125 carriages were kept for one family’s private use is very unlikely. On this aspect of the case, see *Jensen, supra* note 2, at 2351; *Campbell, supra* note 2, at 130.
said that the Dutch “excised” even their “houses of infamy,” although the Dutch tax was imposed on services rather than commodities, and technically was a non-excise duty.

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

Direct taxes encompassed a wide range of levies, but essentially they were exactions on living and producing. Indirect taxes were levies on consuming, on boundary crossings, and on certain special transactions.186

Some other criteria that might seem relevant to the distinction between direct and indirect taxes actually were not. Before the Revolution there had been much discussion of the difference between “internal” taxes (levies imposed within jurisdictional boundaries) and “external” taxes (such as levies on foreign trade).187 That was not the same as the difference among direct and indirect taxes, however. Although all direct taxes were internal, some indirect taxes—such as excises and domestic duties—also were internal.188

186 Supra Parts IV & V.

187 E.g., DICKINSON, supra note 1, at 37 & 42-45 (discussing the distinction).

188 THE FEDERALIST NO. 36 (Alexander Hamilton), reprinted in 15 DOCUMENTARY HISTORY, supra note 2, at 302, 304 (“The taxes intended to be comprised under the general denomination of internal taxes, may be subdivided into those of the direct and those of the indirect kind.”); “Federal Farmer,” Letter III, Oct. 10, 1787, reprinted in 19 id. at 218, 224-25 (referring to impost duties as external and poll and land taxes and duties on written instruments as internal); “Federal Farmer,” Letter XVII, Jan. 23, 1788, reprinted in 17 id. at 350, 358 (referring to duties, excises, and direct taxes as internal).

Admittedly, there are Founding-Era records that may reflect some confusion on this point. E.g., 2 DOCUMENTARY HISTORY, supra note 2, at 557 (reporting speech of James Wilson at the Pennsylvania ratifying convention referring to “internal taxes or excises,” it not being clear whether Wilson meant to communicate that those items were mutually exclusive); “Georgian,” GAZ. OF THE STATE OF GEORGIA, reprinted in 3 id. at 236, 237 (mentioning “internal taxation and excises,” as if the two were separate). But there was not much uncertainty: Participants in the constitutional debates generally identified excises as
Nor did incidence of the levy define the distinction between direct and indirect taxes. Contemporaneous writers recognized that the incidence of direct taxes might fall on either the taxpayer or be passed on to others.\textsuperscript{189} To be sure, many asserted that the burden of indirect taxes usually fell on consumers,\textsuperscript{190} but commentators also acknowledged that in some market conditions the burden of an indirect tax could settle on the merchant or producer instead.\textsuperscript{191}

Nor was the line governed (as I once believed) by whether the exaction was imposed at the time of an item was bought or sold. Import and export duties were levied when an item entered or left the country irrespective of whether there was a change of ownership. Excises on high-cost luxuries (such as carriages) typically were levied annually rather than on sale; the annual fee might bear no relation to the sale price.\textsuperscript{192} New York imposed a “duty of excise” on tavern owners apparently calculated on prospective sales volume, but paid in advance.\textsuperscript{193}

\textsuperscript{189}\textit{E.g.}, \textit{SMITH}, \textit{supra} note 2, at 288-89 (claiming that a direct tax on labor causes the price of labor to rise accordingly, ultimately to the cost of the consumer). \textit{See also} \textit{ANONYMOUS, AN ENQUIRY INTO THE CAUSES OF THE PRESENT HIGH PRICE OF PROVISIONS 49 (1767)} (stating, “The general tendency of taxes of all kinds to enhance the price of every thing brought to market is too obvious to need a proof”).

\textsuperscript{190}\textit{E.g.}, 1 \textit{ANNALS OF CONG.}, \textit{supra} note 1, at 184-85 (Apr. 21, 1789) (quoting John Lawrance [erroneously spelled “Lawrence”] as stating that tonnage on exports will raise price and is in effect a prohibited tax on exports); “Plain Truth,” \textit{INDEPENDENT GAZETTER}, Nov 10, 1787, \textit{reprinted in} 2 \textit{DOCUMENTARY HISTORY, supra} note 2, at 216, 218 (claiming imposts will be included in the price); “Connecticutensus,” \textit{To the People of Connecticut, AM. MERCURY}, Dec. 31, 1787, \textit{reprinted in} 3 \textit{id.} 512, 514.

\textsuperscript{191}\textit{E.g.}, \textit{THE FEDERALIST NO. 33} (Alexander Hamilton), \textit{reprinted in} 15 \textit{DOCUMENTARY HISTORY, supra} note 2, at 268; \textit{DICKINSON, supra} note 59-60 (stating that the incidence of an import duty raised the price to the consumer, but also acknowledging it could fall on the merchant by restricting his trade); \textit{see also} \textit{id.} 73-74 (explaining that the incidence of a duty depends on conditions).

\textsuperscript{192}\textit{Campbell, supra} note 2, at 140.

\textsuperscript{193}\textit{Supra} note 177 and accompanying text.
The fundamental distinction between direct and indirect taxes seems not to have been economic, but political and moral. The political aspect derived from popular distaste for the levies on persons and production traditionally embodied in omnibus tax statutes and the greater popular acceptance of excises and other duties. The moral aspect was threefold: First, most people deemed it better for society and for the development of individual character to impose burdens on consumption, particularly non-essential consumption, than on living or producing. Second, they deemed it morally preferable to lay burdens on well-to-do people who dealt in luxuries rather than on the thrifty and productive or on the poor and “middling folk.” Third, they thought it preferable to tax (and thereby discourage) the use of products, such as alcoholic beverages, that weakened individual character or offered marginal or negative social value.

