THE HIDDEN COSTS OF TEXTUALISM: DOES IT MATTER WHAT SLAVES THOUGHT “DIRECT TAX” MEANT?

ANDRE L. SMITH*

I. INTRODUCTION

The purpose of this article is to show, contrary to some scholarly suggestions, that textualism has little to no efficiency advantage over other statutory construction techniques. Textualism, done right, can consume as much time and resources as dynamism, purposivism or intentionalism. This is because textualism requires, a two-step analysis of both plain meaning and statutory context and, more importantly, an investigation into various interpretive communities and a determination as to the meaning each would ascribe to a text. For example, the word “income” varies in breadth and scope depending on whether the interpretive community consists of lawyers, tax lawyers, accountants, laypersons, or other groupings. In addition, little agreement can be found on the interpretation of the term “direct tax” as used in the United States Constitution. Thus, textualism can require a judge to undertake the arduous activity of determining the 1787 interpretation of “direct tax” according to women, slaves, free Blacks, and Native Americans. This determination is particularly important when the major or predominant interpretative group equivocates on the matter. Consequently, empirical research is necessary to conclude that reliance on the plain meaning is less costly than divining intent or considering foreseeable consequences.

Adrian Vermeule and Cass Sunstein best present the argument that textualism is a less costly activity than considering purposes. Behind each statute a multitude of purposes may be available to consider, each requiring the exercise of some discrete expertise. Purposivism could

* Assistant Professor, Florida International University College of Law
require a judge to become acquainted with different fields of study to decide each case. Dynamism is a broader inquiry into foreseeable consequences than purposivism. Thus, it would be even more costly, unless one was allowed to inquire by “feel” or to deploy one’s “situation sense.” However, Vermeule and Sunstein’s charge of relative inefficiency can stand only when these other statutory construction techniques are compared against an overly simplistic and unrealistic conception of textualism. Proponents of textualism typically offer little more to the would-be textualist other than ‘focus on the text’, as if after mere concentration the correct answer will simply wash over you. However, real textualism, particularly with respect to plain meaning, requires a number of calculations and allows more judicial discretion than is typically acknowledged. Thus, a text-based analysis with regards to “direct tax” cannot be deemed more efficient than a purposive one.

Part II of this article presents a debate between Professors Calvin Johnson and Erik Jensen over the meaning of “No Direct Tax without Apportionment.” According to Professor Jensen, apportionment of direct taxes was intended to significantly limit the federal government’s ability to tax citizens directly. On the other hand, Professor Johnson contends that the Constitution requires apportionment only of federal requisitions levied directly upon the States. Professor Johnson’s theory places the issue of slave counting at the core of the debate

---


3 CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION 160 (2005) [hereinafter JOHNSON, RIGHTEOUS ANGER]; see also Calvin H. Johnson, Apportionment
over taxation and representation. For students of legal construction, interpretation and deliberation, the debate between Professors Johnson and Jensen inspires a couple peculiar questions. First, when interpreting or deliberating over the Constitution does it matter at all what slaves thought particular words or phrases meant? Secondly, if what slaves thought does matter, how important is it and how would it be discovered?

Part III shows that the answer to the first question, ‘does it matter at all’ is... *it depends.* Different deliberative or interpretive techniques such as, textualism, intentionalism, purposivism, and dynamism, each answer the question differently. The results may represent a political irony. Justice Scalia’s brand of originalist textualism accords the most respect to the views of slaves on Constitutional issues. Similarly, it accords the most respect for women’s views. His theory requires judges to consider what the text of the Constitution meant to the People of the United States. He considers the Federalist papers not as evidence of the Framers’ intent, but of the People’s thoughts as to what specific words meant. Even if the Federalist papers represent the best evidence of original Constitutional meaning, they are not the only evidence of what the People of the United States understood. Thus, Scalia’s originalist-textualism requires judges deciding Constitutional questions to consider to some degree and to the extent possible the meaning most likely supplied by Blacks, women, and perhaps Native Americans (especially if there is evidence that their understanding differs to some extent from the dominant public sphere of the time).

---

4 See generally Johnson, Righteous Anger, *supra* note 3.
6 Id. at 23.
7 Id. at 38.
On the other hand, alterative theories of constitutional interpretation, such as originalist intentionalism and dynamism, ignore the views of slaves on constitutional matters. Dynamists believe in a “Living Constitution” and thus, encourage judges examining a constitutional issue to consider the decisional choice most consistent with the majority of important modern-day social and legal principles.\(^8\) Dynamism is very inclusive and permits judges to consider a myriad of factors, including what the People at the time of enactment thought the Constitution meant.\(^9\) Dynamism is most often offered as a distinct alternative to Constitutional originalism, suggesting that, in contrast with originalism, dynamism cares hardly at all for the views of those alive at the time of the Constitution’s drafting.\(^10\)

Thus, Part III illustrates the major techniques for legal construction, interpretation and deliberation and evaluates which techniques require consideration of slaves’ understandings, specifically in reference to the Direct Tax Clause of the Constitution. Ultimately, the meaning of “direct tax” depends on the technique deliberately employed. Those who try to interpret the meaning of words as they were understood at the time of enactment may settle on a meaning different from those who reconstruct the meanings of words to represent modern understandings and concepts.\(^11\) Still, between those who privilege original meanings and between those who promote a living constitution there is little convention as to how those meanings are determined.

\(^8\) See, e.g., William N. Eskridge, Dynamic Statutory Interpretation, 150 (1994); Bruce Ackerman, The Living Constitution, 120 Harv. L. Rev. 1727, 1805 (2007) [hereinafter Ackerman, Living Constitution].

\(^9\) Eskridge, supra note 8, at 34 (“The arguments for textualism as the foundational method in statutory interpretation are strong ones.”); see also, Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham. L. Rev. 1249, 1249-50 (1997).

\(^10\) For a middle ground position, see Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165 (1993).

\(^11\) This is, after all, the fuss over constitutional and statutory construction. See Dworkin, supra note 9, at 1253; Andrew Oldenquist, Is the Death Penalty on Life Support? Retribution and the Death Penalty, 29 U. Dayton L. Rev. 335, 342-41 (2004) (“Scalia and Oxford professor Ronald Dworkin offer contrary views about the application of the Eighth Amendment.”).
under either scheme. An originalist may emphasize the meanings as intended by the authors, as understood by the ratifiers, or as comprehended by the People of the United States. In contrast, a realist may emphasize original purposes rather than meanings, attempt to translate original meanings into the language of modern times, or reject original meanings entirely.

This article does not suggest that an interpretive technique is to be judged based on whether it requires judges to consider the views of slaves. Ironically, the technique that embraces slaves' views, textualism, is considered by some progressives as a means of ignoring the pleas of the disempowered, while some techniques that ignore slaves’ views, like dynamism and purposivism, are credited amongst progressive interest groups. It does, however, suggest that textualism requires empirical inquiry and is incomplete without evidence as to the meanings slaves and women would assign to words used in the Constitution.

