APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the Eighth Circuit

No. 23-1319

Minor Lee McNeil

Plaintiff - Appellant

v.

Asa Hutchinson, Governor and Chief Executive of Arkansas; Charles Collins, Commissioner of Revenue; Bryan West, Collections Manager; Carl F. Cooper, III, "Trey", Assistant Attorney General, State of Arkansas; Brent Dillon Houston, Judge

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: June 12, 2023
Filed: June 23, 2023
[Unpublished]

Before KELLY, ERICKSON, and GRASZ, Circuit Judges.

PER CURIAM.

App. 2

Minor McNeil appeals the district court's[1] dismissal of his 42 U.S.C. § 1983 action related to state taxes. After careful de novo review, we conclude that the district court properly dismissed the claims because they were barred by the Tax Injunction Act. See 28 U.S.C. § 1341 (Tax Injunction Act); Diversified Ingredients, Inc. v. Testa, 846 F.3d 994, 995 (8th Cir. 2017) (standard of review). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1] The Honorable Lee P. Rudofsky, United States District Judge for the Eastern District of Arkansas.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1319

Minor Lee McNeil

Plaintiff - Appellant

v.

Asa Hutchinson, Governor and Chief Executive of Arkansas; Charles Collins, Commissioner of Revenue; Bryan West, Collections Manager; Carl F. Cooper, III, "Trey", Assistant Attorney General, State of Arkansas; Brent Dillon Houston, Judge

Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Central (4:22-cv-00693-LPR)

JUDGMENT

(Filed Jun. 23, 2023)

Before KELLY, ERICKSON, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

June 23, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

U.S. District Court

Eastern District of Arkansas

Notice of Electronic Filing

The following transaction was entered on 1/30/2023 at 2:42 PM CST and filed on 1/30/2023

Case Name: McNeil v Hutchinson et al

Case Number: 4:22-cv-00693-LPR

Filer:

Document Number: **14**(No document attached)

Docket Text:

(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.) ORDER granting Defendants' [5] Motion to Dismiss for the reasons stated at the hearing on 01/30/2023. This case will be dismissed without prejudice. Signed by Judge Lee P. Rudofsky on 01/30/2023. (jwp)

U.S. District Court

Eastern District of Arkansas

Notice of Electronic Filing

The following transaction was entered on 1/30/2023 at 2:57 PM CST and filed on 1/30/2023

Case Name: McNeil v Hutchinson et al

Case Number: 4:22-cv-00693-LPR

Filer:

WARNING: CASE CLOSED on 01/30/2023

Document Number: 15

Docket Text:

JUDGMENT: Pursuant to 14 Order, all claims in this case are dismissed without prejudice. Signed by Judge Lee P. Rudofsky on 1/30/2023. (ldb)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

MINOR L. MCNEIL **PLAINTIFF**

v. **Case No. 4:22-CV-90693-LPR**

ASA HUTCHINSON, et al. **DEFENDANTS**

JUDGMENT

(Filed Jan. 30, 2023)

Pursuant to the Order filed on this date, it is CONSIDERED, ORDERED, and ADJUDGED that all claims in this case are dismissed without prejudice.

IT IS SO ADJUDGED this 30th day of January 2023.

/s/ Lee P. Rudofsky
LEE P. RUDOFSKY
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1319

Minor Lee McNeil

Appellant

v.

Asa Hutchinson, Governor and Chief Executive of Arkansas, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:22-cv-00693-LPR)

ORDER

(Filed Aug. 3, 2023)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

August 03, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

App. 9

DIRECT TAXES UNDER THE CONSTITUTION

BY

CHARLES J. BULLOCK

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THE ORIGIN, PURPOSE AND EFFECT OF THE DIRECT-TAX CLAUSE OF THE FEDERAL CONSTITUTION. I.

WHEN the Supreme Court of the United States decided that the income-tax law of 1894 was unconstitutional, interest was necessarily revived in that clause of the federal Constitution which requires that direct taxes shall be apportioned among the states "according to their respective numbers." Previous judicial interpretation had for nearly a century limited the application of this provision so narrowly that it had been rendered-incapable of causing serious public injury or of arousing general public interest. But our highest tribunal has now decided that hundreds of millions of dollars have been collected in the past by taxes that were unconstitutional and that, for the future, Congress cannot reach property or income except by taxes

apportioned according to the rule of numbers. These circumstances seem to justify an inquiry into the genesis and original purpose of the constitutional rule concerning direct taxation.

Such an investigation will be found to raise questions that cannot be answered satisfactorily without a careful study of all the clauses of the Constitution that relate to the powers of Congress in matters of taxation. It will become necessary to consider the experience of the United States, even during the period of the Confederation, before all the facts relating to the direct-tax clause can be seen in their true light. These considerations have determined the form and scope of this article.

I.

For twelve years prior to the assembling of the constitutional convention, Congress had been attempting to wage war and provide for the ordinary expenses of a league of states without possessing the power to levy or collect taxes. Public expenses had been apportioned among the members of the Confederation, and each had been expected to provide for the payment of its quota of the common charges. The failure of the states to comply with the requisitions made by Congress reduced the United States to bankruptcy and demonstrated the need of a central government that should possess the power of taxation.

Meanwhile Congress experienced the greatest difficulties in securing a satisfactory apportionment of the quotas. This question had arisen when paper

money was issued in 1775. Congress allotted to each state a certain quota of the bills of credit and requested that the currency should be redeemed by suitable taxes. These amounts were determined by a provisional assessment, based upon the number of inhabitants of all ages, including negroes and mulattoes.[1] When the system of requisitions was adopted as the method of raising the revenues of the Confederation, the question of apportionment occasioned much debate. The first draft of the eleventh article of the plan of union provided that the public treasury should "be supplied by the several colonies in proportion to the number of inhabitants of every age, sex, and quality, except Indians not paying taxes, in each colony. . . ." The Southern states immediately objected to having the slaves counted equally with the whites. Chase proposed that the requisitions should be apportioned according to the number of white inhabitants. John Adams, insisted that all the slaves should be included. Harrison suggested "that two slaves should be counted as one freeman." It is probable that the Southern states would have preferred to have the quotas proportioned to numbers, if Harrison's plan could have been adopted. But the Northern states would not accede to this arrangement and defeated Harrison's amendment by a strictly sectional vote. Later it was proposed [illegible] proportion the requisitions to the ascertained value of all property within each state, but this motion failed to pass. Finally, in October, 1777, Congress accepted a suggestion that Witherspoon had made

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[1] Journals of Congress, July 29, 1775.

during the debates of the previous year and resolved that the quota of each state should be fixed according to the ascertained value of the land, with the buildings and improvements thereon. This was the plan finally incorporated into the Articles of Confederation; and in 1778 Congress rejected all amendments which some of the states desired to make to this provision.[1]

Such an apportionment of the requisitions proved to be utterly impracticable. Few, if any, of the states took steps to secure a valuation of their lands; and Congress seems to have given the matter little attention until, early in 1783, it requested the states to make the necessary assessments.[2] But this action was soon followed by a proposal to change the method of apportioning the requisitions. The committee on revenue reported an amendment to the Articles of Confederation, providing that the requisitions should thenceforth be divided among the states "in proportion to the number of inhabitants, of every age, sex, and condition, except Indians not paying taxes. . . ."[3] Then followed the inevitable discussion concerning the propriety of including all the slaves in the enumeration. It was suggested that only one-half of the blacks should be counted, then one-fourth and later three-fourths;

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[1] Elliot, Debates on the Federal Constitution (Philadelphia, 1836), I, 70, 72–74 85–92; V, 79; Works of John Adams (Boston, 1856), I, 496; Journals of Congress, October 13 and 14, 1777; Poore, Federal and State Constitutions of the United States (Washington, 1877), I, 9.

[2] Elliot, V, 5, 21, 24, 25, 43, 45–47; Journals of Congress, February 17, 1783.

[3] Journals of Congress, March 20, 1783.

finally, Madison proposed three-fifths, and Congress at length adopted this proposition, "influenced by the conviction of the necessity of the change, and despair on both sides of a more favorable rate of the slaves."[4]

It proved impossible, however, to induce all the states to accept the amendments which Congress submitted for approval in April, 1783. In 1786 a second attempt was made to secure the acceptance of the amended plan of revenue, but without success; and hence the original plan of assessing quotas was retained until the end of the old Confederation.[5]

II.

In the proceedings of the constitutional convention it will be convenient to study first of all the grant of the general power of taxation, which it was decided to confer upon the new government. We may then consider the direct-tax clause and all the other provisions by which Congress was to be restrained in its exercise of the general power. In this manner the purpose of the

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[4] Elliot, V, 79, 81; Journals of Congress, April 1 and 18, 1783.

[5] In his decision in the income-tax cases, Mr. Justice Fuller falls into a singular error of fact at this point. He bases an argument upon the assumption that the amended plan of apportionment was adopted, whereas it failed of adoption by the votes of one or two states. (158 U. S. Reports, 620, 621.) All the men who discussed the subject in 1787 and 1788 state that the amendment was approved by only eleven or twelve states. See Elliot, I, 485; Peirce and Hale, Debates in the Convention of Massachusetts (Boston, 1856), 299; Ford, Essays on the Constitution (Brooklyn, 1892), 84, 102, 239; Boutell, Life of Roger Sherman (Chicago, 1896), 174.

framers of the Constitution may be set forth in the clearest light possible.

The first proposals concerning the general taxing power of the new government are found in the second and sixth resolutions introduced by Randolph as early as May 29.[1] Of these, the first provided that "the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." This suggestion does not imply necessarily that Randolph contemplated the continuance of the requisition system as a means for supplying the public treasury. It is compatible with any plan of federal taxation in which the quota of each state could be ascertained in advance—that is, with any system of apportioned taxes such as prevailed in all the states north of Maryland and Delaware.[2] But the proposition would have prevented the use of import and excise duties. Accordingly, when it first came before the convention, King and Madison objected to it, because "the revenue might hereafter be so collected by the general government that the sums respectively drawn from the states would not appear, and would besides be continually varying."[1] The sixth of Randolph's

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[1] Elliot, I, 143–145, V, 127; the Papers of James Madison (Gilpin's ed., Mobile, 1842), 731, 732. The plan of government proposed by Charles Pinckney' is entirely overlooked in this paper, because we have no knowledge as to what its original provisions were.

[2] See Wolcott's report on taxation in the various states in 1796, in American State Papers, Finance, I, 418–436.

[1] Elliot, V, 134; *cf.* 178.

resolutions gave to the national legislature "the legislative rights vested in Congress by the Confederation," with the additional power to legislate "in all cases to which the separate states are incompetent," and "to call forth the force of the Union against any member of the Union failing to fulfill its duty unto the Articles thereof." This plan was evidently intended to give to the federal government adequate powers of taxation, the necessity for which was evident to all who desired to remedy the real weaknesses of the Articles of Confederation.[2]

The resolutions submitted by Patterson, on June 15,[3] conceded to the United States the power to raise revenues from duties on imports, stamp duties and postal charges, in addition to the old requisitions upon the several states. Such requisitions, whenever levied, were to be apportioned according to numbers, in the ascertainment of which all the free inhabitants and three-fifths of all others were to be included. The inadequacy of such a plan was strongly urged by Hamilton, who offered another plan of government. He boldly proposed to give the legislature of the United States "power to pass all laws whatsoever," subject only to the negative of the executive.[4] But, though "praised by everybody," his plan was "supported by none."[5]

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[2] On this point see references given by Story, Commentaries on the Constitution, §§ 932–948 (fifth edition, Boston, 1891).

