Institutional Reality in the Age of Slavery: Taxation and Democracy in the States

On August 13, 1782, Alexander Hamilton complained to Robert Morris about the deplorable condition of politics in the state of New York, and especially the condition of taxation. Morris had appointed Hamilton as receiver of continental taxes for New York, meaning that Hamilton was in charge of collecting New York’s share of the “requisitions” of Congress. Under Article 8 of the Articles of Confederation, Congress could raise the tax revenue it needed for the ongoing Revolutionary War only by making “requisitions” on the states—that is, by asking each state to raise a specified sum. Like other states, New York was falling short; four years later, an aggressive tax levy in Massachusetts (to pay requisitions and fund the state debt) would provoke the armed insurrection known as Shays’s Rebellion. The decentralized regime that Congress had established under the Articles of Confederation made the national treasury depend on the productivity of the state tax systems. Ironically, this very decentralization invited national officials like Hamilton to tackle the problem of tax reform within the states.

Hamilton’s August 13 letter to Morris is most famous for its jaundiced portraits of New York politicians. The popular governor George Clinton—later Hamilton’s nemesis in the struggle over the ratification of the U.S. Constitution—was “a man of integrity and passes with his particular friends for a statesman,” though “his passions are much warmer, than his judgment is enlightened.” Hamilton was more critical of John Lansing and Abraham Yates Jr., who later would join him as delegates to the Philadelphia convention in 1787 and then join Clinton as leading Antifederalists. Hamilton’s main grievance against Lansing and Yates was that they had exacerbated the tax problem. Lansing was a “good young
fellow and a good practitioner of the law; but his friends mistook his talents when they made him a statesman": "He thinks two pence an ounce upon plate a monstrous tax." Yates, meanwhile, was a man whose "ignorance and perverseness are only surpassed by his pertinacity and conceit." With a demagoguery so damaging to the revolutionary cause that he "deserves to be pensioned by the British Ministry," Yates "assures [the people] they are too poor to pay taxes." Hamilton’s letter also contained a famously elitist analysis of the problem of government in New York. "Here we find the general disease which infects all our constitutions, an excess of popularity," he complained. "The inquiry constantly is what will please not what will benefit the people. In such a government there can be nothing but temporary expedient, fickleness and folly."²

Hamilton applied the same critique of excessive democracy to the New York tax system. This system, Hamilton thought, was constantly undermined by its inappropriate reliance on democratic politics. The problem began with the fixing of county tax quotas by the elected state legislature: "The members cabal and intrigue to throw the burthen off their respective constituents." It continued with the fixing of local tax quotas by the elected county supervisors, who "play over the same game, which was played in the Legislature." Matters deteriorated further at the local level. Elected local assessors allowed their "personal friendships, or dislikes" to determine the burdens they imposed on individual taxpayers and also granted "some popular characters [the opportunity] of skreening themselves by intriguing with the assessors." Then, there was the collection process, managed lackadaisically by county supervisors who had "little disposition to risk the displeasure of those who elect" by demanding payment. Hamilton deplored this endless political jockeying as an invitation to favoritism, incompetence, and corruption. A month earlier, he had gone even further, arguing in a newspaper essay that New York could levy equitable taxes only by abolishing local assessments altogether:

Wherever a discretionary power is lodged in any set of men over the property of their neighbours, they will abuse it. Their passions, prejudices, partialities, dislikes, will have the principal lead in measuring the abilities of those over whom their power extends; and assessors will ever be a set of petty tyrants, too unskillful, if honest, to be possessed of so delicate a trust, and too seldom honest to give them the excuse of want of skill. The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man by a definite and general rule should know
what proportion of his property the state demands. Whatever liberty we may boast in theory, it cannot exist in fact, while assessments continue.

The only way to make taxation less “iniquitous and ineffectual” in New York, in short, was to take the politics—and particularly the democratic politics—out of the process.3

These comments would appear to be vintage Hamiltonian elitism. Indeed, careful historians such as Edward Countryman and Roger H. Brown have read them in exactly this way.4 Like many of Hamilton’s statements, moreover, they anticipate with precision the elitist arguments that late nineteenth-century conservatives would deploy to block democratic challenges to property rights. For example, almost a century after Hamilton condemned the tax regime of revolutionary New York, Michigan jurist Thomas M. Cooley used almost exactly the same language to justify an aggressive judicial supervision over the taxing power of state legislatures and local governments. Elected officials, Cooley warned in the impassioned introduction to his Treatise on the Law of Taxation (1876)—a handbook for lawyers and judges intent on minimizing the tax bills of corporations and rich individuals—were highly likely to use taxation as an instrument of “confiscation.” In Cooley’s view, judges had an obligation to police the activities of these officials, since they not only were likely to be dishonest and incompetent, but were predisposed to impose the “whole burden of government” on the “few who exhibit the most energy, enterprise, and thrift.” Cooley’s solution was to subject every aspect of the tax process to judicial oversight, from the initial drafting of legislation to its eventual implementation by local officials. “[W]hen one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and into what incompetent hands its execution is usually committed,” Cooley argued, “it seems unreasonable [for the courts] to treat as unimportant, any stretch of power—even the slightest—whether it be on the part of the legislature which orders the tax, or of any of the officers who [administer it].”5

