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NOTE

CONGRESSIONAL POWER TO INSTITUTE A WEALTH TAX

*Will Clark**

Over the last few years, several high-profile politicians have pushed to impose a federal “wealth tax.” For example, a recent bill introduced in the Senate would create a two percent tax on the value of assets between fifty million and one billion dollars, plus a higher percentage on wealth valued over one billion dollars.¹ The proponents of the tax argue that it would reduce the growing wealth inequality in the United States,² while opponents say that it would disincentivize investment in the American economy.³

Policy arguments, however, are only relevant if the federal government has the authority to institute such a tax. Under our Constitution’s limited grant of authority to the government, there exists an intricate framework of how the legislature may impose certain taxes. First is the broad grant that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts

* J.D. Candidate, University of Notre Dame Law School, 2024; B.S. in Accounting, Purdue University, 2017. I would like to thank my wife, Bailey, for being such a positive and supportive partner throughout law school. And thank you to all of the members of the *Notre Dame Law Review* for editing this article; my apologies that it is about taxation. All errors (of which there certainly are some) are mine.

1 S. 510, 117th Cong. § 2901 (2021). Senators Elizabeth Warren and Bernie Sanders are the “chief proponents” of this tax, which is supported by a number of politicians in the House and Senate. Danielle Kurtzleben, *How Would a Wealth Tax Work?*, NAT’L PUB. RADIO (Dec. 5, 2019, 5:00 AM), <https://www.npr.org/2019/12/05/782135614/how-would-a-wealth-tax-work> [<https://perma.cc/PME2-757A>]; see Greg Iacurci, *Elizabeth Warren, Bernie Sanders Propose 3% Wealth Tax on Billionaires*, CNBC (Mar. 1, 2021, 5:18 PM), <https://www.cnbc.com/2021/03/01/elizabeth-warren-bernie-sanders-propose-3percent-wealth-tax-on-billionaires.html> [<https://perma.cc/93GM-GMUF>].

2 See generally Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111 (2018).

3 See Kyle Pomerleau, *A Property Tax Is a Wealth Tax, but . . .*, TAX FOUND. (Apr. 30, 2019), <https://taxfoundation.org/property-tax-wealth-tax/> [<https://perma.cc/U5Q5-QZLD>].

and Excises shall be uniform throughout the United States”⁴ This broad grant, however, is subject to the caveat that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”⁵ The direct tax carve out is reiterated elsewhere in Article I, as “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union”⁶ Exactly what qualifies as a “direct” tax has long perplexed scholars and judges.⁷ There is another grant of taxing authority in the Constitution, which allows the government to impose an income tax—even though it has historically been considered “direct”—without meeting the apportionment requirement.⁸ Most, if not all, commentators have conceded that a tax on property could not be considered an “income” tax, so that issue will not be addressed here.⁹

This Note will argue that any wealth tax will necessarily qualify as a direct tax under Article I. Therefore, although Congress does have the capacity to levy a wealth tax, the requirement that it be apportioned among the several states renders it economically and politically infeasible to actually enact the tax.¹⁰ To bolster this conclusion, it will look into preratification practices of the colonies, which will help to inform the original public meaning of “direct taxes.” The word “direct” to describe a tax was essentially invented by the Founders, so that phrase in isolation does not provide much meaning. However, the Note will

4 U.S. CONST. art. I, § 8, cl. 1.

5 *Id.* art. I, § 9, cl. 4 (the Direct Tax Clause).

6 *Id.* art. I, § 2, cl. 3.

7 *See, e.g.,* Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 847, 871 (2009) (saying that “[t]here is no definition of ‘direct tax’ in the Constitution, and none was offered to the delegates in the 1787 Constitutional Convention” and that “[t]he conclusion that best matches the historical data is that there was no clear consensus view of ‘direct tax’”). This has been the position of academics for over a century. *See* J. H. Riddle, *The Supreme Court’s Theory of a Direct Tax*, 15 MICH. L. REV. 566, 566 (1917) (“[O]nly one thing is sure, namely, that no one knew exactly what was meant by a direct tax, because no two people agreed.” (quoting Edwin R. A. Seligman, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 569 (2d ed. 1914))).

8 U.S. CONST. amend. XVI. Specifically, the government may “lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States.”

9 Some commentators have called for a creative combination of wealth and income taxes, whereby the government would use a citizen’s wealth in order to trigger a higher income tax rate, while staying within the bounds of the Sixteenth Amendment. *See generally* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020). This solution, however, is beyond the scope of this Note.