[3] Elliot, I, 175–177; V, 191, 192.

[4] *Ibid.*, I, 179; V, 201, 205.

[5] From Johnson, in Yates's Minutes.—Elliot, I, 431.

In committee of the whole house, Randolph's resolutions were adopted with some amendments; and then, on June 19, were reported to the convention. The amended resolutions did not suggest the quotas of contributions as the basis of representation, but the general grant of legislative powers remained practically as drafted by Randolph, except for the omission of the words, "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof."[1]

From June 19 to July 26, the report of the committee of the whole was considered by the convention. During the controversy over the question of representation in the national legislature, it was voted that "direct taxation ought to be proportioned to representation."[2] In connection with other questions, a few additional limitations were imposed upon the taxing power of Congress; but it will be shown in subsequent pages that all these restrictions were the result of some special interest or exigency, and were not due to a general desire to limit the new government in its right of taxing its citizens. After the rejection of Patterson's proposal to concede to the United States merely the right to levy impost and stamp duties, there is no evidence of any general desire in the convention to withhold from Congress all necessary powers of taxation.

On July 26, the convention referred to a committee of detail twenty-three resolutions, embodying the

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[1] Elliot, I, 180–183; V, 189, 190, 212.

[2] *Ibid.*, I, 201; V, 302.

results of its deliberations. The right of levying taxes was conceded to the national legislature in the sixth resolution, which was retained largely in the form in which it was submitted by Randolph.[3] Eleven days later, the committee of detail submitted the first draft of a constitution. In conformity with the decision of the convention, the committee had enumerated carefully the specific powers that should be conferred upon Congress. The first section of article eight provided: "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises; . . . "[4] This power was limited in certain directions, as will be shown elsewhere; but the grant was broad enough, expressed as it was in terms that included all four of the common names for taxes,[1] to confer upon the new government adequate powers of taxation. When Luther Martin proposed to allow Congress to levy and collect direct taxes only after a failure to secure from the states a compliance with its requisitions for the necessary revenues, his motion secured the approval of only one state.[2]

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[3] *Ibid.*, I, 221; V, 375. The resolution was as follows: "That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover, to legislate, in all cases, for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Compare Story, Commentaries, § 928.

[4] Elliot, I, 226; V, 378, 379.

[1] Story, Commentaries, § 950.

[2] Elliot, I, 255; V, 453.

On August 23, this grant of the power to levy taxes was amended, in order to make more secure provision for the public debt. In its amended form, this section of the drafted constitution stood as follows[3]: "The legislature shall fulfill the engagements and discharge the debts of the United States, and shall have the power to lay and collect taxes, duties, imposts, and excises." Two days later, this was reconsidered, and Randolph moved to postpone the clause, in favor of the following resolution[4]: "All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States under the Constitution as under the Confederation." When this had been adopted, Mr. Sherman insisted that it was still desirable "to connect with the clause for laying taxes, duties, *etc.*, an express provision for the object of the old debts. . . ." He moved, therefore, to add to the clause giving the right to levy taxes the words, "for the payment of said debts, and for defraying the expenses that shall be incurred for the common defense and general welfare." This proposal was rejected, on the ground that it was unnecessary. But, on August 31, this section of the constitution, together with some others, was referred to a grand committee, of which Sherman was a member. Four days later, this committee reported the following amended resolution: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States."

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[3] *Ibid.*, I, 260; V, 469.

[4] *Ibid.*, I, 264; V, 476.

This resolution was adopted by the convention without dissent.[5] In the final draft of the constitution, a clause was added requiring uniformity in the assessment of duties, imposts and excises. This may be passed over for the present. In other respects, the resolution of September 4 stands unaltered in the completed Constitution, except for the substitution of the word Congress for the word legislature.[1]

Thus, finally, Sherman's amendment was added to the grant of the power to levy taxes. Without entering further into a discussion of the interpretation of the "general welfare" clause, it may be pointed out that the procedure of the convention shows conclusively that the words were inserted originally as a qualification of the grant of the taxing power. By this amendment, the right to levy taxes was limited to the purposes specified—namely, "to pay the debts, and provide for the common defense and general welfare of the United States."[2]

III.

Postponing for the moment the constitutional provisions concerning direct taxes, it is now in order to

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[5] *Ibid.*, I, 280, 283, 284; V, 503, 506.

[1] Poore, Federal and State Constitutions, I, 15.

[2] On the subject see Story, Commentaries, §§ 911–931; Curtis, Constitutional History (N. Y., 1889), I, 518–521. Note also the amendment to this clause proposed in Congress, shortly after the adoption of the constitution.—H. V. Ames, Amendments to the Constitution of the United States, 242. (Washington, 1897.)

consider various other proposals for limiting the taxing power of Congress in certain directions. On August 18, Pinckney urged that the committee of detail should prepare a resolution restraining the legislature of the United States from establishing a perpetual revenue; and, upon a motion of Mr. Mason, this suggestion was adopted.[3] Four days later, the committee recommended that the following words should be added to the clause giving Congress the power to levy taxes: "for payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years." This proposal had not received the attention of the convention when, on August 31, such parts of the constitution or amendments as had not been considered were referred to a general committee.[1] On September 4, this committee reported a revenue clause which did not contain a prohibition of tax laws that should remain in continuous operation.

The ninth section of the first article of the constitution prohibited Congress from taxing exports and limited the amount of the duties that could be imposed upon the importation of slaves. These two limitations of the taxing power had a common origin, and were closely connected in the deliberations of the constitutional convention. On June 12, Pinckney expressed a

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[3] Elliot, V, 440, 441.

[1] Elliot, I, 256, 285; V, 462, 503.

desire that the legislature might be prohibited from taxing exports, since such imposts would strike chiefly the products of the labor of the slaves.[2] It was not strange that such a question arose. During the colonial period, tobacco had been almost the only article that could bear an export duty,[3] and the Southern colonies had been the only ones that could make much use of such an impost. In the fiscal years 1790 and 1791, tobacco, rice and indigo, produced almost exclusively in the slave states, constituted nearly one-third of the total exports from the United States,[4] and would have offered almost the only promising field where export duties could have been applied without destroying the possibility of further exportations. On July 23, Pinckney asserted. that, "if the committee should fail to insert some security to the Southern States against an emancipation of the slaves, and taxes on exports, he should be bound by his duty to his state to vote against their report."[5]

In the report submitted by the committee of detail, on August 6, the following provisions were inserted:

No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states

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[2] *Ibid.*, V, 302.

[3] W. Hill, First Stages of the Tariff Policy of the United States, 23–26 (Publications of the American Economic Association, Baltimore, 1893).

[4] See American State Papers, Commerce and Navigation, I, 23–33, 103–146.

[5] Elliot, V, 357.

shall think proper to admit; nor shall such migration or importation be prohibited.[6]

In the discussions that followed, the restriction on the power of Congress to tax exports was opposed by Morris, Wilson and Madison. Of the Southern members, Mason, Butler, Carroll, Mercer and Williamson favored it; while, of the Northern delegates, Gerry, Sherman and Ellsworth considered the restriction necessary.[1] Sherman and Ellsworth urged that exports could not be taxed without injuring trade and arousing sectional jealousies. While a number of Northern delegates were inclined to Sherman's opinion, that "the complexity of the business in America would render an equal tax on exports impracticable," the debates make it evident that the real moving force back of this prohibition was the fear of the South that the value of the negroes might be decreased by export duties on the peculiar products of slave labor.[2] The clause was finally passed by seven states against four.[3] Massachusetts and Connecticut voted in the affirmative with the five Southern states, while New Hampshire, New Jersey, Pennsylvania and Delaware were counted in the negative.

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[6] *Ibid.*, I, 227; V, 379.

[1] Elliot, V, 432–434, 454–456; Gilpin, 1339–1343, 1382–1387.

[2] On this subject see Curtis, I, 495–498, 504; Bancroft, History (author's last revision, 1891), VI, 315, 316.

[3] Elliot, I, 255; V, 457.

The other clauses reported by the committee of detail, on August 6, prohibited the imposition of duties on slaves imported into the United States and prevented Congress from interfering with the external slave trade. These aroused fierce debates upon the question of slavery, and did not pass until they had been materially amended. As the result of a compromise, in which the South conceded the right of Congress to regulate commerce, the convention finally adopted the following provision:

The migration or importation of such persons as the several states now existing shall think proper to admit shall not be prohibited by the legislature prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.[4]

In the revised draft of the constitution, submitted by the committee of revision on September 12, the clause prohibiting the taxation of exports is separated from that which relates to the taxation of persons imported into the United States.[1] But the proceedings of the convention show that both of these restraints upon the taxing power of Congress grew out of the anxiety of the South for the safety of its peculiar institution.

Another restriction upon the power of Congress to levy taxes was proposed for the first time on August 25. Upon the previous day the committee appointed to

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[4] *Ibid.*, I, 256, 261, 265; V, 461, 470, 471, 477, 478.

[1] Elliot, I, 301; V, 561.

consider the slave trade and the regulation of commerce had reported in favor of allowing the legislature to pass navigation acts by a simple majority vote. In the discussions that followed, anxiety was expressed lest the legislature should favor the ports of some states in preference to those of others. Two sets of resolutions were then introduced, in order to prevent such discriminations.[2] Of these, the latter provided, among other restrictions, that "all duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States." These resolutions were referred to a grand committee, which, on August 28, reported the following clause:

> Nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another, or oblige vessels bound to or from any state to enter or pay duties in another. And all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States.

Three days later, the convention, after striking out the word tonnage, adopted this provision.[3]

On September 14, while the final draft of the constitution was under consideration, these resolutions were placed in separate sections. It was voted that, to the clause conferring on Congress the power of taxation, should be added the words, "but all duties,

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[2] *Ibid.*, I, 227, 261, 265, 266; V, 379, 471, 479.

[3] *Ibid.*, I, 270, 279, 280; V, 483, 484, 502, 503.

imposts, and excises shall be uniform throughout the United States." The origin of the clause shows that it was intended to secure territorial uniformity in the imposition of duties, imposts, and excises, and "to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests."[1]

IV.

We are now ready to study the proceedings of the constitutional convention on the subject of the apportionment of direct taxes. It has already been shown that Randolph's original resolutions had proposed to apportion representation in the national legislature according to either the quotas of contribution or the number of free inhabitants in the several states. When the convention went into committee of the whole to consider Randolph's resolutions, the question of representation engrossed a large portion of its attention. Out of the disputes occasioned by this troublesome subject sprang the proposal to limit the powers of Congress in levying direct taxes. It is necessary, therefore, to study the entire controversy over the question of representation.

After the convention had determined that the national legislature should consist of two branches, it was voted that the lower house should be elected by the people and that the upper house should be chosen by the legislatures of the states. Then came the critical

[1] Elliot, I, 311. See Story, § 957; Curtis, I, 522.

question: What shall be the basis of representation? This brought on the well-known controversy between the smaller states, which demanded equal rights, and the larger states, which advocated proportional representation.