It is tempting to conclude that Hamilton’s critique of the New York tax system in 1782 was a precursor to Cooley’s in 1876. Indeed, in the hoary Jeffersonian tradition of American political history, it is customary to draw just such a line. In this interpretation, the most obstinate opponents of democracy in the early United States were northern merchants and lawyers, while its most determined champions were the slaveholders enrolled in the North-South populist coalition that Martin Van Buren would famously describe as the “planters of the South and the plain
Republicans of the north." It may well be true, as historian Ron Chernow recently has suggested, that Hamilton’s most notoriously elitist statements reflected his talent for impetuous and often self-defeating exaggeration. Yet the crucial issue is the context in which we read them. Although the Jeffersonian tradition has many defenders—it has been championed by generations of historians, from Charles Beard to the recent explicators of “republican ideology”—it has fostered a radical misreading of American political history. The core of this misreading is the mistaken presumption that antidemocratic elitism was a fundamentally northern phenomenon that was associated more with freedom than with slavery. In reality, the problem that Edmund S. Morgan famously identified as the “American paradox”—the idea that the slaveholding elites of the revolutionary era and early republic (particularly the Virginians) could “afford” to champion democracy because they were not, like their northern counterparts, “threatened by a dangerous free laboring class”—is a paradox only if we accept its Jeffersonian premise: that the elites who refused to tolerate democratic decision-making in this period actually were the northern elites, with Hamilton as Exhibit A.

It might seem to be obvious that we could test this thesis by asking where and when democratic decision-making happened in the early United States. Until recently, however, historians have avoided asking anything of the kind. Many have pinpointed the antidemocratic lapses of the fabled town meetings of colonial New England, but these lapses look rather less damning once we recognize that southern local officials often were not elected at all until the mid-nineteenth century. In Virginia, for example, open positions in the county courts—the central institutions of local government—were filled by men appointed for life on the recommendation of the incumbents. This practice persisted not only through the colonial period and revolutionary era, but even through the first half of the nineteenth century. Historians have long idealized the herrenvolk democracy that supposedly bridged the social divide in the South between slaveholding planters and yeoman farmers. The fact, however, is that white men in Virginia did not elect their own local officials until 1851.

Throughout the South, a similar pattern prevailed. North Carolina introduced elections for local constables in 1838 and sheriffs in 1848, but the decision-making officials continued to be appointed until 1868. In Maryland, elections for sheriff dated from 1776, but the county boards were appointed until 1851. Louisiana democratized its local governments in 1845, Kentucky in 1850, and South Carolina in 1868. Although there was good deal of variation—some southern states introduced local-office elections earlier and some northern cities had appointed officials—the
critical point is that, in the North, most local officials had been elected rather than appointed since the seventeenth century. To demonstrate, as generations of historians have, that few southern elites of the early republic sounded like Hamilton, therefore, hardly counts as evidence that they had a greater tolerance for democratic decision-making. In the South, there was much less democratic decision-making to tolerate.

The absence of democratic decision-making in the South had a major influence on the attitudes of southern elites toward their tax systems. The southern tax systems were simply less threatening to southern elites than the northern tax systems were to northern elites. It was not just that local governments in the South were administered by officials who had been appointed by elites—rather than, as in the North, by officials who had been elected by a broad suffrage. It was that the southern tax systems did not even include the assessments that Hamilton found so troubling. Beginning in the seventeenth century and continuing through the nineteenth, the northern tax systems usually were organized around the regular assessment of various kinds of property by elected local officials. Several southern states, in contrast, did not assess any property until the late-1840s and, even then, southern legislators imposed flat-rate tax schedules to minimize the discretion of local officials (particularly over the taxation of slaves and commercial wealth). Flat-rate schedules limited the relationship between a taxpayer’s burden and his “ability to pay” (the standard index of tax justice) because flat rates were not directly related to the value of the property being taxed. But, on the other hand, flat rates did provide the “definite and general rule[s]” that Hamilton demanded in New York. A southern taxpayer knew, in Hamilton’s words, “what proportion of his property the state demands,” since southern tax laws specified the sums to be collected on each form of property.

The contrasting tax systems of northern and southern states offer a benchmark for evaluating the character of democracy in early America. When we step behind the rhetorical professions of Jeffersonian democracy and examine the institutional reality of everyday politics, it becomes clear that, in the critical realm of taxation, democratic decision-making was an everyday practice in the North—and only in the North. It would be too much to say that Cooley’s mistrust of democratic decision-making had southern roots (Cooley certainly would not have said that), but it is clear that the tax policy that Hamilton urged the New York legislature to adopt—a flat-rate policy that would eliminate democratic decision-making at the local level—had long been and would long remain the norm in the South.

In Hamilton’s defense, the tax system he was criticizing in 1782 was peculiar. It was not only political, but purely political. Most northern tax
systems instructed local assessors to value individual holdings of various forms of property. This New York system, however, vested them with much more discretion. They were to determine “the estate and other circumstances, and ability to pay taxes, of each respective person collectively considered.” Incredibly, they were to come up with this total figure for each taxpayer without enumerating any of the taxpayer’s actual assets. Hamilton was right to criticize such a system. “The ostensible reason for adopting this vague basis,” he told Morris, “was a desire of equality: It was pretended, that this could not be obtained so well by any fixed tariff of taxable property [that is, by a flat-rate schedule], as by leaving it to the discretion of persons chosen by the people themselves, to determine the ability of each citizen.” In reality, however, the legislature had adopted this tax system for the political purpose of encouraging the local assessors to discriminate “between the whigs and tories.” In order to reward patriots and punish loyalists, New York had decoupled the assessment of individual tax liabilities from the actual value of property, vesting the elected local assessors with tremendous power.14

Hamilton did not object to the patriotic goal of this tax regime (heavy taxes on loyalists). There was a war going on after all. Rather, Hamilton objected to its absurdity as a strategy in a state rent by deep political divisions. Other states simply doubled the taxes of loyalists. In New York, however, while elected assessors in patriot strongholds were indeed punishing loyalists, elected assessors in loyalist strongholds were also punishing patriots. “[T]his narrow disposition to overburthen a particular class of citizens,” according to Hamilton, “has been retorted upon the contrivers or their friends, wherever that class [loyalists] has been numerous enough to preponderate in the election of the officers who were to execute the law.” Even when the assessors did not use overtly political criteria, assessments based on the “circumstances and ability” of each taxpayer “collectively considered”—rather than on actual valuations of property—forced the assessors to rely on each taxpayer’s reputation and “exterior” appearance (“decency or meaness of his manner of living”) instead of “the proportion of property” that he owned.

