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Slavery and the Politics of Taxation in the Early United States

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It is no longer newsworthy to say that the American Founding Fathers were implicated deeply in the institution of slavery – as slaveowners, slave traders, or just silent collaborators.[1] The fact that this could have seemed to be news in the 1970s and 1980s is, of course, a testament to the power of racism in American society for three centuries. The fact that Thomas Jefferson's DNA test could have shock value in the late-1990s may be even worse.[2] Now that the intellectual task of reducing the iconic status of slaveholding "fathers" has been largely accomplished, however, serious questions remain about the meaning of slavery at the founding. There is more to it than the hypocrisy of whites or even the oppression of blacks. Social historians have described both the sufferings and the heroic self-defense strategies of Africans and African Americans in this period, both slave and free, in detail.[3] Scholars no longer can pretend that "Americans," much less "plebeian" Americans, were all white at the outbreak of the Revolution, whether they were assembled in the Boston streets or South Carolina lowcountry.[4] Yet a substantive consideration of the meaning of these facts for the nation-state that was built in the Revolution is still missing. What was the impact of slavery on the political institutions whose creation was the triumph of the "fathers" of the founding generation? Aspects of the answer are well known: the removal of Jefferson's pathetic slavery clause (blaming Britain for American slavery) from

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1. For modern historiography, the foundational text is Edmund S. Morgan, *American Slavery, American Freedom: the Ordeal of Colonial Virginia* (New York: Norton, 1975), which answers Dr. Samuel Johnson's famous question: "How is it that we hear the loudest yelps for liberty from the drivers of negroes?" See also Winthrop Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (New York: Norton, 1968). For forceful recent statements, Paul Finkelman, "Jefferson and Slavery: 'Treason Against the Hopes of the World'," in *Jeffersonian Legacies,* ed. Peter S. Onuf (Charlottesville: University Press of Virginia, 1993), 181–221; Conor Cruise O'Brien, *The Long Affair: Thomas Jefferson and the French Revolution, 1785–1800* (Chicago: University of Chicago Press, 1996). For forceful older statements, Robert McColley, *Slavery and Jeffersonian Virginia,* 2d ed. (1964; Urbana: University of Illinois Press, 1973); Richard R. Beeman, *The Old Dominion and the New Nation, 1788–1801* (Lexington: University Press of Kentucky, 1972). Sympathy endures, especially for Jefferson, as in the dismissal of Finkelman's essay as "the prosecution's case" in Herbert E. Sloan, *Principle and Interest: Thomas Jefferson and the Problem of Debt* (New York: Oxford University Press, 1995), 259 n.74.

2. See, e.g., the cover story, Barbra Murray, et al., "Jefferson's Secret Life," with accompanying articles including Lynn Rosellini, "Cutting the Great Man Down to Size," *U.S. News and World Report,* Nov. 9, 1998.

3. The historiography of slavery has moved back from the previously dominant antebellum era. For earlier works, esp. Peter H. Wood *Black Majority: Negroes in Colonial South Carolina from 1670 to the Stono Rebellion* (New York: Knopf, 1974); Benjamin Quarles, *The Negro in the American Revolution* (Chapel Hill: University of North Carolina Press, 1961); Ira Berlin and Ronald Hoffman, eds., *Slavery and Freedom in the Age of the American Revolution* (Charlottesville: University Press of Virginia, 1983). More recently, Shane White, *Somewhat More Independent: the End of Slavery in New York City, 1770–1810* (Athens, GA: University of Georgia Press, 1991); Michael Gomez, *Exchanging Our Country Marks: the Transformation of African Identities in the Colonial and Antebellum South* (Chapel Hill: University of North Carolina Press, 1998); Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry* (Chapel Hill: University of North Carolina Press, 1998).

4. For a recent argument to this effect, Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780–1860* (Ithaca: Cornell University Press, 1998).

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the Declaration of Independence, the compromises that placed the three-fifths clause into the Constitution along with the fugitive slave and slave trade abolition clauses, the checkered career of the Northwest Ordinance as a ban on slavery in the territories, and the Haitian Revolution's reality-check on the libertarian enthusiasms of white Southerners.[5]

This article will examine a more direct impact of slavery on the political institutions of the early republic. By looking at taxation, and particularly at efforts to create a national tax policy, it will demonstrate slavery's role in shaping the most striking characteristic of the American state until the twentieth century: its relative weakness at the national level. "Relative" is a key term in this formulation, and requires some background. Nobody believes any longer that "statelessness" is an accurate description of the antebellum United States. From the "commonwealth" studies of the 1940s, which established the active roles played by state legislatures in regulating the economy, to the legal histories of J. Willard Hurst and Morton Horwitz, which established the active roles of state courts in doing the same thing, to the more recent descriptions of federal-level governance by Richard L. McCormick ("distributive politics") and Stephen Skowronek ("state of courts and parties"), which attempted to sever the idea of active governance from its traditional yardstick, the growth of bureaucracy – the "statelessness" interpretation of the antebellum United States has been relegated to the dustbin of American historiography.[6] Nevertheless, James Sterling Young's account of political life in Washington, DC, in the early republic retains its power as an illustration of the weakness of the federal government. Lonely congressmen, who were huddled in crowded boardinghouses when they were not getting lost in the surrounding woods and swamps, felt their powerlessness acutely.[7] London and Paris were nothing like this, and federal officials did not need appalled British and French diplomats to inform them of the difference. They could taunt the diplomats, as Thomas Jefferson did by greeting the British ambassador in slovenly "heelless slippers," but they could not pretend that they exerted great power over the nation they ostensibly governed.[8]

The relevant comparisons always were Britain and France, at the time and in subsequent historiography, as they were the powerful nation-states that defined the weakness of the United States. This was true not only because the Revolution was waged against Britain, and not only because U.S. diplomacy from 1790 to 1815 consisted of struggles against British and French efforts to subvert American independence. It also was true because Britain and France were the world powers that measured the ambition for a North American "empire of liberty" and because, later, they became (along with Germany) the "industrialized democracies" whose more advanced welfare states still measured the ambitions of American state builders.[9] Generations of social scientists emphasized these ideas in theories of "American exceptionalism." Aimed chiefly at explaining the relative absence of socialism in the United States, American exceptionalism arguments also were geared toward explaining the allied problem of the weak American state. In American exceptionalism arguments, the United States was "exceptional," either explicitly or implicitly, in relation to a "general" pattern that supposedly was illustrated by Britain, France, and Germany.[10] There is no reason to dwell here on the Eurocentrism of this formulation, or on its assumption that these three European countries resembled one another enough to constitute a single pattern from which the United States could deviate. What is important is what was consistently missing from the well-known catalogue of American deviations – the frontier, the absence of aristocracy, the large population of immi-

5. On these issues, in the order cited in the text, see Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Knopf, 1997); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage, 1996); Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," *Journal of the Early Republic* 6 (1986): 343–70, and Paul Finkelman, "Evading the Ordinance: the Persistence of Bondage in Indiana and Illinois," *Journal of the Early Republic* 9 (1989): 21–51; Rachel N. Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760–1808* (Chapel Hill: University of North Carolina Press, 1990), and Michael Zuckerman, "The Power of Blackness: Thomas Jefferson and the Revolution in St. Domingue," in *Almost Chosen People: Oblique Biographies in the American Grain* (Berkeley: University of California Press, 1993).

6. For a recent review of much of this literature, Richard R. John, "Government Institutions as Agents of Change: Rethinking American Political Development in the Early Republic," *Studies in American Political Development* 11 (1997): 347–80. Richard L. McCormick, "The Party Period and Public Policy: An Exploratory Hypothesis," *Journal of American History* 66 (1979): 279–98; Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982).

7. James Sterling Young, *The Washington Community, 1800–1828* (New York: Columbia University Press, 1966).

8. Henry Adams, *History of the United States of America During the Administrations of Thomas Jefferson and James Madison,* 2 vols. (New York: Library of America, 1986), 1:550–1.

9. The struggle to maintain independence against Britain and France is the subject of Adams, *History.* It is a major theme in Richard Buel, Jr., *Securing the Revolution: Ideology in American Politics, 1789–1815* (Ithaca: Cornell University Press, 1972). On the "empire of liberty," esp. Marc Egnal, *"A Mighty Empire": the Origins of the American Revolution* (Ithaca: Cornell University Press, 1988). For a recent study of the United States in the industrialized democracies context, Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998). For a comparative approach to taxation, Sven Steinmo, *Taxation and Democracy: Swedish, British, and American Approaches to Financing the Modern State* (New Haven: Yale University Press, 1993).

10. The exceptionalist framework sometimes includes other countries, especially Sweden. For recent works in this mode, see Rodgers, *Atlantic Crossings;* Theda Skocpol, *Protecting Soldiers and Mothers: the Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992). For a review of literature on the "socialism" question, Eric Foner, "Why Is There No Socialism in the United States?" *History Workshop Journal* 17 (1984): 57–80.

grants, the power of Tocquevillian "mediating institutions" between state and individual, and, more recently, the strength of a British ideological strain that was marginal in Britain itself, "country party republicanism."[11] Nobody seemed to notice that there was something else that set the United States apart: the presence of slavery until the mid-nineteenth century. While Britain and France both had slavery in their colonies (and thus could not claim moral superiority), it would seem significant that only the United States had a large population of slaveholders and slaves in the era that was, after all, the heyday of state building in Europe.[12]

The literature on the political history of the Revolution and early republic is not helpful in sorting out the influence of slavery on the formation of American political institutions. Modern scholarship can be divided into two "schools" whose trajectories crossed – rather like supply and demand curves – at the Bicentennial. The downward-sloping curve was the Beardian "economic interpretation," carried into the 1970s by students of Merrill Jensen including E. James Ferguson and Richard H. Kohn, whose studies of political institution building remain standard references. These scholars shared their mentor's view of early U.S. politics as a contest between mercantile elitists and agrarian democrats, a description of the American class structure that, as Staughton Lynd pointed out, tended to erase slavery by conflating slaveholding planters and family farmers as the "agrarians."[13] The upward-sloping curve was the "ideological interpretation," forged in the work of Bernard Bailyn and his students, especially Gordon S. Wood, joined influentially by Lance Banning and his student Drew R. McCoy. This view also downplayed the significance of slavery. In the process of subordinating political institutions and political conflicts to political ideology generally, the ideological interpretation portrayed slavery not as a central institution of the American political economy, but as a metaphor for British repression whose resonance with real slavery troubled some sensitive patriots.[14] The ideological interpretation has dominated the historiography of the Revolution and early republic since the 1970s almost completely. It has neglected the concrete politics of institution building by filtering everything through the lens of country party republicanism. However strongly the Jensen and Bailyn "schools" differ from one another, they have collaborated in writing slavery out of the history of the early American state.[15] While the Jensen interpretation attributed the weakness of the federal government to the triumph of the agrarian democrats, especially in 1800, the Bailyn school attributes it to a consensual fear of the "power" that threatens "liberty" in the ideology of country party republicanism. Neither has had much to say about the impact of slavery on American politics.

One justification for downplaying the significance of slavery as a political issue in the Revolution and early republic, especially in studies that rely on the analysis of discourse, is that slavery actually is not a predominant issue in the discursive evidence from the period. There is far more evidence in the surviving discourse about mercantile elitism, agrarian democracy, and the abstract struggles of "power" and "liberty." The sources are far from silent on slavery,

11. The foundational text on country party republicanism is Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967). Including republicanism in the exceptionalist catalogue reflects my own judgment of its institutional and comparative significance, neither of which is stressed in the large literature on the subject.

12. But see Morgan, *American Slavery, American Freedom;* Peter Kolchin, *Unfree Labor: American Slavery and Russian Serfdom* (Cambridge, MA: Harvard University Press, 1987).

13. Staughton Lynd, *Class Conflict, Slavery, & the United States Constitution* (Indianapolis: Bobbs-Merrill, 1967), chap. 6. See Merrill Jensen, *The Articles of Confederation* (Madison: University of Wisconsin Press, 1940); Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781–1789* (New York: Vintage, 1950); E. James Ferguson, *The Power of the Purse: A History of American Public Finance 1776–1790* (Chapel Hill: University of North Carolina Press, 1961); Richard H. Kohn, *Eagle and Sword: the Federalists and the Creation of the Military Establishment in America, 1783–1802* (New York: Free Press, 1975); Robert A. Becker, *Revolution, Reform, and the Politics of American Taxation, 1763–1783* (Baton Rouge: Louisiana State University Press, 1980). See also Joyce Appleby, *Capitalism and a New Social Order: the Republican Vision of the 1790s* (New York: New York University Press, 1984). Another approach has studied political parties separately from policy-making and ideology, esp. Noble Cunningham, Jr., *The Jeffersonian Republicans: The Formation of Party Organization, 1789–1801* (Chapel Hill: University of North Carolina Press, 1957); Richard Hofstadter, *The Idea of a Party System: the Rise of Legitimate Opposition in the United States, 1780–1840* (Berkeley: University of California Press, 1969); Ronald P. Formisano, "Deferential-Participant Politics: The Early Republic's Political Culture, 1789–1840," *American Political Science Review* 68 (1974): 473–87.

14. Bailyn, *Ideological Origins;* Gordon S. Wood, *The Creation of the American Republic 1776–1787* (New York: Norton, 1969); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (Ithaca: Cornell University Press, 1978); Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: Norton, 1980). For an especially clear example of how the ideological interpretation's dominance has tended to frame interpretations of non-ideological phenomena, see Andrew R. L. Cayton, *The Frontier Republic: Ideology and Politics in the Ohio Country, 1780–1825* (Kent, OH: Kent State University Press, 1986), which casts a fascinating story about competing groups of land speculators as a story about varieties of "Whig" ideology. It is important to note that Bailyn students who do look at institutions tend to stress slavery's significance. See esp. James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978); Rakove, *Original Meanings.*

15. E. Wayne Carp, *To Starve the Army at Pleasure: Continental Army Administration and American Political Culture, 1775–1783* (Chapel Hill: University of North Carolina Press, 1984), synthesizes the Jensen and Bailyn interpretations. H. James Henderson, *Party Politics in the Continental Congress* (New York: McGraw-Hill, 1974), and Joseph L. Davis, *Sectionalism in American Politics, 1774–1787* (Madison: University of Wisconsin Press, 1977), both emphasize North-South sectionalism, but still avoid concluding that slavery defined this division. Jacob E. Cooke, "The Whiskey Insurrection: A Re-evaluation," *Pennsylvania History* 30 (1963): 316, made the key historiographical point long ago: "But for the past half-century and longer, the interpretation that our historians have given to the American past has been predicated on a Jeffersonian bias." Now, we can say the past full-century.

but if we assume that the rhetoric of this era faithfully reflects the concerns of its politically articulate classes – a central assumption in both the Jensen and the Bailyn school interpretations – then slavery cannot be at the center of analysis. There is no "smoking gun" for slavery comparable to the following letter about religion. In July, 1775, the New York delegates to the Continental Congress explained to the New York Provincial Congress that while they opposed the clause in the Galloway Plan of Union that would have disestablished religion, they "unanimously agreed to be silent" on the issue. They agreed, in other words, not to produce discourse about it.

> As the Inhabitants of the Continent are happily united in a political Creed [opposition to British coercion], we are of Opinion that it would be highly imprudent to run the Risque of dividing them by the Introduction of Disputes foreign to the present Controversey; especially as the Discussion of them can be attended with no one single advantage. They are Points about which Mankind will forever differ and therefore should always, and at least in Times like these be kept out of Sight.[16]

The closest thing that exists for slavery is the famous Lynch ultimatum, which ended the 1776 effort to frame the Articles of Confederation. On July 30, 1776, Congress was discussing how to apportion tax burdens among the colonies, operating on the assumption that population offered the best proxy variable for the wealth of each colony. This immediately raised the question of whether to count slaves, the issue that ultimately would be "settled" by the Constitution's three-fifths clause. Thomas Lynch hit the ceiling on behalf of his South Carolina constituents: "If it is debated, whether their Slaves are their Property, there is an End of the Confederation."[17] It was indeed the end of the Confederation for over a year. By the time discussion resumed in the fall of 1777, the tax issue had been recast, though it is not clear by whom. Under the Articles as they were adopted by Congress in 1777 and ratified by the states in 1781, taxes would be apportioned to the states according to real estate value. This was a wildly unworkable approach to taxation – imagine a national assessment of real estate during the war – but it had the important advantage of avoiding further debate about the composition of a taxable population.[18] The tax clause of the Articles of Confederation was a more elegant strategy for preventing the production of discourse than the deliberate silence of the New York delegates on religion, but its result was the same. In the interest of unity, a divisive and troubling issue was "kept out of Sight."[19]

The argument of this article is that national tax debates always raised the issue of slavery. However much politicians wanted to avoid it, they could not have a serious discussion about the economy without addressing slavery. The tax clause of the Articles of Confederation was the most extreme example of a phenomenon that would be repeated many times over. The mere mention of slavery could cripple the American state at the national level, in this case by creating a tax apportionment rule that was impossible to implement – only a few states had the capacity to supply Congress with population totals, much less comprehensive data on real estate values.[20] Moreover, slavery's importance in the South and marginality in the North made it difficult to design a national tax system that could be accepted in both sections as an equitable reflection of "ability to pay," the dominant economic standard for gauging the fairness of

16. New York Delegates to the New York Provincial Congress, July 6, 1775, Paul H. Smith, ed., *Letters of Delegates to Congress, 1774–1789,* 25 vols. (Washington, DC: Library of Congress, 1976–1998), 1:155. Hereafter *LDC.*

17. Lynch was set off by James Wilson, who pointed out that excluding slaves from the taxable population would "be the greatest Encouragement to continue Slave keeping." There are two sources on this debate: John Adams, "Notes of Debates on the Articles of Confederation," July 30, 1776, in *Diary and Autobiography of John Adams,* ed. L.H. Butterfield, 4 vols. (Cambridge, MA: Harvard University Press, 1961), 2:245–46, and Thomas Jefferson, "Notes of Proceedings in the Continental Congress," July 12, 1776, in *The Papers of Thomas Jefferson,* ed. Julian Boyd et al., 27 vols. (Princeton: Princeton University Press, 1950–1997), 1:322. Both record Wilson's speech, but only Adams records the Lynch response. See also Jack N. Rakove, *The Beginnings of National Politics: an Interpretive History of the Continental Congress* (New York: Knopf, 1979), 159–61.