On June 11, the committee of the whole voted[2] that the rights of suffrage in the lower house should be proportioned to the whole number of free inhabitants and three-fifths of all other persons, except Indians not paying taxes, in each state. This, it will be remembered, was the basis adopted by Congress in its resolution of April 18, 1783, concerning the apportionment of requisitions. Upon the same day, by a vote of six against five, the larger states carried a motion that the right of suffrage in the upper house of the legislature should be according to the rule established for the lower; and then, on June 19, the committee of the whole made its final report to the convention. After discussion of this report, the convention finally voted, June 29, that the right of suffrage in the lower house "ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation." Then the small states made a determined struggle to secure equal representation in the upper house. But a motion conceding this point was defeated by a tie vote, Georgia's delegates being divided.[1] Thus it seemed that a deadlock must ensue. But

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[2] Elliot, I, 168, 169; V, 181. See Bancroft, VI, 228; Curtis, I, 340, 343; Hildreth, History of the United States (New York, 1856), III, 486–489.

[1] Elliot, I, 169, 181–183, 192, 193; V, 182, 259, 269, 270.

the entire subject of representation was finally referred to a grand committee for further consideration. On July 5, this committee reported a plan brought forward by Franklin, proposing that in the lower house each state should have one representative for every forty thousand inhabitants, including all the whites and three-fifths of the blacks, while in the upper house each state should have an equal voice. But this arrangement failed to satisfy the convention at that moment, and a long debate ensued. Some members did not like the proposed scheme for regulating representation in the lower house, though little was said at the moment concerning the representation for three-fifths of the slaves. Others still opposed equal representation in the upper house, and a warm discussion followed between delegates from the larger states and those from the smaller. On July 6, the convention resolved to refer to a committee of five the question of the proper basis of representation in the lower house. On the next day it was agreed that the states should have equal votes in the upper branch of the legislature. This decision tended to allay the strife between the larger and the smaller states, although one more attempt was made, a few days later, to destroy the equality of suffrage in the upper house. Mutterings of discontent were, indeed, heard up to July 16, when, Madison tells us, the delegates from the larger states finally decided that such a concession to the smaller states was an absolute necessity.[1]

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[1] Elliot, I, 195, 196, 205; V, 280, 281, 285, 286, 311, 319.

But the question of representation in the lower house was not so easily settled. When the convention agreed that in this branch proportional representation should be the rule, the difficulties had merely commenced. For several days interest centered around the basis of representation in the lower house. In the course of the deliberations the parties of the large and the small states almost disappeared, and distinct Northern and Southern parties were formed.[2] Madison declared, July 14:

It seemed now to be pretty well understood that the real difference of interest lay, not between the large and small, but between the northern and southern states. The institution of slavery, and its consequences, formed the line of discrimination.[3]

In this controversy the direct-tax clause of the constitution originated.

It has been shown that, on July 6, a committee of five was instructed to devise a plan for settling the question of representation in the lower house of the national legislature. On July 9, this committee reported a scheme by which, for the first meeting of the new legislature, fifty-six members should be apportioned among the several states. It was further recommended that, in future apportionments, the legislature should "regulate the number of representatives, in any of the

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[2] This is best appreciated by Hildreth. See his History, III, 496–501.

[3] Elliot, V, 315. *Cf.* the words of King to the same effect.—Elliot, V, 290, 291.

foregoing cases, upon the principles of their wealth and numbers." This latter recommendation was considered first by the convention, and was adopted.[4] It is important to remember this fact, because the discussions of the next few days need to be interpreted in the light of this decision.

At this point a new consideration was brought into the debate. A few members of the convention entertained some jealousy toward the growing power of the West. Three of these delegates, Morris, Gorham and King, were members of the committee of five. When asked for the reasons that had induced the committee to combine wealth and numbers in the basis of representation, Gorham stated that such a provision was necessary, in order to prevent the Western states from outvoting the Atlantic states at some future time.[1] Like arguments were advanced by Gerry, King and Morris during the next few days, and were answered promptly by Mason, Randolph, Madison, Wilson and Sherman.[2] When, July 14, Gerry moved that the number of representatives should be so regulated that states subsequently admitted could never outvote the original members of the Union, the convention rejected the proposal. Massachusetts, Connecticut, Delaware and Maryland were the only states to favor Gerry's motion; and, of these, the votes of Delaware and Maryland were probably nothing more than "the dying expression of

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[4] *Ibid.*, I, 197; V, 287, 288.

[1] Elliot, V, 238.

[2] See Elliot, V, 288–318, *passim.*

old regrets about the proprietaryship of western lands."[3] It is probable that the extent and importance of the jealousy of the West has been exaggerated; but, in any case, the discussion of the subject centered around the question of representation, not that of taxation.

The first recommendation contained in the report of the committee of five did not meet the approval of the convention. The committee's scheme of apportionment awarded twenty-six members to the Southern states and thirty members to the Northern. Upon the motion of Sherman, the subject was referred to another committee consisting of one member from each state; and on July to this committee recommended that the first lower house should consist of sixty-five representatives, of which number thirty-five were allotted to the North and thirty to the South.[4] After various unsuccessful attempts to reduce the representation of New Hampshire and to increase that of the Southern states, the convention finally adopted the distribution recommended by the committee. The discussions of the subject more and more brought the question of slavery to the front;[1] from July 10 to 12 nearly all debate turned on the opposing interests of the Northern and the Southern states.

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[3] *Ibid.*, I, 204; V, 312. See Bancroft, VI, 264.

[4] Elliot, I, 198; V, 293. See Bancroft, VI, 258; Curtis, I, 407.

[1] Elliot, I, 199; V, 293. See especially the speech by King, V, 290, 291.

After the final vote on the distribution of members, Randolph proposed an important amendment to the second paragraph of the report that the committee of five had submitted on the previous day (July 9). This paragraph, which had been accepted by the convention, provided that the national legislature, whenever occasion might arise, should be "authorized" to augment the number of representatives, following numbers and wealth as the rule of apportionment. The control of future representation was thus left wholly to the discretion of the legislature. As the Northern states were to have thirty-five out of the sixty-five members in the lower branch of the first legislature, this plan would enable the North to control all future representation. The delegates from the South were alarmed at such a prospect. Randolph proposed, therefore, that the paragraph should be amended, so as to oblige the legislature "to cause a proper census and estimate to be taken once in every term of —— years." This reasonable suggestion was opposed, especially by Morris and King, on the ground that it would be unwise to fetter the legislature by any rigid constitutional requirement.

Sectional lines having been most sharply drawn, the debates became more heated and excited. On July 11, Randolph's proposition was withdrawn in favor of the following resolution, introduced by Williamson, of North Carolina:

Resolved, That, in order to ascertain the alterations that may happen in the population and wealth of the several states, a census shall be taken of the free

inhabitants of each state, and three-fifths of the inhabitants of the other description, on the first year after this form of government shall have been adopted, and afterwards on every term of —— years; and the legislature shall alter or augment the representation accordingly.[2]

This resolution not only made periodical apportionments obligatory, but marked the return to numbers as the sole rule for representation. In including three-fifths of the slaves, Williamson followed the expedient that had been previously recommended: But this device no longer satisfied the extremists of either the North or the South. Butler and Pinckney moved that all the slaves should be enumerated for the purpose of determining each state's representation, but their demand was refused. Then the convention adopted that part of Williamson's resolution which provided for the enumeration of all the white inhabitants. This brought the members to the single question, whether three-fifths of the slaves should be included also. King and Morris antagonized the proposition most strenuously. Finally, the extremists on both sides—those who desired to have all the slaves counted and those who refused to allow any blacks to be enumerated—combined to defeat the three-fifths clause. After this, Williamson's entire resolution was rejected by a unanimous vote,[1] and the delegates seemed more widely divided than ever. The defeat of Williamson's

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[2] Elliot, I, 199; V, 295.

[1] Elliot, I, 199–201; V, 296, 300–302. *Cf.* Curtis, I, 410, 411; Bancroft, VI, 265; Hildreth, III, 500.

motion left before the convention the amended report of the compromise committee of July 5, providing that the lower house of the first legislature should consist of sixty-five members and that the legislature might adjust future representation according to the rule of wealth and numbers.

When the convention assembled on the morning of July 12, the sole question of immediate interest was that of representation for slaves. For the time being, the controversy between the large and the small states was entirely forgotten. At this juncture, Gouverneur Morris came forward with a proposal which he designed "as a bridge to assist" the convention "over a certain gulf."[2] He moved to add to the clause authorizing the legislature to regulate representation according to wealth and numbers, the provision that "taxation shall be in proportion to representation."[3] This proposal was intended to make the South less desirous of securing representation for all the slaves, since its share of public burdens would be increased

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[2] These are Morris's own words.—Elliot, V, 363.

[3] Elliot, V, 302. This seems to have been an entirely novel suggestion. Precedents might have been found for the reverse proposal—to proportion representation to taxation. In the Continental Congress Middleton had proposed, in 1776, that the colonies should vote according to the amounts they paid in requisitions. (Works of John Adams, II, 499.) The following year a similar motion was defeated. (Journals of Congress, October 13, 1777.) In the convention Randolph had originally proposed the quotas of contribution as a basis for determining representation. (Elliot, V, 127.) On June 11 it was twice proposed to take the actual contributions of the states as the "equitable ratio of representation." (Elliot, V, 179, 181.)

proportionally. On the other hand, such a plan would tend to decrease the opposition of the North to admitting some portion of the slaves into the rule for representation.[1] But, contrary to Morris's expectation, Butler, of South Carolina, immediately demanded representation for all the slaves, although he conceded the justice of the new proposition. On the other hand, Mason and Wilson objected that the provision advocated by Morris "might drive the legislature to the plan of requisitions." This criticism was regarded as a serious one, for no member manifested a desire to restrict the taxing power in such a way as to cripple its effectiveness for purposes of revenue. Accordingly, Morris "admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation." With regard "to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable."[2] Therefore, the motion was amended; and, without dissent, it passed the convention in the following form: "*Provided always*, That direct taxation ought to be proportioned according to representation."

Two conclusions stand out clearly from the foregoing recital of facts. First, the resolution of Morris was intended simply as a means of harmonizing differences between the free and the slave states. Second, it was not designed to injure, much less to cripple, the taxing

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[1] Such is Madison's explanation.—See Elliot, V, 363, note.

[2] Elliot, V, 302.

power of the new government.[3] There is no reason for thinking that any such measure would have been suggested, if the dispute over the representation for the blacks had not taken the turn that it did. One other consideration should be emphasized. Morris's amendment was added to a resolution which provided for representation according to wealth and numbers. It did not contemplate originally an apportionment of direct taxes upon the basis of population alone.

After Morris's motion had been passed, the Southern delegates desired to have the rule of wealth and numbers more explicitly defined. Pinckney urged that the clause, as it stood, left the legislature entire freedom in the manner of ascertaining the wealth of the states, and he demanded protection for property in slaves. Randolph urged the same considerations that he had presented the previous day, against leaving the future regulation of representation entirely to the discretion of the legislature: "Express security," he argued, "ought to be provided for including slaves in the ratio of representation"; he "lamented that such a species of property existed; but, as it did exist, the holders of it would require this security." In accordance with

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[3] This is well shown by the fact that the motion passed unanimously, securing the support of those members who opposed most strenuously all proposals that seemed likely to make the taxing power of Congress ineffective. Thus, the motion was supported by Morris, Madison and Wilson, all of whom had opposed the proposal to prohibit Congress from taxing exports.—Elliot, V, 432, 433, 454–456.

these demands, a motion, made by Randolph and amended by Wilson, was passed in the following form:

Provided always, That representation ought to be proportioned according to direct taxation; and, in order to ascertain the alterations in the direct taxation which may be required, from time to time, by the changes in the relative circumstances of the states, . . . *Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner, and according to the ratio, recommended by Congress in their resolution of April 18, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.[1]

The reader will remember that the resolution of April 18, 1783, provided that all free inhabitants and three-fifths of the slaves should be included in the basis of apportionment of the requisitions. The motion passed by the convention was purposely worded so as to avoid the actual mention of slaves.