This mode of assessment also meant that the quotas fixed by the legislature and county supervisors were inherently arbitrary. Politicians could be expected to “cabal and intrigue to throw the burthen off their respective constituents” even when they were working from actual valuation data that measured the relative wealth of various districts. The apportionment of tax quotas to local communities was inevitably political. In the system Hamilton was criticizing, however, the politicians were fixing quotas without any data to restrain them—since local assessors were not
valuing holdings of property. The crux of the tax problem in revolutionary New York was not corruption, incompetence, or even democracy. Rather, it was legislation that required the distribution of tax burdens to be arbitrary. Hamilton wanted to replace this system with a flat-rate schedule of tax rates because he thought New York could raise more money if a less capricious set of arbitrary rules “put the people in better humour.”

The New York legislature rejected Hamilton’s flat-rate tax proposal in favor of a system based on the actual valuation of property. Yet the crucial point is that the flat-rate policy Hamilton proposed for New York actually was a southern policy. This fact seems surprising only because historians know so little about the history of American taxation. We are all familiar with the tax revolts of the early republic: Shays’s Rebellion (1786), the Whiskey Rebellion (1794), and now even the more obscure Fries Rebellion (1799), which broke out in response to the equally obscure federal direct tax of 1798. We are similarly (if not excessively) familiar with the anti-tax rhetoric that pervaded the “republican ideology” of the period. Yet despite the persistence of a Beardian tradition of interpretation that invested the politics of taxation with great significance—implying, for example, that the tariff was somehow a cause of the Civil War—most historians know remarkably little about the basic structure of American taxation before the twentieth century.

Part of the problem is the absence of data. We do not have reasonable estimates even of the size of the tax burden before the 1880s at any level of government, much less the data we would need to describe the economic incidence of that burden—that is, the progressivity or regressivity of its distribution among the taxpayers. We have the tariff receipts, but these figures include only the revenue raised from the taxes on imported goods, omitting the notoriously controversial burdens the tariff imposed in the form of subsidies for domestic producers. Economic historians have compiled reasonably complete revenue data for the states and big cities. Yet, in an era when the United States was overwhelmingly rural (as late as 1860, 80 percent of Americans lived in places with populations under 2,500), a high percentage of the total tax burden plainly came from the levies of rural counties, towns, townships, school districts, and road districts. Any effort to assemble this data would require a massive national research program that would send trained investigators into the basements of county courthouses and town halls throughout the country.

The core of the problem, however, is methodological rather than evidentiary. For decades, American political history has been dominated by behavioral and ideological approaches with an anti-institutional bias.
The critical recent development—the “new institutionalist” or “policy history” approach—is finally making it possible to produce a political history that steps behind the strategic rhetoric of politicians and the constrained decisions that the electorate registered in voting returns to recover the institutional contexts within which the politicians spoke and the electorate voted. For the era before the Civil War, this approach is producing a broad reinterpretation even of familiar topics. In particular, it is moving slavery from the margin to the center of U.S. political history. At the national level, Don E. Fehrenbacher’s exploration of foreign policy, Leonard L. Richards’s analysis of the mechanics of party governance, and Richard R. John’s study of public administration all emphasize the antidemocratic effects of the institution of slavery. At the state and local levels, Sally E. Hadden’s investigation of slave patrols suggests a compelling new narrative about the origin of American police forces, challenging an earlier tradition that traced it to northern cities, while John Majewski’s micro-level study of transportation investment in Virginia and Pennsylvania explains the less ambitious internal improvement programs of the slave states as a function, at least in part, of the unequal distribution of wealth in a slave society—which reduced the potential number of small-time investors.

The key issue in this scholarship is not the immorality of slavery. Nor is it either the complicity or the direct participation of Northerners as slaveholders, slave traders, economic beneficiaries, or ideologists of white supremacy in everything from law to popular culture. It certainly is not the discursive hoops through which guilt-ridden slaveholders famously jumped in the early republic, and it is not even the constant resistance of slaves and free people of color: sometimes dramatic, often quotidian, always significant. Rather, the key issue in this scholarship is that slavery, because it was a foundational institution in the American political economy, conditioned every aspect of public policy and political debate, even when it was not overtly the problem at hand. Slavery made the political institutions of the South less democratic than the political institutions of the North and, at the national level, led Southerners to demand antidemocratic institutional devices such as the infamous three-fifths rule of the federal Constitution, which granted southern whites extra power to perpetuate slavery by “representing” three-fifths of the slaves. Slavery is not an “exception” or “unresolved problem” that sometimes interrupts the master narrative of U.S. political history—such as by causing the Civil War. Slavery is at the very heart of that narrative.

Like the rest of this institutionally oriented scholarship, my research on taxation demonstrates the centrality of slavery to American political
history. A central theme in the history of American taxation before the Civil War was the refusal of slaveholders to accept democratic decision-making at any level of government. Slaveholders would not permit non-slaveholding majorities to decide how to tax, even if these “majorities” actually were majorities of white men, majorities of white men who owned land, or even majorities of white men who owned land in southern states. It is not that slaveholders always refused to pay taxes. As J. Mills Thornton has shown, planter elites sometimes did favor lavish spending financed by hefty taxes on their human “property.” To be sure, taxes generally were higher in free states than slave states. In the case of local-government school taxes, for example, Northerners paid 31 cents per person in 1850, while Southerners paid 5 cents per person—or 8 cents per free or white person. Yet my argument is ultimately not about the size or distribution of tax burdens, but about the structure of the tax system and the power to decide how to tax. It is about when, where, and how the fear of everyday democratic decision-making that Hamilton articulated in the 1780s and Cooley reiterated in the 1870s found institutional expression.