10 As a simple example: If two states have the same population, but one state has twice the “wealth” of the other, the “poorer” state will pay double the tax rate of the richer state in order to reach the constitutionally required equal amount of both states. *See* Dodge, *supra* note 7, at 845.

assert that only a narrow class of taxes were regularly “apportioned” before ratification, so the historical practice should therefore give meaning to the public understanding of “direct taxes”. Second, it will analyze the debates surrounding ratification of the relevant constitutional provisions. These statements shed light on the distinction between direct and indirect taxes that the Framers intended, and further elucidate the original meaning. While there was no one definition of “direct,” the Framers consistently used the term to describe taxes on the value of property. Lastly, in light of ambiguous text, it will seek to determine whether postratification practice by the legislature and courts effectively gave the provisions a definite meaning.

There have been a number of articles written about the original meaning of a “direct” tax. However, there is a surprising dearth of scholarship about the public meaning of the tax. The originalist-focused articles seem to center around the Framers’ intent (Federalist and Anti-Federalist papers, ratification debates, etc.) surrounding the Direct Tax Clause.¹¹ While this is relevant for constitutional purposes, this Note aims to add to the existing research by highlighting the distinctions between direct and indirect taxes in historical practice, both before and around the time of ratification.

I. PRERATIFICATION HISTORY AND PUBLIC MEANING

When faced with ambiguous constitutional language, “the goal is to discern the most likely public understanding of [the] provision at the time it was adopted.”¹² Reviewing practices from early colonial America often sheds light on the Founders’ beliefs of issues, the problems they were attempting to address with the Constitution, and the contemporary understanding of the issue at the time of ratification.¹³

Even during the seventeenth century, there was a delineation between what would later be termed “direct” and “indirect” taxes.¹⁴ The General Court of Massachusetts first gave itself the power to institute a

11 See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1066–80 (2001).

12 *McDonald v. City of Chicago*, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part and in judgment).

13 See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2142–45 (2022) (reviewing colonial firearm statutes); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 823–29 (2011) (Thomas, J., dissenting) (surveying parent-child relationships in colonial New England); *Carpenter v. United States*, 138 S. Ct. 2206, 2247–48 (2018) (Alito, J., dissenting) (canvassing the usage of grand jury subpoenas from the fourteenth century to the Founding).

14 The actual words “direct” and “indirect” to describe taxes were not used until the Constitution’s drafting. See *infra* note 52. The words are used here to distinguish the treatment of different types of taxes in the preratification period.

tax in 1634.¹⁵ The similarity among the colonies during this time was notable: “In their finances, . . . the colonies of this group resemble one another in all essential particulars.”¹⁶ Uniform currency was not common, so the lack of liquidity “necessitated the payment of taxes—especially direct taxes—in kind.”¹⁷ In the Massachusetts Bay Colony, the first identifiable tax was a property tax, levied on all property of freemen.¹⁸ This property tax, which was representative of nearly every colony at the time, included both real and personal property, livestock, and nearly “all oth[er] visible estate.”¹⁹ Some things never change as centuries pass, as colonists evaded “even low taxes by trying to conceal assets.”²⁰ Other colonies similarly instituted a property tax when other (indirect) taxation efforts did not raise sufficient revenue.²¹

There were two additional forms of direct taxation that were commonplace in the early colonies. First, colonies imposed an income tax to ensure that artisans and merchants, who had less taxable property than farmers, were paying sufficient tax.²² Second, some colonies imposed a “poll” tax, which was effectively a fixed amount for all military-aged men.²³ The unifying theme of all of these “direct” taxes is that

15 ALVIN RABUSHKA, *TAXATION IN COLONIAL AMERICA* 165 (2008); see also Act of May 14, 1634, reprinted in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 120 (Nathaniel B. Shurtleff ed., Boston, Mass. Gen. Ct. 1853) [hereinafter MASSACHUSETTS RECORDS] (“It is further ordered, that in all rates & publique charges, the townes shall have respect to levy e[ver]y man according to his estate, & with considera[tio]n of all other his abilities, whatsoe[v]er, & not according to the number of his p[er]sons.”).

16 1 HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* 468 (Colum. Univ. Press 1930) (1904).

17 *Id.* at 469.

18 Charles H.J. Douglas, *The Financial History of Massachusetts: From the Organization of the Massachusetts Bay Colony to the American Revolution*, in 1 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 259, 265 (Univ. Faculty of Pol. Sci. of Colum. Coll. ed., New York, 1892).

19 Act of Nov. 11, 1647, reprinted in 2 MASSACHUSETTS RECORDS, *supra* note 15, at 213; see also 1 OSGOOD, *supra* note 16, at 471 (noting that the above description “can be found in the records of all the other corporate colonies” (footnote omitted)).

