

THE LIMITS OF NEW ORIGINALISM

*Joel Alicea**

*Donald L. Drakeman***

ABSTRACT

We argue that New Originalism, which has emerged as the dominant theory of originalism, has a significant methodological limitation for anyone who takes historical research seriously. That limitation arises where historical sources indicate different possible original meanings, which can occur because of New Originalism's focus on the meaning of the text for a hypothetical, reasonable person at the time of ratification. We describe the first instance of this problem, which occurred in Hylton v. United States (1796). Hylton involved the constitutionality of an excise tax, and we use that case to provide a real example of the impossibility of a New Originalist interpretation when the historical materials provide clear evidence of equally plausible but conflicting meanings. We suggest that Justice Paterson's opinion in Hylton offers a solution to this problem: where New Originalism cannot settle the question of original meaning, judges might turn to Old Originalism's focus on the intentions of the Founders. Our article thus makes three significant contributions to constitutional scholarship: (1) it identifies a critical weakness of New Originalism; (2) it demonstrates how the Supreme Court in the founding era used Old Originalism to resolve this problem; and (3) it represents the most complete analysis of the historical meaning of the taxation provisions in Hylton, which may prove to be useful for present or future litigation over the taxing power.

* J.D. Candidate (2013) Harvard Law School; A.B. (2010) Princeton University. The authors' names are listed alphabetically and do not indicate primary-author status. The authors wish to thank Johnathan O'Neill and Stephen T. Whelan for their insightful comments on previous drafts, as well as Michael Breidenbach and Rob Hunter for their excellent research assistance.

** Fellow, Centre for Health Leadership, University of Cambridge; M.A., Ph.D. (1988) Princeton University; J.D. (1979) Columbia Law School; A.B. (1975) Dartmouth College.

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INTRODUCTION

Well before Chief Justice Marshall declared in *Marbury v. Madison* that “a law repugnant to the constitution is void,”¹ the Supreme Court had already explicitly invoked its power of judicial review to determine the constitutionality of a federal statute. *Hylton v. United States* concerned the constitutionality of a federal tax on carriages.² The case was trumped up,

1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). The line has been perhaps too celebrated, given that it was not the first use of judicial review in the United States. See *infra* note 2. A notable instance of exaggerated praise for *Marbury*’s declaration of judicial review comes from a breathless passage by Alexander Bickel: “If any social progress can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962).

2 *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); see also WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 104–05 (1995) (discussing the *Hylton* decision and its immediate impact); Robert P. Frankel, Jr., *Before Marbury: Hylton v. United States and the Origins of*

the facts were bogus, the procedure was defective, and the Court lacked a quorum.³ The purpose of the case was to establish the limits—if any—of the federal taxing power, and both sides looked to the Supreme Court to provide the final answer. This resort to the judicial process was especially noteworthy since fresh in everyone’s mind was the most recent dispute over federal taxation—the Whiskey Rebellion.⁴ It must have been a relief to the government that three Justices, rather than 15,000 men from the militia, were able to settle the constitutional issue in *Hylton*.

The decision in *Hylton* is best known as an unabashed defense of Hamiltonian Nationalism,⁵ but it may be far more important for its lessons in originalism. With no clear precedents either on the tax issue itself or, more importantly, on how judicial review should be done, the advocates in the case—essentially Hamiltonian Nationalists, including Hamilton himself, for the government, versus James Madison and a host of states’ rights-focused Virginians—battled over how to interpret the Constitution.

Remarkably, the issues presented and the positions taken sound surprisingly modern—textual analysis, historical context, dictionary

Judicial Review, 28 J. SUPREME CT. HIST. 1, 2 (2003) (“*Hylton v. United States* . . . stands as the most conspicuous example of the Supreme Court’s use of judicial review prior to *Marbury*.”); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 541 (2005) (“[*Hylton* was] the only case [before *Marbury*] in which the Court decided whether a substantive congressional statute (as opposed to a congressional statute concerned with jurisdiction) ran afoul of the Constitution.”); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1276–77 (2009) (“*Hylton v. United States* was the first reported case of Supreme Court review of a federal statute passed under the authority of the U.S. Constitution.”).

³ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 32 (1985) (describing these and other defects in the case).

⁴ See generally WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA’S NEWFOUND SOVEREIGNTY* (2006) (presenting the struggle between government and citizen during the Whiskey Rebellion); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986) (comparing the parallels between the struggle over taxation and representation during the American Revolution and the Whiskey Rebellion); *THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES* (Steven R. Boyd ed., 1985) (giving readers a collection of scholarship regarding the Whiskey Rebellion).

⁵ See, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 20–23 (1999). Ackerman notes, in referring to the most extensive opinion, written by Justice Paterson, “[w]ith this powerful prose, our leading states’ rights Founder joined his nationalizing associates” in upholding the federal tax. *Id.* at 23; see also Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?* 97 COLUM. L. REV. 2334, 2351 (1997) [hereinafter Jensen, *Direct Taxes*] (“[T]he reasoning in the several *Hylton* opinions does not deserve the reverence it is so often shown . . . the Justices relied excessively on the imaginative, but misleading, arguments of Alexander Hamilton.”); Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 695 n.35 (1999) [hereinafter Jensen, *Taxation and the Constitution*] (“The [*Hylton*] Justices’ task, as they understood it, was to support the Federalist government . . .”).

definitions, political and economic philosophy, Framers' intentions, and the like. In the end, we see a number of distinguished Framers on both sides sounding a great deal like twenty-first-century textualists, or "New Originalists." More importantly, we can see why it made sense for the Supreme Court to opt for classic, intent-based "Old Originalism" instead. *Hylton* thus highlights a significant practical weakness inherent in the perhaps theoretically more powerful New Originalism—that is, how to interpret a constitutional text when there are two or more equally persuasive original public meanings. Seeing how the Justices in *Hylton* resolved this issue by focusing on the nature of the negotiations that took place at the Constitutional Convention provides important insights into the merits of Old Originalism.

There is a rapidly increasing literature describing the various permutations of originalism, especially since, in Jeffrey Shulman's recent words, "[i]t is said that we are all originalists now."⁶ There are quite a few good summaries of the numerous approaches to discerning the original "intent," "meaning," or "understanding" of constitutional provisions, variously referred to as Old Originalism, New Originalism, and New New Originalism, in Peter Smith's recent nomenclature.⁷ Generally speaking (and for reasons too theoretically complex to be detailed here), Old Originalism, or what we sometimes call "Originalism Classic," focuses primarily on the intentions of the Framers in enacting a particular provision;⁸ New Originalism seeks instead what a "hypothetical reasonably

⁶ Jeffrey Shulman, *The Siren Song of History: Originalism and the Religion Clauses*, 27 J.L. & RELIGION 163, 163 (2011) (book review).

⁷ Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 707–08, 725 (2011). For a history of constitutional originalism, see generally JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005). See also Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 12 (Grant Huscroft & Bradley W. Miller eds., 2011) ("The aim of this chapter is to clarify these debates by providing a history of contemporary originalism and then developing an account of the core or focal content of originalist theory."); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 674–82 (2009) (offering a brief history of originalism); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003) (providing a history of modern originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (focusing on the developments in constitutional theory regarding Old and New Originalism).

⁸ See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363–73 (1977) (defending the importance of "original intention"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971) ("The first [approach] is to take from the document rather specific values that the text or history show the framers actually to have intended and which are capable of being translated into principled rules."); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) ("Where the framers of the

well-informed Ratifier would have objectively understood the legal text to mean with all of the relevant information in hand;⁹ and the New New Originalists “claim that some provisions of the Constitution ought to be interpreted at a high level of generality, and that even originalist interpretation often requires courts to engage in creative and political acts of construction in the formulation of legal rules.”¹⁰

Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.”). Whether Judge Bork favored intentionalism is not entirely clear from his 1971 article, and he later took the position that the language used by the Framers was “a shorthand formulation” for the original public meaning of the text. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990). However, scholars have suggested that Judge Bork’s original position was much closer to Raoul Berger’s and other intentionalists’, who located original intent in the debates of the Constitutional Convention and the writings of the Founders. See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 9 (2009) (“The first wave of contemporary originalists, led in the 1970s by then-Professor Robert Bork and Raoul Berger . . . advocate[ed] that courts focus on the original intent of the framers.”); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248 (2009) (“When scholars like Raoul Berger and Robert Bork . . . began to compose scholarly monographs articulating an intellectual defense of originalism . . . they repeated and developed the notion that the proper meaning of the Constitution is the meaning originally intended by the Framers.”); Lawrence B. Solum, *Semantic Originalism*, Illinois Public Law Research Paper No. 07-24, 14 (Nov. 22, 2008), available at <http://papers.ssrn.com/abstract=1120244> (“Bork, Rehnquist, Berger, and Meese implicitly endorsed what we now call ‘original intentions originalism,’ the view that constitutional interpretation should be guided by the original intentions of the framers.”).

⁹ Kesavan & Paulsen, *supra* note 7, at 1162; see also, John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341–42 (1998) (“Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention ‘to say what one would be normally understood as saying, given the circumstances in which one said it.’ Ascribing that sort of objectified intent to legislators offers an intelligible way to hold legislators accountable for the laws they have passed, whether or not they have *any* actual intent, singly or collectively, respecting its details. Textualists subscribe to this theory of intent.”) (footnotes omitted) (quoting Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 268 (Robert P. George ed., 1996)). Some might include Randy Barnett in this category of scholars as well, given his emphasis on the public, semantic meaning of the constitutional text. See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not normative. Although we can choose to use words however we wish, as Alice discovered in Wonderland, the social or interpersonal linguistic meaning of words is an empirical fact beyond the will or control of any given speaker (which was the point being made by *Alice in Wonderland’s* author). Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation.”) (footnotes omitted).

¹⁰ Smith, *supra* note 7, at 718 (footnotes omitted) (internal quotation marks omitted) (citing as examples of New New Originalists, among others, Jack M. Balkin, *Original*

The principal division between Old and New Originalists is whether the Framers' subjective intentions in enacting a particular provision represent the Constitution's meaning, or whether instead courts should look to the objective meaning of the text itself. The modern (Old) Originalist movement is generally seen as springing from a 1971 law review article by Robert Bork,¹¹ with a valuable assist from Attorney General Meese's call in 1985 for a "jurisprudence of original intention."¹² New Originalism is most commonly associated with Supreme Court Justice Antonin Scalia and his fellow "textualists."¹³ In the transition from an originalism of original intent to one of original public meaning, the initial stimulus is typically credited to Paul Brest. In 1980, Brest argued that "there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent," posing the so-called "summing" problem of how to reconcile conflicting or indeterminate intentions.¹⁴ He also pointed out the sticky issue of deciding the level of generality at which the original intention

Meaning and Constitutional Redemption, 24 CONST. COMMENT. 427 (2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999)). Whether this "New Originalism" may appropriately be termed "originalism" is contestable. See, e.g., David A. Strauss, *Can Originalism be Saved?*, 92 B.U. L. REV. 1161, 1163-67 (2012) (questioning whether Balkin's "living originalist" scholarship can properly be deemed originalism).

- 11 Bork, *supra* note 8. The standard accounts of the development of originalism tend to cite Bork's article as the launch pad of modern originalism. See, e.g., Whittington, *supra* note 7, at 600-02; Solum, *supra* note 8, at 13-14.
- 12 Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (emphasis omitted).
- 13 See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997) [hereinafter SCALIA, *A MATTER OF INTERPRETATION*].
- 14 Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980); see also *id.* at 214-15 ("[In cases] where a framer had a determinate intent but other adopters had no intent or an indeterminate intent, . . . the institutional intent is ambiguous. One adopter might wish his indeterminate intent to be treated as 'no intent.' Another adopter might wish to delegate his intention-vote to those whose intent is determinate. Yet another might wish to delegate authority to decisionmakers charged with applying the provision in the future. Without knowing more about the mind-sets of the actual adopters of particular constitutional provisions, one would be hard-pressed to choose among these."). This skepticism of group intent in the constitutional context was an echo of Max Radin's earlier realist critiques of legislative intent in the statutory realm. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 642 (1990) ("To talk about the collective intent of a legislature is fiction compounded, not just by the greater number of people whose intent must be discovered, but also by the muteness of most of these people and the special conventions of the legislative process, such as the requirements that a bill must be passed in the same form by both chambers (bicameralism) and that it must then be presented to the President (presentment). Radin showed that one can deconstruct almost any legislative intent argument through predictable analytical moves. This insight has been revived by several newer legal process theorists in the 1980s." (footnotes omitted)).

is to be reconstructed.¹⁵ Just how specific were the original intentions of the Framers, and how strong is our evidence of those intentions? Indeed, how can we be sure that the Founders did not intend to delegate the meaning of certain constitutional provisions to future interpreters?¹⁶

Often left out of descriptions of Brest's article is the fact that he also anticipated the second major argument against original-intent Old Originalism that would emerge in the 1980s: that the Founders themselves did not intend for their intentions to be the basis for discovering constitutional meaning.¹⁷ This was the basis for H. Jefferson Powell's historical critique of original-intent originalism in 1985. Powell examined the history of interpretation in the Anglo-American context, looking at Protestant biblical exegesis,¹⁸ the common law tradition,¹⁹ the ratification debates,²⁰ and the early statements about interpretations of the Constitution.²¹ He concluded that the Framers "shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation."²² They rejected, in other words, the idea that "future interpreters could avoid misconstruing the text by consulting evidence of the intentions articulated at the convention."²³ A real dilemma seemed to emerge for original-intent Originalists: the original intent was against the use of original intent.²⁴ At this point, in 1986, Justice Antonin Scalia stepped forward with a proposal that seemed to overcome these objections. Suggesting that Originalists

¹⁵ See Brest, *supra* note 14, at 220, 223–24.

¹⁶ See *id.* at 216–17. Whittington provides a helpful list of later responses to Brest's arguments. See Whittington, *supra* note 7, at 605 nn.32–33; see also Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 708 (2009).

¹⁷ Brest, *supra* note 14, at 215–16; see also Solum, *supra* note 8, at 15.

¹⁸ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889–94 (1985).

¹⁹ *Id.* at 894–902.

²⁰ *Id.* at 902–13.

²¹ *Id.* at 913–24.

²² *Id.* at 903–04 (footnote omitted).

²³ *Id.* at 903.

²⁴ For responses, see Whittington, *supra* note 7, at 605 n.34. Powell's article touched off a lively debate with Raoul Berger, who rose to intentionalism's defense. See Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1055–80 (1988) (taking issue with the characterization of Berger's book, *FEDERALISM: THE FOUNDERS' DESIGN* (1987), in a review written by Powell); Raoul Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296, 296–97 (1986) (disputing Powell's historical account of the roots of the doctrine of original intention and reaffirming intentionalism); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1531–42 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

“change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”²⁵ Scalia shifted the purpose of the originalist inquiry from one interested in the subjective intentions of the Founders to one seeking the meaning of the Constitution’s words as understood in their original public context. As Scalia later elaborated: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”²⁶

²⁵ Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (Mar. 12, 1987).

²⁶ SCALIA, *supra* note 13, at 38. As this quotation indicates, Scalia’s interpretive mode in the constitutional area is consistent with the textualist approach for which he has advocated in the statutory context. See Eskridge, *supra* note 14, at 650–56. Indeed, when one observes that New Originalism developed and emerged just as New Textualism was beginning to take flight in the courts and scholarship, *see id.* (describing the emergence of New Textualism in the 1980s), it is hard to resist the conclusion that New Originalism is in many ways a byproduct of the intellectual environment created by the rise of New Textualism. This is even more apparent when one considers that many of the critiques of legislative history that motivated the birth of New Textualism also drove the creation of New Originalism. Just as the group-intentionalist premises of purposivism in the statutory context came under realist critiques from Max Radin, *see id.* at 642, Old Originalism’s focus on original intent was rejected by Paul Brest on similarly realist grounds. See Brest, *supra* notes 14–16 and accompanying text. Likewise, New Textualism views the use of legislative history as largely illegitimate because it fails to take account of the views of the entire legislative body responsible for enacting the text. See Eskridge, *supra* note 14, at 642–44 (identifying ways in which legislative history may provide a distorted picture of the views of the legislative body as a whole); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997) (“[A]uthoritative legislative history makes it far too attractive for legislators to bypass the constitutionally proscribed process of bicameralism and presentment. By using legislative history as an authoritative source of legislative intent, the Court makes legislative self-delegation possible; Congress’s own agents can go far in determining the details of statutory meaning simply by declaring their own conception of legislative intent.”). Moreover, New Originalism focuses on the public meaning because those who attended the Constitutional Convention were not the ones who ultimately ratified and conferred authority on the new Constitution. See Kesavan & Paulsen, *supra* note 7, at 1137 (“The shift to original understanding was part of an increased recognition that it was the action of the Constitution’s *Ratifiers*—state ratifying conventions in the case of the original document and state legislatures in the case of the amendments—whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention and the Congresses proposing the amendments.”). These concerns about interpretive theory—shared by New Originalism and New Textualism alike—lead to similar methodologies: a focus on the meaning of the text as understood using the linguistic conventions extant at the time of the text’s adoption. Compare *id.* at 1132 (“[Originalism] is in reference to the original, non-idiosyncratic meaning of words and phrases in the Constitution: how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted.” (footnotes omitted)), with John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–80 (2006) (“Textualists thus look for what they call ‘objectified’ intent—the intent that a

Our goal is not to rehash the arguments against Old Originalism—other than to point out that *Hylton* suggests that they may be overstated—or to attempt finally to settle this ongoing debate. Rather, we point out that, while the New Originalists have made a number of theoretical arguments for the superiority of seeking the objective meaning of the constitutional text, there are practical impediments to doing so, and Old Originalism may be able to help. The issue is: what to do when the evidence of textual meaning points in two opposite directions?²⁷

We conclude, based on our analysis of the *Hylton* case, that the Justices had good cause to trump the various New Originalist-like approaches advanced by the parties with its eighteenth-century version of Really Old Originalism—that is, to invoke the intentions of the Framers to interpret the Constitution, rather than the perfectly good, but contradictory, analyses of the objective meaning of the text that resulted from referring to dictionary definitions, legal commentaries, and the other kinds of sources on which New Originalists typically rely. Moreover, the methodological challenges to ascertaining clear, objective readings of constitutional texts that are exposed in *Hylton* are not limited to that case’s otherwise obscure carriage tax

reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.’ Because one can make sense of others’ communications only by placing them in their appropriate social and linguistic context, textualists further acknowledge that ‘[i]n textual interpretation, context is everything.’” (footnotes omitted) (quoting SCALIA, *supra* note 13, at 17, 37)).

