

Tax after the American War of Independence: A Consideration of The Federalist and The Anti-Federalist Papers

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Abstract

The American War of Independence ended formally with the Versailles peace treaty of 1783 – leaving 13 independent states needing a constitution. Tax played a key role in the lead-up to and during the War and in subsequent years, notably in the debate about the newly-developed Constitution. That debate is captured in *The Federalist Papers* and *The Anti-Federalist Papers*.

The Federalist Papers comprise articles written by Founding Fathers James Madison, Alexander Hamilton and John Jay, aimed at promoting acceptance of the new Constitution, and explaining and justifying the political principles it embodied. Key – and highly controversial – issues were the separation of powers between the judiciary, the legislature and the executive, and the concept of federalism. Numbers 30–36 of *The Federalist Papers*, written by Hamilton, concern taxation. Although not opposed to individual state taxation, Hamilton aimed to persuade readers that federal taxation was required to provide public necessities. Particularly contentious was the relationship between state tax law and any federal imposition and their respective standing.

The views of the Federalists were countered by *The Anti-Federalist Papers*. The Anti-Federalists opposed ratification of the Constitution, though they too favoured federalism: they wanted a ‘small republic’ (a weak central government), as opposed to a ‘big republic’, fearing that a national government would be too powerful and threaten individual liberties and state government. *The Anti-Federalist Papers* are liberally peppered with detailed arguments about taxation, with numbers 30–36 being devoted entirely to tax. Of concern was the federal power to tax, which they wanted limited to taxing overseas imports.

In this chapter, we will examine the background to *The Federalist* and *Anti-Federalist Papers* in terms of the philosophical ideas (eg Locke, Hume, Montesquieu, Paine) about tax leading to the War, the taxes imposed during and after the War and influences on tax policy-making.

Introduction

The purpose of this chapter is to examine the role of taxation in the drafting of the Constitution of the USA, and the philosophical influences on the thinking of the Founding Fathers who developed that Constitution, which are reflected in *The Federalist Papers* and *The Anti-*

Federalist Papers,¹ as noted above. However, that cannot be done without examining the lead-up to the War of Independence (1775–83) (henceforth, the War) in terms of taxation and what happened as regards tax during the War. This chapter is therefore structured as follows. It briefly examines first the background to the War. It then goes on to consider the colonial taxes that were in place prior to the conflict, followed by looking at how the War was financed, and the problems arising. It then examines the influences on political and tax thinking, with consequent examination of the thinkers and writers whose theories of taxation would have had influence on the drafting of the Constitution. The final sections consider the debate about the Constitution and offer our conclusions.

Background, in Brief

Powerful social and economic forces had been at work in the American colonies for many years. For instance, in the 150 years preceding the War, the European institutions and customary patterns of living inherited by settlers from their original homelands had been transformed by colonial life. The population had expanded, with a regular influx of colonists arriving in search of land.² Societal changes caused increasing ‘fragmentation of households, churches, and communities’³ and colonial government lost control over the land-hungry colonists’ settlements. Consequently, the legitimacy of colonial government was weakened.⁴ The spread of settlements meant that ever more land was taken from the native peoples⁵ – which unsurprisingly drove them to desperation and war. Enslaved Africans carried by force to the American colonies frequently rebelled. ‘Conquest was always fragile, slavery forever

¹ For these two works, we use the online versions, B Bailey (ed), available at <https://www.thefederalistpapers.org/wp-content/uploads/2012/12/The-Complete-Federalist-Papers.pdf> and <https://www.thefederalistpapers.org/wp-content/uploads/2012/11/The-Anti-Federalist-Papers-Special-Edition.pdf>.

² R Middlekauff, *The Glorious Cause: The American Revolution, 1763–1789* (Oxford, Oxford University Press, 2005) 38.

³ GS Wood, *The American Revolution: A History* (New York, The Modern Library, 2003) 9.

⁴ RV Wells, ‘Population and the Revolution’ in JP Greene and JR Pole (eds), *A Companion to the American Revolution* (Oxford, Blackwell Publishers Ltd, 2000) 51.

⁵ As Brogan writes: ‘For the respectable, typical, farming English wanted the Indians’ land; and, as time was to show, they wanted all of it’. He subsequently quotes John Winthrop who stated: ‘That which is common to all is proper to none’. According to Brogan, these words ‘look forward to the doctrines of Hobbes, Locke and Rousseau’: H Brogan, *The Penguin History of the United States* (London, Penguin, 1985) 60.

unstable’, says Lepore.⁶ She therefore maintains that long before American independence was thought of, ‘a revolutionary tradition was forged, not by the English in America, but Indians waging war and slaves waging rebellions’.⁷

A sense of difference from England especially was fostered as ‘American conditions tended to loosen family ties and undermine parental authority’.⁸ Economic expansion and a rise in living standards for many Americans undermined ‘the customary paternalistic structure’ of colonial society: small farmers, becoming more independent than previously, became involved in politics and promoted religious dissent.⁹ Moreover, since the ‘Glorious Revolution’ in 1688–89, the English colonies had obtained significant internal representative government, acquiring a right to assemblies and local representative institutions. The assemblies became a dominant force, wielding their power in several areas. ‘Of first importance was their determination to control as much of the raising and distribution of tax money as they could.’¹⁰ The representative assemblies informed the English authorities of popular needs and conditions and could give prior consent, without which the English authorities’ ‘decrees were difficult to formulate intelligently and enforce effectively’.¹¹ The development of the assemblies, used by self-conscious colonial elites to legitimise their search for political power, implied that the Americans had quite some experience with self-government and political compromise.

Besides the social and economic conditions underlying the American Revolution, there are ideological explanations, as Bailyn notes.¹² He views the colonists as driven by a set of radical ideas about power and liberty and deeply rooted fears of conspiracy, which mattered more than Enlightenment radicalism, natural rights’ philosophy, or religious writings. Americans were inspired by seventeenth-century English publicists who criticised ‘the descent

⁶ J Lepore, *These Truths. A History of the United States* (New York, WW Norton & Co, 2018) 58.

⁷ Lepore, above n 6, 55, also comments: ‘They revolted again and again and again. [...] They asked the same questions, unrelentingly: ‘*By what right are we ruled?*’.

⁸ MA Jones, *The Limits of Liberty: American History 1607–1992* (Oxford, Oxford University Press, 1995) 24.

⁹ See Wood, above n 3, 15.

¹⁰ A Tully, ‘The Political Development of the Colonies after the Glorious Revolution’ in Greene and Pole, above n 4, 30.

¹¹ ES Morgan, *Inventing the People. The Rise of Popular Sovereignty in England and America* (New York, WW Norton & Co, 1988) 124. See 125: ‘While colonial governments from the beginning depended more visibly on popular consent than the government of England, there was less occasion in the colonies than in England for the development of ideas about sovereignty.’

¹² B Bailyn, *The Ideological Origins of the American Revolution* (Cambridge MA, Harvard University Press, [1967] 2017) xi.

from freedom to autocracy'.¹³ To Bailyn, the colonists found increasingly attractive the prospect that new American institutions would embody republican virtues partly derived from the classical (Greek and Roman) tradition.

After the Seven Years' War (1756–63, formally ended by the Peace of Paris, 1763), the British Government had to reorganise newly-acquired territories to preserve order and deal with smugglers, bandits and rebellions by native peoples. Its decision to maintain a standing army in America created distrust,¹⁴ making it necessary to 'seek new resources of revenue in the colonies' and to make its trade policies more efficient by tightening the navigation system to 'curb the colonists' smuggling and corruption'.¹⁵ The latter was done by the Sugar Act of 1764,¹⁶ the former by adding new customs duties. Additionally, the Stamp Act of 1765¹⁷ introduced a tax on types of paper (see later). The colonists rejected Parliament's right to impose this tax directly on them, regarding it as not lying within Britain's traditional authority over commerce in the colonies. The Sugar Act and the subsequent Stamp Act were perceived as threats to Americans' liberties, and both were fiercely opposed throughout the colonies. Resistance turned into rebellion with considerable speed.

Taxation thus became a material factor in the rebellion, closely linked to other underlying social and political developments and discontent. However, it should be emphasised that the colonists' cause was 'no taxation without representation' rather than objecting to taxation as such.

The 13 American colonies¹⁸ which rebelled against Great Britain's rule in 1775 had, as noted, long been subject to various social and economic forces, which latter, combined with a growing sense of their own political identity, led to resistance against taxes imposed by the

¹³ *ibid.*

¹⁴ As Brogan, above n 5, 121 notes: 'The colonists had all the distrust of a standing army traditional in England since the time of Cromwell's major-general'.

¹⁵ Wood, above n 3, 23. Middlekauff, above n 2, 63 dryly observes: 'Collecting customs duties in America had not been one of Britain's glorious successes in the eighteenth century, nor had enforcement of any of the tax regulations that the colonials decided to evade'.

¹⁶ 4 Geo 3 c 15.

¹⁷ 5 Geo 3 c 12.

¹⁸ The 13 colonies were New Hampshire, Massachusetts, Rhode Island, Connecticut (collectively referred to as New England); New York, New Jersey, Pennsylvania, Delaware (the Middle grouping); and Maryland, Virginia, North Carolina, South Carolina and Georgia (the Southern grouping). In addition to the mainland American colonies, there were others in the Caribbean and western Atlantic – the Bahamas, Jamaica, and the lesser Antilles, comprising Anguilla, Antigua, Barbados, Barbuda, Dominica, Grenada, Montserrat, Nevis, St Kitts, St Vincent, Tobago and Tortola.

British Government. Great Britain's involvement in the Seven Years' War had resulted in heavy debts. The Seven Years' War was fundamentally a worldwide conflict between Great Britain and France for global supremacy, which had included the French and Indian wars in mainland America (although these started earlier, in 1754), to protect the British colonies. Great Britain thus needed revenue and attempted to impose measures to increase tax collected, which became increasingly contentious over time, as shown – but this was not new. The Sugar Act replaced the earlier Molasses Act of 1733,¹⁹ intended as a measure to regulate trade by imposing a six-pence per gallon duty on molasses imported from non-British colonies. It harmed the New England rum trade, which was dependent on molasses from the West Indies, so was widely evaded. It generated considerable smuggling, and was ultimately repealed. The 1764 Sugar Act²⁰ reduced the tax by half, but it remained unpopular, with Founding Father²¹ Samuel Adams of Massachusetts denouncing it before the Massachusetts assembly:

For if our Trade may be taxed why not our Lands? Why not the Produce of our Lands & every thing we possess or make use of? This we apprehend annihilates our Charter Right to govern & tax ourselves – It strikes our British Privileges, which as we have never forfeited them, we hold in common with our Fellow Subjects who are Natives of Britain: If Taxes are laid upon us in any shape without our having a legal Representation where they are laid, are we not reduced from the Character of free Subjects to the miserable State of tributary Slaves?²²

The Sugar Act was in turn repealed in 1766 and replaced by the Revenue Act²³ (see later), which decreased the duty to one penny per gallon on all imported molasses, whether British or not.