20 RABUSHKA, *supra* note 15, at 168.

21 See JOHN CHRISTOPHER SCHWAB, *HISTORY OF THE NEW YORK PROPERTY TAX* 23 (Baltimore, Am. Econ. Ass’n 1890) (“The low financial condition of [New Amsterdam] . . . led to the . . . addition of direct taxes to the indirect taxes already existing.”). Specifically, the resolution “impose[d] an honest and fair tax upon the real property, as land, houses or lots and [livestock].” Resolutions Adopted Concerning the Proposals Made by the Director-General on the 30th May (June 2, 1654), reprinted in 14 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 270 (B. Fernow ed. & trans., Albany, Weed, Parsons & Co. 1883).

22 See 1 OSGOOD, *supra* note 16, at 472. For example, a Massachusetts Bay Colony law imposed a roughly twenty percent tax on “ev[er]y laborer, artificer, & handicrafts man.” Act of Nov. 4, 1646, reprinted in 2 MASSACHUSETTS RECORDS, *supra* note 15, at 173.

23 See Act of Nov. 4, 1646, reprinted in 2 MASSACHUSETTS RECORDS, *supra* note 15, at 173 (“[E]very male w[i]thin this [j]urisdiction, servant or oth[er], of [the] age of 16 yeares & upward, shall pay yearly . . . [the] sume of 20d . . .”).

the tax was imposed simply for living and owning property in a certain jurisdiction.

Due to most colonies having a relatively weak central government with limited resources, the central authority would define a total amount to be collected, consisting of each communities' quota, then leave the administration and collection of the tax to the individual communities.²⁴ Massachusetts is illustrative. The General Court (its governing body) would impose a "country rate," which was the lump sum for colony-wide usage, and distribute (or "apportion") that amount to each town in the form of a quota.²⁵ For instance, in order to provide for two public officials' salaries in Massachusetts, the government in Boston levied a total tax of fifty pounds, with "each town . . . assigned its proportionate quota."²⁶ After receiving the total levy, the individual communities would consult their respective property listings in order to calculate the appropriate "rate" to impose on local property values.²⁷ The rates would fluctuate depending on the total levy, changes in the communities' populations, and variability in the assessed value of property.²⁸

Nearly every colony also had some form of "indirect" taxation to supplement, or even take precedence over, its direct taxes. How heavily a colony relied on indirect means for revenue depended on its main economic activities. Specifically, colonies that had robust trade practices were more likely to treat import and export duties as a primary source of revenue, as opposed to colonies that had less intercolony interaction.²⁹ The indirect taxes worked in a different manner than

24 See Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 53 (1998).

25 1 OSGOOD, *supra* note 16, at 472. To show how this worked in practice, see Act of Sept. 25, 1634, *reprinted in* 1 MASSACHUSETTS RECORDS, *supra* note 15, at 129. The General Court levied a total charge of 600 pounds, then apportioned a specific quota to twelve towns, to be levied on each town's "several plantations." *Id.* This particular law does not specifically discuss how the quotas were apportioned.

26 1 OSGOOD, *supra* note 16, at 473.

27 See DOUGLAS, *supra* note 18, at 27–29 (noting that this "rate" would increase annually in proportion with public spending); RABUSHKA, *supra* note 15, at 179–82 (noting the same for Connecticut from 1650 to 1687).

28 A similar scheme was common in other New England colonies. In New Hampshire, for instance, the General Assembly assessed a general tax of 500 pounds, with the same order requiring "agree[ment] upon Rules & measures for the New Proportioning the Province Taxes in Each Town & precinct within this Province." Act of May 29, 1724, *reprinted in* 4 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE, FROM 1722 TO 1737, at 380, 381 (Nathaniel Bouton ed., Manchester, John B. Clarke 1870) [hereinafter NEW HAMPSHIRE RECORDS].

29 This was especially true for many of the southern colonies, which relied on taxing exports of tobacco for much of their revenue. See, e.g., RABUSHKA, *supra* note 15, at 228–66 (discussing how Maryland, Virginia, and North Carolina relied primarily on tobacco duties for revenue).

property taxes. Mainly, as opposed to the central governing authority imposing a specific *total amount* that each local community was responsible for collecting, the authority, rather than the local government, would instead impose the specific *rate* on each regulated item or activity.³⁰ For instance, while the Massachusetts General Court would impose a lump sum that the communities would then collect via property, poll, and income taxes, the General Court would instead impose specific rates on imports and exports.³¹ Practically, this distinction was sensible. Certain areas of the colony would not have had the volume of imports and exports that the port towns had, so it would have been irrational—and unfair—to attempt to apportion a trade tax across all towns.