²⁷ In defense of intentionalism, Richard Kay points out that, in some cases, New Originalism will produce conflicting original public meanings, and a court would have to “find some way—apart from considering the intended meaning—to decide which of two proffered meanings is more probably the *correct* public meaning.” Kay, *supra* note 16, at 719–20. Kay believes that the disagreements about original public meaning will typically be about “the precise scope” of the contested constitutional provision. *Id.* at 719. We agree with Kay’s observation of the problem of divergent original public meanings, but we believe that the issue may be significantly broader than one of scope and might instead go to the very essence of what the provision means. Meanwhile, Professor Solum seeks to minimize (or erase) the difference between New and Old Originalists by positing that it “is possible for intended meaning and public meaning to diverge, but in the case of a legal text, such divergence will be rare in practice.” Solum, *supra* note 7, at 38. He bases this conclusion on the grounds that the

authors of the constitutional text knew that those who would read and interpret the text would have limited access to information about idiosyncratic semantic intentions: For example, the records of the Philadelphia Convention and the ratifying conventions were not publicly available in the era that immediately followed ratification. For this reason, the semantic intentions of the ratifiers are likely to closely track original public meaning

Id. For the reasons discussed below, we agree with Solum that “[o]riginalist theory must account for linguistic facts on the ground,” but we believe that those facts—examined on a case-by-case basis—will show not only that intended meaning and public meaning may differ, but also that equally strong semantic arguments can be employed to lead to different public meanings (and that such occasions may not, in fact, be as rare as he suggests). *Id.*

dispute. The same difficulties appear when various other high-profile constitutional issues are raised, including the ever-controversial church-state arena,²⁸ leading to the question of whether New Originalism may be far more interesting in theory than in practice.

I. THE CARRIAGE TAX, ARTICLE I, AND ORIGINALISM

A. *The Hylton Case*

In 1794, the new country was fighting the Indians in the Northwest Territory, and, at the same time, American trading ships were being seized by the British in the Atlantic.²⁹ The government urgently needed to raise funds for the national defense, and the congressional Ways and Means Committee issued a report proposing a variety of “customs duties on specified articles, additional tonnage duties, a stamp tax, increased excise taxes on sales at auction and on tobacco, snuff and sugar[,] . . . a license fee for the sale of foreign distilled liquors and wines” and a carriage tax.³⁰ As Madison wrote at the time to Jefferson, these “items [were] copied as usual from the British Revenue laws,” thanks to the influence of Hamilton’s “Fiscal Department.”³¹ The Congress proceeded to enact a number of the proposed taxes, including the tax on carriages, which called for “duties and rates” on carriages “kept by or for any person, for his or her own use, or to be let out to hire, or for the conveyance of passengers.”³²

The constitutional issue surrounding the carriage tax would arise under Article I, Sections 2 and 8, which give Congress “power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the

²⁸ See *infra* Part III.

²⁹ See generally WILEY SWORD, *PRESIDENT WASHINGTON’S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 1790–1795* (1985); THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION 603 (Edward G. Gray & Jane Kamensky eds., 2013).

³⁰ 4 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 299 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980) [hereinafter 4 LAW PRACTICE OF ALEXANDER HAMILTON].

³¹ *Id.* at 299–300 (quoting Letter from James Madison to Thomas Jefferson (May 11, 1794), in 17 JAMES MADISON PAPERS 64 (Library of Congress), available at http://lcweb2.loc.gov/ammem/collections/madison_papers/index.html). Attorney General Bradford also indicated that “it was Hamilton who fathered the proposal of the 1794 carriage tax.” *Id.* at 300 (citing Letter from William Bradford to Alexander Hamilton (July 2, 1795), in 18 PAPERS OF ALEXANDER HAMILTON 393 (Harold C. Syrett, ed. 1961)).

³² *Id.* at 307 (internal quotation marks omitted) (quoting An Act laying duties upon Carriages for the conveyance of Persons, 1 Stat. 373, 374 (repealed 1802)); see also An Act laying duties upon Carriages for the conveyance of Persons, 1 Stat. 373–375 (repealed 1802).

common defense and general welfare”³³ Both representation in Congress and “direct Taxes” must be “apportioned among the several States,”³⁴ whereas “all Duties, Imposts, and Excises” need only be “uniform throughout the United States.”³⁵ These less-than-transparent provisions led to the primary constitutional question about the carriage tax: Was it a “direct tax” that needed to be “apportioned,” that is, proportional to how the various states were represented in Congress?³⁶ Alternatively, was it perhaps an excise tax that only needed to be uniform throughout the country? These issues focused the arguments on crucial issues for originalists: First, where to look for definitions of important constitutional terms such as “direct Taxes” or “excises;” and, second, what to do when, as will be seen in this case, the best evidence of contemporary usage points in two different directions? In such cases, can the history of the formation of the Constitution—and, in particular, the nature of the debates at the Convention and the delegates’ negotiations over various provisions—solve this problem by providing a definitive reading of the text?

1. *Framers v. Framers*

The facts in the *Hylton* case were simple, largely because they were invented. As set out in Justice Paterson’s opinion (without any hint that he was just playing along), Hylton owned “one hundred and twenty-five chariots for the conveyance of persons, but exclusively for his own separate use, and not to let out to hire, or for the conveyance of persons for hire.”³⁷ Hylton was a successful businessman in Virginia, although not, as far as we know, an avid chariot collector.³⁸ Hylton seems to have owned at least one carriage, and he refused to pay the tax, as did a number of other prominent Virginians who believed that the greater prevalence of carriages in the south than in the north made the tax inequitable. As Virginia jurist St. George Tucker wrote to James Monroe, “[a] friend of yours in this place [Williamsburg] refused to pay the carriage tax, upon the ground that it was a direct tax, & not imposed according to the Constitution. So did Mr.

³³ U.S. CONST., art. I, §§ 2, 8.

³⁴ *Id.* at § 2, cl. 3.

³⁵ *Id.* at § 8, cl. 1.

³⁶ For a discussion of the requirement of apportionment as “a botch in the core of the Constitution,” see Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 11 (1998).

³⁷ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796).

³⁸ It has been noted that the number of carriages allegedly owned by Hylton was greater “than then existed in Virginia.” Edward B. Whitney, *The Income Tax and the Constitution*, 20 HARV. L. REV. 280, 283 n.1 (1907).

Pendleton, Mr. Roan, Col Taylor, Mr. Page & some others.”³⁹ This was a distinguished group: Edmund Pendleton was the President of the Virginia Supreme Court of Appeals, and John Page was a member of the Congress who had adopted the tax.⁴⁰ Hamilton and Attorney General Bradford then sought a way to combat this early example of civil disobedience, and they decided that the best course would be to secure a judgment of the Supreme Court as to the constitutionality of the carriage tax.⁴¹

Legal historian Julius Goebel has provided a detailed and fascinating documentary history of this case. As Goebel notes, the nature of the carriage tax made it nearly impossible for the case to find its way to the Supreme Court.⁴² The 1789 Judiciary Act provided for appeal to the Supreme Court only where the amount in controversy exceeded \$2000, but the contested taxes were just a few dollars per carriage.⁴³ It would therefore be necessary to obtain “an arrangement by mutual consent,” in Hamilton’s words, since only a Supreme Court decision would “produce the acquiescence of the Executive in a determination agreeable to the hopes of the Defendants.”⁴⁴ And so, Hylton, who had been a client of Hamilton’s law practice a few years earlier,⁴⁵ agreed to be sued for failing to pay \$1000 in taxes on 125 chariots, which subjected him to a fine of an additional \$1000, thus reaching—but not exceeding—the \$2000 statutory threshold for suit

³⁹ 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 309 (quoting Letter from St. George Tucker to James Monroe (Mar. 8, 1795) (*in ms.* James Monroe Papers, at the Earl Gregg Swem Library, College of William and Mary, Williamsburg, Virginia). Goebel has discovered an interesting letter on this point from the Supervisor of the Revenue for Virginia, Edward Carrington, to Tench Coxe, the federal commissioner of revenue:

A very general idea prevails in this district, that the act is unconstitutional, and numbers of very respectable Characters have signified their determination to try the point by legal decision. This circumstance renders it of material consequence, that the Officers should proceed strictly under . . . the Act, that, in a legal contest, there may be no confusion of principles, and a decision may turn fairly on the constitutionality of the Act

Id. at 308–09 (quoting Extract of a letter from the Supervisor of Virginia to the Commissioner of the Revenue (July 28, 1794), *in* 17 PAPERS OF ALEXANDER HAMILTON 2 (Harold C. Syrett ed., 1961)). In light of the Whiskey Rebellion, it must have been comforting that Carrington noted that it would only be a “pacific, or what will be called a legal, opposition” to the carriage tax. *Id.* at 308 (quoting Extract of a letter from the Supervisor of Virginia to the Commissioner of the Revenue, July 28, 1794, *in* 17 PAPERS OF ALEXANDER HAMILTON 2 (Harold C. Syrett ed., 1961)).

⁴⁰ *Id.* at 309 n.51.

⁴¹ *Id.* at 310–11.

⁴² *Id.* at 311.

⁴³ *Id.*

⁴⁴ *Id.* at 312 (quoting Draft Letter from Alexander Hamilton, Secretary of the Treasury, to Tench Coxe, Commissioner of the Revenue, Jan. 28, 1795, *in id.* at 340–42).

⁴⁵ *Id.* at 330 n.114.

under the Judiciary Act of 1789.⁴⁶ It was further agreed that if Hylton lost the case, he could satisfy the judgment by the payment of the tax and penalty on the one carriage that he was likely to have actually owned, i.e., sixteen dollars.⁴⁷

The cast of characters in this constitutional drama should be enough to give any originalist pause. Coming down on one side of the interpretive issue are: *Federalist* author and Secretary of the Treasury, Alexander Hamilton;⁴⁸ Senator, Supreme Court Justice, and author of the small-states-focused New Jersey Plan for the Constitution, William Paterson;⁴⁹ and the second-most active speechmaker at the Convention, and Supreme Court Justice, James Wilson.⁵⁰ On the other side: *Federalist* author, “Father of the Constitution,” and Congressman, James Madison, who argued against the law’s constitutionality when it was proposed in Congress;⁵¹ a member of the first three United States Congresses, including the one that passed the carriage tax, John Page;⁵² and the President of Virginia’s constitutional ratifying convention, Edmund Pendleton, who had been appointed to a federal judgeship by President Washington (which Pendleton declined).⁵³ From an Old Originalist perspective, it is noteworthy that several of these men were actual Framers—four of them were among the most prominent of the fifty-five delegates to the Constitutional Convention, and all of them were elected or appointed to positions in the new national government.⁵⁴ For New Originalists, the writings of these prominent lawyers, legislators and statesmen provide valuable evidence of contemporary language usage and meaning with respect to the public meaning of the text.

Not only were influential Framers involved in the case, but topics of taxation and representation were also of particular concern in the formation of the Constitution. One of the principal reasons for adopting a new Constitution was to enable the United States government to raise the funds

46 As Goebel points out, it “is curious that . . . it did not occur to the Attorney General or Hamilton” or any of the Justices, “that the sum sued for must be set at a figure *in excess* of \$2000.” *Id.* at 313.

47 *Id.* at 314 (footnote omitted).

48 See *supra* discussion at note 5.

49 *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175, 181 (1794) (Paterson, J.)

50 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 314.

51 4 ANNALS OF CONG. 729–30 (1794) (“Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it.”).

52 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 309 & n.51.

53 *Id.*

54 Johnson goes as far as to say that the “extraordinary actors who decided *Hylton* were the Founders, so if the constitutional construction must follow the Founders’ intent, then *Hylton* represented the constitutional mandate.” Johnson, *supra* note 36, at 75. The significant issues regarding intentions and meaning that are lurking in Johnson’s statement are discussed *infra* Part II.

it needed in light of the manifest failure of the Articles of Confederation to provide an adequate mechanism for doing so.⁵⁵ This question of the federal taxing powers, as well as the issue of proportionate representation among the various large and small states, was featured not only in speeches at the Constitutional Convention but also during the Federalist-Anti-federalist debates leading to ratification.⁵⁶

One of the most interesting—and challenging—aspects of how these distinguished Framers divided over the carriage tax question is that both sides present very good New Originalist arguments based on a variety of historical sources that provide insights into the objective meaning of language used in the Founding Era. In fact, when the two authors of this article researched the historical use of one of the relevant constitutional terms, we found it difficult to agree on the simple question of whether an annual tax on the ownership of an item of personal property, such as a carriage, could properly be called an “excise,” much as the advocates in *Hylton* so confidently expressed opposing opinions on that seemingly narrow definitional issue.⁵⁷ A review of the historical evidence of the usage of this generally well-known form of tax, as compiled by the participants in the carriage tax debate and as supplemented by our own research, will illustrate this formidable challenge to New Originalism’s desire to identify a single, or even best, objective meaning of a constitutional text.

2. *Definition v. Definition: Contrasting Meanings of Direct and Excise Taxes*

In the Federal Circuit Court, *Hylton* was heard by Supreme Court Justice James Wilson and District Judge Cyrus Griffin.⁵⁸ Prominent Virginia lawyer John Wickham was retained to represent the government, and *Hylton*’s

⁵⁵ Historian Gordon Wood has written, for example, “[t]here were . . . many defects in the Articles of Confederation that had become obvious by the 1780s. Lacking the powers to tax and to regulate the nation’s commerce, the Confederation Congress could neither pay off the debts the United States had incurred during the Revolution nor retaliate against the mercantilist trade policies of the European states, particularly Great Britain.” GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 15 (2009).

⁵⁶ See *infra* Part II.B.2.

⁵⁷ One of us has provided an overview of his understanding of excise elsewhere. Joel Alica, *Obamacare and the Excise Tax*, NAT’L REV. ONLINE (Sept. 1, 2010), available at <http://www.nationalreview.com/articles/245270/obamacare-and-excise-tax-joel-alicea>. That author no longer believes the original meaning of the excise is as clear as he claimed it is in that article. Nonetheless, he continues to think that the scope of the excise taxation power cannot plausibly be stretched to encompass the penalty imposed for the non-purchase of health insurance under the Patient Protection and Affordable Care Act of 2010.

⁵⁸ 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 314.

counsel was John Taylor of Caroline, described by Goebel as “an ardent Republican” and a “spokesman for state rights and agrarian liberalism.”⁵⁹ The court was divided, with Justice Wilson voting for the constitutionality of the tax and Judge Griffin against.⁶⁰ We were unable to find a record of the judges’ opinions, but both Taylor and Wickham published their arguments in pamphlet form.⁶¹

Taylor’s argument was far more polemical (and much longer) than Wickham’s.⁶² His goal was to demonstrate that the carriage tax was a direct tax, and, therefore unconstitutional for not being apportioned.⁶³ To make this argument successfully, he needed to show that it was not an “excise” or other form of indirect tax. He begins with a brief defense of judicial review: “the Constitution . . . was designed to preserve certain rights against the aggression of [legislative] majorities It interposes the judiciary between the government and the individual.”⁶⁴ Because the “Constitution is superior to the law of any legislative majority,” sometimes “a recurrence to the judiciary becomes necessary to ascertain limits, a strict observance of which can only . . . preserve the union.”⁶⁵ Having thus established a rationale for the judiciary to declare a law unconstitutional, Taylor then moves to the specific issue, viz., if Congress has the power “to lay and collect taxes, duties, imposts and excises,” can it “impose the tax upon carriages kept by a citizen for his *own use*?”⁶⁶ Taylor’s main point is based on the constitutional linkage between “direct” taxation and representation. That is, the inhabitants of each state should bear taxes in the same proportion that they are represented in Congress. Echoing Revolutionary themes of taxation without

59 *Id.* at 313 & n.62; see also GARRETT WARD SHELDON & C. WILLIAM HILL, JR., *THE LIBERAL REPUBLICANISM OF JOHN TAYLOR OF CAROLINE* (2008).

60 4 *LAW PRACTICE OF ALEXANDER HAMILTON*, *supra* note 30, at 314.

61 See JOHN TAYLOR, *AN ARGUMENT RESPECTING THE CONSTITUTIONALITY OF THE CARRIAGE TAX; WHICH SUBJECT WAS DISCUSSED AT RICHMOND, IN VIRGINIA, IN MAY, 1795* (1795); JOHN WICKHAM, *THE SUBSTANCE OF AN ARGUMENT IN THE CASE OF THE CARRIAGE DUTIES, DELIVERED BEFORE THE CIRCUIT COURT OF THE UNITED STATES, IN VIRGINIA, MAY TERM, 1795* (1795).

62 4 *LAW PRACTICE OF ALEXANDER HAMILTON* 316. It was also much harder to follow. As Goebel writes, “It is difficult to render a manageable and meaningful account of Taylor’s composition, for his method entailed tedious repetition. One is disposed to agree with John Randolph’s vitriolic comment on another Taylor pamphlet: ‘For heaven’s sake, get some worthy person to do the second edition into English.’” *Id.* at 317 (quoting EUGENE TENBROEK MUDGE, *THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE: A STUDY IN JEFFERSONIAN DEMOCRACY* 2 (1939)).

63 4 *LAW PRACTICE OF ALEXANDER HAMILTON* 317–19.

64 TAYLOR, *supra* note 61, at 4.

65 *Id.*

66 *Id.*

representation, Taylor continually returns to this “sacred principle” throughout his lengthy brief.⁶⁷

Blazing a pathway that would later be followed by many New Originalists, Taylor starts his analysis with dictionaries: “In all the glossaries, legal, scientific or general to which I have referred, the term *excise* is expounded to mean *tribute*, and tribute is a tax.”⁶⁸ Citing in particular “the accurate Mr. [Samuel] Johnson,” Taylor defines the word tax as “the *genus* including all government impositions,” and notes that, according to the Constitution, “direct taxes” must be apportioned.⁶⁹ To allow the Congress to call something an “excise” or “duty” so as to avoid the apportionment requirement “would leave Congress unrestrained upon the subject of taxation, in violation of the plainest words.”⁷⁰ He then summons “Johnson’s aid . . . once more” to define the word “direct” as “straight—not crooked—not oblique.”⁷¹ Applying this definition to financial matters, Taylor argued that a payment is “straight or direct” if it is made “from the payer to the payee,” as opposed to a situation where “a third person [is] interposed between the real payer and payee,” which Taylor concludes is “indirect.”⁷²

A bright line can be drawn between direct and indirect taxes, according to Taylor: “An indirect, is a circulating, a direct, a local tax.”⁷³ That is, an indirect tax relates to goods circulating in commerce, and it is collected upon sale. As Taylor puts it, an indirect tax is essentially a sales tax in that it is “annexed to articles of traffic [and] . . . can travel from state to state in search of an actual payer [I]n the soothing language of solicitation—‘will you buy sir, and thus contribute to the revenue.’”⁷⁴ By contrast, a direct tax is “annexed to articles of necessity or convenience, exclusively produced and needed by particular soils and climates, [and] cannot circulate.”⁷⁵ The “striking distinction,” for Taylor, is “the *voluntary* quality of an indirect tax.”⁷⁶ Indirect taxes could not be apportioned because, “like a circulating medium, [they are] itinerant. The commodities to which [an indirect tax] must be attached, could not be traced throughout the . . . United States, to

67 *Id.* at 11–12.