¹⁹ 6 Geo 2 c 13. This was one of a series of so-called Navigation Acts, designed to regulate maritime commerce, which overall increased revenue from the British colonies, by taxing the goods imported to and exported by the colonies. The American colonies had been affected by a number of Acts of Parliament, designed to protect British trade markets and revenue. The 1699 Wool Act (10 W 3 c 16), for example, forbade American colonists to export wool or woollen products, including to other mainland colonies, at a time when woollen goods exported from England bore heavy duties. The 1732 Hat Act (5 Geo 2 c 22) restricted the manufacturing, selling and exportation of hats made in the colonies.

²⁰ Above n 16.

²¹ There is no definitive list of the individuals who might be categorised as American Founding Fathers, with some sources recognising those who signed the Declaration of Independence and Constitution, while others would include all the delegates to the Constitutional Convention, and yet others those who signed the 1778 Articles of Confederation, or otherwise made valued contributions during the period of protests. The term 'Founding Fathers' seems to have been first used by the senator, Warren Harding in 1916 (see RB Bernstein, *Are We to Be a Nation?* (Cambridge MA, Harvard University Press, 2009): it depends on which sources one reads. In this paper, we interpret the term widely.

²² Cited by T Draper, *A Struggle for Power: The American Revolution* (USA, Vintage, 1996) 219.

²³ 6 Geo 3 c 52.

The revolutionary movement, however, is generally accepted as starting in 1765, when the ‘Sons of Liberty’²⁴ initiated protests against the Stamp Act²⁵ of that year, whereby the British Government required certain paper products to bear embossed stamps, including newspapers, pamphlets (but not books), almanacs, playing cards, dice and some legal documents. The colonies traditionally had the right to raise internal taxes themselves (the quote from Samuel Adams make this clear), and believed the British Government’s imposition of the Stamp Act challenged this right.²⁶ The protest against the Stamp Act became widespread. In the Virginia Resolves – a set of resolutions passed by the Virginia House of Burgesses in response to the Stamp Act – Patrick Henry, one of the Founding Fathers, stated that the attempt was ‘illegal, unconstitutional and unjust’:²⁷ the colonies could not send representatives to the Houses of Parliament in Great Britain to vote on the taxes imposed upon them. Oats and Sadler²⁸ comment also that the British Government ‘underestimated both the logistics of implementing a complex form of taxation across vast geographical distances and the strength of the resistance in the local setting’.²⁹

Alpaugh³⁰ makes clear that the activities of the ‘Sons of Liberty’, ‘[d]espite the geographical obstacles and cultural diversity of colonial America ... encouraged colonists to form a common political movement across a thousand miles with great intensity’, as ‘widespread, affiliated associations, primed for either peaceful debate or forceful action’. They had learned to speak with one voice, and that voice echoed the thoughts of the great political thinkers of the past. Van Tyne comments on the ‘subtle influence’ of Congregational and Presbyterian preachers – men often of Puritan ancestry, who knew the works of Sydney,

²⁴ The ‘Sons of Liberty’ comprised a fast-growing, but clandestine, body which aimed to organise resistance to British taxation and promote colonists’ rights. Its founding is attributed to Samuel Adams. Over time, the organisation became increasingly militant, and did much damage to the property of British officials and notably humiliated a number of such individuals by tarring and feathering them.

²⁵ Above n 17.

²⁶ S Edmund and HM Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill, University of North Carolina Press, 1951) 201. A distinction was generally made between direct/internal taxes (eg stamp duties) and indirect/external taxes (eg import/export duties aimed at regulating trade): see Wood, above n 3, 42. However, what was meant by a direct tax was never actually spelled out in the Constitution: M Keen and J Slemrod, *Rebellion, Rascals, and Revenue* (Princeton, Princeton University Press, 2021) 117.

²⁷ Cited by M Alpaugh, *Friends of Freedom: The Rise of Social Movements in the Age of Atlantic Revolutions* (Cambridge, Cambridge University Press, 2021) 20.

²⁸ L Oats and P Sadler, ‘Accounting for the Stamp Act Crisis’ (2008) 35(2) *Accounting Historians Journal* 101, 107.

²⁹ *ibid.*

³⁰ Above n 27, 43.

Milton, Locke, and Hoadly, and ‘often stated Locke’s theories more clearly than Locke himself’.³¹

Van Tyne continues:

In these sermons, the congregations were told of Locke’s doctrine that it was the people’s right to choose their own rulers and to fix the bounds of their authority. They were taught that government was accountable to the people and that the New England charter had been a compact between the sovereign and the first patentees.³²

The dissent thus adopted certain tones and language. More similar examples might be cited. The concerted movement against the Stamp Act succeeded in securing its repeal in 1766, only a few months after its introduction – and provided a basis for subsequent protests against the Townshend Acts (1767–68) and later the Tea Act of 1773.³³ As the colonies evidently objected to an ‘internal’ tax like the stamp tax, the British Government tried to raise revenue through more traditional ‘external’ customs duties. The Townshend Acts imposed duties on items such as paper, glass, tea and other staple goods.³⁴ Given the sentiments expressed above by Samuel Adams, the actions taken by the British Government show how out of touch it was with grass-roots colonial opinion. Most of the Townshend Acts had been repealed by 1770, as a result of protest movements similar to those that were successful against the Stamp Duty – except that the tea duty remained. The 1773 Tea Act lowered the tea duty – but was designed primarily to help the British East India Company sell the stockpiled tea held in its London warehouses (the company was in financial straits), and undercut the price of untaxed Dutch tea then being smuggled into the colonies.³⁵ The resultant Boston Tea Party, so-called, in which the ‘Sons of Liberty’ were also involved, provoked the British government into passing, in

³¹ CH Van Tyne, ‘Influence of the Clergy, and of Religious and Sectarian Forces, on the American Revolution’ (1913) 19(1) *American History Review* 44, 48–49.

³² *ibid* 49.

³³ 13 Geo 3 c 44.

³⁴ The Townshend Acts were the Revenue Act 1767 (7 Geo 3 c 46), the Indemnity Act (7 Geo 3 c 56), the Commissioners of Customs Act 1767 (7 Geo 3 c 41), the Vice Admiralty Court Act (8 Geo 3 c 22), with some including the New York Restraining Act 1767 (7 Geo 3 c 59) as a fifth. The duties on tea were expected to raise the most revenue: W Barker, ‘United States’ in P Essers (ed), *History and Taxation: The Dialectical Relationship between Taxation and the Political Balance of Power* (Amsterdam, IBFD, 2022) 728. Nonetheless, the yearly sums that were raised were scarcely a tenth of the annual cost of maintaining the British army in America (Wood, above n 3, 31).

³⁵ See Keen and Slemrod, above n 26.

1774–75, what became known as the Intolerable Acts (or Coercive Acts),³⁶ designed primarily as punitive measures against the colonists, curtailing many political and civic freedoms. It must not be forgotten that the ancestors of many colonial residents against whom these measures were directed had sought refuge in America from religious and political regimes that they had found oppressive – origins which were, arguably, indelibly etched into the colonial psyche, and would help form a burgeoning national identity.

It is important to note that initially the colonists did not desire independence, but wanted greater control over their own affairs, especially taxes. The pamphlet by Thomas Paine, published in 1776, *Common Sense*,³⁷ was key to the view that the colonists owed nothing to Britain. *Common Sense* was a polemic, reasoned, albeit radical, that argued with conviction against a monarchical rule from Great Britain and in favour of separating America from Great Britain. It was hugely influential in turning the tide of public opinion in favour of independence. Paine's work had such impact that he is often considered as one of the US Founding Fathers. Though himself English, at the invitation of Benjamin Franklin, he moved to America and took an active part in the struggle for independence.³⁸

Colonial Taxes

Oats and Sadler,³⁹ in relation to the Stamp Act, comment on attempts to make the tax acceptable to colonists. In the latter regard, the total tax was quite small; it was considered an equitable

³⁶ The Boston Port Act (14 Geo 3 c 19), the Massachusetts Government Act (14 Geo 3 c 45), the Administration of Justice Act (14 Geo 3 c 39) and the Quartering Act (15 Geo 3 c 54). A fifth Act, the Quebec Act (14 Geo 3 c 83), is sometimes regarded as one of the Intolerable Acts, in that it granted rights to the erstwhile antagonists of the colonists from the French and Indian wars.

³⁷ T Paine, *Common Sense* [1776] in T Paine, *Selected Writings of Thomas Paine*, I Shapiro and JE Calvert (eds), (New Haven & London, Yale University Press, 2014). In addition, also very influential was Paine's series of pamphlets, known as *The American Crisis* (a series published between 1776 and 1783, and sometimes just referred to as *The Crisis*): see T Paine, *The American Crisis* [1776–83], S Straub (ed), available at <https://thefederalistpapers.org/wp-content/uploads/2013/08/The-American-Crisis-by-Thomas-Paine-.pdf>. After a period of time spent in America, Paine returned to England in 1787. His best-known work, however, is *The Rights of Man*, published in two parts in 1791 and 1792 respectively: see T Paine, *The Rights of Man, Part I and Part II* [1791–92] in *Selected Writings of Thomas Paine*. Part II is significant in its discussion of taxation, and the uses to which tax revenue should be put, in many ways presaging the development of a welfare state.

³⁸ See, for example, J Shklar, 'The Boundaries of Democracy' in J Shklar, *Redeeming American Political Thought*, S Hoffmann and DF Thompson (eds) (Chicago, University of Chicago Press, 1998) 134. Though Paine was not directly involved in building its enduring institutions, he was much read by the American pioneers moving westward. 'More significantly he certainly impressed Jefferson genuinely and through him became a lasting voice in American democratic discourse.'

³⁹ Above n 28.

tax; differences in the colonial situation were considered prior to imposition; leading colonial administrators would deal with it; the tax would, possibly, stay in the colonies;⁴⁰ and stamp duties had been used before, by the colonists themselves, in Massachusetts in 1755 and New York in 1757. The New York tax was a halfpenny (1/2d) tax per copy on newspapers.⁴¹ However, Oats and Sadler⁴² also comment that:

The British government failed to consider adequately the nature of the other taxes in place or had been previously imposed in the individual colonies. Kozub [1983]⁴³ documents the array of taxes imposed by the colonial governments and concludes that the array of taxes imposed by the ‘colonial forefathers’ attempted in their design of tax instruments to measure the faculty or ability of individuals to pay the taxes. Indeed, several colonies imposed taxes actually designated as ‘faculty taxes’ which were taxes on the assumed income of specific occupations. In Connecticut, for example, it applied to attorneys.

Both Kozub⁴⁴ and Paul⁴⁵ cite the comment of Supreme Court Justice Cardozo that colonial forefathers ‘knew more about ways of taxing than some of their descendants seem to be willing to concede’. Kozub⁴⁶ provides an overview of the different taxes levied in the colonies at different times, adapted in Table 1 below, although this appears more a listing of the different tax bases, that is, what was taxed, not how. He further categorises revenue collection measures into seven groups: quit-rents; poll taxes; property taxes; fees; miscellaneous taxes; lotteries; and duties.