This general scheme was consistent throughout the seventeenth century, up to the years before the Revolution. In Massachusetts in 1763–1775, for example, there was a “specific levy in Lawful Money [that] was stipulated and apportioned to the towns and counties for collection, along with pro-rata fractions of the tax on polls and estates.”³² The same governing body that imposed an *apportionable amount* levy would impose specific *rates* on alcohol, sugar, and tobacco trade during that time period.³³ Some of the colonies had a slightly different method of collecting these direct taxes. Connecticut would require the individual communities to submit a population record and calculation of their ratable estates, then impose a uniform tax on that apportioned data in order to reach its desired sum.³⁴ The southern colonies continued to rely mainly on import and export duties to raise funds during the pre-Revolution period.³⁵ One exception were the poll taxes imposed by the central authority, but those required the

30 See *id.* at 245 (citing 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 134–35 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823)) (noting how the Virginia General Assembly would routinely impose fixed amounts on immigrants, food, alcohol, and livestock).

31 RABUSHKA, *supra* note 15, at 171–73. This “per-item” understanding is likely the impetus for the Constitution’s requirement that “all Duties, Imposts and Excises shall be uniform throughout the United States,” but that argument is beyond the scope of this Note. U.S. CONST. art. I, § 8, cl. 1.

32 RABUSHKA, *supra* note 15, at 771 (surveying General Assembly laws from the time).

33 *Id.* at 774.

34 See An Act for Repealing One Part or Paragraph of the Law Entitled An Act in Addition to the Law of this Colony Entitled An Act for Forming and Regulating the Militia and the Encouragement of Military Skill for the Better Defence of this Colony (1763), *reprinted in* 12 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 133, 134 (Charles J. Hoadly ed., Hartford, Press of the Case, Lockwood & Brainard Co. 1881) (“[A] tax of two pence on the pound is hereby granted and ordered to be levied on all the polls and rateable estate in this Colony according to the list thereof to be brought into this Assembly in October, 1763, . . .”).

35 See RABUSHKA, *supra* note 15, at 835–63.

local constables to supply the central governors with accurate lists of the community's population.³⁶ Thus, even if the central authority imposed the specific rate for the poll taxes, the tax was still effectively apportioned according to population, as each community would only pay a total amount proportional to its number of citizens.

In sum, although nearly every colony had both direct and indirect forms of taxation, only direct taxes were regularly apportioned. Not every tax that is today understood to be "direct"—namely the income tax—was apportioned to the towns. However, property taxes were frequently apportioned to each community according to either wealth or population.³⁷ Indeed, knowing how indirect taxes functioned in the preratification era, it was impossible to subject them to any scheme of apportionment. Given a consistent course of practice over a century and a half, one may presume that the public understood that property taxes were generally apportioned by the central government to the constituent communities.

II. RATIFICATION-ERA UNDERSTANDING

The Articles of Confederation provided the federal government with a limited taxing power. Alexander Hamilton called the Articles' tax provision a "mere recommendation[]" for states,³⁸ while modern commentators point out that allowing states to define their own taxes was fraught with conflicts of interest.³⁹ Thus, one of the goals of the Constitutional Convention was to give the new federal government a stronger power to raise funds from the states. The power given to the government, however, needed to have appropriate limits to curb potential overtaxation abuses.⁴⁰

Contemporaneous records demonstrate that the Founders had a similar understanding of the direct/indirect dichotomy that had existed since the mid-seventeenth century. Hamilton, a proponent of strong taxation power, recognized that "duties" on "articles of

36 See Marvin L. Michael Kay, *Provincial Taxes in North Carolina During the Administrations of Dobbs and Tryon*, 42 N.C. HIST. REV. 440, 442 (1965).

37 See, e.g., General Lawes: Making Rates (1680), reprinted in 1 NEW HAMPSHIRE RECORDS, *supra* note 28, at 397 (setting rates for all property to be assessed, as well as the rates which were imposed as a poll tax). For property taxes, the law made clear that "no towne or [person] be burthened beyond proportion." General Lawes: Selectmen Take Accounts (1680), reprinted in 1 NEW HAMPSHIRE RECORDS, *supra*, at 398. The appointed town selectmen were responsible for presenting the General Assembly with valuations of each estate, so that taxes could be apportioned accordingly. See *id.* at 397.