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

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194. E.g., ANONYMOUS, TEMPERATE UNBORROWED ANIMADVERSIONS ON THE PAMPHLET LATELY PUBLISHED BY RICHARD BISHOP OF CLOYNE BY A SINCERE, UNBIASED PROTESTANT (Dublin, 1787) (stating that “every Tax on honest industry is in its Nature execrable in Society”); id. at 39 (“A Mode of Tything which is manifestly a Tax or Check on Agriculture (that honest Industry which of all others is the most natural and the most conducive to publick Prosperity”) cannot be advisable) & 40 (“But a direct crippling Tax on such an Industry as Tillage... appears to us to have Something horrid on the Face of it.”).

See also supra note 122 and accompanying text (reproducing remarks by Oliver Ellsworth at the Connecticut ratifying convention).

195. ANONYMOUS, AN ENQUIRY INTO THE CAUSES OF THE PRESENT HIGH PRICE OF PROVISIONS 50 (1767) (stating, “It is universally allowed, that taxes upon luxury are of all others the most equitable, because the least prejudicial to the body of the people.”).

196. E.g., supra note 161 and accompanying text.

197. For parliamentary speeches, see 25 COBBETT, supra note 2, at 184 (Feb. 28, 1785)
What has been said thus far about how the founding generation classified impositions and taxes can be summarized in the following chart.

(reporting speech of Edmund Burke claiming a moratorium on payment of East India Company’s debt as “a direct tax upon every house in England”); 43 H.C. JOUR. 167 (Feb. 4, 1788) (reporting petition of John Wilkinson complaining of the poor rates [property taxes] on his iron smelting business: “Buildings that are the necessary Instruments of his Trade, and which therefore, like the most ruinous of the Imposts of France, operate as a direct Tax upon Industry”); 27 PARL. REGIS. 432-36 (Apr. 16, 1790) (quoting William Fullarton opposing the tobacco excise as functionally a “direct tax on the wages of labour”). Fullarton’s speech also is reported at 28 COBBETT, supra note 2, at 684. It addressed Richard Brinsley Sheridan’s bill against the tobacco excise. See 28 COBBETT, supra note 2, at 649.

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

For other writings, see Second Report From the Committee Appointed to Enquire in the State of the British Fisheries 6-7 (arguing that the duties on herring for home consumption operated as a “direct Tax upon Subsistence”); ANONYMOUS, CONSIDERATIONS ON THE POLICY, COMMERCE AND CIRCUMSTANCES OF THE KINGDOM (1771) (arguing that “the payment of the bounties . . . has not only been a direct tax on the people to their whole amount, but also an indirect tax, in the prices of those commodities for their consumption, to the full of the differences between market and shipping rates”).
VI. THE APPORTIONMENT RULE

A. Reasons for Apportionment of Direct Taxes

The framers' representation, uniformity, and apportionment clauses were the product of compromise.198 But they were not merely the product of compromise.199

198“Mark Antony,” in INDEP. CHRON., Jan. 10, 1788, reprinted in 5 DOCUMENTARY HISTORY, supra note 2, at 672, 673-74 & 676 (describing the apportionment rule as a compromise).
Unifying principles can guide group decision-making, and that was the case here. In wading through the back-and-forth discussion on these topics at the Constitutional Convention, one should not let details distract from the unifying principles at work. Or, to resort to a stock market analogy, one should not permit seemingly-random fluctuations to distract from underlying trends.

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

In addition to the taxation/representation principle, there were at least two other considerations behind the decision to apportion direct taxes. One was that apportionment was the prevailing custom: England apportioned direct taxes by counties, and most, if not all, states similarly allocated them by towns or by

The apportionment rule appears at U.S. CONST. art I, § 2, cl. 3 & art. I, § 9, cl. 4.

199Cf. Jensen, supra note 2, at 2385 (noting that “it is absurd to conclude that, because the apportionment rule was part of a compromise, it was a meaningless requirement”).

2001 FARRAND’S RECORDS, supra note 2, at 562 (Madison, Jul. 9, 1787) (quoting Rufus King as saying, “Eleven out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and Representation ought to go together.”); 6 DOCUMENTARY HISTORY, supra note 2, at 1241 (quoting Rufus King at the Massachusetts ratifying convention); Albany Federal Committee, An Impartial Address, c. Apr. 20, 1788, reprinted in 21 id. at 1388 (defending the inclusion of slaves in the apportionment rule because “Agreeable to the New System, taxation and representation must go together”).

2011 WILLIAM BLACKSTONE, COMMENTARIES *302 (stating that the method of raising the land tax in England was by charging a particular sum on each county according to the valuation of 1692, and then assessing and raising that sum from individuals). The valuation of 1692 remained unchanged throughout the eighteenth century. EINHÔRN, supra note 2, at 16.