A quit-rent is a duty imposed on occupiers of freehold or leasehold land, in lieu of services owed to a higher authority which had granted or assigned the land. It was, says Kozub,⁴⁷ ‘an inextricable part of the feudal manorial land system transported from England to American soil’, and technically, it would not be considered a tax – though many might dissent. Kozub reviews the circumstances of each of the colonial groupings – Southern, New England

⁴⁰ *ibid* 117. Oats and Sadler indicate that the issues of whether the tax money would stay in the colonies was far from clear.

⁴¹ *ibid* 111.

⁴² *ibid* 114.

⁴³ RM Kozub, ‘Antecedents of the Income Tax in Colonial America’ (1983) 10(2) *Accounting Historians Journal* 99.

⁴⁴ *ibid* 100.

⁴⁵ RE Paul, ‘History of Taxation in the United States’ (1955) 1 *Annual Tax Conference* 5.

⁴⁶ Above n 43, 101, referring to RT Ely, *Taxation in American States and Cities* (New York, Thomas Y Cromwell and Co, 1888) 118. Kozub’s original table includes Vermont, which was not one of the 13 states, so is excluded here.

⁴⁷ Above n 43, 100.

and Middle⁴⁸ – and shows how the individual tax systems in each colony, or group of colonies, progressed and evolved over time, from their more primitive origins to sophisticated systems, designed to achieve a satisfactory balance between ‘the financial need of the colony’⁴⁹ and ‘the reality of the economic and social relations of the colonies’.⁵⁰ The evolution was not always easy or steadily sustained, but accommodated the different requirements of the colonies at their own speed of development.

Table 1: Overview of Colonial Taxes

	Tax levied									
	Poll tax	Land	Collective mass of property ^c	Horses and cattle	All farm stock	Stock in trade of merchants	Money on hand or at interest	Houses, etc	Slaves	Carriages
Colony										
<i>Southern:</i>										
Virginia	X	X		X ^b					X	X
North Carolina	X	X							X	
South Carolina	X	X				X			X	
Georgia	X	X				X		X	X	
<i>Middle:</i>										
New York	X	X	X		X					
New Jersey		X		X				X		X

⁴⁸ Above n 18.

⁴⁹ Above n 43, 113.

⁵⁰ *ibid.*

Pennsylvania	X	X		X				X	X	X
Delaware	X	X	X ^a		X ^a					
Maryland	X	X	X		X				X	
<i>Northern:</i>										
New Hampshire	X	X		X		X	X			
Massachusetts	X	X		X		X	X	X		
Rhode Island	X	X	X		X					
Connecticut	X	X		X			X	X		X
^a Annual income from ^b Horses only ^c With certain exceptions Source: Modified from Ely, <i>Taxation in American States and Cities</i> 118.										

Differences in the needs of the various colonies generally resulted in the assimilation of different forms of the English financial system. The political and economic organisation of the colonies accounts for many differences, and the pattern of organisation of each colony was dependent on the time period in which it was originally organised.⁵¹

Kozub also comments that the emergence of the faculty to pay principle (as vertical equity) came about despite ‘the clashing of divergent interests ... [progressing] from existence, to expenditures, to property and finally to product ... to test the individual’s faculty to bear the burden of government’.⁵² He includes a telling example from Pennsylvania’s poll tax, from 1782, showing too that taxes were evolving even during the period of conflict with Great Britain. This is adapted in Table 2 below.⁵³

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid* 112, referring to W Lowrie and MStC Clark (eds), *American State Papers, Finance* (Washington, Gales and Seaton, 1832–61).

Table 2: Poll Tax – Pennsylvania

Pennsylvania's classified poll tax (originally enacted 1782, and amended 1785)	
Class	
Freemen of no profession or calling	50¢ to \$10.00
Tradesmen	30¢ to \$2.00
Tavern-keepers, shop-keepers and other retailers	50¢ to \$5.00
Brokers, bankers, merchants, lawyers and physicians	\$1.00 to \$10.00
Persons of professions or occupations not included above	25¢ to \$8.00
Exemptions: schoolmasters, ministers of the gospels, mechanics, and manufacturers.	
Source: <i>American State Papers, Finance</i>	

What emerges from Kozub's overview is a picture of states developing internal tax systems individually to meet their own needs, each at a different speed and with differing degrees of sophistication. In the development of the faculty to pay principle, which is seen in part in the Pennsylvania poll tax above (the varying rates depended on 'profits arising from the offices, posts, trade and occupations'⁵⁴), the colonists were in many ways ahead of tax developments in Great Britain, and were not hidebound by particular conventions or practices. It is unsurprising that Great Britain's attempts to impose tax outside this framework should be so resented or that subsequent suggestions for federal taxes, after the end of the War, should be so hotly debated.

Wartime Finance

⁵⁴ *ibid* 111. It is generally considered that the colonists, in comparison with residents of Great Britain, suffered a lower burden of tax and a higher standard of living. See J Keown, 'America's War for Independence: Just or Unjust?' (2009) 6(2) *Journal of Catholic Socialist Thought* 277, 284–86.

During the War itself, the Second Continental Congress, a general congress of the colonies, took on the responsibilities of overall colonial government.⁵⁵ The issue of financing the War was an immensely difficult problem. As Becker notes,⁵⁶ the Congress had no power to tax or compel the states to impose/raise taxes, although it could ask them to do so. In addition to receiving (very small) state contributions, its chief means of finance was to print money⁵⁷ and raise loans (including from overseas), which resulted in currency becoming devalued, rampant inflation and soaring debts. The states themselves followed a similar course, the idea being that borrowing and currency issue was ‘backed by promise of taxes at some conveniently future date’, which deferred consideration of ‘what constituted *just* taxation’.⁵⁸ To deal with soaring prices and collapsing currencies, however, the states had no real option other than to do what Congress could not, namely to raise taxes, which they started to do in 1777. As Becker notes:⁵⁹

In that year, all the states save Delaware, New York, and Georgia began levying high taxes to reduce the amount of circulating paper, to raise money to supply the Continental Army and the state militias, and to meet, whenever possible, Congress’s requisitions. To make these levies more palatable, many of the states substantially reformed their tax laws. Virginia, for example, eventually replaced a land tax that fell equally on every acre with an *ad valorem* land tax. Maryland enshrined the ability-to-pay principle in its new state constitution, which denounced poll taxes as ‘grievous and oppressive’. Paupers aside, it insisted, ‘every...person in the state ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property...’ (Shipton, 1955, No. 14836).⁶⁰

The amounts levied were huge compared with the taxes colonists had been accustomed to paying. Rhode Island, for example, which normally operated its colonial government on £4,000 a year, levied taxes of £96,000 in 1777 and £94,000 in 1778, and had levied a total of nearly half a million in taxes by the end of 1779. Even allowing for inflation, these were wholly unprecedented levies. In a two-year period (1778 and 1779), Pennsylvania levied

⁵⁵ This convened on 10 May 1775, shortly after the Battles of Lexington and Concord, and was successor to the First Continental Congress, which met (in Philadelphia) from 5 September to 26 October 1775. Following the adoption of the Lee Resolution, declaring independence from Great Britain on 2 July 1776, the Congress approved the issue of the Declaration of Independence on 4 July 1776. The Congress drafted the Articles of Confederation and Perpetual Union, which formed the first constitution and established the United States of America as a separate sovereign power.

⁵⁶ RA Becker, ‘Currency, Taxation, and Finance, 1775–1787’ in Green and Pole, above n 4, 389.

⁵⁷ See F Grubb, ‘The US Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and the Constitutional Transformation of the US Monetary System’ (2006) 13(1) *Financial History Review* 43. Grubb makes the point that the American colonies were some of the first to experiment successfully with fiat money, and by 1750, were handling effectively their tax-backed paper money systems. The paper money could be used to pay the state of issue’s taxes, at par value. He argues that state power to tax meant that that state currencies remained stronger than the Continental (or ‘national’) currency.

⁵⁸ Becker, above n 56, 391. See also Wood, above n 3, 146–49.

⁵⁹ Becker, above n 56, 392.

⁶⁰ CK Shipton (ed), *Early American Imprints, 1639–1800: A Microprint Compilation by the American Antiquarian Society* (Worcester, Massachusetts, American Antiquarian Society, 1955).

£5,000,000. In no year between 1763 and 1775 had colonial Pennsylvania raised more than £34,000 in taxes.

Taxes were widely resisted, as might have been anticipated. It cannot have escaped the notice of colonial administrators that they were asking for more tax than the British had tried to raise, in order to win a war against Britain's right to tax. Fighting for freedom was costly not only in lives lost and blood spilt, but also in financial terms.

Becker remarks⁶¹ on Congress's attempts in 1781 to re-establish its position as a national government: it had by then yielded some of its authority to the states and had even had to stop paying the army. In that year it undertook considerable reorganisation, and replaced various committees 'that oversaw finance, military and diplomatic affairs with departments headed by single executive officers'⁶² and chose Robert Morris to run the newly-created Department of Finance. Morris was 'a prominent Philadelphia merchant and committed nationalist who sat in Congress from 1775 to 1778'.⁶³ Also in 1781, Congress asked the states to grant it power to 'collect a 5 per cent impost on all foreign goods imported into the United States'.⁶⁴ As noted earlier, Congress did not have taxing powers, and could only tax with agreement from the states – which they did not grant, and both the Congress and individual states ended the War with massive public debts, with some 50 to 90 per cent of post-War state revenues being allocated to service interest on debts.⁶⁵ This revenue they attempted to raise by heavy new general taxes and indirect taxes and generally attempting to revalue (or, rather, devalue) debt.

Throughout the new republic, as taxes rose to sink⁶⁶ the states' debts in the midst of deflation and depression, angry taxpayers began demanding relief – tax abatements and postponements, the right to pay in virtually any sort of outstanding state or federal notes or certificates, or to pay in commodities and produce. Most states (Massachusetts excepted) adopted extensive tax relief programs in the mid-1780s. Among the most popular demands of the protesters, and politically the most volatile, was the renewed emission of state legal-tender paper money which, harassed taxpayers believed, would make both taxes and private debts easier to pay.⁶⁷

⁶¹ Becker, above n 56, 393.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.* 395.

⁶⁶ Meaning to raise tax in proportion to requirements and remove the money from circulation, that is, to establish a sinking fund.

⁶⁷ Becker, above n 56, 395–96. Rioting broke out in Massachusetts, which became known as Shays's Rebellion. See also MM Edling and MD Kaplanoff, 'Alexander Hamilton's Fiscal Reform: Transforming the Structure of Taxation in the Early Republic' (2004) 61(4) *William and Mary Quarterly, Third Series* 713, 714.