On July 13, Randolph proposed another amendment. The resolutions adopted on the previous day had all been in amendment of the original proposition that the legislature might regulate representation in the lower branch according to the rule of wealth and numbers. The convention had now decided that representation should be proportioned to direct taxation and that

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[1] Elliot, I, 201–203; V, 303–306.

direct taxation should be divided among the states in proportion to population. In order to secure entire clearness, Randolph moved that the word "wealth" should be stricken out of the original motion.[1] This was agreed to by a nearly unanimous vote. Thus the original proposal was made to read, that future representation should be adjusted to the number of inhabitants of the respective states; while amendments provided that representation should be proportioned to direct taxation and that direct taxation should be divided among the states according to the rule of numbers, including three-fifths of the slaves.[2]

This was the final form of the compromise between the North and the South over representation in the lower house.[3] With this difficult question settled, the large and the small states found time, on July 14, to indulge in one more controversy over the equal vote of the states in the upper branch of the legislature.[4] Upon July 16, the report of the grand committee, as amended, was finally adopted, but by the narrowest of majorities; and this was generally accepted as a final settlement of differences over the question of representation.[5]

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[1] Elliot, I, 204; V, 307–309.

[2] These final resolutions may be found most easily in Elliot, I, 202–204, 222, 223.

[3] On August 8, Morris moved once more to strike out the provision allowing representation for three-fifths of the slaves, but he secured the vote of only one state.—Elliot, I, 233; V, 392–394.

[4] Elliot, V, 310–316.

[5] *Ibid.*, I, 205, 206; V, 316, 317, 319, note. Upon July 24, Morris endeavored to induce the convention "to strike out the whole

In the first draft of the constitution,[1] submitted by the committee of detail on August 6, these resolutions relating to representation and direct taxes were separated. The provision regarding the number of representatives in the lower house of the first Congress and that concerning the apportionment of future representatives by the prescribed rule of population were placed in the fourth article. The provision concerning the apportionment of direct taxes was placed in the seventh article, which enumerated the powers of Congress.[2] This arrangement was changed by the committee of revision. All the provisions concerning the apportionment of representatives and direct taxes were brought together in section two of article one[3]:

Representatives and direct taxes shall be apportioned among the several states which may be included

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of the clause proportioning direct taxation to representation." He said that he had intended it merely as a bridge over a certain gulf, and he believed the bridge could be removed now that the gulf had been crossed. He thought that the rule was open to strong objections. But it was too late to disturb the compromise that had been effected with so much difficulty.—Elliot, V, 362, 363.

[1] On August 25, while this draft was under discussion, Luther Martin proposed an amendment, which provided that the United States should not possess the power to levy and collect direct taxes until requisitions for the amounts due should have been made upon the several states and should have been refused. It is not recorded that the members of the convention considered this proposal worth discussion. At any rate, the motion was defeated by an overwhelming vote, in which Martin secured the support only of one of his Maryland colleagues and of the state of New Jersey.—Elliot, I, 255; V, 453.

[2] Elliot, I, 224, 227; V, 377, 379.

[3] *Ibid.*, I, 298.

within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every forty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

While the final draft of the constitution was under consideration, Dickinson and Wilson moved to strike out the words "direct taxes" from this clause, on the ground that the expression was out of place in an article which related merely to the constitution of the House of Representatives. The motion was defeated, however, by a vote of eight states to three; and the clause, without amendment, became a part of the constitution.[1]

Before leaving this subject, mention must be made of a second constitutional provision concerning direct

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[1] Elliot, I, 308; V, 540. Gilpin, 1569, 1570.

taxes. On July 13, after the rule for apportioning representatives and direct taxes had been established, the convention adopted a resolution which required that, until the first census should be taken, direct taxes should be divided among the states in proportion to the number of representatives allowed to each in the first Congress.[2] This resolution does not appear among those referred to the committee of detail on July 26.[3] That committee, however, submitted the following proposition in their report of August 6: "No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken."[4] This prohibited Congress from levying one kind of a direct tax before the census should be completed; and the purpose of the provision was to make it impossible for Congress to render slavery unprofitable by heavy taxation of the slaves.[5] It seems strange that such a clause should have been deemed necessary; for the rule for direct taxation had been established, and it was never doubted at any time that capitation taxes were direct, within the meaning of the constitution. But the Southern

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[2] Elliot, I, 203; V, 306, 307.

[3] *Ibid.*, I, 221, 222; V, 375, 376.

[4] *Ibid.*, I, 227; V, 379.

[5] See explanation made by Baldwin, a member of the convention, in the House of Representatives, on February 12, 1790. (Annals of Congress, First Congress, I, 1242, 1243.) In the Virginia convention this subject came up for discussion. (Elliot, III, 456–458.) Mr. George Mason urged that this clause was "a mere confirmation of the clause which fixed the ratio of taxes and representation." In the subsequent debates of the federal convention, this clause was always grouped with those relating to taxation of the slave trade, navigation acts, *etc.*

members may have feared that, before a census could be taken, Congress might make an arbitrary estimate of population and might apportion a capitation tax unfairly, in such a manner as to lay disproportionate burdens upon owners of slaves. Gerry made an effort, on August 20, to have the convention adopt the original motion concerning the assessment of direct taxes before the taking of the first census. His proposition was rejected as unnecessary, but the clause reported by the committee of detail was accepted.[1]

An amendment was adopted by the convention on September 14, when the final draft of the constitution was under consideration. Read suggested that the words "or other direct tax "be inserted after the word "capitation," and the motion was carried.[2] His purpose was to prevent Congress from attempting "to saddle the states with a readjustment, by this rule, of past requisitions of Congress."

CHARLES J. BULLOCK.

WILLIAMS COLLEGE.

(To be continued.)

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[1] Elliot, I, 253, 254, 261, 265; V, 451–453, 471, 478.

[2] *Ibid.*, I, 311; V, 545.

THE ORIGIN, PURPOSE AND EFFECT OF THE DIRECT-TAX CLAUSE OF THE FEDERAL CONSTITUTION. II.

V.

THIS study of the procedure of the federal convention has shown that there was manifested no general desire to limit the taxing powers of the new government. Patterson's plan, which would have restricted Congress to impost and stamp duties, received the support of only two states; while Randolph's propositions were reported to the convention by a vote of seven states to three, Maryland's delegates being equally divided.[1] But in a few directions limitations were finally imposed. When the power of regulating commerce was granted, the convention provided that duties, imposts and excises should be uniform. throughout the United States. Then the institution of slavery required and secured protection in three provisions—namely, the limitation of the duties that could be imposed upon the importation of negroes, the prohibition of taxes on exports and the specific provision concerning capitation taxes. Finally, out of the controversy over representation for the slaves in the apportionment of members of the House of Representatives, there came the requirement that direct taxes and representatives should be apportioned according to the rule of numbers. Thus it seems that the constitutional requirement concerning direct taxes originated in the struggle to effect a compromise on the question of

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[1] Elliot, I, 180; V, 211, 212.

representation for the slaves. It had no basis in any rational scheme for regulating taxation, and could have had none. There is no reason for thinking that such a plan would have occurred to any one, had the convention not been at its wit's end for some method of effecting an adjustment of the question of representation. Historically, the provision must be viewed as a relic of the great compromise upon the subject of slavery.

But different views have been advanced. Mr. George Ticknor Curtis argued, in 1866, that the direct-tax clause was an intentional limitation of the power of Congress. He held that, after the states gave up to the general government the exclusive right of levying customs duties, they refused to concede full powers of direct taxation concurrent with their own.[1] In the income-tax cases, in 1895, Chief Justice Fuller gave a somewhat similar explanation. "The men who formed and adopted that instrument," he said, "had just emerged from the struggle for independence, whose rallying cry had been that 'taxation and representation go together.'" This principle was incorporated in the

[1] *Harper's Magazine*, XXXIII, 359. Mr. Curtis also advanced a second reason. He said that the people "had never been accustomed to have a direct tax imposed without apportionment among the local subdivisions of the state." Nothing could be further from the truth. In all states south of Delaware, "taxes were laid directly on persons or the property of individuals by the state." (R. T. Ely, Taxation in American States and Cities, 123. See Wolcott's report on direct taxes, State Papers, Finance, I.) In the states north of Delaware, taxes were apportioned among counties and towns, but according to assessed valuations, not according to the absurd and inequitable rule of numbers.

constitution, so that whenever Congress should vote a tax, "it would fall proportionately upon the immediate constituents of those who imposed it." More than this, the states surrendered their power to tax imports. Therefore, in giving Congress "power to tax persons and property directly," they did so "in reliance on the protection afforded by restrictions on the grant of power." "If, in the changes of wealth and population in particular states, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the Senate, was stipulated for."[2]

Again, Mr. Justice Field, in his tirade against the legislators who passed the income-tax law, found time for a few remarks concerning the origin of this constitutional provision. He said that the convention was greatly embarrassed, first, by the disinclination of the importing states to give up their right to levy import duties and, second, by the fear on the part of the small states that the larger states might impose unequal burdens upon them, if the power to tax directly real and personal property should be surrendered to Congress. This embarrassment, he declared, was so great as to threaten the dissolution of the convention, and the direct-tax clause was finally formulated as a compromise on this important point.[1] Justice Field

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[2] 157 U. S. Reports, 556, 557; 158 U. S. Reports, 620, 621.

[1] 557 U. S. Reports, 587. There is no doubt that Justice Field formed this opinion as a result of a correspondence with the late David A. Wells. The writer is informed by a friend, who holds the chair of political economy in a well-known university, that he saw

confined himself to generalities, and did not refer in detail to the proceedings of the convention. This was fortunate for the argument; for an examination of the debates shows that no member of the convention was inclined to question the propriety or expediency of giving Congress power to levy import duties; that the fears of the small states concerned the general influence of the large states in matters of legislation, not in taxation, as a principal source of danger; and that the direct-tax clause was introduced in the middle of a heated controversy over representation for slaves, and without any reference to questions of taxation. There is not one word in the proceedings of the convention to justify the claim that difficulties on the subject of taxation threatened to bring its efforts to naught.

Views similar to those of Justices Fuller and Field were advanced by the counsel in the income-tax cases. It was urged that the older and richer states had been jealous of the growing power of the West, and had inserted this clause in order to prevent a combination of Western states from imposing heavy burdens on the richer communities of the Atlantic coast; and even that this provision was "designed for the protection or advantage of some set of persons or some particular interest or interests," and that the rule "was manifestly

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one letter which Wells wrote to Field, and that this letter was incorporated almost literally in Field's opinion. In the *Popular Science Monthly* (LIII, 385, 386), Mr. Wells discusses the purpose of the direct-tax clause in language which is almost the same, word for word, as that used by Justice Field.

designed for the protection and advantage of property holders, as a class."