18. Three plans were presented: a version of population called "polls" in the South (free adult males and all adult slaves), real estate value, and the total value of all forms of property (which would have been even less workable). Cornelius Harnett to Richard Caswell, Oct. 10, 1777, *LDC,* 8:98. Nathaniel Folsom to Meshech Weare, Nov. 21, 1777, *LDC,* 8:299, complained that the real estate version favored the South, one-third of whose wealth "consists in negroes . . . and no Notice taken of them, in determining their ability to pay taxes, notwithstanding it is by them that they procure their wealth." See also the 1783 recollections of James Wilson and Abraham Clark, who traced the land value apportionment scheme to the paralyzing debate about slavery. James Madison, "Notes of the Debates of the Continental Congress," Mar. 27, 1783, in *The Papers of James Madison,* ed. William T. Hutchinson and William M. E. Rachal, 17 vols. (Chicago: University of Chicago Press, 1962–1991), 6:402.

19. I do not mean to imply that slavery was *ever* entirely out of sight. For an example almost as good as the Lynch ultimatum, see the New Jersey objection to the Articles of Confederation's apportionment of troop quotas by "white" population: "In the act of independence we find the following declaration: 'We hold these truths to be self-evident . . .'" It went on to complain that even "admitting necessity or expediency to justify the refusal of liberty in certain circumstances to persons of a particular colour," it was unfair to exclude a large fraction of the southern labor force when distributing military burdens. *Journals of the Continental Congress, 1774–1789,* 37 vols. (Washington, DC: GPO, 1904–1937), June 25, 1778, 11:650. Hereafter *JCC.*

20. Patrick Henry explained this problem in the initial 1774 debate about how to apportion votes in the Continental Congress, noting that of course Congress lacked official data, since that could only mean "attestations of officers of the Crown." John Adams, "Notes of Debates," Sept. 6, 1774, *Adams Diary,* 2:126. As late as 1783, Congress had received official population data from only four states. Madison, "Notes of Debates," *Madison Papers,* Apr. 4, 1783, 6:432.

tax systems since at least the eighteenth century.[21] Adam Smith's analyses of the economic incidence and political effects of various forms of taxation were cited in U.S. debates, as were those of the French physiocrats; but European theory was misleading in the American context because it assumed a uniform political economy of free labor. Taxes had a different economic impact in a slave-labor economy than in a free-labor economy.[22] Historians of the tax debates of the early republic always note that local economic variation posed a practical problem in the background of tax politics at the national level. If we move this problem from background to foreground, examining it on a suspicion that "local economic variation" was mainly a euphemism for slavery, a different solution emerges to the problem of the weakness of the early American state.[23] It was almost impossible to design a tax structure for a nation that was, as Abraham Lincoln would put it, "half slave and half free." Even if it had been possible to have calm national discussions about how to tax an economy in which slavery was an alarmingly divisive institution (which it was not), the problem of designing the taxes remained. The result was an "exceptionally" weak national government, regardless of how this result fit into or was justified by abstract statements of ideology.[24]

Still, this institutional solution is not the whole story. Even though the practical problems of designing and debating about a national tax structure were immense – and insuperable during the Revolutionary War – they might have been solved after the adoption of the Constitution if the politicians of the early republic had wanted to solve them. Slavery's impact on American political institutions, in other words, was mediated through politics and, specifically, through the partisan politics of the conflicts between Federalists and Jeffersonians. These politicians were fully aware of the different ways that particular taxes would affect taxpayers in the North and the South. They were sophisticated about the economic incidence of taxation in their dual economy. They used this information to partisan advantage in national tax debates and, as everyone knows, the Jeffersonians won. This article concludes, therefore, with reflections on the meaning of that political victory.

The argument will proceed in three parts. Section I analyzes the origin of the "impost," the dominant federal tax in the early republic. It narrates the discovery during the Revolution that a simple tax on imported goods generated less economic debate, and thus less debate about slavery, than other kinds of taxes. Section II turns to the "direct tax clauses" of the Constitution and the Supreme Court's interpretation of them in *Hylton v. U.S.* (1796). Most famous for their 1895 invocation by the Supreme Court to declare the income tax unconstitutional, these clauses resulted from the politics of slavery but shaped the politics of taxation. Section III explores this impact of the direct tax clauses on tax politics, focusing on the congressional politics that created the direct tax of 1798. This politics was far more complicated than historians have realized. It owed nothing to European political economy, despite occasional allusions to European precedents. It was structured by partisan calculations about the impact of apportioned direct taxes in the dual economy that resulted from slavery. It was a dirty politics, and it was unique to the United States.

I. THE IMPOST

There were three sources of precedent for the creation of a national tax policy in the early republic: Europe, the American states, and the expedients that the Continental Congress adopted, tried to adopt, or merely considered. For all the charges of "imbecility" that the pro-Constitution Federalists hurled at the government under the Articles of Confederation, the "impost" developed by the Continental Congress, which came close to ratification in 1782 (every state but Rhode Island), turned out to be the only precedent with practical value. Except in emergencies – the international crises of the 1790s and the War of 1812 – the federal government taxed nothing but imported goods before the Civil War.[25] The sectional

21. On "ability to pay," see Walter J. Blum and Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation* (Chicago: University of Chicago Press, 1953).

22. Adam Smith, *The Wealth of Nations* (New York: Modern Library, 1937), 808, acknowledges this difference for poll taxes.

23. In antifederalist arguments against the Constitution, claims about the difficulty of maintaining free government in the diverse "large republic" often hinged on slavery. See, e.g., "Letters of Cato" and "Observations . . . from The Federal Farmer," in *The Complete Anti-Federalist,* ed. Herbert J. Storing, 7 vols. (Chicago: University of Chicago Press, 1981), 2:110–12, 236. In Virginia, "large republic" objections emphasized that northerners lacking "a fellow-feeling for us" might use taxation to abolish slavery. Jonathan Elliot, ed., *The Debates of the State Conventions on the Adoption of the Federal Constitution,* 2d ed., 5 vols. (Philadelphia: Lippincott, 1836), 3:30–34, 215–16, 285, 327–28, 455–57.

24. There is an important ideological implication. The ideological paradigm's dominance in the historiography of the early republic has been expressed in debates about the relative significance of "republican" and "liberal" thought. Without taking sides on this, it should be noted that the "liberal" ideologists were not the capitalist bourgeoisie with whom laissez-faire liberalism was associated in Europe. They were slaveholding planters. John Taylor of Caroline did not want to foster capitalism. Alexander Hamilton did not want laissez-faire. In the context of the early republic, laissez-faire had less to do with fostering capitalism than with protecting a slave-labor system that was vulnerable in a post-Enlightenment world. John Ashworth, *Slavery, Capitalism, and Politics in the Antebellum Republic* (Cambridge: Cambridge University Press, 1995), is suggestive on this problem.

25. See Table 2 below. Actually, the tariff dominated until WWI, despite excise revenue in the late nineteenth century. The marginality of the income tax before WWII is the main point of Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861–1913* (New York: Oxford University Press, 1993). On the late nineteenth-century excise, Wilbur R. Miller, *Revenuers & Moonshiners: Enforcing Federal Liquor Law in the Mountain South, 1865–1900* (Chapel Hill: University of North Carolina Press, 1991).

politics of the tariff from Nullification to Smoot-Hawley is well known; the industrial North opposed the agrarian South and West for a century. Yet it must be emphasized that these were debates about protection rather than taxation. They were about whether to use the tariff to protect "infant industries" in the antebellum decades and, depending on who was speaking, they were about using it to protect either monopoly profits or "the American standard of living" in the late-nineteenth and early-twentieth centuries.[26] The impost was different. As originally framed in 1781, it would have levied a flat 5 percent *ad valorem* duty on all imported goods. As modified in 1783, it also would have levied higher duties on distilled spirits, wine, tea, pepper, sugar, molasses, coffee, and cocoa – none of which, except hard liquor, were made in the U.S., and all of which were taxed for the obvious purpose of drawing revenue from the consumption of imports.[27] When the "agrarian" wing of the Democratic party, from the 1830s through the 1890s, demanded a "tariff for revenue only," they were supporting the impost as a federal tax instrument. Thus, the tax policy the Continental Congress worked out, but could not implement under the Articles of Confederation, remained an important and popular approach to federal taxation from 1789 until the ratification of the Sixteenth Amendment in 1913.

Everyone liked the impost. Proposed originally by the socially conservative New York merchant Gouverneur Morris in 1778 as part of a larger tax package, it was proposed again by the "radical" states-rights Whig from North Carolina Thomas Burke in 1780 to substitute for all other taxes, and in that form it was adopted unanimously by Congress in 1781.[28] Revolutionaries as different as Robert Morris and James Monroe both championed the impost. Rhode Island's objections were intergovernmental and highly particularistic. Rhode Island stood to lose access to the revenue it already raised from its own impost, which had the added advantage (because of Rhode Island's large coasting trade) of shifting part of its state-level taxes onto the consumers in other states who bought goods imported initially into Rhode Island.[29] This really was a problem with the Articles of Confederation rather than with the impost itself. The impossible tax policy written into the Articles, the apportionment by real estate value, meant that the impost could be enacted only by the unanimous consent of the state legislatures. That was too much to ask. It had taken four years to coax every legislature to ratify the Articles of Confederation in the first place. The irony that a high-impost state defeated the federal impost merely underscores the fact that the problem was never an objection to the impost as a form of taxation. Congress discussed tax policy for the next few years, but could agree on nothing except renewed calls for the impost. In 1783, with the impost failing, the unpaid army officers at Newburgh debating mutiny, and Financier Robert Morris threatening to resign, Congress rejected other national taxes and asked the states to raise long-term revenues of $1.5 million per year, allowing the states to decide what kinds of taxes to levy "as they may judge most convenient." This fared worse than the impost. By January, 1786, only three states had complied with the $1.5 million. Eight had adopted the accompanying proposal for the modified impost with revenue duties and state-level appointment of collectors, and, by late July, twelve (all but the high-impost New York) had complied.[30]

The impost had several advantages. First, it required very little administrative capacity to collect. For all the fears of Leviathan that were expressed in the "country party" idiom, everyone who gave a serious thought to governance during the Revolution knew that the problem was too little rather than too much administrative capacity. The impost required no population censuses, wealth assessments, or lists of retailers and manufacturers. It required customs establishments in the ports and a few revenue cutters to prevent flagrant smuggling, but this was nothing remotely resembling what would have been needed to

26. And, of course, particularlistic rent-seeking interests. From a large literature, the best account of tariff politics is E.E. Schattschneider, *Politics, Pressures, and the Tariff* (New York: Prentice-Hall, 1935). For the historical outline, two works are essential: William W. Freehling, *Prelude to Civil War: the Nullification Controversy in South Carolina, 1818–1836* (New York: Harper & Row, 1966); F.W. Taussig, *The Tariff History of the United States,* 8th ed. (New York: Putnam, 1931). For an argument that tariff politics was a tax politics, John Mark Hansen, "Taxation and the Political Economy of the Tariff," *International Organization* 44 (1990): 527–51.

27. *JCC,* Feb. 3, 1781, 19:112–13; Apr. 18, 1783, 24:257–58. The 1781 version exempted imported cotton and wool cards, but this was removed in 1783, "being considered as no longer necessary & contrary to the general policy of encouraging necessary manufactures among ourselves" (Madison, "Notes of Debates," Mar. 18, 1783, 6:350). Protectionism as a policy seems anachronistic and may reflect a later insertion by Madison, since it appears in a footnote.

28. *JCC,* Sept. 19, 1778, 12:928–29; Mar. 18, 1780, 16:261; Feb. 3, 1786, 30:48. Also Thomas Jefferson, "Report on Arrears of Interest on the National Debt," Apr. 5, 1784, *Papers of Thomas Jefferson,* 7:66.

29. Forrest McDonald, *We The People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958), 324–28. Alexander Hamilton traced Rhode Island's resistance to its ability to tax Connecticut. Madison, "Notes of Debates," Feb. 19, 1783, 6:259.

30. *JCC,* Apr. 18, 1783, 24:258; Jan. 3, 1786, 30:7–10; Feb. 3, 1786, 30:48; Feb. 7, 1786, 30:50; Feb. 15, 1786, 30:71–75; July 27, 1786, 30:440; Aug. 14, 1786, 31:518. By mid-August, five states had complied with the $1.5 million. There was confusion about what counted as impost compliance; Congress required specific legislation (a problem for Maryland) and rejected laws with provisos (Rhode Island and New York). On the financial crisis, Rakove, *Beginnings of National Politics,* 311–24; Ferguson, *Power of the Purse,* 149–68; Kohn, *Eagle and Sword,* chap. 2. On New York, John P. Kaminski, *George Clinton: Yeoman Politician of the New Republic* (Madison, WI: Madison House, 1993), 89–96; Linda Grant DePauw, *The Eleventh Pillar: New York State and the Federal Constitution* (Ithaca: Cornell University Press, 1966), 35–43.

collect an internal excise, much less to implement a nationwide valuation of individual property holdings. No army of assessors and collectors had to fan out across the country to locate and visit the taxpayers. Nor did adequate currency supplies pose a problem. Merchants who had access to money "advanced" the tax to the government, and then shifted it to consumers through whatever cash or credit arrangements happened to prevail in the ordinary commercial transactions of any given locality. Second, nobody knew who actually paid the impost. Merchants might complain about the cost of "advancing" the tax, but everyone else assumed they recovered profits on these advances when they shifted the tax to consumers.[31] Arguments about the economic incidence of the impost usually were based on claims about what kinds of groups tended to consume greater amounts of imported goods, but the ready response to complaints of this kind was that people with higher consumption levels, especially of expensive imported drinks and spices, had a greater ability to pay and therefore should bear the higher tax burdens. The impost also was invisible to its ultimate payers. Nobody risked losing the farm or having the sheriff seize the livestock for the failure to meet an annual tax bill. The irritation that is inevitable in the collection of direct taxes (witness April 15 today) was avoided as the impost shifted imperceptibly into streams of consumer purchases. These characteristics gave the impost a political advantage over other kinds of taxes. Its uncertainty became "equality" more through wish than analysis, but, as long as it was kept simple, nobody had much incentive to investigate the assumption that "everyone" paid it.

The impost was intended to replace the failed system by which the Continental Congress depended on the states to meet "requisitions," which were, literally, congressional requests that the states raise and send money. The requisition system did not originate as a tax system per se. At the outbreak of the war, Congress began to emit paper currency to finance it, hoping that the currency's value could be supported by regular action of the states in pulling it out of circulation. The plan was for the states to collect quotas of the continental currency by making it receivable for state taxes.[32] This was a disaster. The states could not redeem enough continental currency, and some also issued currencies to finance their own military operations. Depreciation reached crisis proportions. The states enacted price regulations and legal tender laws that threatened to impose draconian criminal penalties for refusing or discounting continental bills, but these were predictably ineffective. In 1780, Congress admitted the failure and made an official devaluation. Continental bills could be exchanged for new bills at a ratio of 40 to 1.[33] Requisitions continued, but once the policy of "currency finance" was abandoned, the requisitions were taxes. Except for a chimerical attempt to requisition specific commodity supplies in 1780, Congress simply asked the states to send money. The massive currency depreciation operated as a tax, and probably as the most effective tax levied at any level of government during the Revolution. This "tax" was less capricious than the actual contemporary alternative – impressing supplies for the army from people who lived near the scene of its operations and issuing worthless certificates in ostensible payment – but nobody considered either of these an acceptable approach to financing the war. Congress had to do something. As the capstone of a 1781 administrative reorganization, they appointed Robert Morris as the continental Financier. Morris spent most of his time trying to borrow money in Europe and arranging to purchase and deliver supplies for the army. He also advised Congress on tax policy, but he could not persuade them to adopt any national tax other than the impost they had agreed on shortly before his appointment.[34]

Because James Madison took notes on the proceedings of the Continental Congress and its tax-writing committees in 1783 but not in 1781, a more complete picture of the impost's revision than of its initial adoption can be sketched. Nevertheless, it seems clear that the 1781 discussion was narrow. There is no evidence that Congress compared the impost with any other tax policy, although they did compare it with a bullionist trade policy that penalized luxury imports in order to stem the exportation of specie – on the theory that specie accumulation would support the value of the continental currency.[35] The bullionist version of the impost, reported by a committee on finance, contained a detailed schedule of enumerated rates for particular goods. Congress spent nine sessions in committee on the whole on this report, and emerged with the flat 5 percent

31. See, e.g., *JCC,* Apr. 19, 1781, 19:424–25, a report drafted by James Duane for a committee chaired by Samuel Adams, which explained the shifting of the impost to the Massachusetts General Court. Congress adopted this report.