Nonetheless, Becker believes that in general the states managed their post-War debts with considerable success, but the methods by which it was achieved ('devaluation of debt, currency inflation, tax suspensions and abatements, and the impoverishment of Congress'⁶⁸) caused Hamilton, Madison, Morris and others like them to believe that the existing constitutional arrangements were flawed, and that national fiscal and monetary policies should be put beyond popular caprice and the power of state legislatures. In this they were supported by Paine, whose pamphlet, *Pamphlet 9b The Crisis Extraordinary. On The Subject of Taxation*,⁶⁹ written in Philadelphia in 1780, expressed deep concern about the cost of the War and how it might be paid for by taxation measures. The debate between the Federalists and the Anti-Federalists thus had deep roots.

Influences on Political and Tax Thinking

Colonial dissent did not, of course, develop in a vacuum, but was informed and influenced by ideas propounded by great legal and philosophical minds.⁷⁰ Bailyn⁷¹ argues that the colonists identified themselves with the early eighteenth-century writers, particularly John Trenchard and Thomas Gordon (joint authors of *Cato's Letters* – see later), who in turn reworked seventeenth-century radical social and political thought of the English Civil War and of the Commonwealth period – modifying and applying it to the problems of eighteenth-century politics.⁷² Bailyn concludes: 'Within the framework of these ideas, Enlightenment abstractions and common law precedents, covenant theology and classical analogy – Locke, and Abraham, Brutus and Coke – could all be brought together into a comprehensive theory of politics'.⁷³

⁶⁸ Becker, above n 56, 396.

⁶⁹ This is part of *The American Crisis* – see above n 37.

⁷⁰ See, for example, D Lambright, 'Man, Morality, and the United States Constitution' (2015) 17(5) *University of Pennsylvania Journal of Constitutional Law* 1487.

⁷¹ Bailyn, above n 12, 54.

⁷² *ibid.* See also M Goldie, 'The English System of Liberty' in M Goldie and R Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge, Cambridge University Press, 2005) 40–78.

⁷³ Bailyn, above n 12, 54. For an exhaustive assessment of Renaissance, medieval, and ancient political philosophy and American religious writings of the eighteenth century, see E Sandoz, *A Government of Laws. Political Theory, Religion and the American Founding* (Baton Rouge, Louisiana State University Press 1990); M Stewart, *Nature's God: The Heretical Origins of the American Republic* (New York, Norton, 2014), who deals with the influence of the writings of Spinoza, Lucretius, and other great philosophers; CJ Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (Cambridge MA, Harvard University Press, 1994); DJ Bederman, *The Classical Foundations of the American Constitution Prevailing Wisdom* (Cambridge, Cambridge University Press, 2008).

Asadi⁷⁴ makes the point that, in the area of constitutional development, law and philosophy are very closely linked. He examines particularly the influence of John Locke on Founding Fathers Samuel Adams, Thomas Jefferson, James Madison, Alexander Hamilton and John Adams. However, the 1984 article by Donald Lutz⁷⁵ reveals the wealth of different influences at work in more (quantitative) detail. He starts by summarising earlier work that had examined various writers' influences through the use of textual analysis, assessment of the educational background of prominent American political writers (eg Madison, Hamilton and Jefferson), examination of the books in the libraries of prominent Americans, and of institutions, library companies, private libraries, and also of booksellers' catalogues. Lutz's approach was different. In his own words:⁷⁶

Approximately ten years ago this author set out with Charles S. Hyneman to read comprehensively the political writings of Americans published between 1760 and 1805. This period was defined as the 'founding era' during which the theory and institutions informing the state and national constitutions took final form. Reviewing an estimated 15,000 items, and reading closely some 2,200 items with explicitly political content, we identified and rated those with the most significant and coherent theoretical content. Included were all books, pamphlets, newspaper articles, and monographs printed for public consumption. Excluded was anything that remained private and so did not enter public consciousness, such as letters and notes. Essentially we exhausted all those items reproduced in collections published by historians, the newspapers available in the Library of Congress, the early American imprints held by the Lilly Library at Indiana University, the Huntington Library in San Marino, California, and the Library of Congress. Finally, we examined the two volumes of Shipton and Mooney, National Index of American Imprints, for items in the Evans collection of early American imprints on microcard.

The resulting sample has 916 items, which include 3,154 references to 224 different individuals. The sample includes all of the Anti-Federalist pieces identified by Storing (1981)⁷⁷ plus 33 more, for a total of 197 Anti-Federalist pieces. It also includes 190 items written by Federalists.

Lutz goes on to say that the sample did not include proceedings of legislature and conventions, and clarifies that a reference/citation means 'any footnote, direct quote, attributed paraphrasing, or use of a name in exemplifying a concept or position'.⁷⁸ There are obvious flaws with this method, in that it cannot specify how the citations have been used, nor does it identify the particular topic they address, although it does establish which writers have been

⁷⁴ T Asadi, 'En Route to the US Constitution: Founding Fathers and Lockean Philosophy' (2015) 16 *Historia Constitucional: Revista Electrónica de Historia Constitucional* 407.

⁷⁵ DS Lutz, 'The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought' (1984) 78(1) *American Political Science Review* 189.

⁷⁶ *ibid* 191.

⁷⁷ HJ Storing, with M Dry, *The Complete Anti-Federalist* (Chicago, University of Chicago Press, 1981).

⁷⁸ Lutz, above n 75, 191.

consulted. A further difficulty is that, given the nature of language, it is often possible to express the same ideas by using different words, so more subtle uses of ideas may not have been picked up.⁷⁹ In terms of identifying influences on tax thinking, while this approach does not, for example, help us attribute specific tax ideas to specific writers, it does allow us to suggest with some certainty whose ideas may have been considered. Lutz notes the use of other sources, for example, the Bible, and the common law and classical authors, and includes a table of the most cited individuals, adapted below, in Table 3. Wood notes:

It [the American revolution] seemed to be a peculiar moment in history when all knowledge coincided, when classical antiquity, Christian theology, English empiricism, and European rationalism could all be linked. Thus Josiah Quincy, like other Americans, could without any sense of incongruity cite Rousseau, Plutarch, Blackstone, and a seventeenth Puritan all on the same page.⁸⁰

Lutz comments⁸¹ that Montesquieu and Locke are very prominent in the 1760s – the period seeing the highest number of Enlightenment author citations, and comprise over 60 per cent of all such references – but comprise over 75 per cent of Enlightenment citations during the 1770s. Locke features most prominently in terms of justifying breaking away from England, but Montesquieu as regards constitutional design, with the latter increasing to almost 60 per cent of Enlightenment references in the 1780s when references to Locke fade. As Lutz remarks, this should not surprise us, given that Locke speaks about the basis for government, hence justifying revolt, not design of institutions, which fall into Montesquieu’s domain.

Other writers also feature during the constitution-writing era. Lutz lists Beccaria and deLolme (or DeLolme), ‘Cato’ (Trenchard and Gordon), Hoadley, Bolingbroke, Price, Burgh, Milton, Rollin, Molesworth, Priestly, Macaulay, Sidney, Somers, Harrington, Rapin, Robertson, Grotius, Rousseau, Pope, Raynal, Mably, Burlamaqui and Vattel,⁸² but none was utilised as much as Montesquieu. The citations of Blackstone and Hume increased from the 1770s – both being ‘strong on government process’,⁸³ but also incidentally ‘extending Locke’s

⁷⁹ English is, perhaps, notorious for having a wealth of finely nuanced words which bear the same or similar meanings. For instance, what is the precise difference between words like ‘fair’, ‘beautiful’, ‘pretty’, ‘attractive’, ‘lovely’, ‘pulchritudinous’, ‘pleasing’, ‘alluring’, ‘handsome’, ‘prepossessing’, etc, especially when describing physical appearance? Moreover, the same word sometimes has diametrically opposed meanings, for instance, ‘sanction’, which can mean ‘allow’ or ‘forbid’.

⁸⁰ Wood, above n 3, 7.

⁸¹ Lutz, above n 75, 192.

⁸² *ibid* 193.

⁸³ *ibid*.

visibility’,⁸⁴ as Blackstone cites him a number of times, whereas Hume was noted for his opposition to Locke’s views.

Table 3: Most Cited Thinkers by Decade⁸⁵

	1760s	1770s	1780s	1790s	1800–05	% of total number
Montesquieu	8	7	14	4	1	8.3
Blackstone	1	3	7	11	15	7.9
Locke	11	7	1	1	1	2.9
Hume	1	1	1	6	5	2.7
Plutarch	1	3	1	2	0	1.5
Beccaria	0	1	3	0	0	1.5
Trenchard and Gordon	1	1	3	0	0	1.4
Delolme	0	0	3	1	0	1.4
Pufendorf	4	0	1	0	5	1.3
Coke	5	0	1	2	4	1.3
Cicero	1	1	1	2	1	1.2
Hobbes	<u>0</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>1.0</u>
	33	25	37	29	32	32.4
Others	<u>67</u>	<u>75</u>	<u>63</u>	<u>71</u>	<u>68</u>	<u>67.6</u>
	100%	100%	100%	100%	100%	100%
<i>N</i>	216	544	1,306	674	414	3,154

⁸⁴ *ibid.*

⁸⁵ *ibid* 193.

This table is limited to those who were cited at least 32 times, which is 1 per cent of the total of 3,154 citations. The extra decimal point in the last column is to allow more precise recovery of the number of citations over the era, whereas all other percentages are rounded off to the nearest whole number to ease the viewing of the table. The use of 0 per cent indicates fewer than 0.5 per cent of the citations for a given decade.

Of particular relevance to this chapter are Lutz’s two tables showing the citations by the Federalists and Anti-Federalists, adapted in Tables 4 and 5 below.⁸⁶

It is very noticeable that the Enlightenment writers had enormous influence alike on both Federalists and Anti-Federalists, and this influence is discussed in the next section.

Table 4: Federalist Versus Anti-Federalist (1780s)

	Federalist (%)	Anti-Federalist (%)	Total for 1780s (%)
Bible	0	9	34
Enlightenment	34	38	24
Whig	23	29	19
Common law	8	12	9
Classical	33	9	10
Peers	1	2	3
Other	<u>1</u>	<u>1</u>	<u>1</u>
	100	100	100
<i>N</i>	164	364	1,306

Table 5: Twenty Most Cited Thinkers: Federalist Versus Anti-Federalist (1780s)

⁸⁶ *ibid* 194, 195.