68 *Id.* at 4.

69 *See id.* at 5 (“No capitation or other direct *tax* shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.’ . . . Words, more comprehensive than ‘other direct tax,’ could not have been furnished by our language. ‘Tax’ the *genus* including all governmental impositions. Expounded by the accurate Mr. Johnson to mean ‘an impost—a tribute—an *excise*.’”).

70 *Id.* (emphasis omitted).

71 *Id.* at 6 (internal quotation marks omitted).

72 *Id.*

73 *Id.* at 10.

74 *Id.*

75 *Id.*

76 *Id.* at 11.

the place of their consumption, which is the real place of payment.”⁷⁷ The issue, thus, is not what a tax is called—excise, duty or otherwise—but whether it is direct or indirect. Otherwise, the constitutional text would have read, “Direct taxes shall be apportioned—except they be called duties, imposts or excises, in which case they shall be uniform only”⁷⁸ But, instead, “direct taxation was unexceptionably and indissolubly linked with representation”: it “did not escape the notice of the most humble advocate for the adoption of the constitution, much less of the celebrated author of the *Federalist*.”⁷⁹

One definitional challenge confronting Taylor was that carriage taxes were called excises in England, where, Taylor asserts that the excise had “mingled its poison with almost every human enjoyment.”⁸⁰ Citing a variety of English statutes, Taylor lists over a hundred excised items, from beer, ale, and cider, to soldiers, sailors, and servants.⁸¹ If the constitutional term were to be interpreted solely in light of “the English practice,” the items susceptible of being excised would soon collapse from this long list and “shrink to two words—namely—every thing.”⁸² Such an extremely broad definition of the term “excise” could not have been fully embraced in the United States Constitution because, in England, a capitation tax was called an “excise,” whereas the Constitution expressly describes it as a direct tax.⁸³ Thus, while acknowledging (and documenting) the history of the broad language of taxation in England, Taylor concludes that the “oppressive conduct of the British government, in the use of an excise, cannot surely be exhibited as an example for our imitation, because . . . Britain has no Constitution restrictive of her government” and because this very kind of disproportionate taxation in England “suggested to America, the caution exhibited in her[] [Constitution].”⁸⁴

The Framers must have had a different view, writes Taylor: “If those who entered into the compact did not hunt after the various meanings of every word, nor trace the progress of the excise through . . . British statute law,” then it is not an “improbable conjecture, that the term ‘duties’” was

77 *Id.* at 12.

78 *Id.* at 11.

79 *Id.* (emphasis omitted). It is unclear to which author of *THE FEDERALIST* Taylor was referring. See *infra* notes 230–36 and accompanying text.

80 TAYLOR, *supra* note 61, at 8.

81 *Id.* (“[T]his catalogue is probably far short of the real number of articles excised in England, as I have had no opportunity of referring to the acts of parliament passed during the greater part of the reigns of Geo. 2d & Geo. 3d[,] an era prolific in taxes.”).

82 *Id.* at 14–15.

83 *Id.* at 9; U.S. CONST., art. I, § 9, cl. 4 (“No capitation, or other direct, tax shall be laid . . .”).

84 TAYLOR, *supra* note 61, at 9.

considered to be “nearly equivalent to ‘imposts,’ instead of . . . comprising every species of tax.”⁸⁵ Meanwhile, “the idea of ‘excises’ was borrowed from the common notion, which did not extend them beyond manufactures made for sale.”⁸⁶ To support these definitions, Taylor first argued that “excises, by their being arranged [in the Constitution] with imposts and duties,” emphasizes the “political affinity which really exists, between imported and internal manufactures . . . for sale.”⁸⁷ As to “duties,” Taylor asserts that the “Constitution is itself the best glossary,”⁸⁸ an interpretive method that leads him to Article I, Section 9, which refers to “a tax or duty” on the “importation of slaves,” thus confirming that duties are taxes, and that a duty is a “tax upon an imported commodity.”⁸⁹ And so, a tax on the carriages owned by individuals is not an excise or a duty, as those terms are used in the Constitution, but an unconstitutional direct tax.

At this point, though Taylor had reiterated his argument multiple times, he was only halfway through his brief. Virtually all of the remainder, nearly 10,000 words, is devoted to variations on the theme that “the danger of allowing a majority of Congress, to be unencumbered with constitutional restrictions” will lead to oppression, and “[i]f oppressed, states will combine—the grand divisions of northern and southern will retaliate, as majorities or minorities fluctuate—and a retaliation between nations, invariably ends in a catastrophe.”⁹⁰ This threat of a future civil war might be called the strong form of Taylor’s argument for the exercise of judicial review to strike down this particular federal tax.

John Wickham, representing the government, also acknowledges the Court’s “power . . . to declare an act of the federal legislature null and void,” although he does so largely in the pragmatic sense that he would expect to lose if he pursued an argument on that “point of much delicacy.”⁹¹ He observes that “the information [he has] received from the bench” on this point is that “though never solemnly decided by the Supreme Court,” it has

85 *Id.* at 12.

86 *Id.* at 12–13.

87 *Id.* at 13.

88 *Id.*

89 *Id.*; *see also* U.S. CONST. art. I, § 9, cl. 1. Taylor also cites the provision of the same section reading, “No tax or duty shall be laid on articles exported from any state.” TAYLOR, *supra* note 61, at 13; *see also* U.S. CONST. art. I, § 9, cl. 5.

90 TAYLOR, *supra* note 61, at 16. Taylor may have had deeper concerns than the effect of the carriage tax per se. He writes:

Unhappily for the southern states, they possess a species of property, which is peculiarly exposed, and upon which, if this law stands, the whole burden of government may be exclusively laid. The English precedent will justify the measure, for servants constitute an article in the catalogue of their excises, and an American majority exists, who might inflict, without feeling the imposition.

Id. at 20 (emphasis omitted).

91 WICKHAM, *supra* note 61, at 15.

nevertheless “come before each of the judges in their different circuits, and they have all concurred in opinion.”⁹² Wickham nevertheless seeks to limit the Court’s exercise of its power of judicial review by arguing that the Constitution has empowered Congress to make laws, even if those laws may be “neither polite nor just. Yet if these laws are within the limits of [congressional] authority, it belongs not to a co-ordinate branch of the government to say they shall not be carried into effect.”⁹³

Wickham then turns to whether the carriage tax is a “direct tax,” and he, too, equips himself with the tools of New Originalism. This is a well-known term, argued Wickham, and “long before the Constitution . . . was framed, a tax upon the revenue or income of individuals, was . . . well understood to be a direct tax. A tax upon their expenses, or consumption . . . is an indirect tax.”⁹⁴ Since the carriage tax is “a tax on expense or consumption, [it is] therefore an indirect tax.”⁹⁵ Wickham’s primary support for these “well understood” definitions comes from the “partisans of direct taxation in France . . . known by the appellation of the Oeconomists,” especially “M. Turgot, late Comptroller General of the finances.”⁹⁶ Because, as Wickham argued, customary use has fixed the meaning of the relevant terms, “we must presume the framers of the Constitution meant to use [‘direct tax’ and ‘indirect tax’] in the sense in which [they have] been . . . universally understood[.]”⁹⁷ Here, we see Wickham, as Taylor had argued, assuming that the Framers’ intentions were to use the words in their well-understood contemporary meanings. The problem, of course, is that Taylor and Wickham advance diametrically opposed “common” or “universal” understandings by citing different definitional authorities.

Taylor’s rejoinder to Wickham’s argument is that “[q]uotations from speculative writers . . . [are] entirely without reference to the American confederation, which is a social compact sui generis.”⁹⁸ To understand how words are used in the Constitution, it is essential to understand the “[v]arious political consequences [that] were mediated by that compact, . . . then to discover how far they would be attained or defeated, by this or that construction.”⁹⁹ In this case, it is essential to recognize that the “confederation is not a compact of individuals, it is a compact of states”—the sacred principle linking taxation and representation.¹⁰⁰ The “purpose of the

92 *Id.*

93 *Id.* at 4.

94 *Id.* at 6 (emphasis omitted).

95 *Id.*

96 *Id.* at 6, 7.

97 *Id.* at 9.

98 *Id.* at 25–26.

99 *Id.* at 26.

100 *Id.* at 28.

Constitution,” argued Taylor, is “to bestow upon each state a substantial security against oppression by means of any species of taxation.”¹⁰¹ Then, after decrying Wickham’s use of external sources, Taylor invokes his own—namely, the ideas of Scottish political economist Sir James Steuart—citing the “remarkable coincidence . . . between the ideas of the Constitution and Mr. Steuart” on the subject of direct taxes.¹⁰²

Taylor’s argument was bolstered by an anonymous article published in the *Aurora*.¹⁰³ The article was written by Edmund Pendleton, who had refused to pay the carriage tax.¹⁰⁴ In understanding the taxation clauses, writes Pendleton, it is essential to distinguish between other countries’ “consolidated government[s]” and the “confederated government of United States,” where each of the states “retain[s] distinct sovereignty and rights.”¹⁰⁵ The “great clue” to giving the “fair and proper construction to the words of the Constitution” is the “great object . . . to preserve to each State . . . its due share in Representation, and to fix the like proportion of the public burdens.”¹⁰⁶ Because of this distinction between consolidated and confederated governments, “it is a strange mode of interpreting an American instrument, to have recourse to foreign Lexicons, or foreign theoretical writers on their systems; instead of inquiring how custom had fixed a meaning to those expressions amongst ourselves.”¹⁰⁷ Pendleton looks instead to the history of taxation in the Continental Congress to conclude that “by the terms, duties and customs, in the Constitution, were meant the impost duties [i.e., on imports] . . . and by direct taxes, . . . all internal taxation.”¹⁰⁸ In Virginia, he notes, both the “habit” and the “constant tenor of our laws” make “duty and impost . . . synonymous terms, and expressive of the duty on imported articles.”¹⁰⁹ He believes “that they are so understood in the other states[,] . . . considering that the old [Continental] Congress plainly so used them.”¹¹⁰

Pendleton notes that “we in Virginia can say little” of the term “excise,” “having never experienced [it] before the revolution.”¹¹¹ He calls the excise

101 *Id.* at 31.

102 *Id.*

103 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 332 (citing Edmund Pendleton, *United States against Hilton: Some Remarks on the Argument of Mr. Wickham*, AURORA GENERAL ADVERTISER, February 11, 1796, available at http://news.google.com/newspapers?nid=t_XbbNNkFXoC&dat=17960211&printsec=frontpage&hl=en).

104 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 309, 332.

105 Pendleton, *supra* note 103.

106 *Id.*

107 *Id.*

108 *Id.* (emphasis omitted).

109 *Id.* (emphasis omitted).

110 *Id.*

111 *Id.*

“a disagreeable feature in the constitution [that] was supposed to extend to a duty on articles manufactured for sale only.”¹¹² He then concurs expressly with “Mr. Taylor, that if carriages can be excised in the manner of this law, no line can be drawn for stopping the selection of every other article of property.”¹¹³ If the “use of the term excise [as] in England” is permitted, then “it is easy to prophecy that the great principle of the union, to . . . apportion[] taxation[,] may be sacrificed to a loose expression, undefined, and little understood when used.”¹¹⁴ In conclusion, Pendleton argued that “a construction which preserves the great principle of state justice, the apparent intention of the constitution [sic] . . . and [which] at the same time tends to aid the receipt of public revenue, must surely be preferred . . . to terms arbitrarily used by foreign writers, and pressed into the service of destroying that justice.”¹¹⁵

Before publishing his remarks, Pendleton sent a draft copy to James Madison, who had voted against the carriage tax as a member of Congress because he believed it was unconstitutional.¹¹⁶ Madison wrote back that he was pleased that Pendleton’s article “will be printed in the newspapers in time for the Judges to have the benefit of it.”¹¹⁷ Madison declined an invitation to contribute to the document, which he called “unquestionably a most simple & lucid view of the subject.”¹¹⁸ He commented, “[t]here never was a question on which my mind was more satisfied; and yet I have little expectation that it will be viewed by the Court in the same light it is by me.”¹¹⁹

Madison’s prediction was right. The Supreme Court unanimously upheld the constitutionality of the carriage tax. Madison’s fellow *Federalist*

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 See 4 ANNALS OF CONG., *supra* note 51, at 730 (“Mr. Madison objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it.”); 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 331 (citing Letter from James Madison to Edmund Pendleton (Feb. 7, 1796), in 19 JAMES MADISON PAPERS 21 (ms., Library of Congress), available at http://lcweb2.loc.gov/ammem/collections/madison_papers/index.html) (“In [a letter to Pendleton] Madison acknowledge receipt of a critique of the carriage tax statute which Pendleton had prepared and forwarded to Madison for publication.”).

117 4 LAW PRACTICE OF ALEXANDER HAMILTON 331 (quoting Letter from James Madison to Edmund Pendleton (Feb. 7, 1796), in 19 JAMES MADISON LETTERS 21 (ms., Library of Congress), available at http://lcweb2.loc.gov/ammem/collections/madison_papers/index.html).

118 Letter from James Madison to Edmund Pendleton (Feb. 7, 1796), in 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 450 (Maeva Marcus ed., 2003); available at http://lcweb2.loc.gov/ammem/collections/madison_papers/index.html.

119 *Id.*

author, Hamilton, argued the government's case in a three-hour session before the Court, an event so widely attended by congressmen and senators that Congress struggled to obtain a quorum that day.¹²⁰ Only his notes survive, but it appears that Hamilton cited Adam Smith's *Wealth of Nations*, and indicated that Smith's definition of direct tax was "[p]robably contemplated . . . by [the] Convention,"¹²¹ thus introducing what appears to be an element of Old Originalism's search for what the Convention delegates were thinking, along with New Originalism's focus on general usage. Contra Taylor and Pendleton, Hamilton "suggested the utility of seeking the constitutional meaning . . . 'in the statutory language of [England], from which our Jurisprudence is derived.'"¹²² In looking at that jurisprudential history, Hamilton finds that if "the meaning of the word *excise* is to be sought in the British Statutes, it will be found to include the duty on carriages, which is there considered as an *excise*."¹²³ Furthermore, as to congressional authority under the Constitution, Hamilton's bottom line is that "[s]uch a Construction must be made as that Power to tax may remain in its plenitude consistently with convenient application of the rule of Apportionment."¹²⁴ Since the rule of apportionment does not apply to "excises," the carriage tax need only be uniform.¹²⁵

3. *The Judgment: "The Objects that the Framers . . . contemplated"*

Three justices wrote opinions in *Hylton*—Chase, Iredell and Paterson—and they all found the tax to be constitutional.¹²⁶ To varying degrees, all three employed the concept of the Framers' intentions. A fourth, Justice Wilson, had "before expressed a judicial opinion on the subject, in the

¹²⁰ 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 339 (quoting Letter from Justice Iredell to Mrs. Iredell, February 26, 1796, in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 460, 461 (Griffith J. McRee ed. 1857)) (" . . . Mr. Hamilton spoke in our Court, attended by the most crowded audience I ever saw there, both Houses of Congress being almost deserted.")

¹²¹ *Id.* at 333–34 (quoting Brief for Defendant in error, Alexander Hamilton, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), *in id.* at 342, 346).

¹²² *Id.* at 335 (quoting Statement of the Material Points of the Case on part of defendant in error, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), *in id.* at 351, 355). The record of the arguments for *Hylton* has not been preserved. *Id.* at 333 ("[I]n his printed report of the [*Hylton*] case, Dallas did not set out a summary of the arguments of counsel.")

¹²³ Statement of the Material Points of the Case, on part of defendant in error, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), *in id.* at 351, 355.

¹²⁴ 4 LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 30, at 335 (quoting *Brief, by Hamilton of counsel for defendant in error*, *Hylton v. United States*, 3 U.S. 171 (1796), *in id.* at 342, 348) (emphasis omitted).

¹²⁵ *See id.* at 355 ("[If the carriage tax is] considered as an *excise* . . . [it] then must necessarily be uniform, not liable to apportionment, [and] consequently not a direct tax.")

¹²⁶ *See Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); *id.* at 181 (Paterson, J.); *id.* at 183 (Iredell, J.).

Circuit Court of Virginia,” so he did not participate other than to say that his “sentiments, in favor of the constitutionality of the tax in question, have not been changed.”¹²⁷ Meanwhile, Justice Cushing had not heard the oral argument, and he thought “it would be improper to give an opinion on the merits of the cause,”¹²⁸ and Chief Justice Ellsworth had been sworn in only that morning.¹²⁹ The lack of a quorum did not appear to disturb the justices, perhaps because Justice Wilson’s vote was already on the record.

Justice Paterson wrote the longest and most thoughtful opinion in *Hylton*, and he relied most heavily on the Framers.¹³⁰ His view was that “the [semantic] argument”—that is, essentially the New Originalism approach—“on both sides turns in a circle.”¹³¹ His concern was that “the natural and common, or technical and appropriate, meaning of the words, duty and excise, is not easy to ascertain.”¹³² Because “[d]ifferent persons will annex different significations to the terms,”¹³³ he leaves these definitional points aside, however, to focus instead on what was “obviously the intention” of his fellow constitutional Framers—“that Congress should possess full power over

127 *Id.* at 184 (Wilson, J.).

128 *Id.* (Cushing, J.).

129 *See id.* at 172 n.* (“The Chief Justice Ellsworth, was sworn into office, in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.”).