32. This story is told in several places. Ferguson, *Power of the Purse,* chaps. 1–4, is the best treatment; Ralph Volney Harlow, "Aspects of Revolutionary Finance, 1775–1783," *American Historical Review* 35 (1929): 46–68, is not to be missed; and Roger H. Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (Baltimore: Johns Hopkins University Press, 1993), is essential on state efforts to meet the requisitions.

33. *JCC,* Mar. 18, 1780, 16:264. Bills were circulating in Philadelphia in 1781 at over 100 to 1. Jesse Root to Oliver Ellsworth, Feb. 8, 1781, *LDC,* 16:689.

34. Clarence L. Ver Steeg, *Robert Morris: Revolutionary Financier* (Philadelphia: University of Pennsylvania Press, 1954); Robert Morris to the President of Congress, July 29, 1782, *The Papers of Robert Morris,* ed. E. James Ferguson et al., 9 vols. (Pittsburgh: University of Pittsburgh Press, 1973–1999), 5:65–72.

35. *JCC,* Dec. 18, 1780, 18:1158–64. Also John Sullivan's Committee Notes, Nov. 7–23, 1780; Jesse Root to Jonathan Trumbull, Sr., Jan. 29, 1781; James M. Varnum to John Innes Clark, Feb. 3, 1781; all in *LDC,* 16:305–13, 638–40, 669–72. The bullionist policy also included export encouragements, embargo powers, a bank, and the collection of gold and silver plate from individuals to coin into money.

ad valorem duty on all imports. While this clearly was a victory for tax policy over trade policy, it suggests that delegates may have tried but failed to agree on enumerated rates in the context of the tax policy as well. Several historians have seen a dispute about the powers of Congress in the 1781 impost debate. On this, the finance committee report recommended asking the states to "pass laws granting to Congress" the power to collect the impost. In the course of a debate that started and ended by changing this to asking the states to "vest" Congress with the power to levy the impost, John Witherspoon of New Jersey moved to grant Congress the authority to regulate all U.S. commerce and Madison reintroduced the "pass laws granting" language of the finance report. Witherspoon's motion, which failed, seems to have aimed at reviving the bullionist trade policy; Madison's intentions are not apparent.[36] Yet whatever actually was at stake here, it was not a dispute about the impost as a tax policy. That passed unanimously, and with no evidence that anyone ever proposed any alternative form of taxation.[37]

The 1783 impost emerged from an effort to implement the apportionment scheme of the Articles of Confederation. Led by John Rutledge of South Carolina, this effort culminated in a package of proposals to solve the desperate financial problems of the Confederation and provide for the national debt now that the Revolutionary War had been won. This package included the modified impost with specific revenue duties, the request for $1.5 million per year raised by the states "as they may judge most convenient," a plea for western territorial cessions, and a new and portentous amendment to the Articles of Confederation: to replace apportionment by real estate value with apportionment by population using the three-fifths rule to count slaves. It is tempting to recount the invention of the three-fifths ratio in detail, but the debate that produced it actually was predictable. Once a realization of the administrative and political implausibility of the land value apportionment scheme finally was forced on a majority of delegates, chiefly by Alexander Hamilton, the only viable alternative was population, and Congress was right back where it had been when Thomas Lynch delivered his 1776 ultimatum.[38] If population was to be the proxy for wealth (on an explicit labor theory of value), slaves had to be counted. There was a consensus on the idea that slave labor was less productive than free labor, either because unfree people had no incentives to work hard or because black people were inferior to whites. But the question was how much less productive slave labor was. Madison recorded that he introduced the three-fifths ratio after a debate on figures ranging from one-fourth to three-fourths "in order to give a proof of the sincerity of his professions of liberality" (he really preferred one-half).[39] Congress did not expect the states to ratify this. The package of proposals was framed to make the impost and the annual $1.5 million contingent on the "unanimous accession" of the states to both measures, but the land cession plea and the three-fifths amendment were sent to the states independently.[40]

On the question of tax policy, the clearest result of the 1783 debate was its affirmation of the impost's political virtues. While the impost was considered in isolation in 1781, Congress considered it in 1783 in tandem with alternative tax policies, all of which it rejected. Hamilton urged a national house tax, James Wilson of Pennsylvania called for a land tax, and Nathaniel Gorham of Massachusetts wanted a poll tax. The debates entangled these taxes with the issue of whether Congress should have *any* revenue independent of the states, but the defenders of state sovereignty – John Rutledge, Theodorick Bland, and Arthur Lee – all said that they supported the impost. Wilson defended his land tax as a way to offset the economic incidence of the impost: "that as the tax on trade would fall cheifly on the inhabitants of the lower Country who consumed the imports, the tax on land wd. affect those who were remote from the Sea & consumed little."[41] Such economic analyses, however, were just what Wilson's colleagues preferred to avoid. Madison recognized the problems that arose from estimating the incidence of particular taxes when he proposed poll and land taxes "under certain qualifications," which were "rating blacks somewhat lower than whites" in the poll tax and valuing the land, somehow, "in an inverse proportion" to population density.[42] After Congress rejected all this and agreed on a list of enumerated revenue duties for the impost, they sent their handiwork to Robert Morris

36. *JCC,* Dec. 18, 1780, 18:1158–64; Jan. 18–Feb. 3, 1781, 19:71–74, 77, 85–87, 91–92, 102–3, 105–6, 109–13; Jesse Root to Jonathan Trumbull, Sr., Dec. 27, 1780, James Madison's Motion on an Impost, Feb. 3, 1781, Thomas McKean to Thomas Collins, Feb. 3, 1781, Jesse Root to Oliver Ellsworth, Feb. 8, 1781, James Madison to Edmund Pendleton, May 29, 1781, *LDC,* 16:505–7, 667–68, 689, 17:277–78. Madison was not on the finance committee. Nor is it clear that he actually introduced his motion. Ferguson, *Power of the Purse,* 116–17, and Henderson, *Party Politics,* 273–75, portray the "pass laws granting" versus "vest a power" dispute (the final language was "invest") as a weighty debate about centralization, but ignore its context of the bullionist trade policy. See also James M. Varnum to John Innes Clark, Feb. 3, 1781, *LDC,* 16:671–72. Varnum, who had just arrived in Congress, complained about meaningless verbal sparring by the experienced delegates: "And if a Word in a Report should not exactly suit their mechanical genius's a long Debate ensues" (*LDC,* 16:672).

37. Theodorick Bland later said they also considered and defeated allowing importing states to keep money raised in their ports to help meet their own quotas on requisitions. Madison, "Notes of Debates," Jan. 29, 1783, 6:164.

38. This process can be traced through Madison, "Notes of Debates," Jan.–Mar. 1783.

39. Ibid., Feb. 26, 1783, 6:292; Mar. 28, 1783, 6:407–8.

40. *JCC,* Apr. 18, 1783, 24:257–60.

41. Madison, "Notes of Debates," Mar. 18, 1783, 6:351.

42. Ibid., Jan. 28, 1783, 6:149. By recording the "qualifications" in a footnote, Madison suggests that he actually did not explain them to his fellow delegates.

for comment. Morris answered with new proposals for a land tax, house tax, and liquor excise. Morris had called for a poll tax, land tax, and liquor excise in 1781 and defended each in detail in 1782. Having ignored his previous tax plans and disposed of their own, Congress now swiftly killed this one, "its impropriety being generally proclaimed," as Madison put it.[43] The impost's endorsement by Rutledge, Bland, and Lee is significant. This undoubtedly is why Madison recorded it, either at the time or in later revisions of his "Notes." Yet while Madison's goal would have been to portray a consensus on the impost as a revenue source independent of the states, a consensus on the impost – and only on the impost – as a tax instrument is every bit as important. The impost was the easiest tax to enact. It was the only tax Congress could pass without intensive economic inquiry.

There was a political problem with the impost, although it surfaced in practice only after the adoption of the Constitution. The impost invited a piggybacking protectionism. It did not take the theoretical protectionism of Hamilton's 1791 Report on Manufactures to unleash this; rather, it took only the political opportunity offered by Madison's 1789 effort to make the impost's passage the first achievement of the first Congress under the Constitution. The Articles of Confederation placed a premium on stripped-down simplicity in legislation because thirteen legislatures had to pass identical acts to ratify most of the "recommendations" of Congress. The whole point of the Constitution as a way to "energize" the national government, however, was that it let Congress and the president pass laws without having to anticipate cumbersome rounds of state legislative action. The Constitution made Congress a legislature, which opened it to strategic behaviors in which the Continental Congress could not have indulged. Delegates to the Continental Congress had no reason to suppose that the deals they made with each other would be accepted as binding by the state legislatures, and they regularly invoked potential state resistance to defeat measures they opposed. After the adoption of the Constitution, however, the deals congressmen and the president made were the law, at least until the next election or a judicial review. Madison seems to have been caught off-guard by this change. It may have been mere rhetoric for antifederalist consumption when he predicted, in *Federalist* 45, that federal officials were more likely to be "too obsequious than too overbearing" toward the states and, in *Federalist* 46, that the power the states could mobilize against obnoxious federal laws would prevent Congress from passing them in the first place—but Madison grounded these predictions in the experience of the Continental Congress.[44] For all of his political sophistication, in other words, Madison seems to have missed the Constitution's structural transformation of Congress. He seems to have expected Congress to pass the impost by acclamation with the 1783 rate structure simply because this plan had won the unanimous consent of the Continental Congress and the approval of twelve states.

It was not to be. In 1789, the impost generated recognizable tariff politics immediately. Once this happened, its political advantages diminished. Congress was propelled into a detailed debate about the economic impacts of particular provisions of its first revenue law, which sooner or later had to raise slavery as a factor in economic calculations. Madison introduced the impost with a speech about how the United States, "having recovered from the state of imbecility that heretofore prevented a performance of its duty, ought, in its first act, to revive those principles of honor and honesty that have too long lain dormant." Ingenuously citing a lack of specific commercial data, he proposed the 1783 impost that the states had approved, plus "a clause or two on the subject of tonnage." Historians have analyzed Madison's tonnage policy in detail; he tried but finally failed to scale these duties to favor French over British shipping, setting off a sectional debate about the nature of American foreign trade.[45] The real monkeywrench in the proceedings, however, came from Pennsylvania. Having celebrated the lack of representation from a disruptive Rhode Island (which had not yet ratified the Constitution), Madison was blind-sided by what later generations would take for granted: Pennsylvania protectionism. No sooner had Madison agreed to postpone rate setting until Congress adopted "the principles generally" of his bill (the discriminatory tonnage plan), than Thomas Fitzsimons of Pennsylvania proposed a long tariff list "calculated to encourage the productions of our country, and protect our infant manufacturers." Madison tried to parry this by stressing the urgency of passing a law in time to capture revenue from the spring import season – it was already April – and by arguing that revenue and protection were separate questions that should not be "confusedly blended." But when Elias Boudinot of New Jersey, the next speaker, asked why Fitzsimons had left glass off his list, it was all over. Congressmen were going to think about the economy rather than simply the revenue.[46] The debate dragged on, day after day, from April 8 to May 15, with the tonnage issue extending it to May 29 and the Senate reviving it in mid-June by adding a few items of its own.

This could not fail to get nasty. Tiring of constant southern attacks on his protectionist program, Fitzsimons opened the dangerous question of the identity of the individual "consumers" who bore the tax bur-

43. Ibid., Mar. 11, 1783, 6:323. For Morris's plan, see Section III below of this essay.

44. James Madison, "Federalist 45" and "Federalist 46," *The Federalist Papers* (New York: New American Library, 1961), 291, 295–97.

45. *Annals of Congress,* 1st Cong., 1st sess., 107; Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York: Oxford University Press, 1993), 67–74.

46. *Annals,* 1st. Cong., 1st sess., 111–20.

dens on imported manufactures and luxuries. "For his part, he never could conceive that the consumption of those articles by the negroes of South Carolina could contribute to the revenue as much as that of the white inhabitants of the Eastern States."[47] Fisher Ames had no patience for claims about the uniquely heavy southern dependence on imports:

> Admitting the people of New England to live more moderate than the opulent citizens of Virginia and Carolina, yet they have not such a number of blacks among them, whose living is wretched, consequently the average consumption per head will be nearly the same.

When Southerners complained that a salt impost was regressive, John Laurence of New York responded that "the rich are generally more profuse in their consumption than the poor; they have more servants and dependents also to consume it." Madison conceded this point in the bizarre language with which he often discussed slavery: the salt tax would not be regressive in the South, "because the species of property there consists of mouths that consume salt in the same proportion as the whites." Finally, the southern insistence on high molasses duties, buttressed by temperance arguments, pushed George Thacher of Massachusetts over the edge, beyond consumption or economics: "If the pernicious effects of New England rum have been justly lamented, what can be urged for negro slavery?" Madison rushed to soften this blow, certain that Thacher had not expressed "either the deliberate temper of his own mind, or the good sense his constituents," but the damage was done. Georgia's James Jackson simply had "to observe, that however slavery may be condemned in the Eastern States, it is impracticable to cultivate the Southern country without their assistance." Slavery was not the most important issue in this debate. But it was an issue, and it became one because congressmen analyzed the economics of their tax bill. Their doubt about the regressivity of consumption taxes in a slave-labor economy, moreover, acknowledged the limits of European political economy in the American context.[48]

Then, there was the matter of imported people. Josiah Parker of Virginia, calling himself a reluctant slaveholder and condemning the "inhuman" slave trade as "contrary to the Revolution principles," chose a late moment in the impost debate to introduce the ten dollar tax permitted by the slave trade clause of the Constitution. This may have been Madison's doing. South Carolina and Georgia congressmen expressed a predictable outrage. Northerners, equally predictably, begged that this "subject of some delicacy" not be allowed to derail the revenue bill. Madison stoked the flames until Roger Sherman of Connecticut stated explicitly that slaves would not bear the 5 percent duty the bill levied on unenumerated commodities because the Constitution described them as "persons." Madison had urged that the bill be clarified. He claimed that Congress had been proceeding on the assumption that they were taxing slaves in the 5 percent category and that collectors had to be protected against mistaken interpretations of the law, "for [they] would not presume to apply the term goods, wares, and merchandise to any person whatsoever." Once Sherman stepped in, Madison abruptly announced his realization that the slave tax required a separate bill and asked Parker to withdraw his motion, which Parker immediately did. The ten dollar slave tax was referred to a committee chaired by Parker, whose report was postponed to the next session. It was never revived. The famous slave trade debate of the second session was initiated by petitions from Quakers and the Pennsylvania Abolition Society. Nobody mentioned Parker's report and Congress rejected the ten dollar tax. Historians have made much of the Virginia anti–slave-trade rhetoric in the first Congress, but the debates suggest that the Virginians had no intention of acting against the slave trade. All Madison did was to address a potential loophole in the impost bill that might have resulted in taxes on imported slaves. His stage-management of this debate looks suspiciously like an effort to collect discursive ammunition for the moment when a federal collector tried to tax slaves and a slave-trading merchant filed suit.[49]

In the end, the 1789 tax law was moderately protectionist. Fitzsimons won protection for most of the items he introduced, from cheese, candles, and soap to cordage, shoes, coal, clothing, and carriages. In the typical fashion of tariff politics, New England was paid off with duties on imported fish and preferences for American shipping, and the South was paid off with generally lower "revenue" duties on liquor, sugar, and the like. If a fifty cent tax on imported boots may have been prohibitive, most protected goods were rated at 7.5 or 10 percent *ad valorem*.[50] The Philadelphia arti-

47. For the quotations in this paragraph, ibid., 155 (Fitzsimons), 340 (Ames), 168 (Laurence), 170 (Madison), 224 (Thacher), 227 (Madison), 240 (Jackson). This evidence calls into question the description of this debate in Elkins and McKitrick, *Age of Federalism,* 65: "It was contained; the boundaries were more or less clear, the objects and interests were immediate and measurable; and there was a minimum of hard feelings."

48. Cf. Smith, *Wealth of Nations,* 837–38, an offhand remark in a discussion of the impact of consumption taxes on wage rates: "The poor pay the duties upon malt, hops, beer, and ale, upon their own consumption: The rich, upon both their own consumption and that of their servants."

49. *Annals of Congress,* 1st. Cong., 1st sess., 349–56; 1st Cong., 2nd sess., 1223–33, 1239–47, 1464–66, 1500–1514, 1516–25. For Madison's similar role in the second session, Howard A. Ohline, "Slavery, Economics, and Congressional Politics, 1790," *Journal of Southern History* 46 (1980): 351–52. See also Duncan J. Macleod, *Slavery, Race, and the American Revolution* (London: Cambridge University Press, 1974), 61.

50. *U.S. Statutes at Large,* 1 (1789), 25–27. It also seems a big administrative improvement that the "revenue" duties were expressed in cents rather than the 1783 denomination of ninetieths of a dollar.

sans were winners in the details of this tax and the public creditors of the United States were winners in the fact that there now was a tax to fund interest on the U.S. debt. Consumers in Connecticut, Delaware, New Jersey, and the still unrepresented North Carolina were winners in that they no longer would be taxed to finance the state governments of the neighboring states whose ports supplied their markets.[51] Yet this public policy victory had a price. A detailed tax bill inevitably provoked a debate about the economic incidence of its provisions. Once they opened this issue, Congress could not avoid some of the economic implications of slavery.