202See, e.g., 1780 MASS. RESOLVES, supra note 2, at 91-104. Other apportionment formulae appear at 1781 id. at 503-18 & 547-60; 1784 id. at 62-76 and 1785 id. at 580-97. A statute
The Articles of Confederation allocated requisitions by state land values.\textsuperscript{204}

Another consideration lay in values of public trust. As I have explained elsewhere, the Founders were heavily imbued with the idea that government was a public trust and should be conducted on fiduciary principles.\textsuperscript{205} They particularly emphasized the duty of \textit{impartiality}—that is, equal treatment in equal circumstances of those served.\textsuperscript{206} Indeed, the apportionment rule is only one of several constitutional provisions designed to assure impartial treatment of both individuals and states.\textsuperscript{207} Without the apportionment rule, a congressional majority from one group of states might vote to extract a disproportionate share of revenue from the rest. The Founders had witnessed this political vice,\textsuperscript{208} which in modern times was captured in the late Senator Russell Long’s epigram, “Don’t tax you, don’t

\begin{itemize}
\item in 1784 \textit{id.} at 57-60 provided for a re-evaluation of taxable items.
\item \textsuperscript{203}\textit{E.g.}, BECKER, \textit{supra} note 2, at 67-69 & 240 (New Jersey), 155 (New York), 174-76 (Delaware); EINHORN, \textit{supra} note 2, at 82 (Delaware), 92 (Pennsylvania) & 94 (South Carolina, by parishes, the local equivalent of counties).
\item \textsuperscript{204}ART. CONFED. art. VIII:
\begin{quote}
All charges of war, and all other expenses . . . shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State . . . as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint..
\end{quote}
\item \textsuperscript{205}Robert G. Natelson, \textit{The Constitution and the Public Trust}, 52 BUFF. L. REV. 1077 (2004).
\item \textsuperscript{206}\textit{Lawson, Seidman, Natelson, supra} note 2.
\item \textsuperscript{207}\textit{E.g.}, U.S. CONST. art. I, § 8, cl. 1 (uniformity in imposts and excises); \textit{id.} art. I, § 9, cl. 6 (no preference given to particular states in revenue or commerce); \textit{id.} art. IV, § 2, cl. 1 (protecting citizens visiting other states from certain forms of discrimination); \textit{id.}, art. IV, § 3 (protecting states from unwanted divisions and combinations); & \textit{id.}, art. V. (protecting state equality in the Senate).
\item \textsuperscript{208}\textit{E.g.}, BECKER, \textit{supra} note 2, at 20-27 (discussing tax law manipulation in Rhode Island).
\end{itemize}
“tax me, tax that man behind the tree.” An apportionment rule would curb discriminatory tax legislation. Although the interests of individuals and states sometimes conflicted, as a general proposition protecting states from disproportionate federal tax burdens would protect individuals as well.

Apportionment came at a cost, however. It was administratively clumsy, and could work injustice among similarly-situated individuals who happened to reside in different states. So there was an argument for limiting its scope. The manner in which the framers did so was to apply the apportionment rule to direct taxes only. For indirect taxes, the framers substituted a ban on federal taxation of exports and a requirement that indirect taxes and “Regulations of Commerce or Revenue” be uniform throughout the nation. These provisions reduced the chances that a congressional majority did not play favorites among sections of the country by imposing heavier exactions in some places than in others.

Why limit apportionment only to direct taxes? There were at least three reasons. First, the apportionment rule was problematic when applied to import and export customs because accidents of geography resulted in much higher import and


210 Cf. U.S. CONST. art. I, § 2, cl. 3 & art. I, § 3, cl. 1 (resolving the conflict by using different representation rules in House and Senate).

211 U.S. CONST. art. I, § 9, cl. 5. See 1 FARRAND’S RECORDS, supra note 2, at 592 (Madison, Jul. 12, 1787), which quotes Charles.C. Pinckney as stating

[S. Carola. has in one year exported to the amount of £600,000 Sterling all which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system restraining the Legislature from a taxing Exports.”]

212 U.S. CONST. art I, § 8, cl. 1.

213 U.S. CONST. art. § 9, cl. 6.
export activity in some states than in others. Second, the protection offered by apportionment was more crucial for direct than for indirect levies. Some direct taxes, such as capitations and exactions on property, were “dry taxes”—that is, imposed on status rather than on transactions. It could be difficult even for well-to-do people to pay oppressive “dry taxes” if their wealth was in illiquid form. The impoverished faced even greater potential hardship. The poor usually could avoid indirect levies by avoiding luxuries—in fact, some people even claimed indirect levies were “voluntary”—but abstinence did not enable one to evade most direct levies.

214 Farrand’s Records, supra note 2, at 197 (Madison, Jun. 11, 1787) (reporting Rufus King as stating, “If the actual contributions were to be the rule the non-importing States, as Cont. & N. Jersey, wd. be in a bad situation indeed. It might so happen that they wd. have no representation.”); 1 id. 592 (Madison, July 12, 1787) (“Mr. Wilson approved the principle, but could not see how it could be carried into execution; unless restrained to direct taxation.”). But see id. (reporting that Gouverneur Morris supported different rules for direct and indirect taxes, but “Notwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union.”).


216 Letter from John Quincy Adams to William Cranch, Oct. 14, 1787, printed in 3 Documentary History, supra note 2, at 72, 73 (stating that direct taxes “tend to oppress the poor people”); 9 id. at 1156 (quoting George Mason at the Virginia ratifying convention, noting that a capitation “falls light on the rich, and heavy on the poor”); Hugh Williamson, Speech at Edenton, N.C., N.Y. Daily Advertiser, Feb. 25-27, 1788, reprinted in 16 id. at 201, 206 (stating that taxes on lands and heads “cannot fail to grind the face of the poor”). Williamson had represented North Carolina at the Constitutional Convention.

217 “Plain Truth,” Independent Gazetteer, Nov 10, 1787, reprinted in 2 Documentary History, supra note 2, at 216, 218 (arguing that “every man will have the power of refusal [to pay duties] by not consuming the taxed luxuries”); 2 id. at 481 (reporting speech of James Wilson at the Pennsylvania ratifying convention).

