

Does it Matter what Slaves Thought? The Curious Nexus Between Scalian-Textualism and Pre-Colonial African Tax Experiences, By Andre L. Smith, Assistant Professor, Florida International University College of Law.

Introduction

This article explores a peculiar question concerning Constitutional deliberation presented by Professors Calvin Johnson and Erik Jensen's debate over the meaning of "No Direct Tax without Apportionment."¹ According to Professor Jensen, apportionment of direct taxes was intended to serve as a significant limitation on the Federal government's ability to tax citizens directly.² Professor Johnson, on the other hand, believes the Constitution requires apportionment only of Federal requisitions levied directly upon the States.³ Professor Johnson's theory places the issue of slave counting at the core of the debate over taxation and representation.⁴ For students of legal construction, interpretation and deliberation, their debate inspires a couple peculiar questions: When interpreting or deliberating over the Constitution does it matter at all what slaves thought particular words or phrases meant? If it does matter, how important is it and how would we discover it?

The answer to the question 'does it matter at all' is, of course, it depends. Different deliberative/interpretive techniques—textualism, intentionalism, purposivism, and dynamism—answer the question differently. And the results might represent a political irony to some. Justice Scalia's brand of originalist textualism⁵ accords the most respect to the views of slaves on Constitutional issues. Similarly, it accords the most respect for women's views. His theory requires judges to consider what the text of the Constitution meant to the People of the United States.⁶ He considers the Federalist papers not as evidence of the Framers' intent but as evidence of what the People thought specific words meant.⁷ But, even if the Federalist papers represent the best evidence of original Constitutional meaning, they are not the only evidence of what the People of the United States understood. Thus, Scalia's originalist-textualism requires judges deciding Constitutional questions to consider to some degree and to the extent possible the

¹ Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004); Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004); see also Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMBIA LAW REVIEW 1 (1999).

² ERIK JENSEN, THE TAXING POWER (2005); see also Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUMBIA LAW REVIEW 2334 (1997); Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 JOURNAL OF LAW AND POLITICS 687 (Fall 1999) (taking umbrage at Ackerman's suggestion that he is racially insensitive); Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004) (responding to Calvin Johnson).

³ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005); see also Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WILLIAM & MARY BILL OF RIGHTS LAW JOURNAL 1 (1998); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004).

⁴ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

⁵ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

⁶ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

⁷ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (1997).

meaning most likely supplied by Blacks, women, and perhaps Native Americans (especially if there is evidence that their understanding differs to some extent from the dominant public sphere of the time).

The questions that immediately follow under the textualist regime are ‘how important’ and ‘can it be discovered’ and if so ‘at what cost’?⁸ It is the poverty of American history that the answer to the first question is, according to a similar textualist application, that consideration of slaves’ views are discounted by forty per cent; and that the unlikelihood of discovering their views is due not to an inability of African immigrants to think on the matter but to the fact that their views were neither sought nor preserved.⁹

Hopefully, the latter contention, that the views of slaves were not sought nor preserved, will be disproved.¹⁰ The notion that slaves had no thoughts on what words used in the Constitution meant is likely untrue.¹¹ This notion assumes that slaves were brought from a place without complex civilization.¹² This view of 16th, 17th and 18th century Africa is ignorant of the facts, though unfortunately widely held. In fact, many slaves were drawn from African aristocracies having up to that time thousands of years’ experience with law and justice.¹³ It is likely then that the paucity of evidence regarding slaves’ views is due to societal disinterest (then and now). Also, to the extent memorials of such thoughts are ever discovered they may also serve as indicia of what ‘free’ blacks of the time understood, and vice versa.

On the other hand, other theories of Constitutional interpretation, like originalist intentionalism and dynamism, ignore slaves’ views on Constitutional matters. Dynamists who believe in a ‘Living Constitution,’ encourage judges to consider which decisional choice in a constitutional case is most consistent with most of our most important modern day social principles as well as legal ones.¹⁴ Dynamism is very inclusive and permits judges to consider among myriad factors what people at the time of enactment generally thought the Constitution

⁸ ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

⁹ This notion follows and relies upon Professor Diop’s tracing of African cultural unity through five thousand years of recorded history, back to Ancient Egypt and Nubia. CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987).

¹⁰ Scholars have identified several African slaves taken from aristocratic African families, among them Equiano the African and Prince Abdur Rahman. VINCE CARRETTA, *EQUIANO THE AFRICAN* (2005); TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* (2007).

¹¹ Diop does not address the United States Constitution. Rather, he demonstrates that despite Africa’s size along with the external forces responsible for its retardation African societies are well experienced in terms of governance and civilization building, such that a slave captured from an aristocratic family would indeed have studied law and civil administration and may indeed have thoughts or understandings relating to a central government levying taxes on states within a federation or directly taxing the people of states within a federation. CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987).

¹² See, e.g., David Dalgleish, *Pre-Colonial Criminal Justice in West Africa: Eurocentric Thought Versus Africentric Evidence*, *AFRICAN JOURNAL OF CRIMINOLOGY AND JUSTICE STUDIES* 56-58 (April 2005).

¹³ See, e.g., TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* (2007) (Born in Futa Jalloh, Prince Abdur Rahman is captured and delivered to a plantation in Natchez, Mississippi, where his training in West Africa, particularly at one of the universities of Timbuktu, brings such prosperity to the slave master’s operation that for a time said master would not sell him at any price to those who would purchase his freedom).

¹⁴ See, e.g., WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994); Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1727 (2007).

meant.¹⁵ But it is most often offered as a distinct alternative to Constitutional originalism, suggesting that in contrast with originalism dynamism cares hardly at all for the views of those alive at the time of the Constitution's drafting (dead hand control).¹⁶

Considering slaves' views, by itself, neither legitimates nor discredits a deliberative/interpretive technique. Ironically, the technique that embraces slaves' views, textualism, is considered by some progressives simply a means of ignoring the pleas of the disempowered, while some of the techniques that ignore slaves' views, like dynamism and purposivism, are credited amongst progressive interest groups.¹⁷ It does, however, suggest that textualism requires empirical inquiry and is incomplete without evidence as to the meanings slaves and women would assign to words used in the Constitution.

Scalian textualism is on the rise. In *US v. Murphy*, a panel of the D.C. Circuit used Scalian textualism to hold that damages relating to mental anguish were not income within the meaning of the 16th Amendment and, thus, not subject to the income tax.¹⁸ Scalian textualism stands for the proposition that when deliberating over words in the Constitution a judge should emphasize the meaning held by the People of the United States.¹⁹ According to Judge Ginsburg, the author of the D.C. Circuit's initial decision (which was reversed en banc), the people of the United States who enacted the 16th Amendment did not understand income to include damages received on account of mental anguish.²⁰ Although that panel reversed itself²¹, Judge Ginsburg's opinion denotes the rising currency of Justice Scalia's jurisprudential teachings generally and his Constitutional deliberative technique specifically.

But Scalian textualism is easier to describe than it is to apply, because determining what the people of the United States understood a word to mean at the time of enactment requires research and assessment, both involving rigor, procedure as well as discretion.²² The same word has different meanings to different people.²³ Even if there is substantial symmetry between what two people believe a word to mean it is unlikely that their conceptions can ever be perfectly symmetrical. Of course, the law (and human cooperation generally) relies on tendencies, symmetries and other "close-enoughs." Thus, Scalia, the Supreme Court, and others in the

¹⁵ WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 34 (1994) ("The arguments for textualism as the foundational method in statutory interpretation are strong ones"); see also, Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM. L. REV.* 1249 (1997).

¹⁶ For a middle ground position, see Lawrence Lessig, *Fidelity in Translation*, 71 *TEXAS L. REV.* 1165 (1993).

¹⁷ The beef over methods of statutory and constitutional construction is after all political. See Phillip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 *MINN. L. REV.* 241 (1999).

¹⁸ *United States v. Murphy*, 460 F.3d 79, 92 (D.C. Cir. 2006). Gregory L. Germain, *Taxing Emotional Injury Recoveries: A Critical Analysis of Murphy v. Internal Revenue Service*, 60 *ARK. L. REV.* 185 (2007).

¹⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

²⁰ *United States v. Murphy*, 460 F.3d 79, 92 (D.C. Cir. 2006).

²¹ Gregory L. Germain, *Taxing Emotional Injury Recoveries: A Critical Analysis of Murphy v. Internal Revenue Service*, 60 *ARK. L. REV.* 185, 187 (2007).

²² Adrian Vermeule, *JUDGING UNDER UNCERTAINTY* (2006) (examining the efficiency of stopping rules in adjudicatory decision making).

²³ See generally Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in *VAGUENESS IN NORMATIVE TEXTS* (2005) (drawing a distinction between vagueness and ambiguity).

practice examine many different types of discourse as evidence as to what the people understood a word to mean, including dictionaries, the Federalist papers, English legal texts, etc.²⁴

Adherents to Scalian textualism, however, have not spent much if any effort exploring the meaning of words as understood by those who had no influence on dictionaries, the Federalist papers or English legal texts. Of course they would be wasting their time if it is true that propertied, white males who controlled these discourses accurately reflected the meanings understood by slaves, women, non-propertied white males, Indians, etc.²⁵ Such is a reasonable assumption for them to make even if based on the uncomfortable notion that as controllers of power-constellations, propertied white males determined ultimately what others thought words meant. However, I suspect that that assumption while somewhat reasonable is largely inaccurate, that marginalized groups tend not to succumb simply to the whims of power-brokers, that they tend to inculcate within their own cultures differing meanings and understandings regarding lots of stuff. Moreover, to the extent a word or phrase like “direct tax” had no identifiably determinate meaning between propertied white males of the time, it is gainful under Scalian textualism, perhaps even required, to explore the meanings held by others. To that end, this article claims that an aristocratic slave captured from a well-to-do African family would have had ideas and understandings regarding terms in the U. S. Constitution, including what ‘direct tax’ might mean.

This article illustrates four main techniques for legal construction, interpretation and deliberation by determining which ones require consideration of slaves’ understandings, specifically in terms of a clause in the Constitution specifically referencing them, the Direct Tax Clause. Ultimately, the meaning of direct tax depends on the deliberative technique employed. Those who try to interpret the meaning of words as they were understood at the time of enactment may settle on a meaning different from those who reconstruct the meanings of words to represent modern understandings and concepts.²⁶ Still, between those who privilege original meanings and between those who promote a living constitution there is little convention as to how those meanings are determined under either scheme.²⁷ An originalist might emphasize most the meanings intended by the authors, the meanings as understood by the ratifiers, or the meanings as understood by the People of the United States. A realist on the other hand might accept original purposes rather than meanings, attempt to translate original meanings into the language of modern times, or reject original understandings entirely.²⁸

²⁴ JELLUM & HRICK, MODERN STATUTORY INTERPRETATION 35 (2006).

²⁵ Prof. Vermeule argues that the mental and resource limitations of judges preclude their considering everything. Adrian Vermeule, JUDGING UNDER UNCERTAINTY (2006). He does not argue specifically for privileging the views of white men.

²⁶ This is, after all, the fuss over constitutional and statutory construction. See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249 (1997); Andrew Oldenquist, *Is the Death Penalty on Life Support? Retribution and the Death Penalty*, 29 *U. DAYTON L. REV.* 335 (2004) (“Scalia and Oxford professor Ronald Dworkin offer contrary views about the application of the Eighth Amendment”).

²⁷ Andre L. Smith, *The Deliberative Stylings of Leading Tax Law Scholars*, 61 *Tax Law 1* (2008)

²⁸ WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 205-308 (1994). These scholars can be described as realist, though each of their methods of deliberating over the Constitution differs markedly from each other. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), STEPHEN F. BREYER, *ACTIVE LIBERTY* (2003); Bruce

This article then takes an Afrocentric turn and explores the concept of African cultural unity in terms of law and governance, with specific attention to taxation, towards possible understandings an aristocratic slave might have with respect to direct taxation. It presents historical references to pre-colonial African societies dating back thousands of years and comments on their level of legal modernity and sophistication. It concludes that a slave captured from an aristocratic West African family who was bonded and delivered to the United States, like Prince Abdur Rahman or Equiano the African, would indeed have an understanding of what exactly the Federal government is restricted from doing where the Constitution prohibits direct tax without apportionment.

II. The Debate of “Direct Tax without Apportionment”

A. Current Notions

Most participants in the debate over direct taxes have not taken a jurisprudential position regarding their style of interpreting the Constitution. A popular casebook defines direct tax as “a tax demanded from the very person who is intended to pay it.”²⁹ Later, the authors present *Helvering v. Independent Life Insurance* for the notion that the Direct Tax clause prevents a Federal property tax.³⁰ Most tax law theorists operate it seems under the assumption that a direct tax under the Constitution is one placing liability on a person solely due to their holding wealth in some form. Similarly, Stephanie Willbanks in her casebook *Federal Taxation of Wealth Transfers* declares that a tax on all property owned at death—as opposed to taxing transfers at death, an excise tax—would violate the Direct Tax clause.³¹ Professor Erik Jensen, is perhaps the leading proponent of the idea that the Direct Tax clause seriously limits Congress’ powers to tax individuals.³² He presents considerable evidence suggesting that many Conventioneers relied upon the understanding that the Federal government would have limited taxing power.³³ He also criticizes Professor Johnson’s theory (that direct tax in the Constitution meant only ‘requisitions’ from the several States) as one impermissibly rendering words and phrases in the Constitution meaningless, especially since Congress has never requisitioned funds from the States.³⁴

Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1727 (2007); Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

²⁹ FREELAND, LATHROPE, LIND & STEPHENS, FEDERAL INCOME TAXATION (2009)

³⁰ *Helvering v. Independent Life*, 292 U.S. 371 (1934)

³¹ STEPHANIE WILLBANKS, FEDERAL TAXATION OF WEALTH TRANSFERS (2004)

³² ERIK JENSEN, THE TAXING POWER (2005); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUMBIA LAW REVIEW 2334 (1997); Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 JOURNAL OF LAW AND POLITICS 687 (Fall 1999) (taking umbrage at Ackerman’s suggestion that he is racially insensitive); Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

³³ ERIK JENSEN, THE TAXING POWER (2005); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUMBIA LAW REVIEW 2334 (1997); Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 JOURNAL OF LAW AND POLITICS 687 (Fall 1999) (taking umbrage at Ackerman’s suggestion that he is racially insensitive); Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

³⁴ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

Professor Calvin Johnson, on the other hand, maintains that the Direct Tax clause merely represented an illusory (though necessary) political compromise with regard to representation and taxation, made between abolitionist and pro-slavery delegates.³⁵ What the Constitutional Convention was really after was the power to lay import and export taxes, to pay off the Revolutionary war debts and continue to defend the new country. In exchange for county slaves in some proportion for purposes of representation, slaveholding states were required to count slaves in that same proportion if ever the States were called upon for funds due to a national emergency.

Representation in the House of Representatives was originally intended to mirror a state's wealth, not necessarily its population, though population was used as a proxy for wealth.³⁶ Including slaves as a whole person in respect of representation in the House of Representatives would increase the relative strength of the South in Congress, and encourage the South to import more slaves to further strengthen their economic system and political power in the Federal government. Slave-states also worried that if they did not control it, Congress would outlaw slavery. Northern delegates objected to this scheme, but agreed upon the counting of slaves as three-fifths for purposes of representation in the House of Representatives so long as slaves would also count as three-fifths persons if and when Congress requisitioned monies from the States according to population, perhaps to fight another war.³⁷ Thus, the Direct Tax Clause presented a means of designing a system of representation and taxation based on population which was slightly discouraging towards the slave trade on its face, but particularly lenient in practice.³⁸ According to Professor Johnson, "the Constitution was not perceived to be substantially pro- or anti-slavery at the time, even though by the judgment of eternal morality, the Constitution should have done better."³⁹

B. The Road to "No Direct Tax Without Apportionment."

1. The Problem

Slavery, the Constitution and taxation are inextricably intertwined. Robin L. Einhorn, in her book *American Taxation, American Slavery*, describes colonial tax systems prior to

³⁵ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 *Const. Comment.* 295 (2004).

³⁶ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 4, 102 (2005) ("In one of the most interesting political moves in the Convention, the Federalists avoided the conflict between votes reflecting wealth and votes reflecting population by arguing that there was no need to distinguish between the two bases").

³⁷ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 106-08 (2005) ("the Great Compromise").

³⁸ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 183-86 (2005) (Aside from sanctioning slavery by incorporating it in respect of taxation and representation, "The new federal government was to return fugitive slaves and suppress slave insurrections, along with other internal rebellions").

³⁹ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 186 (2005); ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 158 (2006).

independence.⁴⁰ She claims the degree of modernity attributable to each state tax system mirrored the modernity with which each colony treated Africans.⁴¹ In northern colonies like Massachusetts, where slavery was not essential to the economy and slave numbers were thusly low, government acted as an arbiter of diverse political interests rather than as an arm of the propertied.⁴² Massachusetts instituted a modern tax scheme, one which respected the concept of progressivity (that the wealthy should pay more than the poor) and incorporated the valuation of personal and real property.⁴³ By contrast, Virginia and South Carolina plantation owners, both of whom relied heavily on slaves, relied on flat capitation taxes (or poll taxes) which, one, were regressive in that they placed a disproportionate burden of State taxation on poor whites and, two, did not require any sophisticated government administration towards the valuation of personal property (which would have included the valuation of individual slaves).⁴⁴ Slave masters redirecting the State's financial burden towards poorer whites is inconsistent with Adam Smith's principle that the incidence of taxes should be distributed according to wealth, and Einhorn believes this tradition is carried forward by political conservatives.⁴⁵ As colonies independent of each other, these distinctions are merely interesting. But in attempting to unite as States, the differing tax schemes and differing ethos and interests relating to slavery had to be dealt with.

By 1787, the Articles of Confederation had proven a failure, specifically because it did not provide a viable means for the federal government to pay the revolutionary war debt, non-payment of which would leave the fledgling country vulnerable to renewed attacks.⁴⁶ When the federal government demanded sums from the States in order to pay the debt, i.e., requisitions, the States either refused or otherwise failed to comply.⁴⁷ The Articles of Confederation neither provided a means for levying upon the States' property nor a means of revenue-raising other than requisitions.⁴⁸ The States, even while in rebellion against the British, poorly funded the Revolutionary War, several times turning its back financially on George Washington and his armies.⁴⁹ In 1781 when Rhode Island vetoed a federal impost tax on exports the impotence of

⁴⁰ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 24-109 (2006).

⁴¹ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 7 (2006).

⁴² ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 24-109 (2006).

⁴³ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 24-109 (2006).

⁴⁴ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 24-109 (2006).

⁴⁵ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 68 (2006). See also Beverly Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337 (2008).

⁴⁶ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 19 (2005) ("What is there to prevent an Algerine Pirate from landing on your coast and carrying your citizens into slavery?... You have not a single sloop of war" quoting a Hugh Williamson of North Carolina).

⁴⁷ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15-26 (2005).

⁴⁸ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 119 (2006) ("When the champions of the Constitution attacked the 'imbecility' of the Articles of Confederation, they were talking about these rounds of state legislative action and the power of a single state to frustrate the rest. Mostly, they were talking about the defeat of the impost."); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15-26 (2005).

⁴⁹ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15-26, 32-39, 37 (2005) ("With the end of the Continental dollar, the Army in the field survived primarily on impressments ... involuntary seizures from civilians with the misfortune of living within reach of the army as it moved or camped."")

the Articles became too apparent to ignore, and apparently too deep-seeded to simply amend.⁵⁰ In 1783, New York joined Rhode Island in vetoing a federal impost.⁵¹ For the country to survive, the federal government had to become more powerful. It needed to raise revenue directly, without the States as a conduit.⁵² It needed at least the power to tax exports and imports, and perhaps collect sin taxes on the sale of ‘undesirable’ goods.⁵³ Thus, the committee responsible for amending the Articles of Confederation scrapped it entirely and constructed a new document, the U.S. Constitution, which gave the federal government considerably more power, especially the power to lay excise taxes.⁵⁴

2. The 3/5ths Compromise

The Constitution could not give the federal government the power to tax without dealing with the controversy over slavery.⁵⁵ By 1787, slavery was considered an evil on several fronts, but persisted due to the States’ drunkenness with economic advancement.⁵⁶ Slavery violated moral and religious principles of the day as well as the principles of “liberte” which had enthralled colonialists and inspired them to revolt against the English.⁵⁷ But slave labor, being cheap by definition, competed well against more expensive non-propertied white labor, not just in terms of the cost of running a tobacco farm but also in terms of blacksmithing and other urban occupations.⁵⁸ Slaves outnumbered white South Carolinians and constituted forty percent of Virginians, which made those whites fearful and required them to institute numerous techniques towards squelching the enslaved Africans’ want of freedom (maiming, whipping, lynching, killing, threatening to sell children to distant slave owners).⁵⁹ Still, representatives from South Carolina had long threatened that there be no union if the institution of slavery is at all

⁵⁰ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 26-29 (2005).