Tariff politics never again resembled the unanimous adoption of an unanalyzed impost by a Continental Congress that considered it a panacea. Protectionism politicized import taxation, generating the articulation of competing economic analyses in which slavery necessarily became one of the relevant variables. Nevertheless, import taxes retained an advantage over other taxes in this regard. Nobody ever knew exactly who paid the tariff. The question of what assumptions to use in estimating its incidence kept economists busy into the twentieth century. This uncertainty would favor the tariff, though the tariff could not reap the full political benefits of the impost. In 1782, Robert Morris advised the Continental Congress to enumerate fixed rates for commodities in the impost rather than levying the flat 5 percent, basing his recommendation on a sensible administrative analysis: fixed rates would simplify the tasks of collectors and reduce a discretion that might tempt them to collude with merchants by undervaluing goods.[52] Congress refused. To enumerate would invite divisive political debates. Interest groups would organize around the production or consumption of particular commodities, first in Congress and then in the thirteen state legislatures. The Continental Congress could not win the impost anyway. Nor could they avoid enumerating "revenue" duties as their financial situation deteriorated. But each time the Continental Congress tried to forge an alternative tax policy, their commitment to the impost increased.[53] This commitment survived the adoption of the Constitution. Even though a tariff politics replaced the consensus politics of the impost immediately, producing angry and scary moments in the first session of the first Congress, congressmen knew it would be worse if they turned to a tax whose incidence was more transparent. Advocates of the impost/tariff constantly raised the specter of a direct tax. If this bill failed, they warned, Congress would have to discuss an alternative that everyone knew to be dynamite.[54]

The long-term dominance of the tariff in the federal revenue system can be explained by stressing the advantages that made the impost attractive to the Continental Congress in the first place. The tariff required less administrative capacity than other taxes to collect. Its payment in the first instance by merchants avoided currency supply problems, insulated most people from contact with federal collectors, and made the tax "invisible" to the consumers who finally paid it. In an overwhelmingly agricultural economy, moreover, import taxes substituted for excises on manufacturing. Protectionist support for the tariff would cut both ways. It would create strong and enduring pro-tariff constituencies, but it also would create strong and enduring opposition. The crucial difference between the impost and tariff, however, was that the impost's simplicity discouraged discussions of its economic incidence. It engendered remarkably little economic analysis at all. In the impost, the Continental Congress identified a tax it could adopt without exploring the structure of the economy and, therefore, without broaching the divisive issue of slavery. As the impost/tariff proponents hinted in 1789, no direct tax would be able to escape scrutiny in this way.

II. THE DIRECT TAX CLAUSES

In the Continental Congress, the Constitutional Convention, and the colonies/states, the term "direct tax" meant two things: property taxes and poll taxes.[55] Complications arose when it became necessary to define property and poll taxes, but there was little ambiguity in the idea of a "direct tax" itself – and no reason to worry about its definition – until its use in the Constitution made it a legal term of immense significance. The Constitution, of course, used the term in two places: the three-fifths clause ("Representatives and direct taxes shall be apportioned . . .") and the direct tax clause ("No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration . . ."). Because the apportionment rule was used to declare federal income taxation unconstitutional in the *Pollock v. Farmers' Loan and Trust Company* decision of 1895, the provenance of the term "direct tax" in the Constitution received close examination. A recent study by legal scholar Bruce Ackerman affirms the findings of the pro-income tax

51. Note that Congress enacted the 1789 impost before it received Hamilton's plan for the federal assumption of state debts, which dominated the second session, energizing "country party" fears and the conflicts that would take shape as the first party system.

52. Admitting that it was impractical to fix rates for every commodity, Morris proposed a few broad groups, mingling bulky with fine goods on the assumption that Congress could overtax the bulky goods because they were difficult to smuggle and should undertax the fine ones because they were easy to smuggle (Morris to Congress, July 29, 1782, *Morris Papers,* 5:68–69).

53. *JCC,* Apr. 5, 1784, 26:192; Mar. 31, 1785, 28:219; Feb. 13, 1786, 30:67–68; Aug. 31, 1786, 31:613–19.

54. *Annals,* 1st Cong., 1st sess., 171, 206, 225, 314, 317, 472. Only James Jackson of Georgia spoke in favor of a direct tax, and with no specifics (ibid., 326).

55. E.R.A. Seligman, *The Income Tax,* 2d ed. (New York: Macmillan, 1914), 570.

writers of the immediate post-*Pollock* era: (1) the legal definition of the term "direct tax" was political rather than economic, and (2) the term entered the Constitution not as an effort to regulate federal tax policy, but as an absentminded by-product of the slavery compromise at the Convention.[56] Ackerman then takes it a step further, arguing that because the direct tax clauses were known to be "tainted" by the slavery compromise, they were construed permissively by the Supreme Court until a conservative Court, which was determined to strike down the income tax, broke with tradition in *Pollock.* Exhibit A in Ackerman's brief is *Hylton v. U.S.* (1796), in which the term "direct tax" was construed permissively to declare a carriage tax "indirect" and thus constitutional without apportionment.[57] Ackerman is answering scholars who want to revive *Pollock* as a precedent to invoke the direct tax clauses against new federal tax plans today, and he counters with a call to revive "the *Hylton* tradition of judicial restraint."[58] *Hylton* is an interesting case. It created confusion about the meaning of the term "direct tax" in the early republic, but it more importantly helped to obscure the reality that the "great compromise" about slavery had inserted serious limits on the federal tax power into the Constitution. The true scope of these limits became clear only when *Hylton* was overturned a century later in *Pollock.*[59] This clarity resulted in the Sixteenth Amendment.

The story of how the three-fifths clause entered the Constitution is well known. At the Convention, the conflict over representation between large and small states turned into a conflict between slave and free states, and then into a deadlock over the three-fifths rule to count slaves.[60] Gouverneur Morris tried to break the deadlock by proposing "that taxation shall be in proportion to representation," and, in response to objections that this would perpetuate the tax problems of the Confederation, modified his motion "by restraining the rule to *direct* taxation." Now, "the rule would be inapplicable" to "indirect taxes on *exports* & imports & on consumption," which meant that the Convention would not repeat the mistake the Continental Congress had made in 1777. The impost would be constitutional. Four days later, the Convention adopted the three-fifths clause as its "great compromise" of the representation issue. Ten days after that, Morris tried to remove the clause "proportioning direct taxation to representation." He had "only meant the clause as a bridge to assist us over a certain gulph; having passed the gulph the bridge may be removed." Nobody, however, wanted to reopen the question of representation. In action on a later draft, Rufus King "asked what was the precise meaning of *direct* taxation? No one answd." Charles Carroll objected that the number of congressional representatives "did not admit of a proportion exact enough for a rule of taxation," and the response was an immediate adjournment. John Dickinson and James Wilson then tried to remove "and direct taxes" from the final draft on the grounds that taxation was "improperly placed in a clause relating merely to the Constitution of the House of Representatives," but now Gouverneur Morris defended it, referring to the great compromise and suggesting that the stress on taxation in this phrasing would "exclude the appearance of counting the negroes in *the Representation.*"[61] The origin of the three-fifths clause had nothing to do with taxation. When King and Carroll tried to draw attention to its implications for federal tax policy, they were rebuffed. The three-fifths clause was about representation and slavery. It was about granting the southern states extra representation in Congress for the property in slaves ("all other persons") owned by their citizens.

The origin of the direct tax clause generally is interpreted as an effort to limit the taxation of slaves.[62] Introduced late in the Convention as part of a full draft of the Constitution, it banned any "capitation tax" levied without reference to the three-fifths clause. There was no debate, but the clause later was amended with the insertion of "or other direct" tax on the motion of George Read of Delaware. Read explained that he was worried about how the state accounts for the cost of the Revolution would be settled. He wanted to head off any attempts to apply the rule "of past requisitions."[63] This rule was a seat-of-the-pants estimate of total population "including negroes and mulattoes" that the Continental Congress adopted in 1775. Congress used it to set state quotas in every requisition through 1787, except that they reduced quotas of states under British occupation at different phases of the war. Beginning in 1777, the requisitions included explicit statements that the quotas they set were provisional. Not only would they be revised in a future financial settlement between the states, but this settlement would include 6 percent

56. *Pollock v. Farmers' Loan and Trust Company,* 157 U.S. 429 (1895), 158 U.S. 601 (1895); Bruce Ackerman, "Taxation and the Constitution," *Columbia Law Review* 99 (1999): 1–58; Seligman, *Income Tax,* 531–89; Charles J. Bullock, "The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution," *Political Science Quarterly* 15 (1900): 217–39, 452–81. See also Rakove, *Original Meanings,* chap. 4.

57. *Hylton v. U.S.,* 3 Dallas 171 (1796).

58. Ackerman, "Taxation," 51. The "tradition" consists of *Pacific Insurance v. Soule,* 7 Wall. 433 (1868); *Veazie Bank v. Fenno,* 8 Wall. 533 (1868); *Scholey v. Rew,* 23 Wall. 331 (1874); and *Springer v. U.S.,* 102 U.S. 586 (1880); with a post-*Pollock* revival in *Knowlton v. Moore,* 178 U.S. 41 (1900).

59. *Pollock* had to overturn the *Hylton* precedent to strike down the income tax because *Springer* had upheld the Civil War income tax, defining it as an "indirect tax" according to *Hylton.*

60. See, generally, Rakove, *Original Meanings,* chap. 4.

61. James Madison, *Notes of the Debates in the Federal Convention of 1787,* Adrienne Koch, ed. (Athens: Ohio University Press, 1966), July 12, p. 277; July 24, p. 362; Aug. 20, p. 494; Sep. 13, p. 633.

62. The argument is that "capitation" meant a slave tax. Seligman, *Income Tax,* 554–55, Ackerman, "Taxation," 12–13.

63. Madison, *Notes,* Sep. 14, 1787, 640.

interest on what turned out to be the overpayments and deficiencies of various states.[64] Read's amendment was adopted without discussion. The rule "of past requisitions" clearly was inadequate. Aside from its provisionality, it was based on total population and thus violated the rule that had been adopted for "direct taxes" in the three-fifths clause, which promised lower tax burdens for slave states. Read's amendment, in short, offered yet another protection for slaveholders.[65] Its only really interesting aspect is Read's expectation that direct taxes would be levied in the settlement of state accounts. What actually happened was that those states that ended up with deficiencies after a complicated audit process were forgiven unofficially, an outcome entangled in the politics of the federal assumption of state debts.[66] The Convention, meanwhile, inserted the term "direct tax" into the Constitution twice, without paying attention to what it might mean, and framed both clauses in the context of efforts to safeguard the property of slaveholders.

Gouverneur Morris was wrong about the political impact of the phraseology of the three-fifths clause. Taxation could not distract attention from slave representation. In the ratification debates, slave representation was so obviously outrageous in the North and so obviously a boon in the South that the presence of "direct taxes" in the three-fifths clause seemed little more than a verbal detail. Representation held center stage and everyone noticed "the negroes."[67] Hardly anyone grasped that apportionment might make it difficult for Congress to levy direct taxes at all. Everywhere, Antifederalists attacked and Federalists defended the "unlimited" tax power of Congress. Antifederalists further predicted that direct taxes were likely, and Federalists answered that the impost could finance the federal government without them. The resemblance between apportionment and requisitions (the use of "population" to set state quotas) focused attention on the key difference: that, under the Constitution, Congress would design the taxes levied to raise the state quotas. Antifederalists doubted that taxes could be designed fairly at the national level, urging that tax design be left to the states. In Virginia, Antifederalists worried aloud that northern majorities would tax slavery out of existence, but most Antifederalists wanted amendments to mandate requisitions, with federal collection as a stopgap should states fail to pay, which Federalists considered a recipe for armed conflict.[68] In fact, however, apportionment raised serious obstacles to direct taxation. Table 1 illustrates the problem. It apportions a tax to the free populations of the states in accordance with the three-fifths clause. If the 1790 figures suggest that the South might have resisted direct taxes, the later figures are decisive. In 1830, for every $1.00 per free person that would have been charged to a northern state, Virginia would have been charged $1.38, Louisiana $1.62, and South Carolina $1.71.[69] While nobody could have predicted this population data in the 1780s, the consensus that the Constitution granted Congress an "unlimited" tax power remains striking.

The Constitution placed complicated legal restraints on the federal tax power. In addition to the direct tax clauses, which required that "direct taxes" be apportioned, the Constitution fixed a different rule for all other taxes. Defined only by implication, these "indirect taxes" – taxes that were not covered by the direct tax clauses – had to be levied uniformly ("The Congress shall have power to lay and collect taxes, duties, imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States"). What, then, were "direct" and "indirect" taxes? Nobody answered when Rufus King asked this question at Philadelphia, and the tax laws of the states offered no guidance.[70] The "great compromise" over slavery at the Convention, in other words,

64. *JCC,* July 29, 1775, 2:222; Dec. 26, 1775, 3:458; Nov. 22, 1777, 9:955; Jan. 5, 1779, 13:29; May 21, 1779, 14:626; Oct. 7, 1779, 15:1150; Mar. 18, 1780, 16:266; Nov. 4, 1780, 18:1017–18; Mar. 23, 1781, 19:299; Nov. 2, 1781, 21:1090–91; Apr. 1, 1782, 22:159; Sept. 10, 1782, 23:564–71; Oct. 18, 1782, 23:665–67; Apr. 18, 1783, 24:259; Sept. 27, 1785, 29:767–68; Oct. 21, 1786, 31:894.

65. Ackerman, "Taxation," 13, conjectures that Read's amendment reflected Delaware's failure to pay its past requisitions, but these payments probably were irrelevant. The problem was the rule for settling the state accounts, which involved much more than past requisitions. My explanation of Read's concern strengthens Ackerman's argument about the "taint" of slavery in the direct tax clauses.

66. Of six debtor states in 1793, only one made a token gesture toward payment. Ferguson, *Power of the Purse,* 333; "Balances Due To and From the Several States," *Annals,* 3rd Cong., appendix, 1311–12.

67. In Massachusetts, however, the three-fifths clause debate centered on taxes. Rufus King said: "*five negro children* of South Carolina are to pay as much tax as the three governors of New Hampshire, Massachusetts, and Connecticut." Samuel Nasson answered: "this state will pay as great a tax for three children in the cradle, as any of the Southern States will for five hearty, working negro men." Elliot, *Debates,* 2:36–44 (quotations on 37, 39). See also South Carolina's Edward Rutledge: "All the free people (and there are few others) in the Northern States are to be taxed . . . whereas only the free people, and two fifths of the slaves, in the Southern States, are to be rated in the apportioning of taxes" (ibid., 4:277).

68. See New York, ibid., 2:263–66, 330–35, 342–44, 371–74; Virginia, ibid., 3:34, 57, 95–96, 99, 116–20, 251–52, 263, 457–58, 589–91; North Carolina, ibid., 4:76–81, 87–88. The exception to the "unlimited" tax power, of course, was the Constitution's ban on export taxes.

69. Counting this way, per free person, makes sense of the "great compromise." Yet the logical alternative to counting three-fifths of slaves would not have been to exclude slaves, but to count everybody. If the three-fifths clause is interpreted using the labor theory of value from the 1783 debate that introduced the ratio, it actually handed the slave states extra representation *and* a tax break. This would reverse the figures in Table 1.

70. Seligman scoured eighteenth-century state tax legislation for the words "direct" and "indirect." He found only one instance, a 1786 Massachusetts excise law whose preamble declared its intent "to ease" the burden of "direct taxation." This law also levied a carriage tax. Seligman, *Income Tax,* 561; Massachusetts, *Laws and Resolves* (1786–1787), 130–31, 139–40.