218 “Philanthrop,” To the People, Am. Mercury, Nov. 19, 1787, reprinted in 3 Documentary History, supra note 2, at 467, 449 (describing the duty on imports as a “voluntary tax”).
taxes. Although some of the latter were adjusted according to means,\textsuperscript{219} many were not.

Third, limiting apportionment to direct taxes likely would restrict it to taxes rarely imposed. The framers expected the new federal government to rely, at least in times of peace, almost exclusively on indirect levies. This was partly because indirect levies were easier to collect than direct ones, and partly because direct taxes were profoundly unpopular. Indirect taxes were easier to collect because the duties on imports, at least, could be gathered at discrete locations, particularly seaports; but as Benjamin Franklin observed, “Direct taxes are not so easily levied on the scantily settled inhabitants of our wide extended country.”\textsuperscript{220}

The unpopularity of direct taxes prevailed in every part of the country,\textsuperscript{221} not merely in the South as some commentators seem to assume. This unpopularity derived from the massive state burdens imposed to finance military actions during the Revolutionary War and, after the war, to finance debt repayment.\textsuperscript{222} It also derived from the unfairness with which state legislatures had imposed direct levies.\textsuperscript{223} Not surprisingly, many people objected to granting Congress any power to

\textsuperscript{219}Supra note 111 and accompanying text.

\textsuperscript{220}Benjamin Franklin to Louis-Guillaume Le Veillard, Feb. 17, 1788, \textit{reprinted in} 16 DOCUMENTARY HISTORY, supra note 2, at 135, 136. \textit{See also} supra note 122 and accompanying text (quoting Oliver Ellsworth, a framer, for the view that direct taxes were harder to collect than indirect exactions).

\textsuperscript{221}This unpopularity was noted at the time by the young John Quincy Adams, the future president. Letter from John Quincy Adams to William Cranch, Oct. 14, 1787, 3 DOCUMENTARY HISTORY, \textit{supra} note 2, at 72, 73 (stating that direct taxes “are always extremely unpopular”). \textit{See also} \textit{A Dialogue Between Mr. Schism and Mr. Cutbrush, BOSTON GAZ.}, Oct. 29, 1787, \textit{reprinted in} 4 id. at 162, 164 (“dry Taxes are held in mortal detestation now a-days”) (italics in original); 6 \textit{id.} at 1245 (quoting Thomas Dawes, Jr., at the Massachusetts ratifying convention).

\textsuperscript{222}BECKER, supra note 2, at 219-27 (summarizing widespread tax resistance).

\textsuperscript{223}See generally BECKER, supra note 2.
lay direct taxes: They feared that Congress might raise the overall burden and undo whatever progress toward equity states had achieved during the war.

Of the nearly universal sentiment against direct taxes, signs abounded. The 1776 Maryland Declaration of Rights proclaimed that “levying taxes by the poll is grievous and oppressive, and ought to be abolished.” The preamble to a 1786 Massachusetts excise statute recited that its indirect levies would “to ease the people as much as possible of direct taxes.” Popular complaint led to Virginia’s 1787 repeal of its poll tax. During the ratification process, at least nine state conventions received motions for constitutional amendments restricting the federal direct-tax power. These motions lost in Pennsylvania and Maryland, but they

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224See, e.g., Letter from David Redick to William Irvine, Sept. 24, 1787, reprinted in 2 DOCUMENTARY HISTORY, supra note 2, at 135 (expressing reservations about the direct tax power); FREEMAN’S J., Phila., Sept. 26, 1787, reprinted in 2 id. at 146-48 (objecting to the Constitution’s failure to ban capitations); 3 id. at 438, 440 (reprinting statement of town of Preston, Conn., objecting to the direct tax power).

225BECKER, supra note 2, at 225-26.

226MD. CONST. (1776). Not surprisingly, therefore, during the Constitutional Convention, Maryland’s Luther Martin sought a rule making Congress’s power to lay direct taxes contingent on failure of previous requisitions. Luther Martin, “Genuine Information VI,” BALTIMORE MD. GAZ., Jan. 15, 1788), reprinted in 15 DOCUMENTARY HISTORY, supra note 2, at 374, 377-78.

2271786 MASS. RESOLVES, supra note 2, at 130.

228Dodd, supra note 2, at 361. See also VA. H.D. JOUR., Nov. 4, 1777 (reproducing petition to repeal poll tax); id., Dec. 13, 1777 (reproducing recommendation of the committee of the whole for repeal of the poll tax).

2292 DOCUMENTARY HISTORY, supra note 2, at 598 (reproducing a proposed amendment that “no taxes, except imposts and duties upon goods imported and exported, and postage on letters shall be levied by the authority of Congress”).

230Amendments Proposed by William Paca in the Maryland Convention, Md. J., Apr. 29, 1788, reprinted in 17 DOCUMENTARY HISTORY, supra note 2, at 240, 241 (“That Congress shall not lay direct Taxes on Land, or other Property, without a previous Requisition of the respective Quotas of the States, and a failing, within a Limited Time, to comply therewith”). See also a similar amendment reprinted in id. at 244-45.
prevailed in Massachusetts, Rhode Island, New Hampshire, New York, Virginia, North Carolina, and South Carolina. Anti-direct tax sentiment was evident even in the first session (1789) of the heavily-Federalist First Congress, although that session ultimately failed to propose a direct-tax constitutional amendment. The records of first session show members straining to avoid direct levies. When North Carolina and Rhode Island joined the union after the first congressional session, both of their legislatures voted to instruct their Senators to oppose all direct taxes.

2316 DOCUMENTARY HISTORY, supra note 2, at 1469 (demanding amendment that “Congress do not lay direct Taxes but when the Monies arising from the Impost & Excise are insufficient” and requisitions first have been attempted).