⁵¹ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 26-29 (2005).

⁵² CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 40-99 (2005).

⁵³ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 40-99 (2005).

⁵⁴ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 157-199 (2006); CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005).

⁵⁵ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 118(2006) (“Regardless of whether the apportionments rested on population or wealth, they had to include decision about how to treat slaves: how to count them as persons or how to count them as property.”)

⁵⁶ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 182-86 (2005).

⁵⁷ CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 182-86 (2005).

⁵⁸ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 122 (2006) (“Slavery crowded out free labor”). By the mid 19th century, slave-owners assigned considerable numbers of slaves to urban occupations. See George Ruble Woolfolk, *Slavery and Taxation in the Antebellum South*, *JOURNAL OF SOUTHERN HISTORY* (19__); JOHN HOPE FRANKLIN AND LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 33-37 (1999).

⁵⁹ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 33, 94 (2006). JOHN HOPE FRANKLIN AND LOREN SCHWENINGER, *RUNAWAY SLAVES: REBELS ON THE PLANTATION* 33-37 (1999).

threatened.⁶⁰ Many northerners may have wanted to end slavery for various reasons, but they believed apparently that the colonies needed to unite for economic and military reasons and could not if slavery was challenged.⁶¹ South Carolina and other states not only wouldn't tolerate a prohibition on slavery, they feared that a Congress controlled by the northern states would tax slavery out of business.⁶²

Framers of the U.S. Constitution had to design a federal government with more power than it had previously under the Articles of Confederation yet without the power to end slavery.⁶³ Ultimately, they achieved their goal, but not before serious discussion and negotiation over the federal government's powers generally and the power to tax specifically. The Constitution does not outlaw slavery, and it offers a grace period for ending the importation of slaves (which was agreeable even to slave states since the number of enslaved Africans had become dangerously high).⁶⁴ It gave the federal government the power to lay excise taxes, except that it prohibited confiscatory taxes on the importation of slavery.⁶⁵ It also retained the federal government's power to tax the states directly (requisitions), but added an apportionment requirement this time.⁶⁶ Whether to count slaves as people or property if the government were to tax the states directly under a rule of apportionment became what is infamously known as the 3/5th Clause.⁶⁷

Most important to this discussion, however, is that they neglected to define precisely what direct taxes were. So the reasons why I find it interesting to imagine what slaves thought 'direct tax' meant are because the Constitutional prohibition against direct taxes without apportionment is possible only after determining whether slaves are property or people, and, if Scalian textualism is deployed to determine what direct tax meant it would be odd to exclude the thoughts of thousands if not millions who were the objects of the law. Framers of the Constitution debated how much slaves would count towards apportionment of taxes and representation in the House of Representatives. Here, I ask how much slaves count towards what the People of the United States as an interpretive community understands a word in the Constitution to mean. Perhaps their views are relevant but discounted to 3/5^{ths} that of a white man? Despite the fact that reconstructing the views and history of marginalized groups is difficult and costly—Adrian Vermeule reminds us deliberation requires time and effort which

⁶⁰ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 120 (2006) ("If it is debated, whether their Slaves are their property ... there is an end of the Confederation" quoting Thomas Lynch, delegate from South Carolina).

⁶¹ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 138-45 (2006).

⁶² CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 182-84 (2005) ("In South Carolina, Anti-Federalist Rawlins Lowndes would oppose the Constitution because 'Negroes were our wealth, our only natural resource; yet behold how our kind friends I the north were determined soon to tie up our hands, and drain us of what we had!'")

⁶³ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 183-85 (2005).

⁶⁴ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 138-45 (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 183-86 (2005).

⁶⁵ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 138-45 (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 183-86 (2005).

⁶⁶ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 138-45 (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 183-86 (2005).

⁶⁷ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 138-45 (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 183-86 (2005).

must be bounded—hopefully we will not make the same mistake of ignoring the humanity of a specific group of people in exchange for convenience.

C. The Political Importance of the meaning of ‘Direct Tax.’

Recently, Beverly Moran proposed a wealth tax, contending that it is more consistent with the capitalism Adam Smith envisioned when he wrote *Wealth of Nations* over two hundred years ago.⁶⁸ Her proposal follows Bruce Ackerman’s position that the Direct Tax Clause, if not all provisions of the Constitution even remotely relating to slavery, is invalid on moral grounds.⁶⁹ Others, however, believe the Direct Tax Clause imposes a serious limitation on the Federal government’s power to tax individuals, and prohibits a wealth tax specifically, or even income tax without apportionment.⁷⁰ A third position is that the Direct Tax Clause is a valid constitutional restriction but only concerns the Federal government’s relationship with State governments, and poses no serious restriction on its relationship with the People of the United States directly.⁷¹

1. The Debate

Scholars and judges debate the scope of the Constitutions limitations on direct taxes, specifically with respect to what constitutes a direct tax. Scholars agree that where the Constitution requires that all direct taxes be apportioned, it means that with respect to direct taxes each state must be required to raise a certain amount in proportion to its representation in the national census.⁷² And with the 3/5ths Clause, there is no longer any debate over the proper way to apportion direct taxes. Scholars also agree apportioned direct taxes, at least income taxes, are a dumb idea, since it would require the poorest states to tax its citizens at higher rates in order to satisfy the direct tax.⁷³ However, politically speaking the apportionment rule is sometimes useful towards restricting the government’s ability to directly tax individual wealth and income from high earners. Apportionment being a settled issue, the controversy over the limitation relates to which taxes constitute a direct tax.⁷⁴

Some have argued at various times that the direct tax clauses limit the federal government’s ability to levy an income tax, estate and gift tax, wealth taxes, a flat tax or a real

⁶⁸ Beverly Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337 (2008).

⁶⁹ BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMBIA LAW REVIEW 1 (1999).

⁷⁰ E.g. ERIK JENSEN, *THE TAXING POWER* (2005).

⁷¹ Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004); Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 Harv. L. Rev. 198, 198 (1895).

⁷² ERIK JENSEN, *THE TAXING POWER* (2005); CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005); Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3 (1987).

⁷³ Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WILLIAM & MARY BILL OF RIGHTS LAW JOURNAL 1 (1998). But see Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

⁷⁴ Compare ERIK JENSEN, *THE TAXING POWER* (2005) with CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005);

estate tax.⁷⁵ Infamously, the Supreme Court held in *Pollock*, a 5-4 opinion, that an income tax is a direct tax, despite its holding the opposite many years prior.⁷⁶ The Supreme Court retreated somewhat from its tax Lochnerism, later holding that the estate and gift taxes were not direct taxes subject to apportionment.⁷⁷ Thus, the 16th Amendment was enacted to reverse the Supreme Court's decision and allow the government to tax incomes without apportionment.⁷⁸ Recently though, scholars have discussed the propriety of a tax on held wealth and whether such a tax would be scuttled as a direct tax in need of apportionment.⁷⁹

Bruce Ackerman, of the *Living or Democratic Constitution*, contends that a tax on held wealth is not a direct tax because the term should be limited to its specific facts, the requisition of monies directly from the states.⁸⁰ The direct tax limitation was a political expedient used to facilitate a compromise between the northern and southern states, but one which was illusory in that the authority to levy direct taxes on the states had already proved useless under the Articles of Confederation because the states refused to pay it and the federal government had no means or will to forcibly collect it. He argues that the 16th Amendment along with the New Deal Amendments to the Constitution declare in principle that the federal government's economic regulatory powers are not limited in any meaningful way.⁸¹ Thus, he would not, as Calvin Johnson might, limit the direct tax clause to requisitions, capitation and property taxes on real estate. Ackerman would disavow the whole direct tax deal as anachronistic on two counts, that its strictures have been extended past its intended scope and that it is irreparably tainted by its entwinement with slavery.⁸²

Calvin Johnson, relying primarily on intentionalist argument, agrees with Ackerman that the *Pollock* Court was completely incorrect and probably overtly political when it held inconsistently with precedent that the income tax was a direct tax.⁸³ In *Hylton*, a case close enough in time to the constitutional convention that the Justices are assumed to be aware of the debates and compromises, the Supreme Court held that the direct tax clause only be extended past requisitions to those taxes which could reasonably be apportioned.⁸⁴ An income tax cannot

⁷⁵ Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 JOURNAL OF LAW AND POLITICS 687 (Fall 1999) (taking umbrage at Ackerman's suggestion that he is racially insensitive).

⁷⁶ *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.* ("Pollock II"), 158 U.S. 601 (1895). *Pollock II*, 158 U.S. at 618 ("[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property ... is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution."). Francis R. Jones, *Pollock v. Farmers' Loan and Trust Company*, 9 HARV L. REV. 198, 198 (1895) (the Court "deliver[ed] an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years").

⁷⁷ *Knowlton v. Moore*, 178 U.S. 41, 106-07 (1900).

⁷⁸ U.S. Const. amend. XVI.

⁷⁹ BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); Eric Rakowski, *Can Wealth Taxes be Justified?* 53 TAX L. REV. 263; Beverly Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61 SMU L. REV. 337 (2008).

⁸⁰ Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMBIA LAW REVIEW 1 (1999).

⁸¹ Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMBIA LAW REVIEW 1 (1999).

⁸² Bruce Ackerman, *Taxation and the Constitution*, 99 COLUMBIA LAW REVIEW 1 (1999).

⁸³ Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004).

⁸⁴ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 172, 181 (1796).

be apportioned because, in addition to political ridiculousness, it would fail the constitutional requirement of uniformity: If Congress sought to raise \$1trillion under a rule of apportionment, it would have to require each state to produce an amount based on its percentage of national population which would necessarily require a low tax on states with high per capita income and a higher tax rate on individuals from states with a low per capita income.⁸⁵ During the Civil War, Congress enacted an income tax that withstood a challenge to it as a direct tax.⁸⁶ But the Pollock Court, operating under a renewed vigor for the protection against governmental deprivations of property and economic liberty, put the burden on Congress to either push through a tax that would extremely burden poorer people generally and poorer states specifically or scrap the idea altogether.⁸⁷ Professor Johnson wishes that the Supreme Court find an appropriate opportunity to reverse Pollock specifically and certify the income tax as an excise tax on all profitable activities and occurrences, requiring only uniformity and not apportionment.⁸⁸

Eric Jensen disagrees.⁸⁹ He does not seek to defend the Pollock Court, but does defend the direct tax clause as an important and vital restraint on federal power, one that would require Congress to apportion any so-called wealth tax and navigate the furor such an apportionment regime would inspire.⁹⁰ He contends that, even if the framers had no concrete conception of what constitutes a direct tax, and even if the direct tax clause was a straw provision to facilitate a political compromise, it is the job of legal practice to read the Constitution's provisions coherently and supply meaning to them.⁹¹ The Constitution prohibits capitation taxes as well as direct taxes without apportionment.⁹² Also, at least one of the Federalist papers describes direct taxes as including requisitions, poll taxes and real estate taxes.⁹³ Taken as a whole, Jensen suggests that direct taxes are those levied on accumulated wealth and which cannot be avoided by engaging or not engaging in a particular transaction.⁹⁴ Jensen argues that the Constitution establishes a form which can reasonably be extended by analogy to newer concepts.⁹⁵ He is not

⁸⁵ Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004).

⁸⁶ *Pacific Insurance Co. v. Soule*, 74 U.S. (7 Wall.) 433 (1869).

⁸⁷ *Pollock v. Farmers' Loan & Trust Co.* ("Pollock I"), 157 U.S. 429 (1895); *Pollock v. Farmers' Loan & Trust Co.* ("Pollock II"), 158 U.S. 601 (1895). *Pollock II*, 158 U.S. at 618 ("[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property ... is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution.").

⁸⁸ Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Comment. 295 (2004).

⁸⁹ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

⁹⁰ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

⁹¹ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 370 (2004) ("Professor Johnson is correct, of course, that the founders didn't understand all of the consequences of the provisions they created... But the appropriate response to criticisms of that sort is 'So what?' ... We do the best we can.").

⁹² U.S. Const. Art. I, sec. 9.

⁹³ See *The Federalist No. 21* (Alexander Hamilton).

⁹⁴ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

⁹⁵ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

alone, as Stephanie Willbanks, in her casebook Introduction to the Federal Transfer Tax System, claims “a tax based on the value of all property owned at death... would be unconstitutional as a direct tax.”⁹⁶

III. How the Law Thinks about Direct Tax

The debate over the Direct Tax limitation of the U.S. Constitution illustrates the natural indeterminacy of words and the usefulness of more precisely delineated jurisprudential decision procedures.⁹⁷ Words are naturally vague and ambiguous, even if not perfectly so. Adjectives are especially problematic.⁹⁸ It is usually the “open-ended” clauses of the Constitution which give the judiciary such pause.⁹⁹ Invariably those open-ended clauses include an adjective that necessarily means something different one person to the next.¹⁰⁰ What makes protection equal? What process is due? Was the search or seizure reasonable? In the case of the income tax, the Pollock dealt with whether a tax on all transactions garnering income was the functional equivalent of a direct assault on wealth? How direct must the tax be for the Constitution to require Congress to apportion it amongst the States by population? Nouns are problematic as well, particularly with respect to phenomena which was previously inconceivable. Later legal applicators are often stymied by whether the text of law extends its provisions over modern inventions which a previous legislature could not conceive. Consider modern technology and freedom of speech.

Also, to the extent ‘direct tax’ is a term to be taken as a whole as a proper noun it is naturally unclear whether the term applies to taxes not conceived of in 1787. Jensen asks whether the people of the United States would approve a Constitution expressly authorizing the unlimited taxing power Ackerman’s construction would give it.¹⁰¹ The reason this counterfactual question has little force however is because it is doubtful whether any American government of the time, whether state or federal, had the bureaucracy necessary to levy an income tax on a national citizenry.¹⁰² One might argue that we still don’t. If the income tax had been a known concept and a viable possibility for the federal government in 1787, pondering such a question might be seen as determinative.

A. Originalist Intentionalism

⁹⁶ STEPHANIE WILLBANKS, *FEDERAL TAXATION OF WEALTH TRANSFERS* (2004).

⁹⁷ Scholars debate the degree with which this is true, with some arguing that legal terminology is fairly determinate and others believing that it is almost perfectly indeterminate. For a balanced exposition, see Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in *VAGUENESS IN NORMATIVE TEXTS* (2005).

⁹⁸ Ruth Vatvedt Fjeld, *The Lexical Semantics of Vague Adjectives*, in *VAGUENESS IN NORMATIVE TEXTS* (2005).

⁹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁰⁰ Of course some adjectives like ‘thirty-five years of age’ are more determinate than others like reasonable, due, equal, necessary, substantial, etc. Ruth Vatvedt Fjeld, *The Lexical Semantics of Vague Adjectives*, in *VAGUENESS IN NORMATIVE TEXTS* (2005).

¹⁰¹ Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 *JOURNAL OF LAW AND POLITICS* 687 (Fall 1999).

¹⁰² ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006).

Whatever slaves may have thought Direct Tax meant, it does not matter under originalist intentionalism, the practice of interpreting text by discerning the intentions of its author(s).¹⁰³ According to intentionalists, words have no meaning outside the intent of their author.¹⁰⁴ According to Stanley Fish, figuring out what meaning readers supply to a text they encounter, textualism, is not interpreting; it is constructing a meaning independent of the purposes for which the text was set down.¹⁰⁵ Intentionalists, those who are only concerned with what the authors intended, consult the Federalist papers and other sources like Federal statutes of the time for evidence of what meaning the Framers intended for words in the Constitution to have. Thus, an intentionalist judge would not care what slaves thought because none were drafters of the Constitution. As such, their views are wholly irrelevant. Intentionalists would consider the views of slaves if the People are the authors of the Constitution or that the Framers intended to use words as they were most plainly understood by the People.

B. Originalist Textualism

Some originalist textualists might consider the meaning a slave may supply to the words Direct Tax, others would not. Textualism emphasizes the meaning people assign to text they encounter.¹⁰⁶ In our legal system, the Supreme Court, Justice Scalia in particular, encourages the legal deliberator to select the meaning that is plain.¹⁰⁷ In the case of a meaning that is less than plain, the deliberator usually considers other sources, like textual context, indicia of intent and purpose, modern dynamics, etc.¹⁰⁸ Of course, a chauvinistic textualist would not consider other sources, instead choosing the meaning of the word that is plainest even if not plain in the abstract.¹⁰⁹ In other words, if plain meaning in the abstract requires, say, 75% of people to agree upon a word's construction, a chauvinistic textualist may still reject all forms of context and choose the meaning as understood by only 51%, or even 40% of people would choose so long as at least two other popular meanings receive less support.

1. Understandings of the Ratifiers

Textualism presents a core question that must be answered before one determines whether it matters what slaves thought Direct Tax meant. To whom must the text be plain? Different communities will often supply different meanings to the same word.¹¹⁰ For example, the definition of income differs depending on whether one is talking to an economist adherent to Haig-Simons or a tax lawyer relying on *Glenshaw Glass v. Commissioner*.¹¹¹ Income requires realization to one, but not the other. These are called interpretive communities, and the exact number breadth of such communities depends on the context. Thus, whether a textualist will

¹⁰³ Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649 (2005).

¹⁰⁴ Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649 (2005).

¹⁰⁵ Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649 (2005).

¹⁰⁶ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-18 (1997).

¹⁰⁷ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997) (“When the text of a statute is clear, that is the end of the matter.”).

¹⁰⁸ Andre L. Smith, *The Deliberative Stylings of Leading Tax Law Scholars*, 62 TAX LAWYER 1 (2008)

¹⁰⁹ Allan Madison (2003); cf. Manning, Vermeule and Molot

¹¹⁰ STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITATIVENESS OF INTERPRETIVE COMMUNITIES (1980).

¹¹¹ *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955)

consider what slaves thought Direct tax meant depends on the interpretive community our deliberator chooses to privilege. It is a matter of discretion.

Whether the thoughts of slaves matter to a textualist, then, depends on whether the deliberating textualist focuses on the understanding of Ratifiers of the Constitution or rather the understanding of the People alive and residing in the United States at the time of ratification.¹¹² Consequently, a textualist who privileges the Ratifiers as an interpretive community would ignore the views of slave, since no slaves were ratifiers.

2. Understandings of the People

Justice Antonin J. Scalia's brand of textualism, on the other hand, indeed concerns itself with what slaves thought Direct Tax meant. His originalist textualism emphasizes the meaning the People of the United States supply to text.¹¹³ According to Scalia, he does not rely on the Federalist Papers to determine what the authors of the Constitution intended, but to discover what the People of the United States took the words in the Constitution to mean.¹¹⁴ The Federalist Papers presumably being the best source of meaning, they are obviously not the only real or theoretical items of evidence.

None of the Federalist Papers were written by slaves, so we cannot be sure that the Federalist Papers represent the meaning of Direct Tax, or Liberty, or Property, or Cruel and Unusual, as understood by those African immigrants. African slaves came from civilizations that may or may not have had understandings of terms and concepts similar to newly-immigrated Europeans.¹¹⁵ We do know, however, that many captured slaves were part of their homeland's aristocracy and were indeed familiar with if not expert in governance and law.¹¹⁶ Thus, the reason we do not know what African slaves thought Direct Tax meant is more likely to be that they were not asked, rather than because none of them knew. For that matter, it is not free from doubt whether the Federalist Papers represented the meanings as would be understood by 18th Century women.

This article does not suggest that the meanings of words and phrases in the Constitution as understood by African slaves should trump the understanding of newly-immigrated Europeans. For one thing, it is not certain whether there is a difference at all. We are coming to understand that all the world's legal systems, if not their cultures as a whole, have been quite syncretic for some time. Instead, it is an attempt to highlight the fact that plain meaning is

¹¹² Although not discussing constitutional deliberation specifically, Jellum & Hricik acknowledge that the plain meaning rule admits some discretion as to which interpretive community a judge should emphasize. JELLUM & HRICIK, *MODERN STATUTORY INTERPRETATION* 46 (200_) ("Should the ordinary meaning apply unless the legislature has expressly adopted a technical meaning in the statute? Or, should courts use the technical meaning if the statute is directed to a technical audience?")

¹¹³ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

¹¹⁴ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

¹¹⁵ Implicit in Diop's claim that the African has a distinct culture is the understanding that it differs from others, including Europe. CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987).