All these views may be fairly summarized in two theories of the origin and purpose of the direct-tax clause. The first is that it was a check upon the powers of Congress in direct taxation, devised for the purpose of compensating the states for conceding to the general government the right to levy customs duties. The second is that it was intended to prevent oppressive taxation of any one section of the country by a combination of representatives from other sections.[1]

In the proceedings of the convention there seems to be nothing to support either of these theories. The direct-tax clause was proposed at a time when the members were interested solely in the question of representation for the slaves. It was manifestly intended as an expedient for cooling the ardor of the South in insisting upon such representation or for reconciling the North to a concession of at least a part of what was demanded. For data with which to settle this question

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[1] In this connection, allusion has been made to the jealousy of the growing power of the West; and it has been intimated that the direct-tax clause was intended to protect the property of the Eastern states from combinations of Western representatives. Nothing could be more incorrect. It has already been shown in this article that jealousy of the West was confined to a few members of the convention, who were promptly outvoted when they made a definite proposal to restrict the representation of new states. Moreover, the fears expressed with regard to the future power of the West concerned general matters of legislation, taxation never being mentioned in this connection. No one dreamed of crippling the government's powers of taxation in order to restrict the future power of the West.

we are not dependent solely upon the votes and debates of the convention. We have the express testimony of the very man who proposed to proportion direct taxation to representation, and this is confirmed by the explicit statement of James Madison. On the twenty-fourth of July, just before the resolutions of the convention were referred to the committee of detail, Gouverneur Morris expressed the hope that the committee would strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as a bridge to assist us over a certain gulf: having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections.

This was sufficiently explicit, but Madison, in his report of the debates, added an explanatory note at this point.[1] He wrote:

The object was to lessen the eagerness on one side for, and the opposition on the other to, the share of representation claimed by the Southern States on account of the negroes.

The obvious interpretation suggested by the proceedings of the convention is, therefore, corroborated by the testimony of the men who were in the best

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[1] Elliot, V, 363; Gilpin, 1197. This note was clearly in the original minutes taken by Madison. The writer examined the original manuscript to determine this point, and found that the color of the ink, the writing and the position of the note leave no doubt that it was a part of the original minutes. See Madison Papers, III, 75, in State Department Library.

position to know the exact reason for the introduction of the direct-tax clause. The most careful reading of the journal of the convention and of Madison's report of the debates fails to show anything that contradicts this explanation or lends support to any other. We have but one other account of the proceedings of the convention at the time when the direct-tax proposition was brought forward. This is contained in the papers of Rufus King.[2] It is not satisfactory in many respects, but it deserves mention at this point. King gives an account of the famous controversy over representation for the slaves, and says:

The Representation was twice recommitted altho' not to the same Committee; finally it was agreed yt Taxation of the direct sort & Representation shd. be in direct proportion with each other. . . .

This makes it clear that, in the mind of King, the provision concerning direct taxation was connected with the compromise over the representation for the slaves.

The proceedings of the convention, therefore, as interpreted by Morris, Madison and King, should leave no room for doubt concerning the origin and purpose of the direct-tax clause. If, however, the subsequent discussions concerning the constitution are examined, the case is not, at first sight, so perfectly clear. Statements

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[2] The Life and Correspondence of Rufus King, I, 615 (New York, 1894). The minutes kept by Robert Yates cover only the period from May twenty-fifth to July fifth. (Elliot, I, 389–479.) The notes taken by William Pierce cover only a small portion of the debates in June.—*American Historical Review, III*, 317–324.

were made concerning the probable effects, if not the original purpose, of the clause, which seem to lend support to other views. Some of these facts are perhaps the basis for the theories advanced by Mr. Curtis and by Justices Fuller and Field.

We may consider first the theory that the states were unwilling to give the general government the right to levy customs duties, without having the powers of Congress narrowly restricted in matters of direct taxation. This theory seems to be entirely unsupported by any explicit statements of the men who framed and adopted the constitution. It is based upon inferences from certain well-established facts, and its truth or falsity depends upon the correctness with which the inferences have been drawn.

In its support it is pointed out that, when the constitution was before the people, much criticism was directed against the power of direct taxation;[1] that fears were expressed lest the new government would seize upon all sources of revenue, leaving the states with no means of support;[2] and that the friends of the constitution often declared that direct taxes would probably be a last resort of Congress, and would be used only in

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[1] Elliot, I, 369; II, 71, 160, 332, 333, 374; III, 29, 56, 57, 166, 167, 214, 280, 320; IV, 75; Ford, Essays on the Constitution, 53; Ford, Pamphlets on the Constitution (Brooklyn, 1888), 102, 304.

[2] For example, see a report of a committee of the Massachusetts legislature in 1790. Published in *American Historical Review*, II, 104.

case of some great emergency.[3] But, on the other hand, it may be answered conclusively that the leaders in the fight for a national government unfalteringly insisted that the United States ought to possess complete powers of taxation, and that they carried the day against the timid conservatives and the paper-money repudiators who desired to deprive the new government of all adequate means of support. He who reads the ringing words of Hamilton, Jay, Ellsworth, McKean, Randolph, Wilson and a host of others cannot doubt that the constitution was intended to confer upon Congress complete powers of taxation.[1] Ellsworth, for instance, argued:

It is necessary that the power of the general legislature should extend to all the objects of taxation, that government should be able to command all the resources of the country; because no man can tell what our exigencies may be. . . . A government which can command but half its resources is like a man with but one arm to defend himself.

More than this, the opponents of the constitution explicitly stated that its adoption would confer upon Congress the most complete powers of taxation. These men never doubted the intention of the new instrument on

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[3] Elliot, II, 42, 57, 60, 61, 64, 76, 106, 132, 191, 192, 211, 243, 333, 343, 501; III, 40, 95, 109, 300; IV, 77, 78, 189, 190, 220, 260; V, 373, 417, 433, 455; Ford, Pamphlets, 160, 253; Ford, Essays, 239, 404; Lodge, Works of Hamilton (New York, 1885-1886), IX, 69, 123, 125, 183.

[1] See especially Elliot, II, 190, 191, 367, 380, 466, 535; III, 127.

this point.[2] William Patterson, the man who proposed in the federal convention the plan of government that sought to limit Congress to impost and stamp duties,[3] has left us a judicial opinion upon this very subject. In 1796 he declared: "It was, however, obviously the intention of the framers of the constitution, that Congress should possess full power over every species of taxable property, except exports." And in this opinion all of Patterson's associates upon the supreme bench concurred.[4] Upon other questions the framers of the constitution were sometimes obliged to resort to compromises, but in the matter of taxation this was not the case. The men who were willing to have Congress incur debts, but unwilling to provide adequate means for their honest payment, were squarely met and totally defeated. Except in the case of exports, it is clear that the constitution was intended to give to the general government full power to command the resources of the country in its exercise of the right of taxation.

But it has been argued that a number of states proposed amendments by which it was to be provided that Congress should not levy direct taxes until it should first make requisitions upon the states for the quotas of money due according to the rule of apportionment, and should fail to secure a compliance with its demands.[1] Furthermore, it may be said that friends of

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[2] Elliot, II, 71, 330-332, 378; III, 29, 57, 263; IV, 75; Ford, Pamphlets, 102, 304; Ford, Essays, 53.

[3] Elliot, I, 175; V, 191.

[4] 3 Dallas, 173, 176, 181.

[1] Elliot, I, 322, 323, 325, 326, 329, 335; III, 31; V, 453.

the constitution recognized the strength of the opposition to direct taxation, when they intimated that the states would probably be given an opportunity to collect, in the manner most convenient, their quotas of direct taxes, before Congress would proceed to exercise the right of taxing citizens directly.[2] But these facts do not prove the theory that the states insisted upon the direct-tax provision, as a necessary protection for their own revenue powers after import duties were conceded to the national legislature. These proposals do indicate an opposition to direct taxation by the federal government, and part of this opposition did certainly come from jealousy concerning the safety of state revenues. But these proposals were opposed in the state conventions by the leading friends of the new plan of government;[3] the constitution was actually adopted without the suggested alterations; and when an amendment to secure them was introduced in the first House of Representatives, it was rejected by a vote of 39 to 9.[4] It is submitted that the failure of the attempt to oblige Congress to resort to requisitions does not support the theory that the direct-tax clause was intended as a safeguard of the revenues of the states.

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[2] Elliot, I, 492; V, 316; Pierce, Debates in the Convention in Massachusetts, 304, 311; Ford, Essays, 235, 236; Ford, Pamphlets, 49.

[3] Elliot, II, 59, 60, 342, 343, 367, 368, 380, 381, 536; III, 40, 41, 100, 101, 118, 119, 122, 181, 228, 229, 245, 250-252, 328, 329; IV, 77, 78, 82, 85, 92.

[4] Annals of Congress, First Congress, 807.

According to the second theory, the rule for apportioning taxes was intended to prevent oppressive taxation of any state or section by a combination of other states or sections. Various passages from the speeches of such men as Madison, Randolph, Hamilton, Nicholas, Pendleton and Williamson may be cited in support of such a view. We may begin with extracts from the *Federalist.* Hamilton, after discussing the difficulties of securing accurate assessments for the apportionment of direct taxes, wrote:

In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave the discretion altogether at large.[1]

This was intended as a defense of the rule of apportionment according to numbers. It will be noted that Hamilton considered that rule not incompatible with the end of giving the government complete powers of taxation. He did not consider the adequacy of direct taxation for purposes of revenue to be limited by the constitutional requirement, but simply thought that abuse of the power might be prevented by the apportionment rule. Elsewhere he wrote that this provision "effectually shuts the door to partiality or oppression."[2] Similar ideas were advanced in the Virginia convention, where Patrick Henry, George Mason and others

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[1] Lodge, Works of Hamilton, IX, 125.

[2] *Ibid.*, IX, 210.

attacked vigorously the proposal to give Congress the right to levy direct taxes. In reply to such objections, Madison said:

Our state is secured on this foundation. Its proportion will be commensurate to its population. This is a constitutional scale, which is an insuperable bar against disproportion, and ought to satisfy all reasonable minds.

Randolph and George Nicholas also urged strongly that the provision fixed the amount which could be drawn from Virginia by direct taxation.[3]

These statements, if they stood by themselves, would seem to support strongly the theory under discussion. But they need to be considered carefully, with reference to the circumstances under which they were made. Hamilton, Madison, Randolph and Nicholas were in the midst of a controversy, and were defending the power of direct taxation from the criticisms that were raised against it. It will be noticed that none of these statements are express explanations of the purpose of the clause relating to apportionment. They may be considered merely as declarations concerning its incidental effects upon the position of the states in the matter of direct taxation. In the case of Madison, it will be remembered, we have his express statement, made in his minutes of the debates of the convention, that Morris offered his proposals concerning the apportioning of taxes in order to hasten a settlement of a

[3] 8 Elliot, III, 307; *cf.* 121, 244.

dispute over representation for the slaves. Special pleading in the course of a heated controversy cannot stand against the deliberate records which are found in the proceedings of the convention.

Upon later occasions we find two express statements that the object of the direct-tax clause was to safeguard a state or section against oppressive taxation. Hugh Williamson said in Congress, in 1792, that this clause was intended to prevent the imposition of unequal burdens.[1] Four years later Edmund Pendleton advanced a similar argument.[2] Such evidence is of importance, especially when added to that furnished by the words of the statesmen previously quoted. But it needs to be weighed against the express statements of Morris, Madison and King, made in the accounts of the debates of the federal convention, and against all the other materials that can be drawn from the discussions of the period when the constitution was being ratified. It will be shown in subsequent paragraphs that the explanation which Morris, Madisori and King made concerning the purpose of the direct-tax clause is confirmed by evidence drawn from later sources.

Besides the two theories already presented, there was suggested a third explanation of the purpose of the apportionment clause. In support of this third theory, James Madison may be quoted. In the Virginia convention he urged that, "from the modes of representation and taxation, Congress cannot lay such a tax on slaves

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[1] Elliot, IV, 427.