2326 DOCUMENTARY HISTORY, supra note 2, at 1000, 1001 (seventh, eighth, and ninth items).

23318 DOCUMENTARY HISTORY, supra note 2, at 186, 188 (fourth item).

23418 DOCUMENTARY HISTORY, supra note 2, at 297, 300-301 (statement of understanding); id. at 301-02 & 303 (proposed amendment).

23518 DOCUMENTARY HISTORY, supra note 2, at 203 (third item).

23618 DOCUMENTARY HISTORY, supra note 2, at 316, 317 (item III).

23718 DOCUMENTARY HISTORY, supra note 2, at 71-72 (first resolution).

238 Congress did consider such an amendment. 1 ANNALS OF CONG., supra note 1, at 78 (Sept. 7, 1789) (reproducing proposed amendment that direct taxes not be imposed “but where the moneys arising from the duties, impost, and excise are insufficient,” and even then only after unsuccessful requisitions).

239 E.g., 1 ANNALS OF CONG., supra note 1, at 292-93 (May 6, 1789) & 296 (May 7, 1789) (quoting John Page as distinguishing a duty of tonnage from direct taxes and supported a tonnage law to avoid direct taxes); id. at 316-18 (May 9, 1789) (reporting Roger Sherman as stating that a duty is an alternative to direct taxes and arguing for imposts rather than direct taxes).

The sentiment against direct taxes was not unanimous. See id. at 326 (May 9, 1789) (reporting James Jackson as stating that direct taxes would be more equitable than an impost).

During the ratification debates, the Constitution’s promoters assured the public that Congress would enact direct taxes only as a last resort, and they further contended that congressional taxes would reduce the state burden on a dollar-per-dollar basis. They must have been grateful that, to bolster those unconvincing arguments, they could point to the apportionment rule. Without apportionment, the Constitution might not have been ratified.

**B. Adoption of an Apportionment Formula**

Agreeing on the general principle of apportionment was less difficult than settling on a formula applying it. The Confederation system of allocating requisitions by state values had proved impractical. Apportionment by actual

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241 E.g., James Wilson, Speech in the State House Yard, Oct. 6, 1787, reprinted in 2 Documentary History, supra note 2, at 167, 171; id. at 558 (reporting speech by James Wilson at the Pennsylvania ratifying convention); 6 id. at 1250 (quoting Francis Dana at the Massachusetts ratifying convention); “A Native of Virginia: Observations upon the Proposed Plan of Federal Government,” Apr. 2, 1788, reprinted in 9 id. at 655, 663 (stating that revenues from imposts and the post office would be sufficient). Cf. “Fabius,” Albany Fed. Herald, Mar. 17, 1788, reprinted in 20 id. at 862, 863 (arguing that direct taxes are necessary in time of war).

242 E.g., 2 Documentary History, supra note 2, at 481 (reporting speech of James Wilson at the Pennsylvania ratifying convention); “Philanthrop,” To the People, Am. Mercury, Nov. 19, 1787, reprinted in 3 id. at 467, 449; 8 id. at 999 (quoting George Nicholas at the Virginia ratifying convention).

243 2 Documentary History, supra note 2, at 538 (reporting speech of Thomas McKean, a Federalist, at the Pennsylvania ratifying convention, observing that a direct tax law “must equally affect every state”); Hugh Williamson, Speech at Edenton, N.C., N.Y. Daily Advertiser, Feb. 25-27, 1788, reprinted in 16 id. at 201, 207.

244 Farrand’s Records, supra note 2, at 542 (Madison, Jul. 6, 1787) (reporting that “Mr. Pinkney [said that] [t]he value of land had been found on full investigation to be an impracticable rule.”); 2 Documentary History, supra note 2, at 462 (reporting James Wilson at the Pennsylvania ratifying convention as staying, “After trying [the Confederation method] for a number of years, it was found on all hands, to be a mode that
taxes paid seemed to be likewise unworkable. A new formula was needed.

The starting point in the search was collective agreement that each state’s contribution in federal taxes would be a function of (1) the state’s population and its wealth. Fortunately, experience strongly suggested that, for the most part, wealth followed population. In other words, population usually was a good proxy for wealth. Madison reported Connecticut’s William Samuel Johnson as

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245 FARRAND’S RECORDS, supra note 2, at 35 (Madison, May, 30, 1787), reporting as follows:

Mr. King observed that the quotas of contribution which would alone remain as the measure of representation, would not answer; because waving every other view of the matter, the revenue might hereafter be so collected by the general Govt. that the sums respectively drawn from the States would not appear; and would besides be continually varying.

<Mr. Madison admitted the propriety of the observation, and that some better rule ought to be found

See also 1 id. at 542 (Madison, Jul. 6, 1787):

Mr. Pinkney [said that] . . . The contributions of revenue including imports & exports, must be too changeable in their amount; too difficult to be adjusted; and too injurious to the non-commercial States. The number of inhabitants appeared to him the only just & practicable rule.

246 FARRAND’S RECORDS, supra note 2, at 561 (Madison, Jul. 9) (quoting William Paterson as saying, “What is the true principle of Representation? It is an expedient by which an assembly of certain indivdls. chosen by the people is substituted in place of the inconvenient meeting of the people themselves.”); 1 id. at 582 (Madison, Jul. 11) (“Mr. Sherman thought the number of people alone the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.”).