¹¹⁶ See, e.g., TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* xv (2007) ("from time to time African princes and kings had wound up as slaves").

inherently empirical and, as such, the discovery process should include all relevant sources. That plain meaning textualism's empirical nature encourages historical research into the lives of Africans and Africa is as interesting sociologically as it is ironic politically, but it does not by itself privilege textualism over other deliberative techniques—like intentionalism, purposivism or dynamism—in a juristic sense.

According to Justice Taney, in *Sanford v. Scott* (the *Dred Scott* case), claimed that slaves were not included in the People of the United States.¹¹⁷ If he is correct, then Scalian textualism would ignore their views. However, others on the same Court disputed this claim.¹¹⁸ We also acknowledge through social and legal understanding that Taney was simply wrong. African immigrants were people of the United States, even if immoral laws of the time said they were not.

C. Realism

Realism in Constitutional understanding is represented most cogently by the notion of a Living Constitution.¹¹⁹ Under this style of interpretation, if it can be called that, judges deliberating over the Constitution choose the meaning that best serves modern society. Living Constitution scholars are comfortable with the reality that meanings of words and phrases change over time. In its most radical form, living constitutionalism ignores the understandings and intentions of 18th century persons, regardless of their status as authors, ratifiers or mere citizens.¹²⁰ In a milder form, however, living constitutionalism or constitutional realism might attempt to maintain some tether between modern meanings and original text.¹²¹

1. The Living Constitution

Adherents to living constitutionalism do not care what slaves thought at all, about Direct Tax or any other phrase in the Constitution meant. Generally speaking, they contend that we ought not govern ourselves based on the ideals of an 18th Century, euro-male dominated, slave holding society.¹²² Even if the thoughts of slaves were to be counted, judges will likely continue to emphasize the meaning understood by slaveowners more. Instead, the Constitution may legitimately be reconstructed through judicial opinions, so that the supreme law of the land is more symmetrical with the ideals of a people who believe democracy means the ability of a group of people to govern themselves, rather than having some higher authority of men governing over them, i.e., the Founders.¹²³ While living constitutionalism is credited with (or

¹¹⁷ *Scott v. Sanford*, 60 U.S. 393 (1857)

¹¹⁸ *Scott v. Sanford*, 60 U.S. 393 (1857)

¹¹⁹ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1727 (2007).

¹²⁰ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1727 (2007).

¹²¹ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (contending that the structure of the U.S. Constitution exemplifies a commitment to greater participatory democracy, and that that non-text based commitment should be determinative in hard cases); STEPHEN F. BREYER, *ACTIVE LIBERTY* (2003).

¹²² See, e.g., Sanford Levinson, *How the United States Constitution Contributes to the Deficit of Democracy in America*, 55 DRAKE L. REV. 859, 875-76 (2009). But see Charles R. Kesler, *Thinking About Originalism*, 31 Harv. J.L. & Pub. Pol'y 1121, 1127-28 (2008).

¹²³ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1727 (2007).

discredited for) expanding the notions of privacy and equality, it cares not at all for what slaves thought terms in the Constitution meant, as it does not care what anyone in the 18th Century thought.

2. Translation

According to Lawrence Lessig, judges who rely on modern understandings can still be faithful to text.¹²⁴ For some, judges must rely on original understanding in order to be faithful to a written Constitution; otherwise they defeat the purpose of memorializing that huge social contract in the first place.¹²⁵ Lessig, on the other hand, believes that translating the original text into modern terms does not cast Constitutional deliberation adrift into the sea of judicial legislation.¹²⁶ Words are inherently imprecise representations of concepts people share.¹²⁷ So the trick of fidelity, according to Lessig, is to stay faithful to the concept the text identified, rather than adhere to the static meaning of a word or phrase.¹²⁸ A legal decision maker stays faithful to a concept in the same way a translator of literary texts identifies the concepts a word in one language identifies then reiterates those concepts using the terms of another language.¹²⁹ In constitutional translation, first a judge imagines the concepts that words and phrases of the Constitution are intended to represent, then he reiterates the concept in terms of modern understanding. For example, a translationist does not rely on the meaning of liberty as understood by the people or intended by the Framers, but instead identifies the word liberty as imperfectly representative of the concept of responsible personal autonomy and translates that into what personal autonomy means today. In order to translate old words into modern parlance a judge must have evidence and an understanding of what concepts an 18th Century writing is trying to represent. Thus, such a translationist may care to consider African conceptions of liberty or property or Direct Tax. However, a translationist might, in a way similar to an originalist textualist or intentionalist, restrict his focus to the concepts as understood by Framers or Ratifiers, which have nothing to do with what slaves thought.

3. Purposivism

John Hart Ely and Stephen Breyer's kind of Constitutional purposivism might legitimate the views of modern Black people towards what the Constitution ought to mean today, but it ignores the views of slaves.¹³⁰ Purposivism is the privileging of consequences a legislature (or author) intended for a judge to consider.¹³¹ It is distinct from intentionalism in that it focuses on consequences whereas intentionalism is concerned strictly with meaning.¹³² According to Ely

¹²⁴ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993). See also Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991 (2009) (contending that Living Constitutionalism is text based).

¹²⁵ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

¹²⁶ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

¹²⁷ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

¹²⁸ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

¹²⁹ Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

¹³⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); STEPHEN F. BREYER, *ACTIVE LIBERTY* (2003).

¹³¹ AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005)

¹³² Andre L. Smith, *Deliberative Stylings of Leading Tax Law Scholars* (2008); JELLUM & HRICIK, *MODERN STATUTORY INTERPRETATION* 245 (200_).

and Breyer, the structure of the Constitution commits us to the preservation and widening of a participatory democracy.¹³³ According to this deliberative technique, the most important consequence to consider in constitutional cases is which choice better preserves or widens participation in our governmental processes.¹³⁴ With respect to this determination, the views of slaves as to Direct Tax or anything else is irrelevant.

D. Natural Law

Natural law stands for the proposition that law is not man-made, it precedes human-kind, that it comes from God, gods, nature, etc.¹³⁵ The most difficult aspect of instituting natural law as a legal system is designing techniques for determining when legal decision makers (legislatures, judges, etc.) have departed from natural law. In other words, how does one determine what natural law is in order to determine whether there has been a departure from it? That question is not answered here. Here, we note that, under the natural law paradigm, whatever the source of it law is universal and binds us all. Thus, African methods of discovering the divine are just as relevant as any other.¹³⁶

E. Jurisprudential Ignorance of Non-European Legal Culture and Systems

Ignorance of non-European cultures operates in the midst of this epistemological confusion. Aristocratic slaves may well have had experiences relating to income or individual wealth taxes, as well as experiences relating to the proper degree of governmental invasiveness on individual property. There is plenty of reason to believe they did. African civilizations for over the last five thousand years, beginning with the Old Kingdom Egyptians, have officially respected private property in the law.¹³⁷ So too did the great West African civilizations of Ghana, Mali and Songhai, as did smaller states like Kilwa, Kanem, Mossi, Benin, Kuba and Kongo.¹³⁸ Even the conspirators of the Haitian revolution, self-emancipated slaves, incorporated in their Constitution of 1804 legal respect for privately held property.¹³⁹ On the other hand, perhaps Africa was purposely ignored. For inspiration and edification, the Constitution's principal author, James Madison, relied upon Scottish philosopher and historian David Hume's *Of the Origin of Government*,¹⁴⁰ in which he examined numerous European republics but excluded African ones. Hume commented in another work that Africans were not civilized and never contributed to civilization:

I am apt to suspect the Negroes, and in general all other species of men, to be naturally inferior to the whites. There never was any civilized nation of any other complection than white, nor even any individual eminent in action or speculation. No ingenious manufactures among them, no

¹³³ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); STEPHEN F. BREYER, *ACTIVE LIBERTY* (2003).

¹³⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); STEPHEN F. BREYER, *ACTIVE LIBERTY* (2003).

¹³⁵ An example of a natural law approach to constitutional construction is *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹³⁶ Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center's Black Law Student Association) (on file with author).

¹³⁷ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* (1971).

¹³⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY (1997).

¹³⁹ *Second Constitution of Haiti* (1804).

¹⁴⁰ DAVID HUME, *OF THE ORIGIN OF GOVERNMENT*, IN *ESSAYS MORAL, POLITICAL AND LITERARY* (1777).

*arts, no sciences...Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction between these breeds of men.*¹⁴¹

It is in response to this attitude towards Black people that Cheikh Ante Diop, W.E.B. Dubois, Martin Bernal and other scholars re-present evidence of the African and Asiatic origins of Western civilization. Bernal shows specifically how Eurocentric scholars created the concept of race as a means of facilitating far-flung economic domination, before which the majority of learned people understood the origins of ancient Greece and Rome to be of a cosmopolitan sort, heavily influenced by Africa and Asia. As a supposed great historian, it is surprising that Hume was unaware of comments by Greek historians like Lucian, who claimed that “Ethiopians (Nubians) ‘being in all else wiser than other men’ invented astrology and taught it to the Egyptians.”¹⁴² For another invention, one relating to the subject at hand, the first inheritance tax was African (Egyptian).¹⁴³ Contemporaneous with Hume, the Songhai empire taxed both in the style of requisitions from local governments and taxes on trade, etc.¹⁴⁴ Aside from revenue raising, taxation in West Africa was a regulatory mechanism designed for instance to keep the price of gold high or the price of salt low, or to institute a caste system of national economic policy.¹⁴⁵ Thus, it is a gross misstatement that Africans had no experience with and nothing to say about government generally and taxation specifically.

However correct it may be to say that African concepts of taxation, government, economic liberty, etc., are irrelevant to deliberations over the meaning of ‘direct tax’, this is because a deliberative procedure of the Supreme Court may deem such views practically or jurisprudentially out of bounds, not that they do not exist. For instance, Bruce Ackerman’s approach to the Constitution would ignore the views of slaves since his constitutional interpretive style privileges understandings of the New Deal era. By contrast, Justice Scalia’s version of text based originalism seems to require consideration of the views of slaves, as well as women, Indians, etc. Adrian Vermeule and Cass Sunstein might permit judges to ignore considerations they do not have time or expertise to analyze and evaluate. Ignoring the views of all the People might be forgivable as expedient, but it is certainly not excused, especially as an academic rather than jurisprudential matter.

¹⁴¹ David Hume, *Of National Characters*, THE PHILOSOPHICAL WORKS OF DAVID HUME (1854). See also Eric Morton, Race and Racism in the Works of David Hume, *Journal of African Philosophy* (2002) (“Hume was a chief spokesman for the thesis that blacks are permanently inferior to whites.”); MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

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¹⁴³ STEPHANIE WILLBANKS, *FEDERAL TAXATION OF WEALTH TRANSFERS*.

¹⁴⁴ S. M. Cissoko, *The Songhay from the Twelfth to the Sixteenth Century*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 77, 82-84 (1997).

¹⁴⁵ D.T. Niane, *Relationships and Exchanges among the Different Regions*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 245, 246 (1997).

Part II

Part II is dedicated to those who are skeptical towards the idea that slaves drawn from aristocratic families in pre-colonial African civilizations would have sophisticated understandings of taxation and also those who accept this notion but are interested in more detail. Ancient Nubia (Kerma and Kush) and Egypt (Khem) employed governmental systems of taxation thousands of years before the Christian era. A newly discovered tablet shows that by the time of the new epoch, Egypt had income, excise, estate and other special taxes, complete with exemptions, collection due process, and perhaps even tax shelters. As those societies wane in global importance, from the 1st to the 18th Century A.D., from the Muslim north, the Swahili Coast in the east, to the Bantu south and west, African civilizations instituted excise and poll taxes and requisitions or tribute from states within their federations and from conquered and colonized states surrounding their empires. Some of these tributary payments, particularly those from states within a greater African empire, resemble the requisitions and direct taxes required of colonies and states under the Articles of Confederation and the United States Constitution.¹⁴⁶ The next sections represent a sampling of references to these pre-colonial African governments.

IV. African Cultural Unity

A. Denial of African Cultural Unity

This article attempts to examine African civilizations from pre-history to the colonial era as a means of imaginatively reconstructing notions of governance likely held by an 18th Century slave captured and removed from an aristocratic West African family, particularly those with respect to taxation. The idea that Africa had no civilizations worthy of Western study has yet to be dispelled. However, the sheer size of Africa and a paucity of records in some parts and for some periods make it difficult to reconstruct African cultural history.¹⁴⁷ Decades ago, Cheikh Ante Diop famously dared to historiography Africa and Africans as a people.¹⁴⁸ He argued that Africa as a whole, but particularly those societies least influenced by Europeans and West Asians, are culturally unified in terms of governance, inheritance, language, cosmogony, and social organization, all deriving from ancient Nubia and Old Kingdom Egypt civil and religious organization.¹⁴⁹ More recently, in 2007, Balogun Oladele Abiodun asked that legal theorists

¹⁴⁶ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005).

¹⁴⁷ For cogent criticisms of Afrocentricity, see STEPHEN HOWE, *AFROCENTRISM: MYTHICAL PASTS AND IMAGINED HOMES*.

¹⁴⁸ CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987); see also MAGHAN KEITA, *CONCEPTUALIZING/RE-CONCEPTUALIZING AFRICA: THE CONSTRUCTION OF AFRICAN HISTORICAL IDENTITY* (2002); see also CHANCELLOR H. WILLIAMS, *THE DESTRUCTION OF BLACK CIVILIZATION* (1986) (for a stridently Afrocentric historiography).

¹⁴⁹ CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987). Stephen Howe criticizes Afrocentricity generally and Diop specifically, but praises Diop as a serious scholar. STEPHEN HOWE, *AFROCENTRISM: MYTHICAL PASTS AND IMAGINED HOMES* 186 ("By far the most important single figure in the development of what is now called Afrocentric thought is the Senegalese historian Cheikh Anta Diop. Indeed, one might say that every significant idea or claim put forward by Afrocentrists today was earlier expressed by him (though as we have seen, many of them also have a much older, more diffuse ancestry). The only real exceptions to this are the wilder, more mystical and more racially exclusivist assertions made by extreme Afrocentrists. These Diop did not anticipate; for although his work involves many unsustainable claims, his was primarily a career of rational intellectual inquiry. Not only did his writings precede those of the currently high-profile US Afrocentrists, they are in almost every respect superior.")

“explore the possibility of arriving at an African concept of law”, one which “should be resonant with African cultural and legal systems.”¹⁵⁰

Many people are unaware that ancient African civilizations existed and that Africa contributed mightily to the development of so-called Western Civilization. Worse, some very notable and otherwise respectable scholars have denied the very existence of a civilized Africa.¹⁵¹ Ignorance and denial of the rightful place of African civilizations in world history support prejudice towards Black peoples’ inferiority. These false notions, absence of civilization and innate racial inferiority, spiral around one another and reinforce each other; that Blacks neither produced a civilization nor contributed to western civilization proves their inferiority, and, because of their inferiority they could neither have produced civilizations nor contributed significantly to western civilization.¹⁵²

Fortunately, a number of 20th Century scholars, including, inter alia, Aristide Theodorides¹⁵³, Basil Davidson¹⁵⁴, Cheikh Ante Diop¹⁵⁵, Ivan Van Sertima¹⁵⁶, Martin Bernal¹⁵⁷, S.O.Y. Keita¹⁵⁸, re-discovered and re-presented first-hand accounts of the complexity and modernity of ancient African civilizations, including Nubia, Egypt, Ghana, Mali and Songhay to name a few. In fact, P.G. Monteri is quite convinced that the legal systems of Europe and the United States derive ultimately from Africa and Western Asia.¹⁵⁹

B. The Difficulty in Identifying African Cultural Unity

Africa’s size along with West Asian and European subjugation are two elements which make it somewhat difficult to construct a unified African culture.¹⁶⁰ Africa’s land mass is many times larger than Europe. It is several times larger than North America. In fact, several ancient West African civilizations, like Songhay, were larger than all of what is now Western Europe.¹⁶¹

¹⁵⁰ Balogun Oladele Abiodun, *Towards an African Concept of Law*, AFRICAN JOURNAL OF LEGAL THEORY (2007).

¹⁵¹ David Hume, *Of National Characters*, THE PHILOSOPHICAL WORKS OF DAVID HUME (1854). See also Eric Morton, Race and Racism in the Works of David Hume, *Journal of African Philosophy* (2002) (“Hume was a chief spokesman for the thesis that blacks are permanently inferior to whites.”); MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION (1987) (calling out Hume, Hegel and Benjamin Franklin).

¹⁵² MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION (1987).

¹⁵³ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

¹⁵⁴ E.g., Basil Davidson, *African Kingdoms* (1966)

¹⁵⁵ CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY (1974); CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA (1987).

¹⁵⁶ IVAN VAN SERTIMA, THEY CAME BEFORE COLUMBUS.

¹⁵⁷ MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION (1987).

¹⁵⁸ S.O.Y. Keita, *Early Nile Valley Farmers From El-Badari: Aborigines or "European" AgroNostratic Immigrants? Craniometric Affinities Considered With Other Data*, JOURNAL OF BLACK STUDIES (2005)

¹⁵⁹ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000).

¹⁶⁰ AMADOU-MAHTAR M’BOW, PREFACE, in UNESCO’S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA vii (1990) (“it is now widely recognized that the various civilizations of the African continent, for all their differing languages and cultures, represent, to a greater or lesser degree, the historical offshoots of a set of peoples and societies united by bonds centuries old.”).

¹⁶¹ FREDERICK MCKISSACK, THE ROYAL KINGDOMS OF GHANA, MALI, AND SONGHAY: LIFE IN MEDIEVAL AFRICA 56 (1995).

Further convoluting Africa's cultural unity are myriad, smaller, stateless societies that have always existed between the borders of Africa's more elephantine nations and empires.

In addition to the difficulties posed by Africa's size, West Asian and European colonization and subjugation confounds the exploration of African cultural unity.¹⁶² Hostile to indigenous leadership and organization, colonizers and subjugators destroyed many artifacts and documents describing African cultural and political institutions, often forbade the operation of native cultural and political institutions which retarded and sometimes destroyed them, and imposed upon the populace foreign languages, borders and legal systems.¹⁶³ Yet, despite colonialism and the enormity of the continent, Cheikh Ante Diop is convinced of an African cultural unity; that cultural and political institutions throughout Africa derive primarily from Egyptian-Nubian invention over 5,000 years ago.¹⁶⁴

For cultures to be unified they need not be identical, otherwise there would be no European cultural unity and no Western Civilization. Instead, cultures that are united have similarities and symmetries in form and purpose, and derive generally from the same source.¹⁶⁵ Scholars like S.O.Y. Keita use DNA evidence to identify the likely phenotypes and family groups of ancient corpses to determine whether they are more likely to be of an African strand versus European or Asian.¹⁶⁶ Keita, Chris Ehret, Diop and Jan Vansina use linguistics to determine when a people first dealt with a particular construct or phenomena and to determine from whence the concept derived.¹⁶⁷ Of course, African culture was impacted by contact with Europeans, Asians and Americans. But research has proven that, despite fairly recent colonial subordination, features of African philosophy and notions of justice extending back to antiquity permeate the legal processes and institutions of African states as they existed before the terror of the trans-Atlantic slave trade and European Colonization.

C. Indicia of African Cultural Unity

An historically contiguous African culture can be identified, despite the vastness of size and the influence of non-Africans. Throughout Northeast, Southern, Central, and Western Africa, similarities abound in terms of governance, language, cosmogony, etc. African societies have been more likely than any others to regulate their economies based on a caste system and

¹⁶² Western Asian conquest is represented by the expansion of Islam and the importation of laws and styles. D.T. Niane, *Introduction*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 2 (1997) ("The continent was thus besieged from two sides – the Sudan and the eastern coast.") European conquest through the Transatlantic slave trade and colonization is more widely known. I. Hrbeki, *The Disintegration of Political Unity in the Maghrib* in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 43 (1997).

¹⁶³ The Congo is the prime example of how Belgian colonization retarded an entire region. [Note on Aswan damn: "Islamic Egyptians have a deep ambivalence about Ancient Egypt" **Bernal**

¹⁶⁴ CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987).

¹⁶⁵ MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987); JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* (2004).