130 *Id.* at 175–81 (Paterson, J.). In the background, it is almost possible to hear Justice Paterson saying something like, “The Convention could have chosen a state-focused constitutional design with much more limited national powers. It was called the Paterson Plan.” As Currie notes, the Court’s decision was unanimous and described “in seriatim opinions.” CURRIE, *supra* note 3, at 31.

131 *Hylton*, 3 U.S. at 176 (Paterson, J.).

132 *Id.* These comments about the Justice’s lack of familiarity with the meaning of these tax-related terms are especially intriguing in light of the fact that he, as a delegate from New Jersey, had employed some of those same terms at other moments in his career: He had introduced a plan for a constitution to the Constitutional Convention on June 15, 1787 that included the word “duty,” and, at that time, he was familiar enough with the meaning of “duty” to use it in association with “goods or merchandises of foreign growth or manufacture, imported into any part of the United States.” JAMES MADISON, 2 THE PAPERS OF JAMES MADISON, PURCHASED BY ORDER OF CONGRESS; BEING HIS CORRESPONDENCE AND REPORTS OF DEBATES DURING THE CONGRESS OF THE CONFEDERATION AND HIS REPORTS OF DEBATES IN THE FEDERAL CONVENTION 862, 863 (Henry D. Gilpin ed., 1841). An interesting summary of the various positions taken in the Convention by key players in the carriage tax drama is provided by “Doctor Johnson,” as recorded in Madison’s notes (June 21, 1787):

On a comparison of the two plans which had been proposed from Virginia and New Jersey, it appeared that the peculiarity which characterized the latter was its being calculated to preserve the individuality of the States. The plan from Virginia did not profess to destroy this individuality altogether; but was charged with such a tendency. One Gentlemen alone (Col. HAMILTON) in his animadversions on the plan of New Jersey, boldly and decisively contended for an abolition of the State Governments.

Id. at 920–21.

133 *Hylton*, 3 U.S. at 176 (Paterson, J.).

every species of taxable property, except exports.”¹³⁴ He testifies that “the principal, I will not say, the only, objects, that the framers . . . contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.”¹³⁵ He then describes the political issue that the Framers were addressing in reaching the disputed constitutional language: “The provision was made in favor of the southern States,” notes Paterson, which “possessed a large number of slaves; [and] had extensive tracts of territory, thinly settled, and not very productive.”¹³⁶ If there had been no special consideration for this situation, “Congress . . . might tax slaves . . . and land in every part of the Union after the same rate or measure,” thus disproportionately burdening the South.¹³⁷ Preventing this kind of disproportionate taxation was, according to Justice Paterson, “the reason of introducing the clause in the Constitution” linking representation and direct taxes.¹³⁸

Paterson further explains why he is focusing on the Framers’ intentions by pointing out that the “Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise.”¹³⁹ The “rule of apportionment” is, for Justice Paterson, an unfortunate compromise: “it is radically wrong; it cannot be supported by any solid reasoning.”¹⁴⁰ He asks rhetorically, “[w]hy should slaves, who are a species of property, be represented more than any other property?”¹⁴¹ While the constitutional deal needs to be honored, according to Paterson, he argued that this specific constitutional compromise “ought not to be extended by construction.”¹⁴² That is, a constitutional bargain was struck to accommodate specific Southern concerns about the relationship of slavery to representation and taxation, but that compromise should not be understood to change the basic principle embraced by the Framers, which was to give Congress broad powers in the area of taxation.

Paterson continues on his theme of interpreting the language of the Constitution in light of the Framers’ intentions when he addresses the argument:

that an equal participation of the expense or burden by the several states . . . was the primary object, which the framers of the Constitution

134 *Id.*

135 *Id.* at 177.

136 *Id.*

137 *Id.*

138 *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796).

139 *Id.* at 177–78.

140 *Id.* at 178.

141 *Id.*

142 *Id.*

had in view; and that this object will be effected by the principle of apportionment, which is an operation upon states, and not on individuals; for, each state will be debited for . . . its quota of the tax, and credited for its payments.¹⁴³

Paterson counters by noting that such an approach was not what happened when the constitutional bargain was made; rather it is the same as “the old system of requisitions” under the Articles of Confederation.¹⁴⁴ Under the Articles, “Congress could not . . . raise money by taxes . . . They had no coercive authority . . . Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional.”¹⁴⁵ The point of the taxing powers under the Constitution was instead for the national government to have the “fiscal power . . . exerted certainly, equally, and effectually on individuals.”¹⁴⁶ (In the background, it is almost possible to hear Justice Paterson saying something like, “The Convention could have chosen a state-focused constitutional design with much more limited national powers. It was called the Paterson Plan.”)

While Justice Iredell does not specifically mention the Framers, he shares Paterson’s focus on intention. Iredell relies specifically on the fact that “the present Constitution was particularly intended to affect individuals, and not states[,] . . . [a]nd this is the leading distinction between the articles of Confederation and the present Constitution.”¹⁴⁷ The national power to tax is thus sufficiently broad that Congress even has the authority to impose taxes that are neither direct nor “comprehended within the term duty, impost or excise.”¹⁴⁸ Such other taxes, he “presume[s] . . . ought to be uniform.”¹⁴⁹ He then shows that the carriage tax could not reasonably be apportioned without being “destructive of the . . . common interest, upon which the very principles of the Constitution are founded,”¹⁵⁰ especially since some of the states have very few carriages, whose owners would be forced to pay massive sums per carriage compared to carriage owners in some of the southern states. Therefore, the carriage tax must not be a direct tax and as such, it is fully within the power of Congress.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.* at 181 (Iredell, J.).

148 *Id.* (emphasis omitted).

149 *Id.*

150 *Id.* at 183. His answer is that carriage owners would pay different amounts in each state based on representation, while “[i]f any state had no carriages, there could be no apportionment at all.” *Id.* at 182.

Of the three opinions, only Justice Chase expresses any concerns about the concept of judicial review. Because he voted to uphold the law, he said that it was “unnecessary, at this time . . . to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution.”¹⁵¹ Justice Chase signals, however, that “if the court have such power, I . . . declare, that I will never exercise it, but in a very clear case.”¹⁵²

As for the meaning of the constitutional language, Chase says that he would normally be inclined to defer to the construction of the “National Legislature, (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty).”¹⁵³ But in this case, relying solely on the legislative judgment was not necessary because Chase was “inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the Constitution.”¹⁵⁴ To reach this conclusion, Chase, in his brief opinion, looks beyond the text to the “great object of the Constitution,” which was “to give Congress a power to lay taxes, adequate to the exigencies of government,”¹⁵⁵ and he talks about what “the framers of the Constitution” contemplated.¹⁵⁶ In this particular case, Chase concludes, “an annual tax on carriages for the conveyance of persons” is an indirect tax because any “tax on expense is an indirect tax.”¹⁵⁷ For Chase, the carriage tax is a “duty,” which “is the most comprehensive next to the general term tax; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.) . . . is not confined to taxes on importation only.”¹⁵⁸

B. Historical Overview: Many Sources of Multiple Meanings

Both sides in the *Hylton* case summoned a broad collection of distinguished published sources in support of their preferred definitions of direct tax, excise, and related terms. They did their homework, they made excellent points, and it is difficult to say that one or the other represents the meaning that a “hypothetical reasonably well-informed Ratifier would have objectively understood the legal text to mean with all of the relevant

151 *Id.* at 175 (Chase, J.) (emphasis omitted).

152 *Id.* (emphasis omitted).

153 *Id.* at 173 (emphasis omitted).

154 *Id.* (emphasis omitted).

155 *Id.*

156 *Id.* While Chase uses the language of intention—and it would be difficult for him to identify the “great object” otherwise—most of his focus is on the language itself.

157 *Id.* at 175 (emphasis omitted).

158 *Id.* (emphasis omitted). Chase further notes, “I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only . . . a capitation, or poll tax . . . and a tax on land.” *Id.* (emphasis omitted).

information in hand.”¹⁵⁹ Nowhere can this be seen more clearly than in the debate over the meaning of “excise”—a term that, at that time, had existed in Anglo-American tax law only for about 150 years, and that represented over half of the British government’s tax revenues at the time of American independence.¹⁶⁰ Such a term should surely have an easily determined objective meaning, yet neither the parties in *Hylton* nor the authors of this article were able to agree on one. To illustrate this practical challenge to New Originalism’s textual goal, it is worth reviewing the evidence about the meaning and usage of the term “excise” in some detail. (It is possible to repeat this type of analysis for “duty,” “import” and other tax-related terms, but this article focuses on originalism rather than taxation, and this clear example amply makes the methodological point.)

1. *Dictionaries, Commentaries, and Historical Usage*

If we begin by looking at the views of scholars and other commentators, a clear and consistent definition of an excise tax emerges. The secondary literature, both now and at the time the Constitution was adopted, all points in the same direction, and the answer is neatly summarized by a modern historian of the excise in Great Britain as “commodity taxes on home [i.e., domestically produced] products.”¹⁶¹ Or, as seventeenth-century building and insurance magnate, Nicholas Barbon, wrote, “For every Man that Works, pays by those things which he Eats and Wears, something to the Government.”¹⁶² It was, as described by the most recent historian of the English excise, William Ashworth, and numerous others, a tax on the consumption of local goods.¹⁶³ An excise, for virtually all of the commentators of the past several hundred years, is, strictly speaking, a tax on the sale or creation of “goods manufactured or grown domestically. It is meant to be a duty on inland goods as distinct from customs levied on imported commodities.”¹⁶⁴ The 1785 edition of Samuel Johnson’s *Dictionary*

159 Kesavan & Paulsen, *supra* note 7, at 1162.

160 See WILLIAM J. ASHWORTH, CUSTOMS AND EXCISE: TRADE, PRODUCTION, AND CORRUPTION IN ENGLAND 1640–1845, at 5 (2003).

161 John Torrance, *Social Class and Bureaucratic Innovation: The Commissioners for Examining the Public Accounts 1780–1787*, 78 PAST & PRESENT 56, 80–81 (1978).

162 Nicholas Barbon, *A Discourse of Trade* (1690), in A REPRINT OF ECONOMIC TRACTS 23 (Jacob H. Hollander ed., 1905).

163 See ASHWORTH, *supra* note 160, at 44–62 (citing sources).

164 *Id.* at 4. He goes on to write, however, that “certain imports came under the management of the excise . . . from 1643 to 1825 when most of the excised imports were transferred to the customs . . . [and] some exports during the English Civil War and the Interregnum also paid an excise.” *Id.*

of the *English Language* defined the excise as “[a] hateful tax levied upon commodities.”¹⁶⁵ Adam Smith, in his *Wealth of Nations* in 1776, wrote:

The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use. There can never be any doubt either concerning the goods which are subject to those duties, or concerning the particular duty which each species of goods is subject to. They fall almost altogether upon what I call luxuries, excepting [those] upon salt, soap, leather, candles, and, perhaps, that upon green glass.¹⁶⁶

In a similar vein, William Blackstone penned the following definition of the excise: “Directly opposite in its nature to [imposts on merchandise] is the excise duty, which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.”¹⁶⁷

Noah Webster published the first major American dictionary in the 1820s, and it also defined the term “excise” in terms of a tax on commodities when “consumed . . . or on the retail,” as follows:

An inland duty or impost, laid on commodities consumed; or on the retail, which is the last stage before consumption; as an *excise* on coffee, soap, candles, which a person consumes in his family. But many articles are excised at the manufactories, as spirit at the distillery, printed silks and linens at the printer’s, &c.¹⁶⁸

Interestingly, nearly two hundred years later, the “revised and updated” 2002 version of Webster’s dictionary provides a definition of excise that has remained much the same as the early-nineteenth-century version: “tax levied on domestic goods during manufacture or before sale.”¹⁶⁹ A carriage might be included in a broad definition of a “commodity,” but is an annual tax on ownership the same as a tax on “consumption” or “on the retail”? Hamilton said yes, and the Virginians said no.¹⁷⁰

165 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS 726 (6th ed. 1785).

166 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS 493 (1776).

167 1 WILLIAM BLACKSTONE, COMMENTARIES *237.

168 1 NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 989 (1828). Webster had also published “a modest, small-sized dictionary” in 1806, which has been called the “first dictionary of any significance produced by an American.” Sidney I. Landau, *Johnson’s Influence on Webster and Worcester in Early American Lexicography*, 18 INT’L J. LEXICOGRAPHY 217, 217 (2005); see generally JOSEPH H. FRIEND, THE DEVELOPMENT OF AMERICAN LEXICOGRAPHY, 1798–1864 (1967).

169 WEBSTER’S NEW DICTIONARY OF THE ENGLISH LANGUAGE: REVISED AND UPDATED 168 (Merriam-Webster ed., 2002); OXFORD ENGLISH DICTIONARY, *Excise*, (New ed. 2000), available at <http://www.oed.com/>.

170 To some extent the debate over the meaning of “excise” in *Hylton* is between the first two examples of meaning recorded in the modern Oxford English Dictionary—the “gen.”

Perhaps historical usage will be more illuminating. “That [her] Subjects may the more cheerfully bear the necessary taxes,” Queen Anne asked Parliament in 1702 to check for “abuses or mismanagements” in the “accounts of the public receipt and expenditure.”¹⁷¹ Perhaps the least cheerfully borne tax, and the one most likely to be abused, was the dreaded excise, which had first appeared in 1643, and would be greatly enlarged during Britain’s expensively bellicose eighteenth century.¹⁷² Prior to the introduction of the first excise in 1643, taxes had “[t]raditionally . . . been collected on land and on foreign goods at the port of arrival.”¹⁷³ In contrast, the excise taxed the manufacture, sale or, if homemade, consumption of domestically produced goods, typically the purchase of essential items such as food and drink. The Long Parliament, which needed to pay for the First English Civil War, announced that there would be a tax on “strong beer or ale, of 8s. the barrel, 1s.; for a hogshead of cyder or perry, 1s.; to be paid by the first buyer. The same tax was laid on the housekeeper for beer, ale, cyder, or perry brewed or made for his own spending.”¹⁷⁴ The proclamation went on to cover “all sorts of wines” and tobacco; before the year was out, silk, soap and salt were added, and rabbits and pigeons became fair game for the excise as well.¹⁷⁵ By taxing popular and often necessary consumables such as beer, wine, salt, rabbits, and soap, the government found a new and ultimately very lucrative, “inland” or “interior” revenue.¹⁷⁶ Not surprisingly,

meaning, which is “[a]ny toll or tax,” and the “spec.” meaning, “[a] duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers” OXFORD ENGLISH DICTIONARY, *Excise*, (New ed. 2000), available at <http://www.oed.com/>. The first example cited for the “gen.” meaning is the Latin text of a treaty between England and Florence in 1490: “Quas excisas, gabellas, et dacias dicti subditi Regis Angliae in dicta civitate Pisarum solvent et dabunt.” *Id.* The first example in England of the “spec.” meaning is from 1642: “Aspersions are by malignant persons cast upon this House that they intend to . . . lay excizes upon . . . commodities.” *Id.* (alteration in original).

171 ASHWORTH, *supra* note 160, at 24 (internal quotation marks omitted) (quoting JOHN OWENS, *PLAIN PAPERS RELATING TO THE EXCISE BRANCH OF THE INLAND REVENUE DEPARTMENT FROM 1621 TO 1878: OR A HISTORY OF THE EXCISE 15* (1879)).

172 *See id.* at 4. Ashworth points out that “[b]etween 1693 and 1815 England/Britain was at war for fifty-six years, while revenues grew by a factor of thirty-six between the reign of Charles I and the arrival of Lord Liverpool’s administration in the 1810s.” *Id.*; *see generally* PABLO PEBRER, *TAXATION, REVENUE, EXPENDITURE, POWER, STATISTICS, AND DEBT OF THE WHOLE BRITISH EMPIRE THEIR ORIGIN, PROGRESS, AND PRESENT STATE: WITH AN ESTIMATE OF THE CAPITAL AND RESOURCES OF THE EMPIRE, AND A PRACTICAL PLAN FOR APPLYING THEM TO THE LIQUIDATION OF THE NATIONAL DEBT: THE WHOLE FOUNDED ON, AND ILLUSTRATED BY, OFFICIAL TABLES, AND AUTHENTIC DOCUMENTS 48* (1833); Patrick K. O’Brien & Philip Hunt, *The Emergence and Consolidation of Excises in the English Fiscal System Before the Glorious Revolution*, 1 BRIT. TAX REV. 35 (1997).

173 SLAUGHTER, *supra* note 4, at 12.

174 ASHWORTH, *supra* note 160, at 94–95.

175 *Id.* at 95.

176 *Id.*

to collect these new taxes, excise officers needed to have “unprecedented power to enter cellars, warehouses, and shops, and examine persons on oath.”¹⁷⁷ And then, by the middle of the eighteenth century, excise officers were further authorized to enter and search any properties that might be brewing cider, including private homes.¹⁷⁸

“Never, within memory,” writes historian Thomas Slaughter, “had the poor, the propertyless, and the disenfranchised been taxed for support of the government,”¹⁷⁹ and political battles attended each of the government’s nearly relentless efforts to increase and expand the excise tax. These disputes included a foreshadowing of colonial American concerns over “taxation without representation” as well as battles over “the extent and nature of the commodities to be taxed; namely, luxuries versus necessities (the rich versus the poor).”¹⁸⁰ This volatile mixture of taxing everyone, including the poor, for the consumption of necessities, with the accompanying need for the government to pry into both private homes and quotidian commercial transactions, led to everything from political protests and riots to bartering, smuggling, and other efforts to circumvent “that so much abhorred Tax . . . of Excise.”¹⁸¹ As Andrew Marvell wrote in London in 1776:

Excise, a monster worse than e’er before
Frightened the midwife, and the mother tore.
A thousand hands she has, a thousand eyes,
Breaks into shops, and into cellars prys;
With hundred rows of teeth the shark exceeds,
And on all trades, like Casawar, she feeds¹⁸²

Even if it was not always cheerfully borne by the heavily taxed populace, the excise, which accounted for 36% of English national revenues in 1685 and as much as 56% during the war for American independence,¹⁸³ was highly

177 *Id.*

178 *Id.* at 319, 320.