247 E.g., 1 FARRAND’S RECORDS, supra note 2, at 568 (Madison, Jul. 10, 1787) (“Genl. Pinkney urged the reduction, dwelt on the superior wealth of the Southern States, and insisted on its having its due weight in the Government”). See also 1 id. at 582 (Madison, Jul. 11, 1787) (“Mr. Rutledge [sic] contended for the admission of wealth in the estimate by which Representation should be regulated. The Western States will not be able to contribute in proportion to their numbers, they shd. not therefore be represented in that proportion.”).
telling the Constitutional Convention that “wealth and population were the true, equitable rule of representation; but . . . these two principles resolved themselves into one; population being the best measure of wealth.”

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

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

248 FARRAND’S RECORDS, supra note 2, at 593 (Madison, Jul. 12, 1787); see also id. at 179-80 (Madison, June 9, 1787) (reporting that William Paterson, “observed that in districts as large as the States, the number of people was the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same.”); id. at 587 (Madison, Jul. 11, 1787) (“Mr. Ghorum. supported the propriety of establishing numbers as the rule. He said that in Massts. estimates had been taken in the different towns, and that persons had been curious enough to compare these estimates with the respective numbers of people; and it had been found even including Boston, that the most exact proportion prevailed between numbers & property.”); id. at 587-88 (reporting James Wilson as making a comparable observation).


At the Constitutional Convention, Pierce Butler of South Carolina argued that
To attune state representation to projected tax contributions, therefore, the framers needed to calculate the tax productivity of each slave as some fraction of the tax productivity of each free person. As it happened, the Confederation Congress already had estimated this fraction as three-fifths.\(^{250}\) This resulted in a formula of

\[
T = N_f + \left(\frac{3}{5} \times N_s\right)
\]

where \(T\) was a state’s tax burden, \(N_f\) the state’s free population and \(N_s\) the state’s slave population.

The three-fifths formula is sometimes said to be the product of pure racism,\(^ {251}\) but the record does not support that. Madison’s summary of the 1783 congressional debates that produced the formula show that the considerations leading to it were purely economic. They included the respective imports and exports from states relying or not relying on slavery; the effect of climate differences on productivity; the levels of consumption of free and unfree persons; and, most importantly, the fact that slaves did not have the same positive incentives to slaves were as productive as freemen, 1 FARRAND’S RECORDS, supra note 2, at 580 (Madison, Jul. 11, 1787), but the convention disagreed. Cf. id. (reporting disagreement with Butler by Nathaniel Gorham of Massachusetts) and id. at 581 (reporting remarks of George Mason to the effect that slaves “were useful to the community at large” and so “they ought not to be excluded from the estimate of Representation,” but arguing that he “could not however regard them as equal to freemen and could not vote for them as such.”).\(^{250}\) FARRAND’S RECORDS, supra note 2, at 580 (Madison, Jul. 11, 1787) (reporting Nathaniel Gorham as saying, “This ratio was fixed by Congs. as a rule of taxation . . . .The arguments on ye. former occasion had convinced him that 3/5 was pretty near the just proportion and he should vote according to the same opinion now”). (Gorham had served as president of Congress.)

See also Campbell, supra note 2, at 148 (pointing out that the ratio had been “painfully worked out during the years 1776 to 1783 as a rough expression” of the relative prices of slave and free labor).

produce that motivated free people.252 During the deliberations, moreover, the term “free white inhabitants” was altered to drop the word “white,”253 thereby including with full parity the 60,000 free African Americans then living in the United States.254 Also included at full parity were Indians who paid taxes—i.e., those subject to direct state rather than tribal authority.255

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

The framers adopted the apportionment rule unanimously and the three-fifths formula with equal votes from the North and South.256

VII. THE COURTS AND COMMENTATORs (INCLUDING N.F.I.B. v. SEBELIUS)

The conclusions arrived at in this study differ from assertions made by a

25225 J. CONT’L CONG 946 (Mar. 28, 1783) (Madison’s notes):

The arguments used by those who were for rating slaves high were, that the expence of feeding & cloathing them was as far below that incident to freemen as their industry & ingenuity were below those of freemen; and that the warm climate within wth the States having slaves lay, compared wth the rigorous climate & inferior fertility of the others, ought to have great weight in the case & that the exports of the former States were greater than of the latter. On the other side it was said that Slaves were not put to labour as young as the children of laboring families—that, having no interest in their labor, they did as little as possible, & omitted every exertion of thought requisite to facilitate & expedite it; that if the exports of the States having slaves exceeded those of the others, their imports were in proportion, slaves being employed wholly in agriculture, not in manufactures; & that in fact the balance of trade formerly was much more agst the S’ States than the others.

25324 J. CONT’L CONG 215 (Mar. 28, 1783).


255Natelson, Indian Commerce, supra note 2, at 260.

256Campbell, supra note 2, at 114.
number of commentators and Supreme Court cases, particularly on the scope of the phrase “direct tax.” The commentary includes contributions referenced in the bibliographical footnote and throughout this Article. 257 The cases culminate, of course, in Chief Justice Roberts’ holding that the Affordable Care Act’s individual insurance penalty was a “tax,” but not a “direct” one. 258 This Part lists nine examples of such assertions and summarizes what I believe to be the principal reasons my findings differ from them. I hasten to add that the value of the commentary varies greatly, so these reasons apply with more force to some writings than to others. 259

The first two assertions were initially made soon after the ratification, the other seven somewhat later. They are as follows:

Assertion #1: Direct taxes comprised only capitations and land levies. 260 In fact, direct taxes comprised a broad spectrum of impositions on personal property, income, profits, and enterprise. 261

Assertion #2: Apportionment of direct taxes was a mere surrender to the slave

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257 One contribution I do not discuss here is Charlotte Crane, Reclaiming the Meaning of Direct Tax, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553230 (2010). This paper has never been published, which suggests that the author considers it unfinished. (An email inquiring as to the reason for non-publication went unanswered.) In it she argues that, “By direct taxes, the drafters [of the Constitution] had in mind the prior practices of the states in imposing what we would now call property taxes, as opposed to taxes on commercial transactions.” Id. at 3. She buttresses her conclusion with citations to founding-era tax statutes. Her direct reliance on founding-era statutes explains why her conclusion is closer to my own than those of commentators who do not reference such sources. However, the primary focus of her paper is on the Hylton case.