Part IV deals with the questions that immediately follow under the textualist regime, ‘how important’ and ‘can it be discovered’ and if so ‘at what cost’? It is the poverty of American history that the answer to the first question is, according to a similar textualist application, that consideration of slaves’ views are discounted by forty per cent; and that the high cost of discovering their views is due to the fact that their views were neither sought nor preserved.
Hopefully, this contention that slaves’ views were not sought nor preserved will be disproved. After all, the notion that slaves had no thoughts on what the words of the Constitution meant is likely untrue. The assumption is that slaves were brought from a place without complex civilization. However, this view that 16th, 17th, and 18th century Africa did not have complex civilization is ignorant of the facts, though unfortunately widely held. In fact, many slaves were drawn from African aristocracies having up to that time thousands of years’ experience with law and justice. Most likely, the paucity of evidence regarding slaves’ views is due to societal disinterest at the time of enactment and now. Also, to the extent memorials of such thoughts are ever discovered they may also serve as indicia of what ‘free’ blacks of the time understood, and vice versa.

In an effort to fill this gap, Part IV continues by taking an Afrocentric turn, exploring the concept of African cultural unity in terms of law and governance, with specific attention to taxation, and developing possible understandings an aristocratic slave may have about direct taxation. This part presents historical references to pre-colonial African societies dating back thousands of years and comments on their level of legal modernity and sophistication. The conclusion contends that a slave captured from an aristocratic West African family who was

---

17 Scholars have identified several African slaves taken from aristocratic African families, among them Equiano the African and Prince Abdur Rahman. VINCE CARRETTA, EQUiano THE AFRican 9 (2005); TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 3 (2007).
18 Diop does not address the United States Constitution. Rather, he demonstrates that despite Africa’s size along with the external forces responsible for its retardation African societies are well experienced in terms of governance and civilization building, such that a slave captured from an aristocratic family would indeed have studied law and civil administration and may indeed have thoughts or understandings relating to a central government levying taxes on states within a federation or directly taxing the people of states within a federation. DIop, supra note 16, at 176-77 (1987).
20 See generally ALFORD, supra note 18 (Born in Futa Jalloh, Prince Abdur Rahman is captured and delivered to a plantation in Natchez, Mississippi, where his training in West Africa, particularly at one of the universities of Timbuktu, brings such prosperity to the slave master’s operation that for a time said master would not sell him at any price to those who would purchase his freedom).
enslaved and delivered to the United States, like Prince Abdur Rahman or Equiano the African, would indeed have an understanding of how the Constitution restricts the federal government by means of the prohibition on direct tax without apportionment.

II. THE DEBATE OF “DIRECT TAX WITHOUT APPORTIONMENT”

A. Current Notions

Most participants in the debate over direct taxes have not taken a jurisprudential position regarding their style of interpreting the Constitution. A popular casebook defines direct tax as “a tax demanded from the very person who is intended to pay it.”21 Later, the authors of that casebook present Helvering v. Independent Life Insurance for the notion that the Direct Tax clause prevents a Federal property tax.22 Most tax law theorists appear to assume that a direct tax under the Constitution is the placement of liability on a person solely due to their holding of some form of wealth. Similarly, Stephanie Willbanks in her casebook, Federal Taxation of Wealth Transfers, declares that a tax on all property owned at death—as opposed to an excise tax of taxing transfers at death—would violate the Direct Tax Clause.23 Professor Erik Jensen is perhaps the leading proponent of the idea that the Direct Tax Clause seriously limits Congress’ powers to tax individuals.24 He presents considerable evidence suggesting that many Conventioneers relied upon the understanding that the federal government would have limited taxing power.25 He also criticizes Professor Johnson’s theory that direct tax in the Constitution meant only “requisitions” from the several States as impermissibly rendering meaningless the

24 Jensen, supra note 3; Jensen, Consumption Taxes, supra note 2, at 2384; Jensen, Taxation, supra note 2; Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 357-58.
25 Jensen, The Taxing Power, supra note 2, at 25-29; Jensen, Consumption Taxes, supra note 2, at 2351; Jensen, Taxation, supra note 2; Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 357-58.
Constitution’s words and phrases, especially since Congress has never requisitioned the States’ funds.  

In opposition, Professor Calvin Johnson maintains that the Direct Tax Clause merely represents an illusory—though necessary—political compromise between abolitionist and pro-slavery delegates with regard to representation and taxation. The Constitutional Convention’s actual goals were to attain the power to lay import and export taxes, to pay off the Revolutionary war debts, and to continue defending the new country. In exchange for counting slaves in some proportion for purposes of representation, slaveholding states were required to count slaves in that same proportion if ever the States were called upon for funds due to a national emergency.

According to Professor Johnson, representation in the House of Representatives was originally intended to mirror a state’s wealth, not necessarily its population; however, population was used as a proxy for wealth. Including slaves as a whole person for representation in the House would increase the relative strength of the South in Congress, and encourage the South to import more slaves to further strengthen their economic system and political power in the federal government. Slaveholding states were concerned that if they could not control Congress, the North would push Congress to outlaw slavery. Northern delegates objected to counting slaves as a whole person, but agreed upon counting slaves as 3/5ths for purposes of representation so long as the same scheme applied if and when Congress requisitioned monies from the States

---

26 Jensen, Interpreting the Sixteenth Amendment, supra note 1, at 367-68.
27 JENSEN, THE TAXING POWER, supra note 2, at 184-86; Johnson, Fixing the Constitutional Absurdity, supra note 1, at 304.
29 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 102 (“In one of the most interesting political moves in the Convention, the Federalists avoided the conflict between votes reflecting wealth and votes reflecting population by arguing that there was no need to distinguish between the two bases.”); Johnson, Fixing the Constitutional Absurdity, supra note 1, at 300.
30 See Johnson, Fixing the Constitutional Absurdity, supra note 1, at 305-06, 307.
according to population—perhaps for the purpose of fighting another war. Thus, the Direct Tax Clause presented the means to design a system of representation and taxation based on population, which was slightly discouraging towards the slave trade on its face, but particularly lenient in practice. According to Professor Johnson, “the Constitution was not perceived to be substantially pro- or anti-slavery at the time, even though by the judgment of eternal morality, the Constitution should have done better.”