179 SLAUGHTER, *supra* note 4, at 13.

180 ASHWORTH, *supra* note 160, at 53.

181 Edward Raymond Turner, *Early Opinion About English Excise*, 21 AM. HIST. REV. 314, 316 (1916) (quoting *A Narrative of the late Parliament (so called), etc.*, in 3 THE HARLEIAN MISCELLANY: OR A COLLECTION OF SCARCE, CURIOUS, AND ENTERTAINING PAMPHLETS AND TRACTS, ALL WELL AS MANUSCRIPTS AS IN PRINT, FOUND IN THE LATE EARL OF OXFORD’S LIBRARY 430, 446 (1745)) (alteration in original). As to bartering, a 1645 ordinance specified that “the exchange of one sort of good for another is accounted a sale involving liability of Excise duty if both or either sort is of a dutiable description.” ASHWORTH, *supra* note 160, at 96 (internal quotation marks omitted).

182 Turner, *supra* note 151, at 316 (quoting Andrew Marvell, *Instructions to a Painter, About the Dutch Wars*, in 3 EDWARD THOMPSON, THE WORKS OF ANDREW MARVEL, ESQ.: POETICAL, CONTROVERSIAL, AND POLITICAL 365, 369–70 (1667)).

183 ASHWORTH, *supra* note 160, at 5.

popular among experts in taxation. Sir William Petty, in his 1689 *Discourse of Taxes and Contributions*, for example, extolled the “very perfect Idea of making a Leavy on Consumptions,”¹⁸⁴ and a writer in 1644 declared that “the Impost, called Excise [is] . . . the most equal and indifferent Levy that can be laid upon the people,” noting further that “all ingenious men who have studied the Nature and Product of it, upon the result of solemn and serious Debates, have acknowledged it so to be.”¹⁸⁵

Battles nevertheless frequently ensued whenever the government sought to extend the excise to yet another item of commerce; as a result, there is an extensive collection of historical documents illuminating the application of the excise tax in Britain between its inauguration in 1643 and the adoption of the United States Constitution in 1787. The liveliest dispute may have occurred in 1733 with Sir Robert Walpole’s proposal “changing Duties on Importation into Inland Duties, that is, the Customs on these two Commodities [tobacco and wine] into Excises.”¹⁸⁶ One of the primary reasons for the attempt to repeal these imposts and replace them with excises was that the imposts had “been found liable to great Frauds and Abuses,” which the scheme’s proponents hoped excises would correct.¹⁸⁷

The measures generated intense opposition that ultimately led to the defeat of Walpole’s plan, with the principal concern being the tendency toward a “general excise.”¹⁸⁸ One Member of Parliament, William Pulteney, was among those who voted against the bills.¹⁸⁹ Pulteney cited the possibility that once the excise replaced the imposts on wine and tobacco, “the same plausible pretence of frauds might, with equal justice, have been extended to other customable commodities,” ultimately resulting in a dramatic

184 WILLIAM PETTY, A DISCOURSE OF TAXES AND CONTRIBUTIONS 69 (1689).

185 Turner, *supra* note 181, at 316 (quoting CONSIDERATIONS TOUCHING THE EXCISE OF NATIVE AND FOREIGN COMMODITIES (1644)).

186 BARON JOHN HERVEY HERVEY, THE REPLY OF A MEMBER OF PARLIAMENT TO THE MAYOR OF HIS CORPORATION 16 (1733).

187 A Bill for Repealing Several Subsidies and an Impost now Payable on Tobacco of the British Plantations, and for Granting an Inland Duty in Lieu Thereof, *in* THE MOST IMPORTANT TRANSACTIONS OF THE SIXTH SESSION OF THE FIRST PARLIAMENT OF HIS MAJESTY KING GEORGE II 3 (4th ed. 1733).

188 For an explanation of the context of the 1733 bill, including the political situation with regard to Sir Robert Walpole and the reason for its having been introduced, see generally SAMUEL RAWSON GARDINER, 3 A STUDENT’S HISTORY OF ENGLAND: FROM THE EARLIEST TIMES TO 1885, at 722–24 (1891); PAUL LANGFORD, THE EXCISE CRISIS: SOCIETY AND POLITICS IN THE AGE OF WALPOLE (1975) [hereinafter LANGFORD, THE EXCISE CRISIS]; PAUL LANGFORD, A POLITE AND COMMERCIAL PEOPLE 28–33 (1998) [hereinafter LANGFORD, COMMERCIAL PEOPLE].

189 WILLIAM PULTENEY, A LETTER FROM A MEMBER OF PARLIAMENT TO HIS FRIEND IN THE COUNTRY GIVING HIS REASONS FOR OPPOSING THE FARTHER EXTENSION OF THE EXCISE LAWS (1733).

expansion in the number of goods excised.¹⁹⁰ John Hervey, another MP, supported the tobacco bill and authored a pamphlet, in which he tried to refute the argument made by the bill's opponents that the extension of the excise would be fatal to liberty by asking the question, "why the excising these two Commodities, Wine and Tobacco, should have Consequences so much *more* terrible to Liberty, than the excising of all those Commodities already subject to this Method of Taxation?"¹⁹¹

The *Dialogue between Sir Andrew Freeport and Timothy Squat, Esquire, on the Subject of Excises* is a pamphlet constructed in the dialectical method to showcase the absurdity of the arguments of the opponents of the bill (at least in the mind of the author of the pamphlet). The character of Timothy Squat was cast as a strong opponent of the measure, while Sir Freeport argued in favor of the bill. In one passage, Squat details his "last General Objection" to the bill as being "it has a direct and strong Tendency to a General Excise."¹⁹² This sentiment refers to Pulteney's argument—frequently made at the time—that once Parliament extended the excise one step further, it would provide justification for extending it to all excisable items: "every Thing that we eat, drink or cloath ourselves withal, will be thrown under the Claws of this rapacious Dragon," i.e. the excise.¹⁹³ Sir Andrew, in summarizing Squat's argument, restates it as follows: "Food and Raiment, Bread, Butter and Cheese, Fish Flesh and Fowl, all the Commodities of our own Produce which we can't subsist without . . . [have] to have a new Tax levied upon 'em by way of Excise."¹⁹⁴

Of particular relevance to the constitutional conflict in *Hylton* is the 1747 Act of Parliament "granting to his Majesty several Rates and Duties upon Coaches, and other Carriages."¹⁹⁵ The tax would be paid annually on

190 *Id.* at 17. This would have been significant for many reasons, but one of them is that opponents of the excise generally believed the tax to be unfair, undemocratic, and abusive, in part because those accused of violating excise tax laws were not entitled to jury trials; instead, these cases were brought before the commissioners of excise. *See id.*; ANDREW FREEPORT, A DIALOGUE BETWEEN SIR ANDREW FREEPORT AND TIMOTHY SQUAT, ESQUIRE, ON THE SUBJECT OF EXCESS BEING A FULL REVIEW OF THE WHOLE DISPUTE CONCERNING A CHANGE OF THE DUTIES ON WINE AND TOBACCO INTO AN EXCISE 15–19 (1733); OBSERVATIONS UPON THE LAW OF EXCISE SHEWING, I. THAT EXCISES MUST BE DESTRUCTIVE OF TRADE IN GENERAL, II. THAT EXCISES ARE INCONSISTENT WITH THE LIBERTIES OF A FREE PEOPLE 8–14 (1733) [hereinafter OBSERVATIONS UPON THE LAWS OF EXCISE].

191 HERVEY, *supra* note 186, at 23 (emphasis added); *see also* OBSERVATIONS UPON THE LAWS OF EXCISE 6.

192 FREEPORT, *supra* note 190, at 23 (emphasis omitted).

193 *Id.* at 24 (emphasis omitted).

194 *Id.* (emphasis omitted).

195 6 Geo. II, c. 10, § 349 (1747).

carriages,¹⁹⁶ and its collection would be “under the Management of the Commissioners and Officers of the Excise.”¹⁹⁷ And so, as in Congress’ 1794 tax on carriages, the payments required by the tax were called “rates and duties,” and, in Britain, they would be collected by officials explicitly described as excise officers. This system of collection continued until 1785 when the responsibility for collecting the carriage tax (and certain stamp taxes) was transferred to the “Commissioners for the Affairs of Taxes.”¹⁹⁸ Although the Acts of Parliament did not specifically call the “rates and duties” on carriages “excise” taxes, they were collected by excisemen, and even Hylton’s lawyer admitted that England’s carriage taxes were called “excises.”¹⁹⁹

Much as England had imported this domestic tax from Holland—prompting protests of “No excise, no wooden shoes²⁰⁰—the American colonies, and then the new government of the United States, adopted the excise from Britain. A broad overview of the colonial excise situation is given in Frederic Howe’s history of the internal revenue system in the United States, which shows that excise taxes were adopted primarily in the North:

[A]t the time of the Revolution excise taxes had been developed to considerable extent in several of the colonies. In Connecticut, not only all ardent spirits, but foreign articles of consumption generally, had been the objects of an inland duty . . . [I]n New York, beer, wine, and liquors of all kinds sold at retail, as well as receipts from sales at auction. Spirits were also taxable in New Jersey and Pennsylvania.²⁰¹

It thus appears that the excises in the colonies were to a great extent focused on alcohol, with other traditionally excisable items like tea and tobacco also being taxed in some states.²⁰²

196 Described as “every Coach, Berlin, Landau, Chariot, Calash with four Wheels, Chaise Marine, Chaise with four Wheels, and Caravan, or by what Name soever such carriages now are, or hereafter may be called . . . that shall be kept by or for any Person, for his or her own Use, or to be Let out to Hire.” *Id.*

197 *Id.*

198 See 9 Geo. III, c. 47, § 538–39 (1785) (“An Act for transferring the Receipt and Management of certain Duties therein mentioned from the Commissioners of Excise, and the Commissioners of Stamps respectively, to the Commissioners for the Affairs of Taxes; and also for making further Provisions in respect to the said Duties so transferred.”).

199 See 6 Geo. II, c. 10, §349 (1747); TAYLOR, *supra* note 61, at 5.

200 See SLAUGHTER, *supra* note 4, at 15; see also ASHWORTH, *supra* note 160 at 17 (discussing the tax’s Dutch origins); Turner, *supra* note 181, at 315 (noting opposition to “this monstrous tax”).

201 FREDERIC CLEMSON HOWE, TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM, 1791–1895; AN HISTORICAL SKETCH OF THE ORGANIZATION, DEVELOPMENT, AND LATER MODIFICATION OF DIRECT AND EXCISE TAXATION UNDER THE CONSTITUTION 16 (1896).

202 See 4 LAW PRACTICE OF ALEXANDER HAMILTON 302 (discussing various items on which Duties of Excise were levied in the colonies).

As in Britain, however, some states extended the excises beyond these types of consumables. In 1781, Massachusetts adopted an “act laying certain duties of excise on certain articles.”²⁰³ In addition to requiring taxes to be paid on the retail sale of spirits such as brandy and “New England Rum,” the act provided for annual “duties” to be paid by “every Owner or Possessor of any Coach, Chariot, Four wheel Carriage, Phaeton, Chaise or Sulkey Chair.”²⁰⁴ Similarly, Rhode Island, in 1786, enacted a law “laying Duties of Excise on certain Articles therein described.”²⁰⁵ As in Massachusetts, taxes were paid on retail sales of “Rum, Wine and other distilled spirits,” as well as a yearly “Duty . . . for each Carriage, Horse, or Dog, and Billiard-Table . . . owned or possessed.”²⁰⁶ A few lines later, the act specifically describes these examples of personal property as being “excised” items.²⁰⁷ And so, whatever may have been the general understanding of excise taxes in other regions of America around the time the Constitution was adopted, there are clear examples in two New England states where the ownership of carriages (and other items of personal property) were “excised” on an annual basis.

2. *Constitutional Convention and Ratification*

The delegates to the Constitutional Convention were considerably more concerned about direct taxation—and its link to representation—than excises or any other form of “indirect” taxes. In light of Justice Patterson’s focus in *Hylton* on the Framers’ intentions, it may be useful to provide a fuller discussion of the drafting and ratification debates than just those few instances where the term “excise” was addressed. In doing so, it is possible to see the basis for Justice Paterson’s conclusion that the nature of the negotiations over representation at the Convention meant that “direct tax” should be read narrowly, thus leading to an expansive definition of “excise” and other forms of indirect taxes.

According to James Madison’s notes of the Convention, following weeks of debates about representation in the new national government, Gouverneur Morris proposed “that taxation shall be in proportion to representation.”²⁰⁸ Southern delegates complained that this approach would

²⁰³ Mass. Acts §17 (1781) at 525–33. For a discussion of the controversy surrounding an earlier Massachusetts excise tax, and the degree to which the rhetoric was informed by familiarity with similar excise battles in Britain, see Paul S. Boyer, *Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754*, 21 WM. & MARY Q. 328 (1964).

²⁰⁴ Mass. Acts § 17 (1781) at 529.

²⁰⁵ R.I. Acts & Resolves 23 (1786) (“March, 1786, An ACT laying Duties of Excise on certain Articles therein described.”).

²⁰⁶ *Id.* at 25, 28.

²⁰⁷ *Id.* at 28–29.

²⁰⁸ MADISON, *supra* note 132, at 1079.

be unfair, with Pierce Butler of South Carolina seeking representation based on “the full number of inhabitants, including all the blacks.”²⁰⁹ Morris responded, saying that these objections “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.”²¹⁰ Morris added the word “direct” before “Taxation”, and it “passed, *nem. com.*, as follows: provided always that direct taxation ought to be proportioned to representation.”²¹¹ At this point, William Davie, sputtering that “it was high time now to speak out,” said that this proposal was

meant by some gentlemen to deprive the Southern States of any share of representation for their blacks. He was sure that North Carolina would never confederate on any terms that did not rate them at least as three fifths. If the Eastern States meant, therefore, to exclude them altogether, the business was at an end.²¹²

In response to these kinds of comments, Connecticut’s Ellsworth proposed to include the following language in the Constitution: “that the rule of contribution by direct taxation . . . shall be the number of white inhabitants, and three fifths of every other description in the several States,”²¹³ which was withdrawn in favor of a similar motion from Edmund Randolph, and the debate over slavery, representation and taxation continued.²¹⁴ The version then recommended to the committee on detail contained a clause reading, “[p]rovided always, that representation ought to be proportioned to direct taxation,” and calling for a periodic census so “that the Legislature of the United States shall proportion the direct taxation accordingly.”²¹⁵

A few days later, the committee on detail returned with a revised draft that included, as the first section of Article VII, “[t]he Legislature of the United States shall have the power to lay and collect taxes, duties, imports, and excises.”²¹⁶ Section 3 specified that the “proportions of direct taxation shall be regulated by the whole number of white and other free citizens[,] . . . and three fifths of all other persons . . . (except Indians not paying taxes).”²¹⁷ Section 4 specified, “[n]o tax or duty shall be laid by the Legislature on articles exported from any State,” and Section 5 said, “[n]o

209 *Id.* at 1079–80.

210 *Id.* at 1080. He noted further that “he was persuaded that the imports and consumption were pretty nearly equal throughout the Union.” *Id.*

211 *Id.* at 1081 (internal quotation marks omitted). “*Nem. com.*” is an abbreviation for *nemine contradicente*, Latin for “without objection.”

212 *Id.*

213 *Id.* at 1082.

214 *See id.* at 1083.

215 *Id.* at 1223.

216 *Id.* at 1232.

217 *Id.* at 1233.

capitation tax shall be laid, unless in proportion to the census.”²¹⁸ The delegates then moved through the draft clause by clause.²¹⁹

In a discussion of the impact of slaves on representation, Gouverneur Morris decried the “nefarious institution” of slavery.²²⁰ “[W]hat is the proposed compensation to the Northern States, for a sacrifice of every principle of right, of every impulse of humanity?” he asked.²²¹ His rhetorical answer was that they not only would have “to march their militia for the defence of the South[,],” but also that the “Legislature [would] have indefinite power to tax them by excises, and duties on imports,” and he was concerned that “excises and duties . . . will fall heavier on [Northern states] than on the Southern inhabitants.”²²² He also argued, “Let it not be said, that direct taxation is to be proportioned to representation. It is idle to suppose that the General Government can stretch its hand directly into the pockets of the people, scattered over so vast a county. They can only do it through the medium of exports, imports and excises.”²²³

Luther Martin from Maryland, who would ultimately refuse to sign the Constitution, wondered “what was meant . . . in the expression,—‘duties,’ and ‘imposts.’ If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.”²²⁴ Wilson responded that “[d]uties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce, the former extend to a variety of objects, as stamp duties, &c.”²²⁵

The discussion subsequently returned to the topic of direct taxation, which generated more controversy than excise taxes. Martin, arguing that “[t]he power of taxation is most likely to be criticized by the public,” proposed that if the legislature believes that “revenue should be raised by direct taxation, . . . requisitions shall be made of the respective States to pay . . . their respective quotas, . . . and in case of any of the States failing to comply with such requisitions, then, and then only, to devise and pass acts . . . authorizing the collection of the same.”²²⁶ This motion was

218 *Id.* at 1233–34.

219 *See generally* MADISON, *supra* note 132 (recording the lengthy debates among the delegates regarding the contents of the proposed draft).

220 *Id.* at 1263.

221 *Id.* at 1264.

222 *Id.*

223 *Id.* at 1265.

224 *Id.* at 1339 (emphasis omitted).

225 *Id.* (emphasis omitted).

226 *Id.* at 1382.

defeated,²²⁷ although the concept would later become popular with the Anti-federalists.²²⁸

The tax provisions were slightly revised with no recorded comments until the final discussions concerning the draft that had been prepared by the Committee on Style. In that draft, Congress had the power “[t]o lay and collect taxes, duties, imposts, and excises.”²²⁹ That power was subject only to the limitations that Congress could not enact a “tax or duty . . . on articles exported from any State,” that “[n]o capitation or other direct tax shall be laid, unless in proportion to the census,” and that “[r]epresentatives and direct taxes shall be apportioned.”²³⁰ Madison’s notes say that the language “but all such duties, imposts and excises, shall be uniform throughout the United States’ [was] unanimously annexed to the power of taxation,” but he did not say why that addition was requested.²³¹ Additionally, George Read of Delaware proposed adding the words “or other direct tax” after “capitation” because, as Madison wrote somewhat cryptically in his notes, “[h]e was afraid that some liberty might otherwise be taken to saddle the States with a readjustment, by this rule, of past requisitions of Congress; and that his amendment, by giving another cast to the meaning, would take away the pretext.”²³² This change was adopted²³³ and, within days, the Constitution was completed and became the subject of intense political debate, only a very small part of which touched on excise taxes.