[2] In Bache's *Aurora General Advertiser* for February 11, 1796.

as will amount to manumission."[3] In North Carolina it was argued by Spaight, who had been a member of the federal convention, that the apportionment rule was "meant for the salvation and benefit of the Southern States."[1] Without this provision the South might be oppressed, since "an acre of land in the Northern States is worth many acres in the Southern States." In the Hylton case, in 1796, Judge Patterson advanced the same explanation.[2] He held that the constitutional rule was made in the interest of the South. This section had many slaves and large tracts of land thinly settled. The other states had few slaves, and their territory was limited and well settled. Without this constitutional requirement, Congress might have taxed slaves arbitrarily, and might have taxed land in all parts of the country at a uniform rate. This would have been highly oppressive to the South.

Madison's words are not an express statement of the purpose of the constitution, and may be merely an opinion concerning its incidental effects. But Spaight and Patterson clearly advanced explanations of the object of the direct-tax clause. Two things may be said concerning the theory here presented. First, it ought not to stand against the evidence found in the debates of the federal convention, supported, as we shall find it to be, by later testimony. Second, it seems certain that Patterson and Spaight were misled by what they

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[3] Elliot, III, 453.

[1] Elliot, IV, 209, 210.

[2] 3 Dallas, 177.

undoubtedly remembered concerning the provision that no "capitation or other direct-tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." We have seen that so much of this clause as refers to a capitation tax was introduced for the sole purpose of protecting slave owners from an arbitrary tax upon the blacks. Knowledge of this fact might easily lead to the conclusion that the original apportionment rule was likewise intended for the benefit of the South.

Having considered all the evidence in favor of these three divergent theories, we may now inquire what facts can be drawn from subsequent discussions to support the theory which seems to be the only one justified by the proceedings of the federal convention, as explained by Morris, Madison and King. In the New York convention Hamilton referred to the direct-tax clause in a manner that corroborates the view that this provision was intended to reconcile both the North and the South to representation for three-fifths of the slaves. Hamilton was called upon to meet the contention that it was unfair to allow the South any representation whatever for men who were held as property, with no political rights and no "will of their own." He argued:

But representation and taxation go together, and one uniform rule ought to apply to both. Would it be just to compute these slaves in the assessment of taxes, and

discard them from the estimate in the apportionment of representatives?[1]

In the same state, George Clinton objected to the rule for apportioning direct taxes according to numbers. He held that property should be the basis for the assessment of public burdens, and said: "You are told to look for the reason for these things in accommodation."[2] Hamilton's argument and Clinton's objection alike make it clear that in New York the requirement of direct taxation for three-fifths of the slaves was used, as Morris had intended, for the purpose of reconciling the people of the North to the concession of a three-fifths representation.

In the Massachusetts convention, when the provision for apportioning direct taxes was under discussion, the record states[3] that "Messrs. King, Gore, Parsons, and Jones, of Boston, spoke of the advantage to the Northern States the rule of apportionment in the third paragraph (still under debate) gave to them." Unfortunately these speeches are not reported; but the drift of the argument is, nevertheless, sufficiently plain. Better still is the reply which James Warren made to the plea that the taxation for the three-fifths of the slaves compensated the North for the concession of a three-fifths representation. Warren asked whether Massachusetts ought to give up her right of equal representation for her white inhabitants "to any State

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[1] Elliot, II, 237.

[2] Ford, Essays, 273.

[3] Elliot, II, 42.

that would pay our whole proportion of direct and indirect taxes."[1] He declared that no financial consideration could compensate for a concession of unequal representation. Moreover, he thought that the burdens avoided by Massachusetts would be merely nominal, because the South, enjoying slave representation, could prevent the imposition of direct taxes and confine the federal government to indirect taxation. Here again both the argument and the reply show that the direct-tax clause was actually used in precisely the manner contemplated by Morris and explained by Madison.

We find, therefore, four conflicting views of the purpose of the constitutional provision for apportioning direct taxes. The proceedings of the constitutional convention, interpreted fairly and explained by Morris, Madison and King, give countenance to only one theory—that the apportionment rule was merely a bait for extremists in the North and in the South, thrown out in order to secure the adoption of the compromise over representation for the slaves. This consideration should be of decisive weight. Three other theories find more or less support in the discussions of the period that witnessed the adoption of the constitution. But the theory based upon the proceedings of the federal convention finds important corroborating testimony. Can there be any doubt as to which explanation has the weight of evidence on its side?

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[1] Letters of a Republican Federalist, quoted by S. B. Harding, The Contest over the Ratification of the Federal Constitution in Massachusetts (New York, 1896), 157, 158.

This particular question has not attracted much notice from the writers upon American constitutional law and history. But it will be well to consider the views of the few authorities who have in any way referred to the subject. Joseph Story has treated at length the great controversy over the concession of representation for three-fifths of the slaves. After explaining the real nature of the compromise between the free and the slave states[2] upon this point, he shows that, in order to reconcile the non-slaveholding states to this provision concerning representation, another clause was inserted, requiring that direct taxes should be apportioned in the same manner as representatives. Thus the weight of his authority can be invoked in support of the theory clearly indicated by the proceedings and debates of the federal convention. James Kent treated of this subject very briefly.[1] He considered the objections that could be advanced against allowing representation for the slaves and the reasons for such a concession. Then he pointed out that these same slaves served to increase the burdens of direct taxation—a fact which he regarded in the light of a compensation to the non-slaveholding states. W. A. Duer noted that the apportionment of direct taxes upon the same basis as representatives increased the burdens of direct taxation to be borne by the South.[2] Mr. Justice Swayne, in

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[2] Commentaries, § 642.

[1] Commentaries on American Law (fourteenth edition, Boston, 1896), I, 231.

[2] Constitutional Jurisprudence of the United States (second edition, Boston, 1856), p. 56.

a decision delivered in 1880,[3] called attention to the origin of the direct-tax clause in the compromise over representation for slaves. Mr. George Ticknor Curtis, who advanced in 1866 a different theory of the purpose of the apportionment rule, presented in his *Constitutional History*[4] an account of the genesis of this provision that is identical with that offered in the present essay. Finally, George Bancroft has given us a history of the proceedings of the convention, in which he explains most clearly that the provision concerning direct taxes originated in the attempt of Gouverneur Morris to effect a compromise of the dispute over representation for the slaves.[5] With the exception of George Ticknor Curtis, in his article of 1866, it is believed that no writer can be quoted in support of the views advanced by Justices Fuller and Field in 1895. It thus appears that the weight of authority has always been on the side of that theory which alone finds justification in the records of the constitutional convention.

VI.

It remains for us to consider the character and the effect of this constitutional rule, which had its origin, as has been shown, in an attempt to compromise differences of opinion concerning the justice of allowing representation for the slaves.

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[3] 102 U. S. Reports, 596.

[4] Constitutional History, I, 408–414.

[5] History of the United States, VI, 265, 266.

This clause of the constitution requires that direct taxes shall be divided among the states according to their respective numbers, and provides for what Bancroft would have called a "collective poll tax."[1] Such a rule of apportioning public burdens is repugnant to every principle of just taxation. It is open to the further objection that direct taxes assessed upon this basis must prove almost valueless as a source of revenue. When public burdens are apportioned in such a manner that the weakest communities must bear as great a burden as the strongest, the fruitfulness of any tax is measured by the ability of the weakest state to contribute to the support of the general government.[2] Both the injustice and the unproductiveness of such imposts ought to be so clear as to require no further discussion. But in the income-tax cases it was argued by counsel, and explicitly stated by the court, that there is no real difficulty in apportioning taxes, even upon income, according to the rule prescribed by the constitution. The Chief Justice gravely raised the question:

Cannot Congress, if the necessity exists of raising thirty, forty, or any other number of million dollars for

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[1] History of the United States (fifth edition, Boston, 1863), VIII, 58.

[2] This was well stated by George Nicholas in the Virginia convention: "If we be wealthier, in proportion, than other states, it will fall lighter upon us than upon poorer states. They must fix the taxes so that the poorest states can pay; and Virginia, being richer, will bear it easier." (Elliot, III, 243.) Nicholas urged this fact as an argument in favor of the constitution. Such a consideration would have made no friends for the constitution in the poorer states.

the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census?[3]

Elsewhere, he seemed to admit the possibility of inequalities arising from the operation of the apportionment requirement; but he claimed, nevertheless, that the clause conferred upon Congress "a power just as efficacious "as any form of taxation "to serve the needs of the general government."[4] These statements may perhaps warrant a historical and statistical investigation of the justice and efficacy of taxes apportioned according to the constitutional rule.

1. *Opinions of the framers of the constitution.*—It must be said that most of these men had no idea that the direct-tax clause would seriously impair the power of the government to draw forth the resources of the country. Such men as Hamilton, who desired Congress to possess all necessary authority, considered the provision "not incompatible with the end "of conferring upon the United States a general revenue power.[1] The clause was not accepted in the constitutional convention, until it had been amended so as to appear incapable of causing injury to the financial powers of Congress.[2] Sufficient other evidence has already been offered to support the conclusion that all, or nearly all, of the friends of the constitution held the same views

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[3] 158 U. S. Reports, 632, 633.

[4] *Ibid.*, 621.

[1] Lodge, Works of Hamilton, IX, 125.

[2] Elliot, Debates, V, 302.

as Hamilton. But one important consideration should not be overlooked. It is probable that the inequalities in the comparative wealth of the different states were not so marked in 1787 as they are to-day. At that time, the ability of the weakest state to contribute may not have fallen so far short of the ability of the richest as to make an apportioned tax so ineffective for revenue purposes as it would be at the present time.

Concerning the justice of the apportionment rule, opinions were divided. It will be well to consider first the arguments advanced in favor of numbers as a basis for apportioning direct taxes. Perhaps a majority of those who defended the provision did so because they believed it impossible to secure an equal and uniform assessment of property in all the states and preferred numbers as a "more practicable "rule, possessing greater "simplicity and certainty."[3] Thus, in the *Federalist*,[4] it is stated that numbers are not "a precise measure "of wealth and ordinarily are "a very unfit one"; but the constitutional provision is called the "least objectionable among the practicable rules." Other leaders seemed to endorse more fully the principle of the apportionment clause.[1] But when reasons were advanced for such an opinion, nothing better was offered than a statement that "population, industry, arts, and the value of labor, would constantly tend to

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[3] See Works of Hamilton, IX, 125; Elliot, I, 70, 71; II, 42; V, 295.

[4] Works of Hamilton, IX, 339.

[1] Elliot, I, 72; IV, 210; V, 281, 299, 303, 309; Pelatiah Webster, Political Essays (Philadelphia, 1791), 55; Ford, Essays, 193.

equalize themselves," or some other equally vague explanation.[2]

On the other hand, many statesmen believed that the requirement was unjust. Opponents of the constitution naturally did not neglect such an opportunity as this clause offered, and insisted, with George Clinton, that property should be the basis of taxation.[3] But King and Morris also expressed their hostility to selecting numbers as a measure of wealth.[4] Moreover, Wilson and Hamilton can be quoted in opposition to the proposition that numbers are a fair rule for taxation.[5] Hugh Williamson asserted: "It is impossible to tax according to numbers. Can a man over the mountain, where produce is a drug, pay equal with one near the shore?"[6] Gouverneur Morris, as we have seen, declared, before the convention closed, that the provision was "liable to strong objections." In 1789 he wrote that the difficulties caused by the direct-tax clause would probably "force Congress into requisitions."[7] In 1796 Justice Patterson declared that "numbers do not afford a just estimate or rule of wealth," and that the apportionment clause was "radically wrong."[8] In 1797

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[2] Elliot, V, 299. *Cf.* Works of Hamilton, IX, 125.