The tax systems of the North were designed to encourage day-to-day political jockeying, especially within local communities. The tax systems of the South were designed to minimize this jockeying and, when it could not be avoided altogether, to hedge it with constitutionalized “guarantees” for planter elites. The problem was not how much the slaveholders paid. It was who decided how much they paid.

This contrast between the northern and the southern tax systems was starkest in the colonial era. Except for commercial assets in South Carolina, no southern colony assessed the value of any form of property before the Revolution. Southern colonies taxed slaves at flat rates per head (“by the poll”). When they taxed land, they taxed it at flat rates per acre. Their other taxes were also set at flat rates: so much per wheel on a carriage, so much per hogshead of tobacco exported, and so on. Northern colonies, in contrast, usually based their taxes on local assessments of the value of various forms of property. In Massachusetts, annually elected town assessors valued taxpayers’ holdings of land, buildings, wharves, ships, commercial inventories (“merchandizes”), financial assets, the income of artisans, merchants, and professionals, and the colony’s small population of slaves (“to be estimated as other personal estate”). They did fix the valuations for livestock, a convention that freed assessors from having to value every animal on every farm, but the essence of this tax system was the ongoing, everyday political negotiation between taxpayers and elected local officials. Apportionments of colony-wide taxes to
individual towns were thoroughly political, as town representatives in the General Court jockeyed to protect their constituents. Yet this jockeying was not purely political—as it would be in Hamilton’s New York. Rather, it proceeded from the valuation data that town assessors compiled periodically. Pennsylvania and, on occasion, even New York also assessed various kinds of property at the local level. Connecticut was the exception that proved the rule. In the 1710s, it stopped valuing property, but replaced assessments with a uniquely sophisticated schedule of legislated valuations, which was framed to create tax incentives to promote family farming on small holdings of land by penalizing grazing and favoring intensive cultivation.

The contrast between the North and South persisted after independence. During the Revolutionary War, the three largest southern states—Virginia, North Carolina, and Maryland—tried to replace their flat-rate tax regimes with assessments. North Carolina failed completely, emerging from the war with the most primitive tax system in the nation, but Maryland and Virginia instituted limited assessments on land that survived into the nineteenth century. Northern states, meanwhile, built on their prewar experience with assessments. They met the financial demands of the war with incremental reforms: increasing the range of taxable assets, attempting to curb war profiteering by taxing war-related profits at high rates, and exempting soldiers from poll taxes.

The contrast between North and South was striking. In 1796, when Treasury Secretary Oliver Wolcott Jr. surveyed the state tax systems in the hope of devising a national property tax based on them, he found the task impossible. The various state tax systems, he declared, were “utterly discordant and irreconcilable, in their original principles.” Wolcott listed many variations in detail, but the major difference was the greater sophistication of the northern tax systems. Wolcott thought this difference was the result, in turn, of the more democratic character of northern local governments. In particular, he thought their reliance on elected rather than appointed officials permitted northern states to tax a wider variety of property in more sophisticated ways, and especially through a more comprehensive use of assessments.

By the mid-nineteenth century, almost all the northern tax systems looked like the one that New York adopted in 1823, and would continue to use into the twentieth century: “All lands and all personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified.” Land consisted of all real estate: the land itself, buildings, improvements, trees, mines, minerals, quarries, and fossils (presumably coal). “Personal estate”
consisted of “all household furniture; moneys, goods; chattels, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks; and stocks of monied corporations.” New York exempted the holdings of governments, churches, schools, libraries, agricultural societies, $1,500 of the property of ministers and priests, and property on reservations of the Seneca Nation. The state also protected a basic standard of living. In a provision that resembled the personal exemption in our modern income tax, it exempted the assets it sheltered from liability for private debts: food, clothing, bedding, housewares, stoves and fuel, minimal holdings of tools and livestock, family bibles and pictures, church pews, schoolbooks, and $50 of other books. Local assessors were directed to value all the taxable property “at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor,” county boards equalized local assessments by raising or lowering them to make them comparable across jurisdictions, and then various government bodies—the state, counties, towns, highway commissions, and so on—levied ad valorem rates on the result.29

Known as a “general property tax,” this type of tax was intended to distribute burdens to taxpayers in accordance with estimates of their total wealth, much as the modern income tax is intended to distribute burdens in accordance with estimates of total income. From Massachusetts and Pennsylvania in the Northeast to Ohio and Wisconsin in the Northwest, state and local governments in the nineteenth-century North relied heavily on this kind of tax—a tax that was ostensibly based on the “full and true value” of “all” property, but that actually was based on the local politics of local assessments. The exemptions in these taxes (for the clergymen, agricultural societies, and so on in New York) were analogous to the exemptions, deductions, and credits in our own income taxes.

New York’s version of the general property tax had an unusual loophole, much like the loopholes familiar to us today. Any taxpayer who thought an assessor had overvalued his “personal property” (primarily his financial assets) could “swear” to a lower figure—even a ridiculously lower figure. By comparing the tax valuations of New York City elites against independent estimates of their wealth, one historian has found that in the 1840s and 1850s this loophole encouraged large-scale abuse by the very rich. This abuse would persist. “It is still the annual practice in New York City,” a tax scholar would note in 1914, “for millionaires to appear before the proper authorities and have their personal property assessment reduced to a figure named by themselves, under threat to become nonresidents of the state.”30 Nevertheless, the fact that assessors treated nonelite taxpayers with a similarly notorious leniency offers compelling
evidence that the essence of the general property tax lay in the local political jockeying that determined the actual distribution of tax burdens.