Convention delegate Luther Martin became one of the leaders of the group of people who have come to be called the Anti-federalists, who sought either to defeat ratification or to require amendments. Martin was worried in particular that imposts would “impose duties on any or every article of

227 *See id.* Even two of Martin’s fellow Maryland delegates (Carroll and Jenifer) voted against it. *Id.*

228 *See* The Ratifications of the Twelve States, in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319, 322–23 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION] (including the content of this motion as a suggested constitutional amendment within the ratification statement issued by Massachusetts); *id.* at 325 (same regarding South Carolina); *id.* at 325–26 (New Hampshire); *id.* at 327, 329 (New York); *id.* at 336 (Rhode Island); Debates of the Convention of the State of North Carolina on the Adoption of the Federal Constitution, in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 245 (Jonathan Elliot ed., 2d ed. 1836) (North Carolina); The Virginia Convention, June 27, 1788, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1550, 1556 (John P. Kaminski et al. eds., 1993) (Virginia).

229 MADISON, *supra* note 132, at 1611.

230 *Id.* at 1606, 1613.

231 *Id.* at 1575. Madison does not say who made this proposal. *Id.*

232 *Id.* at 1579. Williamson seconded the motion, according to Madison’s notes, and there was no further discussion. *See id.*

233 *Id.*

commerce imported into these states;" meanwhile, "[b]y the power to lay excises, . . . the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort."²³⁴ These taxes, in Martin's view, would give the federal government "a power very odious in its nature, since it authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns."²³⁵ Martin thus appears to have had a fairly clear understanding of the nature of excise taxes, including their use in Britain not only to tax the sale of domestically produced commodities ("the food that we eat" and "the liquors that we drink"²³⁶) but also the possession of certain household items ("the glass which enlightens our houses, or the hearths necessary for our warmth and comfort.")²³⁷

While Martin wrote quite knowledgeably, another Anti-federalist, calling himself "A Farmer and Planter," noted that "[e]xcise is a new thing in America, and few country farmers and planters know the meaning of it."²³⁸ It is much better known, he explained, "in Old England, where I have seen the effects of it It is there a duty, or tax, laid upon almost every necessary of life and convenience, and a great number of other articles."²³⁹ The excise extended not only to the purchase of things such as salt and rum (and here he recalls the "detestable" excise rates in England from twenty-six years earlier, such was the degree to which he "felt the smart"²⁴⁰), but it also meant that "[i]f a private family make their own soap, candles, beer, cider, &c.[,] &c.[,] they pay an excise-duty on them."²⁴¹ Another Antifederalist, writing in New York as "A Countryman," echoes the point that the concept of excise taxes was not well known among those in the backcountry. What they had heard, however, was that it was a very broad tax. He writes that "some of our neighbors from the old countries, where they say, [excises] are as common as Mayweed[,] tell us that they will go to almost every thing."²⁴²

Although a number of Anti-federalists acknowledged the reasonableness of "external taxes, [which] are impost duties . . . laid on imported goods," in

234 Luther Martin's Letter of the Federal Convention of 1787, in 1 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 344, 368 (Jonathan Elliot ed., 2d ed. 1836).

235 *Id.*

236 *Id.*

237 *Id.*

238 Essay by A Farmer and Planter, in 5 THE COMPLETE ANTI-FEDERALIST 74, 75 (Herbert J. Storing ed., 1981).

239 *Id.*

240 *Id.*

241 *Id.* He then goes on to describe the evils of excise tax collectors, "who are the very scurf and refuse of mankind." *Id.*

242 Letters from a Countryman, in 6 THE COMPLETE ANTI-FEDERALIST 69, 79 (Herbert J. Storing ed., 1981).

the words of the influential Federal Farmer,²⁴³ “internal taxes, as poll and land taxes, excises, duties on all written instruments, etc. may fix themselves on every person and species of property in the community; they may be carried to any lengths.”²⁴⁴ The lengths to which those excises could go can be seen in comments by Federalist Oliver Ellsworth at Connecticut’s ratifying convention. After describing the various methods by which European countries raise revenues, Ellsworth points out that “[i]n Holland their prodigious taxes . . . are levied chiefly upon articles of consumption. They excise every thing, not excepting even their houses of infamy.”²⁴⁵

The fact that excise taxes frequently fell on manufactured goods occasioned a number of additional comments, both pro and con. General James Wadsworth, speaking at the Connecticut ratifying convention, “objected against imposts and excises because their operation would be partial and in favor of the Southern states.”²⁴⁶ Meanwhile, in states with agrarian economies, an excise on manufactured goods had the attractive feature of being borne primarily by others. On January 18, 1788, a few months before the state ratifying convention, Charles Pinckney addressed the South Carolina legislature.²⁴⁷ In speaking about the excise provision in Article I, Pinckney noted: “as to excises, when it is considered how many more excisable articles are manufactured to the northward than there are to the southward, . . . he thought every man would see the propriety . . . of this clause.”²⁴⁸

243 Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican, *in* 2 THE COMPLETE ANTI-FEDERALIST 214, 239 (Herbert J. Storing ed., 1981) [hereinafter Federal Farmer]; *see also* Letters of Agrippa, *in* 4 THE COMPLETE ANTI-FEDERALIST 68, 113 (Herbert J. Storing ed., 1981); Essays of an Old Whig, *in* 3 THE COMPLETE ANTI-FEDERALIST 17, 39, 40 (Herbert J. Storing ed., 1981).

244 Federal Farmer, *supra* note 243, at 239.

245 Fragment of the Debates in the Convention of the State of Connecticut on the Adoption of the Federal Constitution, *in* 2 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 195, 190–97 (Jonathan Elliot ed., 2d ed. 1836).

246 James Wadsworth, Speech in the Connecticut State Ratification Convention (Jan. 7, 1788), *in* 2 BIRTH OF THE BILL OF RIGHTS: ENCYCLOPEDIA OF THE ANTIFEDERALISTS 81 (Jon L. Wakelyn ed., 2004).

247 Debates in the Legislature and in Convention of the State of South Carolina on the Adoption of the Federal Constitution, *in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 253, 300 (Jonathan Elliot ed., 2d ed. 1836). The South Carolina legislature first considered the proposed Constitution within the legislature before voting to assemble in convention in May. The vote to convene a convention was approved by the slightest of margins, 76-75. Pinckney, who had been a delegate at the federal convention, was elected President of the South Carolina ratifying convention. *Id.* at 316–18.

248 *Id.* at 306.

The other side of the coin can be seen in the comments of Charles Livingston, Chancellor of New York, when he addressed the convention on July 1, 1788 about a proposed constitutional amendment to the effect “[t]hat the Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them.”²⁴⁹ Livingston’s concern was that manufacturing was the future of America, and the excise would grow with the economy. He stated:

[O]ne word with respect to excise. When I addressed the committee on Friday last, I observed, that the amendment would operate with great inconvenience; that at a future period this would be a manufacturing country; and then there would be many proper objects of excise.²⁵⁰

The ratification debates of the New York convention were accompanied by the publication of the *Federalist Papers*, which provide interesting insights into how Hamilton—not yet responsible for raising revenue for the new federal government—described the future use of the power to tax. Hamilton’s *Federalist 12* begins by observing that the “prosper[ity of] commerce is . . . acknowledged . . . to be the most useful, as well as the most productive, source of national wealth; and has accordingly become a primary object of their political cares.”²⁵¹ When it comes to raising revenue, in “so opulent a nation as that of Britain . . . direct taxes, from superior wealth, must be . . . much more practicable, than in America,” yet most revenue comes from “taxes of the indirect kind; from imposts and from excises. Duties on imported articles form a large branch of this latter description.”²⁵² For the new American nation, he argued, “we must a long time depend . . . chiefly on such duties.”²⁵³ Moreover, “excises must be confined within a narrow compass. The genius of the people will illy brook the inquisitive and peremptory spirit of excise laws.”²⁵⁴ Hamilton then noted that “[t]he pockets of the farmers . . . will reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands;

249 *The Ratifications of the Twelve States*, in 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319, 329 (Jonathan Elliot ed., 2d ed. 1836).

250 *The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution*, in 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 14, 310, 362 (Jonathan Elliot ed., 2d ed. 1836).

251 THE FEDERALIST NO. 12, at 55 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

252 *Id.* at 56–57; see also THE FEDERALIST NO. 36, at 174 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting that “taxes . . . may be sub-divided into those of the *direct*, and those of the *indirect* kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive, what can be the nature of the difficulties apprehended”).

253 THE FEDERALIST NO. 12, *supra* note 251, at 57.

254 *Id.*

and personal property is too precarious and invisible a fund to be laid hold of in any other way, than by the imperceptible agency of taxes on consumption.”²⁵⁵ After a strong argument in favor of duties on importation, especially on the “four millions of gallons” of “ardent spirits” estimated to arrive on American shores each year, Hamilton returns to his effort to minimize the likely effect of excises, which “are too little in unison with the feelings of the people, to admit of great use . . . nor, indeed, in the States where almost the sole employment is agriculture, are the objects proper for excise sufficiently numerous, to permit very ample collections in that way.”²⁵⁶

In a subsequent essay, Hamilton returns to the fact that the new nation will need to raise revenue, and he specifically addresses the alternate proposal that any needed revenue would be requisitioned from the states, which would be solely responsible for taxation. In *Federalist 21*, Hamilton writes that the “[i]mposts, excises, and in general all duties upon articles of consumption . . . contain in their own nature a security against excess.”²⁵⁷ Hamilton’s implication in both papers is that excises were narrowly confined to “articles of consumption”²⁵⁸ where they would be absorbed in the price of the goods, and thus “imperceptible.”²⁵⁹ Moreover, the “amount to be contributed by each citizen will . . . be at his own option The rich may be extravagant . . . the poor can be frugal: and private oppression may always be avoided, by a judicious selection of objects proper for such impositions.”²⁶⁰ And so, for the Hamilton of the *Federalist*, excise taxes will be infrequently and judiciously employed, so as to be “imperceptible . . . taxes on consumption,”²⁶¹ and drawn with due care for the separate concerns of the rich and poor.

The Constitution’s taxation clauses ultimately emerged unchanged from the ratification process. Despite Anti-federalist concerns about excises, “direct taxes,” in contrast to “duties, imposts, and excises,” were especially controversial.²⁶² Even after ratification, Anti-federalist Thomas Tudor Tucker introduced into the First Congress an amendment that read, “[t]he Congress shall never impose direct taxes but where the moneys arising from

255 *Id.*

256 *Id.* at 59.

257 THE FEDERALIST NO. 21, at 102–03 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

258 *Id.* at 102.

259 THE FEDERALIST NO. 12, *supra* note 251.

260 THE FEDERALIST NO. 21, *supra* note 257, at 103.

261 THE FEDERALIST NO. 12, *supra* note 251.

262 See 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1133 (1971) (“Mr. Tucker moved the following as a proposition to be added to [the amendments to the Constitution]: The Congress shall never impose direct taxes but where the moneys arising from the duties, imposts, and excise are insufficient for the public exigencies. . . .”) (internal quotation marks omitted).

the duties, imposts, and excise are insufficient for the public exigencies, . . . then . . . Congress [should make] a requisition upon the States to assess, levy, and pay their respective proportions”²⁶³ Livermore “thought this an amendment of more importance than any yet obtained; that it was recommended by five or six states,”²⁶⁴ but it was defeated thirty-nine to nine.²⁶⁵ The new nation was thus empowered “[t]o lay and collect Taxes, Duties, Imposts and Excises,” subject to the requirements that direct taxes be apportioned, and “all Duties, Imposts and Excises shall be uniform throughout the United States.”²⁶⁶

In summary, throughout the constitutional debates, we can see that those opposing extensive federal power—mostly the Anti-federalists—employed broad definitions of “excise,” a semantic choice that allowed them to emphasize their fears of an unrestrained national taxing power. On the other hand, Federalists argued for narrow definitions and predicted limited and prudent use of the federal power of taxation. After the Constitution was ratified, however, the positions were reversed: Hamilton and other nationalists promoted expansive definitions that would give the government greater power, while the Virginians in *Hylton* sought narrow, more technical meanings in the hopes of deflating that power. Once again, simply surveying contemporary usage provides no direct guidance as to which is the correct meaning of the constitutional text, in substantial part because the people using those terms pushed their meanings in one direction or another in their efforts to promote particular political outcomes on specific occasions.

3. Congress

The 1791 debate in the First Congress surrounding the imposition of excise taxes on “spirits” is the most substantive discussion of the excise that can be found in the congressional records prior to the discussion of the carriage tax. Hamilton, then serving as Secretary of the Treasury, was not as reluctant to impose excise taxes as he had appeared to be in the *Federalist*. Hamilton proposed a federal tax on whiskey to provide revenue to pay off

²⁶³ *Id.*

²⁶⁴ *Id.* at 1134.

²⁶⁵ *Id.* at 1137.

²⁶⁶ See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”); *id.* at § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States”).

the large Revolutionary War debt.²⁶⁷ It is frequently described as the “Whiskey Excise,” although the statutory language used the word “duties.” The proposed bill would have repealed “the duties heretofore laid on distilled spirits imported from abroad, and laying others in their stead, and also upon spirits distilled within the United States.”²⁶⁸ The “others” thus appear to be understood as excises since the entire debate over the imposition of the new duties centered on the excise.

The most interesting passages are those taken from Congressman James Jackson of Georgia, who ardently opposed the new excises on spirits. In a speech on January 5, 1791, Jackson derided the excise as being “odious, unequal, unpopular, and oppressive, more particularly in the Southern States.”²⁶⁹ Jackson had studied the history of the excise and its development over time. During the same January 5 proceedings, he “gave a short sketch of the history of excises in England. He said they always had been considered by the people of that country as an odious tax, from the time of Oliver Cromwell to the present day; even Blackstone, a high prerogative lawyer, has reprobated them.”²⁷⁰ Both sides of the debate over the excise bill in 1791 seemed to be familiar with this history and employed it in advancing their positions.

Samuel Livermore of New Hampshire spoke in support of the whiskey excise, saying that the people “will consider it as drinking down the national debt.”²⁷¹ Livermore believed that the objections to the bill “arose principally from the word excise,” and tried to distinguish the spirits bill from the “unequal” excises of the past.²⁷² His explanation was that an excise traditionally taxed the population unequally “inasmuch as it fell on the poor only, who were obliged to purchase in small quantities; while the rich, by storing their cellars, escaped the duty.”²⁷³ After Sedgwick of Massachusetts rather optimistically sought to set his colleagues’ minds at ease by assuring them “that he did not contemplate the execution of the [excise] laws by military force,” William Smith of South Carolina also tried to show “in what

267 When Congress asked Hamilton for a funding plan to pay for assuming state debts, his report was not limited to whiskey: Hamilton “responded with a report outlining further increases in the import duties, a carriage tax, a tobacco excise, federal legal licenses and stamp taxes, levies on auction sales, and taxes on the retail sale of wines and liquors.” William D. Barber, “Among the Most Techy Articles of Civil Police”: *Federal Taxation and the Adoption of the Whiskey Excise*, 25 WM. & MARY Q. 58, 74 & n.47 (1968).

268 1 ANNALS OF CONG. 272 (1790) (Joseph Gales ed., 1857).

269 2 ANNALS OF CONG. 1890 (1791) (Joseph Gales ed., 1834); *see also* 1 ANNALS OF CONG. 262 (1857).

270 2 ANNALS OF CONG. *supra* note 269, at 1890–91 (emphasis omitted).

271 *Id.* at 1896.

272 *Id.*

273 *Id.*

respects [the bill] differed from the English plan of an excise” in its specifics, including the opportunity for trial by jury.²⁷⁴

Three years later, in 1794, the Third Congress’s debate over the carriage tax took place in the midst of a broader discussion of various proposed taxes, including an excise tax on the manufacture of tobacco. Although Virginia’s representatives were unhappy with both the carriage tax and the tobacco tax, most likely because the economic burden of both would fall heavily on Virginia and other southern states, they appeared not to contest the issue of whether the tobacco tax was properly called an “excise,” whereas they refused to put the carriage tax in the same category. As to the tobacco tax, the debate was focused primarily on questions of tax policy: Madison made a point of distinguishing between “direct personal taxes, and those raised by indirect means, such as excise and customs.”²⁷⁵ Quoting “an author of respectable character, in England,” Madison noted that indirect taxes were much more expensive to collect,²⁷⁶ often because “dealers . . . endeavored to evade the duties, and thus commences a struggle, which has many bad effects, both upon industry and public morals.”²⁷⁷

As the debate shifted to an excise on sugar, representatives from states involved in sugar manufacturing rose to make similar arguments about the evils of the excise, generally focusing on the intrusive methods needed to collect them.²⁷⁸ Virginia’s Nicholas sought to make common cause with them by saying that “the excise system . . . was, at best, from its essence, inseparably connected with vexation, . . . [and] of false informations for smuggling.”²⁷⁹ Direct taxes, he argued, “were the best, both as being the least expense in the collection, and as tending more than any others, to keep the attention of the people strictly fixed on the way in which their money shall be expended.”²⁸⁰

Despite the appearance of the provision for excise taxes in the Constitution, Congressmen Smilie and Findley both spoke of excise taxes as, in Smilie’s words, “contrary to the spirit of the Constitution of a free country, and in opposition to the Constitution of the United States.”²⁸¹ These comments appear to be broad-based rhetorical arguments about the

²⁷⁴ *Id.* at 1897–98.

²⁷⁵ 3 ANNALS OF CONG. 630 (1894) (Joseph Gales & Winston Seaton eds., 1849).

²⁷⁶ *Id.* (pointing to a difference of three percent for “direct taxes . . . such as the land tax” and thirty percent for indirect taxes).

²⁷⁷ *Id.* at 631.

²⁷⁸ *Id.* at 636–38.

²⁷⁹ *Id.* at 638.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 637. This statement came after he read a long quotation from Blackstone about the broad powers given to excise officers in England. *Id.* Findley called excises “inconsistent with personal liberty, and the spirit of the American Constitution.” *Id.* at 638.

likely effect of excise taxes rather than an effort at constitutional interpretation bearing on the direct-versus-indirect tax constitutional issue, as it was raised in *Hylton*. That particular issue came up later with a lengthy debate between Massachusetts congressman Sedgwick and Virginia's Nicholas.