[3] Ford, Essays, 272, 273.

[4] Elliot, V, 297, 304.

[5] Elliot, I, 77; V, 25; Works of Hamilton, IX, 122–124.

[6] Elliot, I, 459.

[7] Sparks, Life of Monis (Boston, 1832), III, 471.

[8] 3 Dallas, 178.

it was argued in Congress that a direct tax would be inexpedient, because its distribution among the states would, of necessity, be extremely unequal and unjust.[9] In 1807, and again in 1812, Gallatin urged the same considerations.[10]

In proof of the assertion that the constitutional rule of apportionment was considered entirely just and satisfactory, it is pointed out that eleven or twelve states had voted to amend the Articles of Confederation in such a way as to permit the quotas of the requisitions to be determined by a similar rule. But this was not done until all attempts to assess the requisitions upon the basis of the value of real property had failed. So far as the old Confederation was concerned, there can be no doubt of the absolute impracticability of any other rule of apportionment than that of numbers. But when a new government was formed and endowed with a general power of taxation, there was no longer any necessity for apportioning requisitions among the states, and there was no justice in selecting numbers as the basis of direct taxation. The direct-tax clause was accepted by most of the friends of the constitution with the best grace possible, and was defended as well as its manifest injustice allowed. But it prescribed a rule of taxation that would have secured the assent of few, if any, of the framers of the constitution, under circumstances of less dire necessity.

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[9] Annals of Congress, 4th Congress, II, 1866, 1906, 2196.

[10] State Papers, Finance, II, 249; Writings of Gallatin (Philadelphia, 1879), II, 506.

Many of the expressions that can be quoted in favor of the apportionment rule are labored arguments in support of a compromise measure that could be neither rejected nor defended. In justification it was often said that "taxation ought to be in proportion to representation," or that "taxation and representation ought to go together." These phrases were on the surface akin to the watchword of the Revolution, "no taxation without representation"; but in essence they were, of course, totally dissimilar. That taxpayers should have a voice, through their representatives, in the imposition of taxes, is one principle: that every man should be taxed in proportion to the representation that he enjoys, is a very different proposition. The last principle would lead to a uniform poll tax as the sole source of public revenue, whenever citizens have an equal voice in the choice of representatives. Such a rule of taxation would have been universally repudiated in state affairs, where the poll tax had either been abandoned or had been supplemented by taxes upon property. In all quarters the very suggestion of a poll tax aroused bitter opposition,[1] and no one defended such an impost as a principal source of revenue, except in cases of direst emergency. The Maryland constitution of 1776 had condemned levying taxes by the poll" as "grievous and oppressive."[2] Two states proposed to amend the federal constitution so as to prohibit Congress from ever

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[1] Elliot, II, 43, 805, 106, 135, 340, 391, 502; III, 364; Ford, Essays, 272, 273; Works of Hamilton, IX, 213, 214.

[2] Poore, Federal and State Constitutions, I, 819.

levying a poll tax.[3] It is difficult to believe that the fathers would have chosen freely to limit the government's powers of direct taxation to what is practically a collective poll tax.

Finally, the constitution did not provide for equality of representation; for the whites of the South were given representation for three-fifths of their slaves. When the expression "taxation according to representation" is interpreted in the light of this fact, it may be taken to mean that the South should bear an additional share of direct taxation, to compensate for the increased representation that its white population was to enjoy. This brings us back to the true explanation of the purpose of the direct-tax clause. In view of the representation conceded for three-fifths of the slaves, it may have seemed a fair compromise that the South's quota of direct taxation should be proportioned to its share of representation.

2. *The experience of the federal government.*— Five years after the new government was established under the constitution, the necessary expenditures of the United States had increased to such an extent that it was perceived by the best financiers that indirect taxation ought to be supplemented by other revenues. A direct tax was proposed in 1794 and in 1796,[4] but Congress did not come to a decision until 1798. One of the reasons assigned for the reluctance to pass such a measure was the inequality and injustice of the

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[3] Elliot, I, 330, 336.

[4] State Papers, Finance, I, 276, 409, 414-441.

constitutional requirement. The act of 1798 apportioned among the states a direct tax of $2,000,000.[5] This was assessed upon dwelling-houses, lands and slaves, and was collected by federal officers, without reference to state authorities. The tax was to be paid in 1800, but only $734,000 was raised in that year. In 1801 the collections amounted to $534,000, and in 1803 $207,000 was paid in.[1] Thus, less than three-quarters of the tax was raised in three years. Small payments dribbled into the treasury until 1813, when $238,000 still remained uncollected. The amount of the tax had been extremely small, when compared with the apparent needs of the government in 1798, but the difficulties of collection rendered it still more insignificant as a source of revenue. It will be seen that, if other imposts had been equally "efficacious to serve the needs of the general government," the United States would have been reduced to practical bankruptcy.

Congress did not attempt to levy another direct tax until the country became involved in the second war with Great Britain. Then the blockade of our ports caused the revenue from customs duties to fall off so heavily that internal taxes became absolutely necessary. So in 1813, Congress imposed, among other taxes,

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[5] I Statutes at Large, 580, 597. See also C. F. Dunbar, in *Quarterly Journal of Economics*, III, 448, 442; Bolles, Financial History of the United States, II, 116-122 (New York, 1879-1886); Howe, Taxation in the United States, 30-34 (New York, 1896).

[1] These figures may be found in Scribner's Statistical Atlas, plate 81. (New York, 1883.) The amounts are stated in the nearest thousands of dollars.

a direct levy of $3,000,000 upon the states.[2] This was assessed upon lands, houses and slaves, but the states were allowed to assume their quotas and collect the money for the United States by means of their own taxes. Seven states[3] availed themselves of this privilege, and in the other eleven the tax was collected by the federal government. This was a most favorable opportunity for proving the efficacy of direct taxes apportioned in the constitutional manner. The emergency was alarming, the necessities of the federal treasury were perfectly clear, and no one could deny the propriety of attempting to collect the small amount of money called for under the law. The result was a deficiency of nearly $800,000 out of the total levy of $3,000,000 for the year 1814. Congress felt obliged to establish, in 1815, an annual direct tax of $6,000,000. But this measure was repealed in 1816, when, however, a tax of $3,000,000 was required for that year.[1] These later acts differed in no essential feature from the law of 1813. The amounts required had been as follows: $3,000,000 by the act of 1813, $6,000,000 by the act of 1815 and $3,000,000 by the act of 1816. By the close of the fiscal year 1817, the payments had amounted to $10,470,000. Small collections continued until the year 1839, when the total receipts had risen to $10,984,000. The efficacy of this power of apportioned taxes can be

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[2] 3 Statutes at Large, 22, 53; *Quarterly Journal of Economics*, III, 442, 443; Bolles, II, 254,259; Howe, 41-49.

[3] State Papers, Finance, II, 860, 861.

[1] 3 Statutes at Large, 564, 255; *Quarterly Journal of Economics*, III, 444.

judged from the fact that, during the years 1814, 1815, 1816 and 1817, when the returns were largest, direct taxes upon property had yielded only $10,470,000 out of a total of $100,486,000 which the government had drawn from the people by taxation.[2] Worse even than the failure of these direct taxes for purposes of revenue were the hardships caused by their unequal assessment.

Congress made no further attempts to use this efficacious power until the nation was convulsed in the throes of a life and death struggle with domestic insurrection. In the first war revenue act of 1861, there was a provision for an annual direct tax of $20,000,000.[3] This followed closely the lines laid down by the laws of 1813 and 1815. It was assessed upon lands and dwelling-houses, and the states were allowed to assume their quotas, if they should prefer to do so. The seceding states were included in the apportionment, so that the loyal states were asked for only $15,000,000. This was a very small amount, when compared with the resources of the country and the needs of the federal government. All the loyal states but two assumed their quotas. The payments made, however, consisted largely of the settlement of accounts which the states held against the federal treasury for their expenses in

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[2] These figures may be found in Scribner's Statistical Atlas. The results are stated in the nearest thousands.

[3] 12 Statutes at large, 294; *Quarterly Journal of Economics*, III, 445 *et seq.*; Bolles, III, 57, 18, 160, 161; Howe, 81-90. See also House Report, No. 552, 50th Congress, first session, February 21, 1888.

equipping troops. By an act of 1862[1] the duration of the tax was limited to a single year and all further assessments were suspended until 1865; and in 1864 the tax was practically repealed.[2] Thus, $20,000,000 represents the total amount which Congress attempted to draw from the country by means of apportioned taxes during a struggle which required an increase of all other taxation to an extent that would have seemed absolutely impossible at the opening of the war. It will be instructive to present in a single table the payments made under the law of 1861 during the years when they were largest, and to contrast them with the receipts of the federal government from other taxes. The results, stated in the nearest thousands of dollars, are as follows[3]:

YEARS.	ALL OTHER TAXES.	DIRECT TAX.
1861	$39,582	
1862	49,056	$1,795
1863	106,701	1,485
1864	212,057	476
1865	294,392	1,201
1866	488,274	1,975
1867	442,446	4,200
1868	355,553	1,788
Totals	$1,988,061	$12,920

[1] 12 Statutes at Large, 489.

[2] 13 Statutes at Large, 304.

[3] Scribner's Statistical Atlas, plate 81.

Long after the close of the war, small payments kept dribbling into the treasury, the last being credited in 1888. The total amount paid or credited up to February 18, 1888, is stated at $15,360,000.[4] After allowing $2,125,000 for the cost of collecting the tax in the states where the quotas had been assumed, there remained an unpaid balance amounting to $2,554,000. The tax had been but partially collected in the seceding states; and this circumstance, with others, led Congress in 1891[5] to vote to return to the states the amounts that had been paid and to remit the quotas that still remained due. Under this law, about $14,222,000 had been returned to the states by the close of the fiscal year 1895.

The direct tax of the Civil War, then, did not prove a more brilliant success than its predecessors. An exhibit of the net results to the United States from the exercise of the power of levying apportioned taxes may not prove uninstructive. The five direct taxes levied in 1798, 1813, 1815, 1816 and 1861 called for a total of; $34,000,000. Of this amount, the government succeeded in collecting, within periods varying from thirteen to twenty-six years, the surprising sum of $28,100,000. From this, however, we must deduct the $14,222,000 returned to the states under the law of 1891. When this is done, it will be seen that, in' the course of the one hundred and nine years that have elapsed since the federal government has possessed

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[4] House Report, No. 552, 50th Congress, first session, 45.

[5] 26 Statutes at Large, 822.

this valuable power, Congress has been able to collect the net sum of $13,880,000 from these apportioned taxes. Upon a liberal estimate, this is much less than one-tenth of one per cent of the total ordinary revenues of the United States since 1789, exclusive of the postal receipts.

3. *The inequalities caused by the constitutional rule.*—The direct tax of 1861 was assessed upon lands and dwelling-houses; but, since all the loyal states except two assumed their quotas, it became practically a general property tax. The federal census gives the assessed value of property in each state in 1860, as well as the *per capita* assessed valuation.[1] In order to show the inequality of assessment, Massachusetts, Rhode Island and Connecticut are compared with Michigan, Kansas and Minnesota. The results are embodied in the table on the opposite page, in which the *per capita* assessed valuation of all property is stated in the nearest number of dollars.