In the Northeast, the general property tax emerged gradually, as legislators abolished discriminatory rates and particularistic tax breaks, devised procedures for assessing corporations, and expanded the types of intangible wealth that were subject to assessment—in New York, the corporation stock, “monies,” and “debts due from solvent debtors.” In Massachusetts in the 1820s, the legislature abolished a tax break for the textile industry that dated from 1817 (exempting the machinery in cotton and woolen factories) and a tax break for owners of unimproved land that dated from 1782 (assessing it at a lower fraction of its actual value than other property). After 1829, Massachusetts assessed all real and personal property, including property owned by corporations, at “the just and true value thereof.” Pennsylvania, Connecticut, and the other states of the Northeast instituted similar changes in this era. In the Northwest, meanwhile, states adopted general property taxes by adapting—sometimes simply by copying—laws that were already on the books in the Northeast. Only Michigan adopted New York’s “swearing” loophole for personal property, but many states borrowed its description of taxable assets as well as its configuration of administrative arrangements.

Southern states did not levy general property taxes before the Civil War, even after they introduced ad valorem taxes based on the assessment of certain kinds of property. Louisiana did not even assess the value of land until 1846, Alabama until 1847, Mississippi until 1850, and South Carolina until 1865. Instead, these states categorized land by region and quality and then levied flat per-acre taxes on the land that fell into each category. Upper South states introduced land assessments earlier. Maryland assessed land and some other assets starting in 1776 (primarily for local tax purposes), and Virginia made a statewide land assessment in 1782. North Carolina and Kentucky began to assess real estate—land, buildings, and other improvements—in the 1810s. Tennessee, for its part, levied a single flat per-acre rate on all land in the state until 1834. This primitive practice had been mandated in its state constitution of 1796, and would not be supplanted until 1834, when a new constitution mandated an ad valorem tax on land and several other forms of property.

Southern historians have recognized the introduction of the ad valorem principle in the first half of the nineteenth century as a major tax reform. They have disagreed about its political implications—that is, who benefited from it—but it is important to recognize that its adoption did not make the southern tax systems resemble those of the North. In many southern states, the ad valorem principle applied only to specific
items rather than to a taxpayer’s total assessed valuation. It also often included separate tax rates for different kinds of property instead of one *ad valorem* rate for “all” property. In Mississippi, for example, it meant that taxpayers were charged 16 cents per $100 on the value of real estate; 20 cents per $100 on money-at-interest, the goods of out-of-state merchants, currency from out-of-state banks, and sales of “slaves, horses, and mules” by professional traders; 25 cents per $100 on pianos and the receipts from ferries, toll bridges, and turnpikes; 30 cents per $100 on bank stock; 50 cents per $100 on carriages, clocks, watches, and gold and silver plate (exempting the first $50); 75 cents per $100 on race, saddle, and carriage horses; $1 per $100 on liquor sales; and $3 per $100 on sales by auctioneers and transient peddlers. Mississippi also levied flat taxes, including a slave tax (40 cents per slave under age 60) and a series of business taxes. This tax system had a major *ad valorem* component, but it was nothing like the general property taxes of the North.

The mixture of property and sales taxes in the Mississippi rate list suggests another major feature of the tax systems of the South. Even when southern states levied a single (“uniform”) tax on total property valuation, as opposed to the array of particularistic tax rates in Mississippi, they supplemented this tax with elaborate and often flat-rate taxes on businesses. Northern states also supplemented their general property taxes with taxes on banks and certain other corporations; in the extreme case of Massachusetts, a bank tax raised 82 percent of state-level tax revenue from 1836 to 1840. Southern states, however, used these taxes far more comprehensively, and often to finance both state and local government.

Consider the case of Tennessee. The Tennessee constitution of 1834 mandated a uniform, single-rate property tax on valuations of land, slaves (ages 12 to 50), bank stock, “and such other property as the legislature may . . . deem expedient.” The legislature added carriages and then levied 5 cents per $100 on these four forms of property. It supplemented this narrow property tax with a long list of flat-rate business taxes. Auctioneers, wholesalers, and agents of out-of-state insurance companies paid $200, commission merchants paid $150, brokers paid $75. Retailers with stores, grocers, jewelers, and druggists paid $150 or less, depending on their assets. Transient retailers paid $25 in each county for each of their vehicles, retailers from boats paid $50. It went on and on like this: turnpike keepers $25 unless exempted by charter or if on a M’Adamised turnpike, toll bridge keepers $10 ($2.50 if they charged only in high water), confectioners $20, taverns $5 and another $25 if they sold liquor, magicians and other exhibitors $50 in each county where they worked,
racetrack owners $25, owners of stud horses the fees they charged to service one mare for one season. Anyone who imported playing cards into Tennessee paid 50 cents per deck, and anyone who bought bills, notes, or other negotiable instruments at discounts over 6 percent paid the ad valorem tax of 5 cents per $100. There was also a poll tax on white men aged 21 to 50 (12.5 cents) and an additional tax on real estate (10 cents per 100 acres of land and 20 cents per city lot).37

Although several of its details were unique, this Tennessee law was generally typical of the southern tax codes of the first half of the nineteenth century. Local officials valued some forms of property. They valued land and—in a practice that clearly warrants more detailed research—they valued enslaved human beings.38 At the same time, however, two of the most obvious features of this Tennessee system distinguished it from the general property tax systems of the North. One was its cherry-picking list of taxable assets (land, slaves, bank stock, carriages). The other was its long list of flat-rate business taxes, some intended to be shifted to consumers and some reflecting obvious social policy agendas: that it would be better to import fewer decks of playing cards into Tennessee and that in-state insurance companies should be protected against out-of-state competition. The general property taxes of the North (levied on “all” property) did not discriminate explicitly among groups of taxpayers in this manner. Northern states often found other ways to protect their own insurance companies or pursue other social policy objectives. The general property tax, however, was not a vehicle for state-level social and economic policymaking. Instead of manipulating the relative burdens on agriculture and commerce or favored and stigmatized occupations, the general property tax in the North reflected the political principle that tax burdens would be distributed through the day-to-day negotiations of taxpayers and elected local assessors.