B. The Road to “No Direct Tax Without Apportionment”

1. The Problem

Slavery, the Constitution, and taxation are inextricably intertwined. Robin L. Einhorn, in her book *American Taxation, American Slavery*, describes colonial tax systems prior to independence. She claims the degree of modernity attributable to each state tax system mirrored the modernity with which each colony treated Africans. In northern colonies, like Massachusetts where slavery was not essential to the economy and less prevalent, the government acted as an arbiter of diverse political interests, rather than an arm of the propertied. Massachusetts instituted a modern tax scheme, which respected progressivity—that the wealthy should pay more than the poor—and incorporated the valuation of personal and real property. By contrast, Virginia and South Carolina plantation owners depended heavily on

---

31 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 106-08 (“the Great Compromise”).
32 Id. at 183-86 (Aside from sanctioning slavery by incorporating it in respect of taxation and representation, “[t]he new federal government was to return fugitive slaves and suppress slave insurrections, along with other internal rebellions.”).
33 Id. at 186.
34 See generally EINHORN, supra note 28, at 1.
35 Id. at 7.
36 Id. at 60-65.
37 Id. at 65-75.
slaves and had flat capitation taxes, also called poll taxes. These taxes were regressive because a disproportionate burden of state taxation was placed on poor Whites. Furthermore, they did not require any sophisticated government administration to monitor personal property valuation, perhaps because that would have required an intrusive valuation of individual slaves. The redirection of the financial burden towards poorer Whites by slave masters is inconsistent with Adam Smith’s principle that the incidence of taxes should be distributed according to wealth, and Einhorn believes this tradition is carried forward by political conservatives. As colonies independent of each other, these distinctions are merely interesting; however, the differing tax schemes, ethos, and interests relating to slavery had to be addressed when attempting to unite as States.

By 1787, the Articles of Confederation had proven to be a failure specifically because a viable means for the federal government to pay the revolutionary war debt was not advanced in the document. Non-payment of this war debt would leave the fledgling country vulnerable to renewed attacks. When the federal government demanded sums from the States to pay the debt, i.e., requisitions, [most] States either refused or otherwise failed to comply. The Articles of Confederation did not provide a means for levying upon the States’ property or alternatives to requisitions for revenue-raising. The States, even while in rebellion against the British, poorly funded the Revolutionary War, several times turning its back financially on George Washington

---

38 Id. at 37-44.
39 EINHORN, supra note 28, at 37-44.
40 Id.
42 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 19 (“What is there to prevent an Algerine Pirate from landing on your coast, and carrying your citizens into slavery? . . . You have not a single sloop of war,” quoting Hugh Williamson of North Carolina).
43 Id. at 15.
44 Id.; see EINHORN, supra note 28, at 119 (“When the champions of the Constitution attacked the ‘imbecility’ of the Articles of Confederation, they were talking about these rounds of state legislative action and the power of a single state to frustrate the rest. Mostly, they were talking about the defeat of the impost.”).
and his armies. When Rhode Island vetoed a federal impost tax on exports in 1781, the impotence of the Articles became too apparent to ignore and too deep-seeded to simply amend.46 In 1783, New York joined Rhode Island in vetoing the federal impost.47 For the country to survive, the federal government had to become more powerful. It needed to raise revenue directly, without the States as a conduit.48 It needed, at least, the power to tax exports and imports, and possibly collect sin taxes on the sale of “undesirable” goods.49 Thus, the committee responsible for amending the Articles of Confederation scrapped it entirely and constructed a new document, the U.S. Constitution, which gave the federal government considerably more power, especially the power to lay excise taxes.50

2. The 3/5ths Compromise

The Constitution could not give the federal government the power to tax without handling the controversy over slavery.51 By 1787, slavery was considered an evil on several fronts, but persisted due to the States’ drunkenness with economic advancement.52 Slavery violated moral and religious principles of the day, including the principles of “liberte,” which had enthralled colonialists and inspired the revolt against the English.53 Yet, slave labor was

45 JOHNSON, RIGHTEOUS ANGER, supra note 3, at 32. “With the end of the Continental dollar, the Army in the field survived primarily on impressments[,] which are]... involuntary seizures from civilians with the misfortune of living within reach of the army as it moved or camped.” Id. at 37.
46 Id. at 26-27, 29, 76-77, 79 (implying that the nature of the Articles of Confederation would have required the creation of an amendment endorsed by all thirteen states and that this requirement was its undoing with the impost proposal).
47 Id. at 28.
48 Id. at 77.
49 See id. at 225-27 (discussing Hamilton’s idea for taxing imports that were considered vices and discouraged).
50 EINHORN, supra note 28, at 166; JOHNSON, supra note 3, at 75.
51 EINHORN, supra note 28, at 118 (“Regardless of whether the apportionments rested on population or wealth, they had to include decision about how to treat slaves: how to count them as persons or how to count them as property.”).
52 JOHNSON, RIGHTEOUS ANGER supra note 3, at 184-85.
53 Id. at 183-185 (stating that the meaning of “liberty” was different for different people).
cheap by definition and competed well against more expensive, non-propertied White labor.\textsuperscript{54} Slave labor brought down the costs of running a tobacco farm and was also used for urban occupations, such as blacksmithing or industrial work.\textsuperscript{55} Slaves outnumbered White South Carolinians and constituted forty percent of Virginians.\textsuperscript{56} The large population of Blacks frightened the Whites and compelled them to institute numerous techniques towards squelching the enslaved Africans’ want of freedom—including maiming, whipping, lynching, killing, threatening to sell children to distant slave owners.\textsuperscript{57} Still, representatives from South Carolina had long threatened that there be no union if the institution of slavery was at all threatened.\textsuperscript{58} Many northerners wanted to end slavery for various reasons, but they feared that the colonies would be unable to unite economically and militarily if slavery was challenged.\textsuperscript{59} South Carolina and other states would not tolerate a prohibition on slavery and feared that a Congress controlled by the northern states would tax slavery out of business.\textsuperscript{60}

Framers of the U.S. Constitution had to design a federal government with more power than previously under the Articles of Confederation, but without the power to end slavery.\textsuperscript{61} Ultimately, the goal was achieved, but only after serious discussion and negotiation over the