38 THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

39 See Johnson, *supra* note 24, at 13.

40 See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2337 (1997) (noting that the power had to be "restrained to protect individuals, and . . . to protect state governments, the tax bases of which can be destroyed by excessive national taxation").

consumption” “usually fall under the denomination of indirect taxes,” while “direct” taxes “principally relate to land and buildings” and “may admit of a rule of apportionment.”⁴¹ Indirect taxes were considered to be less contentious by the Founders because of the possibility to pass the resulting price increase on to consumers.⁴² These indirect levies were thought to have implicit protections, since if the taxes increased beyond an acceptable level, the consumers would cease purchasing the product altogether, rendering the tax increase counterproductive.⁴³ “Direct” taxes, levied on the value of owned property, were more “dangerous” because the only alternative would be to not own property.⁴⁴

Just as there was variability in how the colonies apportioned direct taxes in the preratification era, there was debate at the Constitutional Convention over how to allocate direct taxes among the states. Multiple delegates argued that it should be based on states’ wealth, contending that “money [is] power.”⁴⁵ The discussion soon turned to using states’ populations as the basis for apportionment, as “[t]he value of land had been found . . . to be an impracticable rule” and “[t]he number of inhabitants appeared to [be] the only just & practicable rule.”⁴⁶

Some commentators argue that the apportionment rule should be disregarded because it makes the imposition of certain taxes a practical impossibility.⁴⁷ This difficulty, however, is precisely what some Founders had in mind: “It is evident . . . from the experience we have had on the point itself that it is impracticable to raise any very

41 THE FEDERALIST NO. 21, *supra* note 38, at 142–43 (Alexander Hamilton).

42 See Jensen, *supra* note 40, at 2395 (citing THE FEDERALIST NO. 21 (Alexander Hamilton)).

43 See THE FEDERALIST NO. 21, *supra* note 38, at 142–43 (Alexander Hamilton) (“If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds.”). Anti-Federalists also agreed with this point: “there is no danger of oppression in laying them, because, if they are laid higher than trade will bear, the merchants will cease importing, or smuggle their goods.” *Essays of Brutus V*, N.Y.J., Dec. 13, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 388, 392 (Herbert J. Storing ed., 1981).

44 See Jensen, *supra* note 11, at 1077.

45 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196 (Max Farrand ed., 1911) (June 11, 1787).

46 *Id.* at 542 (July 6, 1787) (also noting that the inclusion of import & export duties in the “wealth” consideration would be “too difficult to be adjusted; and too injurious to the non-commercial States”); see also Robert G. Natelson, *What the Constitution Means by “Duties, Imposts, and Excises”—and “Taxes” (Direct or Otherwise)*, 66 CASE W. RESV. L. REV. 297, 333 (2015) (noting the idea that “taxation should be coupled with representation” was one of the key factors that led to the revolution, so the constitutional requirement of apportionment based on the census continues that principle).

47 See Johnson, *supra* note 24, at 14–15 (concluding, simply because the apportionment requirement can produce a difficult-to-implement result, that somehow means the “Founders intended no absurdity nor hobble on Congress’ power to lay direct taxes,” and that we should simply disregard the requirement, *id.* at 10).

considerable sums by direct taxation.”⁴⁸ The Federalists, in assuaging the Anti-Federalists fear of overtaxation, made it clear that their aim was for the federal government to rely mainly on indirect taxes for revenue, with direct taxes levied only in case of necessity.⁴⁹ To be sure, the apportionment requirement made it difficult to impose direct taxes. Yet this was just one of the many compromises that allowed the Constitution to be ratified.

What exactly the full scope of what the Framers were referring to when discussing “direct” taxes was, however, is somewhat ambiguous. That poll taxes are included in this group, however, is undisputed.⁵⁰ Many at the time especially feared capitation taxes, as they are easy to administer and regressive in nature: the per head imposition takes no account of the individual’s ability to pay.⁵¹ Beyond what is clear in the constitutional text, it would be conclusory to suggest that the Framers agreed on a particular definition for “other direct[] Tax” when ratifying the document.⁵² Some of the Framers wrote propaganda pieces and private documents attempting to define the two types of taxes,⁵³ but there does not appear to be an accepted consensus at the time of ratification.

III. POSTRATIFICATION HISTORY

In the face of textual indeterminacy, it is often helpful to determine if there was a “course of deliberate practice” that effectively settled, or liquidated, the constitutional meaning.⁵⁴ To ensure that no

48 THE FEDERALIST NO. 12, *supra* note 38, at 92 (Alexander Hamilton).

49 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 95–96 (June 16, 1788) (Jonathan Elliot ed., 1876) (James Madison) (arguing that “[d]irect taxes will only be recurred to for great purposes,” typically in times of war, when import and export duties are insufficient to fund the government’s operations).