¹⁶⁶ S.O.Y. Keita, *Early Nile Valley Farmers From El-Badari: Aborigines or "European" AgroNostratic Immigrants? Craniometric Affinities Considered With Other Data*, *JOURNAL OF BLACK STUDIES* (2005)

¹⁶⁷ JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* (2004); CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987). (Ehret) (Keita)

employ a matriarchal system of inheritance and power succession.¹⁶⁸ Versions of the Bantu language are spoken by well over half the people on this immense continent.¹⁶⁹ Traditional African societies have always been more apt than any other place in the world to educate and indoctrinate youth through fraternal rites.¹⁷⁰ Similarities in cosmogony and arts have been noted (perhaps overemphasized).¹⁷¹ I believe there is something significant to the fact that the names of the greatest pre-colonial African civilizations bear some linguistic similarity, e.g., Kerma, Khem, Kush, Kenya, Kilwa, Kuba, Kanem, Kongo, Kuba, Ghana, Kano, Kebbi. By the time Prince Abdur Rahman¹⁷² or Equiano the African¹⁷³ is abducted from West Africa and brought to the Americas in the 18th Century, the African continent had already experienced over five thousand years of rises and falls with respect to civilization building and over that time had developed identifiable patterns of governance and legal administration, including with respect to taxation.

D. Nubia as the Origin of African Cultural Identity

Nubia (Kerma¹⁷⁴ and Kush¹⁷⁵) represents the cultural origin for most of the African continent. It lay directly south of Ancient Egypt and had a complex relationship with its northern neighbor before either was known internationally as nations.¹⁷⁶ Nubia and Egypt had ties even before the dynastic period, circa. 3200 BC.¹⁷⁷ The calendar, geometry and, according to John A. Wilson, legal administration were invented during this time.¹⁷⁸ Egyptians as far back as the Old Kingdom imported gold, steel and other items from Nubia and then traded them to

¹⁶⁸ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 6-17, 48-52, 58, 149 (1987); UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 19, 72, 79, 133, 159, 189, 222 (1997).

Emperors instituted the caste system through taxation, by requiring each group to pay their taxes in quantities of the produce the empire expected of them. CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 155 (1987)

¹⁶⁹ Diop contends that the ubiquitous nature of the Bantu language represents a series of migrations from the Nile Valley towards other parts of Africa. CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 212 (1987). Jan Vansins on the other hand believes the Bantu language has a West African origin and spread south and eastward from there. JAN VANSINA, HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600 (2004).

¹⁷⁰ JAN VANSINA, HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600 219-223(2004); CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 190-92 (1987).

¹⁷¹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 212 (1987).

¹⁷² TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH (2007).

¹⁷³ VINCE CARRETTA, EQUIANO THE AFRICAN (2005).

¹⁷⁴ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 144-45 (1990); N.M. Sherif, *Nubia Before Napata*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 154-55 (1990).

¹⁷⁵ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 144-45 (1990); N.M. Sherif, *Nubia Before Napata*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 154-55 (1990).

¹⁷⁶ Before the dynastic period in Egypt, the people of what is now considered Nubia were known to the Egyptians as Ta-Seti. S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 141 (1990).

¹⁷⁷ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 142 (1990) ("It was only towards -3000 that a distinct difference developed between the civilization of the lower, Egyptian part of the Nile Valley and that of the upper, Nubian part.")

¹⁷⁸ John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954).

other parts of the ancient world.¹⁷⁹ Although the great pyramids of Egypt were built around 2500BC, during the Old Kingdom,¹⁸⁰ more pyramids were eventually built in Nubia than in Egypt.¹⁸¹ At times, Egyptians dominated Nubia and required her to pay annual tribute.¹⁸² At other times, during the Old and New Kingdoms, Nubian kings reigned over Egypt.¹⁸³ There being no recorded European or West Asian invasion of Africa prior to 2000BC suggests that social developments before this time in terms of law, religion and other forms of social organizations are decidedly African.¹⁸⁴

Egypt during the Middle and New Kingdoms becomes more cosmopolitan and Mediterranean,¹⁸⁵ until it becomes Hellenic in the first millennium BC,¹⁸⁶ Roman around the turn of the millennium,¹⁸⁷ and Islamic in the 7th Century AD.¹⁸⁸ Nubia is also subjugated by Mediterranean Egypt and the Romans at times during this ancient period¹⁸⁹, but has a glorious almost thousand year epoch during the turn of the millennium¹⁹⁰, becomes a great Christian empire during the later half of the first millennium and beginning of the second¹⁹¹, only to fall to Islam in the 13th Century AD¹⁹², like Egypt.

Each societal decline in Nubia likely produced several internal migrations, leading to the spread of northeast African culture south- and westwards. For instance, Ghana, likely the first

¹⁷⁹ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 142-47 (1990); CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 105, 204 (1987).

¹⁸⁰ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 63-4 (1990).

¹⁸¹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 196 (1987).

¹⁸² A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 71 (1990).

¹⁸³ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 77 (1990). CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY 146 (1974).

¹⁸⁴ Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center's Black Law Student Association) (on file with author).

¹⁸⁵ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 69-78 (1990).

¹⁸⁶ H. Raid, *Egypt in the Hellenistic Era*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 119 (1990).

¹⁸⁷ S. Donadoni, *Egypt under Roman Domination*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 131 (1990).

¹⁸⁸ S. Donadoni, *Egypt under Roman Domination*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 140 (1990).

¹⁸⁹ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 141 (1990); N. M. Sherif, *Nubia Before Napata (-3100 to -750)*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 131 (1990).

¹⁹⁰ J. Leclant, *The Empire of Kush: Napata and Meroe*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 161 (1990). A. A. Hakem, *The Civilization of Napata and Meroe*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 172 (1990).

¹⁹¹ K. Michalowski, *The Spreading of Christianity in Nubia*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 185 (1990).

¹⁹² L. Kropacek, *Nubia from the Late Twelfth Century to the Funj Conquest in the Early Sixteenth Century*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159 (1997).

‘advanced’ West African civilization, was involved in international trade within Africa possibly as early as the fourth century BC.¹⁹³ The route from the Nile to the Niger went through Kanem and Borno and what became the Hausa states of Kano and Katsina and Kebbi. Ultimately, even those southern and western societies were impacted by the rise of Islam and then European influences. But, outside influences notwithstanding, this article focuses on the legal systems of Nubia and Old Kingdom Egypt as the dawn of African legal culture then travels south- and westwards, identifying reported aspects of pre-colonial African tax administrations.

V. Historical References to African Legal Sophistication, Excepting West Africa

A. Due Process and Equal Protection as the Test for Modernity

The modernity of African law from ancient Nubia and Egypt through Mali and Songhai is proven through its respect for due processes of law and its commitment to equal protection, rather than its commitment to maintaining legal codes.¹⁹⁴ Those who would deny the modernity of African law or in some cases the very existence of law during Africa’s antiquity seem to confuse a commitment to codification as the standard for both the existence of law and its modernity.¹⁹⁵ They suggest that if Egypt was not governed through the administration of a legal code, then Egypt did not experience law.¹⁹⁶ They confuse the democratic process for making law with the definition of law, which instead of the existence of a code is more usefully conceived of as a jurisdiction’s official agreements to restrict conduct, perhaps limited to those which state consequences are supposed to ensue.

¹⁹³ A.F.C. Ryder, *From the Volta to Cameroon*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 142 (1997). But see D.T. Niane, *Mali and the Second Mande Expansion*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50 (1997)

¹⁹⁴ Whether Ancient Egypt governed through formal legal codes is debatable. RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 7 (2002). Regardless, overreliance on the discovery of legal codes to determine whether a society experienced ‘law’, seems to be the kind of hyper-positivism deployed in historiography generally to diminish the civilizations of non-europeans. But see MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

¹⁹⁵ Jan Vansina’s theory that private property naturally emanates from a societies decision to abandon hunting and gathering and adopt pastoralism suggests that all societies experience law at a very early stage. JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* 118-19 (2004) (“Adopting a fully pastoral nomadic way of life clearly required considerable social adaptations. ... Some of the major social consequences included new conceptions of property and hence new dispositions for inheritance and succession.”). So the existence of a code does not represent the existence of law, it represents evidence of a higher modernity of law.

¹⁹⁶ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* (1971) (“In daring to speak of ‘law’ in ancient Egypt one tends to lay oneself open to a number of criticisms”); John A. Wilson, *Authority and Law in Ancient Egypt*, *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* 7 1954 (“Certainly there was a recognition of the necessity and obligation for good management, but apart from that it is impossible to claim that ancient Egypt formulated any ethical basis for government and law. This ‘lawlessness’ permitted a kind of flexible strength in allowing a dogmatically traditional society to meet the new situations of changing times.”). See also, ANNA MANCINI, *MAAT REVEALED: PHILOSOPHY OF JUSTICE IN ANCIENT EGYPT* 9-10 (2006) (“The idea of creating a system logically structured as well as the use of logical deductions, was very unfamiliar to the ancient Egyptian mind. One of the main features of the Egyptian mind is its unfamiliarity with our modern rational way of thinking.”).

The conception of law as text based product of a democratic process denies, perhaps intentionally, the existence of law to a majority of the world's great civilizations whose models of governance differ in myriad respects suitable for their time and territory even climate.¹⁹⁷ It excludes almost all non-European civilizations, unless their inclusion is suggested via elaborate comparisons and contrasts. Due to the indoctrination of the author, this article too cannot escape using the Western model of law as part of the standard for modernity. Fortunately, a variety of 20th century anti-structuralist scholars legitimated conceptions of social systems including law somewhat detached from the strictures of elite formalism, the theory usually deployed towards privileging the Western form as THE form.

Attempting here to elude western legal positivism is not meant to disrespect positivism, but instead it is meant to avoid the western legal form as prima facie evidence of modernity. Positivism is not folly, as order and predictability, essential features of due process of law, are important societal norms which correspond well to formalism.¹⁹⁸ Neither does my admittedly failed attempt to avoid western hegemony suggest the uselessness of the traditional western conception of law as code or some other text, the modernity of which depends on the degree with which the legislature producing it is in fact attenuated to the public. Pragmatically speaking, legislatively produced text as law is a noble conception clearly intended to uphold a democratic society, which in turn is supposed or intended to protect the grandeur of the individual.¹⁹⁹ In other words, while the western legal tradition of law as code is certainly a modern form of law, my complaint is that it is neither the sole nor most important criteria for modernity.

That said, the test for modernity, instead of the existence of code and the sophistication of the process producing it, should be on one hand the degree and sophistication of the state's economic regulatory bureaucracy and on the other the degree of the state's commitment to due process of law and equal protection of law.²⁰⁰ This test is compatible with the most important norms characterizing the western legal system, except that its high marks for the administrative state is to some degree less compatible with Western obligations to economic liberty as an a priori principle. This article does not deny economic liberty as a social and legal principle worth fighting over. But the state's commitment to individual control of property is weak as a standard for modernity since the equilibrium between individual autonomy and state intervention is still and perhaps forever will be a matter of intra-national political contention. Moreover, this article pays some but less attention to economic regulations, as that would require a much thicker study of their complex economies including drawn inferences regarding their regulation by the state. Ultimately, the test for modernity of law used here will be 1) the degree with which each state was apparently committed to instituting processes for resolving disputes and otherwise

¹⁹⁷ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000).

¹⁹⁸ ROY L. BROOKS, THE STRUCTURES OF LEGAL DECISION MAKING: FROM FORMALISM TO CRITICAL LEGAL STUDIES (___) (advocating for Blacks to appreciate formalism's attempts to constrain the personal preferences of judges, as those preferences in the aggregate would likely disadvantage Black people).

¹⁹⁹ This statement intentionally confuses several legal justificatory principles.

²⁰⁰ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971) ("The skilful government which the country enjoyed throughout the vicissitudes of its history guaranteed to individuals certain rights which together may legitimately be described as the Egyptian 'law' of the period, a law embodied in statutes and protected by courts.... In short, what is striking is the modernity of this law.")

restricting immoral or unethical (useless or inefficient) conduct and 2) the degree with which it sought to insure these processes represented and were available to all citizens.

Over 5000 years ago, Old Kingdom Egyptians developed a legal system with procedures of law designed to settle disputes and administer government based on principled and reasoned deliberation and to afford protection of the system on equal grounds to all citizens.²⁰¹ Scholars debate whether Old Kingdom Egyptian law was codified.²⁰² Some believe Egypt's complex system of legal procedures was older than Egypt itself, presumably either instilled by the Nubians or left over from the Badarians. Clearly, however, by 2000 BC, before any successful invasion of Egypt from outside of Africa, everyday Egyptians operated within an intense legal structure governing most aspects of their lives, and that Middle and New Kingdom dynasties tried to restore Egypt to its Old Kingdom greatness, including adherence to its principles of due process and equal protection.²⁰³

B. Ancient Nubia (Kerma, then Kush)

Nubia (Kerma, then Kush) is older than Egypt. As Kerma or Ta-Seti, it existed before Menes the first Pharaoh united upper (southern) and lower (northern) Egypt.²⁰⁴ Diodorus wrote that Egypt was a colony of Nubia.²⁰⁵ It was recognized as one of the most powerful kingdoms on Earth and despite being the primary source of gold for the ancient world was never conquered during antiquity by the Romans, Greeks, Assyrians or Persians.²⁰⁶ Nubia eventually developed its own system of writing.²⁰⁷ And it was often governed by women, the Candaces.²⁰⁸

C. Ancient Egypt (Khem)

²⁰¹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002); Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971); John A. Wilson, *Authority and Law in Ancient Egypt*, Journal of the American Oriental Society (1954); P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000); J.G. Manning, *Demotic Egyptian Instruments of Transfer as Evidence for Private Ownership of Real Property*, 71 CHICAGO-KENT L. REV. 237 (1995).

²⁰² RUSS VERSTEEG, LAW IN ANCIENT EGYPT 7 (2002).

²⁰³ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971) (“it attained from the outset, during the Old Kingdom, a high level of institutional and juridical development, which was subsequently distorted by the intrusion of religious practices. Not only did Egypt not surpass this level in the later phases of her development, she may even perhaps have failed to reach it again, despite the efforts of her rulers and thinkers.”)

²⁰⁴ Before the dynastic period in Egypt, the people of what is now considered Nubia were known to the Egyptians as Ta-Seti. S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 141 (1990).

²⁰⁵ CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY 1-5 (1974) (Ethiopia was then the term used for what today is called Nubia); MARTIN BERNAL, BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION (1987).

²⁰⁶ N. M. Sherif, *Nubia before Napata (-3100 to -750)*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 148 (1990).

²⁰⁷ A.A. Hakem, *The Civilization of Napata and Meroe*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 174-75 (1990).

²⁰⁸ A.A. Hakem, *The Civilization of Napata and Meroe*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 174-75 (1990).

According to the S.O.Y. Keita, the Badarian civilization (4000BC – 3200 BC) predates dynastic Egypt and is possibly the first African civilization (if the development and commitment to agriculture identifies the existence of civilization or at least society).²⁰⁹ Their remains are found in Northeast Africa, between a fertile but drying Sahara and the Nile river valley.²¹⁰ At this time, Nubia is referred to as Ta Seti, and what will be Egypt is divided into two lands, Upper Egypt in the south and Lower Egypt to the north.²¹¹ Little is known, however, about taxation or governmental organization generally in these lands, except that John A. Wilson believes that Old Kingdom Egypt's legal procedures from these early societies.²¹²

The original name for Egypt is Khem, or land of the Blacks.²¹³ Around 3200 BC, Menes, from southern (Upper) Egypt, united upper and lower Egypt, thus establishing the first Egyptian dynasty.²¹⁴ This first Egyptian Dynasty begins what is known as the Old Kingdom era. From 3200 – 2000 BC, Egypt developed its statehood, originated systems of writings, applied the sciences, and built all of the Pyramids.²¹⁵ Old Kingdom Egyptians traveled and traded broadly, conquering and controlling areas outside of Africa.²¹⁶ Egyptian law's modernity is proven through its respect for due processes of law, its majesty relates to its commitment to equal protection.²¹⁷ This was Egypt's Golden Age, all Pharaohs thereafter pledged to return the country to the greatness it enjoyed during this time.²¹⁸

1. Origins

Even Egyptian mythology suggests a deep commitment to law and legal procedure predating dynastic Egypt, and it also points slightly towards mediation and reconciliation as the intended purposes behind the state's resolution of disputes.²¹⁹ Tehuti, known as Thoth or Hermes in other mythologies, and also as the 'lord of law', presided over the trial of Heru (or

²⁰⁹ S.O.Y. Keita, *Early Nile Valley Farmers From El-Badari: Aborigines or "European" AgroNostratic Immigrants? Craniometric Affinities Considered With Other Data*, JOURNAL OF BLACK STUDIES (2005).

²¹⁰ S.O.Y. Keita, *Early Nile Valley Farmers From El-Badari: Aborigines or "European" AgroNostratic Immigrants? Craniometric Affinities Considered With Other Data*, JOURNAL OF BLACK STUDIES (2005).

²¹¹ S. Adam, *The Importance of Nubia: a link between Central Africa and the Mediterranean*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 141-42 (1990).

²¹² John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 6 (1954).

²¹³ Cheikh Anta Diop, *Origin of the Ancient Egyptians*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 27 (1990). Some argue that Land of the Blacks is a reference to the color of the soil.

²¹⁴ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 63 (1990).

²¹⁵ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 62 (1990).

²¹⁶ A. H. Zayed, *Pharaonic Egypt: Society, Economy and Culture*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 90 (1990).

²¹⁷ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971) ("it attained from the outset, during the Old Kingdom, a high level of institutional and juridical development, which was subsequently distorted by the intrusion of religious practices. Not only did Egypt not surpass this level in the later phases of her development, she may even perhaps have failed to reach it again, despite the efforts of her rulers and thinkers.")

²¹⁸ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

²¹⁹ John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954).

Horus), who revenged against his uncle, Set, for killing his father Osiris.²²⁰ Tehuti makes peace between Set and Heru, which means, according to Asa Hilliard, that the role of the judge in Egypt was not necessarily the preservation of individual rights but the mediation of disputes preferably by way of reconciliation of the parties.²²¹

According to Ernest Budge, the Egyptians believed Tehuti represented intelligence; he invented letters, writing, the arts and sciences, was skilled in astronomy and mathematics, and was the begetter of law.²²² The Book of the Coming Forth from the Darkness into the Light (the Book of the Dead) associates Tehuti with the negative confessions the dead must declare in order to be adjudged fit for the afterlife.²²³ The scales of justice are derived from this trial of the dead where one's soul is measured against the weight of a feather.²²⁴ In another book from about 2300BC, the teachings of Ptahhotep devotes itself to explaining the principles of Ma'at, roughly translated as truth, justice, law and order.²²⁵ Some consider a civilization's mythology to be loose interpretations of their actual beginnings, and if so, Egyptian mythology suggests a commitment to orderly dispute resolution in the Nile Valley perhaps predating Badarian times. Consider that the Egyptians in the earliest dynasties relied on mythology probably because the actual inventor and invention of letters, writing, mathematics, astronomy, arts and science, and law could not actually be identified, being so long ago before them.

The actual administration of law predates dynastic Egypt, even if evidence of its precise forms is paltry. The mere idea of a state or nation or other political jurisdiction that exists outside of the personal control of its most powerful citizen suggests law, even if only as a procedure for electing or choosing the next head of state.²²⁶ While Old Kingdom pharaohs enjoyed almost unbounded authority and were to be revered as gods, the principles of Ma'at were greater than Pharaoh's whim and were the standards against which his decisions were judged.²²⁷ The principles of 'natural law' embodied by Ma'at might be the product of centuries of norm formation by pre-dynastic Egyptians and Nubians.²²⁸ Whatever its origin, the principles of Ma'at and the governments of the Egyptian dynasties at all times respected the concept of

²²⁰ Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center's Black Law Student Association) (on file with author).

²²¹ Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center's Black Law Student Association) (on file with author).

²²² SIR ERNEST BUDGE, *THE BOOK OF THE DEAD: AN ENGLISH TRANSLATION OF THE CHAPTERS* (1933); RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* 34, fn. 76 (2002).

²²³ SIR ERNEST BUDGE, *THE BOOK OF THE DEAD: AN ENGLISH TRANSLATION OF THE CHAPTERS* (1933).

²²⁴ SIR ERNEST BUDGE, *THE BOOK OF THE DEAD: AN ENGLISH TRANSLATION OF THE CHAPTERS* (1933).

²²⁵ Georges Posener, *Literature*, in *THE LEGACY OF EGYPT* 220 (1971).

²²⁶ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 *HASTINGS L.J.* (2000).

²²⁷ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002); John A. Wilson, *Authority and Law in Ancient Egypt*, *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* (1954).