Table 1. Result of Apportioning a $1 Tax Per Capita ("Federal"): Tax Burden Per Free Person

	1790	1800	1810	1820	1830	1840	1850	1860
Northeast	1.01	1.01	1.00	1.00	1.00	1.00	1.00	1.00
ME	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
NH	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
MA	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
RI	1.01	1.00	1.00	1.00	1.00	1.00	1.00	1.00
CT	1.01	1.00	1.00	1.00	1.00	1.00	1.00	1.00
VT	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
NY	1.04	1.02	1.01	1.00	1.00	1.00	1.00	1.00
NJ	1.04	1.04	1.03	1.02	1.00	1.00	1.00	1.00
PA	1.01	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Northwest		1.01	1.00	1.00	1.00	1.00	1.00	1.00
OH		1.00	1.00	1.00	1.00	1.00	1.00	1.00
IN		1.02	1.01	1.00	1.00	1.00	1.00	1.00
IL			1.01	1.01	1.00	1.00	1.00	1.00
MI			1.00	1.00	1.00	1.00	1.00	1.00
WI						1.00	1.00	1.00
IA						1.00	1.00	1.00
CA							1.00	1.00
KS								1.00
MN								1.00
OR								1.00
Up South	1.19	1.20	1.20	1.18	1.18	1.18	1.17	1.16
DE	1.11	1.06	1.04	1.04	1.03	1.02	1.02	1.01
MD	1.29	1.27	1.25	1.21	1.18	1.14	1.11	1.09
VA	1.39	1.39	1.40	1.40	1.38	1.34	1.30	1.27
NC	1.21	1.23	1.26	1.28	1.30	1.29	1.30	1.30
KY	1.12	1.13	1.15	1.17	1.19	1.18	1.16	1.15
TN	1.06	1.09	1.12	1.14	1.16	1.17	1.19	1.20
MO				1.11	1.13	1.11	1.09	1.06
ARK				1.08	1.11	1.15	1.17	1.21
Low South	1.39	1.39	1.48	1.47	1.53	1.56	1.52	1.54
SC	1.45	1.44	1.54	1.63	1.71	1.73	1.81	1.80
GA	1.33	1.35	1.43	1.47	1.44	1.41	1.44	1.47
MS		1.39	1.44	1.46	1.56	1.65	1.63	1.74
LA			1.50	1.49	1.62	1.55	1.54	1.53
AL				1.29	1.37	1.45	1.48	1.49
FL					1.48	1.54	1.49	1.47
TX							1.23	1.26
TERRS							1.00	1.00
DC		1.18	1.17	1.14	1.11	1.07	1.05	1.03
TOTAL	1.13	1.12	1.12	1.11	1.11	1.10	1.10	1.09

Source: Calculated from *Seventh Census of the United States: 1850,* ix; *Eighth Census of the United States: 1860,* 598–99.

created a legal thicket that awaited only an effort by Congress to use its tax power. Nobody could challenge the 1789 impost or 1791 whiskey excise by claiming they were "direct taxes," since both "imposts" and "excises" appeared in the Constitution in the clause mandating uniformity. In 1794, however, Congress laid a tax on pleasure carriages. Like an automobile registration fee, the carriage tax was an annual tax on carriage owners, graded to charge more for expensive carriages ("coaches" and "chariots")

than for cheaper ones ("top" and two-wheeled carriages).[71] It was a tax on the owners of a particular form of property. It resembled carriage taxes that most of the states also levied, but this did not help to define it under the Constitution. Massachusetts levied its carriage tax in the laws that levied its excises (indirect), using separate laws for land and poll taxes (direct), but most other states taxed carriages in the same laws that levied land and poll taxes.[72] Unsurprisingly, the federal carriage tax went straight to the courts. The result was *Hylton v. U.S.*

Fisher Ames and James Madison jousted briefly in Congress over the different treatment of carriage taxes in the tax laws of their states, but the *Hylton* record contains no appeals to state-level precedents.[73] In fact, construction of the tax power was a problem raised almost solely by the federal Constitution. State constitutions said little about taxes. Many vested the tax power in the legislature, required lower houses to originate money bills, and limited or abolished religious taxes.[74] Pennsylvania's 1776 constitution instructed the legislature to determine that taxes were "of more service to the community than the money would be, if not collected," and required that septennial reviews of legislation by councils of censors look into "whether the public taxes have been justly laid and collected in all parts of this commonwealth."[75] New Jersey in 1777 created an appeals process for "unjust assessments, in cases of public taxation."[76] Yet only two of the revolutionary-era state constitutions mentioned particular tax instruments. The Massachusetts constitution of 1780 required "assessments, rates, and taxes" to be "proportional and reasonable" and property to be valued decennially if the state tax continued to tax "polls and estates, in the manner that has hitherto been practised." It also permitted "duties and excises," which had to be "reasonable" as well.[77] The Maryland constitution of 1776, uniquely among the revolutionary constitutions, inaugurated a major tax reform. It barred "levying of taxes by the poll," exempted "paupers" from property tax ("paupers ought not to be assessed for the support of government"), and required "every other person" to be taxed "according to his actual worth, in real or personal property."[78] There was nothing in any of the state constitutions resembling the direct tax clauses of the U.S. Constitution. The reason is clear: no state faced the same problem as the Philadelphia Convention, the need to forge a "great compromise" between slave and free states. No state had to protect slaveholders explicitly in its constitution. Only the nation had to do this because only the nation was "half slave and half free." The states were, to continue in Lincoln's words, "all one thing, or all the other."[79]

Nor did the tax clauses in state constitutions generate much litigation. From a modern (or a late nineteenth-century) perspective, the Massachusetts and Maryland clauses look like invitations to challenge taxes on constitutional grounds. They were not. The "proportional and reasonable" rule in Massachusetts reached the state supreme court only three times before the Civil War, the court decided all three cases permissively, and only the first case was serious, upholding a tax on bank stock in 1815. The other two upheld a Boston law requiring property owners to shovel the snow from their sidewalks (1835) and a sidewalk tax levied on owners of the abutting property (1844).[80] In Maryland, the appellate courts ruled on the state's poll tax ban in 1793, upholding a law to finance county courts by requiring lawyers to buy licenses to practice. The more complex uniformity clause ("according to his actual worth, in real or personal property") did not reach the appellate courts until 1843, and even then the courts "presumed" that the legislature had obeyed

71. *U.S. Statutes at Large,* 1 (1794), 373–74. The law targeted carriages "for the conveyance of persons," exempting those used in farming or trucking ("the transporting or carrying of goods, wares, merchandise, produce, or commodities").

72. For state carriage taxes, Julius Goebel, Jr., and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton: Documents and Commentary,* 5 vols. (New York: Columbia University Press, 1964–1981), 4:300–303. For state tax systems, Oliver Wolcott, Jr., "Direct Taxes," *American State Papers: Finance,* 5 vols. (Washington, DC: Gales and Seaton, 1832–1859), 1:414–65. Virginia's local governments still tax cars as "tangible personal property," though this tax is in the process of a phased elimination.

73. *Annals,* 3rd Cong., 1st sess., 730. The congressional debate is summarized in *Hamilton's Law Practice,* 4:305–7.

74. For the tax power vested in the legislature: Maryland, 1776; North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784; Vermont, 1786. For money bills originating in lower houses: Delaware, 1776; Maryland, 1776; New Hampshire, 1776; New Jersey, 1776; South Carolina, 1776; Virginia, 1776; Massachusetts, 1780. For religious taxes: New Jersey, 1776; South Carolina, 1778; Massachusetts, 1780; New Hampshire, 1784. For the original texts of state constitutions, Ben. Perley Poore, ed., *The Federal and State Constitutions,* 2d ed., 2 vols. (Washington, DC: GPO, 1878); Francis Newton Thorpe, ed., *The Federal and State Constitutions,* 7 vols. (Washington, DC: GPO, 1909).

75. *Constitution of Pennsylvania,* 1776, secs. 41, 47. Vermont copied these clauses; *Constitution of Vermont,* 1777, art. 2, secs. 37, 44.

76. *Constitution of New Jersey,* 1776, sec. 14.

77. *Constitution of Massachusetts,* 1780, art. 1, sec. 4, copied by *Constitution of New Hampshire,* 1784, art. 2.

78. *Constitution of Maryland,* 1776, sec. 13. *Constitution of Tennessee,* 1796, art. 1, secs. 26–27, were very specific, and *Constitution of Ohio,* 1802, art. 8, sec. 23, copied Maryland's poll tax ban. For the antebellum constitutions and Maryland's reform, Robin L. Einhorn, "Species of Property: The American Property Tax Uniformity Clauses Reconsidered" (ms. in author's possession).

79. This was true legally, but not economically. Recent antebellum studies stress divisions within slave states, esp. William G. Shade, *Democratizing the Old Dominion: Virginia and the Second Party System, 1824–1861* (Charlottesville: University Press of Virginia, 1996); Harry L. Watson, "Slavery and Development in a Dual Economy: The South and the Market Revolution," in *The Market Revolution in America: Social, Political, and Religious Expressions, 1800–1880,* ed. Melvyn Stokes and Stephen Conway (Charlottesville: University Press of Virginia, 1996), 43–73. Starting with Kentucky in 1792, many southern state constitutions were amended to incorporate explicit protections for slaveholders.

80. *Portland Bank v. Apthorp,* 12 Mass., 252 (1815); *Goddard's Case,* 16 Pick., 504 (1835); *City of Lowell v. Hadley,* 8 Met. 180 (1844).

the requirements of the constitution.[81] In a legal context this permissive, the direct tax clauses of the U.S. Constitution stand out. There were no state precedents when the carriage tax raised the problem of defining "direct taxes" in *Hylton*. As the opponents of the federal carriage tax (who paid an uncontroversial state carriage tax in Virginia) would argue, the act of targeting a form of property for taxation was grievous only when it was Congress that did the targeting – because only Congress legislated for a polity that was half slave and half free.

Hylton was a trumped-up test case of the carriage tax, organized by Alexander Hamilton to ensure that it reached the Supreme Court. Because the Judiciary Act of 1789 granted appellate jurisdiction to the Supreme Court only in cases involving more than $2,000, both sides agreed to the fictitious "facts" that Daniel Hylton of Virginia owned 125 chariots that he kept "exclusively for [his] own private use," and the United States paid Hylton's legal fees.[82] At the circuit court phase in Virginia, Hylton was represented by John Taylor of Caroline, who would pioneer the proslavery states' rights doctrines later identified with John C. Calhoun. The U.S. government was represented by John Wickham, a close friend (and next-door neighbor) of John Marshall in Richmond and, in his own right, a major figure in Virginia legal circles.[83] The Virginia lawyers searched European political economy for the usage of the term "direct tax." Taylor emphasized the theories of James Steuart, and Wickham answered with Smith and Turgot. Ultimately, however, the Virginians agreed that European political economy could not solve their problem. For Taylor, the issue of whether the carriage tax could be ruled "indirect" (and thus constitutional) was about whether Congress could levy a prohibitive slave tax. The connection might not seem obvious, but Taylor believed that a positive verdict on the carriage tax would mean that "every other species of property is exposed." "Unhappily for the southern states," he continued, "they possess a species of property, which is peculiarly exposed, and upon which if this law stands, the whole burden of government may be exclusively laid." A carriage tax that passed constitutional muster, according to Taylor, would let Congress use taxation "to effect a general emancipation, by imposing upon the property thus intended to be secured [i.e., the slaves intended to be freed], an excise or duty so exorbitant as to deprive it of its value."[84] Wickham dismissed Taylor's anxiety. The reference to "capitation" in the direct tax clause ("No capitation, or other direct tax . . .") was "intended to remove ambiguity on this point."[85] Slave taxes were capitations, capitations were direct taxes, and an "indirect" carriage tax therefore had no implications for slavery.

When the *Hylton* case reached the Supreme Court, Hamilton defended the carriage tax. In Hamilton's hands, the case was not about slavery at all. It was about the political economy of "direct" and "indirect" taxes. Hamilton expanded the Virginians' list of European authorities to include Locke and Necker, as well as the physiocrats, Steuart, and Smith (whom Hamilton called the "Oracle").[86] Generally, however, Hamilton followed Wickham's lead in using the theory. The carriage tax was "indirect" because it taxed an item of luxury consumption. A carriage was a proxy for the high income of its owner, making the tax an indirect tax on that income.[87] In the late eighteenth century, however, there was also another way to distinguish direct from indirect taxes: on the basis of shifting. Since merchants who paid imposts and

81. *Egan v. Charles County,* 3 H. & McH., 169 (1793); *Waters v. Maryland,* 1 Gill 302 (1843). *Waters,* the first appellate test of the Maryland uniformity clause, emerged from circumstances bizarre enough to affirm that state constitutions usually did not propel taxes into the courts. In the early 1830s, Maryland levied property taxes to finance the deportation of "free negroes and mulattoes" to Liberia. The Montgomery County tax collector collected them but refused to give the proceeds to the state treasurer. The state sued him and lost on a technicality about his official bond, with the court meanwhile rejecting his claim that the tax was apportioned to the counties in a way that violated the uniformity clause—as though this justified Waters stealing the money!

82. *Hylton v. U.S.,* 171; *Hamilton's Law Practice,* 4:315; Jacob E. Cooke, *Tench Coxe and the Early Republic* (Chapel Hill: University of North Carolina Press, 1978), 294. For Hamilton organizing the case, esp. Hamilton to Tench Coxe, Jan. 28, 1795, *Hamilton's Law Practice:* 4:340–42, and Harold C. Syrett, ed., *The Papers of Alexander Hamilton,* 27 vols. (New York: Columbia University Press, 1961–1987), 18:201–2. See also, in ibid., Edward Carrington to Coxe, July 28, 1794 (17:2); Coxe to Carrington, Aug. 26, 1794 (17:2); Hamilton to Coxe, Aug. 1–15, 1794 (17:2); Coxe to Hamilton, Jan. 14, 1795 (18:40–41); Coxe to Carrington, Jan. 14, 1795 (18:41–42); William Bradford to Hamilton, July 2, 1795 (18:396–97).

83. On Taylor, see Robert E. Shalhope, *John Taylor of Caroline: Pastoral Republican* (Columbia: University of South Carolina Press, 1980). On Wickham, Albert J. Beveridge, *The Life of John Marshall,* 4 vols. (Boston: Houghton Mifflin, 1916–1919), 2:182–185, 3:394–97. Both published their briefs as pamphlets: John Taylor, *An Argument Respecting the Constitutionality of the Carriage Tax* (Richmond: Augustine Davis, 1795); John Wickham, *The Substance of an Argument in the Case of the Carriage Duties* (Richmond: Augustine Davis, [1795]).

84. Taylor, *Argument,* 8, 20.

85. Wickham, *Substance,* 15.

86. Alexander Hamilton, "Brief" and "Statement of the Material Points of the Case," *Hamilton's Law Practice,* 4:342–55 ("Oracle" on 4:346). See also, Jean-Pierre Gross, "Progressive Taxation and Social Justice in Eighteenth-Century France," *Past and Present* 140 (1993): 79–126.

87. Smith, *Wealth of Nations,* 827:

> Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways. The consumer may either pay an annual sum on account of his using or consuming goods of a certain kind; or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods which last a considerable time before they are consumed altogether, are most properly taxed in the one way. Those of which the consumption is either immediate or more speedy, in the other. The coach-tax and plate-tax are examples of the former method of imposing: the greater part of the other duties of excise and customs, of the latter.

manufacturers who paid excises shifted the taxes into the prices they charged consumers, the taxes fell on consumers "indirectly." The fictitious "facts" of the *Hylton* case, the 125 chariots "exclusively for [Hylton's] own private use," acknowledged the currency of this distinction by preventing the Court from considering whether Hylton ran a jitney service and shifted the tax to his customers (which he did not). The fictitious facts show that the logic distinguishing direct and indirect taxes on the basis of shifting was a common-sense logic in the late eighteenth century.[88] Had this logic prevailed in *Hylton,* John Taylor might have won.

Yet, as it turned out, the Supreme Court had even less interest in economic theory than the Virginia attorneys. The Court upheld the carriage tax unanimously, but not because the justices were persuaded by Hamilton's exposition of European political economy. They held that the carriage tax was "indirect" under the Constitution rather than "indirect" as defined by any of the political economists. All three of the justices who wrote opinions stressed, in the words of Justice Samuel Chase, that a carriage tax could not be apportioned by population "without very great inequality and injustice" because the distribution of carriages did not mirror the distribution of population.[89] The quota apportioned to a state with few carriages would fall prohibitively on its few carriage owners, while the quota apportioned to a state with many carriages would fall lightly on its many carriage owners. Because the apportionment rule could not produce a fair carriage tax, the tax had to be "indirect" under the Constitution. Justice William Paterson added a gloss on the "great compromise," arguing that because the three-fifths clause's representation of slaves was "radically wrong," the clause's impact "ought not to be extended by construction."[90] Justice James Iredell, however, summed up the common argument of his colleagues by defining "direct taxes" from the Constitution's text: "As all direct taxes must be *apportioned,* it is evident that the Constitution contemplated none as direct but such *as could be apportioned.*"[91] The Court acknowledged slavery's role in creating the predicament that gave rise to *Hylton,* but it gave no notice to the Virginia discourse about slavery – Taylor's fear of the "general emancipation" that would result if a northern congressional majority could decide what to tax.

Unlike the "great compromise" that produced the direct tax clauses, the *Hylton* case was about taxes. This is why Hamilton and the Supreme Court could safely ignore the Virginia talk about abolitionist northern majorities. Taylor drew this rhetoric from the Virginia Antifederalists of 1788, although his analysis of the tax power under the Constitution actually was the opposite of theirs. George Mason and Patrick Henry thought the tax power was "unlimited" (except for the ban on export taxes) and that the Constitution would destroy the states because Congress would preempt their revenue sources. Taylor, in contrast, claimed that the Constitution did not grant Congress much of a tax power at all. Even though *Hylton* involved a carriage tax, a mainstay of Virginia's tax system, Taylor never mentioned intergovernmental competition. He insisted that the Framers had placed almost all federal taxation under the apportionment rule, and that they had done so in order to protect slavery: "[I]f the southern states are allowed not to have been duped, it is not improbable, that this species of property, had its influence . . . to produce the rule of numerical proportion."[92] In the end, neither Taylor nor Mason and Henry really cared about tax policy. They were not thinking about slaveholders as an interest group with a straightforward economic stake in tax decisions. They were not arguing either about whether slaves should be taxed (as they were in Virginia) or about whether slave taxes should be high or low. They were worried that a robust government at the national level, a government able to tax, would abolish slavery altogether. When the question was whether to ratify the Constitution, this was a relevant consideration. Taylor and Wickham echoed debates waged throughout the South in 1788. In *Hylton,* however, the fear of abolition was not relevant. Nobody was planning to use the federal tax power to liberate African Americans. Hamilton and Congress, with help from the Supreme Court, were trying to raise money.

The *Hylton* decision had long-term consequences. Congress could lay a variety of taxes. The federal government would not inherit the full "imbecility" of the Articles of Confederation. Yet, while *Hylton* reduced the potential impact of the direct tax clauses on the federal tax power, the case also inspired a belated acknowledgement of the significance of the "great compromise" for taxation. As Paterson saw, apportioned

88. Nor is this the only evidence. For an especially clear statement, Charles Thomson to John Dickinson, Dec. 25, 1780, *LDC,* 16:486:

> There are two methods [of taxation] in use; one by a direct application to the people for the sums necessary; the other by imposts and duties. The latter is a mode of drawing money from the people insensibly. For although the money is first paid by the importer, exporter or possessor of the article, upon which the impost or duty is laid, yet . . . the money is refunded to him by the people.