50 This is inherent in the Direct Tax Clause: “No *Capitation*, or other direct, Tax shall be laid, unless in Proportion to the Census . . .” U.S. CONST. art. I, § 9, cl. 4 (emphasis added). This is consistent with the poll tax, which had been employed since the mid-1600s. See *supra* note 23 and accompanying text.

51 See Jensen, *supra* note 40, at 2391.

52 U.S. CONST. art. I, § 9, cl. 4; see Dodge, *supra* note 7, at 861. Professor Dodge notes that “[t]he term appears to have no legal relevance in the United States apart from” this particular clause. *Id.* This is confirmed by a survey of contemporaneous federal and state laws, where the direct vs. indirect language was never used. *Id.* at 864–67.

53 Compare THE FEDERALIST NO. 36, *supra* note 38, at 219 (Alexander Hamilton) (defining indirect taxes as “duties and excises on articles of consumption” and direct taxes as, presumably, everything else), with Essays of Brutus V, *supra* note 43, at 393 (defining direct taxes to include “poll taxes, land taxes, excises, duties on written instruments, on every thing we eat, drink, or wear; they take hold of every species of property, and come home to every man’s house and packet”).

54 William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13, 13–21 (2019) (discussing the concept of liquidation).

single erroneous decision is binding on interpreters years later, the issue must be determined by a “course of authoritative, deliberate and continued decisions.”⁵⁵ In addition to a course of practice, the interpretation must be approved by the public. This is generally shown both by acceptance of the result through many years and political administrations, as well as acceptance by the general public.⁵⁶ Interpretations around the time of ratification may help to inform the meaning of the text, yet early interpretations should not be subject to any less scrutinizing review.⁵⁷

The first direct tax case arose a mere seven years after ratification. Congress had imposed a federal tax of ten dollars on “all carriages for the conveyance of persons,” which was a tax directly on property ownership.⁵⁸ The law was challenged in *Hylton v. United States*, in which three Justices wrote opinions, all holding that the tax was not a direct tax subject to apportionment.⁵⁹ Justice Chase began his opinion with the presumption that “[t]he great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government,” only subject to the direct tax rule and uniformity requirements for “duties, imports, or excises.”⁶⁰ In concluding that a carriage tax was indirect, he noted as dispositive that “a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice.”⁶¹ He did not engage with the concept that direct taxation was *intended* to be difficult, a step which Framers only envisioned being used in case of emergency.⁶² In an equally conclusory manner, Justice Iredell assumed that the carriage tax must be indirect, as it would have been too difficult to apportion.⁶³ Justice Paterson also wrote, saying it was a “questionable point” whether direct taxes could include anything other than “a capitation tax, and tax on land,”⁶⁴ yet presented no further evidence on how he determined that land was the only item

55 *Id.* at 16 (citation omitted).

56 *See id.* at 18–21.

57 *See id.* at 59–63 (“Privileging early practice through liquidation is tempting but wrong.” *Id.* at 59.). *But see* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (noting that the question of “[h]ow long after ratification may subsequent practice illuminate original public meaning” is “unsettled,” *id.* at 2163).

58 Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373, 373–74 (repealed 1796).

59 *See* 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.); *id.* at 181 (opinion of Paterson, J.); *id.* at 183 (opinion of Iredell, J.).

60 *Id.* at 173 (opinion of Chase, J.) (emphasis omitted).

61 *Id.* at 174 (emphasis omitted).

62 *See supra* notes 48–49 and accompanying text.

63 *Hylton*, 3 U.S. at 181 (opinion of Iredell, J.) (“As all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned*.”).

64 *Id.* at 177 (opinion of Paterson, J.).

contemplated by the phrase “other direct tax.”⁶⁵ In short, the opinions in *Hylton* were long on conclusions and short on details.⁶⁶ Even though the Justices were part of the “framing generation,”⁶⁷ the lack of insight into the Constitution’s original meaning should give one pause before treating this early case as textual liquidation.

After *Hylton*, the Court did not decide any significant direct tax cases for seven decades. From 1868 to 1880, it decided two income tax cases⁶⁸ (holding the income tax constitutional, based almost solely on *Hylton*), an inheritance tax case,⁶⁹ and a case involving the taxation of state bank notes⁷⁰ (solely looking at postratification practice). After these cases, the Court then determined in *Pollock v. Farmers’ Loan & Trust Co.* that the income tax was, in fact, a direct tax.⁷¹ The Court specifically noted that “taxes on personal property, or on the income of personal property, are likewise direct taxes.”⁷² The *Pollock* decision expressly disavowed the reasoning of *Hylton*, reasoning that simply because an apportioned tax would be inequitable, does not mean that the tax is therefore not required to be apportioned.⁷³

This Note does not take a position on whether *Hylton* and its progeny or *Pollock* was correct. Rather, the cases merely demonstrate that the Direct Tax Clause, specifically its applicability to taxation of personal property, was hotly contested after ratification and throughout the nineteenth century. Accordingly, there is little argument to be made that the provision has been liquidated.