²²⁸ The concept of Ma'at is identified with the Egyptian legal system since the beginning of the dynastic order. John A. Wilson, *Authority and Law in Ancient Egypt*, *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* 1, 6 (1954).

privately held property.²²⁹ Records relating to property, contracts, even wills date all the way back to Egypt's founding.²³⁰

John A. Wilson believed the complex legal procedures of the Old Kingdom in effect as early as 3000 B.C. predated that civilization.²³¹ Diodorus' belief that Egyptian culture originated from the South, i.e., Nubia, is consistent with the idea that Old Kingdom legal experience derived from earlier Nubian influence.²³² That the Great Court instituted by the earliest Egyptian dynasties were to be staffed by the "Great Men of the South" is also consistent with a Nubian origin of Egyptian law and procedure.²³³ That Egyptian law and procedure emanated from Nubia is not the only possible interpretation, as it is plausible that law in Egypt and Nubia derived from the Badarians who occupied the Nile Valley before each of them.

2. Codification

With respect to modernity, codification relates to due process, because notice as a feature of due process supports the idea that citizens need to be aware of their legal rights so as not to act in contravention of them or others'. I do not mean to suggest that modern legal systems have developed perfect due processes of law, particularly with regard to notice of what the law is, as an abundance of equitable principles along with the rule against absurd consequences have and will always problematize knowledge and understanding of what the law requires.

Old Kingdom Egypt may or may not have governed by way of legal code. Several west Asian civilizations of the same time period, Hammurabi's Mesopotamia for famous example, had codes that have since been discovered.²³⁴ Greek and New Kingdom Egyptian authors believed that the Old Kingdom operated under legal codes, authored by at least five Pharaohs. Hieroglyphic texts suggest the same.²³⁵ But these codes have never been found.²³⁶ If the Old Kingdom Egyptians did not govern by code perhaps it was because the very existence of a legal code predating a Pharaoh was inconsistent with his supposed godliness, as it would serve to limit his authority.²³⁷ An alternate explanation might be that Old Kingdom Egyptians, who were assuredly aware of the existence of legal codes used by their trading partners, may have decided not to govern by code for the purpose of remaining flexible and pragmatic, so as to privilege

²²⁹ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002); Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* (1971).

²³⁰ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in *THE LEGACY OF EGYPT* (1971); J.G. Manning, *Demotic Egyptian Instruments of Transfer as Evidence for Private Ownership of Real Property*, 71 *CHICAGO-KENT L. REV.* 237 (1995).

²³¹ John A. Wilson, *Authority and Law in Ancient Egypt*, *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* 6 (1954) ("Of course legal procedure was followed in Egypt, but the specified practice must have stemmed from the customary law of the land before there was a unified state.").

²³² ANNE BURTON, *DIODORUS SICULUS* (1973).

²³³ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002); CHEIKH ANTA DIOP, *THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY* (1974).

²³⁴ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002).

²³⁵ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002).

²³⁶ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002).

²³⁷ RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (2002); John A. Wilson, *Authority and Law in Ancient Egypt*, *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* (1954).

mediation and reconciliation over certainty of legal right.²³⁸ Further, large portions of modern western law are still determined through a common law court system, one not very dissimilar to that used by the Old Kingdom Egyptians. It is remarkable to think of a country so big, that lasted for so long, and which accomplished such wonders could govern without a code of laws. It suggests an unappreciated genius in itself that would deserve significant study. Yet, if, despite the assertion of several ancient historians, the Old Kingdom Egyptians did not in fact govern by code, it suggests a slightly lesser degree of modernity than West Asian civilizations of the time. A tiny indictment, indeed.

3. Common Law Courts

Regardless the situation with legal codes, it is clear Old Kingdom Egyptians developed an elaborate common law court system, with decisions based on proffered evidence and rules of procedure designed to afford due process and equal protection.²³⁹ The First Dynasty appears to rely on a member of the royal family to serve as Vizier, which at the time appears to be a combination of attorney general and Chief Justice.²⁴⁰ By the Fifth Dynasty, the Vizier is no longer related to the king, and resembles what we might call today a cabinet member.²⁴¹ During these earliest days, the Vizier was required to “walk forth every day, so that poor or timid people might also have a chance to appeal to him for justice.”²⁴² This concern for equal protection is mirrored in the venerated legal systems of pre-colonial West African civilizations. It suggests that availability to the poor is one of the standards upon which all African legal systems are judged.

The Vizier administered the Egyptian court system, which includes the Great Court and the Six Great Courts on which local judges served.²⁴³ As a member of cabinet subservient to the King, who in turn was adjudged against the principles of Ma’at, the Vizier did not enjoy much personal discretion.²⁴⁴ According to Wilson, “the king’s charge to the vizier is very detailed, insists upon the strictest impartiality and also directs that all of the vizier’s judicial activity be carried out in conformance with the regulations and that everything be done in conformance with the precedent therefor.”²⁴⁵ Commanding the Vizier to enforce impartiality was important because of course local judges were not immune to bribery and Egypt certainly required an honorable court system to protect its stature as the preeminent international marketplace.²⁴⁶ With

²³⁸ Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center’s Black Law Student Association) (on file with author); Balogun Oladele Abiodun, *Towards an African Concept of Law*, AFRICAN JOURNAL OF LEGAL THEORY (2007).

²³⁹ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

²⁴⁰ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 40 (2002).

²⁴¹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 40 (2002). John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 3 (1954).

²⁴² John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 4 (1954).

²⁴³ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 38-41 (2002).

²⁴⁴ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 66-68 (2002). John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 3 (1954).

²⁴⁵ John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 4 (1954).

²⁴⁶ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 53 (2002) (describing the Horemheb’s judicial reforms, including tax exemption for judges).

respect to modernity, minimizing judicial discretion, or requiring that cases be resolved by rule or reasonably ascertainable standards, relates well to our modern concepts of due process and equal protection.

The Vizier as cabinet member supervised the provincial courts to ensure that they held regular, formal hearings and that they adhered to the principles of law, precedent and neutrality.²⁴⁷ Texts from that period describe lawsuits, court proceedings, testaments, transfers of property, edicts and decrees from the King.²⁴⁸ Some suggest that the judiciary was comprised of the “thirty great men of the south”, who may have served as both judges and district governors.²⁴⁹ From time to time, the Vizier’s commissioners visited and consulted with the local judges.²⁵⁰ According to Russ VerSteeg, “it was customary, though not required, for a judge to apprentice as a clerk in the court prior to the time that the king promoted him to a judgeship”, a process for selecting ‘federal’ judges similar to our own.²⁵¹ Pharaohs sometimes appointed special commissions to preside over particular cases, such as when Ramses obviously concerned with the appearance of impartiality convened such a commission to try conspirators against his regime.²⁵² Egypt may have had other ‘non-federal’, local courts to hear minor petitions and accusations of petty crime.²⁵³

Stare decisis is a known and important concept in the Old Kingdom.²⁵⁴ A judge’s “individual authority was thoroughly limited by known precedents and procedures from the past.”²⁵⁵ On one hand, Diodorus claimed that at least five Old Kingdom Pharaohs instituted codified laws.²⁵⁶ On the other, these laws have not been discovered; meanwhile contemporaneous codes have been found throughout West Asia.²⁵⁷ There being no discovered record of these laws casts some doubt on the claim of codified law, the absence of a code can be explained either by lack of sophistication or purposeful choice towards flexibility, or records of codified law were destroyed by weather or man. Regardless, Egyptian courts were known to

²⁴⁷ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁴⁸ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002); Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971); J.G. Manning, *Demotic Egyptian Instruments of Transfer as Evidence for Private Ownership of Real Property*, 71 CHICAGO-KENT L. REV. 237 (1995).

²⁴⁹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁵⁰ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁵¹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁵² RUSS VERSTEEG, LAW IN ANCIENT EGYPT 37 (2002).

²⁵³ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 37 (2002).

²⁵⁴ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971). Cf. RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002) (denying stare decisis to Old Kingdom Egyptians); John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954).

²⁵⁵ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971). Cf. RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002) (denying stare decisis to Old Kingdom Egyptians); John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954).

²⁵⁶ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 7 (2002); ANNE BURTON, DIODORUS SICULUS (1973).

²⁵⁷ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 7(2002); Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

have forty rolls of past precedent available to each judge in the court room and were to decide accordingly.²⁵⁸

Only during the first intermediate period was there ever a doubt as to whether any individual had recourse to the courts as a matter of right.²⁵⁹ The Vizier as well as judges of local courts was expected to avail themselves to “the poor and the timid.”²⁶⁰ Notably, Egyptian legal procedure recognized the importance of lawyers yet restricted their duties, as they believed excessive lawyering favored the rich.²⁶¹ Even more remarkable than their sophisticated appreciation for the good and bad consequences of legal practice was their acceptance of women as a full legal person.²⁶² Egypt was known to have on occasion female Pharaohs.²⁶³ But more impressively by the Middle Kingdom era even a common woman could exercise whatever legal rights every citizen of her day was supposed to have.²⁶⁴ Aristide Theodorides recounts a story about an Egyptian woman who sued her father for goods he owed to her and her husband.²⁶⁵ It is quite noteworthy towards the concept of equal protection that her husband was not required to sue on her behalf and that she could sue her father.²⁶⁶ This suggests that, unlike vast majority of western societies up until close to our own time, women were neither the property of their fathers nor their husbands.²⁶⁷ Indeed, in addition to Africa’s well documented acceptance of female rule and matrilineal succession, the respect for women as equal in the eyes of the law in ancient Egypt suggests a continental appreciation for equal protection greater than that of contemporaneous legal systems.

4. Administrative Government and Taxation

Apparently, agents of the Egyptian state operated for thousands of years under the direction but somewhat removed from personal control of Pharaoh. In fact, by around 1350 BC, Pharaoh could no longer make law by decree. The Egyptian Dynasties, even as far back as the Old Kingdom, were committed to the development of the administrative government, and were quite familiar with numerous forms of taxation, including tributes, tariffs, poll taxes, and the world’s first estate tax.²⁶⁸ Wilson describes Old Kingdom government as an “elaborate

²⁵⁸ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971). Cf. RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002) (denying stare decisis to Old Kingdom Egyptians); John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954).

²⁵⁹ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

²⁶⁰ John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 4 (1954).

²⁶¹ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT 311 (1971).

²⁶² RUSS VERSTEEG, LAW IN ANCIENT EGYPT 210-12 (2002). Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

²⁶³ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 213 (2002).

²⁶⁴ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 210-12 (2002).

²⁶⁵ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971).

²⁶⁶ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT (1971)

²⁶⁷ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 210-12 (2002).

²⁶⁸ STEPHANIE WILLBANKS, FEDERAL TAXATION OF WEALTH TRANSFERS 3 (2008). Willbanks places the inheritance tax in Egypt at 7 B.C.E., which makes it less African and more Mediterranean. However, a burial tax was levied at earlier times. RUSS VERSTEEG, LAW IN ANCIENT EGYPT 115 (2002).

bureaucracy”, including several cabinet-level ministers.²⁶⁹ By its 4th Dynasty, Egypt had a national archive where they stored deeds, contracts, wills and royal decrees.²⁷⁰

The Old Kingdom developed numerous tax systems.²⁷¹ The most informal form of taxation was the tribute either paid by or paid to Egypt by other nations.²⁷² When conquering lands on the Arabian peninsula and northwards towards Palestine, the Egyptians required payment in exchange for autonomy.²⁷³ In this way, Egypt at times operated something like a confederacy. Other times, Egypt was required to pay the likes of Nubia or the Macedonians to keep them from attacking.²⁷⁴ Local ‘nomarchs’ collected poll taxes during this time.²⁷⁵ Instead of money, tax collectors sometimes received payment in kind.²⁷⁶ According to Stephanie Willbanks, the first estate tax was instituted in Egypt.²⁷⁷ Furthermore, the Egyptian estate transfer system contemplated a trust system where a trustee holds property and distributes income therefrom to a class of intended beneficiaries.²⁷⁸

Tax in ancient Egypt was fairly ubiquitous. Pharaoh’s of the very first dynasty (3000-2800BC) levied an annual poll tax.²⁷⁹ Egyptian taxes also included ad hoc levies dedicated to specific activities like military campaigns.²⁸⁰ As early as the 4th Dynasty, Egyptian government issued tax exemption charters.²⁸¹ Taxes on exports and imports, along with the establishment of tariff-free zones, were also part of Old Kingdom Egyptian tax administration.²⁸²

The Egyptian tax system is phenomenally comprehensive for its time. It was not modern in the sense Robin L. Einhorn uses the term. In her discussion of taxation in the Americas pre- and post- Revolutionary war, she suggests modernity is to be judged by both a commitment to the progressivity of tax incidence philosophically and to appraising the commercial value of property administratively.²⁸³ However, considering the over-mystification of Egyptian government and society and the still prevalent attitude that Egyptian civilization was pre-

²⁶⁹ John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954) (“An elaborate bureaucracy was constructed, which dispensed justice and carried out administration in the king’s name.”).

²⁷⁰ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 38-40 (2002).

²⁷¹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷² RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷³ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷⁴ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷⁵ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷⁶ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 116 (2002).

²⁷⁷ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁷⁸ Aristide Theodorides, *The Concept of Law in Ancient Egypt*, in THE LEGACY OF EGYPT 297-300 (1971) (discussing the term usufructuary).

²⁷⁹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁸⁰ RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁸¹ RUSS VERSTEEG, LAW IN ANCIENT EGYPT 121 (2002).

²⁸² RUSS VERSTEEG, LAW IN ANCIENT EGYPT (2002).

²⁸³ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2006).

logical²⁸⁴, it is very important to detail Egypt's commitment to taxation as a means of maintaining responsible government and a harmonious society.

5. Persian and Hellenistic Egypt

After 2000 BC, Egypt faced threats to its borders from the Assyrians and the Persians to their northeast²⁸⁵, and around 500 BC from the Greeks and Romans to their north.²⁸⁶ Political upheaval characterizes the first intermediate period (2280-2060). The Middle Kingdom (2060-1785) returned Egypt to a dynastic order.²⁸⁷ Following the Middle Kingdom, other west Asian invasions occurred, bringing a second intermediate period of political upheaval.²⁸⁸ Eventually, the Nubians led by Piankhi retook Egypt and through Taharqa restored its prominence, after fall of the New Kingdom (1580-1085).²⁸⁹ Persia conquers Egypt in 530.²⁹⁰ Then, Hellenistic Egypt (500 BC to 350 AD) refers to a time when Egypt succumbs to a new world power, the first known European civilization, Greece.²⁹¹

During the Middle Kingdom, Pharaoh Seneferu I extended Egypt's power to include the Nubian empire of Kerma and demanded annual tribute.²⁹² Internally, Horemheb was noted for restoring order and integrity to Egyptian tax administration after a period of societal decline.²⁹³ Payment of annual tribute from the Nubian empire of Kush continued into the New Kingdom. Similar demands were made of the Libyans.²⁹⁴ New Kingdom Egypt also instituted an estate tax.²⁹⁵ Recently re-discovered texts show that New Kingdom Egyptians were heavily burdened by income taxes, and sometimes openly chafed under their weight.²⁹⁶

Hellenistic Egypt relates to the period in Egypt after the fall of the New Kingdom Dynasties to Alexander the Great through eventual Roman conquest around 350AD.²⁹⁷ Those who exaggerate the greatness of Greek culture would suggest that they, the Greeks, invented logic and philosophy and mathematics and spread this knowledge amongst the people they

²⁸⁴ ANNA MANCINI, *MAAT REVEALED: PHILOSOPHY OF JUSTICE IN ANCIENT EGYPT* (2006).

²⁸⁵ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁸⁶ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁸⁷ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 69 (1990).

²⁸⁸ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 71 (1990).

²⁸⁹ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 73, 77 (1990).

²⁹⁰ A. Abu Bakr, *Pharaonic Egypt*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 78 (1990).

²⁹¹ UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹² UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹³ UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹⁴ UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹⁵ UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹⁶ UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA (1990).

²⁹⁷ H. Riad, *Egypt in the Hellenistic Era*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 119 (1990).

conquered.²⁹⁸ In fact, the Greeks were much less sophisticated than those they conquered, and borrowed concepts of good governance and learning from the Egyptians, the Hebrews, Persians, Indians, etc.²⁹⁹ Specifically, P.G. Monateri relays Revillout's claim that the Greek "Law of Persons and general Jurisprudence were of Egyptian origin."³⁰⁰ Monateri maintains that Egyptian law remained firmly Egyptian even after Greek then Roman conquest, "Egyptian national law remained in force even after the Antonian Constitution."³⁰¹

C. Medieval Egypt and Nubia

Egypt and Nubia's presence as great ancient African civilizations declines at the hands of a rising West Asian civilization, the Arabs. Until approximately the 5th Century AD, the Nubian-Kushite Empire governed over much of Arabia. The rise of Islam as a religion and civilization begins contemporaneously with the expulsion of Nubian hegemony from the Arabian Peninsula and the subjugation of Egypt by the 7th Century AD and Nubia by the 14th. These conquests facilitate a widespread international trade in African slaves, before the later European subjugation.³⁰² Egypt and Nubia, being on the African continent of course, remain African states no less. However, this article recognizes the imposition of Islamic systems of governance and other means of social regulation as an oriental import. This recognition extends to North African states where Islam eventually became the dominant power, such as Libya, Tunisia and Morocco. Similarly, recognition of non-African influences extends to South Africa under Afrikaaner rule.

Around 641, Egypt and Nubia signed an international treaty called the bakt, requiring Nubia to pay an annual tribute.³⁰³ Part of the tribute was to be paid in slaves, likely obtained from conquered lands to Nubia's south and west, from their jails and prisons or both.³⁰⁴ Little is written about this relationship between the 7th Century and 12th Century which suggests possibly an equilibrium or re-emergence of the Nubians, for Arab sources generally ignore the unflattering while Nubian sources on the other hand have disappeared along with Nubia.³⁰⁵

²⁹⁸ MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

²⁹⁹ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000); MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

³⁰⁰ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000); MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

³⁰¹ P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L.J. (2000); MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSIC CIVILIZATION* (1987).

³⁰² VINCE CARRETTA, *EQUIANO THE AFRICAN* 17-20 (2005) ("Between 1492 and around 1870 Christian traders enslaved more than twelve million Africans to be sent to the Americas. About eleven million actually departed. Between the Middle Ages and the end of the twentieth century Islamic traders enslaved approximately another twelve million Africans, sending them across the Sahara Desert, Red Sea, and Pacific Ocean to eastern markets.").

³⁰³ K. Michalowski, *The Spreading of Christianity in Nubia*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 187 (1990).

³⁰⁴ L. Kropacek, *Nubia from the late Twelfth Century to the Funj Conquest*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159-66 (1997).

³⁰⁵ K. Michalowski, *The Spreading of Christianity in Nubia*, in UNESCO'S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 189 (1990).

In the 12th Century AD, Egypt became the seat of power in the Islamic civilization.³⁰⁶ Their governance included of course import and export duties, poll taxes, and tributes from subjugated states within the empire. The Mamluk Empire under Saladin distributed tax revenues as a means of securing the loyalty of the army, the leaders of which were apparently seen by Egyptians as more Turkish or Kurdish than Egyptian.³⁰⁷ By the 13th Century AD, the Abbuyyid Empire also caused major upheaval in Nubia and regions to the south by demanding the annual tribute in slaves.³⁰⁸ Several reprisals from Nubia are reported, both militarily and by way of refusing its obligations under the bakt.³⁰⁹ But in the end Egypt with the help of many, Arabs turned Nubia “into raiding country”, then converted it to Islam.³¹⁰ A poll tax was levied on non-Arabs, and thousands of slaves were taken.³¹¹ In the 14th and 15th Century AD, Nubia took on a renewed importance in the Islamic empire, as Christian crusaders impinged on northern international trade routes.³¹² Economic power shifted to Nubian cities on the coast of the Indian Ocean, requiring the formation of new tributary alliances.³¹³

At first, Nubia paid its tribute in slaves by obtaining them from conquered or subjugated lands to its south and west.³¹⁴ But the northern and eastern demand for slaves increased such that they were soon taken from Nubia itself, likely causing substantial migration and cultural diffusion.³¹⁵ This chain of events—conversion, external slave raiding, internal slave taking—repeats itself with respect to West Africans and their relationship with Islam, and then again with respect to Europe. Nation-states in Africa appear to rise and fall depending on their ability to defend the citizenry from slavers either by military defense, capturing and trading others, or both.³¹⁶ The ruthlessness with which medieval Islamic civilization advanced against Nubia

³⁰⁶ J.C. Garcin, *Egypt and the Muslim World from the Twelfth to the Beginning of the Sixteenth Century*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 148 (1997).

³⁰⁷ J.C. Garcin, *Egypt and the Muslim World from the Twelfth to the Beginning of the Sixteenth Century*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 148 (1997).

³⁰⁸ J.C. Garcin, *Egypt and the Muslim World from the Twelfth to the Beginning of the Sixteenth Century*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 148 (1997).