Thus it appears that a hundred dollars' worth of property was taxed in Minnesota nearly four times as much as in Connecticut; while the three Western states, in general, paid at three and one-half times the rate that was imposed upon the three Eastern states.

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[1] Eleventh Census: Report on Wealth, Debt and Taxation, II, 59.

States.	Quotas of Tax.	Amount of Tax *per capita.*	Value of all Property *per capita.*	Amount of Tax per Hundred Dollars of Property.
Mass....	$825,000	$0.67	$631	$0.106
R. I.....	117,000	.67	716	.093
Conn.	308,000	.67	742	.090
Minn.	109,000	.63	186	.338
Kan.....	72,000	.67	210	.318
Mich.....	502,000	.67	218	.307

We may next compute the largest possible yield of a direct tax in the United States at the present time, and the inequalities that would be caused by the attempt to levy such an impost. The census of 1890 showed the smallest *per capita* valuation of assessed property to be in North Carolina.[1] The amount that could be collected by a direct tax must be gauged by the ability of this state to contribute to the support of the general government. In order to make the estimate of the yield of the tax as large as it could possibly be, under any circumstances, let us assume that the United States decides to ask from North Carolina an amount equal to all the taxes, state and local, which the property of the state was compelled to bear in 1890. As a matter of fact, to double the direct taxes, state and local, which property is now compelled to bear, would be a political impossibility in any section of the country; but we will suppose this to be done in North

[1] Eleventh Census: Wealth, Debt and Taxation, II, 59.

Carolina. In 1890 that state raised, for state and local purposes, the sum of $2,151,835 by *ad valorem* taxes on real and personal property.[2] This amounted to $1.33 for each person in the state. This figure sets the limit which Congress could not exceed in imposing the collective poll taxes which the constitution calls direct taxes. In 1890, such an apportioned tax of $1.33 would have yielded $83,287,000. If we assume a population of 70,000,000 at the present moment, we should get about $93,000,000 as the largest conceivable amount of a direct tax.

This estimate is probably two or three times as large as any tax that Congress would dare to ask for. It would impose upon the poorer states a crushing burden, and would cause an amount of injustice that cannot be readily described. Moreover, it could never be collected, even in times of direst need, as the history of previous direct taxes has shown. If the tax should be needed for more than a single year, Congress would not venture to impose upon the poorer states more than one-third or one-fourth of the amount of their present property taxes. Thus, if we suppose a war, lasting four years, to call for all the resources of the country, Congress might hope to raise from twenty to thirty million dollars annually by means of this efficacious power conferred by the constitution. This, it will be remembered, presupposes that enormous inequalities would be tolerated and that a crushing burden would be imposed upon the poorer states. It also assumes, contrary

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[2] *Ibid.*, p. 412.

to all previous experience, that such an unjust tax could be promptly collected.

The inefficacy of the power of apportioned taxation may be further shown by another comparison. In 1890 the state and local governments raised $443,096,574 by *ad valorem* taxes upon real and personal property. If Congress could reach this property uniformly with a tax only one-third as large as that imposed by state and local authorities, it could raise $147,697,000 by this means. If, on the other hand, the property of the poorest states should be taxed at one-third the rate imposed for local purposes and the other states should be taxed the same *per capita* amount, as required by the constitution, the yield would be but $31,000,000.

We may conclude this subject by examining the extent of the inequalities that would be perpetrated, if Congress should attempt to raise $93,000,000 by an extraordinary levy of $1.33 for each person in every state. For this purpose we may use the census figures of the *per capita* amounts of property assessed for taxation. At this point it may be objected that the assessed value of property is not, for all the states, a uniform proportion of the true valuation. It would be better to use figures of the true valuation of all property, if any such could be found that were anything more than the most conjectural estimates. As it is, we have only the statistics of assessed valuation available for scientific purposes. But these are sufficient in this case, because a comparison is to be made of the richer Eastern states and the poorer states of the West and South. Now it may happen, although nothing definite can be said

upon the subject, that real property, in the poorer states selected for our table, is assessed at a smaller per cent of its true value than is the case in the richer states selected. For the sake of argument, this may be conceded. But it is perfectly certain that the amount of personal property that escapes the assessor in the richer states is far greater than in the poorer states. In Kansas, Nebraska, North Carolina and South Carolina, a far larger proportion of personal property consists of farm stock and household goods, which are readily found for the purpose of assessment. The intangible forms of personalty, which escape taxation almost wholly, are far more common in the richer states.[1] These forms of intangible wealth have probably escaped taxation in an increasing degree; for the census shows that the *per capita* amount of personal property assessed in Massachusetts had increased by only two dollars between 1860 and 1890. In Rhode Island the *per capita* assessment of personalty had decreased by nine dollars during the same period, and in New York it had decreased by eighteen dollars. We are safe in concluding that the census tables of property assessed for taxation cannot exaggerate the differences in wealth between such states as are chosen for our table.

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[1] The taxation of personal property is in inverse ratio to its quantity: the more it increases, the less it pays." (Seligman, Essays in Taxation [New York, 1895], p. 27.) See the statistics presented by Professor Seligman, pp. 27-30. A single fact may be cited here. From 1860 to 1890 the assessed value of real estate increased from $6,973,000,000 to $18,957,000,000. During the same period the assessed value of personal property increased only from $5,112,000,000 to $6,516,000,000. — Eleventh Census: Report on Wealth, Debt and Taxation, II, 59, 60.

The probability is that such differences are even greater than are shown by the figures of the census; so that our results will underestimate, rather than overestimate, the extent of the inequalities.

The subjoined table shows the *per capita* amount of assessed property in each state selected for comparison, the figures being stated in the nearest number of dollars. It also shows the amount of the tax that must be assessed upon each hundred dollars of property, in order to raise each state's quota, estimated upon the basis of $1.33 *per capita*.

States.	Amount of Tax *per capita.*	Value of Assessed Property *per capita.*	Amount of Tax *Per* Hundred Dollars of Property.
Mass.	$1.33	$962	$0.138
R. I.	1.33	931	.142
Kan.	1.33	244	.545
Neb.	1.33	174	.764
N. Car.	1.33	145	.917
S. Car.	1.33	146	.910

Thus the rate of taxation in Nebraska would be more than five times the rate in Rhode Island; while property in the Carolinas would bear about seven times the burden imposed in Massachusetts. It is not likely that Congress will ever attempt to perpetrate such an injustice, which would be not taxation, but robbery—a robbery of the weakest for the benefit of the strong; a

robbery none the less because sanctioned by a constitutional rule begotten of the old strife over slavery.

4. *Opinions of various writers.*—Judge Story, writing long before the abolition of slavery, expressed the belief that the direct-tax clause was unjust. In view of the existence of slavery, however, he thought that "some artificial rule of apportionment" might be "indispensable to the public repose."[1] George Bancroft, after explaining the manner in which the direct-tax provision was introduced by Morris, said: "In this short interlude, by the temerity of one man, the United States were precluded from deriving an equitable revenue from real property."[2] Francis Bowen, in his discussion of the finances of the Civil War,[3] called the article obsolete, and held that it should be repealed. He wrote:

> This article was adopted only as part of a compromise, being intended as compensation for the rule which ascertains the representative population, by adding to the whole number of whites three-fifths of the slaves. As there are no slaves now, this rule for apportioning the number of Representatives in Congress is obsolete, and ought to be abrogated, together with its appendage and offset, the rule for the apportionment of direct taxation.

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[1] Commentaries, §§ 993-997.

[2] History, VI, 266.

[3] American Political Economy, p. 438 (New York, 1870).

More recently, three other writers have considered the subject. Professor C. F. Dunbar, discussing the experience of 1861, has written[1]:

> The direct tax had, in fact, far less to recommend it in 1861 than at the beginning of the century. The inequality of apportionment according to population, serious enough at first, had been increased by the concentration of wealth in the commercial and manufacturing States.

Then he narrates the miserable failure of the tax levied as a war measure, and concludes as follows[2]:

> The direct tax provided for by the constitution has at last been effectually discredited as a source of revenue, and it has also been too prolific of misconception and confusion to have any interest henceforth as a practical measure of finance.

Dr. Howe, after reviewing the history of apportioned taxes, wrote[3]:

> Even admitting that the tax conformed roughly to justice a hundred years ago, when population was a rough criterion of the ability of the states to pay, it must be apparent that the unequal territorial distribution of wealth at the present time renders even an approximation to justice impossible.

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[1] *Quarterly Journal of Economics*, III, 445.

[2] *Ibid.*, 461.

[3] Taxation in the United States, p. 84.

Finally, Francis A. Walker discussed the subject in one of his last books. He said:

> The provisions of the constitution regarding direct taxes, again, are such that it might just about as well have declared that such taxes should not be imposed at all.

And then he explains:

> If the amount of the tax were to be made large enough really to bring out the resources of the older and richer states, the newer and poorer states could not pay their share. If, on the other hand, the amount is kept so low as to be within the means of the frontier states, the proceeds for the whole country will be insignificant.

Mr. Walker's conclusion is as follows:

> Three times has the general government undertaken to levy such a tax; but in each case the amount raised was small in proportion to receipts from other sources. In each case the collection of the tax excited bitter opposition. In each case large portions of the tax were left uncollected, after the lapse of years. It would not be a very hazardous prediction that the United States government will never again resort to this mode of raising revenue.[1]

Against the opinion of Chief Justice Fuller may be placed that of one of the dissenting judges in the

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[1] The Making of the Nation, pp. 145, 146 (New York, 1895).

income-tax cases. Mr. Justice White declared[2] that the rule of apportionment, especially as interpreted in 1895, prescribes "the most flagrantly unjust, unequal, and wrongful system of taxation known to any civilized government." In the light of all our experience of the operation of the direct-tax clause, the reader will have no difficulty in deciding between the opinions of Justices Fuller and White.

The writer is unable to dismiss this subject without referring to the experience of the Confederate States in trying to secure revenue by apportioned direct taxation. Fortunately for the cause of the Union, the constitution of the Confederacy borrowed from that of the United States the provision that direct taxes should be apportioned according to the rule of numbers. The result was what reason and experience could have foretold. On account of the blockade of its ports, the Confederacy was obliged to depend very largely upon internal taxation as a support for its loans and paper money. A direct war tax was apportioned among the states, which were given the privilege of assuming its payment. Some of the states then issued bonds, in order to secure the means for paying their quotas. In these cases the tax was converted into a loan, at a time when the public credit was beginning to be strained to a perilous point. Elsewhere the tax was only partially collected. The net result was that direct taxes furnished only one-third of one per cent of the total revenue of the Confederacy in one year, and two-thirds of

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[2] 158 U. S. Reports, 713.

one per cent in another.[1] Jefferson Davis has left us a melancholy record of the failure of the Confederate States to reach their principal sources of wealth, land and slaves, by means of apportioned taxes.[2] It need not surprise us, therefore, to find the direct-tax clause of its constitution assigned as an important cause of the downfall of the Confederacy.[3] Yet this was the exact provision whose application has been so widely extended by the recent decision of our Supreme Court that, apart from customs, excise and some other duties, the United States has no clear power to reach the wealth or income of its citizens, save by taxes apportioned according to the rule of numbers.

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[1] See J. C. Schwab, "The Finances of the Confederacy," POLITICAL SCIENCE QUARTERLY, VII, 38-56 (March, 1892).

[2] Rise and Fall of the Confederate Government, I, 495, 496 (New York, 1880.

[3] See the *Century*, LIII, 38.