	Federalist (%)	Anti-Federalist (%)	Total for 1780s (%)
Montesquieu	29	25	14
Blackstone	7	9	7
Locke	0	3	1
Hume	3	1	1
Plutarch	7	0	1
Beccaria	0	4	3
Trenchard and Gordon	2	2	3
Delolme	0	6	3
Pufendorf	0	1	1
Coke	0	1	1
Cicero	0	1	1
Robertson	0	0	1
Lycurgus	6	1	1
Mably	7	2	2
Grotius	5	0	1
Temple	5	1	1
Price	0	2	1
Addison	0	2	.5
Vattel	0	1	.5
Sidney	<u>1</u>	<u>0</u>	<u>.5</u>
	72	62	44.5
Other	<u>28</u>	<u>38</u>	<u>55.5</u>
	100	100	100.0

N	164	364	1,306
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Theories of Taxation – Locke, Montesquieu and Hume

In Table 5 above, three of the first four names are those supporting or opposing the idea of a social contract – Montesquieu (1689–1755), Locke (1632–1704) and Hume (1711–76). William Blackstone (1723–80), on the other hand, was renowned as a legal theorist, and for his *Commentaries on the Laws of England*.⁸⁷ The four volumes of Blackstone’s *Commentaries* addressed the rights of persons, the rights of things, private wrongs and public wrongs. The work was hugely influential, and made the common law accessible to a lay reader, with Holdsworth saying that ‘[i]f the *Commentaries* had not been written when they were written, I think it very doubtful that the United States, and other English speaking countries would have so universally adopted our [English] common law’.⁸⁸ It is hard to overestimate the influence of the *Commentaries* on affairs in the Americas. To this day, they are still cited in US Supreme Court decisions.

Blackstone’s writings were nearly contemporaneous with the ‘founding era’, but Locke, Montesquieu and to a great extent, Hume, had written well before the War. Their ideas were well known, as Lutz’s work makes clear. The relationship between a government and its citizens lies at the heart of the social contract they either opposed or supported. A key element of this is taxation, so their ideas on this topic are of great relevance. An observation often made about any form of social contract is that it was tacit and did not exist in any written format. Arguably, the American Constitution was an attempt to put into written form a version of the social contract, to define the rights of government and those governed. However, Pollock⁸⁹ notes that there is some historical evidence of written agreements, citing Magna Carta as one such instance, and as another, the formal covenant made by the Pilgrim Fathers for a body

⁸⁷ W Blackstone, *Commentaries on the Laws of England*, vols 1–4 (Oxford, Clarendon Press, 1765–70).

⁸⁸ WS Holdsworth, ‘Sir William Blackstone’ (1928) 7(2) *Oregon Law Review* 155, 157.

⁸⁹ F Pollock, ‘The Social Contract in English Political Philosophy’ (1908) 9(1) *Journal of the Society of Comparative Legislation, New Series* 107, 108.

politic. Nonetheless, as the present authors have argued elsewhere,⁹⁰ it is perhaps not understood today how radical the idea of a written document was at the time the US Constitution was first drafted. Then, the predominant form of government worldwide was monarchy, often absolute.

In this context, the wider significance of Locke's work must be appreciated. He wrote after experiencing the English Civil War (including the execution of Charles I), the restoration of the monarchy, the 'Glorious Revolution', which saw the removal of another monarch (James II) and the establishment of a Bill of Rights. He was accustomed to see the sweeping away of long-established institutions (the monarchy, albeit restored, the House of Lords, the Anglican Church and the Cromwellian Protectorate). As Snape and Frecknall-Hughes⁹¹ comment, that idea of 'starting from first principles' permeated much of his writing, and note, in *An Essay Concerning Human Understanding*,⁹² throughout Book 1, his use of the image of a 'tabula rasa', or blank slate, to describe the state of a man's mind, before experience writes upon it. In his *Second Treatise of Government*,⁹³ in defining political power, he aims to 'derive it from its original'.

A 'tabula rasa', however, really means a slate that is blank because it has been 'scraped clean' (the meaning of 'rasa') of what had been written on it previously.⁹⁴ Is this not similar to the situation in which the American states found themselves after the end of the War of Independence? They had thrown off the rule of Great Britain, and were starting national government 'from scratch', but had legacy systems of state government and state taxation. A key question was how to fit the state and national systems together, not least in terms of taxation, as imposing taxation at national level might not seem so different from the British imposts which they had fought to abolish. It needed to be something to which all parties agreed.

⁹⁰ H Gribnau and J Frecknall-Hughes, 'The Influence of Social Contract Theory on Taxation' in R van Brederode (ed), *The Political Philosophy of Taxation: A History from the Enlightenment to the Present* (London, Springer, 2022) 51.

⁹¹ J Snape and J Frecknall-Hughes, 'John Locke: Property, Tax and the Private Sphere' in PA Harris, and D de Cogan (eds), *Studies in the History of Tax Law*, vol 8 (Oxford, Hart Publishing, 2017) 1, 7.

⁹² J Locke, *An Essay Concerning Human Understanding, Epistle to the Reader* [1689, dated 1690] (P Nidditch (ed) (Oxford, Oxford University Press, 1975) 9–10.

⁹³ J Locke, 'Second Treatise of Government' in P Laslett (ed), *Two Treatises of Government* [1690] (Cambridge, Cambridge University Press, 1988) 1.

⁹⁴ The term is derived from the Roman use of a wax tablet (tabula), made of wood and covered with a wax layer for writing on. It could be scraped clean of what had been previously written and smoothed for reuse. See Gribnau and Frecknall-Hughes, above n 90, 59.

Locke did not actually write much about taxation, although what he did write has been much discussed ever since. The essence of his thought appears in a key passage of the *Second Treatise*:⁹⁵

‘Tis true that Governments cannot be supported without great charge, and ‘tis fit every one who enjoys his share of the Protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own Consent – *i.e.* the Consent of the Majority, giving it either by themselves or their Representatives chosen by them.

For Locke, tax is very much tied up with property rights, and the meaning of many of the terms he used is still debated.⁹⁶ However, a crucial element here in the US context is the requirement of the consent of the majority. Later in the same section of the *Second Treatise*, Locke comments that the ‘supreme power cannot take from any man any part of his property without his own consent’. This is the basis of his social contract. The voluntary alienation of property rights contradicts the government-protected right to private property – but tax is seen as the voluntary and consensual price paid for living in a society. It is not clear from Locke’s text whether majority means a majority of individuals or elected representatives. In the latter case, a sizeable minority might disagree. Locke says, however, that a legislative power cannot act wilfully or arbitrarily,⁹⁷ and that in such cases, revolt by the people is justified.⁹⁸ He was never specific about any particular form of taxation, but thought that tax would fall ultimately on land. As a former Registrar of Excise himself during his long and varied career, he would have known, though, that excise and customs duties raised much more than land taxes.

For Montesquieu and Hume, there was no need for a social contract. That man lived in society was simply a fact of life. To Montesquieu, despotic power concentrated in the hands of one person or institution was abhorrent, and he famously distinguished three types of power needed to sustain political liberty: legislative, executive and judicial,⁹⁹ which should work as partners in making laws. He saw political liberty as closely linked to taxes: ‘[t]he revenues of the state are a portion each citizen gives of his goods in order to have security or the comfortable enjoyment of the rest’.¹⁰⁰ The raising of public funds, a fortiori, the levying of taxes, is the

⁹⁵ Locke, above n 93, Ch 11, 140.

⁹⁶ See Gribnau and Frecknall-Hughes, above n 90, 60, and Snape and Frecknall-Hughes, above n 91.

⁹⁷ Locke, above n 93, Ch 11.138.

⁹⁸ *ibid* Ch 19.222.

⁹⁹ Montesquieu, *The Spirit of the Laws* [1748], AM Cohler, BC Miller and HF Stone (trans and eds) (Cambridge, Cambridge University Press, 1989) XI, 6, 157–58.

¹⁰⁰ *ibid* XIII, 1, 123.

legislator's prerogative and it is the 'most important point of legislation'.¹⁰¹ Taxation, like governance, is all about moderation and political prudence.¹⁰²

Montesquieu also thought that taxes should be adapted to the state in which societies find themselves, and their general spirit: they were contextual, in other words. However, the greater the political liberty enjoyed, the greater the amount of revenue that could be raised.¹⁰³ He distinguishes between taxes on persons, land and commodities. For example, taxes such as a poll tax are more common in despotic regimes with little or no political liberty, and those on commodities (indirect taxes) are more usual in moderate states with more political liberty, as they are less related to the person. The latter are least felt by payers because they are not specifically requested,¹⁰⁴ and can be so designed that people are almost unaware of them.¹⁰⁵ He advocates progressive taxation in a limited way.

Like Montesquieu, Hume saw no need for a social contract. However, the development of his thought processes is hard to unwind, owing to his frequent revisions of his own works over time. A member of the Scottish Enlightenment, he had witnessed in his lifetime, like Locke, significant unrest. As Frecknall-Hughes¹⁰⁶ notes:

Scotland had been involved in the disastrous Darien schemes, to set up colonies in the late 1690s on the Isthmus of Panama, which had lessened resistance to its formal political union with England in 1707, though there was still protest against this; there were the various Jacobite rebellions (1689–1692, 1715, 1719 and 1745); the South Sea Bubble had burst in 1720; the Bank of England had been established (1694) and the National Debt to fund Britain's wars, notably the War of the Spanish Succession (1702–1713) and the War of the Austrian Succession (1740–1748).

During his own lifetime, Hume was better known as a historian than as a philosopher. He wrote a six-volume history of England¹⁰⁷ between 1754 and 1761, and was a friend of both Benjamin Franklin and Jean-Jacques Rousseau, although Rousseau latterly fell into contention with him, alleging that he had plotted to undermine his character. Hume is widely credited with destroying the (Lockean) concept of a social contract, notably in his work, *Of the Original*

¹⁰¹ *ibid* XI, 6, 164.

¹⁰² JN Shklar, *Montesquieu* (Oxford, Oxford University Press, 1987) 91.

¹⁰³ *ibid*, citing Montesquieu, above n 99, XIII, 12, 220–21.

¹⁰⁴ Montesquieu, above n 99, XIII, 7, 217.

¹⁰⁵ *ibid* 218.

¹⁰⁶ J Frecknall-Hughes, 'Locke, Hume, Johnson and the Continuing Relevance of Tax History' (2014) 12(1) *eJournal of Tax Research* 87, 93.

¹⁰⁷ D Hume, *The History of England* [1754–61] (USA, Liberty Fund, Incorporated, 1983).

Contract.¹⁰⁸ He objected to notions of tacit consent: many people might live under a particular government simply because they are unable to leave. Hume argued that government was most usually founded in violence (commonly because of a shortage of resources), a subject to which he frequently returns.¹⁰⁹ With regard to free government, Hume argued, against the prevailing view, that a republic was possible in a large commonwealth (see below).

Without the benefit of a social contract theory, Hume relies on custom as an underlying rationale for the imposition of taxation, but does not outline any underlying theory. People deal with what exists: there is no need to speculate why something might exist. For example, he notes that '[t]ime, by degrees, ... accustoms the nation to regard, as their lawful or native princes, that family, which, at first, they considered as usurpers or foreign conquerors'.¹¹⁰ This may go some way towards understanding Hume's view of taxation expounded in his work *Of Taxes*.¹¹¹ This is a purely practical work, albeit inconsistent. Gribnau and Dijkstra,¹¹² for instance, comment that Hume's ideas about taxation 'resemble more an assemblage of separate thoughts than a consistent exposition on taxation'. He opines that workers should increase their labour to deal with any increase in taxation, not seek higher wages, in that a man working more will earn more. In *Of Taxes*, Hume categorises taxes into consumption taxes, taxes on possessions and poll taxes.