One meaning of “direct” tax that does appear to have been liquidated, however, is regarding real property. Congress passed five direct taxes on real estate, all of which were apportioned according to the census.⁷⁴ These statutes were never overturned by the judiciary, and

65 *Id.* at 175.

66 *See also* Jensen, *supra* note 40, at 2354 (saying that “[t]he three *Hylton* opinions, all short, are hardly models of intellectual rigor”).

67 *See* Baude, *supra* note 54, at 62.

68 *Pac. Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1868); *Springer v. United States*, 102 U.S. 586 (1881).

69 *Scholey v. Rew*, 90 U.S. (23 Wall.) 331 (1875).

70 *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 543 (1869) (concluding that, after only studying legislative acts from 1798 to 1861, “personal property . . . [has] never been regarded by Congress as proper subjects of direct tax”).

71 158 U.S. 601 (1895).

72 *Id.* at 637.

73 *See id.* at 633–34 (“We are not here concerned with the question whether an income tax be or be not desirable Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision.” *Id.* at 634.).

74 *See* Jensen, *supra* note 40, at 2355 n.110. Professor Jensen notes the relevant statutes: Act of July 14, 1798, ch. 75, 1 Stat. 597; Act of Aug. 2, 1813, ch. 37, 3 Stat. 53; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164 (repealed 1815); Act of Feb 27, 1815, ch. 60, 3 Stat. 216 (repealed 1816); Act of Mar. 5, 1816, ch. 24, 3 Stat. 255; Act of Aug. 5, 1861, ch. 45, 12 Stat. 292.

no real estate taxes were ever imposed by Congress that were not apportioned. From this evidence, it is clear that any taxation of real property will fall squarely within the apportionment requirement.

IV. ANALYSIS AND CONCLUSION

While there is a risk that the historical evidence is presented incompletely,⁷⁵ there does seem to be a clear picture of how property tax laws operated in the seventeenth and eighteenth centuries. While most scholars have attempted to simply define what a “direct” tax is using ambiguous and conflicting ratification-era history, centered around Framers’ intent, the approach of this Note is different. Rather than trying to determine direct versus indirect tax in isolation, using the apportionment requirement to help inform the rest of the clause⁷⁶ allows interpreters to use uniform colonial history and practice to define which taxes would be “direct.” This Note asserts that there is a fixed meaning of the tax provision, as defined by historical practice, and that any judicial interpretation of the clause should be constrained to that meaning.⁷⁷ By presenting an array of the original colonies’ and states’ tax laws, this Note hopes to achieve what Justice Thomas accomplished in his *Brown v. Entertainment Merchants Ass’n* dissent: to paint a clear picture of what the Founding generation would have understood a certain constitutional provision to mean.⁷⁸

The wealth tax proposed today would most closely resemble the property tax of the colonial era. Specifically, the proposal would tax “all property of the taxpayer . . . , real or personal, tangible or intangible, wherever situated, reduced by any debts.”⁷⁹ Because this tax is so similar to those levied on property in the past, most of the task here is one of constitutional interpretation, rather than one of construction.⁸⁰

75 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 857 (1989) (noting that originalist analysis “is, in short, a task sometimes better suited to the historian than the lawyer”). There is no doubt that not all of the relevant history has been presented here, but the major historical trends should be encapsulated in the above.

76 See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67–68 (2011) (“When it comes to resolving ambiguity, the context of a statement usually reveals which sense is meant.” *Id.* at 67.).

77 See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–9 (2015) (defining the fixation thesis and constraint principle).

78 564 U.S. 786, 835 (2011) (Thomas, J., dissenting) (concluding, after surveying pre-ratification and ratification-era practice, that “the founding generation would not have understood ‘the freedom of speech’ to include a right to speak to children without going through their parents”).

79 S. 510, 117th Cong. § 2902 (2021).

80 See Barnett, *supra* note 76, at 69–70 (defining interpretation as discerning the public meaning of the constitutional text, as opposed to construction, which is how we apply the interpreted text to un contemplated situations).