The records of Nicholas's remarks are limited, but his argument was summarized by Congressman Dexter: "[A] gentleman from Virginia [Mr. Nicholas] thought the meaning was, that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect."²⁸² In contrast, Sedgwick believed that "there had been a general concurrence in a belief that . . . a capitation tax and taxes on land and on property and income generally, were direct charges . . . He had considered those, and those only, as direct taxes."²⁸³ Meanwhile, Sedgwick "had never supposed" that "a tax imposed on a specific article of personal property, and particularly if objects of luxury . . . had been considered a direct tax, within the meaning of the Constitution."²⁸⁴ To discover that "pleasure carriages and other objects of luxury were excepted from contributing to the public exigencies," observed Sedgwick, would "astonish the people of America."²⁸⁵ Yet, this exemption would undoubtedly occur under Nicholas's definitions, since "several of the States had few or no carriages," and thus, "apportionment could not be made and the duty . . . could not be imposed."²⁸⁶ In case of any doubt, Sedgwick argued that it would not be "the just construction" of the Constitution to limit Congress's ability "to impose taxes on every subject of revenue."²⁸⁷

Congressman Murray admitted that "the terms in the Constitution, direct and indirect taxes, had never conveyed very distinct or definite ideas to his mind," but, on balance, "he thought the tax on pleasure carriages a good one."²⁸⁸ After wrestling with the various arguments, Murray concluded that since ownership of carriages was so different among the various states, apportionment would be virtually impossible.²⁸⁹ In the end, he was persuaded that owning a carriage was comparable to owning a still, and he

282 *Id.* at 646.

283 *Id.* at 644.

284 *Id.* He noted that the "exaction was indeed directly of the owner, but, by the equalizing operation, of which all taxes more or less partook, it created an indirect charge on others besides the owners." *Id.*

285 *Id.* at 644–45.

286 *Id.* at 645.

287 *Id.* at 644.

288 *Id.* at 652.

289 *Id.* at 652–53.

would rely on the widely accepted “argument that the tax on stills was an indirect one, [which] would equally prove the tax on coaches such.”²⁹⁰

When the carriage tax came to a final vote in the House, there was another brief debate on its constitutionality. Madison “objected to this tax on carriages as an unconstitutional tax; and, as an unconstitutional measure, he would vote against it.”²⁹¹ Ames from Massachusetts responded that “it was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax”²⁹² For those living in his state, “this tax had been long known; and there it was called an excise.”²⁹³ The Congress then voted, and the carriage tax was adopted by a vote of forty-nine to twenty-two.²⁹⁴

II. NEW PROBLEM, OLD SOLUTION

Our seemingly simple goal in this analysis was to review the understanding of the term “excise” at the time the Constitution was adopted to consider whether Justice Chase was correct in *Hylton* when he said that Article I, Section 8, gave Congress a “general power . . . to lay and collect taxes of every kind or nature, without any restraint,”²⁹⁵ or whether, as the Virginians argued, the original understanding of the term “excise” was limited to a type of sales tax on transactions involving commodities or manufactured goods. What we learned was that credible sources can be found to support opposite conclusions, and that the original meaning depends on which sources are deemed authoritative. The two principal authors of *The Federalist* expressed diametrically opposite views, not only on the substantive issue of national power but also on the narrow issue of what “excise” means. The Founding Era dictionaries and commentaries point in one direction, while there are well-known examples of much broader usages—including both British and American statutory language—pointing in the other.

This array of inconsistent uses of the key constitutional language creates a methodological conundrum for New Originalists quite similar to the “summing” problem they have linked with Old Originalism. Broadly speaking, the question is what to do with too much evidence pointing in too many directions. This phenomenon of a multiplicity of potential meanings of words or phrases is ancient and well known. In particular, it has provoked

290 *Id.* at 653.

291 *Id.* at 730.

292 *Id.*

293 *Id.*

294 *Id.*

295 *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 171 (1796) (Chase, J.) (emphasis omitted).

battles among the professional lexicographers who compile dictionary definitions: Should a dictionary specify “proper” or correct usage (and if so, how should a dictionary writer decide what that is?), or should it more comprehensively represent the full range of evidence of the actual use of the word? Traditionally, prescriptivists have opted for the former, descriptivists have chosen the latter; it appears that the descriptivists currently have the upper hand in professional lexicographic circles.²⁹⁶ But which course should the Supreme Court take?

It is not clear that New Originalists who insist on a strict rejection of original intent have the theoretical tools with which to resolve the conundrum created by having legitimate sources of original textual meaning pointing to the likelihood of multiple public meanings that are inconsistent with each other.²⁹⁷ A hypothetical, well-informed ratifier could have had the New England usage of “excise” in mind, or he could have shared the Virginians’ more prescriptive views, or, perhaps the truly hypothetical, really well-informed ratifier would know that people in Massachusetts understood

²⁹⁶ See, e.g., SIDNEY I. LANDAU, *DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY* 174–225 (2d ed. 2001); JACK LYNCH, *THE LEXICOGRAPHER’S DILEMMA: THE EVOLUTION OF “PROPER” ENGLISH FROM SHAKESPEARE TO SOUTH PARK* (2009); David Foster Wallace, *Tense Present: Democracy, English, and the Wars Over Usage*, *HARPER’S MAGAZINE*, Apr. 2001, at 39, 44–45; see also Johnson, *supra* note 36, at 66 (“Sometimes one looks to the dictionary for a unique definitional answer. We might legitimately ask, for instance, for a unique yes or no answer as to whether ‘direct tax’ excluded ‘excises.’ The answer unfortunately is not lexicographic. Both definitions of ‘direct tax’ to include and to exclude ‘excise’ were used publicly in debates at the time of the Constitution without any objection . . . that the terms were misused.”); Stephen C. Mouritsen, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 *BYU L. REV.* 1915 (2010); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *BUFF. L. REV.* 227 (1999).

²⁹⁷ This is not to say that New Originalists are unwilling to prioritize sources. See, e.g., Kesavan & Paulsen, *supra* note 7, at 1165 (noting that “not all early American precedents are created equal”). They identify as the best evidence of the “original, objective public meaning,” *id.* at 1132 (emphasis omitted), “the meaning the language . . . would have had . . . to an average, informed speaker and reader of that language at the time.” *Id.* at 1133 (quoting Van Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 *CALIF. L. REV.* 291, 398 (2002)). This meaning is best shown when it is “clear on direct evidence,” *id.* at 1133 (quoting Kesavan & Paulsen, *Is West Virginia Unconstitutional?*, *supra*, at 398), but “second- and third-best evidence [can be used] . . . in accordance with a reasonably strict hierarchy of interpreted sources, principles, and canons.” *Id.* Kesavan and Paulsen’s hierarchy is based primarily on their conclusion that “Founding-era sources, which constitute the legislative history of the framing and adoption of the Constitution, deserve more interpretive weight than the post-Founding sources, which constitute the ‘post-enactment legislative history’ of the Constitution, because the Founding-era sources are more contemporaneous expositions of original meaning.” *Id.* at 1180 (footnote omitted). Our point is that, in this case, the potential win-place-and-show evidence points in multiple directions, even within the Kesavan and Paulsen categories (i.e., there are conflicting accounts within both the Founding-era and post-Founding era sources), thus leaving the textual meaning potentially indeterminate.

the term differently than their contemporaries in Virginia. The modern Court could lean toward “proper” usage, thus giving the methodological nod to prescriptivists such as Samuel Johnson or William Blackstone, but that may still require them to choose which source is most authoritative. That judgment could be something like, “William Blackstone is a more important source than Samuel Johnson,” although it is hard to know why one eighteenth-century English source is better or worse than another at predicting what a hypothetical American ratifier might have thought.²⁹⁸ Any such judgment increases the risk that the justice will lean toward the most desirable source, as in “Adam Smith’s usage better aligns with my policy preferences than Sir James Steuart’s.”

The Court could follow instead many modern philosophers of language and adopt a descriptivist New Originalism, leading it to focus on all of the ways the words may have been used at the time of the Founding, although it is not clear how a broad-based descriptivism, which would count all uses essentially as equals, would help a court choose one over another. The descriptivist challenge to New Originalism is thus that it requires a justice to choose among multiple possibilities with no theoretical basis for that choice. To solve this problem, the Court could follow Justice Paterson’s lead and—perhaps just in tie-breaking cases—let the intentions of the constitutional Framers be the ultimate authority for determining the meaning of the text. That is, when the meaning must be sought outside the four corners of the

²⁹⁸ These sources were not discussed in Kesavan and Paulsen’s hierarchy. *See id.* at 1148 n.128. One could imagine differentiating between sources based on how widely circulated and well-known they were, but it does not appear that this method of differentiation is available to New Originalists appealing to the hypothetical ratifier. After all, if the assumption of New Originalism is that the hypothetical ratifier is “reasonably well-informed,” it is hard to know how widely a particular source need have circulated before a “reasonably well-informed” person alive at the Founding would have become familiar with the source. *See id.* at 1132. One might reasonably worry that the answer to this question will depend on whether the judge deciding a case desires that the source in question be part of the hypothetical ratifier’s library (or not) so that the judge can achieve a particular result. That a source’s popularity is irrelevant within Kesavan and Paulsen’s hierarchy is confirmed by their argument that “it does not matter whether a particular source of constitutional meaning is private (and hence invisible to the Ratifiers) under an original public meaning approach to constitutional interpretation.” *Id.* at 1183. By contrast, if New Originalism did not presuppose a hypothetical ratifier, and instead based its analysis on what people alive at the time *actually knew and said*—even if the majority of them were not reasonably well-informed—then ranking sources according to their circulation becomes a potentially plausible solution, since the focus shifts to discovering what sources people actually knew of and were familiar with. Different methods of ranking could, however, lead to different outcomes. In the case of the word “excise,” for example, the broad Massachusetts usage could dominate because of the greater use of the term through annual taxation of the populace, whereas under a different methodology, Virginia’s narrow usage could be chosen because the population of Virginia was greater than that of Massachusetts.

constitutional text, why not opt for answering the question “what were the Framers actually trying to accomplish in using this language?” rather than letting Samuel Johnson (an eighteenth-century English lexicographer) or Hans-Georg Gadamer (a twentieth-century German philosopher) make the final determination?

When confronted with these questions of interpretive methodology, Justice Paterson set aside the objective “semantic” arguments because they did not lead to a clear textual answer; as he put it, they “turn in a circle.”²⁹⁹ He looked specifically to the “framers,” and focused directly on “the reason of introducing the clause in the Constitution.”³⁰⁰ Although leading New Originalists have argued that the Constitution “does not generally designate a body of persons who are authorized, by virtue of their station, to determine with finality the Constitution’s meaning,”³⁰¹ Justice Paterson does just that in defaulting to the intentions of the delegates to the Constitutional Convention when “semantics” simply were not able to supply a clear answer.³⁰²

²⁹⁹ *Hylton*, 3 U.S. at 176 (Paterson, J.).

³⁰⁰ *Id.* at 177. By citing the justices’ invocation of the Framers’ intent, we do not take a position on whether they accurately described that intent. Our point is that, as a matter of interpretive methodology, the justices—and Justice Paterson, in particular—sought to resolve an indeterminate result that followed a textualist analysis by using an intentionalist approach. That being said, Currie points out that “[w]hat little the [Convention] debates reveal about direct taxes tends to support the *Hylton* decision.” CURRIE, *supra* note 3, at 36 n.40. Currie nevertheless accuses the justices of merely following “their own policy preferences.” *Id.* at 37. This accusation has been made about justices adopting just about every possible interpretive methodology. Our point relates to the rationale expressed by the justices—that is, the extent to which they seek to make an argument in their opinions about which constitutional meaning should be followed. In this case, Justice Paterson constructed a methodological argument that the Framers’ intention could resolve disputes over the objective public meaning of the constitutional text.

³⁰¹ Kesavan & Paulsen, *supra* note 7, at 1168 (quoting Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835 (1997)).

³⁰² Even if the Court were to defer to the Legislature, these methodological issues may not disappear. For an argument that Congress should employ originalism, see generally Joel Alicea, *Originalism and the Legislature*, 56 LOY. L. REV. 513 (2010); Joel Alicea, *An Originalist Congress?*, NAT’L AFF., Winter 2011, at 32. If Congress was originalist, it would run into some of the same methodological issues. See Joel Alicea, Note, *Stare Decisis in an Originalist Congress*, 35 HARV. J.L. PUB. POL’Y 797 (2012). The New Textualists propose that, in cases of statutory interpretation, “purpose” can be invoked to resolve this sort of indeterminacy. *Id.* at 803 n.33, 816. Whether such an approach parallels Justice Paterson’s use of the intent of the members of the Constitutional Convention depends largely on how broadly “purpose” (and evidence of purpose) is interpreted. If the inquiry into the purpose of the constitutional provisions relating to “direct taxes” and “excises” is answered by saying, “[t]he purpose was to establish the extent of the federal taxing power,” then “purpose” will not resolve the question in *Hylton*. (It would be useful, in another type of case, to tell us that the Second Amendment is about guns rather than short-sleeved shirts.) If the purpose of the taxation clauses is understood more

Even if there is a clear picture of the intentions of the Convention delegates, can New Originalists become comfortable with an Old Originalism solution to this kind of semantic conundrum? If not, it is not clear how a *Hylton*-like case involving an indeterminate meaning of the constitutional text can be resolved. Limiting the analysis to the text and contemporary word usage will require choosing one meaning over another arguably equally good meaning, and will subject an ostensibly objective interpretive methodology to the risk that judges will be inclined to select the meaning that leads to the outcome that is most in line with their preferred policy choices.

There may, however, be a rationale by which New Originalists could potentially embrace at least this limited application of Old Originalism. Much as the New Textualists will, when necessary, look to the purpose of a law, the New Originalists could open their inquiry at least as far as to asking what the ratifiers were trying to accomplish with the text in question.³⁰³ And the records of the Philadelphia Convention may have more bearing on that question than New Originalists have recognized to date. Typically, New Originalists have argued that the Constitutional Convention had no law-making authority, and therefore, the delegates' understanding of the language is not relevant. As Kesavan and Paulsen have written, it was only "the action of the Constitution's Ratifiers . . . whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention."³⁰⁴ There are, however, arguments in favor of considering documentary evidence of the Convention's compromises as carrying greater interpretive weight than being merely an irrelevant historical background to the inking of "dead words on paper."³⁰⁵

specifically to mean something on the order of, "[t]o maximize the reach of federal taxing power subject only to narrow, heavily negotiated limitations designed to placate the southern states," then it becomes essentially the same as what we and Justice Paterson are calling "intent."

303 Given the intellectual kinship between New Originalism and New Textualism, *see supra* note 25, this result would hardly be novel. After all, where statutory language is ambiguous and the ambiguity cannot be resolved by resort to non-purposive sources, "textualists think it quite appropriate to resolve that ambiguity in light of the statute's apparent overall purpose." Manning, *supra* note 26, at 84. As Professor Manning points out, "[t]o be sure, textualists generally forgo reliance on legislative history as an authoritative source of such purpose, but that reaction goes to the reliability and legitimacy of a certain type of evidence of purpose rather than to the use of purpose as such." *Id.* For New Originalists who find themselves growing queasy at the thought of resorting to original intent, it is important to keep in mind the analogy to New Textualism in the statutory context, *see supra* note 25, and its willingness to examine legislative purposes where the text provides no clear answer.

304 Kesavan & Paulsen, *supra* note 7, at 1137 (emphasis omitted).

305 *Id.*

Perhaps the most powerful reason for looking more seriously at the views of the Convention delegates is that most of them were also ratifiers. There were Convention delegates active in every state ratifying convention except Rhode Island, which did not send delegates to the Convention in the first place.³⁰⁶ Several of these delegate-ratifiers were among the most prominent public figures of the constitutional debates. They included the writers of widely reprinted essays on behalf of the Federalists, such as Hamilton and Madison, as well as the Anti-federalists, such as George Mason and Luther Martin.³⁰⁷ In fact, Luther Martin's very long and widely distributed pamphlet was originally a speech to the Maryland Legislature in which he reported in detail on the proceedings of the Convention.³⁰⁸ The 30,000-word pamphlet was titled, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, and it was reprinted in a number of newspapers.³⁰⁹ Although the *Genuine Information* lacks the transcription-like reporting of Madison's notes, Martin describes proposals, objections, and compromises in a manner that allowed his many readers to obtain a good sense of the Convention's discussions (albeit one tinged with strong Anti-federalist sympathies).³¹⁰ Its breadth of distribution during the ratification period can be seen in the fact "Anti-Federalist authors as different as Columbian Patriot (Mercy Otis Warren of Massachusetts) and Centinel (likely to be Samuel

³⁰⁶ See FRANCIS NEWTON THORPE, 2 THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 15 (1901); *id.* at 34 (Connecticut—William Samuel Johnson, Roger Sherman, and Oliver Ellsworth); *id.* at 18 & n.2 (Delaware—George Read, Gunning Bedford, Jr., and Richard Bassett); *id.* at 33 (Georgia—William Few); *id.* at 57 (Maryland—James McHenry, Luther Martin and John F. Mercer); *id.* at 38 (Massachusetts—Nathaniel Gorham, Rufus King, and Caleb Strong); *id.* at 73 (New Hampshire—John Langdon); *id.* at 32 (New Jersey—David Brearly); *id.* at 134–35, 139 (New York—Alexander Hamilton, John Lansing, Jr., and Robert Yates); *id.* at 181 (North Carolina—William Blount, Richard Dobbs Spaight, Hugh Williamson, and William R. Davie); *id.* at 21 (Pennsylvania—James Wilson); *id.* at 69 (South Carolina—John Rutledge, Charles Cotesworth Pinckney, and Charles Pinckney); *id.* at 83 (Virginia—John Blair, James Madison, Jr., George Mason, Edmund J. Randolph, and George Wythe). Thus, nearly 60% of the Convention delegates were ratifiers.

³⁰⁷ Three of the four most widely reprinted essays written by individual Anti-federalists were penned by Convention delegates Elbridge Gerry, who was invited to attend the Massachusetts ratifying convention, and two delegate-ratifiers, George Mason and Edmund Randolph. SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 309 (1999).

³⁰⁸ See Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland* (1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 238, at 19.

³⁰⁹ *Id.*

³¹⁰ Kesavan and Paulsen note that "Luther Martin's Letter revealed no small portion of the hitherto secret proceedings of the Philadelphia Convention—including the drafting history (in some detail) of various clauses." Kesavan & Paulsen, *supra* note 7, at 1152 n.143.