258 Sebelius, supra.

259 For example, my conclusions on direct taxes differ only slightly with those in Jenson, supra note 2, which I attribute to that study’s careful use of sources.

260 Hylton, supra, 3 U.S. (3 Dall.) at 175 (Chase, J.). See also Springer v. United States, 102 U.S. 586 (1881) (surveying earlier cases and holding that direct taxes consist only of capitations and others on land).

261 Supra Part IV.
Actually, the apportionment decision had little or nothing to do with slavery, and the valuation formula was a purely economic estimate supported equally by North and South.

Assertion #3: The apportionment formula was designed to discourage slavery. There seems to be little evidence for this.

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

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

Assertion #6: *The distinction depended on the incidence of the tax.*269 Although some founding-era writers believed an indirect tax was more likely to be paid by the consumer, the fundamental distinction was independent of the incidence of the tax.270

Assertion #7: *A direct tax was merely a levy that could practically be apportioned.*271 In fact, political and moral factors seem to have been more important to the classification.272

Assertion #8: *Direct taxes meant the same thing as “internal” taxes.*273 Although all direct taxes were internal, excises and many other duties were also internal.274

Assertion #9: *Indirect taxes were imposed on transactions and direct taxes connection with France must have been highly attenuated. It seems unlikely that the authors of the popular unrest that led to the 1786 Massachusetts excise law or the 1787 Virginia repeal legislation took their terminology from Turgot. Also, the physiocrats promoted direct taxes—an attitude distinctly at war with views in Britain and America. NICOLAS DE CARITAT, MARQUIS DE CONDORCET, THE LIFE OF TURGOT 145-47 (1787) (reporting that Baron Turgot favored direct tax to replace scores of indirect taxes—that is, tolls and market duties). The duties were imposed on sales, leases, transfers, and engagements. *Id.* at 147. Turgot argued that a “direct tax upon the net produce of land” would be the best way of assuring equity. *Id.* at 357. The influence of Adam Smith’s direct/indirect distinction was probably greater than that of the physiocrats. *Supra* note 56.

268 *Supra* Part V.C.

269 *E.g.*, Erik M. Jensen, *Direct Taxes* in THE HERITAGE GUIDE TO THE CONSTITUTION 208 (stating that the burden of indirect taxes was thought to be shifted to consumers while the burden of direct taxes could not be shifted).

270 *Supra* Part IV.


272 *Supra* Part V.C.

273 *E.g.*, Johnson, *Apportionment*, supra note 2 (arguing that a direct was the same as an internal tax and included excises); Jensen, *supra* note 2, at 2360 (claiming that indirect taxes are those based on transfers of goods and services).

274 *Supra* Part V.C.
were not. However, direct taxes sometimes fell on transactions and indirect taxes sometimes did not.

Several factors have led to these wrong turns. In some instances, the writer’s preferences have gotten in the way. For example, the justices deciding *Hylton* seem to have been hostile to apportionment, and several distinguished modern commentators clearly have been writing in service of pre-fixed agendas. In other instances, the historical record has been misunderstood. For example, in the eighteenth century, capitations were common and land was the most important capital asset, so capitations and land levies often were presented as examples of direct taxes. Presumably this contributed to the notion that capitations and land levies were the only direct taxes.

Anachronistic assumptions also may be at work: Today we often define taxes

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275 *Jensen, supra* note 2, at 2390 (stating, “Direct taxes are those taxes that are not indirect, and indirect taxes are generally those consumption taxes imposed on transfers of goods and services”). At one time I adhered to this view.

276 *Supra* Parts IV & V.

277 *Jensen, supra* note 2, at 2354 (noting that the views of the justices in *Hylton* may have been colored by their dislike of apportionment).

278 *E.g., Ackerman, supra* note 2 (promoting a wealth tax and arguing that only capitations should be recognized as direct); *Johnson, Fixing, supra* note 2 (promoting greater federal taxing flexibility and arguing that apportionment is absurd and should be avoided); *Johnson, Apportionment, supra* note 2 (same). Particularly striking is the statement of Robin Einhorn of her “main findings:”

“... [T]he antigovernment rhetoric that continues to saturate our political life is rooted in slavery rather than liberty. The American mistrust of government is not part of our democratic heritage. It comes from slaveholding elites...”

*EINHORN, supra* note 2, at 7.

Einhorn comes nowhere near adequately supporting this thesis. Unlike some other agenda-driven authors, however, she collects much useful information along the way.

279 *E.g., 22 Documentary History, supra* note 2, at 1940 (quoting Robert R. Livingston at the New York ratifying convention as saying “direct taxes, that is, taxes on land”).
by whether they are affixed to a transaction and where their incidence falls and whether they are progressive or redistributive. But that was not how the Founders thought.