\textsuperscript{54} See EINHORN, supra note 28, at 122 (“Slavery crowded out free labor.”).
\textsuperscript{55} See id. By the mid 19\textsuperscript{th} century, slave-owners assigned considerable numbers of slaves to urban occupations. See George Ruble Woolfolk, Taxes and Slavery in the Ante Bellum South, 26 J. S. HIST. 180, 184-85 (1960); JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANTATION 33, 36-37 (1999) (describing how working conditions in urban industries were often worse than agricultural work for hired slaves, which led to an increasing number of them escaping, which would interrupt operations due to their numbers absconding).
\textsuperscript{56} EINHORN, supra note 28, at 33, 94.
\textsuperscript{57} FRANKLIN & SCHWENINGER, supra note 55, at 34-36 (describing how poorly hired slaves were treated).
\textsuperscript{58} EINHORN, supra note 28, at 120 (“If it is debated, whether their Slaves are their property . . . there is an End of the Confederation,” quoting Thomas Lynch, delegate from South Carolina).
\textsuperscript{59} Id. at 142, 144-45 (describing how the Northern states compromised with the Southern states regarding taxation).
\textsuperscript{60} JOHNSON, RIGHTEOUS ANGER, supra note 3, at 184 (“In South Carolina, Anti-Federalist Rawlins Lowndes would oppose the Constitution because ‘Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!’”).
\textsuperscript{61} Id. at 185 (describing how anti-slaves states were missing during the Philadelphia Convention, which swayed the features of the Constitution to pro-slavery).
federal government’s powers generally and the power to tax specifically. The Constitution does not outlaw slavery, and it offers a grace period for ending the importation of slaves (which was agreeable even to slave states since the number of enslaved Africans had become dangerously high). The U.S. Constitution gave the federal government the power to lay excise taxes; however, confiscatory taxes on the importation of slavery were prohibited. Additionally, the federal government’s power to tax states directly by means of requisitions was retained, but an apportionment requirement was added. The issue of whether to count slaves as people or property if the government directly taxed the States under a rule of apportionment became infamously known as the 3/5ths Clause.

Most important to this discussion, however, is that the Framers neglected to provide the precise definition of “direct taxes.” Imagining what slaves thought “direct tax” meant is interesting because the Constitutional prohibition of unapportioned direct taxes is possible only after determining whether slaves are property or people. Plus, if Scalian textualism is utilized to determine what direct tax meant, excluding the thoughts of thousands if not millions who were the objects of the law would be odd. The Framers of the Constitution debated over how much slaves would count towards the apportionment of taxes and representation in the House of Representatives. This article asks how much slaves count under a word in the Constitution according to the meaning given by the People of the United States. Perhaps a slave’s views are relevant, but discounted to 3/5ths of a White man’s views? Despite the fact that reconstructing the views and history of marginalized groups is difficult and costly, Adrian Vermeule reminds us

62 EINHORN, supra note 28, at 139 (quoting the U.S. Constitution language about the 3/5ths clause).
63 JOHNSON, supra note 3, at 184, 185 n.157 (stating James Dredell’s regret over the twenty year moratorium of slavery).
64 EINHORN, supra note 28, at 149, 153.
65 Id. at 145; JOHNSON, supra note 3, at 108.
66 EINHORN, supra note 28, at 138; JOHNSON, RIGHTEOUS ANGER, supra note 3, at 107-08.
deliberation requires time and effort which must be bounded—hopefully we will not make the same mistake of ignoring the humanity of a specific group of people in exchange for convenience.

C. The Discussion Over the Political Importance of the Meaning of “Direct Tax”

Recently, Beverly Moran proposed a wealth tax, contending that it is more consistent with the capitalism Adam Smith envisioned when he wrote Wealth of Nations over two hundred years ago. Her proposal follows Bruce Ackerman’s position that the Direct Tax Clause, and perhaps all Constitutional provisions remotely relating to slavery, is invalid on moral grounds. Other commentators believe that the Direct Tax Clause imposes a serious limitation on the federal government’s power to tax individuals and prohibits a wealth tax or unapportioned income tax. A third position is that the Direct Tax Clause is a valid constitutional restriction, but it poses no serious restriction on the federal government’s relationship with the United States public directly and only concerns the federal government’s relationship with state governments.

Scholars and judges debate about the scope of the Constitution’s limitations on direct taxes, specifically with respect to what constitutes as a “direct tax.” Scholars agree that the constitutional requirement demanding the apportionment of all direct taxes means that, with direct taxes, each state is mandated to raise a certain amount in proportion to its representation in the national census. Furthermore, with the 3/5ths Clause, there is no longer any debate over the

67 Moran, supra note 42, at 339-41.
68 BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 123 (1999); Ackerman, Taxation, supra note 1, at 57-58 (commenting that the direct tax was created only for the slave compromise).
69 E.g., JENSEN, supra note 3, at 25 (describing how the direct tax apportionment rule made direct taxes and unapportioned income taxes more difficult to implement, especially after the Pollock decision).
70 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 297; Francis R. Jones, Pollock v. Farmers' Loan and Trust Company, 9 HARV. L. REV. 198, 206, 210 (1895).
proper way to apportion direct taxes. Scholars also agree that apportioned direct taxes, at least income taxes, are an irrational idea because the poorest states would be required to tax their citizens at higher rates to satisfy the direct tax. However, the apportionment rule can be useful politically to restrict the government’s ability to directly tax individual wealth and income from high earners. Apportionment being a settled issue, the controversy over the limitation relates to which taxes constitute a direct tax.

Over time, various commentators have argued that the Direct Tax Clause limits the federal government’s ability to levy income tax, estate and gift tax, wealth taxes, a flat tax, or real estate tax. In the infamous Pollock opinion, the Supreme Court held 5-4 that an income tax is a direct tax, despite its holding the opposite many years prior. Yet later, the Supreme Court retreated from its tax Lochnerism by holding that estate and gift taxes were not direct taxes subject to apportionment. Thus, the Sixteenth Amendment was enacted to reverse the Supreme Court’s decision and allow the government to tax incomes without apportionment. Recently, scholars, like Beverly Moran, have discussed the propriety of a tax based on held wealth and whether such a tax would be scuttled as a direct tax in need of apportionment.

Bruce Ackerman of the Living or Democratic Constitution contends that a tax on held wealth is not a direct tax because that term should be limited to the requisition of monies directly

---

73 Compare JENSEN, THE TAXING POWER supra note 2, at 5-6, with JOHNSON, RIGHTEOUS ANGER, supra note 3, at 155.
74 Jensen, Taxation, supra note 2, at 706-07.
75 Pollock v. Farmers' Loan & Trust Co. [hereinafter Pollock I], 157 U.S. 429, 583 (1895); Pollock v. Farmers' Loan & Trust Co. [hereinafter Pollock II], 158 U.S. 601, 618 (1895) ("[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property . . . is so different from a tax upon the property itself that it is not a direct, but an indirect, tax, in the meaning of the constitution."); Jones, supra note 72, at 198 (the Court "deliver[ed] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years.").
76 Knowlton v. Moore, 178 U.S. 41, 106-07 (1900).
77 U.S. CONST. amend. XVI.
The direct tax limitation was a political expedient used to facilitate a compromise between the northern and southern states; however, the limitation was illusory because the authority to levy direct taxes on the States was proven useless under the Articles of Confederation due to the States’ refusal to pay and the federal government’s lack of power to forcibly collect it. Ackerman argues that the Sixteenth Amendment along with the New Deal Amendments to the Constitution declare in principle that the federal government’s economic regulatory powers are not limited in any meaningful way. Thus, in contrast to Calvin Johnson, Ackerman would not limit the Direct Tax Clause to requisitions, capitation, and property taxes on real estate. Ackerman would disavow the direct tax situation as anachronistic on two counts: first, its strictures have been extended beyond the intended scope; and secondly, it is irreparably tainted from being entwined with slavery.