³⁰⁹ K. Michalowski, *The Spreading of Christianity in Nubia*, in UNESCO’S GENERAL HISTORY OF AFRICA II: ANCIENT CIVILIZATIONS OF AFRICA 189 (1990); L. Kropacek, *Nubia from the late Twelfth Century to the Funj Conquest*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159-66 (1997).

³¹⁰ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159-66 (1997).

³¹¹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159-66 (1997).

³¹² UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 159-66 (1997).

³¹³ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 167 (1997).

³¹⁴ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 166 (1997).

³¹⁵ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 166 (1997).

³¹⁶

presages Africa's subjugation and technological retardation as a continent. Ironically, diaspora from their oppression probably helps spread Nubian culture further south- and westward.³¹⁷

D. North Africa (Almoravids, Banu Ghaniya)

At its height, Islamic civilization spread through North Africa, up the strait of Gibraltar into Spain.³¹⁸ After the 1st millennium AD, it begins replacing Ghana as the hegemonic power in West and Northwest Africa.³¹⁹ For centuries, Ghana taxed the northern Berbers.³²⁰ But the Almoravids were apparently the first to shake off Ghanaian dominance in 1087, at least for a time.³²¹ As Islamic influence rises, Ghana falls, although a people named the Banu Ghaniya are entrusted at times by Islamic caliphates with governance over areas of North Africa and even Spain.³²² By 1180, almost all of North Africa was annexed as part of the larger Islamic civilization, with the Almohads levying a lucrative land tax on non-Muslims. Excise taxes were levied alongside property taxes.³²³

Even during times of successful Islamic expansion, however, several Bantu speaking peoples governed over large portions of the North African portion of the Islamic empire. In the 13th Century AD, the Banu Marin and Banu Wattas levied taxes over the peoples of Morocco.³²⁴ Interestingly, the Banu Marin protected its rule in part by employing European mercenaries in its military. As in Nubia, the Banu Marin restricted its poll tax (and perhaps its slaving) to non-Muslims, which likely encouraged at least urban populations to convert in large numbers.³²⁵ By this time, many factions rivaled for control over North Africa, including Almohad civilian governors, Almohad religious leaders, the Banu Ghaniya, the Banu Marin, and renaissance Christians, some of whom offered their rule as protection from taxation.³²⁶

³¹⁷ The ubiquitous reliance on militarism also contributes to the social retardation of Africa, for one reason it completely shifted power in social relationships away from women, and for another it contributed to almost ceaseless migration patterns causing short and long-term retardations in terms of recordkeeping, architecture, etc. Militarism in Africa contributed to late 20th Century economic stagnation and is a problem of varying degrees in the 21st.

³¹⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 8-49 (1997).

³¹⁹ D.T. Niane, *Mali and the Second Mande Expansion*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50 (1997).

³²⁰ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 90 (1987).

³²¹ D.T. Niane, *Mali and the Second Mande Expansion*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50 (1997). CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 90-91 (1987).

³²² O. Saidi, *The Unification of the Maghrib under the Almohads*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 19-23 (1997).

³²³ Islam's relationship with Africa is exemplified by the persistence and widespread nature of a poll tax for non-Muslims in almost every society where the leaders were faithful to Islam in both rites and deeds. See UNESCO'S General History of Africa III: Africa from the Seventh to the Eleventh Century 24, 26, 31, 55, 87, 89, 126, 131 (1992).

³²⁴ R. Idris, *Society in the Maghrib after the Disappearance of the Almohads*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 46 (1997).

³²⁵ R. Idris, *Society in the Maghrib after the Disappearance of the Almohads*, in UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 46 (1997).

³²⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 22 (1997).

By the 14th century, power and governance in North Africa was centralized in Islamic hands.³²⁷ Their Mediterranean empire stretched from Northwest Africa to Arabia and included parts of southern Europe. Islamic hegemony in this part of Africa remains today.

E. East Africa (Kenya, Kilwa, Axum, Zimbabwe, Monomopatwa)

East Africa from the 11th to the 16th century was involved in large-scale international trade with Asia, taxation constituting an important component of economic regulation.³²⁸ Also known as the Swahili Coast, states and city-states extended from present-day Ethiopia (Kilwa) down to the southern state of Great Zimbabwe.³²⁹ Urban coastal cities aligned with states in the interior, “with varying groups levying taxes on caravans traversing their territory. Chiefdoms and states that failed to protect traders risked being excluded from the lucrative trade of the Afrasian world system.”³³⁰ Tons of African gold was traded for new plants, cowries, glass and cloths.³³¹ Ethiopian rulers taxed both imports and exports.³³² In Kilwa, the majority of governmental revenues came from the tax on imported cotton.³³³

Although Islam was a dominant power in West Asia and East Africa, it did not have a monopoly on Afrasian trade. Ethiopia remained largely a Christian territory, and trade from this region with Asia extended all the way to China.³³⁴ One 13th century Ethiopian emperor was said to have under his rule ninety-nine kingdoms, including seven Muslim ones.³³⁵ As usual, payment of tribute signified allegiance to the emperor.³³⁶

³²⁷ O. Saidi, *The Unification of the Maghrib under the Almohads*, in UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 2 (1997). See also UNESCO’S GENERAL HISTORY OF AFRICA III: AFRICA FROM THE SEVENTH TO THE TWELFTH CENTURY (1992).

³²⁸ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-244 (1997); C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 160 (2007).

³²⁹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-244 (1997); C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 160 (2007).

³³⁰ C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 168 (2007).

³³¹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-244, 258 (1997); C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 160 (2007).

³³² UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-175 (1997).

³³³ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-258 (1997).

³³⁴ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-258 (1997) (“In Kilwa, ... Chinese sources describe four- or five- story houses in the fifteenth century. That was when the Chinese arrived in great numbers in this region, although there is a mention of Africans in China as early as the seventh century. But, in 1402, a Korean map gave a non-Ptolemaic outline of southern Africa. In the fifteenth century, enormous ships, five times bigger than the Portuguese vessels, headed by Cheng Ho, carried the most sought after African products to China: gold, ivory, amber, slaves.”)

³³⁵ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-173-174 (1997).

³³⁶ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 169-173-174 (1997).

The Portuguese and their advanced weaponry arrive on the East African coast in the 16th Century, imposing their own taxes, enslaving the people and setting off another mass migration towards the interior.³³⁷ The Portuguese subjugated states and forced them to pay tribute to the King of Portugal in exchange for ‘protection’, waged war against uncooperative states, and sent punitive expeditions against states that defaulted on agreed upon tributes.³³⁸ Historians record an episode between King Ibrahim of Kilwa and the Portuguese explorer Vasco De Gama that illustrates the ubiquitous nature of taxation in Africa, the wanton destruction of sophisticated African civilizations, and the mass migration of peoples and their culture towards the interior of the continent:³³⁹

King Ibrahim: Good friendship was to friends like brothers are, and that he would shelter the Portuguese in his city and harbor ... to pay tribute each year in money or jewelry was not a way to a good friendship, it was tributary subjugation ... to pay tribute was dishonor.

Vasco De Gama: Take it for certain that if I so decide your city would be grounded by fire in one single hour, and if your people wanted to extinguish the fire in town, they would all be burned, and when you see all this happen, you will regret all you are telling me now, and you will give much more than what I am asking you now, it will be too late for you. If you are still in doubt, it is up to you to see it.

*King Ibrahim: Sir, if I had known that you wanted to enslave me, I would not have come, and I would have fled in to the forest, for it is better for me to be a fox but free, than a dog locked up in a golden chain.*³⁴⁰

King Ibrahim agreed to pay tribute, but that did not prevent the Portuguese from returning to destroy a once proud empire.³⁴¹ A Portuguese eyewitness records the brutality as such:

The Portuguese entered the city by force of arms, killed many Moors, and carried off great riches which their owners had not thought to save, in the belief they could defend the town. They could not even save their own women, very rich and beautiful with seven and eight bracelets on each arm and just as many thick and valuable on their legs. This was an occasion for severe

³³⁷ C. Kusimba, The Collapse of Coastal City-States of East Africa, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 173-80 (2007).

³³⁸ C. Kusimba, The Collapse of Coastal City-States of East Africa, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 173-80 (2007).

³³⁹ C. Kusimba, The Collapse of Coastal City-States of East Africa, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 173-80 (2007) (“Out of the more than four hundred coastal settlements, only a handful were inhabited by the seventeenth century; the rest vanished. Even Malindi, the town most faithful to the Portuguese, became a mere shell of its old vital self shortly after Vasco da Gama’s visit.”).

³⁴⁰ C. Kusimba, The Collapse of Coastal City-States of East Africa, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 174-75 (2007).

³⁴¹ C. Kusimba, The Collapse of Coastal City-States of East Africa, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 174-75 (2007).

*cruelty, for the men, blinded by avarice rather than mercy, in order not to lose time, cut off the arms, the legs, and the ears which bore the jewelry without pity.*³⁴²

The Portuguese forced many into their service, removed scores more as slaves destined for Europe, and instituted one-sided trading policies with the remaining free citizens.³⁴³ Many of the Ethiopians retreated to the hinterlands where they set up defensive fortresses and resisted Portuguese incursions.³⁴⁴ Rebels were impaled, hacked to death, quartered, and put to death by other cruel and inhuman means.³⁴⁵ Yet, the East Africans still managed to keep the Portuguese from the interior, and at least once in 1592 forced the Portuguese to pay tribute in exchange for protection.³⁴⁶

F. South and Central Africa (Kongo, Kuba, Zimbabwe, Ki-Zulu)

Presumed to be the last parts of Africa to develop advanced civilization, Central and South Africa instituted tax systems much like the rest of Africa. For instance, 15th century Kongo governors utilized cowry shells as a medium of exchange but also demanded taxes paid in kind as a means of instituting a caste system of economic regulation.³⁴⁷ Similarly, in the 17th century, the kingdom of Kuba, a neighbor of the Kongo and the kingdom of Luba, instituted a tax system designed to increase the productivity of its kingdom.³⁴⁸ At first, 18th century Angola instituted only an internal requisition or tribute as a tax.³⁴⁹ Jan Vansina contends that their markets were less sophisticated than other parts of Africa, with no set market days and no taxation.³⁵⁰ However, at some point in Angola, perhaps after Portuguese incursion, poll taxes and other land based taxes became the norm.³⁵¹

VI. Historical References to the Legal Systems and Tax Administrations of Pre-Colonial West African Empires (Ghana, Mali, Songhai)

The wealthy empires of Ghana, Mali and Songhai are three major West African civilizations that preceded European colonization. At their respective heights, each of these empires stretched from the Atlantic Ocean thousands of miles inland towards the Afro-Islamic civilizations of the north and north-east and the Bantu speaking civilizations of the Congo near

³⁴² C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 175 (2007).

³⁴³ C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 175-80 (2007).

³⁴⁴ C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 175-80 (2007).

³⁴⁵ C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 175-80 (2007).

³⁴⁶ C. Kusimba, *The Collapse of Coastal City-States of East Africa*, in *ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA* 175-80 (2007).

³⁴⁷ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 228 (1997).

³⁴⁸ James Giblin, University of Iowa

³⁴⁹ JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* 195-96 (2004).

³⁵⁰ JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* 188 (2004).

³⁵¹ JAN VANSINA, *HOW SOCIETIES ARE BORN: GOVERNANCE IN WEST CENTRAL AFRICA BEFORE 1600* 245 (2004).

Africa's center and south. With control over the major source of the world's gold, these nations could afford and indeed consumed the best of the world's goods and supported the most advanced scholarly academies of their day.³⁵² Gold was obviously known by Africans to be important to the rest of the world, as smart rulers restricted its production and regulated its trade.³⁵³ Nevertheless, its abundance in West Africa made it less valuable within local marketplaces than salt.³⁵⁴

Ghana, and its successors, Mali and Songhai operated for the most part as confederations, with a central state from time to time subduing adjacent kingdoms and either governing them directly or requiring from them large tax payments in exchange for some degree of autonomy.³⁵⁵ While at certain times these West African civilizations were subordinate to Islamic-African civilizations to the north, their customs and culture remained intact at least to a degree sufficient to identify distinctions between indigenous cultures and imposed Islamic customs, particularly with respect to law.³⁵⁶ Diop contends that distinct and identifiable facets of these indigenous cultures point towards African cultural unity from times of ancient Egypt and Nubia.³⁵⁷

A. Ghana

Ghana exists as a kingdom perhaps as far back as 400 BC.³⁵⁸ It lasts as a political entity for over fifteen hundred years, eventually overtaken by Mali, then Songhai.³⁵⁹ Around 700 AD, the Soninke Clan advanced the use of iron smelting towards weaponry and united Ghana under its might.³⁶⁰ A 10th century Moor, Ibn Hawkal, believed the king of Ghana to be the "richest

³⁵² CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 105 (1987) ("The principal source of revenue for the sovereigns of Black Africa, from antiquity to modern times, from the Indian Ocean to the Atlantic, i.e., from the Nubia of Herodotus and Diodorus Siculus to the Ghana of Bakri and the Mali of Ibn Battuta and Khaldun and the Songhai of Sadi and Kati, was gold extracted from mines. ... It contributed powerfully to the economic prosperity of the country; it quite certainly meant the sovereigns did not have to overwhelm their respective peoples with taxes and tariffs.")

³⁵³ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 69, 246 (1997).

³⁵⁴ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 246 (1997).

³⁵⁵ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7, 65, 70, 82 (1997).

³⁵⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 3 (1997) ("[O]n the political, sociological and even cultural levels, the Berbers and Sudanese remained tenaciously attached to their own institutions and accepted Islam without Arabization."); CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA (1987).

³⁵⁷ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY vii (1997) ("it is now widely recognized that the various civilizations of the African continent, for all their differing languages and cultures, represent, to a greater or lesser degree, the historical offshoots of a set of peoples and societies united by bonds centuries old."); CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA (1987).

³⁵⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50 (1997).

³⁵⁹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 51 (1997).

³⁶⁰ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 51 (1997).

sovereign on earth.”³⁶¹ In the 11th century, the Spanish Moor, Al Bakri describes the Ghanaian city of Aoudaghost as “a very large city with several markets ... filled with fine houses and solid buildings.”³⁶² Its decline in the 13th century is reported by the Arab historian Ibn Khaldun who describes the north African Almoravids as subduers of Ghana, taxing it and rendering it vulnerable to further conquest by its neighbors, the Sosso.³⁶³ But by 1238, the great Mali king, Sundiata, captured what remained of Ghana from the Sosso placing it within the new Malian empire.³⁶⁴

B. Mali (the Mandinke)

Mali is founded by Mansa Allakoi Keita in 1213 and becomes a world power within 25 years by conquering its neighbor Ghana, before it is eventually conquered around 1475 by another west African neighbor Songhai.³⁶⁵ At its height around the early 1300s, Mali is as large as western Europe.³⁶⁶ So committed to the use of government towards the absence of chaos and strife, Ibn Battuta said of the Malians, “the Negroes are of all peoples those who most abhor injustice... complete and general safety one enjoys throughout the land.”³⁶⁷ Even after its golden era, according to Howard Zinn, “European travelers in the sixteenth century were impressed with the African kingdoms of Timbuktu and Mali, already stable and organized at a time when European states were just beginning to develop into the modern nation.”³⁶⁸

Mansa Musa’s reign brought unparalleled cosmopolitanism to Mali. In 1324, Mansa Musa made a famous pilgrimage to Mecca, carrying with him such extreme gold and luxury and exciting so many merchants from Portugal, Italy, Egypt and North Africa that traders from those areas descended upon Mali in great number, enriching it with tax revenues.³⁶⁹ Regarding Malian legal and scholarly sophistication, Leo Africanus reported that “In Timbuktu, there are numerous judges, doctors, and clerics, all receiving good salaries from the Mansa... More profit is made from the book trade than from any other line of business.”³⁷⁰ Its wealth allowed it to focus on specialization, learning and the development of professional classes.³⁷¹ It was renowned worldwide for its universities and schools of higher learning. Mahmud Kati, from Syria, records 150 to 180 schools in Timbuktu alone, with Muslim scholars attending from far-away places such as

³⁶¹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 246 (1997).

³⁶² BASIL DAVIDSON, THE LOST CITIES OF AFRICA 84 (1959).

³⁶³ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 51-2 (1997).

³⁶⁴ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50-76 (1997).

³⁶⁵ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50-76 (1997).

³⁶⁶ BASIL DAVIDSON, THE LOST CITIES OF AFRICA 91 (1959); UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 56 (1997) (“the conquest of Gao and Takrur for the first time completed the unity of the western Sudan”). MAULANA KARENGA, INTRODUCTION TO BLACK STUDIES, 109 (2002).

³⁶⁷ BASIL DAVIDSON, AFRICAN KINGDOMS 82 (1966).

³⁶⁸ HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492-PRESENT 182 (1999)

³⁶⁹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 59 (1997).

³⁷⁰ BASIL DAVIDSON, THE LOST CITIES OF AFRICA 93 (1959).

³⁷¹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 60 (1997). “[E]normous resources served partly for the upkeep of men of letters, the poor and mosques.” Id. at 80.

Europe, west Asia, North Africa and other parts of sub-Saharan Africa.³⁷² Ancient historian Abderranman es Sadi tells of an Arab who sought to practice law but wanted to avoid Timbuktu initially because it was full of “legal experts.” Remarkably, the city of Jenne was thought by many to be even more advanced than Timbuktu, as its universities taught medicine including surgery.

Mali embraced the administrative nature of government. It had as many as 12 provinces.³⁷³ To govern them, Sundiata, its greatest king, appointed cabinet level officers, including ministers of foreign affairs, treasury, commerce, sanitation, fishery, forest, and agriculture, a Head Inspector, and Lieutenant Governor.³⁷⁴ Each department employed low ranking officials.³⁷⁵ The government played a significant role in regulating the economy, including encouraging interstate and foreign trade, controlling exports, taxing imports, and setting production quotas.³⁷⁶ Ibn Battuta attributes to the Malian legal system an appeals process where the Mansa (or King) serves as the court of last resort. Lower court proceedings were attended by governmental ministers.³⁷⁷ Battuta admires, “They do not confiscate the property of any white man who dies in their country, even if it be uncounted wealth. On the contrary, they give it into the charge of some trustworthy person among the whites, until the rightful heir takes possession of it.”³⁷⁸

C. Songhai

Songhai emerges as a powerful kingdom in the 11th century.³⁷⁹ Songhai’s rise stems from Mali’s decline. Beginning in the mid-15th century Mali is under pressure from the Islamic Tuareg people to their North, small coastal kingdoms armed by the Portuguese, and the rising of Songhai, a former Malian province.³⁸⁰ In 1433, the Taureg’s captured several Mali cities, including the venerated Timbuktu and other large capital cities such as Gao.³⁸¹ Meanwhile, coastal kingdoms were breaking ranks and trading with the Portuguese without paying over taxes

³⁷² UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 86 (1997). CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 177 (1987).

³⁷³ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 64-65 (1997).

³⁷⁴ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 53-57, 64-65 (1997).

³⁷⁵ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 53-57, 64-65 (1997).

³⁷⁶ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 50-69 (1997).

³⁷⁷ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 53-57, 64-65 (1997).

³⁷⁸ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 53-57, 64-65 (1997); CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY 171-72 (1974).

³⁷⁹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 77 (1997).

³⁸⁰ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 70-79 (1997).

³⁸¹ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 71 (1997).

to the central government.³⁸² The breakdown of order depressed the gold trade. Finally, Sonni Ali successfully led neighboring Songhai's forces against the Taureg and reasserted authority over several areas that had aligned themselves with the Portuguese.³⁸³

Despite the fact that since 1019 Songhai's Askia was Muslim, Songhai leaders such as Sonni Ali, who came to the throne in 1464, identified with indigenous religions and were hated by devout Muslims, probably due to conflict over control over the river Niger.³⁸⁴ Askia Muhammad (or Askia the Great), on the other hand a devout Muslim whose reign lasted from 1493-1528, pushed the empire's borders to the Atlantic, east towards the Sudan, and northwest into the Sahara, a region clearly larger and more populated than Western Europe.³⁸⁵ During his reign, African scholars stopped traveling to Fez and Cairo to universities at Djami al-Karawiyyin and al-Ashar, and began attending Songhai universities at Timbuktu, Djenne and Gao to learn theology, grammar, rhetoric, logic, astrology, astronomy, history, geography, medicine, science and math.³⁸⁶ These universities granted different levels of academic degrees.³⁸⁷

Askia the Great is also renowned for increasing the sophistication of Songhai government.³⁸⁸ He is credited with "codifying the legal system, centralizing his bureaucracy, establishing a more effective banking and credit system, and providing education from kindergarten through the University of Sankore in Timbuktu." Askia Muhammad established a court of appeals separate from and greater in power than the Askia, the Islamic-styled Kadi.³⁸⁹

The Songhai empire flourished until the late 16th century, when Morocco long a rival of Songhai finally gained a military advantage through the use of muskets.³⁹⁰ War with Morocco lasted until 1618, when Morocco was eventually repelled.³⁹¹ But the victory was hollow and the glory days were over. The empire had become weak through prolonged external warfare and as the Portuguese pinched its coastal trade and supported internal warfare with ammunition and weaponry. "From that moment everything changed. Danger took the place of security, poverty of wealth. Peace gave way to distress, disasters, and violence."³⁹² The Dendi people, formerly

³⁸² UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 75 (1997).