See also Taylor, *Argument,* 6, 10–11, 32.

89. *Hylton v. U.S.,* 174.

90. Ibid., 177–78. Paterson also argued that because the direct tax clauses were framed to protect the South against high taxes on land and slaves, these were the only objects of "direct taxes."

91. Ibid., 181. Later cases citing *Hylton* as a precedent emphasized that Justices Chase, Paterson, and James Wilson (who approved the tax in the circuit court) were delegates to the Philadelphia Convention, as was Hamilton. Thus, they presumably knew what the term "direct tax" meant when it was placed into the Constitution. See esp. *Veazie Bank v. Fenno,* 545.

92. Taylor, *Argument,* 20.

direct taxes would create administrative nightmares and probably raise "a fund not much more productive than that of requisition under the former government."[93] In imagining the "inequality and injustice" that would result from a carriage tax apportioned to the states by population, Wickham, Hamilton, and the Supreme Court justices all grasped the weakness of the apportionment rule as a way to distribute tax burdens. The clearest explication was Paterson's. Population "do[es] not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence."[94] Even without the special problem raised by including three-fifths of the slaves in the taxable population (see Table 1), the political economy of an apportioned tax depended on the relative wealth of the states. Any tax that was apportioned by population would capture a higher proportion of the wealth of poorer states than of richer states.

This would be the issue in *Pollock*. Slavery was gone by the 1890s, and the South was a poorer region than it had been in the early republic and antebellum decades. The 1894 income tax was, among other things, an effort by the South and West to tax the disproportionate wealth of the Northeast by levying an indirect (unapportioned) income tax. The Supreme Court sided with the Northeast, abandoned the *Hylton* precedent, revealed the full implications of the Philadelphia Convention's "great compromise" for the tax power, and inspired the Sixteenth Amendment.[95] As Ackerman explains, the amendment exempted *only* an income tax from the apportionment rule, which means that slavery's legacy in the Constitution's text might be invoked to obstruct major federal tax reforms even today.[96] In the early republic, however, the apportionment rule actually was not the main obstacle to direct taxation; the "great compromise" was recent enough to command assent. In the early republic, the chief problem was the design of direct taxes. This problem arose from the partisan implications of the dual economy created by slavery.

III. THE POLITICS OF DIRECT TAXATION

Much of the discourse about direct taxes in the early republic hinged on the issue of their transparency. Tax systems, Madison argued in 1792, should "include a proportion of such as by their direct operation keep the people awake, along with those, which being wrapped up in other payments, may leave them asleep, to misapplications of their money." Jefferson made a similar point, recommending a federal land tax in 1797 that "would awaken our constituents, and call for inspection into past proceedings" of the federal government that had increased the public debt.[97] These statements were grounded in hostility to the Federalist administrations of Washington and John Adams, but James Wilson had said much the same thing in 1783, drawing the opposite policy conclusion. Americans, Wilson explained, had a "peculiar repugnance" to taxation not only because of the "odious" British taxes that had triggered the Revolution, but also because of "the direct manner in wch. taxes in this Country have been laid; whereas in all other countries taxes were paid in a way that was little felt at the time."[98] Wilson was referring to state taxes and praising the impost (although he also favored a national land tax). His point was that the impost could be more productive than requisitions because the requisition system rested on direct taxes in the states. These arguments sketched a trade-off in tax policy between transparency and productivity. Direct taxes on polls and property were honest because they were highly visible to the taxpayers, but they also could be unproductive. Indirect taxes on consumption raised revenue easily, but could fool the taxpayers to whom they were shifted in the prices of other things. In an early modern economy with uneven monetization, this trade-off was very real. Shays' Rebellion dramatized the problem of a highly visible direct tax. Scarce currency supplies made it difficult for many farmers to pay heavy property taxes, and they were losing their farms as a result. The Massachusetts direct tax in 1786 was brutally honest, but it also was uncollectable.

Yet, as the impost debates demonstrated, transparent taxes created problems long before they dunned any taxpayers. Whenever Congress considered taxes that had more or less obvious economic impacts, they soon found themselves in distasteful debates about economic interests and in scary debates about slavery. Hence the impost's political virtue. Robert Morris may have been trying to explain the difference to the Continental Congress in the sophisticated economic analysis he sent them with a politically implausible tax plan in 1782.[99] First, Morris proposed to tax land at flat rates per acre rather than according to value. Not only would per-acre land taxes make an assessment of real estate values unnecessary, but it also would deter land speculation by taxing large uncultivated tracts heavily in proportion to their value. How was a Con-

93. *Hylton,* 178.

94. Ibid., 174–75, 179–80, 181–83 (quotation on 178); Wickham, *Substance,* 9; Hamilton, "Statement of Material Points," 4:352–53.

95. John D. Buenker, *The Income Tax and the Progressive Era* (New York: Garland, 1985).

96. Ackerman, "Taxation," 56–58, proposes an annual federal tax on total individual wealth.

97. Madison, "Universal Peace," Jan. 31, 1792, Thomas Jefferson to St. George Tucker, Aug. 28, 1797, both quoted in Sloan, *Principle and Interest,* 178, 193. See also John Page, "Circular Letter," May 12, 1794, in *Circular Letters of Congressmen to their Constituents, 1789–1829,* ed. Noble Cunningham, 3 vols. (Chapel Hill: University of North Carolina Press, 1978), 1:28–29, which adds the physiocratic idea that all taxes fall ultimately on land.

98. Madison, "Notes of Debates," Jan. 27, 1783, 6:134.

99. Morris to Congress, July 29, 1782, *Morris Papers,* 5:65–69.

gress full of land speculators supposed to react to this? Were they supposed to become more receptive when Morris praised this tax as "an Agrarian Law without the Iniquity"? Morris presented a poll tax unlike those of any of the states. Northern poll taxes taxed adult males or unmarried "freemen." Southern poll taxes taxed free adult males plus slaves of both sexes, usually between certain ages.[100] Morris's plan would tax free adult males plus male slaves aged 16 to 60. The first thing everyone would notice here was the exemption of female slaves. This exemption may have been intended to equalize the taxation of labor in the North and South (Morris did not explain), but it obviously would open a debate that nobody in Congress would want to have. Morris proposed a whiskey excise for its invisibility ("Of all Taxes, those on the Consumption of Articles are most agreable; because, being mingled with the price, they are less sensible to the People"), as a sumptuary regulation ("a Means of compelling Vice to support the Cause of Virtue"), and, most strangely, as a regressive tax that could "draw from the Idle and Dissolute that Contribution to the public Service, which they will not otherwise make."[101] After reading all this, there was just no way the Continental Congress could contemplate seriously any tax but the impost. Economic analysis was political suicide.

Table 2 outlines the history of federal tax revenue in the early republic. The impost was overwhelmingly dominant, raising more than 85 percent of total tax revenue in every year until late in the War of 1812. "Internal revenue" includes the 1794 carriage tax and several other small taxes passed at the same time, plus the infamous whiskey excise. The "direct" taxes were federal taxes on real estate and slaves imposed in 1798 and 1813.[102] Clearly, none of the internal taxes raised very much money. In the context of this data, the *Hylton* case seems little more than a footnote in the history of federal tax policy, despite its constitutional significance. The carriage tax was projected to raise only $150,000 per year; it actually raised $44,000 in 1795, $41,000 in 1796, and $72,000 in 1797.[103] The crisis over the whiskey excise in 1794 was far more serious. President Washington riding out with the troops to crush the "rebellion" in western Pennsylvania was a more dangerous episode in U.S. political history than any judicial review could have been. Little money was at stake in the Whiskey Rebellion, despite the burdens the whiskey excise may have imposed on the frontier farmers who claimed to be "forced" by high transport costs to distill their grain into whiskey, though there were high stakes that were not financial.[104] Enmeshed in the politics of the U.S. response to the French Revolution and the creation of the party system of Federalists and Jeffersonians, the Whiskey Rebellion posed the most significant threat to federal sovereignty until the Nullification Crisis of 1832 or even (because of the military response) until the shelling of Fort Sumter. There was a revolt against the 1798 direct tax, the Fries Rebellion of 1799. Its partisan ramifications were more localized, though troops were sent, treason trials were held, and President John Adams ended up pardoning ringleaders who were sentenced to death.[105] The point, however, is that no consideration of the direct taxes, whiskey excise, or carriage tax can ignore the context of the impost's dominance in the federal revenue system.

European states did not rely on direct taxes in the

100. See, e.g., South Carolina, *Statutes at Large* (Cooper 1838), 1:365 (1777), 413 (1778), 487 (1779), 529 (1783), 627–28 (1784), 729 (1786); Pennsylvania, *Statutes at Large from 1682 to 1801* (Mitchell, Flanders 1903), 9:102 (1777), 364 (1779), 10:240 (1780), 330–31 (1781), 390 (1782). South Carolina taxed only slaves and free people of color in its poll tax until 1786, when it added "free white men" aged 21 to 50. A 1799 New York law taxed slaves as property. New York, *Laws* (1886), 4:403. Virginia taxed slaves in the poll tax, but experimented with valuation during the Revolution. Frederick Tilden Neely, "The Development of Virginia Taxation, 1777 to 1860" (Ph.D. diss., University of Virginia, 1956), 36–37, 49. Maryland, having banned poll taxes, taxed slaves as property. Einhorn, "Species of Property." For the race and gender implications of these poll taxes, see Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996), 116–28. The tax on unmarried freemen (Pennsylvania) reflected an assumption about married men supporting women and children.

101. As far as I know, nobody has read this letter as a satire of political economy. In addition to the evidence for this suggestion cited in the text, Morris could not have thought Congress, much less the state legislatures, would favor requiring men to carry their national poll tax receipts as a "useful Regulation of Police." (*Morris Papers,* 5:68) Nor do his activities as a land speculator suggest that an "agrarian law" would have appealed to him. Finally, the editors of the *Morris Papers,* 5:43, say Morris "delegated the task of deriving theoretical formulations and defenses of his policies" to Gouverneur Morris, who is widely described as too clever by half.

102. Nontax revenue from land sales and the post office raised over 10 percent of federal revenue only in 1796 (15 percent), 1802 (11 percent), 1814 (12 percent), and 1815 (10 percent). Davis Dewey, *Financial History of the United States,* 12th ed. (New York: Longmans, Green, 1934), 112, 126, 142. The 1794 package also taxed auction sales, sugar refineries, snuff mills, and retail licenses to sell imported liquor. For its low yield, Tench Coxe, "Internal Revenue," Feb. 29, 1796, and Feb. 21, 1798, *American State Papers: Finance,* 1:386–403, 557–65.

103. Ibid., 560, 595. Indeed, Table 2 identifies the main event in the history of federal taxation as a foreign policy rather than a tax policy. Presidents Jefferson and Madison tried to influence Britain and France by shutting down U.S. trade, which disrupted the previously steady rise in customs receipts and had an especially painful revenue impact during the War of 1812.

104. Whiskey as a cash crop is standard in the literature. Cooke, "Whiskey Insurrection," 329–36, questions it; Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986), deemphasizes it.

105. Elkins and McKitrick, *Age of Federalism,* 695–700. See also Adaneus Burke (South Carolina Jeffersonian) on the Whiskey Rebellion's local origin. It had enhanced federal power, "but what did the silly, mischievous Yahoos over the Allegeny think, or care, about consequences." Burke to James Monroe, Dec. 26, 1794, quoted in George C. Rogers, *Evolution of a Federalist: William Loughton Smith of Charleston* (Columbia: University of South Carolina Press, 1962), 270.

Table 2. Components of Federal Tax Revenue

	Tax Revenue (millions of dollars)				Tax Revenue (percent)		
	Customs	Internal Revenue	Direct	Total	Customs	Internal Revenue	Direct
1791	4.4			4.4	100		
1792	3.4	0.2		3.7	92	5	
1793	4.2	0.3		4.6	91	7	
1794	4.8	0.3		5.1	94	6	
1795	5.6	0.3		5.9	95	5	
1796	6.5	0.5		7.1	92	7	
1797	7.5	0.6		8.1	93	7	
1798	7.1	0.6		7.8	91	8	
1799	6.6	0.7		7.4	89	9	
1800	9.1	0.8	0.7	10.6	86	8	7
1801	10.7	1.0	0.5	12.3	87	8	4
1802	12.4	0.6	0.2	13.2	94	5	2
1803	10.4	0.2		10.7	97	2	
1804	11.0			11.2	98		
1805	12.9			12.9	100		
1806	14.6			14.6	100		
1807	15.8			15.8	100		
1808	16.3			16.3	100		
1809	7.2			7.2	100		
1810	8.5			8.5	100		
1811	13.3			13.3	100		
1812	8.9			8.9	100		
1813	13.2			13.2	100		
1814	6.0	1.6	2.2	9.8	61	16	22
1815	7.3	4.7	2.1	14.1	52	33	15

Source: Davis Dewey, *Financial History of the United States,* 12th ed. (New York: Longmans, Green, 1934), 112, 126, 142.

eighteenth century either. While only Britain collected reliable data on the yields of its various taxes, the major European powers all leaned on consumption taxes. The British excise, French *aides* and *gabelles,* Dutch *gemene middelen,* and Spanish *alcabala* were notoriously regressive, though the Dutch excise was made less regressive in the eighteenth century through rates scaled to favor goods bought by less wealthy consumers.[106] In Britain, the excise on alcoholic beverages and other commodities raised almost half the total tax revenue annually from 1750 to 1798, with the other half split fairly evenly among customs, land tax, and a group of miscellaneous taxes. In France, direct taxes may have been more important; economic historians report figures as high as one-half, although the surviving data systematically inflate the relative burden of the French direct taxes.[107] This reliance on domestic consumption taxes, however, differed from U.S. policy, as the miniscule "internal revenue" figures in Table 2 illustrate. Nor did the politics that led European states to rely on consumption taxes involve the American transparency problem. Adam Smith

106. Jan de Vries and Ad van der Woude, *The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500–1815* (Cambridge: Cambridge University Press, 1997), chap. 4; Carolyn Webber and Aaron Wildavsky, *A History of Taxation and Expenditure in the Western World* (New York: Simon and Schuster, 1986), chap. 5; Peter Mathias and Patrick O'Brien, "Taxation in Britain and France, 1715–1810. A Comparison of the Social and Economic Incidence of Taxes Collected for the Central Government," *Journal of European Economic History* 5 (1976): 601–50; John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783* (Cambridge, MA: Harvard University Press, 1990); George T. Matthews, *The Royal General Farms in Eighteenth-Century France* (New York: Columbia University Press, 1958); James C. Riley, *The Seven Years War and the Old Regime in France: The Economic and Financial Toll* (Princeton: Princeton University Press, 1986), chap. 2; John Lynch, *Bourbon Spain 1700–1808* (Oxford: Blackwell, 1989), 61–65, 110, 114–15, 165–69.

107. The "direct" figures are levies rather than yields that must have been lower; the "indirect" figures are lease prices paid by tax farmers rather than collections that must have been higher. See Mathias and O'Brien, "Taxation in Britain and France," 642–46. On the collection of the direct taxes, J. F. Bosher, *French Finances 1770–1795: From Business to Bureaucracy* (Cambridge: Cambridge University Press, 1970).

defended the European excises on administrative grounds: "The state not knowing how to tax, directly and proportionably, the revenue [income] of its subjects, endeavors to tax it indirectly by taxing their expense . . . by taxing the consumable commodities upon which it is laid out." He also praised their invisibility; to Smith, it was a good thing that "the consumer, who finally pays them, soon comes to confound them with the price of the commodities, and almost forgets that he pays any tax."[108] Yet politics was more important than theoretical political economy. European direct taxes were too thoroughly compromised by aristocratic privilege to produce revenue on a large scale. The French *taille* and *capitation* taxes arbitrarily exempted lands that belonged, or that once had belonged, to nobles and clergy, while the monarchy also corrupted its newer land taxes, the *dixièmes* and *vingtièmes,* by the sale of exemptions. It is difficult to imagine a better illustration of the clout of the British landed elite (both gentry and aristocracy) than the fact that the British land tax registers, compiled in 1692, were never updated during the eighteenth century.[109]

Regressivity was only part of the problem with European tax systems. Their enforcement regimes also often were brutal. The French tax farming cartel (*fermiers généraux*) was the worst. In addition to their regular collectors, they deployed an armed, uniformed force of 20,000 guards who could enter any house, stop any vehicle, seize any goods they deemed contraband, and arrest anyone they considered a smuggler. They even conducted house-to-house searches through poor neighborhoods, looking for salt that had been purchased in violation of the royal salt monopoly (*gabelles*) that the tax farmers operated. The height of their arrogance was a plan to enforce the taxes on goods entering Paris (*entrées de Paris*) by building an elaborate customs wall around the city. Begun in 1783, this massive project involved the wholesale demolition of private homes in its path and was almost complete in July, 1789, when the Paris mob destroyed it two days before storming the Bastille.[110]

The British collection bureaucracy was much better, though it inspired widespread hatred as well. John Brewer's excellent study of the Excise Office suggests that its poor reputation resulted primarily from a sustained slander campaign by gentry opponents of the government, who meanwhile supported the constant expansions of the excise tax that subsidized their low land taxes. The fact that Americans eagerly read the critiques of ministerial "tyranny" produced by the country party propagandists made the United States an echo chamber for an anti-excise rhetoric ranging from learned treatises to scurrilous doggerel.