Hume notes that not all customs are beneficial, particularly in reference to taxation. Even established governments, particularly monarchies, may degenerate owing to excess debts and taxes, using France as an example in *Of Civil Liberty*:¹¹³

The greatest abuses ... proceed not from the number or weight of taxes, beyond what are to be met with in free countries; but from the expensive, unequal, arbitrary,¹¹⁴ and intricate method

¹⁰⁸ D Hume, *Of the Original Contract* [1748], Essay 34 in *Essays, Literary, Moral, and Political*, 270–83 (London, Ward, Lock, & Co, 1875).

¹⁰⁹ D Hume, *Of the Origin of Government* [1777], Essay 5 in *Essays, Literary, Moral, and Political*, 25–28 (London, Ward, Lock, & Co, 1875).

¹¹⁰ Hume, above n 108, 275–76.

¹¹¹ D Hume, *Of Taxes* [1752], Essay 30 in *Essays, Literary, Moral, and Political*, 203–207 (London, Ward, Lock, & Co, 1875).

¹¹² H Gribnau and C Dijkstra, 'Social Contract and Beyond: Sociability, Reciprocity and Tax Ethics' in R van Brederode (ed), *Ethics and Taxation* (Singapore, Springer Nature Pte Ltd, 2020) 47, 81.

¹¹³ D Hume, *Of Civil Liberty*. [1741] Essay 11 in *Essays, Literary, Moral, and Political*, 49–55 (London, Ward, Lock, & Co, 1875).

¹¹⁴ Smith elaborated on these abuses in his famous four maxims of taxation: A Smith, *An Inquiry in the Nature and Causes of the Wealth of Nations* [1776] (Indianapolis, Liberty Fund, 1981) V.ii.b, 1–6, 825–27.

of levying them, by which the industry of the poor, especially of peasants and farmers, is, in great measure, discouraged, and agriculture rendered as beggarly and slavish employment.

Hume does not offer recommendations for development of a tax system, although he does show concern with the level of public debt.¹¹⁵ He feels that luxury goods should be taxed rather than the things needed in daily life: there is no choice in buying the latter whereas there is as regards luxuries.

The best taxes are those which are levied on consumptions, especially those of luxury: because such taxes are least felt by the people. They seem to be, in some measure, voluntary; since a man may chuse how far he will use the commodity which is taxed: They are paid gradually and insensibly: They naturally produce sobriety and frugality, if judiciously imposed: And being confounded with the natural price of the commodity, they are scarcely perceived by the consumers. Their only disadvantage is, that they are expensive in the levying.¹¹⁶

Tax on consumption was convenient in terms of payment, although costly to levy. Hume opposed arbitrary taxes, as they were unfair and uncertain and ‘most pernicious’¹¹⁷ – and disagreed with Locke that all taxes would ultimately fall upon land. Dome comments that Hume left ‘to future generations the problem of how to establish a system of public finance compatible with liberal and commercial society’.¹¹⁸

In terms of the taxes outlined above, we see mentioned land taxes, taxes on commodities in the form of excises and customs, and poll taxes. As the earlier discussion makes clear, while the American colonists used such taxes, they had adapted them to their circumstances and had advanced beyond them in concept in the use of a faculty tax, implementing vertical equity in regard to an ability to pay, and a near-proxy for an income tax.

It is, perhaps, surprising that the work of Jean-Jacques Rousseau (1712–78) does not feature more prominently in the lists above adapted from Lutz.¹¹⁹ He was a noted social contract theorist, and as mentioned, was known to Hume and Franklin, and had much to say on taxation.¹²⁰ Dietze argues that Rousseau was rejected for his advocacy of absolute democracy,

¹¹⁵ T Dome, *The Political Economy of Public Finance in Britain 1767–1873* (London and New York, Routledge, 2004) 3.

¹¹⁶ *ibid* 3 citing *Of Taxes*, above n 111, 205.

¹¹⁷ *ibid*.

¹¹⁸ *ibid* 5.

¹¹⁹ Lutz, above n 75.

¹²⁰ See Gribnau and Frecknall-Hughes, above n 90. Also, Rousseau’s great work on the social contract was published in 1762, so his ideas were current in the ‘founding era’ (see JJ Rousseau, ‘On the Social Contract or Principles of Political Right’ [1762] in RD Masters and C Kelly (eds), *The Collected Writings of Rousseau*, vol 4 (Hanover, University Press of New England, 1994) 129.

like Hobbes as proponent of absolute government. To his mind *The Federalist Papers* constituted ‘primarily a treatise against the extremes of democracy and the resulting injustice to the rights of the individual’.¹²¹

Constitutional Debate

The US Constitution, as ratified in 1788, contains the following taxing powers:¹²²

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.¹²³

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.¹²⁴

No tax or duty shall be laid on articles exported from any State.¹²⁵

In terms of tax, the Constitution has only been amended once, by means of the Sixteenth Amendment (passed by Congress in 1909, and ratified in 1913), which allowed income tax to be levied without being apportioned to individual states, and so retained by central government, thus removing the second item above. The amendment was in direct response to the 1895 Supreme Court case decision in *Pollock v Farmers’ Loan & Trust Co.*¹²⁶

These powers look remarkably straightforward and have been long-lasting, but hide the considerable debate that took place about them – captured in *The Federalist Papers* and *The Anti-Federalist Papers*. *The Federalist Papers* comprise various essays and articles composed by the Founding Fathers James Madison, Alexander Hamilton and John Jay. They were published collectively under the pseudonym ‘Publius’, with the objective of promoting acceptance of the Constitution that had been developed in 1787, and of explaining and justifying the principles underlying it. The pseudonym was employed to stress that the ideas

¹²¹ G Dietze, *The Federalist, A Classic on Federalism and Free Government* (Baltimore, Johns Hopkins University Press [1960], 1999) 321.

¹²² The Constitution of the United States, available at <https://usconstitution.net/const.pdf>.

¹²³ *ibid* Art I, s 8, cl 1.

¹²⁴ *ibid* Art I, s 9, cl 4.

¹²⁵ *ibid* Art I, s 9, cl 5.

¹²⁶ *Pollock v Farmers’ Loan & Trust Co.*, 157 US 429 (1895), affirmed on rehearing, 158 US 601 (1895). The Supreme Court decision had overturned the income tax, which had been imposed by the Wilson-Gorman Tariff Act, on the grounds of it being an unapportioned direct tax. The Sixteenth Amendment reversed the Court decision, and so allowed tax to be levied without apportionment to states.

expressed were more important than the identity of individual writers, although attribution of papers to specific writers has been made. The newspaper articles making up *The Federalist Papers* were not written as a political treatise with references, for example, to the writings of famous Enlightenment thinkers which many Americans had absorbed. However, annotated editions are abundant with references to Montesquieu (the Enlightenment thinker most frequently cited during the entire debate on the Constitution), Hume and Locke. Crucial and contentious matters were the separation of powers between the judiciary, the legislature and the executive, and the concept of federalism, not least in relation to taxation.

The post-revolutionary constitutional debate shows the radical change taking place in American political thought since the Revolution. In addition to the new forms of government that the Americans constructed, an entirely new conception of politics was created. This required a new conceptualisation of received political concepts.¹²⁷ ‘The independence of America, considered merely as a separation from England would have been a matter of little importance’, wrote Thomas Paine in 1791, a few years after the constitutional debate, ‘had it not been accompanied by a revolution in the principles and practice of government’.¹²⁸ Thus the Revolution transformed political theory.

A major issue in the constitutional debate was the size of a viable republic. A large republic seemed to defy history’s lessons: a large country characterised by many different interests attempting to establish a republic would degenerate into dictatorship. In this vein the Anti-Federalist George Clinton relied on Montesquieu’s claim that ‘[i]t is natural to a republic to have only a small territory, otherwise it cannot long subsist’.¹²⁹ He argued that the United States was simply too diverse in its geography, climate, people and existing arrangements to admit of a ‘consolidated republican form of government’.¹³⁰

The Federalists strongly disagreed, preferring ‘civil society upon an enlarged scale’ [...] to the unceasing agitations and frequent revolutions which are the continual scourges of

¹²⁷ GS Wood, *The Creation of the American Republic* (Chapel Hill, The University of North Carolina Press [1969], 1998) xvi–xvii.

¹²⁸ Paine, *Rights of Man, Part the Second, Introduction* in Paine, above n 37, 269.

¹²⁹ Montesquieu, above n 99, VIII, 16, 124: in a small republic, ‘the public good is better felt, better known, lies nearer to each citizen’.

¹³⁰ *The Anti-Federalist Papers*, above n 1, Number 14, 46. See also L Banning, ‘Republican Ideology and the Triumph of the Constitution’ 31 (1974) 1, 2 *The William and Mary Quarterly* 170: ‘Most Antifederalists denied that America could support a republican government of national extent. Many of them wondered whether the new Constitution was genuinely republican at all’.

petty republics'.¹³¹ They argued that the form of representation in the colonies simply demolished the received 'small republics' logic. The actual representation of interests and people in the governments of the American provinces that had developed with the growth and movement of the population made 'the extension of the nation to continental proportions perfectly compatible with republican freedoms'.¹³²

Hume had already conceded that 'form[ing] a republican government in an extensive country' may be more difficult. However, once a republican government is formed in a large territory it is more stable, 'without tumult and faction', than in a small one.¹³³ Madison agreed with Hume in conceiving a large republic as defence against factionalism. Moreover, he appealed to another aspect of Montesquieu's thought to counter this objection. To root out corruption and tyranny, the doctrine of separation of the legislative, executive and judicial powers and the need for proper checks and balances should be built into the constitution. The 'constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other'.¹³⁴

In the years between independence and the adoption of the Constitution, the state parliaments proved incapable of deliberating and legislating effectively. They posed a threat to freedom by changing court judgments, outlawing individual citizens, deposing officials and issuing paper money.¹³⁵ Madison believed that most of the problems of American state legislatures were caused by factions, special interest groups and partisan politics: government was used to advance private interests at the expense of the public. Ordinary people were electing to the state legislatures too many selfish men like themselves, subject to greed,

¹³¹ Hamilton, *The Federalist Papers*, above n 1, Number 28. See also Hamilton, *The Federalist Papers*, Number 9: 'It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.'

¹³² B Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (New York, Knopf, 2003) 33.

¹³³ D Hume, 'Idea of a Perfect Commonwealth' [1752] in D Hume, *Political Essays*, K Haakonssen (ed) (Cambridge, Cambridge University Press, 1994) 232.

¹³⁴ *The Federalist Papers*, above n 1, Number 51. See also C Moellers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford, Oxford University Press, 2015) 28. This also goes for the constitutions of the 13 original states, which were designed so as that the power of legislators and magistrates was checked by one another and by a politically active citizenry. See MW Kruman, *Between Authority and Liberty: State Constitution-Making in Revolutionary America* (Chapel Hill, The University of North Carolina Press, 1997).