Insofar as the tax would be levied on real and personal property, it would likely run afoul of the Constitution's apportionment requirement. This tax would be nearly identical to the property taxes of the Northeast colonies, nearly all of which were levied by the central governing authority, only then imposed via a quota system on the individual towns and communities. Some critics would surely point out that certain colonies, notably Connecticut,⁸¹ required the localities to submit calculations of ratable estates and then imposed a uniform rate on the colony as a whole. To be sure, this evidence shows that there was not one universal approach to the collection of property taxes, and that there is not an unbroken line of historical practice. The Connecticut example, however, does not detract from the fact that nearly every other colony, especially those in New England, that imposed property taxes did so via apportionment. This historical practice is bolstered by the fact that the Framers unambiguously chose population as the method of apportionment for the federal government.⁸² Thus, any tax on tangible property that is not apportioned according to the census would be unconstitutional.

While the tangible property issue is clear, intangible wealth was less common in colonial times, and the history surrounding the taxation of intangibles—stocks, bonds, and the like—is not as definitive.⁸³ Some scholars assert that, because the Framers did not have an accurate concept of the distinction between tangible and intangible property, intangibles should automatically be disqualified from consideration in the Direct Tax Clause and only be subject to the uniformity requirement.⁸⁴ This argument, however, carries little force. The Constitution was supposed to be an adaptable document, rather than one that foresaw every use scenario. To categorically say that all unanticipated financial vehicles fall outside of the Direct Tax Clause would be contrary to the wishes and principles of the citizens who ratified the document.⁸⁵

Based on the above, this Note's contention is that the Direct Tax Clause is not as underdeterminate as many commentators assert, so the

81 See *supra* note 34 and accompanying text.

82 See *supra* notes 45–46 and accompanying text.

83 The only colony who seemed to include the value of intangible assets in its assessment was Connecticut, where (after apportionment) the town of New Haven would levy “25s. on every £100 on the investments of the Joint-Stock Association of Adventurers.” RABUSHKA, *supra* note 15, at 179.

84 Dodge, *supra* note 7, at 920 (saying that “the Framers lacked an appropriate vocabulary with which to encapsulate their intention”).

85 See Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1758–59 (2015) (“To interpret the document to mean something else—something they did not mean—would usurp the authority of the People and thus violate the fundamental constitutional premise of popular sovereignty.” *Id.* at 1759 (emphasis omitted)).

analysis can be completed solely via interpretation.⁸⁶ However, even if interpretation does not yield a definite result, certain rules of construction, faithful to the background principles of ratification, come into play.⁸⁷ As one esteemed Sixth Circuit judge wrote, it is consistent with the original understanding of the judicial role for interpreters to employ “a presumption of liberty [that] applies at least to federal regulation.”⁸⁸ This general presumption arises principally because both sides of the ratification debate—Federalists and Anti-Federalists—agreed on certain key aspects of federal government power, compromises which allowed the Constitution to be ratified in the first place.⁸⁹ Certain presumptions may also be inferred regarding the tax clauses specifically. Even Hamilton, a zealous advocate for a strong central government, discussed the main differences between direct and indirect taxes.⁹⁰ The premise of his argument for unrestrained indirect taxes was that they had a “security against excess,” due to customers’ unwillingness to pay prices over a certain level.⁹¹ And although he said that direct taxes “principally” relate to land and buildings, a tax on personal property would be just as susceptible to abuse as one on real property, lacking any built-in protection that normal consumption taxes have.⁹² Thus, it seems that both parties agreed on a certain protection—the apportionment requirement—to protect against excessive taxation on property ownership.

In sum, any unapportioned tax by the federal government on the value of property would be inconsistent with the original meaning of the Direct Tax Clause, as defined by historical practice.

86 This conclusion is reached solely regarding property taxes. Whether income taxes are correctly considered “direct” is an interesting question, as the historical research demonstrates that those were often *not* apportioned to the constituent communities. See *supra* note 22 and accompanying text. However, the wealth tax would be levied directly on property, so this Note does not reach a conclusion regarding whether income taxes are correctly understood.

87 See Barnett, *supra* note 76, at 70 (arguing that there is “no escaping” the fact that there are certain normative theories of construing the Constitution “when its meaning runs out”).

88 Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 798 (2020).

89 See *id.* at 797–98 (discussing that the Federalists specifically allayed the Anti-Federalist concerns regarding federal judicial power, and that both parties agreed on the need for federalism to be protected).

90 See THE FEDERALIST NO. 21, *supra* note 38, at 143 (Alexander Hamilton).

91 *Id.* at 142; see also *supra* notes 42–44 and accompanying text.

92 See THE FEDERALIST NO. 21, *supra* note 38, at 143 (Alexander Hamilton). Hamilton also thought that taxing personal property would have been impracticable. See THE FEDERALIST NO. 12, *supra* note 38, at 93 (Alexander Hamilton) (“[P]ersonal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on *consumption*.” (emphasis added)).