Relying primarily on an intentionalist argument, Calvin Johnson agrees with Ackerman’s point that the Pollock Court was completely incorrect and probably overtly political by holding, inconsistently with precedent, that the income tax was a direct tax. During the Hylton case, the Justices are assumed to have been aware of the debates and compromises of the Constitutional Convention due to their proximity in time. Yet, the Hylton Supreme Court held that the Direct Tax Clause could only be extended past requisitions to those taxes which could reasonably be apportioned. An income tax cannot be apportioned because it would be politically ridiculous and fail the constitutional requirement of uniformity. If Congress sought to raise $1 trillion under a rule of apportionment, each state would have to produce an amount based on its

---

79 Ackerman, Taxation, supra note 1, at 57.
80 Id. at 3.
81 Id. at 4-5, 51.
82 Johnson, Fixing the Constitutional Absurdity, supra note 1, at 298.
83 Hylton v. United States, 3 U.S. 171, 176 (1796).
percentage of the national population.\textsuperscript{84} This scheme would necessarily require a low tax rate on states with high per capita income and a high tax rate on individuals from states with a low per capita income.\textsuperscript{85} During the Civil War, Congress enacted an income tax that withstood a direct tax challenge.\textsuperscript{86} Yet the Pollock Court, operating under a renewed vigor to protect against governmental deprivations of property and economic liberty, charged Congress with two options: either approve a tax that would extremely burden poorer people generally and poorer states specifically; or scrap the idea altogether.\textsuperscript{87} Professor Johnson would like the Supreme Court to find the appropriate opportunity to reverse \textit{Pollock} specifically and to certify the income tax as an excise tax on all profitable activities and occurrences, requiring only uniformity and not apportionment.\textsuperscript{88}

Nevertheless, Eric Jensen disagrees.\textsuperscript{89} He does not defend the \textit{Pollock} Court, but does defend the Direct Tax Clause itself as an important and vital restraint on federal power.\textsuperscript{90} This restraint would require Congress to apportion any so-called wealth tax and navigate the furor such an apportionment regime would inspire.\textsuperscript{91} His contention is that, even if the Framers had no concrete conception of a direct tax’s scope, and even if the Direct Tax Clause was a straw provision to facilitate political compromise, the job of current legal practitioners is to read the Constitutions provisions coherently and supply meaning to them.\textsuperscript{92} The Constitution prohibits...

\textsuperscript{84} Johnson, \textit{Fixing the Constitutional Absurdity}, supra note 1, at 322-23.
\textsuperscript{85} Id.
\textsuperscript{86} Pacific Ins. Co. v. Soule, 74 U.S. 433, 446 (1869).
\textsuperscript{87} \textit{Pollock I}, 157 U.S. 429, 583-84 (1895); see also \textit{Pollock II}, 158 U.S. 601 (1895).
\textsuperscript{88} Johnson, \textit{Fixing the Constitutional Absurdity}, supra note 1, at 298.
\textsuperscript{89} Jensen, \textit{Interpreting the Sixteenth Amendment}, supra note 1, at 360-61.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 370 (2004) (“Professor Johnson is correct, of course, that the founders didn’t understand all of the consequences of the provisions they created . . . But the appropriate response to criticisms of that sort is ‘So what?’ . . . We do the best we can.”).
capitation taxes as well as direct taxes without apportionment. Also, at least one of the Federalist papers describes direct taxes as including requisitions, poll taxes and real estate taxes. Taken as a whole, Jensen suggests that direct taxes are taxes levied on accumulated wealth, which cannot be avoided by engaging or not engaging in a particular transaction. Furthermore, Jensen argues that the Constitution establishes a form which can reasonably be extended by analogy to newer concepts. Stephanie Willbanks makes a similar argument in her casebook, *Introduction to the Federal Transfer Tax System*, claiming that “a tax based on the value of all property owned at death . . . would be unconstitutional as a direct tax.”

### III. HOW THE LAW THINKS ABOUT DIRECT TAX

The debate over the U.S. Constitution’s direct tax limitation illustrates the natural indeterminacy of words and the usefulness of more precisely delineated jurisprudential decision procedures. Words are naturally vague and ambiguous. Adjectives are especially problematic. It is usually the “open-ended” clauses of the Constitution which give the judiciary such pause. Invariably those open-ended clauses include an adjective that necessarily means something different from one person to the next. What makes protection equal? What process

---

93 U.S. CONST. art. I, §9, cl. 4, 7.
94 See THE FEDERALIST NO. 21 (Alexander Hamilton).
95 Jensen, *Interpreting the Sixteenth Amendment, supra* note 1, at 358-61.
96 Id.
97 WILLBANKS, supra note 23.
98 Scholars debate the degree with which this is true, with some arguing that legal terminology is fairly determinate and others believing that it is almost perfectly indeterminate. For a balanced exposition, see Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation, in VAGUENESS IN NORMATIVE TEXTS* 73 (Vijay Bhatia et al. eds., 2005).
100 ELY, supra note 13, at 38.
101 See Fjeld, supra note 100, at 162-63 (explaining how adjectives are inherently vague and open to differing interpretations as well as how these contrasting readings of adjectives have lead to frequently specifying the ‘legal definitions’ of words in modern laws). Of course some adjectives like ‘thirty-five years of age’ are more determinate than others like reasonable, due, equal, necessary, substantial, etc. Id. at 162.
is due? Was the search or seizure reasonable? In the context of the income tax, how direct must the tax be for the Constitution to require congressional apportionment amongst the States by population? Nouns can also be problematic, particularly nouns naming previously inconceivable phenomena. Contemporary legal practitioners are often stymied by whether the text of law provisions extends to the modern inventions inconceivable to previous legislatures, such as modern technology and freedom of speech.

Depending on the extent to which the term, “direct tax,” is generally to be used as a proper noun, determines whether the term is to be applied to taxes inconceivable in 1787. Jensen asks whether the People of the United States would approve a Constitution expressly authorizing the unlimited taxing power of Ackerman’s construction. This counter-factual question has little force because no state or federal government of the time likely had the bureaucracy necessary to levy an income tax on national citizenry and one might argue that we still do not. If the income tax had been a known concept and a viable possibility for the federal government in 1787, pondering such a question might be seen as determinative.