¹³⁵ JM Bessette, *The Mild Voice of Reason: Deliberative Democracy & National Government* (Chicago, University of Chicago Press, 1994) 6–13.

passions and prejudices. Too many narrow-minded representatives were driven by the partial interests of their little districts.¹³⁶

Checks and balances serve democratic self-determination – the different institutions drawing upon different forms of democratic legitimacy. The Founders, however, intended to create a republic rather than a democracy, which was understood to mean rule of the common people at the time. Popular sovereignty should be mediated by virtuous and educated men to preserve liberty. They were opposed to democratic voting because most Americans were largely ignorant of public affairs, having received little or no formal schooling, and lived in tiny settlements and villages and on isolated farms. They were dependent on others for their livelihood and vulnerable to the opinions of their neighbours.¹³⁷

The solution was that the ‘virtuous, educated, experienced people would rule, albeit subject to a check from the common people’.¹³⁸ Popular sovereignty implied self-government of the common people, who delegated their political power to an elite class of educated and successful gentlemen. From the ranks of the more influential members of society bureaucrats and elected officials would be drawn. This was sometimes called a ‘natural aristocracy’, an ‘expression of the uneasiness that attended representative democracy’.¹³⁹ It should be noted that ‘large swathes of the population’ were excluded from democratic voting, most notably women and slaves.¹⁴⁰

According to Madison, the system of representation, relying on property restrictions for the franchise, should act as ‘a kind of filter, refining and extracting out of the mass only those men’,¹⁴¹ who possessed ‘the most attractive merit and most diffusive and established

¹³⁶ GS Wood, *The Purpose of the Past: Reflections on the Uses of History* (New York, The Penguin Press, 2008) 26.

¹³⁷ EA Posner, *The Demagogue’s Playbook: The Battle for American Democracy from the Founders to Trump* (New York, All Points Books, 2020) 21–22. Moreover, most Americans still believed in religious dogmas that had been refuted by the scientific revolution and Enlightenment thinkers. Furthermore, most lacked adequate information about the wider world, since they had hardly any access to newspapers or books. Importantly, the ballot at the time was public, so, as Posner points, out ‘it took significant character and independence to avoid the crushing local conformism that prevailed in most places’.

¹³⁸ Posner, above n 137, 43.

¹³⁹ J Shklar, ‘The American Idea of Aristocracy’ in Hoffmann and Thompson, above n 38, 47. Not all agreed. John Adams was the first to protest. To his mind even ‘a Harvard degree – which Adams clearly thought little of – could win an election in the absence of any other sign of merit’ (151).

¹⁴⁰ A de Dijn, *Freedom: An Unruly History* (Cambridge MA, Harvard University Press, 2020) 200.

¹⁴¹ Wood, above n 136, 25.

characters'.¹⁴² Here, Madison's distinction between a republic and a (direct) democracy shows.

In the latter:

the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A ('pure') democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.¹⁴³

However, democracies have always been short-lived theatres of 'turbulence and contention' at the expense of security while ending in chaos and violence.¹⁴⁴

Consequently, in the American republic not all distinctions of rank and status were eliminated. Republics would still have an aristocracy, as Thomas Jefferson said, but it would be a natural, not an artificial one. An artificial aristocracy, 'founded on wealth and birth, without either virtue or talents, [...] is a mischievous ingredient in government.'¹⁴⁵ Wood concludes that the Constitution was intrinsically 'an aristocratic document designed to check the democratic tendencies of the period'.¹⁴⁶

Many Anti-Federalists agreed with the Federalists that such an elite was inevitable. However, many of them believed that 'the best defense against mass rule was state sovereignty, which allowed control by a *local* aristocracy'.¹⁴⁷ The Anti-Federalists thus not only opposed the extended size of the American republic but also the central authority of federal government in the constitution. To their minds it would defy the logic of sovereignty to have two supreme powers; that is, the state governments and the national ('consolidated') government made sharing of sovereignty impossible. There cannot 'exist two independent taxing powers in the

¹⁴² *The Federalist Papers*, above n 1, Number 10.

¹⁴³ *The Federalist Papers*, above n 1, Number 14.

¹⁴⁴ *The Federalist Papers*, above n 1, Number 10.

¹⁴⁵ T Jefferson, *Political Writings*, J Appleby and T Ball (eds) (Cambridge, Cambridge University Press, 1989) 187.

¹⁴⁶ Wood, above n 127, 513. He quotes John Quincy Adams: the effect of the constitutional arrangements was 'to increase the influence, power and wealth of those who have it already' (514). However, America also has an egalitarian tradition, Thomas Paine being one of their spokesmen; see S Wilentz, *The Politicians and the Egalitarians: The Hidden History of American Politics* (New York, WW Norton, 2016); also Wood, above n 3, 121: 'This growing egalitarianism did not mean that wealth was distributed more evenly in post-Revolutionary America.'

¹⁴⁷ Posner, above n 137, 49; see also Shklar, above note 139, 148.

same community’, they argued.¹⁴⁸ Moreover, if the federal government would be the supreme power, the state governments would inevitably dwindle into insignificance.¹⁴⁹

For the Federalists it was not easy to deal with this challenging argument. However, James Wilson found a brilliant solution. He fundamentally revised the theory of sovereignty. In the end it was not about sharing or dividing sovereign power, he contended. Sovereignty did not reside with the national government or the state government; it resided with ‘the people’.¹⁵⁰ By directly appealing to the sovereign people, the Federalists hoped to neutralise the states’ pretensions to sovereignty and to mitigate fears that a strong national government ‘meant a return to despotic, monarchical rule’.¹⁵¹ Thus, contrary to prevailing thought in the eighteenth century, the Federalists located sovereignty in the people at large. This sovereignty always stays with the people, as Wilson argued. The people can delegate some of their power to the various institutions of the federal government, some to the various state governments, or other ‘popular agents’, such as judges.¹⁵² Hamilton applied this idea of sovereignty to the judiciary. The power of the people is superior to both the judicial and the legislative power, he said, which implies that judges acting as agents of the people may have to check the legislature.¹⁵³

The upshot of this view was that the sovereign people were not fully represented in any single institution. No governmental agent could claim exclusively to represent the people. This new way of seeing the people’s relationship to government also enabled the Federalists to explain the emerging idea of federalism. Thus by locating sovereignty in the people, this revolutionary doctrine said that both the federal and the state legislatures are equally and

¹⁴⁸ Wood, above n 127, 530.

¹⁴⁹ *The Anti-Federalist Papers*, above n 1, Number 1, 56 (Robert Yates): ‘Every one who has thought on the subject, must be convinced that but small sums of money can be collected in any country, by direct tax[e]s, when the foederal government begins to exercise the right of taxation in all its parts, the legislatures of the several states will find it impossible to raise monies to support their governments. Without money they cannot be supported, and they must dwindle away, and, as before observed, their powers absorbed in that of the general government.’ Yates’ view seems different from Montesquieu’s contention that the greater the political liberty enjoyed, the greater the amount of revenue that could be raised (see above).

¹⁵⁰ J Wilson, ‘Pennsylvania Ratifying Convention 4 Dec. 1787’ in PB Kurland and R Lerner (eds), *The Founders’ Constitution. Volume One: Major Themes* (Indianapolis, Liberty Fund, 2000) 62. Wilson’s conception of sovereignty is quite similar to Rousseau’s, yet Wilson’s views of democracy and the role of government vary from Rousseau’s position; MD Hall, *The Political and Legal Philosophy of James Wilson 1742–1798* (Columbia, University of Missouri Press, 1997) 104.

¹⁵¹ PS Onuf, ‘Sovereignty’ in Green and Pole, above n 4, 666.

¹⁵² G Wood, ‘The American Revolution’ in Goldie and Wokler, above n 72, 620–24.

¹⁵³ See *The Federalist Papers*, above n 1, Number 78: ‘where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.’

simultaneously agencies of the people.¹⁵⁴ This also pertains to taxation. Hamilton mentions ancient Rome to demonstrate that the power of two concurrent taxing authorities, the states and the national government, does not have to lead to dire consequences for the citizenry¹⁵⁵ (see below).¹⁵⁶

With regard to the federal legislature the Federalists, having the dismal experience and corrupt practices of state legislatures in mind, initially conceived of the Senate as embodying a natural aristocracy. This second branch, endowed with enlightened views and experience, should check the inconsiderate and hasty proceedings of the House of Representatives. The Senate members' six-year tenure was indeed perceived as 'aristocratical'.¹⁵⁷ For Madison, the Senate could guard the wealthier minority against the 'levelling spirit' of the majority. However, in the constitutional debate this view was rapidly undermined. The small states pushed through that each state was awarded the same number of senators (Connecticut compromise). The Federalists framed this as a check on the power of the House of Representatives. Thus, the doctrine of checking and balancing of powers won the day.¹⁵⁸ Of course, in this way the Senate also served as a limiting factor to the taxing power of the House of Representatives.¹⁵⁹ In passing, we note that the Federalists introduced a fiscal regime 'in which the tax incidence fell almost entirely on a small and well-defined group while sparing the population at large'.¹⁶⁰

Numbers 30 to 36 of *The Federalist Papers*, written by Alexander Hamilton, are about taxation. Hamilton wanted to persuade readers that there should be a general power of taxation granted at national level, in other words, federal taxation. This was needed to fund the provision of public requirements, such as:

... the expense of raising troops, of building and equipping fleets, and all other expenses in any wise connected with military arrangements and operations. But these are not the only objects to which the jurisdiction of the Union, in respect to revenue, must necessarily be empowered to extend. It must embrace a provision for the support of the national civil list; for

¹⁵⁴ Wood, above n 127, 545–46.

¹⁵⁵ *The Federalist Papers*, above n 1, Number 34.

¹⁵⁶ J Shklar, 'A New Constitution for a New Nation' in Hoffmann and Thompson, above n 38, 166.

¹⁵⁷ Bailyn, above n 132, 110.

¹⁵⁸ Wood, above n 127, 550–60.

¹⁵⁹ W Schön, *Taxation and Democracy*, Max Planck Institute for Tax Law and Public Finance Working Paper 2018, 13, 15–16.