The key to the tax system in Tennessee, however, lay in the constitutional mandates. It is not just that the legislature made the decisions that northern states delegated to local communities. In addition, the state constitution constrained the choices that the legislature could make. The 1796 mandate was very specific. “All lands liable to taxation . . . shall be taxed equal and uniform so that no one hundred acres shall be taxed higher than another.” Town lots were pegged to the tax rate for 200 acres, while the poll tax on free men and the slave tax were pegged to the land tax: the poll tax to the tax on 100 acres, the slave tax to the tax on 200 acres.39 The 1834 mandate was more permissive, allowing as it did the valuation of land, slaves, and bank stock, and granting the legislature broad powers to tax commerce, which it defined to include “merchants, pedlars,
and privileges.” But the property tax remained inflexible: “No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.”

The tax clauses in both the 1796 and 1834 Tennessee constitutions emerged from elaborate political compromises between planters and yeomen that included apportionment rules for the legislature and property qualifications for voting and officeholding. The details of these compromises need not detain us here. Generally, they protected planter elites from democratizing reforms by limiting the power of the legislature to decide how to tax. The 1834 deal protected slaveholders through a mandate known as a “uniformity clause.” By defining slaves as taxable property and obliging the legislature to levy the same tax rate on all forms of taxed property, this clause limited the taxes that the legislature could levy on slaves. Other southern states struck similar deals, particularly in those parts of the South where slavery faced the most internal opposition: Maryland in 1776, Missouri in 1820, North Carolina in 1835, and Virginia in 1851, as well as in Louisiana in 1845 and in Arkansas, Florida, and Texas at statehood. These tax deals were often accompanied by more direct guarantees for slaveholders: outright prohibitions on emancipation and apportionments of legislatures in ways that favored plantation districts (especially by counting slave populations in allocating the legislative seats).

No northeastern state inserted a uniformity clause into its constitution before the Civil War. Northeastern states rarely constrained tax decisions with any constitutional mandates—a striking contrast with the South, where this practice was common. In the Northwest, however, most states in the 1840s and 1850s did add uniformity clauses to their constitutions. The framers of the northwestern constitutions did not adopt the clauses to strike political deals between segments of the electorate, but in the mistaken belief that they were emulating the tax systems that had long been the norm in the Northeast—the general property taxes levied at single rates on “all” property assessed at its “full and true value.” The constitution-writers of the Northwest did not realize that, by including uniformity clauses in their constitutions, they were draining their tax systems of their democratic core. Yet that is precisely what they did. By constitutionalizing specific tax mandates, they invited corporations and rich individuals to sue state and local governments on the grounds that particular tax laws or assessments violated the state constitutions. And, in so doing, they invited judges to usurp the power to decide how to tax. In the late nineteenth century, activist judges like Thomas M. Cooley—anxious to quash taxes that reflected “any stretch of
power—even the slightest”—cited the uniformity clauses to justify aggressive judicial supervision over state and local taxation in a deliberate campaign to undermine the democratic decision-making that previously had been a hallmark of taxation in the North.

The political logic that Cooley relied on was not altogether novel. Indeed, in myriad ways—implicit and explicit—it drew on precedents that had long been familiar in the South. Northern elites in Hamilton’s era tolerated a good deal of democratic decision-making, even if Hamilton himself disapproved. Southern elites tolerated nothing of the kind. To be sure, northern elites sometimes won significant victories in the local political struggles over taxation—as in the case of the New York elites who “swore” to ridiculously low valuations of their personal property. The elites of Cooley’s era, however, were not willing to risk the chance of losing. In the decades following the Civil War, corporations and rich individuals demanded exceptions from democratic decision-making to a degree that only slaveholders had in the past. In particular, they demanded fail-safe guarantees to ensure that democratic majorities could not deprive them of the fruits of what Cooley hailed as their “energy, enterprise, and thrift”—and others derided as their monopoly privileges and antisocial behavior (from watered stock schemes to the evasion of responsibility for industrial accidents and the recruitment of private armies to disrupt union meetings and strikes). In the era of slavery, a comparable mistrust of everyday politics—rooted in the conviction that it was intolerable for elites to risk the chance of losing a political battle—had made democratic decision-making difficult in the South. In the industrial era, it also would come to constrain democratic decision-making in the North.

The slaveholders’ insistence on fail-safe guarantees extended beyond the structure of state tax systems to the structure of the federal Constitution. Slaveholders were responsible not only for the blatantly antidemocratic three-fifths clause in the U.S. Constitution that increased their representation by counting a slave as three-fifths of a free person, but also for the “direct tax” clauses that later would be cited by the U.S. Supreme Court in *Pollock v. Farmers’ Loan and Trust Company* (1895) to quash a federal income tax.44 The direct tax clauses of the U. S. Constitution were subtler than the uniformity clauses of the state constitutions. When the direct tax clauses were initially debated at the Philadelphia convention in 1787 and in the ratification struggle in 1788, no one understood precisely what they would turn out to mean.45 But their intention was plain. Southerners who feared that Congress might be dominated by a northern majority demanded a constitutional guarantee against the possibility that this majority would decide to levy a
national slave tax. The direct tax clauses prevented Congress from levying a modest slave tax—say, $1 per slave—that would impose a disproportionate burden on southern states. More important, it prevented Congress from levying a confiscatory slave tax—say, $100 per slave—in an attempt to tax slavery out of existence. “No capitation, or other direct tax,” the Constitution decreed, could be levied except in proportion to the population of each state (until 1868, the population as defined in the three-fifths clause).