A. Originalist Intentionalism

Whatever meanings the slaves may have attributed to the term “direct tax,” they are unexplored under an originalist intentionalism technique, which is the practice of interpreting text by discerning the intentions of its author(s). According to intentionalists, words have no meaning outside their author’s intent. In particular, Stanley Fish argues that textualism, the

---

102 See Fjeld, supra note 100, at 157 (remarking at how “[m]ost nouns are indefinite and need specification.”).
103 Jensen, Taxation, supra note 2, at 708.
104 See generally EINHORN, supra note 28.
105 Stanley Fish, There is No Textualist Position, 42 SAN DIEGO L. REV. 629, 649 (2005).
106 Id.
practice of determining the meaning readers supply to a text, is not interpreting; it is constructing a meaning independent of the text’s original purposes.\textsuperscript{107} Intentionalists are only concerned with the author’s intent and thus, consult the Federalist papers, federal statutes from 1787, and other original sources to discover evidence of the Framers’ intended meanings for words in the Constitution. Thus, an intentionalist judge would likely be unconcerned about slaves’ thoughts because none were drafters of the Constitution. As such, their views are wholly irrelevant. Intentionalists would only consider slaves’ views if the Constitution’s authors were the People or if the Framers intended to use words most plainly understood by the People.

\textbf{B. Originalist Textualism}

Some, but not all, originalist textualists would consider the meaning a slave may have attributed to the term “direct tax.” Textualism emphasizes the meaning people assign to text they encounter.\textsuperscript{108} Justice Scalia of the Supreme Court, in particular, encourages legal deliberators to select the plain meaning.\textsuperscript{109} If the meaning is less than plain, the legal deliberator is encouraged to consider other sources, such as textual context, indicia of intent and purpose, and modern dynamics.\textsuperscript{110} Of course, a chauvinistic textualist would not consider other sources, instead choosing the meaning of the word that is plainest even if not plain in the abstract.\textsuperscript{111} For example, if the abstract plain meaning of a word’s construction is understood and accepted by 75\% of people, a chauvinistic textualist may still reject all forms of context and choose the meaning as understood by only 51\% or even 40\% of people.

\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textsc{Scalia}, \textit{supra} note 5, at 16-18.
\textsuperscript{109} \textit{Id.} at 16 (“[W]hen the text of a statute is clear, that is the end of the matter.”).
\textsuperscript{110} Smith, \textit{supra} note 12, at 6-7.
\textsuperscript{111} Allan Madison, \textit{The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law}, 43 \textsc{Santa Clara L. Rev.} 699, 700-01 (2003); \textit{cf.} Vermeule, \textit{supra} note 15.
1. Understandings of the Ratifiers

Textualism presents a core question that must be answered before one determines whether it matters what slaves thought Direct Tax meant. To whom must the text be plain? Different communities will often supply different meanings to the same word.\footnote{STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITATIVENESS OF INTERPRETIVE COMMUNITIES, 338–40 (1980).} For example, the definition of income differs depending on whether the person spoken to is an economist adherent to Haig-Simons or a tax lawyer relying on Glenshaw Glass v. Commissioner.\footnote{Comm’r v. Glenshaw Glass Co., 348 U.S. 426 (1955).} Income requires realization to one of those individuals, but not the other. These are called interpretive communities, and the exact number breadth of such communities depends on the context. Thus, textualists may differ over the importance of slaves’ thoughts about the meaning of “direct tax,” because they may be from different interpretive communities. Ultimately, it is a matter of discretion.

Whether a textualist is interested in the thoughts of slaves depends on whether the deliberating textualist focuses on the understanding of the Ratifiers of the Constitution or the People living and residing in the United States at the time of ratification.\footnote{Although not discussing constitutional deliberation specifically, Jellum & Hricik acknowledge that the plain meaning rule admits some discretion as to which interpretive community a judge should emphasize. JELLUM & HRICIK, MODERN STATUTORY INTERPRETATION 46 (2009) (“Should the ordinary meaning apply unless the legislature has expressly adopted a technical meaning in the statute? Or, should courts use the technical meaning if the statute is directed to a technical audience?”)} Consequently, a textualist that is part of an interpretive community sympathetic to the Ratifiers’ views would ignore the views of slaves, because no slaves were ratifiers.
2. Understandings of the People

On the other hand, Justice Scalia’s brand of textualism does concern itself with what slaves thought “direct tax” meant. His originalist textualism emphasizes the meaning the People of the United States as a whole supply to text.\textsuperscript{115} According to Scalia, he does not rely on the Federalist Papers to determine the intentions of the authors of the Constitution, but to discover the meaning the People of the United States attributed to the words in the Constitution.\textsuperscript{116} The Federalist Papers may be the best source of meaning, but they are obviously not the only real or theoretical items of evidence.

None of the Federalist Papers were written by slaves, so it is uncertain whether the Federalist Papers represent the meaning of Direct Tax, or Liberty, or Property, or Cruel and Unusual as understood by African immigrants. African slaves came from civilizations that may or may not have had understandings of terms and concepts similar to newly-immigrated Europeans;\textsuperscript{117} however, many captured slaves are now known to have been part of their homeland’s aristocracy and familiar with, if not experts in, governance and law.\textsuperscript{118} Thus, the reason African slaves’ thoughts about the meaning of “direct tax” are unknown is more likely because they were not asked, rather than because none of them knew. For that matter, it is not free from doubt whether the Federalist Papers represented the meanings as would be understood by 18\textsuperscript{th} Century women.

This article does not suggest that the meanings of words and phrases in the Constitution as understood by African slaves should trump the understandings of newly-immigrated

\textsuperscript{115} SCALIA, supra note 5, at 38.
\textsuperscript{116} Id.
\textsuperscript{117} Implicit in Diop’s claim that the African has a distinct culture is the understanding that it differs from others, including Europe. DIOP, supra note 16, at 148-50.
\textsuperscript{118} See, e.g., ALFORD, supra note 17, at xv (“[F]rom time to time African princes and kings had wound up as slaves.”).
Europeans. Whether a difference between the views existed at all is not certain. We are coming
to understand that all the world’s legal systems, if not their cultures as a whole, have been quite
syncretic for some time. Instead, this article attempts to highlight that plain meaning is
inherently empirical and thus, the discovery process should include all relevant sources. That
plain meaning textualism’s empirical nature encourages historical research into the lives of
Africans and Africa is as interesting sociologically as it is ironic politically, but it does not by
itself privilege textualism over other deliberative techniques, like intentionalism, purposivism or
dynamism, in a juristic sense.

According to Justice Taney, in the Dred Scott case Sanford v. Scott, slaves were not
included among the People of the United States. If he is correct, then Scalian textualism
would ignore the views of the slaves. However, others on the same Court disputed this claim.
We also acknowledge through social and legal understanding that Taney was simply wrong.
African immigrants were people of the United States, even if immoral laws of the time said they
were not.