³⁸³ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 79 (1997).

³⁸⁴ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 77-79 (1997).

³⁸⁵ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 97 (1987).

³⁸⁶ Robin Walker & Sif Millar, *The West African Empire of Songhai* (DANIEL CHU & ELLIOT SKINNER, A GLORIOUS AGE IN AFRICA 100 (1965).

³⁸⁷ Chancellor Williams, *The Destruction of Black Civilization* 205 (1987).

³⁸⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 81-83 (1997).

³⁸⁹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 83 (1997) ("the kadi was assisted by secretaries, clerks of the court and notaries."). However, "Customary justice, the most widespread in the empire, was exercised amicably through the traditional agencies."

³⁹⁰ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 192 (1987). UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 82 (1997)

³⁹¹ FREDERICK MCKISSACK, *THE ROYAL KINGDOMS OF GHANA, MALI, AND SONGHAY: LIFE IN MEDIEVAL AFRICA* 123 (1995).

³⁹² Jackson, Rashidi & Clark, *Introduction to African Civilizations* 218 (2001).

inhabitants of one of Songhay's main provinces, take over much of a beleaguered Songhai from the south. Ultimately, the French take Timbuktu in 1894, Gao in 1898 and the salt-mines of Tuareg in 1900.

D. Due Process and Equal Protection in Pre-Colonial West Africa

It is a daunting task for any civilization to compare itself to ancient Nubia and Egypt, and especially so when records of its past are largely unavailable.³⁹³ This section therefore does not seek to determine whether pre-colonial West Africa surpassed or compares to Old Kingdom Egypt in terms of sophistication of law. Instead, it seeks to highlight certain features of ancient West African governments, societies and legal systems that support the view of their law as sophisticated and modern, as well as consistent and contiguous with original understandings of justice developed in the Nile Valley. Here, this article attempts to demonstrate that an aristocratic slave captured from any of the many nations of West Africa is likely to have meaningful thoughts concerning concepts of liberty, property, and perhaps even 'direct tax.'

1. Central Administration

Pre-colonial West African civilizations continued the African tradition of administrative government. Like the Egyptian Pharaohs before them, pre-colonial West African governments deployed a cadre of civil servants to regulate day to day life. For example, Songhai required its ruler, the Askia, to appoint national ministers for agriculture, procedure and protocol, cavalry chief, and several other cabinet level officers.³⁹⁴ There were also many lesser administrative positions, including ones responsible for the protection of minorities.³⁹⁵ It was the job of the *Berbuchi-mondio* to represent the arabs and the task of the *Korei-farna* to advocate on behalf of white minorities.³⁹⁶ Obviously, Songhai sought to maintain its place as an international trading power in part by presenting to the world its commitment to equal protection of its laws.

Songhai's government took great pains to regulate international and intra-national trade, their efforts including a tax system designed to maintain stable pricing for its most lucrative export, gold.³⁹⁷ They also instituted poll taxes and tariffs as a means of controlling the economy.³⁹⁸ Like Egypt before it, Songhai allowed some of its conquered protectorates govern themselves in exchange for requisitions or tribute.³⁹⁹ However, there is no indication that their

³⁹³ CHEIKH ANTA DIOP, *THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY* (1974) ("The African historian who evades the problem of Egypt is neither modest nor objective, nor unruffled: he is ignorant, cowardly, and neurotic. Imagine, if you can, the uncomfortable position of a western historian who was to write the history of Europe without referring to Greco-Latin Antiquity and try to pass that off as a scientific approach").

³⁹⁴ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 81-83 (1997).

³⁹⁵ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 81-83 (1997).

³⁹⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 81-83 (1997).

³⁹⁷ CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* 106 (1987).

³⁹⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 83 (1997)

³⁹⁹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 82 (1997)

tax systems were sophisticated enough to tax by assessing the value of personal or real property, or to design their tax system so as to be less regressive. But there is evidence of poll taxes in Songhai and in smaller societies nearby, the Hausa whose pre-colonial society lay in modern day Nigeria.⁴⁰⁰ In Songhai, the poll tax was implemented on a progressive basis.⁴⁰¹

Dispute resolution by a state court system is an essential feature of government in Ghana, Mali and Songhai.⁴⁰² But rather than exclusively or even primarily focusing on the preservation of individual rights and liberties, West African courts, like ancient Egyptian ones, sought to mediate the dispute and reconcile the parties.⁴⁰³ By first-hand accounts, West African governments from 1000AD to 1500AD were committed to the maintenance of a court system as one of its prime responsibilities.⁴⁰⁴ In the 11th century, the Muslim historian Al-Bakri referred to Ghana's court of justice.⁴⁰⁵ Ghana's twelfth century king, Takruri, was widely known for his commitment to the just cause.⁴⁰⁶ Reports regarding 12th century Borno and 13th century Kanem identify judges, magistrates and jurists. Songhai, heirs to the great scholarly institutions established by Mali, created within its government Islamic styled judicial officers known as the Kadi.⁴⁰⁷

Pre-colonial West African legal systems depended on a well-educated legal community.⁴⁰⁸ Under Sundiata and Mansa Musa, Mali established preeminent scholarly institutions in Timbuktu, Djenné and Gao, where scholars came from all over the world to study law, among other things.⁴⁰⁹ Rather than study law at Fez or Cairo, wealthy African families and tribes from all parts of the continent began sending their scholars to study in Songhai.⁴¹⁰ In

⁴⁰⁰ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154 (1987); UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 108 (1997).

⁴⁰¹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154 (1987).

⁴⁰² UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 62, 64, 79-84 (1997).

⁴⁰³ Balogun Oladele Abiodun, *Towards an African Concept of Law*, AFRICAN JOURNAL OF LEGAL THEORY (2007) ("Idowu establishes the thesis of reconciliation as a basis of African legal theory. According to him, the nature and element of African conceptions of law consists of the fact that at law is a reconciliatory instrument for the enhancement of social equilibrium, the restoration of social co-existence and as a social transformation."); Asa G. Hilliard III, *African Origins of Justice* (1992) (paper representing speech given to Georgetown University Law Center's Black Law Student Association) (on file with author); John A. Wilson, *Authority and Law in Ancient Egypt*, JOURNAL OF THE AMERICAN ORIENTAL SOCIETY (1954) ("the ancient Egyptians ... preferred to compromise or conciliate, to work things out on a topical basis ... crises could be met with flexibility of action").

⁴⁰⁴ BASIL DAVIDSON, AFRICAN KINGDOMS 82 (1966) (account of Ibn Battuta, 14th Century Arab scholar)

⁴⁰⁵ BASIL DAVIDSON, AFRICAN KINGDOMS 80 (1966); DANIEL CHU & ELLIOT SKINNER, A GLORIOUS AGE IN AFRICA 25 (1965).

⁴⁰⁶ David Dalgleish, *Pre-Colonial Criminal Justice in West Africa: Eurocentric Thought Versus Africentric Evidence*, AFRICAN JOURNAL OF CRIMINOLOGY AND JUSTICE STUDIES 55 (April 2005).

⁴⁰⁷ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 81-83 (1997).

⁴⁰⁸ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 6 (2007).

⁴⁰⁹ FREDERICK MCKISSACK, THE ROYAL KINGDOMS OF GHANA, MALI, AND SONGHAY: LIFE IN MEDIEVAL AFRICA 100-103(1995).

⁴¹⁰ FREDERICK MCKISSACK, THE ROYAL KINGDOMS OF GHANA, MALI, AND SONGHAY: LIFE IN MEDIEVAL AFRICA 100-103 (1995).

addition to law, these universities taught mathematics, music, astronomy, and literature. David Dalgleish reports that the university at Djenne specialized in medicine and surgery.

It is the West African commitment to higher education generally and legal education specifically that suggests if not proves that a slave in the Americas, captured from an aristocratic West African family of almost any nation, would have an understanding of good governance and thus the terms used in the United States Constitution. The universities at Timbuktu were not attended solely or perhaps even primarily by citizens of Songhai or Mali.⁴¹¹ Songhai's immense wealth allowed them to support schools that were the envy of the world and regularly attended by North African Muslims, Europeans, West Asians, and sub-Saharan Africans.⁴¹² In fact, so committed to education were the West Africans that Askia Muhammad is famous for instituting public kindergarten. Aristocrats from West African societies were well schooled in the liberal arts, and those that found themselves captives on American shores, like Equiano and Prince Abdur Rahman, could have contributed to the understandings of justice held by 18th century Americans, if only they were asked.

E. Historical References to West African taxation - (Ghana, Mali, Songhai, Benin, Hausa, Kano, Kebbi)

1. Tax Administration

By the 18th century AD, a West African society like Rahman's Futa Jalloh was equipped to institute inheritance, import, export, excise or poll taxes. Payment of taxes signified allegiance, while tax expenditures were used to secure loyalty.⁴¹³ Special taxes were levied, for example to fund Mansa Musa's famous 13th century hajj to Mecca, during which he lavished the Middle East with so much gold its price dropped internationally by one seventh.⁴¹⁴ Typically, a member of state council was responsible for collecting the empire's share of taxes from the local government, while in local government the administrator in charge of the official marketplace collected taxes assessed on the citizens.⁴¹⁵ Taxes were paid in kind, coin, and by other mediums of exchange.⁴¹⁶ Cowry shells, being relatively scarce and easy to carry but hard to conceal and impossible to counterfeit, served as a medium of exchange throughout many parts of the continent.⁴¹⁷ Salt was another. As both a consumable good and medium of exchange,

⁴¹¹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 60, 86 (1997).

⁴¹² UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 60, 86 (1997).

⁴¹³ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7, 65, 140 (1997).

⁴¹⁴ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 59 (1997).

⁴¹⁵ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7, 108, 140 (1997).

⁴¹⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7, 108, 108 (1997). CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 104, 108, 133 (1987).

⁴¹⁷ Akinwumi Ogundiran, *Living in the Shadow of the Atlantic World: History and Material Life in a Yoruba-Edo Hinterland, ca. 1600-1750*, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 95 (2007).

rulers relied on revenues from taxing the salt trade but also wanted to keep prices low.⁴¹⁸ Gold pieces and other metal ingots were also used.⁴¹⁹ At times, taxes on the import of unworked copper garnered the most revenue for the Malian Empire, as their merchants traded it to nations in the interior for their gold at the rate of “one mithkal of [copper] for two-thirds its weight in gold.”⁴²⁰

West Africans also instituted taxes not just as a means of amassing riches, but as a form of economic regulation.⁴²¹ For instance, gold being plentiful in West Africa but scarce in Europe and West Asia, West African kings taxed its trade heavily in order to extract rents from foreigners.⁴²² For another, West African states used taxation to institute a caste system of economic production, taxing some vassal states and chiefdoms in kind, they demanded payment exclusively in quantities of produce the empire expected of them.⁴²³ In certain societies, poll taxes on farmers were paid in kind, but on a graduated scale with a cap.⁴²⁴

West African empires may have relied less on taxation in the form of poll taxes and the like because of their abundance in gold and its trade internationally.⁴²⁵ Still, tax administration remained important, if not in the least part because its orderly administration probably signified to citizens and foreigners alike the sophistication and might of the empire, or the lack thereof when tax administration is arbitrary.⁴²⁶ Of Ghana, Mali, and Songhai, the three most recognizable pre-colonial West African empires, each took great pains to institute a regulated tax system, and several rulers were credited with severely punishing those governors who exacted unlawful taxes from the people. By the time Songhai rules over most of West Africa in the 16th Century, it employed a panoply of taxes, including taxes on estates, the zakat or Muslim tithe dedicated to the poor, in kind poll taxes on agriculture, herding and fishing, general and specific excise taxes, import and export tariffs.⁴²⁷ Sometimes, the tax system of a particularly successful merchant area would survive the transition from one empire or conqueror to the next, as it did in the infamous city of Timbuktu, which resided at different times under the regime of the Mandinke, the Tuaregs and Songhai, but where the local governors continued to collect taxes and

⁴¹⁸ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 246 (1997).

⁴¹⁹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 108 (1987).

⁴²⁰ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 60 (1997).

⁴²¹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 80 (1997).

⁴²² CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 106 (1987).

⁴²³ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7, 154 (1997). CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154-55 (1987).

⁴²⁴ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154-55 (1987).

⁴²⁵ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 106 (1987) (“Gold ... contributed powerfully to the economic prosperity of the country; it quite certainly meant the sovereigns did not have to overwhelm their respective peoples with taxes and tariffs.”).

⁴²⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 62, 83 (1997) (“[R]evenues from imperial estates; the zakat or tithe, for the poor; taxes in kind levied on harvests, herds and fishing; taxes and customs duties on commercial transactions; special levies on the merchants in the towns; the spoils of almost annual war, etc. This income paid for the upkeep of the court, the administration and the army, and for giving presents and alms.”).

⁴²⁷ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 83 (1997).

regulate market activity under an apparently locally devised scheme and distributed a share of revenues to whichever central administration ruled over the larger area.⁴²⁸

2. Direct taxes

A West African empire would collect internal requisitions from its member states, as well as collect tribute from vassal states outside the empire's direct administration.⁴²⁹ The relationship between West African empires and North African empires are marked by tributary arrangements, with revenue flowing either way depending on the balance of power at the time and was paid in produce, metals, and slaves towards the colonial era.⁴³⁰ As well, African nations closer to the interior, like those located in today's Nigeria, exacted tribute from each other as the preferred form of conquest and subordination.⁴³¹ Internal requisitions (direct taxes) and external requisitions (tributes) were ubiquitous. In this way, many West African civilizations resembled the 18th century attitude towards federal government in the United States, with limited central government where each State would govern itself in terms of local mores, customs and mercantilism.⁴³²

West African empires utilized an internal system of taxation resembling requisitions under the Articles of Confederation and the United States Constitution.⁴³³ In 12th to 15th Century Benin, the council of state included representatives from each part of the kingdom who were required to collect an amount from that region and deliver it to the central administration.⁴³⁴ At the same time, a similar council assists the emperors of Mali.⁴³⁵ The amount due from the region was apportioned loosely amongst the people, particularly landowners.⁴³⁶ In the area known today as Nigeria, the kingdoms of Katsina and Kano presaged the poll tax by collecting requisitions from conquered chiefdoms in the form of iron bars.⁴³⁷ By comparison, George Washington's revolutionary army depended on requisitions from the States, which were often times paid in kind and were sometimes out of necessity collected by Washington's troops themselves, i.e., impressments.⁴³⁸

⁴²⁸ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 94 (1987).

⁴²⁹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 97 (1987).

⁴³⁰ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 70 (1997).

⁴³¹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 107-08, 115, 118 (1997). ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 101-03, 132 (2007).

⁴³² ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

⁴³³ ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2006); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

⁴³⁴ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 140 (1997).

⁴³⁵ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 7 (1997).

⁴³⁶ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 80 (1997). CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154-55 (1987).

⁴³⁷ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 108 (1987).

⁴³⁸ CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

3. Import, export and other excise taxes

Diop contends that the Ghanaian Empire was involved in international commerce, complete with an excise tax system, as early as the Roman destruction of Carthage in the 2nd Century B.C.E.⁴³⁹ This system survived the fall of Ghana, and lasted through Mali and Songhai into colonialism.⁴⁴⁰ One of the greatest Arab historians records a tax of one gold dinar per load of salt imported and two dinars for each load exported. Five gold mithkals was the rate for copper, and ten for all else.⁴⁴¹ Excise taxes were collected in Timbuktu by local officials who would then distribute the proper share to whichever federal rulers there might be, whether Ghana, Mali, Berbers, or Songhai.⁴⁴² By the 18th Century A.D., all parts of West Africa instituted like systems of merchant taxes, including market days and taxes on caravans as they crossed borders.

4. Poll taxes and income taxes

Diop notes a religious veil over West African systems of taxation.⁴⁴³ He contends that “one’s goods and crops that ritual decreed must be turned over to the sacrosanct authority who linked the two worlds, so that order might be maintained in the universe and nature continue to be fruitful.”⁴⁴⁴ Perhaps he is referring to zakat, or tithe dedicated to alleviation of poverty, which was instituted by West African societies ruled by Muslim governors.⁴⁴⁵ However, he attributes this tax to Ghana at a time before Islamic prevalence in West Africa. Apparently, a Ghanaian dynasty ruling between the 6th and 8th centuries AD collapsed due to the peoples’ perception that taxes were being administered in a manner against their spiritual principles.⁴⁴⁶

But while the religious aspect of taxation probably existed primarily as a means for promoting obedience to the tax collector and the empire more generally, rulers clearly had more earthly and practical ideas about tax administration. Askia Muhammad, for example, encouraged agricultural production at times by lowering taxes on certain farmers.⁴⁴⁷ Like other West African societies, poll taxes were collected in kind, so as to collect revenue and to institute a caste system of economic regulation.⁴⁴⁸ But Askia Muhammad’s 15th Century Songhai introduced government tax appraisers and a progressive scheme, a graduated scale depending on wealth.⁴⁴⁹

⁴³⁹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 104 (1987).

⁴⁴⁰ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 133 (1987).

⁴⁴¹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 104 (1987).

⁴⁴² CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 94, 104 (1987).

⁴⁴³ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 64-65 (1987).

⁴⁴⁴ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 64-65 (1987).

⁴⁴⁵ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 104 (1987); see also UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 83 (1997).

⁴⁴⁶ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 104 (1987) (“Ghana probably experienced the reign of a corrupt dynasty between the sixth and eighth centuries. Kati tells of an extremely violent revolt of the masses against it.”).

⁴⁴⁷ UNESCO’S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 80 (1997).

⁴⁴⁸ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154-55 (1987).

⁴⁴⁹ CHEIKH ANTA DIOP, PRECOLONIAL BLACK AFRICA 154-55 (1987).

5. European colonialism

What remained of the great West African empires collapsed under European intervention and colonialism.⁴⁵⁰ As in East Africa, the Portuguese in the 15th Century AD are the first Europeans to arrive on sub-Saharan shores.⁴⁵¹ At first, they established coastal forts and paid use taxes to regional kings and chiefs for the right to freely navigate inland waterways.⁴⁵² Importantly, like in East Africa, the Portuguese' technological superiority with respect to guns promotes one sided trading, and promotes militarism both with respect to those societies interested in saving themselves by aligning with the Portuguese towards capturing slaves farther inland and with respect to those societies inland who sought to protect themselves from the Portuguese and their newly-bought African mercenaries.⁴⁵³ African professionals—blacksmiths, iron smelters, woodcarvers, doctors, and warriors—migrated towards the interior and integrated themselves in those societies, by paying taxes for one.⁴⁵⁴ Those West African societies with sophisticated central administration seemed to do much better against the Portuguese than those without.⁴⁵⁵ But by the 18th century AD, the Portuguese were joined by the British, the Dutch, France and other Europeans.⁴⁵⁶ Ultimately, Africa is split up amongst European powers and colonized practically from sea to sea.⁴⁵⁷ Consider that the Belgians who conquered and colonized the Congo sought to exploit its abundance in rubber (as uses for rubber, particularly with car tires, rose exponentially) employed a West African mercenary force and killed an estimated 13million Congolese.⁴⁵⁸ Those mercenary forces instituted the practice of chopping off victims' limbs as proof to their masters of their military success.⁴⁵⁹ Chopping off limbs became a standard punishment for those Congolese who survived but could not produce their quota of rubber.⁴⁶⁰ Obviously, education and self-governance became a thing of the past, yet even to this day to be reclaimed.

F. Case Studies: Equiano and Prince Abdur Rahman

⁴⁵⁰ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 260-61 (1997).

⁴⁵¹ UNESCO'S GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY 260-61 (1997).

⁴⁵² Alioune Deme & Ndeye Sokhna Gueye, *Enslavement in the Middle Senegal Valley: Historical and Archaeological Perspectives*, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 133 (2007).