> No new EXCISE
> With five hundred Eyes,
> Shall henceforth your Wives or your Daughters surprize;
> For if they had License to gage all your *Stocks,*
> May also pretend to gage under their Smocks.[111]

As Brewer shows, the Excise Office was highly professional and effective, with a well-organized and well-trained force of 4,900 employees (which briefly included Tom Paine). Still, its success in extracting taxes from a disfranchised population was hardly a recommendation to Americans, whose memories of the more brutal Customs Service enhanced their enthusiasm for the country party critique. Even Americans who saw through the hypocrisy of the British gentry use of this rhetoric had no interest in introducing a bureaucracy on this scale to the United States.[112]

The demand for transparent direct taxes in the early republic involved more than a hint of hypocrisy. Federalist Rep. Uriah Tracy was enraged by the Jeffersonian "wakefulness" argument in 1794. It was, he said, a claim "that, when taxes are to be raised, Government is in duty bound to give the people who pay these taxes, *as much trouble as possible!*"[113] More to the point, the difficulty of designing and enacting a national direct tax was well understood. On top of the apportionment rule, Congress had to straddle two very different economies in the context after 1791 of a highly charged partisan atmosphere. There is no need to recount the history of the formation of the first party system here. For our purposes, the critical point is that struggles in the second session of the first Congress – over the assumption of state debts and the location of the national capital – led to the formation in Congress of what soon would be the Federalist and Republican parties. It took the parties longer to organize outside of Congress, but, energized by the domestic politics of the French Revolution and the Jay Treaty with Britain, they were firmly in place by 1796. Madison led the Republicans in Congress until 1797, then handed the reins to Albert Gallatin of Pennsylvania. Federalist leadership was dispersed among a group of articulate New Englanders with help from

108. Smith, *Wealth of Nations,* 821, 846–47.
109. Riley, *Seven Years War,* 48–52; Brewer, *Sinews of Power,* 203.
110. Matthews, *Royal General Farms,* esp. 109–14, 172–73.

111. *An Excise Elegy: or, the Dragon Demolish'd, a New Ballad* (London, 1733), quoted in Paul S. Boyer, "Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754," *William and Mary Quarterly,* 3d ser., 21 (1964): 341; Brewer, *Sinews of Power,* 91–114, 199–206; Paul Langford, *The Excise Crisis: Society and Politics in the Age of Walpole* (Oxford: Clarendon, 1975), 156–62; Isaac Kramnick, *Bolingbroke and his Circle: the Politics of Nostalgia in the Age of Walpole* (Cambridge, MA: Harvard University Press, 1968).
112. Brewer, *Sinews,* 105; Forrest McDonald, *Alexander Hamilton: A Biography* (New York: Norton, 1979), 120–21, 159–60, 215–17; Herbert E. Sloan, "Hamilton's Second Thoughts: Federalist Finance Revisited," in *Federalists Reconsidered,* ed. Doron Ben-Atar and Barbara B. Oberg (Charlottesville: University Press of Virginia, 1998), 69. See also Theodore Sedgwick on the excise in British politics, *Annals,* 3rd Cong., 1st sess., 624.
113. Ibid., 623.

South Carolina.[114] Nobody raised the transparency argument against the impost in the first session of the first Congress. Nor was it used against the whiskey excise that was defeated in the second session, before the assumption of state debts. In the third session, however, the successful whiskey excise incited a classic "country party" tirade ("a swarm of harpies, who, under the denomination of revenue officers, will range through the country, prying into every man's house and affairs"), which Madison tried to deflect. Madison "should prefer direct taxation to any excise whatever," but no direct tax could win a majority in Congress and this particular excise was acceptable.[115] It turned out, of course, that the whiskey excise was not acceptable in western Pennsylvania.

For the history of federal tax policy, the most significant result of the Whiskey Rebellion was the election of Albert Gallatin to Congress in 1794, from the district at its center (he lived in a neighboring district) and as a result of his active participation. What he later called his "only political sin" launched his career to the national level.[116] Madison could analyze the economic and administrative aspects of tax policy with authority, but Gallatin had a specific expertise in the American politics of taxation.

His arrival in Congress was well-timed. In the debates over the 1791 whiskey excise and 1794 carriage tax package, the threat of a direct tax was chiefly a club Federalists used to beat back Republican country party attacks on excises. If the problem with excises was the "swarm" of officials necessary to collect them, a direct tax could only be worse. If the problem was their dishonesty, drafting a more honest tax would involve Congress in "infinite difficulty." In support of the 1791 whiskey excise, John Laurance of New York also cited the three-fifths clause, doubting "whether direct taxes on this principle would be agreeable, even to the gentlemen who have mentioned them."[117] Gallatin transformed this discourse. His contribution to Jeffersonian tax theory was to subordinate the vague country party preference for "honest" taxes to a forthright demand for a federal land tax. His contribution to Jeffersonian tax politics was to return the Federalist dare with a double dare. Federalists helped defeat the direct tax Gallatin championed in the Republican fourth Congress, but in the notorious Federalist fifth (which also authorized big army and navy build-ups, the naval "quasi-war" with France, and the Alien and Sedition Acts), they swallowed the bait. Some Federalists understood Gallatin's effort to manipulate them into enacting an unpopular measure. The Connecticut Federalist Uriah Tracy attributed the Republicans' 1797 demand for a direct tax to a "satanic hope, that they can enjoy the fulfillment of their prophecies concerning the administration." When the strategy worked in 1798, moreover, Jefferson celebrated his party's victory. The disease of Federalism would pass: "Indeed, the Doctor is now on his way to cure it, in the guise of a tax gatherer."[118]

Gallatin's brilliant move was to notice that the political economy of the apportionment rule had two parts, both of which shaped the partisan politics of a federal direct tax. Everyone knew that the three-fifths clause would affect the distribution of tax burdens *between* states, but Gallatin realized that it also affected the distribution *within* states. What Tracy called a "satanic" partisan tactic embraced only half Gallatin's strategy. Gallatin explained this in *A Sketch of the Finances of the United States* (1796).[119] Most of the book was an attack on Hamilton's funding system, and especially the assumption of state debts. The funding package, Gallatin noted, had provided for the payment only of interest immediately, deferring most of the principal until 1801. The impending principal charges could never be met from such marginal revenue sources as the whiskey excise and carriage tax. The impost generated large sums of money, but because it bore unduly heavily on the South, it should not be hiked to finance the assumption, which benefited the North disproportionately. Thus, some kind of direct tax was needed, and Gallatin proposed a federal land tax. This was the part of the argument that offended Tracy: Gallatin's demand that Federalists take responsibility for the cost of the assumption by taxing with maximum visibility. Gallatin also claimed that a land tax could raise vastly more money than internal indirect taxes, which was plausible on eco-

114. For a detailed road map, Elkins and McKitrick, *Age of Federalism.* See also Cunningham, *Jeffersonian Republicans;* Manning J. Dauer, *The Adams Federalists* (Baltimore: Johns Hopkins University Press, 1953); Mary P. Ryan, "Party Formation in the United States Congress, 1789–1798: A Quantitative Approach," *William and Mary Quarterly,* 3d ser., 28 (1971): 523–42; Alfred F. Young, *The Democratic Republicans of New York: the Origins, 1763–1797* (Chapel Hill: University of North Carolina Press, 1967); Paul Goodman, *The Democratic-Republicans of Massachusetts: Politics in a Young Republic* (Cambridge, MA: Harvard University Press, 1964).

115. *Annals,* 1st Cong., 3rd sess., 1891–92, 1894.

116. He was elected to the Senate in 1793, but unseated on the ground that he had not yet been a citizen for nine years. Raymond Walters, Jr., *Albert Gallatin: Jeffersonian Financier and Diplomat* (New York: Macmillan, 1957), 50–52, 59–63, 65–86.

117. *Annals,* 3rd Cong., 1st sess., 641; 1st Cong., 3rd sess., 1895. In the third Congress, the main "country" speakers were William Findley and John Smilie of Pennsylvania and John Nicholas of Virginia. It may have seemed the end of the line for this rhetoric when Nicholas was forced to apologize for insulting U.S. excise collectors, "whom he represented as the dregs of society." "With some gentlemen in the line referred to," he now claimed, "he had as strict a friendship as with any persons on earth" (ibid., 3rd Cong., 1st sess., 700, 705).

118. Uriah Tracy to Oliver Wolcott, Sr., Jan. 24, 1797, George Gibbs, ed., *Memoirs of the Administrations of Washington and John Adams. Edited from the Papers of Oliver Wolcott,* 2 vols. (New York: printed privately, 1846), 1:439; Jefferson quoted in Elkins and McKitrick, *Age of Federalism,* 724–25. Sloan, "Hamilton's Second Thoughts," 74, explains that France's conquest of the Netherlands meant that the Federalists could not borrow—they had to tax.

119. Albert Gallatin, *A Sketch of the Finances of the United States,* in *The Writings of Albert Gallatin,* ed. Henry Adams, 3 vols. (New York: Antiquarian Press, 1960), 3:69–168.

nomic grounds ("our capital in lands is immense"), but doubtful in administrative terms.[120] Gallatin's crucial insight, however, lay in his analysis of the economic incidence of a federal land tax. A land tax apportioned to the states by population would burden northern farmers more heavily than anyone else. This was true because the northern populations contained relatively large numbers of artisans (he did not mention merchants or lawyers), whose presence would boost the apportioned burdens of northern states. "If a land tax presses harder upon the landholders of the North, it is because the proportion of cultivators is less and that of manufacturers is greater than to the South."[121] In an apportioned tax that was levied solely on land, northern farmers would bear heavy burdens. Not coincidentally, these northern farmers were the core constituency of the Federalist party.

As clever as this was, Gallatin's southern colleagues in the fourth Congress improved it. Gallatin had recognized slavery only as part of a conventional defense of the three-fifths clause (the low productivity of slave labor).[122] In the House Ways and Means Committee deliberations on the design of the direct tax, however, he learned that he had missed the partisan significance of slavery. Southerners insisted that the direct tax be levied on both land and slaves, and, when the committee reported a bill in accordance with this, a strange debate erupted on the floor. New Englanders opposed the slave tax; Southerners insisted on it. Richard Brent (R-VA) captured the basic oddity of this debate: "it was a very extraordinary thing that gentlemen who represented States where there were no slaves, should oppose a tax on that species of property, and that the Southern States where slavery existed, should be advocating that tax."[123] Extraordinary, yes, but not inexplicable. It followed from Gallatin's initial insight about the *within-state* incidence of an apportioned tax. Jeremiah Potter (F-RI) explained the New England position. A tax on land and slaves would fall on "the personal property of the Southern States, which, no doubt, they would be glad of," but it would fall in the North on real estate alone. Potter

> saw no reason the personal property of those States should be made to bear a part of the proposed burden, whilst personal property in other States was suffered to go free. It was a hard case, he said, that a man who possessed three or four hundred dollars in land, should be made to pay a portion of the direct tax, whilst men of affluence, who possessed many thousands in public securities, or loaned on interest, should pay nothing.[124]

That was it. Much of the personal property held by elites in the North consisted of what a later generation would call "intangible assets" (negotiable paper). Much of the personal property held by elites in the South, however, consisted of human beings.[125] If the apportioned tax was levied on land *and* slaves, non-slaveholding farmers in the South would pay less than if it was levied on land alone (a smaller proportion of their states' quotas). New England farmers, meanwhile, not only would bear the burdens apportioned for larger non-farm populations, but they also would "suffer" the wealth of the urban elites in their states to "go free." Slave taxes would insulate the slaveholding elites of the South against charges in their states that they were "aristocrats," while land taxes would have the opposite impact on the merchant elites of the North. An apportioned tax on land and slaves would mute class conflict in the South but exacerbate class conflict in the North. This could only help Republicans and hurt Federalists. A tax designed this way created an ideal "wedge issue" to split the Federalist party in its New England stronghold.[126]

The Federalists were not entirely at a loss on this problem. Most of them preferred to tax consumption, on the theory that consumption was the best proxy for the incomes of free people, and the fourth Congress ended up rejecting the direct tax and hiking the impost rates. In the fifth Congress, however, when the Federalists favored a direct tax (to fund their military build-up and because French attacks on U.S. shipping made impost revenue seem precarious), they needed a strategy to avoid the partisan trap Gallatin and the southern Republicans had set. Their solution was to separate "dwelling houses" from other real estate and tax the houses at progressive rates. The house tax was

120. Ibid., 3:168. Gallatin dismissed excises on the grounds that U.S. manufacturing was too small-scale and scattered to generate revenue either in large sums or efficiently. Ibid., 3:162–63.

121. Ibid., 3:160. Madison anticipated this analysis in his 1783 proposal to tax land in an inverse proportion to population density, and there were precursors as early as the 1776 debate over the Articles of Confederation. Gallatin's innovation was to grasp the partisan implications of the analysis for Republicans in the 1790s: A national land tax identified with the Federalists could turn New England farmers into Jeffersonians.

122. Ibid., 3:159.

123. *Annals,* 4th Cong., 2nd sess., 1939. For party identification in the fourth and fifth congresses, I am relying on Dauer, *Adams Federalists,* 294–96, 306–9.

124. *Annals,* 4th Cong., 2nd sess., 1936.

125. For slaves as taxable personal property in antebellum states, Peter Wallenstein, *From Slave South to New South: Public Policy in Nineteenth-Century Georgia* (Chapel Hill: University of North Carolina Press, 1987); J. Mills Thornton III, "Fiscal Policy and the Failure of Radical Reconstruction in the Lower South," in *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward,* ed. J. Morgan Kousser and James M. McPherson (New York: Oxford University Press, 1982), 349–94. For the taxation of "intangible assets," Clifton K. Yearley, *The Money Machines: the Breakdown and Reform of Governmental and Party Finance in the North, 1860–1920* (Albany: State University of New York Press, 1970).

126. The effect in South Carolina would include both: the urban merchants of Charleston, largely Federalist, would "go free," while the slaveholding planters, largely Republican, would be seen paying their share. There was also another problem with direct taxation. Apportionment using the 1790 census would neglect a decade of westward migration, which would hurt New England and benefit the middle states and South. *Annals,* 4th Cong., 2nd sess., 1855–56, 1906, 1917–27.

intended to shift much of the tax burden in the North to the cities, and especially to the opulent houses of the merchant elite, in precisely the same way that the slave tax was intended to shift much of the tax burden in the South to the planter elite. A progressive house tax would tax the intangible wealth of northern merchants indirectly. "Land carries with it evidence of no other property besides itself," as Nathaniel Smith (F-CT) explained it, "but an elegant house carries an idea of something farther, and the possessor of it certainly ought to pay a heavier tax than the solitary possessor of land." The separate house tax, Smith concluded, was necessary to make the direct tax "palatable" in the North.[127] The result was a complicated tax structure. The direct tax of 1798 was a $2 million tax to be:

1. apportioned to the states based on population as defined in the three-fifths clause,
2. levied on slaves aged 12 to 50 at 50 cents per slave,
3. levied on houses worth over $100 at progressive rates ranging from 0.2 percent on houses worth $100 to $500 to 1.0 percent on houses worth over $30,000, and
4. levied on land according to value, but only in states where the slaves and houses had raised less than the apportioned quota, and at rates set to make up the difference.[128]

Federalists estimated that, of the $2 million, houses would raise $1.2 million, slaves $300,000, and land only $500,000 – which would indeed be a break for ordinary farmers, North and South, if the house assessments worked out as planned (which would depend on the choice, instruction, and supervision of assessors).[129] Nobody challenged the slave tax this time, but Gallatin opposed the house tax strenuously. He insisted that valuing houses separately from land was impractical and a sinister scheme to favor urban elites. Samuel Sewell (F-MA) could justly describe these as "uncandid arguments."[130] Some southern Republicans, meanwhile, realized that the house tax might dump the entire southern burden on the planter elite. Abraham Venable (R-VA) panicked: if "houses [were] taxed as the representatives of other property," the slave tax was "a double tax" on "the large slaveholders, as they generally occupied the largest houses."[131] The Federalists had demonstrated that two could play at this game. If the southern planters wanted to be seen paying their share, the tax could be structured not only to give northern merchants the same opportunity, but also to hike the cost of the show in the South.