C. Realism

Realism in the context of constitutional understanding is represented most cogently by
the notion of a Living Constitution. Under this style of interpretation, judges choose the
meaning of the Constitution’s words that best serves modern society. Living Constitution
scholars are comfortable with the reality that the meanings of words and phrases change over
time. The most radical form of living constitutionalism completely ignores the understandings
and intentions of 18th century persons, regardless of their status as authors, ratifiers, or mere

119 Scott v. Sanford, 60 U.S. 393, 404-05 (1857)
120 Id. at 531, 537-38 (DeClean Dissenting); 588-89 (Curtis Dissenting).
121 Ackerman, supra note 8, at 118-12.
citizens. In a milder form, living constitutionalism or constitutional realism attempts to maintain some tether between modern meanings and original text.

1. The Living Constitution

Adherents to living constitutionalism are unconcerned with the slaves’ thoughts about the meaning of “direct tax,” or any other phrase in the Constitution. Generally, their contention is that the modern United States ought not be governed based on the 18th century ideals of a euro-male-dominated, slave-holding society. Instead, the Constitution may legitimately be reconstructed through judicial opinions, so that the supreme law of the land is more symmetrical with the ideals of a people who believe democracy means the ability of a group of people to govern themselves, rather than having some higher authority of men governing over them, i.e., the Founders. While living constitutionalism is credited—or discredited—with expanding the notions of privacy and equality, its focus is not on the slaves’ thoughts of the Constitution’s meaning because ultimately, it is unconcerned with what anyone in the 18th century thought.

2. Translation

According to Lawrence Lessig, judges who rely on modern understandings can still be faithful to text. For some, judges must depend on original understanding to be faithful to a written Constitution; otherwise the purpose of memorializing the huge social contract is defeated. Lessig, on the other hand, believes that translating the original text into modern

---

122 Id. at 1801.
123 Lessig, supra note 10, at 1189; see also Ely, supra note 13, at 38-41 (contending that the structure of the U.S. Constitution exemplifies a commitment to greater participatory democracy, and that non-text based commitment should be determinative in hard cases); see also Breyer, supra note 13, at 116-17.
125 Ackerman, Living Constitution, supra note 8, at 1812.
126 Lessig, supra note 10, at 1184; see also Todd E. Pettys, The Myth of the Written Constitution, 84 Notre Dame L. Rev. 991, 1023 (2009) (contending that Living Constitutionalism is text based).
127 Scalia, supra note 5, at 38.
terms does not cast constitutional deliberation adrift into the sea of judicial legislation.\textsuperscript{128} Words are inherently imprecise representations of concepts people share.\textsuperscript{129} So the trick of fidelity, according to Lessig, is to stay faithful to the concept the text identified, rather than adhere to the static meaning of a word or phrase.\textsuperscript{130} A legal decision maker stays faithful to a concept in the same way a translator of literary texts identifies the concepts a word in one language identifies then reiterates those concepts using the terms of another language.\textsuperscript{131} In constitutional translation, a judge first imagines the concepts that are intended to be represented by the Constitution’s words and phrases, then he reiterates those concepts using a modern understanding. For example, a translationist does not rely on the meaning of liberty as understood by the people or intended by the Framers, but instead identifies the word liberty as imperfectly representative of the concept of responsible personal autonomy and translates that into what personal autonomy means today. To translate old words into modern parlance, a judge must have evidence and an understanding of the concepts an 18\textsuperscript{th} century writing is attempting to represent. Thus, a translationist may consider African conceptions of liberty, property, or direct tax. However, a translationist might, in a way similar to an originalist textualist or intentionalist, restrict his focus to the concepts as understood by Framers or Ratifiers, which have nothing to do with what slaves thought.

\textit{3. Purposivism}

John Hart Ely and Stephen Breyer’s kind of constitutional purposivism might respond to the views of modern Black people regarding the Constitution’s meaning today, but the views of

\textsuperscript{128} Lessig, \textit{supra} note 10, at 1189-92.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
slaves are ignored. Purposivism emphasizes the consequences a legislature or author intended a judge to consider. Whereas intentionalism is concerned strictly with meaning, purposivism differs because it focuses on consequences. Ely and Breyer argue that the structure of the Constitution commits us to preserving and widening our participatory democracy. According to the deliberative technique of purposivism, the most important consequence to consider in constitutional cases is which choice better preserves or widens participation in our governmental processes. In this kind of determination, the views of slaves as to direct tax or anything else are irrelevant.

D. Natural Law

Natural law stands for the proposition that law is not man-made; it precedes human-kind and comes from God or nature. The most difficult aspect of instituting natural law as a legal system is designing techniques that identify when legal decision makers have departed from natural law. For instance, how does one determine what natural law is in order to determine whether a departure from it has occurred? This article does not attempt to answer that question. All that can noted here is that under the natural law paradigm, law is universal and binds us all. Thus, African methods of discovering the divine are just as relevant as any other method.

---

132 ELY, supra note 13, at 135-6; BREYER, supra note 13, at 78.
134 Smith, supra note 12, at 37-43; JELLUM & HRICK, supra note 114, at 245.
135 ELY, supra note 13, at 5-9; see also BREYER, supra note 13, at 5-6.
136 Id.
IV. WHAT SLAVES MAY HAVE THOUGHT

Ignorance of non-European cultures operates in the midst of this epistemological confusion. Prior to arriving in the United States, aristocratic slaves most likely had experienced income or individual wealth taxes as well as the proper degree of governmental intrusion into individual property. In the last five thousand years, multiple African civilizations have officially respected private property in the law, including the Old Kingdom Egyptians, the great West African civilizations of Ghana, Mali and Songhai, as well as the smaller states of Kilwa, Kanem, Mossi, Benin, Kuba and Kongo. 139 Even the self-emancipated slaves and conspirators of the Haitian revolution incorporated in their 1805 Constitution legal respect for privately held property. 140 The possibility exists that Africa was purposely ignored. For inspiration and edification, the Constitution’s principal author James Madison relied upon Scottish philosopher and historian David Hume’s writing, Of the Origin of Government. 141 In this writing, Hume examined numerous European republics, but excluded African ones. 142 In another work, Hume commented that Africans were not civilized and never contributed to civilization:

I am apt to suspect the Negroes, and in general all other species of men, to be naturally inferior to the whites. There never was any civilized nation of any other complexion than white, nor even any individual eminent in action or speculation. No ingenious manufactures among them, no arts, no sciences…Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction between these breeds of men. 143