⁴⁵³ Aribidesi Usman, The Landscape and Society of Northern Yorubaland during the Era of the Atlantic Slave Trade, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 144 (2007).

⁴⁵⁴ Aribidesi Usman, The Landscape and Society of Northern Yorubaland during the Era of the Atlantic Slave Trade, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 144 (2007).

⁴⁵⁵ Aribidesi Usman, The Landscape and Society of Northern Yorubaland during the Era of the Atlantic Slave Trade, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 144 (2007).

⁴⁵⁶ Aribidesi Usman, The Landscape and Society of Northern Yorubaland during the Era of the Atlantic Slave Trade, ARCHAEOLOGY OF ATLANTIC AFRICA AND THE AFRICAN DIASPORA 144 (2007).

⁴⁵⁷ Martin Meredith, The Fate of Africa 96 (2006). Walter Rodney, How Europe Underdeveloped Africa 167 (1988).

⁴⁵⁸ Martin Meredith, The Fate of Africa 96 (2006). Walter Rodney, How Europe Underdeveloped Africa 167 (1988).

⁴⁵⁹ Martin Meredith, The Fate of Africa 96 (2006). Walter Rodney, How Europe Underdeveloped Africa 167 (1988).

⁴⁶⁰ Martin Meredith, The Fate of Africa 96 (2006). Walter Rodney, How Europe Underdeveloped Africa 167 (1988).

1. Olaudah Equiano

Olaudah Equiano (1745-1797) was an African who was captured, sold into slavery, purchased his freedom, and wrote an autobiography detailing his life prior to captivity, the dreadful Middle Passage, and the horrors of plantation life in Virginia.⁴⁶¹ His journey demonstrates the availability of African intellectuals and aristocrats who could at the time of the United States' founding have provided an account of justice or law which would have been decidedly African in nature. Though Equiano himself may have been enslaved before receiving a tremendous amount of learning regarding his home nation's legal systems, he describes his father as a judge in his original village and would probably be familiar with at least some of the principles under which African legal disputes were decided.⁴⁶²

Equiano, otherwise known as Gustavus Vassa, a name given to him by his first white slaveowner, was captured as a child by fellow Africans and sold in the Americas to a British Naval officer who lived in Virginia.⁴⁶³ While under the charge of his British master, Equiano learned to read and write and became a worthy seaman.⁴⁶⁴ When he was later sold in the Caribbean, plantation owners viewed him as too valuable for grueling plantation work, but also feared him because he could navigate a ship and might have lead an escape or insurrection.⁴⁶⁵ Equiano was sold to another master, this time a Philadelphia Quaker named Robert King who allowed Equiano to trade goods on his own account in addition to the wares of his master and purchase his freedom.⁴⁶⁶ Instead of accept King's offer to partner with him in business, Equiano settled in England where he became prominent in the abolitionist movement.⁴⁶⁷

In 1789, only two years after the Continental Congress, Equiano published his autobiography, becoming a cause célèbre.⁴⁶⁸ As an abolitionist writer Equiano described how slavers on the *Zong* tossed 133 slaves overboard for purposes of an insurance claim.⁴⁶⁹ His autobiography helped towards ending the slave trade in Great Britain in 1807. Equiano used the wealth derived from his autobiography to gain independence from his abolitionist benefactors.⁴⁷⁰ He spent parts of the rest of his life assisting former English slaves resettle in Sierre Leone.⁴⁷¹ However, the sincerity of his commitment to opposing slavery can be questioned because a free Equiano also owned slaves, not unlike a few other wealthy free blacks of the time.⁴⁷² In fact, Vincent Carretta questions Equiano's sincerity in all matters relating to his autobiography, believing that Equiano was born in South Carolina instead of Africa.⁴⁷³

⁴⁶¹ VINCE CARRETTA, *EQUIANO THE AFRICAN* (2005).

⁴⁶² VINCE CARRETTA, *EQUIANO THE AFRICAN* 9 (2005).

⁴⁶³ VINCE CARRETTA, *EQUIANO THE AFRICAN* xi, 7, 38 (2005).

⁴⁶⁴ VINCE CARRETTA, *EQUIANO THE AFRICAN* 38-70, 80-83 (2005).

⁴⁶⁵ VINCE CARRETTA, *EQUIANO THE AFRICAN* 96 (2005).

⁴⁶⁶ VINCE CARRETTA, *EQUIANO THE AFRICAN* 114(2005).

⁴⁶⁷ VINCE CARRETTA, *EQUIANO THE AFRICAN* 270-302 (2005).

⁴⁶⁸ VINCE CARRETTA, *EQUIANO THE AFRICAN* 275-79 (2005).

⁴⁶⁹ VINCE CARRETTA, *EQUIANO THE AFRICAN* 237-8 (2005).

⁴⁷⁰ VINCE CARRETTA, *EQUIANO THE AFRICAN* 330-368 (2005).

⁴⁷¹ VINCE CARRETTA, *EQUIANO THE AFRICAN* (2005).

⁴⁷² VINCE CARRETTA, *EQUIANO THE AFRICAN* 184-85 (2005).

⁴⁷³ VINCE CARRETTA, *EQUIANO THE AFRICAN* 1-2 (2005).

2. Prince Abdur Rahman

Abdulrahman Ibrahim Ibn Sori is better known as Prince Abdur Rahman, the African prince who was enslaved in 1791, sold to a plantation owner in Natchez, Mississippi, freed at the behest of President John Quincy Adams and Secretary of State Henry Clay, and returned in 1829 with his wife but without his children to Liberia, West Africa.⁴⁷⁴ Andrew Jackson used Adams' well-treatment of Rahman against Adams in the presidential election.⁴⁷⁵ Rahman died within four months of his homecoming, without having reached the place of his birth, Futan Jalloh.⁴⁷⁶

What's most interesting about Prince Rahman, relative to this piece anyway, is that he was in fact a member of an African royal family, and as such had studied at the universities in Jenne and Timbuktu.⁴⁷⁷ He was not taught to read and write by slave masters, as he was already schooled in liberal arts and could read and write in Arabic.⁴⁷⁸ An English/American doctor, John Cox, who had been the first European to visit Rahman's West African kingdom, and who Rahman had personally tended to while the former was ill, discovered Rahman's presence on the Mississippi plantation.⁴⁷⁹ Initially, his master in Natchez would not grant Rahman his freedom for almost any price, as indispensable as Rahman was to Foster's farming operation.⁴⁸⁰ It wasn't until 1826 when Rahman sent a letter received by the U.S. government that he was recognized as an African prince and plans for his repatriation developed.⁴⁸¹ Clearly, Rahman can be counted as one of many Africans who, despite our modern conception of slaves as ignorant and lesser, were in fact knowledgeable of governmental systems and law.

Futan Jalloh was a Muslim kingdom formerly within the Malian Empire but at the time of Prince Rahman near the Songhai Empire, a federation of states most of which paid tribute in exchange for local autonomy.⁴⁸² The Fulbe of Futan Jalloh were a minority and often in conflict with non-Muslims in the area, sometimes in control over the more populous Jalunke and at other

⁴⁷⁴ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* (2007).

⁴⁷⁵ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 152 (2007).

⁴⁷⁶ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 183 (2007).

⁴⁷⁷ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 11-12 (2007).

⁴⁷⁸ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 11-12 (2007).

⁴⁷⁹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 17 (2007) ("As for the Fulbe, this was the beginning of a long friendship with whites. No traveler was ever to be killed in these plateaus, and, indeed, when another visitor fell sick there fifty years later, one of Ibrahima's brothers was greatly upset, 'for, if any accident happened, the character of Timbo might be ruined, and he should never again, he feared, see another white stranger.'").

⁴⁸⁰ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 85-102 (2007).

⁴⁸¹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 85-102 (2007).

⁴⁸² UNESCO'S *GENERAL HISTORY OF AFRICA IV: AFRICA FROM THE TWELFTH TO THE SIXTEENTH CENTURY* 70, 74, 119-125 (1997).

times controlled by them.⁴⁸³ Futan Jalloh participated in the slave trade, selling prisoners of war and exiled criminals in exchange for European goods, especially guns.⁴⁸⁴ European traders would not accept any form of payment except slaves, including gold.⁴⁸⁵ Obviously, a tribe refusing to trade with the Europeans left itself vulnerable to other tribes who would acquire guns, subdue them, sell them into slavery, and take over their lands. Selling prisoners of war and criminals to Europeans became an expeditious though shortsighted way for West African tribes to deal with both national rivals and crime.⁴⁸⁶ According to Rahman, his people appeased their own sensibilities regarding slavery by restricting their battles to non-Muslims, i.e., the Jalunkes.⁴⁸⁷ “We never go to war with people who do God Almighty service.”⁴⁸⁸ As this was a typical philosophy towards slavery, many kings and princes and other royalty were sold into American slavery.

In 1730, the Fulbe established Futan Jalloh as a theocracy but with a military head of state, the Almaami or “he who leads the community in prayer.”⁴⁸⁹ In 1748, Rahman’s father, Sori, was elected (or appointed) Almaami.⁴⁹⁰ Sori’s armies expanded the northern and eastern frontiers of Futa Jalloh.⁴⁹¹ The Fulbe ruled subject to a constitution, and Sori sought to extend its protections to all citizens within the state.⁴⁹² However, Sori’s chosen ministers failed to support his endeavors, particularly by underreporting and embezzling significant tax revenue.⁴⁹³ In 1759, Sori exiled himself before a likely coup d’etat.⁴⁹⁴ However, his successor proved weak, eventually allowing an alliance of non-Muslim peoples, in 1763, led by the Wasulu, to raze the capitol of Timbo, destroying “the old mosque, where the constitution of the state and other historic papers were burned.”⁴⁹⁵ A senate of the kingdom’s elders re-appointed Sori as head of

⁴⁸³ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 4, 7-8 (2007).

⁴⁸⁴ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 5 (2007).

⁴⁸⁵ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 5 (2007).

⁴⁸⁶ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 26 (2007) (“Most of those sold ... were criminals, condemned in fair trials, and the remainder were prisoners of war.”).

⁴⁸⁷ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 5 (2007).

⁴⁸⁸ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 5 (2007).

⁴⁸⁹ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 4 (2007).

⁴⁹⁰ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 4 (2007).

⁴⁹¹ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 4 (2007).

⁴⁹² TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 8 (2007).

⁴⁹³ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 8 (2007).

⁴⁹⁴ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 8 (2007).

⁴⁹⁵ TERRY ALFORD, PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH 9-10 (2007).

state.⁴⁹⁶ After several initial defeats, his military campaigns again proved successful, restoring the country's prosperity, and those he conquered and captured were sold into slavery.⁴⁹⁷

Terry Alford describes Prince Rahman's experiences in his homeland of Futan Jalloh as a somewhat unexceptional child of privilege, who as a member of the ruling clan, the Fulbe, received a proper Muslim education before becoming a colonel in his father's army and eventually captured in battle and sold into slavery.⁴⁹⁸ Rahman's home town of Timbo had a population of about eight thousand, who lived in neatly arranged houses with hedges made tall so that pedestrians could not see within.⁴⁹⁹ The men wore white gowns and either turbans or skullcaps to cover their long braided hair.⁵⁰⁰ Consistent with Songhai culture, the Fulbe prized education and learning.⁵⁰¹ Their schools taught reading, writing, arithmetic, and languages, and Islamic law as an advanced, elective subject.⁵⁰² "Individual libraries on religion and jurisprudence were common, and books and writing paper were prized gifts."⁵⁰³

As was traditional, Rahman began his schooling at age seven, reading and writing the Qu'ran, hardly any different than would a privileged Moroccan or Egyptian child.⁵⁰⁴ At age twelve, Sori sent Rahman to further his education in two of the Songhai Empire's famous cities of learning, Djenne and Timbuktu.⁵⁰⁵ According to Thomas H. Gallaudet, Rahman learned geography, astronomy, calculations, and the laws of the country.⁵⁰⁶ He returned to Timbo in 1778 to aid his father's final campaign against the Fulbe's opponents.⁵⁰⁷ Rahman helped Sori

⁴⁹⁶ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 10-11(2007) ("Sori hastily erected a stone and clay bank thirty to fifty feet high and one hundred and twenty feet square... and on top of it he put a square tower hemmed in by sixteen-foot-high walls. Constructed under the direction of a man in Timbo who had spent time in England, this fortress gave the city the security it had lacked the year before.").

⁴⁹⁷ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 19-22 (2007).

⁴⁹⁸ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* (2007).

⁴⁹⁹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 6 (2007) ("Each establishment with its courtyard was usually surrounded by a hedge higher than a man so that anyone traveling the narrow streets and culs-de-sac could mind his own business without effort.").

⁵⁰⁰ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 7 (2007).

⁵⁰¹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 6 (2007) ("Considerable attention is devoted to the acquirement of knowledge, particularly with the higher class," the American Cyrus Griffin wrote in 1828... These comings-and-goings, together with the visits of merchants, kept the Fulbe in touch with the Islamic world and informed of events throughout West Africa.").

⁵⁰² TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 6 (2007).

⁵⁰³ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 6 (2007).

⁵⁰⁴ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 11-12 (2007).

⁵⁰⁵ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 12-13 (2007).

⁵⁰⁶ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 13 (2007).

⁵⁰⁷ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 15 (2007).

successfully lead a coalition of Fulbe fighters, allies and Muslim mercenaries, twice the size of George Washington's army.⁵⁰⁸ The Kingdom's elders again appointed Sori as Almaami, and Rahman became one of his colonels.⁵⁰⁹ Shortly thereafter, however, a military expedition led by Rahman to restore a vital trading route resulted in his capture.⁵¹⁰ Despite offers of ransom, he was delivered to the coast and sold.⁵¹¹

G. What a Slave Might've Thought Direct Tax Meant

If a system of federal requisitions coupled with state administrations represents the norm of African taxation at the time of Atlantic slavery, it suggests that an aristocratic slave in the Americas would not understand 'direct tax' to include the central government's direct levy upon an individual's income. This would support Calvin Johnson's view that the only taxes required by the Constitution to be apportioned are requisitions required of State governments who would then collect it from their citizens in whichever method they might choose.⁵¹² Eric Jensen might see West African taxation as consistent with his argument that the people of the United States in 1791 would never allow the federal government such authority over individuals.⁵¹³ While perhaps true by itself, it does not answer the question of what people thought direct tax meant, since the people of the United States in 1791 were never asked to approve of federal income taxation. West African taxation suggests that 18th century citizens of empires or federated states, like 18th century citizens of the United States, simply would not have been able yet to contemplate the federal government having the will or an administration sizable enough to tax citizens individually. In her book, *American Slavery, American Taxation*, Robin L. Einhorn points out that the States had varying levels of sophistication with respect to tax, Virginia and South Carolina having the least modernity and with few having even the sophistication and manpower to implement an ad valorem property tax.⁵¹⁴ Considering that types of taxation were limited, it is perhaps unreasonable to think that the people of the United States would have even thought an income tax levied by the federal government was in the realm of possibility. Thus, in support of Johnson's position, West African tax experiences, if conceived of as the culmination of thousands of years of African tax schemes, suggest that the term direct tax to an aristocratic slave could not have included income taxes levied by the federal government, something which

⁵⁰⁸ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 15 (2007).

⁵⁰⁹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 15 (2007).

⁵¹⁰ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 20-23 (2007).

⁵¹¹ TERRY ALFORD, *PRINCE AMONG SLAVES: THE TRUE STORY OF AN AFRICAN PRINCE SOLD INTO SLAVERY IN THE AMERICAN SOUTH* 23 (2007) ("An English slave trader who dealt with these slaves wrote one such subject, 'If they are captured that have been particularly active in wars—a King, Prince, or their sons—no price can purchase them.' It was also true that the Hebohs 'refused to exchange him [because they] feared his vengeance.'").

⁵¹² CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005).

⁵¹³ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 *CONST. COMMENT.* 355 (2004).

⁵¹⁴ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006).

she as a member of an interpretive community within the body of We the People could or would not have contemplated.

Again, what slaves thought direct tax meant might not matter to Professor Jensen for several reasons. Under non-originalist constitutional jurisprudence, income tax can be considered a direct tax because there are good reasons to do so.⁵¹⁵ Even some originalists would not care, particularly those advocating an intentionalist approach to the Constitution.⁵¹⁶ And even those who, like Scalia, attempt to divine the meanings of words as they were understood by the People of the United States might refuse to consider the views of slaves, either because they were not at that time included as People of the United States, because their views are adequately represented by slave masters or subsumed by the legal ethos of the day, or because there is not enough evidence to determine what slaves thought about such matters or because it would cost too much time and money to investigate what slaves thought.⁵¹⁷ Also consider that if the views of slaves are to be considered, then such views might be controlling with respect to a state like South Carolina, where slaves outnumbered whites at times.⁵¹⁸ But even in that situation a judge might discount the views of slaves by 2/5ths, in accordance with the U.S. Constitution.

VII. Conclusion

What slaves thought Direct Tax meant matters most under Scalia's version of originalist textualism, because it is concerned with the understandings of the People of the United States, of which slaves were a minority. Lawrence Lessig's translationist deliberator considers the views of slaves to a lesser extent, as that judge seeks to identify the concepts old texts are trying to identify then translates them into modern language. Similarly, natural law theorists should be interested in any way, style or method of identifying what Nature requires of us, including the means by which Africans recognize those duties. Originalist intentionalism and living constitutionalism does not at all consider what slaves thought Direct Tax meant. Neither assigns any deliberative emphasis to the understandings of the People of the United States at the time of enactment, and thusly does not care what slaves thought the words and phrases in it meant.

A poverty of American history is that we do not know what slaves thought Direct Tax or any other term of the Constitution meant. This is due to our collective ignorance, not theirs. Many slaves were members of aristocratic families in the many African societies from which they were plucked. The famous story of Equiano the African illustrates this point.⁵¹⁹ Consider that African societies had for thousands of years been familiar with complex taxation, ancient Egypt having the oldest recorded tax system. Consider also that for several centuries the West

⁵¹⁵ Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004).

⁵¹⁶ Jensen and Johnson's debate mirrors Originalist Textualism versus Originalist Intentionalism, with Jensen claiming priority for what he believes are the Peoples' understandings of the phrase Direct Tax and Johnson attempting to reconstruct the intentions of the Framers.

⁵¹⁷ Adrian Vermeule, *JUDGING UNDER UNCERTAINTY* (2006).

⁵¹⁸ ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005).

⁵¹⁹ VINCE CARRETTA, *EQUIANO THE AFRICAN* (2005).

African empires of Mali, Songhai and Ghana organized government in a quasi-federal manner.⁵²⁰ Thus, it is entirely conceivable, perhaps even likely, that slaves captured from aristocratic environments would have an understanding of taxation implementation, and direct tax specifically. If it does anything at all, hopefully this article inspires more investigation and exposure of African civilizations incorrectly thought to be bereft of high culture.

And if historians actually discover what forcefully immigrated Africans thought terms and concepts in the U.S. Constitution meant, there remains the question of how much is it worth. Under Scalian textualism, it means something, but not necessarily much. If we were to read the Constitution textually, we might come to the conclusion that whatever any particular slave thought direct tax meant, it would only count as three-fifths of that of a white man.

In addition to illustrating judicial deliberation techniques, this paper presents an interesting synthesis of legal theories with respect to formalism, realism, critical race theory, and law and economics. Scalia's originalist textualism, the method most receptive to the views of slaves, relies on formalist justifications.⁵²¹ However, the law is not completely autonomous and judging is not without discretion.⁵²² Even the plain meaning rule requires an empirical analysis into social concepts and beliefs. Such discretion should be guided by social science, according to the early realists. Critical race theorists point out that law and the social sciences are constructed from a dominant gaze, and ignore the views of the subordinated.⁵²³ While law and economics, of the kind proposed by Adrian Vermeule, suggests a stopping rule against considering the views of slaves as a component of the plain meaning rule, not because it is irrelevant but because it costs a judge too much time and effort to consider and consider correctly.⁵²⁴ With respect to the views of slaves as to what 'direct tax' meant, textualism makes them relevant, social science should inform a judge as to what they thought, the dominant gaze has been uninterested in such queries, thus, it would be too costly for a judge adjudicating a case to seriously discover and consider slaves' views.

⁵²⁰ CHEIKH ANTA DIOP, *PRECOLONIAL BLACK AFRICA* (1987).

⁵²¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

⁵²² Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORHAM. L. REV.* 1249 (1997).

⁵²³ DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* (1992)

⁵²⁴ Adrian Vermeule, *JUDGING UNDER UNCERTAINTY* (2006).