The Sixteenth Amendment (1913) finally voided the Supreme Court’s ruling in the *Pollock* case that the income tax was an unconstitutional “direct tax” by exempting the income tax from the constitutional ban. The adoption of the income tax amendment followed a long struggle by Westerners and Southerners to force the industrial elites of the Northeast to bear more equitable shares of the federal tax burden. Like the state-level uniformity doctrine that Cooley formalized in his *Treatise*, the *Pollock* decision exploited what was originally intended as a protection for slaveholders to grant the elites of the industrial era a fail-safe protection against democratic decision-making—like the ones that only the southern slaveholding elite had enjoyed previously. By demanding this kind of antidemocratic protection, the industrial elites essentially admitted that their despotism required the same safeguard as that of their slaveholding predecessors—who had lived in fear not only that their African American victims would slit their throats but also that their white fellow citizens might refuse to protect them.

Democratic politics does not mean a system in which “the people” always win struggles against elites. Democratic politics is a system that permits these struggles to unfold through the ordinary process of everyday majoritarian political action. If northern elites complained more vociferously about democracy than southern elites did in the early republic, it was because the political arrangements of the North included more democratic arrangements to complain about. In the everyday politics of the early republic, northern elites won some battles and lost others. The crucial point, however, is that they could lose without fearing an impending armageddon. Southern elites could not lose. In 1860, when a northern majority finally won an election without southern support, the South’s refusal to tolerate its defeat brought the system down. It precipitated the bloodiest war of the nineteenth century and, in the end, the abolition of slavery in the United States.

There was no “American paradox” locking democracy and slavery in a fatal embrace in American history. On the contrary, there was more democracy where there was more liberty: in the places where most people
were free. In the age of slavery, state and local governments in the North were more democratic than state and local governments in the South. They included more democratic decision-making and more everyday politics on the ground. This is not to suggest that the North was some kind of egalitarian paradise. It is to suggest that when we compare the actual structure of the political institutions of the North and South, both Hamiltonian elitism and Jeffersonian egalitarianism come to look like rhetorical sideshows to the real story of democracy in the United States. Marx, characteristically, made the critical analytical point in a single sentence: “Whilst in ordinary life every shopkeeper is very well able to distinguish between what somebody professes to be and what he really is, our historiography has not yet won this trivial insight.”46 By directing our attention behind the rhetorical professions to the institutional realities, the “policy history” approach to U.S. political history is hastening a revision that is long overdue.

University of California, Berkeley

Acknowledgments

An earlier version of this essay was presented at the Policy History Conference of the Institute for Policy History, Clayton, Missouri, May 2002. I am grateful to Richard R. John, Margo Anderson, and Louis Gerteis for helpful commentary on that occasion. Many thanks also to Richard R. John for the intrepid editing that improved this essay tremendously.

Notes


8. Edmund S. Morgan, “Slavery and Freedom: The American Paradox,” Journal of American History 59 (June 1972): 28. Morgan compared the Virginians primarily with British elites, leaving the comparison with northern elites mostly implicit. Joseph J. Ellis, Founding Brothers: The Revolutionary Generation (New York, 2000), 14–15, is absolutely right to contend that "historians have essentially been fighting the same battles, over and over again, that the members of the revolutionary generation fought originally among themselves.” The stunning part is that the Jeffersonian bias in political history has barely been contested by what has been a massive reorientation of American historical writing to emphasize the social, cultural, and economic realities of slavery. As Ellis’s comment suggests, one problem is a historiographical logic that poses a false choice: historians too often assume that a criticism of Jefferson requires an embrace of Hamilton—or John Adams. The solution for historians is not to pick the right founder to admire, but to reject this cult of personality altogether. For Jefferson’s protean legacy in politics and popular culture, see Merrill D. Peterson, The Jefferson Image in the American Mind (New York, 1960). For evidence that the Virginia elites actually felt quite threatened in the revolutionary era, see Woody Holton, Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia (Chapel Hill, 1999).


11. The term “flat-rate tax” in this essay is unrelated to current proposals for a “flat” federal income tax. Flat-rate taxes were taxes that were enumerated regardless of the value of the item being taxed—for example, $1 per acre of land, $2 per gold watch, $10 per bowling alley. Taxes on slaves usually were flat-rate taxes, typically described as being levied “by the poll” and described in the federal Constitution as “capitations.” Current proposals for a “flat tax” envision a federal income tax with only one tax bracket and without any targeted credits or deductions—for mortgage interest, charitable contributions, and the rest.

12. Although the idea that tax burdens should be based on each taxpayer’s “ability to pay” is very old—it was Adam Smith’s canon of tax equity—it has always been difficult to operationalize in practice. Wealth and income are the traditional proxies for “ability to pay.” For an influential discussion, see Walter J. Blum and Harry Kalven Jr., *The Uneasy Case for Progressive Taxation* (Chicago, 1963 [1953]).

13. Although the legal doctrines elaborated to protect slaveholders were problematic precedents for a free society, Cooley mixed pre–Civil War legal precedents from slave states and free states without noticing the radically different political contexts out of which they emerged. Cooley’s refusal to recognize context is exemplified by his gloss on *O’Byrne v. Savannah*, 41 Ga. 331 (1870). Referring to a Georgia tax levied during the Civil War, this decision blocked an effort to collect a tax “after the government by which it was imposed has ceased to exist.” Cooley raised euphemism to high art: “So held of a government set up in an attempted revolution which failed.” Cooley, *Taxation*, 5n. Cooley’s reliance on prewar southern case law was emphasized by legal historian Morton Horwitz, who noted Cooley’s reliance on a pre–Civil War Kentucky case, *Lexington v. McQuillan’s Heirs*, 39 Ky. 513 (1839), to support the argument that judges could enforce “implied” constitutional restraints on the taxing power even in states that had either failed or refused to adopt adoption ones. Horwitz, *Transformation*, 22.