Bryan of Pennsylvania) each referred to Martin's *Genuine Information* when discussing the Philadelphia Convention."³¹¹

In addition to these Federalist and Anti-federalist authors, very active participants in the state ratification debates included future Supreme Court Justices Oliver Ellsworth in Connecticut, who wrote the widely reprinted "Letters of a Landholder,"³¹² John Rutledge in South Carolina, and James Wilson in Pennsylvania. In states where ratification was heavily debated, the prominent men who had been Convention delegates were, not surprisingly, very influential participants. Meanwhile, a number of states, such as Georgia, New Jersey, and Delaware overwhelmingly and rapidly approved the Constitution,³¹³ which may suggest that in some states the ratifiers were unlikely to have had dramatically different views about the constitutional text than their own states' Convention delegates (at least absent evidence to the contrary).³¹⁴

It therefore could be reasonable, at least in difficult cases such as those discussed in this article, for even New Originalists to look to whether there is useful evidence of how the Convention delegates—and hence many key ratifiers—understood the meaning of the constitutional text (or at least the goal that text was designed to accomplish). Doing so need not rest on a claim that the Convention had independent law-making authority but on the grounds that evidence of the views of the Convention delegates is, in fact, evidence of the views of many of the most influential ratifiers. And, in the absence of any other way to choose between conflicting textual readings, the ratifiers' goal in choosing the words could be a reasonable basis for determining their meaning.

However, the specific views of the ratifiers will only be a reasonable way of resolving a *Hylton*-like New Originalist dilemma if there is sufficient documentary evidence to identify those views. Whether that evidence exists

311 See CORNELL, *supra* note 307, at 52 n.2; see also 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 146–50 (John P. Kaminski et al. eds., 1984) (noting that Martin's *Genuine Information* was available to ratifiers in at least Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Virginia, and South Carolina). It is worth noting that even if Martin's information was inaccurate or incomplete, its existence (especially in light of its Anti-federalist orientation) was bound to stimulate discussion among the ratifiers as to the Convention debates, negotiations, and compromises. For the "voluminous [n]ewspaper commentaries on Martin's *Genuine Information*," see *id.* at 149–50.

312 See Donald S. Lutz, *Connecticut: Achieving Consent and Assuring Control*, in RATIFYING THE CONSTITUTION 117, 127 (Michael Allen Gillespie & Michael Lienesch, eds., 1989) [hereinafter RATIFYING THE CONSTITUTION].

313 See Pauline Maier, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 97–124 (2010).

314 For a discussion of the various state ratifying conventions, see generally *id.*, and the state-by-state essays in RATIFYING THE CONSTITUTION, *supra* note 312.

is a factual question to be addressed on a case-by-case basis. The “summing” problem will need to be confronted; and, with respect to that issue, it may be useful to note that Justice Paterson focused on the final result of a fairly extensive negotiation rather than on the intentions or desires of the individual participants in the various debates over taxation, representation, and slavery. He did not describe the text as the sum of all of the arguments and proposals, but as representing the final negotiated compromise, a deal that probably did not fully satisfy any individual delegate or ratifier.³¹⁵ The Constitution, noted Paterson, “was the effect of mutual sacrifices and concessions; it was the work of compromise.”³¹⁶ The “natural and common, or technical and appropriate, meaning of the words . . . is not easy to ascertain,”³¹⁷ but the nature of the “unfortunate compromise” could be determined by asking, essentially, what the Framers were trying to accomplish in describing the compromise they reached. In this kind of case, where the text, read in light of all the tools in the New Originalists’ kit, leads to a semantic “tie,” it is at least conceivable that a sufficiently clear understanding of the provision’s meaning to the Framers can be found in the records of the Philadelphia Convention and the state ratifying conventions. If such evidence exists in what could otherwise be a potential “coin-flipping” situation, Paterson’s version of Old Originalism may provide a reasonable way to resolve an otherwise indeterminate New Originalism analysis. That is, if there are competing views of what a “hypothetical reasonably well-informed Ratifier would have objectively understood the legal text to mean,”³¹⁸ the evidence of how actual ratifiers (as members of the Philadelphia Convention) understood the text could be at least *prima facie* evidence of what a hypothetical ratifier might have thought.³¹⁹

This brings us back to the second major drawback of Old Originalism—that the Framers themselves rejected intentionalism as the correct method

³¹⁵ See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 97 (1999) (“The process of negotiation and compromise that marked the framing process indicates that the authors of the Constitution were making efforts to unite behind a single text This is not to contend that all were satisfied with those changes but that such negotiated amendments create a presumption that all understood the language being used.”).

³¹⁶ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177–78 (1796) (Paterson, J.).

³¹⁷ *Id.* at 176.

³¹⁸ Kesavan & Paulsen, *supra* note 7, at 1162.

³¹⁹ Some will nevertheless argue that discerning collective intention is conceptually impossible. See Brest, *supra* note 14, at 214–15 (describing the critique of Max Radin’s collective intent idea, which was later adopted by Paul Brest). Radin’s views notwithstanding, some continue to think collective intention is unproblematic as a theoretical matter. See WHITTINGTON, *supra* note 315, at 96 (“Analytically, the concept of collective intent creates no difficulties The real difficulty of collective intent is in its empirical discovery, not in its conceptual viability.”).

of constitutional interpretation. Powell's article is invariably cited for this proposition,³²⁰ although Robert Natelson has more recently argued to the contrary that a fuller review of the evidence shows that the "Founders' hermeneutic—how they expected the Constitution to be construed—rested on the text, . . . but also on the subjective understanding of the ratifiers."³²¹ There is, of course, a "summing" issue presented when asking whether the Framers believed in interpreting the Constitution based upon the Framers' intentions.³²² In lieu of attempting to resolve this issue in the abstract, we simply point out that at least one bona fide Framers, Justice Paterson, employed an argument based on the Framers' intentions in his opinion in *Hylton*, and his brethren on the Court similarly used the language of intention. And so, we can conclude that, at least some of the time, the Framers' subjective intentions were invoked by some of the Framers even if we cannot reach a firm conclusion about the sum of the Framers.³²³

It thus seems reasonable to consider that there may be cases where there is documentary evidence of what the Framers of a particular provision were trying to accomplish when they adopted the constitutional language. Whether that evidence exists is a factual issue, and the answer may differ based on both the clause and the controversy. Similarly, the degree to which it is possible to identify a single, well-supported original public meaning is a factual issue that again may differ from case to case. What Paterson's opinion in *Hylton* suggests is that subjective understanding (Old Originalism) can fill a void created by a factual failure of New Originalism's search for objective meaning. We will leave for another day the question (perhaps hypothetical, perhaps not) of what to do if there is good evidence for both the Framers' intentions and an objective public meaning, yet that evidence leads to two different original understandings—that is, if Originalism Old and New were to be inconsistent with each other.

³²⁰ See *supra* text accompanying notes 17–23.

³²¹ Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1305 (2007).

³²² We find it perplexing that critics of Old Originalism would advance both the summing argument and the Framers-did-not-expect-intentionalism argument at the same time. If one is true, it seems that the other is likely to be false, or at least unknowable.

³²³ Powell overlooks *Hylton* by devoting his brief discussion of the Supreme Court of the 1790s to an analysis of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which addressed the issue of "state amenability to suit in federal court." See Powell, *supra* note 18, at 921–23. Keith Whittington briefly notes other historical flaws in Powell's analysis, while also providing a theoretical rationale for ignoring the intent of the Founders with regard to the use of original intent. See WHITTINGTON, *supra* note 315, at 180–82.

III. NOT JUST A HORSE AND BUGGY ISSUE

The taxation clauses are hardly the only place where the semantics “turn[] in a circle.”³²⁴ It may be the case that more originalist ink has been spilled on the Establishment Clause—“Congress shall make no law respecting an establishment of religion . . .”—than in any other area of constitutional interpretation.³²⁵ As one of us has recently written, commentators “have poured out thousands of heavily footnoted pages” on the original meaning of the Establishment Clause, and it “is not for lack of attention, then, that there are such enduring constitutional controversies over the meaning of fairly simple words such as ‘an’ and ‘respecting,’ a situation that hardly bodes well for our ability to resolve disputes over genuinely challenging concepts such as ‘establishment’ and ‘religion.’”³²⁶ A

³²⁴ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 176 (1796) (Paterson, J.)

³²⁵ U.S. CONST. amend I; see also Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 585 (2006) (“No aspect of constitutional law has been dominated more by ‘originalism’ than First Amendment Establishment Clause jurisprudence.”).

³²⁶ DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 326 (2010). For the dispute over the meaning of “an,” see, e.g., ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 11 (1982) (arguing that the choice of “an” rather than “the” shows “the intent to prevent a single and not some pluralistic national religious establishment”); MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14 (1978) (claiming that “by choosing ‘an establishment’ over ‘the establishment,’ [the Framers] were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect”). On the opposite side, Douglas Laycock characterizes the Cord/Malbin interpretation as just “a figleaf of a textual argument” that is “wrong for at least four reasons.” Douglas Laycock, *“Nonpreferential” Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 884 (1986). As to the argument regarding ‘respecting,’ see Leo Pfeffer, *Church and State: Something Less than Separation*, 19 U. CHI. L. REV. 1, 14 (1951) (arguing that the word “respecting” broadens the word “establishment” to include anything that might tend towards an establishment); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting) (“Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased.”). Phillip Muñoz has pointed out that “[t]his interpretation of ‘respecting’ was subsequently instrumental to Chief Justice Burger’s majority opinion in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).” Muñoz, *supra* note 325, at 591 n.28. A host of scholars disagree, pointing out that “respecting” conveys the “obvious meaning . . . then as now [of] ‘regarding,’ or ‘having to do with,’ or ‘in reference to’ such an establishment,” thus preventing the Congress from “interfering with established churches . . . at the state level.” William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 136–37 (1987); see also Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 1 (1996) (arguing that the Amendment’s language “also prohibited the national legislature from interfering with, or trying to disestablish, churches established by state and local governments.”); Muñoz, *supra* note 325, at 586, 588 (concluding that Justice Thomas “most accurately captures the Establishment Clause’s original meaning” in describing it as a clause that “‘protects state establishments from federal interference but does not protect any individual right.’”) (quoting Elk Grove

brief review of one of those challenging concepts—an establishment of religion—will show that a New Originalist approach to the Establishment Clause will end up in the same kind of semantic circle that appeared in a study of the taxation clauses.

If there is one thing upon which virtually all modern scholars in this contentious field can find agreement, it is that, at the time of ratification of the U.S. Constitution, Massachusetts, Connecticut, and New Hampshire had established churches.³²⁷ The details varied slightly, but the basic situation was the same in the three states: each town collected taxes that would be used to fund a Protestant church in that town. Members of other Protestant churches (but generally not Roman Catholics or those who belonged to no church) could sometimes obtain an exemption from these church taxes if they could show that they contributed to their own churches.³²⁸ These local church taxes were eliminated over the fifty-year period after the Constitution was adopted, a process almost universally described by modern scholars as “disestablishment.”³²⁹

This system of ecclesiastical taxation would seem to be inarguably an “establishment of religion,” especially viewed from the vantage point of a modern era in which the challenging constitutional issues typically involve far fewer direct links between church and state than tax-funded churches, such as whether the Pledge of Allegiance is unconstitutional.³³⁰ But a committed New Originalist would find even direct tax support of churches to be an excise-like semantic challenge. Judicial decisions in the Founding

Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring)); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1893 (2006) (arguing for the widespread acceptance of the jurisdictional interpretation of the Establishment Clause).

³²⁷ As Gerard Bradley has pointed out, “[w]hen [modern] commentators and justices look for religious establishment at the time the Bill of Rights was enacted, they are not sure how many there were in America, but they are sure there were some in New England.” GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 20 (1987). He cites numerous authorities who agree on this issue even while promoting a wide range of views on the proper separation of church and state, including Justice William Rehnquist’s dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985); LEONARD W. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 169–218 (1972); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* 141 (1953).

³²⁸ See generally LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385 (2004) (discussing the religious history of, and disestablishment in, America from the pre-colonial era to the mid-nineteenth century).

³²⁹ LEVY, *supra* note 328; Esbeck, *supra* note 328.

³³⁰ See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4–5 (2004) (holding a father had no standing to sue his daughter’s school district for requiring elementary school classes to recite daily the Pledge of Allegiance because relevant state law denies him the right to sue as next friend).

Era, for example, came to diametrically opposite conclusions. Chief Justice Theophilus Parsons of Massachusetts proudly called his commonwealth's system of church taxes an "establishment,"³³¹ something he believed to be an essential bulwark of society. Meanwhile, New Hampshire's Chief Justice Jeremiah Smith opined that the Granite State's virtually identical approach was not an establishment.³³² For Justice Smith, "[a] religious establishment . . . is where the State prescribes a formulary of faith and worship for the rule and government of all the subjects."³³³ Similarly, Connecticut's Judge Zephaniah Swift rejected the "establishment" label,³³⁴ as did many of the supporters of the church taxes in New England, which they typically called the "Standing Order."³³⁵ There was even a debate published in a Massachusetts newspaper between Baptist leader Isaac Backus and "Hieronymous" (most likely, the distinguished lawyer Robert Treat Paine) over whether Massachusetts had an establishment. Backus, wrote Hieronymous, "displayed 'his ignorance' . . . in defining a religious establishment simply in terms of religious taxation."³³⁶ Rather, Hieronymous argued, "[a] religious establishment by law is an establishment of a particular mode of worshipping God, with rites and ceremonies peculiar to

331 *Barnes v. Falmouth*, 6 Mass. 401, 408 (1810); see also DRAKEMAN, *supra* note 326, at 220 (describing the issue in *Barnes v. Falmouth* as "whether the minister of an unincorporated church (in this case a Universalist minister) could share in taxes raised under Article III" [of the Massachusetts Constitution]); THEOPHILUS PARSONS, JR., MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 201–03 (1859) (offering Chief Justice Parsons's lengthy encomium to establishments).

332 See *Muzzy v. Wilkins*, 1 N.H. 1, 12 (1803) (holding that, because New Hampshire does not designate "a formulary of faith and worship for the rule and government of all the subjects," no religious establishment has been prescribed); see also 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT: 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 863–70 (1971) (discussing the facts and holding in *Muzzy*). According to Justice Smith, there was no establishment, despite taxes supporting "public teachers of piety, religion, and morality," because "[n]o one sect is invested with any political power much less with a monopoly of civil privileges and civil offices . . . All denominations are equally under the protection of the law, [and] are equally the objects of its favor and regard." *Id.* at 864 (alteration in original) (internal quotation marks omitted); see also CHARLES B. KINNEY, JR., CHURCH AND STATE: THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE, 1630–1900, 96 (1955) (presenting Chief Justice Jeremiah Smith's summation of his interpretation of the Constitution in the *Muzzy* case).

333 *Muzzy*, 1 N.H. at 12–13.

334 MCLOUGHLIN, *supra* note 322, at 923–24 (describing Swift's view "that an establishment of religion was defined specifically in terms of a legally required uniformity and conformity of belief and practice").

335 See generally THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 98 (1986).

336 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT: 1630–1833, at 615 (1971). For a description of this debate in greater detail, see *id.* at 614–16. See also Charles H. Lippy, *The 1780 Massachusetts Constitution: Religious Establishment or Civil Religion?*, 20 J. CHURCH & ST. 533 (1978) (discussing the intersection of public tax dollars and religion in Article III of the 1780 Massachusetts Constitution).

such mode, from which the people are not suffered to vary.”³³⁷ In the end, according to historian William McLoughlin, “the definition of an ‘establishment’ was not settled. And it really did not matter. For whether the New England system was an establishment or not, the Baptists opposed it.”³³⁸

Once again, the New Originalist needs to make a definitional choice, and the objective evidence—all of it highly credible—points in two opposite directions. For some, mandatory taxes collected for the support of a particular church constituted an “establishment” and, for others, they did not. There is no particular reason for a New Originalist to choose one meaning of establishment over the other. It is possible, however, to follow Justice Paterson’s method, and ask what the Framers were trying to accomplish in adopting the establishment clause.³³⁹ The answer to that question is unimportant for the purposes of this article, other than to say that there may well be such an answer,³⁴⁰ and that it could be used to resolve the textual impasse created by the contradictory evidence of actual usage. Here again, Originalism Classic can rescue New Originalism from its inability to select from competing and contradictory meanings.

CONCLUSION: ORIGINALISM OLD AND NEW

The use of any version of originalism as a method of interpreting the Constitution has waxed and waned between 1787 and today, and this approach has lately received increasing levels of interest from legal scholars and the Supreme Court. This growing enthusiasm has led to higher levels of intensity in the intellectual battles over just what it means to mean something. Our goal here is not to settle those disputes once and for all, but to add a healthy dose of uncertainty to the mix. New Originalists have offered the possibility of an objectively determined textual meaning

337 MCLOUGHLIN, *supra* note 336, at 614 (internal quotation marks omitted). Recognizing this definitional ambiguity, John Adams wrote that the “laws of Massachusetts were the most mild and equitable establishment of religion that was known in the world, if indeed they could be called an establishment.” CURRY, *supra* note 304, at 131 (internal quotation marks omitted). See generally John Witte, Jr., “A Most Mild and Equitable Establishment of Religion”: John Adams and the Massachusetts Experiment, in RELIGION AND THE NEW REPUBLIC 1 (James H. Hutson ed., 2000) (exploring Adams’s model of religious liberty and the text and formation Massachusetts Constitution).

338 MCLOUGHLIN, *supra* note 336, at 617. A collection of the definitions of “establish” and “establishment” in a number of eighteenth-century English dictionaries can be found in JOHN WITTE, JR., GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 185–86 (2006).

339 Interested parties are encouraged to see how one of the authors has answered this question in DRAKEMAN, *supra* note 326.

340 *Id.* at 326–34.

detached from difficult and messy questions about discerning the intentions of an amorphous group called the Framers. We simply point out that the evidence of language use in the Founding Era can be just as messy, and may not always lead to a single “original meaning,” as defined by the New Originalists. In those cases, we suggest that Justice Paterson may have had a good idea when he turned to the Old Originalism approach of asking what the Framers intended to accomplish when they adopted the constitutional language. In the abstract, New Originalism may be supported by impressive theoretical arguments, but its appeal may be severely limited in cases where it must engage fairly with complex and inconsistent facts. In those cases, we propose that there may be good cause to supplement the search for a single, objectively determined hypothetical ratifiers’ original meaning with Originalism Classic’s focus on what the Framers originally meant.