Most writers have formed their conclusions from a poor selection of evidence. The selection has been both too narrow (for example, relying heavily on the constitutional debates while neglecting contemporaneous tax statutes) and too broad (crediting a great deal of non-probative material). An illustration of too narrow a range was Justice Cardozo’s *ipse dixit* for the Court in *Charles C. Steward Machine Co. v. Davis* holding that the Social Security imposition on employers was an “excise.” An instance of inclusion of non-probative material has been the credit given to events, such as the *Hylton* case and the 1798 Direct Tax Act, which could not have been part of the ratification bargain because they arose several years afterward. The focus on *Hylton* has been particularly misplaced because the contending arguments were, of course, generated for the litigation;

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280 E.g., Johnson, *Fixing*, supra note 2 (relying primarily on the Constitutional Convention); Springer, *supra*, 102 U.S. at 597 (“The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists”).

281 E.g., Ackerman, *supra* note 2, at 17-18 (relying on post-ratification material, including a comment by Alexander Hamilton). On Hamilton’s unreliability at this juncture, see Jensen, *supra* note 2, at 2357-58. Hamilton’s views seem to have been colored by his former position as continental collector for New York, and his staunch opposition to relief for suffering taxpayers. BECKER, *supra* note 2, at 162-65 & 223.

282 301 U.S. 548 (1937).

283 301 U.S. 548, 583 (1937). The Court cited three examples of “duties” (not excises), one of which was a duty on specific transactions and two of which were capitations. *Id.* at 579. The Court did not examine the classification of general business taxes.

284 Campbell, *supra* note 2, mars otherwise excellent work by repeatedly roaming back and forth between pre-ratification and post-ratification events, including the Direct Tax Act and discussion of *Hylton*.
because the justices’ dicta were unreliable, inconsistent, and hedged with qualifiers; and because those dicta were substantially contradicted both by Alexander Hamilton’s pre-case opinion (admittedly, itself suspect, because Hamilton represented a party), and by Justice Iredell’s recently-discovered notes.

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

A similar lack of evidence seems to have led to the Court’s finding that the proclaimed “tax” was not “direct.” The historical record informs us of the nature of the direct/indirect distinction, but the Court suggested it might be unknowable: “Even when the Direct Tax Clause was written,” Chief Justice Roberts wrote, “it was unclear what else, other than a capitation ... might be a direct tax.”

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285 Jensen, supra note 2, at 2354 (explaining why the dicta were unreliable).
286 Campbell, supra note 2, at 134 (reproducing the qualifiers).
287 Campbell, supra note 2, at 112-13 (mentioning the discovery of the notes in 2003 and quoting from them).
288 Part III.
289 Part III.
290 Sebelius, 567 U.S. at ___ 132 S.Ct. at 2598.
291 Part IV.
292 Sebelius, 567 U.S. at ___ 132 S.Ct. at 2598.
proposition, the Court referenced *Springer v. United States*, a case based in part on the erroneous belief that the ratification debates did not address the subject.

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

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, “without regard to property, profession, or any other circumstance.” *Hylton, supra*, at 175 (opinion of Chase, J.) (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

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

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293 102 U. S. 586 (1881).

294 102 U. S. at 596–598.

295 567 U.S. at ___, 132 S.Ct. at 2599.

296 3 U.S. at 175 (italics added).

297 Part IV.
Particularly striking about the *Sebelius* opinion is that the Court never addressed the question of whether the penalty might be an indirect tax. This is peculiar, since the Supreme Court had stated previously that direct and indirect taxes are mutually-exclusive categories,\(^{298}\) so a natural part of the process of determining that the penalty was *not direct* should have been determining whether it was *indirect*. Examination of the founding-era record would have informed the Court that a penalty for “going without health insurance does not fall within any recognized category”\(^{299}\) of *indirect* tax. The penalty was not tonnage, for it was not imposed on the cargoes of ships. It was not an excise, for it was imposed on the non-consumption of services rather than on the consumption of commodities. It was not an impost, for it was not a tax on imports. Nor was it any other kind of duty, for it was not levied on a transaction or event.

On the contrary, the penalty, assuming it was a tax at all, was a classic direct or “dry tax.” That is, it was imposed on citizens not for anything they had consumed or done, but for merely living and (arguably) for producing. Since it was imposed by the head (or “poll”) and not on property or “faculties,” it is most plausibly categorized as a capitation. The fact that was adjusted for income and other circumstances did not disqualify it as such. Such gradation simply rendered it akin to the many other founding-era capitations scaled by ability to pay and by other circumstances.\(^{300}\)

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

VIII. CONCLUSION

The original legal force of the Constitution is how courts and lawyers would

\(^{298}\)Pollock v. Farmers’ Loan and Trust Co., 157 U.S. 429, 557 (1895)

\(^{299}\)Sebelius, 567 U.S. at ___, 132 S.Ct. at 2599.

\(^{300}\)Supra notes 110-119 and accompanying text; *Campbell, supra* note 2, at 171.
have applied the document immediately after its ratification. In the language of the
time, any financial exaction was called an *imposition*. An imposition could be
imposed principally to raise revenue or principally for regulatory purposes. A *tax*
was an imposition principally to raise revenue. Taxes were authorized by Article I,
Section 8, Clause 1—the Taxation Clause. Regulatory impositions had to be
grounded in some other congressional power, such as the Commerce Clause. A
regulatory imposition outside Congress’s enumerated powers was not
constitutional.

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

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

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

The administrative complexity of the apportionment rule made it desirable to limit the rule, if feasible. The line of limitation selected was the boundary between direct and indirect taxes. Apportionment was restricted to direct taxes partly because of the difficulty of apportioning indirect levies and partly because the collection difficulties and universal unpopularity of direct taxes suggested that the federal government was less likely to impose them.

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

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