¹⁶⁰ MM Edling, *A Revolution in Favor of Government: Origins of the US Constitution and the Making of the American State* (Oxford, Oxford University Press, 2003) 210.

the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury. The conclusion is, that there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.¹⁶¹

Hamilton returns to these ideas in other papers, for example, Number 31, and also Number 34, where he says that '[t]here ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity'.¹⁶² In the latter paper, he also expressed deep concern about paying off the levels of debt incurred during the War,¹⁶³ and the need for public opinion to be taken into account by elected officials (ie consent of the people). Hamilton was also at pains to stress that the taxes to be levied were familiar:

The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. ... The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself, or can easily be procured from any well-informed man, especially of the mercantile class. The circumstances that may distinguish its situation in one State from its situation in another must be few, simple, and easy to be comprehended.¹⁶⁴

He did not, however, oppose individual state taxation (Numbers 32 and 33). The idea of two systems of taxation operating at the same time, but doing different things, was novel, especially as any federal system would be superimposed on the legacy systems of state taxes. Superimposing tax on all states, and the right to do so, were after all, the root causes of the recently-ended War, and trying to do this without the (majority) consent of the 13 states' representatives could easily have led to further conflict. This resonates with Locke's need for majority consent. Federal tax was an issue with which Great Britain had not needed internally to contend. It had absorbed the countries of Wales in the distant past when monarchic rule prevailed and Scotland in 1707 when that country's finances had been in disarray and it was in no position to complain about any 'fiscal rescue' package. Its attempt to incorporate the American colonies into some sort of federal system had met with disaster, of which the colonists would have been all too aware. Indeed, Great Britain has, in recent years, started

¹⁶¹ *The Federalist Papers*, above n 1, Number 30, 137.

¹⁶² *ibid* Number 34, 152.

¹⁶³ In his position as Secretary of the Treasury, after the Constitution was ratified, Hamilton oversaw the national government taking on states' War debts, thus relieving them of great fiscal burdens and instituted considerable fiscal reforms. See Edling and Kaplanoff, above n 67. T McCraw, 'The Strategic Vision of Alexander Hamilton' (1994) 63(1) *American Scholar* 31, 47, gives an estimate of about \$160m for the cost of the War – 'more than the total expenditures of the future national government over the first twenty years of its existence, from 1790 to 1810'.

¹⁶⁴ *The Federalist Papers*, above n 1, Number 36, 161. Hamilton refers to the *Comitia Centuriata* (patrician) and *Comitia Tributa* (plebeian) here.

slowly upon a system of federalisation in granting certain taxing rights and powers to the separate nations. To show that two sets of law could work well together, Hamilton refers to examples from ancient Rome.

It is well known that in the Roman republic the legislative authority, in the last resort, resided for ages in two different political bodies not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed: in one the patrician; in the other, the plebian. Many arguments might have been adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to annul or repeal the acts of the other.¹⁶⁵

The Anti-Federalist Papers expressed the views of those who were opposed to ratifying the Constitution.¹⁶⁶ The term ‘anti-federalist’ is misleading, as they were in favour of federalism, but wanted central government to be weak, preferring a ‘small’ – as opposed to a ‘big’ – republic, as noted earlier. They reflected the fear of many, no doubt from the pre-War period, that a national government might be rather like Great Britain’s overlordship and have too much power (especially in a president’s hands) that would threaten individual freedoms. To counter this, they favoured having a bill of rights. They also had concerns about a federal court system and, given the size of the combined 13 states, about whether a federal republic would actually work effectively (as discussed above). The authors of the *The Anti-Federalist Papers* also used pseudonyms, but while some are attributable to specific individuals, the authorship of others is less certain. In general, their views represent the body of landowners, farmers, merchants and workmen of whom the body was comprised. Indeed, Richard Henry Lee (see later), one of the identified authors, refers to himself as the ‘The Federal Farmer’. In this regard, they no doubt identified with the comments of Hume, outlined earlier, in respect of peasants and farmers, in *Of Civil Liberty*.¹⁶⁷

The Anti-Federalist Papers are generously laced with detailed arguments about taxation, with Numbers 30 to 36 being entirely about taxation. Unsurprisingly, they were troubled by the idea of a federal power to tax, which they wanted – perhaps surprisingly, in view of what had gone before – to restrict to imposts on goods imported from overseas (see Number 31, which specifically acknowledges this reversal of pre-War stance). As Dry notes:¹⁶⁸

¹⁶⁵ *ibid* Number 34, 151.

¹⁶⁶ See T Ball, ‘The Federalist Papers’ in D Boucher and P Kelly (eds), *Political Thinkers: From Socrates to the Present* (Oxford, Oxford University Press, 2003) 235.

¹⁶⁷ Above n 113.

¹⁶⁸ M Dry, ‘The Debate over Ratification’ in Green and Pole, above n 4, 482, 489.

Thus they attempted to reply to Hamilton's great challenge, expressed in *The Federalist*, no. 23, that one not embrace the contradiction of, on the one hand, supporting union and entrusting certain national objectives to the federal government, and, on the other hand, refusing to grant ample powers for the attainment of those objectives.

The Constitution was very narrowly approved, but taxation remained a contentious issue, with the government needing to resort to arms in 1794 and 1798 to deal with rebellions (the Whiskey Rebellion and Fries's Rebellion respectively).

What then were the philosophical influences dominating the thinking of the writers and approvers of the Constitution, and the Founding Fathers generally? From Lutz's work, it is evident that many thinkers and sources influenced the founders, especially in *The Federalist* and *The Anti-Federalist Papers* – and not all sources would have carried equal weight. Sometimes a specific writer was acknowledged, as in the case of Locke – and in reference to taxation. Asadi¹⁶⁹ notes the explicit citation by Samuel Adams of Locke's *Second Treatise*, Chapter 11.140, in an article Adams wrote in the *Boston Gazette* on 23 December 1771. Asadi¹⁷⁰ goes on to cite a further article by Adams in the *Boston Gazette*, on 20 January 1772:

But the parliament's laying taxes on the Colonies for the express purpose of raising a revenue, takes the purse strings out of their hands, and consequently it is 'repugnant to, and subversive of (the end of) our constitution' – Liberty. Mr. Locke says, that the security of property is the end for which men enter into society ...

Significantly, Adams was part of the Massachusetts ratifying convention for the US Constitution, and was an Anti-Federalist (as were also, notably, Patrick Henry and Richard Henry Lee, both representing Virginia). More specifically, Number 32¹⁷¹ of *The Anti-Federalist Papers* comments:

Not only are these terms very comprehensive, and extend to a vast number of objects, but the power to lay and collect has great latitude; it will lead to the passing a vast number of laws, which may affect the personal rights of the citizens of the states, expose their property to fines and confiscation, and put their lives in jeopardy: it opens a door to the appointment of a swarm of revenue and excise officers to prey [sic] upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country.

Mashaw¹⁷² notes that these concerns were, however, taken on board. The early tax statutes took into account balancing the individual rights of taxpayers with protecting individuals' rights, and employed 'a host of different techniques to energize officials, guard

¹⁶⁹ Above n 74, 413.

¹⁷⁰ *ibid.*

¹⁷¹ Above n 1, 107.

¹⁷² JL Mashaw, 'Recovering American Administrative Law: Federalism Foundations, 1787–1801' (2006) 115(6) *Yale Law Journal* 1256, 1278.

against corruption, bring relevant expertise to bear on the determination of the value of goods, satisfy local interests, and utilize existing state and local enforcement resources’.

The author of Number 32 of *The Anti-Federalist Papers* likewise fears¹⁷³ that federal power to tax will override any state’s ability to do so, with the author of Number 35¹⁷⁴ saying that ‘[t]hese two concurrent powers cannot exist long together; the one will destroy the other’. Again, the underlying influence is that of Locke, but the types of taxes are more those envisioned by Hume and Montesquieu, and there is an oblique reference to Hume’s reference to custom, in terms of state powers to tax, which they had always had. Hamilton, in Number 32 of *The Federalist Papers*, is explicit that this would not be the case, saying that ‘[t]here is plainly no expression in the granting clause which makes that power exclusive in the Union. There is no independent clause or sentence which prohibits the States from exercising it’.¹⁷⁵ This also resonates with Montesquieu’s view that taxes should be adapted to the nature of the state and its circumstances.

Weaver¹⁷⁶ comments, however, that Locke was also a ‘dominant influence’ on the Federalists. Wootton¹⁷⁷ notes that, while the recent War had aimed to curb monarchical power, rising debt and taxation had shifted emphasis more to restraining legislative rather than executive power. However, the ideas are inextricably intertwined, possibly in both the English and American psyche. To quote John Pym, addressing the opening of the English Parliament in 1640:

[It was] a fundamentall truth, essentiall to the constitution and government to this kingdome, an hereditary liberty and priviledge of all the free-borne subjects of the land, that no tax, tallage, or other charge, might be laid upon us without common consent in parliament.¹⁷⁸

Concluding Remarks

¹⁷³ Above n 1, 108.

¹⁷⁴ *ibid* 118.

¹⁷⁵ *ibid* 146.

¹⁷⁶ DR Weaver, ‘Leadership, Locke and the Federalist’ (1997) 41(2) *American Journal of Political Science* 420, 422

¹⁷⁷ D Wootton, *Power, Pleasure, and Profit: Insatiable Appetites from Machiavelli to Madison*. (Cambridge MA, The Belknap Press of Harvard University Press, 2018) 140–41.

¹⁷⁸ Cited by JP Reid, *Constitutional History of the American Revolution: The Authority to Tax* (Madison WI, University of Wisconsin Press, 1987) 137.

The road leading to the American Constitution's explicit taxing powers was long, tortuous and costly in lives, blood spilt and money. To rid themselves of Great Britain's monarchical tax overlordship, the colonists, effectively, ended up transferring that overlordship to their own Republican Congress. The fact that they managed to do this, and establish their own national taxing powers of a similar kind to the British ones they had thrown off, without further armed conflict is testament to that cost, and also to their willingness to debate and compromise. The key issue, of course, is that tax would be levied by a body to which they could send representatives, rather than by an overseas power to which they could send none. What emerges from the review of taxation above is the degree of sophistication that the individual states had reached in adapting or imposing tax to meet their own needs and state of development, which was not appreciated by the British Parliament in London, which was primarily concerned with its own finances and protection of its own trade and home markets. Conceptually, in terms of the 'faculty tax', many of the colonies had advanced the development of tax well beyond anything in place in Great Britain, and it is more than understandable that, after the War, the individual states did not want to give up their state taxing rights. Before, during and after the War, tax remained a contentious and sensitive topic.

There were many thinkers who influenced the colonists and Founding Fathers, as the work of Lutz and others has shown. It is clear that the forerunners in terms of influence as regards tax were Locke, Montesquieu and Hume, but what is particularly interesting is that both sides of the tax debate, the Federalists and the Anti-Federalists, knew their works so intimately and both cited them or showed their influence in their support or otherwise for the taxing powers incorporated into the Constitution in regard to the rule of law, consent and custom. It is, perhaps, surprising that the works of Thomas Paine and Jean-Jacques Rousseau do not feature more explicitly as significant influences on the Federalists or the Anti-Federalists, since both were noted for their social contract views/writings. In the case of Paine, it might be because he was himself regarded as one of the Founding Fathers (see earlier), and through Jefferson became a lasting voice in American democratic discourse. Rousseau was probably rejected for his advocacy of absolute government (ie democracy). Montesquieu's works, although written likewise originally in French, had been widely available in English from the 1750s and had had a longer period during which to exert their influence.