---

141 See generally DAVID HUME, OF THE ORIGIN OF GOVERNMENT (1777), reprinted in VOLUME I, ESSAYS MORAL, POLITICAL AND LITERARY 113 (T.H. Green & T.H. Rose eds., Longsman, Green & Co. 1875).
142 See generally id.
143 David Hume, Of National Characters, The PHILOSOPHICAL WORKS OF DAVID HUME 228 (1854); See generally MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION (1987).
In response to this attitude towards Black people, Cheikh Ante Diop, W.E.B. Dubois, Martin Bernal, and other scholars re-present *Western civilization’s evidence of African and Asiatic origins*. Bernal shows specifically how Eurocentric scholars created the concept of race as a means of facilitating far-flung economic domination.\(^{144}\) Prior to this concept’s creation, learned people understood the origins of ancient Greece and Rome to be heavily influenced by Africa and Asia.\(^{145}\) Hume was apparently unaware of comments by Greek historians like Lucian claiming that “[e]thiopians [Nubians], ‘being in all else wiser than other men,’ invented astrology and taught it to the Egyptians.”\(^{146}\) Another more relevant invention was the inheritance tax, which originally was African—more specifically Egyptian.\(^{147}\) Contemporaneous with Hume, the Songhai Empire taxed in the style of requisitions from local governments and taxes on trade.\(^{148}\) Aside from revenue-raising, taxation in West Africa was a regulatory mechanism designed to maintain the price of gold high and the price of salt low, or to institute a caste system of national economic policy.\(^{149}\) Thus, to conclude that Africans had no experience with and no commentary on taxation and government would be a gross misstatement.

Ultimately, Bruce Ackerman’s approach to the Constitution would ignore slaves’ views because his constitutional interpretive style yields to understandings of the New Deal era. By contrast, Justice Scalia’s version of text-based originalism appears to consider the views of slaves, women, and Native Americans. Yet, Adrian Vermeule and Cass Sunstein may permit judges to ignore considerations if they lack the time or expertise to analyze and evaluate.

\(^{144}\) See generally BERNAL, *supra* note 143.

\(^{145}\) *Id.*


\(^{147}\) WILLBANKS, *supra* note 23, at 3.


Ignoring the views of all the People may be expeditious, but certainly not excused, especially as an academic rather than jurisprudential matter.

V. CONCLUSION

Scalian textualism is on the rise. In *United States v. Murphy*, a panel of the D.C. Circuit used Scalian textualism to hold that damages relating to mental anguish were not income within the meaning of the Sixteenth Amendment and thus, not subject to income tax. Scalian textualism stands for the idea that judges deliberating over words in the Constitution should emphasize the meaning held by the People of the United States. According to Judge Ginsburg, the author of the D.C. Circuit’s initial decision, which was reversed en banc, the People at the time of the Sixteenth Amendment’s enactment did not understand income to include mental anguish damages. Although that panel reversed itself, Judge Ginsburg’s opinion denotes the rising currency of Justice Scalia’s constitutional deliberative technique and jurisprudential teachings.

Yet, Scalian textualism is easier to describe than apply, because a determination of how the People of the United States understood a word’s meaning at the time of enactment requires research and assessment, which involves rigor, procedure, and discretion. The same word has different meanings to different people. Even if substantial symmetry exists between a word’s meanings to two people, their conceptions are unlikely to be perfectly symmetrical. Of course, the law and human cooperation generally both rely on tendencies, symmetries, and other “close-

---


151 SCALIA, supra note 5, at 23.

152 *Murphy*, 460 F.3d at 92.


154 *Vermeule, supra* note 15, at 178 (examining the efficiency of stopping rules in adjudicatory decision making).

155 See generally Solan, *supra* note 100, at 73.
enoughs.” Thus, Scalia, the Supreme Court, and others in the practice of law examine many different types of discourse, including dictionaries, the Federalist papers, and English legal texts, to fully grasp the People’s understanding of a word’s meaning.\textsuperscript{156}

Adherents to Scalian textualism, however, have not spent much if any effort exploring the meaning of words as understood by those who had no influence on dictionaries, the Federalist papers or English legal texts. Of course they would be wasting their time if it is true that propertied, white males who controlled these discourses accurately reflected the meanings understood by slaves, women, non-propertied white males, Native Americans, etc.\textsuperscript{157}

However, I suspect that that assumption while somewhat reasonable is largely inaccurate, that marginalized groups tend not to succumb simply to the whims of the powerful, that they tend to inculcate within their own cultures differing meanings and understandings regarding many issues. Moreover, if a word or phrase like “direct tax” actually had no identifiably determinate meaning between propertied White males of the time, then Scalian textualism should require an exploration of the meanings held by others. To that end, this article claims that an aristocratic slave captured from a well-to-do African family would have had understood the ideas and terms of the U. S. Constitution, including the meaning of “direct tax.”

\textbf{VI. WHAT A SLAVE MIGHT HAVE THOUGHT DIRECT TAX MEANT}

If the norm of African taxation at the time of Atlantic slavery was a system of federal requisitions with state administrations, then an aristocratic slave in the Americas would not have understood “direct tax” to include the central government’s direct levy upon an individual’s income. This proposition would support Calvin Johnson’s view that the only constitutionally

\textsuperscript{156} JELLUM \& HRICK, supra note 116, at 34.
\textsuperscript{157} Professor Vermeule argues that the mental and resource limitations of judges preclude their considering everything. VERMEULE, supra note 15. He does not argue specifically for privileging the views of white men.
required apportioned taxes are requisitions paid by state governments, which would collect the tax from their citizens in a variety of methods.\textsuperscript{158} Eric Jensen may view West African taxation as consistent with his argument that the People of the United States in 1791 would never have allowed the federal government such authority over individuals.\textsuperscript{159} This view may be true; however, the question not answered is the meaning people attributed to the idea of a “direct tax,” considering that the People of 1791 were never asked to approve federal income taxation. A look at West African taxation suggests that 18\textsuperscript{th} century citizens of empires or federated states would not have been able to contemplate the idea of a federal government with a sizable enough will or administration to tax citizens individually. In her book, \textit{American Slavery, American Taxation}, Robin L. Einhorn points out that the States had varying levels of sophistication with respect to tax.\textsuperscript{160} Few of the States had the sophistication and manpower to implement an ad valorem property tax, with Virginia among the least modernized.\textsuperscript{161} The types of taxation were limited; thus, the People of the United States may not have thought an income tax levied by the federal government was even possible. Considering that types of taxation were limited, it is perhaps unreasonable to think that the people of the United States would have even thought an income tax levied by the federal government was in the realm of possibility. Thus, in support of Johnson’s position, West African tax experiences, if conceived of as the culmination of thousands of years of African tax schemes, suggest that the term direct tax to an aristocratic slave could not have included income taxes levied by the federal government, something which she as a member of an interpretive community within the body of We the People could or would not have contemplated.

\textsuperscript{158} See generally JOHNSON, supra note 3.
\textsuperscript{159} Jensen, \textit{Interpreting the Sixteenth Amendment}, supra note 1, at 372.
\textsuperscript{160} EINHORN, supra note 29, at 29.
\textsuperscript{161} Id.