The roll call votes on the direct tax, presented in Tables 3 and 4, support this analysis of the congressional tax game of the late 1790s. Table 3, the fourth Congress votes, shows that both Federalists and Republicans divided on Gallatin's direct tax (votes 1 and 3). It also reveals the solid southern and weak northern support for the slave tax (vote 2) that was suggested in the "extraordinary" debate. Table 4 presents direct tax roll calls from the fifth Congress.[132] Table 4 shows that Federalists strongly favored the separate house tax ("no" on votes 1 and 2) and that Republicans strongly opposed it ("yes" on votes 1 and 2). Two bills were required to enact the direct tax, one to value property and count slaves (vote 3), and another to levy the tax in 1798 (vote 4). Federalists voted for both bills overwhelmingly, 46 to 1 on the valuation, 42 to 0 on the tax, but Republicans split on the bills, with interesting behavior emanating from the Jeffersonian heartland. The large delegation of Virginia Republicans opposed the separate house tax 8 to 1 and 9 to 0, but *supported* the tax bills 10 to 1 and 9 to 0. Because the bills would have passed even without them, this might seem puzzling. Gallatin also voted against the house tax and for the valuation, but he voted "no" on the tax bill. Yet the Virginia Republicans played the game out to the end. They tried to make the tax regressive in the North. Failing at that, they still voted to enlist Jefferson's "doctor" to help beat the Federalists in 1800. Given the general record of the fifth Congress – particularly the Alien and Sedition Acts – the Vir-

127. *Annals,* 5th Cong., 2nd sess., 1846. See also Samuel Sewall (F-MA):

> This clause was intended as a remedy to the defect acknowledged to exist in a system of this kind, of not being able to reach personal property. This bill does not go to the property of persons in business, or to any kind of money-property, and laying a tax upon a man, in proportion to the size and goodness of his house, will, in some degree, remedy the omission. (*Ibid.,* 1853)

Hamilton had proposed a house tax in 1783, and now fleshed out the proposal as a progressive tax with a schedule of rates per room plus surcharges, e.g., 20 cents per fireplace, 25 cents per painted room, $2 per stucco ceiling. Hamilton, however, wanted this (with other taxes) to substitute for a land tax even if it had to be apportioned. Hamilton to Wolcott, June 6, June 8, 1797, Gibbs, *Memoirs,* 1:544–47; Hamilton to William Loughton Smith, June 10, 1797, *Hamilton Papers,* 21:106–7. Wolcott and the congressional Federalists incorporated the progressive house tax into the direct tax.

128. *U.S. Statutes at Large,* 1 (1798), 597–98.

129. I have found no better source for these estimates than Gallatin's attack on them as "a mere take-in." *Annals,* 5th Cong., 2nd sess., 1850. Oliver Wolcott, "Apportionment of Direct Taxes," May 25, 1798, *American State Papers: Finance,* 1:589–90, made similar estimates for a bill that assessed houses differently and taxed slaves at a lower rate. Federalists were explicit about their intentions for the houses. John Williams (F-NY): "The riches of the country lie in the cities, and the taxes ought, therefore, principally to fall there." Sewall: urban houses "will be taxed much higher than houses in the country" in order to favor farmers, who "would see the reasonableness of taxing people according to their ability to pay, which is the object of this bill." *Annals,* 5th Cong., 2nd sess., 1841, 1854.

130. Ibid., 1853. Gallatin also tried to raise the slave tax to 65 cents. Ibid., 2059.

131. Ibid., 2058.

132. Two roll call votes are omitted: a June 8 vote defeating an attempt to use state tax laws to distribute the tax within states, and a June 29 vote on the slave tax. Federalists opposed the use of the state laws overwhelmingly and Republicans opposed it by a small margin. The slave tax won far stronger support from the North than the South this time, though 44 percent of Upper South congressmen still voted for it. Ibid., 1898, 2059–60.

Table 3. Direct Tax Roll Calls, 4th Congress (January 20, 1797)

		1 Tax Land		2 Tax Slaves		3 Prepare Bill		Percentage Voting Yes		
		Yes	No	Yes	No	Yes	No	1 Land	2 Slaves	3 Bill
New England	Total	5	21	10	17	5	21	19	37	19
	CT	2	5	1	6	2	5	29	14	29
	MA	1	11	5	7	1	11	8	42	8
	NH	1	3	2	2	1	3	25	50	25
	RI	0	2	0	2	0	2	0	0	0
	VT	1	0	2	0	1	0	100	100	100
Middle	Total	18	5	19	3	17	5	78	86	77
	DE	1	0	1	0	1	0	100	100	100
	NJ	1	2	1	2	1	2	33	33	33
	NY	8	1	7	0	6	1	89	100	86
	PA	8	2	10	1	9	2	80	91	82
Up South	Total	22	11	33	3	25	10	67	92	71
	KY	2	0	2	0	2	0	100	100	100
	MD	5	1	7	0	6	1	83	100	86
	NC	2	8	8	2	2	7	20	80	22
	TN	0	1	1	0	0	1	0	100	0
	VA	13	1	15	1	15	1	93	94	94
Low South	Total	3	2	6	0	2	3	60	100	40
	GA	2	0	2	0	1	0	100	100	100
	SC	1	2	4	0	1	3	33	100	25
Federalists		23	21	29	16	23	21	52	64	52
Republicans		25	17	38	7	26	18	60	84	59
TOTAL		48	38	67	23	49	39	56	74	56

Source: Annals of Congress, 4th Cong., 2nd sess., 1933, 1941, 1942– 43.

ginians did not have to worry about being charged with complicity in a tax everyone would blame on the Federalists. In fact, they could don the mantle of fiscal responsibility: A wild Federalist spending spree, which they had opposed, had forced them to acquiesce in this odious tax.

There are several noteworthy points in this political story. First, both Federalists and Republicans favored relatively progressive taxes on their respective home turfs. Based on their behavior in these debates, neither can be characterized as greedy elitists seeking to profit themselves, their friends, or their "class" at the expense of the mass of "ordinary farmers." On the contrary, both presented themselves as champions of the farmers' interests, and they were equally plausible in the role. Second, this politics was a local politics. New Englanders worried about how farmers would respond to a tax exempting commercial wealth, and Virginians worried about how they would respond to a tax exempting the "peculiar" assets of slaveholders. Third, the use of the term "personal property" in these debates provides conclusive evidence against Charles A. Beard's old interpretation of early national politics as a contest between "realty" and "personalty" interests.[133] Congress understood "personal property" to include both slaves *and* assets represented by paper (such as public securities). The complexity of the 1798 tax exemplified this double meaning in a design that aimed to burden personalty more heavily than realty by taxing both slaves and houses before land. Fourth, country party republicanism was irrelevant to the politics of the direct tax. It was important in the excise debates of the early

133. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); Charles A. Beard, *Economic Origins of Jeffersonian Democracy* (New York: Macmillan, 1915).

Table 4. Direct Tax Roll Calls, 5th Congress (June–July 1798)

		1		2		3		4					
		June 29		June 29		June 13		July 2		Percentage Voting Yes			
		House=Land		House=Land		Valuation Bill		Tax Bill		1	2	3	4
		Yes	No	Yes	No	Yes	No	Yes	No	H=L	H=L	Value	Tax
Federalists	Total	8	35	9	32	46	1	42	0	19	22	98	100
New England	CT		7		7	7		7				100	100
	MA	1	10	1	10	10	1	10		9	9	91	100
	NH	3	1	3	1	2		4		75	75	100	100
	RI		1		1	1		1				100	100
	VT												
Middle	DE					1		1				100	100
	NJ		4		4	4		4				100	100
	NY		3		3	6		3				100	100
	PA	1	4	2	3	3		4		20	40	100	100
Up South	KY												
	MD	2	3	2	2	6		5		40	50	100	100
	NC		1	1		1		1			100	100	100
	TN					3						100	
	VA	1						1		100			100
Low South	GA												
	SC		1		1	2		1				100	100
Republicans	Total	24	11	29	7	23	18	20	18	69	81	56	53
New England	CT												
	MA	1		1			1		1	100	100		
	NH												
	RI	1		1		1			1	100	100	100	
	VT	1	1	1	1	1	1	1	1	50	50	50	50
Middle	DE												
	NJ												
	NY	3		3			2	1	2	100	100		33
	PA	2	1	4		4	2	3	3	67	100	67	50
Up South	KY	1			2		2		2	100			
	MD	2		1	1	2		2		100	50	100	100
	NC	2	5	4	3	3	5	3	3	29	57	38	50
	TN		1	1			1		1		100		
	VA	8	1	9		10	1	9		89	100	91	100
Low South	GA	1	1	1		2		1	1	50	100	100	50
	SC	2	1	3			3		3	67	100		
TOTAL		32	46	38	39	69	19	62	18				

Source: Annals of Congress, 5th Cong., 2nd sess., 1925, 2059, 2060, 2066–67.

1790s, but once direct taxation was on the agenda, congressmen stopped making derivative speeches about "swarms of harpies." Fifth, while this politics hinged on the sectional economies arising from the dominant labor systems of the North and South, it reflected a national partisanship. No congressman wanted to exempt the personal property of the rich in his own state, especially not the rich of his own party, but all were happy to brand their rivals as self-interested elitists, or, in a word, as "aristocrats." This

was Gallatin's strategy. Although Federalists were able to fight back on the design of the 1798 direct tax itself, the strategy worked like a charm in 1800 more generally. It also worked on Charles Beard and Merrill Jensen, and it works on some historians of the early republic even today. The direct tax debates, in short, show the Jeffersonians and Federalists in action as partisans.

They also confirm the significance of slavery in the national politics of taxation. Gallatin missed this at first, perhaps because frontier Pennsylvania was not the place to learn it. Madison might not have initiated a game as dangerous as the one congressional Republicans played in the late 1790s. His call for "honest" taxes operated on the premise that his opponents would flinch before the prospect of a divisive debate about transparent taxes. Madison also focused chiefly on energizing the southern base of his party. Gallatin, however, developed a strategy to win in the North. With his Virginia colleagues in the fourth Congress, Gallatin worked out a tax policy designed to alienate northern farmers from merchants to break up the Federalist coalitions in the North, but to do it without alienating southern farmers from planters in the Republican coalitions of the South. This was a diabolical deployment of class politics that was possible only because slavery created two political economies in the United States. For it to work, moreover, the Republicans had to embrace slavery openly. They had to acknowledge that planters were far from "ordinary farmers." This was not a *Herrenvolk* strategy emphasizing equality among whites. It was an acknowledgement of inequality in the South designed to let planters patronize their inferiors by visibly bearing higher tax burdens. Federalists caught on, and embraced the progressive house tax to give northern merchants the same patronage opportunity in their own states. Gallatin kept insisting that the house tax was a scheme to exploit farmers in favor of merchant elites. To argue otherwise, Federalists had to explicate the details of a very complicated piece of legislation.[134] The 1799 Fries Rebellion, in which farmers resisted assessors in an eastern Pennsylvania district with no merchants or opulent houses, played into both the Republican charges of "aristocracy" and the country party appeal against swarms of U.S. officials. Jefferson's "doctor" cured the Federalist disease in that Pennsylvania district forever.[135]

Many Federalists would respond with sputtering rage to the reality that the Jeffersonians, led by a slaveholding elite, succeeded in branding *them* as "aristocrats." Their sometimes florid expressions of this rage – attacks on "Jacobins" and praise for a deferential, hierarchical social order – did nothing for their historical reputation. As David Hackett Fischer and Linda Kerber have shown, a second generation of Federalists recovered from the madness the Jeffersonians provoked in some of their elders, reviving a forthright critique of the hypocrisy of slaveholders posing as the apostles of liberty.[136] Samuel Dexter had made this point in the 1794 carriage tax debate. He noted that Massachusetts was rather more egalitarian than some other states. There, Dexter claimed, few people could afford to own coaches and few could not afford to own horses. On top of this, "one man was not there disposed of at the will of another." And yet, "this happy race of equal Republicans never, since the institution of our Government, have sent one member here to whine and thunder about the aristocracy of our Constitution."[137] The key to recovery for New England Federalists may have been the party's loss of South Carolina and Maryland. Much like the Democrats in the 1930s and 1940s, the Federalists in the late 1790s had a southern wing the northerners were unwilling to alienate. They did not even respond when, for example, John Page (R-VA) blithely dismissed the concerns of their constituents in the 1797 slave tax debate:

> If a person living in a State where slavery does not exist, paid something more for his land, the difference was certainly not equal to the satisfaction he must enjoy in reflecting, that his State was free from that evil.[138]

Spoken, of course, like a true Jeffersonian.

Finally, these debates demonstrate the centrality of slavery to the design of a national tax system. From the 1776 attempt to draft Articles of Confederation to the end of the Federalist era, slavery intruded into every effort to create a tax system at the national level. This should not be surprising. Slavery was a major institution in the American political economy. However much politicians wanted to avoid discussing slavery in the interest of unity, serious thinking about the economy could not evade it. Whether they were analyzing the incidence of consumption taxes, applying a labor theory of value to the problem of tax apportionments, or sorting the implications of the three-fifths clause into partisan programs for direct taxes, politicians in the early republic had to figure slavery into their calculations. Neither Adam Smith nor the English country party ideologists could help here. There were no relevant European precedents for handling a crucial socioeconomic institution that

134. One wonders, for example, how many of his South Carolina backcountry constituents actually read the detailed explication in Robert Goodloe Harper, "Circular Letter," July 23, 1798, *Circular Letters,* 1:136–38.

135. Dauer, *Adams Federalists,* 207.

136. David Hackett Fischer, *The Revolution of American Conservatism: the Federalist Party in the Era of Jeffersonian Democracy* (Chicago: University of Chicago Press, 1965). For New England Federalist rhetoric about slavery, Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca: Cornell University Press, 1970), chap. 2, is indispensable.

137. *Annals,* 3rd Cong., 1st sess., 628.

138. *Annals,* 4th Cong., 2nd sess., 1939. Dauer, *Adams Federalists,* 296, identifies Page as a Federalist but shows that he voted with the Republicans in the fourth Congress.

made even its most ardent defenders uncomfortable. The political problems slavery raised were unique to the United States. Tax debates are often contentious, since they distribute concrete costs among groups who defend their direct economic interests. That is the stuff of politics. But when the interests included an institution as totally indefensible as slavery in a polity holding "truths to be self-evident," normal interest-group conflict could give way to paralysis. There is a paradox here for the history of early U.S. state-building. In the interest of political unification, it was absolutely essential to downplay slavery. Had Thomas Lynch bolted in 1776, the United States might have been dead within weeks of its creation. The three-fifths clause was a "great compromise" in part because its linguistic formula – "three fifths of all other persons" – accommodated slavery without naming it. But this state-building success was difficult to extend to the visible taxation of American wealth. European direct taxes were weakened by elite power and entrenched privilege. In the United States, the problem was not taxing elites, but naming their assets in the first place. Unless there is a powerful (thus, expensive) navy to protect commerce, a strong state requires an internal tax base. Whiskey and carriages could never become more than token revenue engines. Anything else elicited the dangerous politics of slavery.

There is an epilogue to this story. In 1802, the Jeffersonians abolished the internal taxes and dismantled the collection bureaucracy. During the War of 1812, Madison and Gallatin faced revenue needs much like those the Federalists had faced in 1798: military action was costly, and the impost failed when trade was disrupted, now by the British Navy and the Jeffersonian foreign policy of trade embargoes. In 1812 before war was declared, Gallatin tried to persuade Congress to tax. One Republican condemned him for "treading in the muddy footsteps of his predecessors in attempting to strap round the necks of the people this odious system of taxation, adopted by them, for which they have been condemned by the people and dismissed from power." Gallatin's tax plan certainly looked familiar. He proposed impost hikes, a whiskey excise, the carriage tax package, and a direct tax on land, houses, and slaves.[139] Congress did nothing. In the summer of 1813, however, they passed the plan wholesale – twelve bills through the entire legislative process in six weeks.

The most significant innovations involved the direct tax. The direct tax of 1813 was apportioned to particular counties within the states (though it let the state legislatures amend the county quotas) and it offered the states 15 percent discounts if they assumed their quotas, raising the money themselves. It also dropped the progressive house tax and the prior taxation of houses and slaves. It was to be levied on land, houses, and slaves "at the rate each of them is worth in money."[140] This tax met Gallatin's old demand that houses be assessed with other real estate. It enhanced assessors' discretion over the taxation of slaves, with results that would depend on the micropolitics of local assessments. This tax also would fall solely on real estate in the North, but on both real and personal property in the South. It was the Jeffersonian direct tax. It was levied again in 1815 and then abolished in 1817 with the rest of the internal revenue system.[141]

Federalists said little during the 1813 tax debates, voting against all of the bills to express their opposition to the war. As the Republicans wrangled with each other, the politics of slavery intruded in a venerable context. John Clopton (R-VA), an aging veteran of the fourth and fifth congresses, declared the carriage tax unconstitutional. The Supreme Court were not "the arbiters of my conscience," and an "indirect tax" was a tax that was shifted to consumers. Clopton's main point, however, was that carriages and slaves were similar "objects of property," distinct "only in being different species of it." If a slave tax was "direct" and could be assessed by the value of individual slaves, a carriage tax was "direct" and could be assessed by the value of individual carriages. "Can the human imagination mark any real distinction between a tax upon the one and a tax upon the other, as it affects, in either case, the owner or person immediately charged with the payment of the tax?" Clopton rejected his colleagues' revival of the "consumption" defense of the carriage tax, which had held that it was "indirect" because carriages were items of luxury consumption. Slaves who worked as "the attending servant or waiter" provided a "convenience" for their owners just as carriages did: "Many slaves are employed in a manner to which the idea of expense may be as well attached, as that idea is attached to the employment of a carriage."[142] Clopton, of course, wanted the planter elite to bear more of the apportioned direct tax in southern states by paying it on their carriages as well as their slaves. He wanted carriages to function as both slaves and houses had functioned in 1798, reducing the taxes levied on the landholdings of yeoman farmers. When Clopton finished his speech, the "indirect" carriage tax was amended slightly and engrossed for its third reading. New England Federalists sat back and watched this display of the multiple ambiguities of Jeffersonian democracy.

139. For the quotation, *Annals,* 12th Cong., 1st sess., 1123. For Gallatin's plan, ibid., 847–56. For the abolition of the Federalist tax system, *U.S. Statutes at Large,* 2 (1802), 148–50.

140. *Statutes at Large,* 3 (1813), 26, 53–71.

141. Ibid., 3 (1815), 164–80; 3 (1817), 401–3.

142. *Annals,* 13th Cong., 1st sess., 422–28, quotations on 423, 427.