15. Ibid., 3:135, 142.


17. A tax is “progressive” when it imposes a higher rate on—takes a larger fraction of—higher incomes than lower incomes. A tax is “regressive” when it imposes a higher rate on lower incomes than higher incomes. A tax is “proportional” when it imposes the same rate regardless of income. Current “flat tax” proposals aim at proportionality, and draw popular support from the mistaken suspicion that our current income tax structure—progressive rates plus credits and deductions that favor the wealthy—is more regressive than a flat, or proportional, tax would be. On this point, see especially Dennis J. Ventry, “Equity versus Efficiency and the U.S. Tax System in Historical Perspective,” in *Tax Justice: The Ongoing Debate*, ed. Joseph J. Thorndike and Dennis J. Ventry (Washington, D.C., 2002), 56–58.


21. The three-fifths clause of the federal Constitution is commonly misunderstood to have insulted enslaved African Americans by granting them the representation of “three-fifths of a person.” In reality, its effects were far more pernicious, since it denied enslaved African Americans any representation at all. Intended to injure rather than merely to insult, the three-fifths clause increased the power of slaveholders in order to guarantee that the slaves’ interests—in the abolition of slavery—would never prevail. The electoral college compounded its antidemocratic effects by basing each state’s vote for president on the sum of its Senators (two per state) and number of seats in the House of Representatives (allocated by the three-fifths rule). This antidemocratic arrangement gave the slave states disproportionate political power, and led directly to the election of Thomas Jefferson in 1800. On this issue, see especially Richards, Slave Power; see also Garry Wills, “Negro President”: Thomas Jefferson and the Slave Power (Boston, 2003). The 1800 election was not a triumph of American democracy. After two hundred years, one might think we could stop repeating the partisan claim that it was.


23. J. Mills Thornton III, Power and Politics in a Slave Society: Alabama, 1800–1860 (Baton Rouge, 1978), chap. 5. See also Thornton, “Fiscal Policy and the Failure of Radical Reconstruction in the Lower South,” in Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward, ed. J. Morgan Kousser and James M. McPherson (New York, 1982), 349–94. Local taxes seem to have been much higher than state-level taxes in the North, but not in the South. Several southern states capped their local tax rates at or below state tax rates. Einhorn, American Taxation, chap. 6.


29. New York, *Revised Statutes*, 3 vols. (Parker, Wolford, Wade 1859), 1:905–15, 2:646; New York, *Laws*, 1823, 390–97. An “*ad valorem*” tax is a tax that is levied at a percentage of the taxed item’s value. In the case of a property tax, it is a tax levied at a percentage of the assessed valuation of the property—which is almost always a lower figure and usually a much lower figure. The tax rate is expressed in cents per $100 or mills per dollar of value (valuation).


34. Mississippi, *Revised Code* (Sharkey et al. 1857), 71–78. See also ibid., 87–89. The flat 40-cent slave tax was much lower than the *ad valorem* rates on other assets. For example, if one assumes the average slave price to have been $774, this tax was equivalent in 1860 to an *ad valorem* tax of only 5 cents per $100 (actually slightly less because of the exemption of elderly slaves). Although the legislature almost doubled the rate to 75 cents in 1880, this tax remained, at 9.7 cents per $100, lower than any of the state’s *ad valorem* rates. The slave price is based on an estimate in Roger Ransom and Richard Sutch, “Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation,” in *Quantitative Studies in Agrarian History*, ed. Morton Rothstein and Daniel Field (Ames, 1993), 148.

35. In Mississippi, most plantation wealth was, in practice, exempted from the *ad valorem* tax system since slaves were taxed at a flat rate, while real estate was handled in a peculiar way. Although assessors had the authority to verify the taxpayers’ estimates of most assets, they were forbidden to challenge taxpayers’ estimates of the value of their real estate. Mississippi, *Revised Code* (Sharkey et al. 1857), 74–77. For a similar self-assessment rule in Georgia, see Thornton, “Fiscal Policy,” 358.

37. Tennessee, *Public Acts* (1836), 58–66. Note that the Tennessee Constitution of 1834 (art. 2., sec. 28) required the exemption from taxation of all slaves under 12 and over 50. Although most southern states set similar age limits—Mississippi, for example, exempted slaves over 60—the age limit mandated in the Tennessee constitution was unusually generous to slaveholders.


40. Tennessee Constitution (1834), art. 2, sec. 28.

41. For details, see Einhorn, “Species of Property,” and Einhorn, *American Taxation*, chap. 6. The inclusion in southern constitutions of emancipation bans and slave representation provisions challenges the traditional view that early nineteenth-century constitutional reforms in the North and the South were comparably democratizing. For this traditional view, see Fletcher M. Green, *The Constitutional Development of the South Atlantic States, 1776–1860: A Study in the Evolution of Democracy* (Chapel Hill, 1930), and Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge, 1995).

42. Einhorn, “Species of Property,” 980. Although no northeastern state constitution included a uniformity clause in the pre–Civil War period, the Massachusetts constitution of 1780 and the New Hampshire constitution of 1794 contained the vague requirement that taxes be “proportional and reasonable.” In the late nineteenth century, the courts would redefine these clauses as uniformity clauses. Wade J. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, 2d ed., 2 vols. (Buffalo, 1984).


