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WITHOUT REPRESENTATION, NO TAXATION: FREE BLACKS, TAXES, AND TAX EXEMPTIONS BETWEEN THE REVOLUTIONARY AND CIVIL WARS

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This Essay is the first general survey of the taxation of free Blacks in free and slave states between the Revolutionary and Civil Wars. A few states treated all equally for tax purposes, but most states enacted taxation systems that subjected free Blacks to different requirements. Both free and slave states viewed free Blacks as an undesirable population, and this Essay posits that—within the relevant political constraints—states used taxes and tax exemptions to dissuade free Black immigration and limit the opportunities for free Blacks within their borders.

This topic is salient for at least two reasons. First, the Essay sheds light on laws and events that the literature—and the American educational system—has largely ignored. It directly contradicts the commonly held belief that free Blacks largely enjoyed the same set of rights and privileges as their White counterparts until Jim Crow and the Black Codes set in after the Civil War. Second, by juxtaposing then-widely prevailing views with historical tax laws, this Essay underscores the inherent relationship between tax policy and social policy. Taxes have never been just about bolstering the public fisc. Although this Essay will hopefully never have direct applicability to contemporary events, it can provide insight into current and future tax policies and the extent to which history, prejudice, and economic concerns inform policymakers' decisions.

TABLE OF CONTENTS

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INTRODUCTION

Around 1860, the town of Norwich, Connecticut, seized assets from R.I. Stoddard's estate to recover taxes he failed to pay before he died.[1] Charles Johnson, the executor of Stoddard's estate, sued the town to recover the amount it seized.[2] The Connecticut Supreme Court ruled in Johnson's favor without determining whether Stoddard paid the taxes.[3] How did the court reach its decision?

The decisive factor was Stoddard's race. Because Stoddard was a quadroon,[4] his estate was exempt from taxation.[5] Connecticut's General Assembly exempted "[t]he personal and real estate of persons of color" from taxation[6] because Connecticut's constitution denied them the right to vote.[7]

Connecticut and Rhode Island were the only states to exempt free Blacks'[8] personal and real property from all taxation.[9] A few states treated all equally for tax purposes, but most states enacted taxation systems that subjected free Blacks to different requirements. This Essay is the first gen-

1. Johnson v. Town of Norwich, 29 Conn. 407, 407 (1860).

2. *Id.*

3. *Id.* at 408.

4. *Id.* at 407 ("A quadroon, or person having one-fourth negro blood, is a person of color . . . .") (internal quotation marks omitted).

5. *Id.* at 407–08.

6. 1844 Conn. Pub. Acts 36–37.

7. *Johnson*, 29 Conn. at 409 (referencing CONN. CONST. art. VI, § 2, which limited the franchise to White males meeting certain qualifications).

8. As a quick aside, this Essay intentionally uses the term "free Blacks" instead of "African Americans" due to the realities of the time period. As the infamous *Dred Scott v. Sanford* decision declared, free persons of African origin were not citizens "and had no rights or privileges but such as those who held the power and the Government might choose to grant them." 60 U.S. (19 How.) 393, 405 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

9. *See infra* text accompanying note 92. See generally *infra* Part II for examples of states that exempted free Blacks from paying taxes used for particular purposes, like voting and schools.

eral survey of the taxation of free Blacks in the free and slave states between the Revolutionary and Civil Wars.[10]

This Essay's primary purpose is to shed some light on laws and events that the literature and the American educational system have largely ignored. Many Americans have grown up with misconceptions about the lives of free Blacks during this time period. Some have been taught that Blacks who were not slaves largely enjoyed the same set of rights and privileges as their White counterparts until Jim Crow and the Black Codes set in after the Civil War. Others believe free Blacks suffered de jure injustices only in the southern slave states that constituted the Confederacy. Both of these beliefs are incorrect.

To provide context for the discussion of the taxation of free Blacks, Part I briefly reviews the then-prevalent public perception of free Blacks through the lens of judicial opinions and legislative acts. Part II then surveys the taxation of free Blacks in the slave and free states. Part III introduces the "no taxation without representation" conscientious tax objections free Blacks made in a handful of free states. Finally, Part IV offers hypotheses for why the taxation of free Blacks varied from state to state.

I. "A GRIEVOUS AFFLICTION": FREE BLACKS THROUGH THE EYES OF THE JUDICIARY AND LEGISLATURE

According to judicial opinions and legislative acts in the period between the Revolutionary and Civil Wars, "free negrodom"[11] was a twofold "grievous affliction."[12] Free Blacks ostensibly presented a danger to the institution of slavery because they would entice slaves to run away and revolt. Jurists and legislators also characterized free Blacks as a class unworthy of envy, lazy and incapable of self-care, destined to live in a state of squalor and degeneracy far below the station of the slave, and fated to create a burden on society as a whole.

On the heels of the Revolutionary War, lawyers openly stated that free Blacks were immoral and posed a danger to societal and economic interests.[13] Similar language appeared in the body of judicial opinions in the early 1800s, but these opinions merely quoted or paraphrased prefatory

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10. For a highly informative and interesting survey of the tax treatment of slaves before the Civil War, see George Ruble Woolfolk, *Taxes and Slavery in the Ante Bellum South*, 26 J. S. HIST. 180 (1960). Woolfolk's article briefly discusses tax provisions from a few slave states regarding free Blacks, but makes no mention of the taxation of free Blacks in free states.

11. Curry v. Curry, 30 Ga. 253, 259 (1860).

12. Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 119, 130 (1834).

13. *See, e.g.*, Collins v. Hall, 1 Del. Cas. 652, 655 (1793) (argument of Read, Bayard, and Miller, attorneys for the defendant) ("[I]t is well known that Negroes are generally uninformed as to the principles of morality and religion, . . . without regard to which our persons, property or lives cannot be in a state of security.").

wording of legislative enactments.[14] In 1834, John Catron, who sat on the Tennessee Supreme Court from 1824 to 1834 and the United States Supreme Court from 1837 to 1865, provided the judiciary's first full-throated endorsement of this position.

Justice Catron wrote the opinion in *Fisher's Negroes v. Dabbs*,[15] a case concerning the manumission of several slaves through a will. Peter Fisher's will (1) called for his slaves to be set free; (2) left them livestock, farming equipment, and a year's worth of financial support; and (3) granted them the right to live on his plantation for 15 years following his death.[16] He left the remainder of his estate to his nieces and nephews.[17] James Dabbs, the appointed administrator of Fisher's estate, refused to petition the county court for the slaves' freedom because he did not want to pay the bond the state required to safeguard against the fear that manumitted slaves would become wards of the state.[18] The slaves sued for their freedom in chancery court, stating, "through their counsel, that they were willing to accept their freedom upon any terms the court thought proper to impose."[19] Fisher's slaves agreed to immigrate to Liberia in exchange for their freedom, and the chancery court emancipated one of the slaves.[20] Dabbs and one of Fisher's nephews, who had purchased the entirety of the estate's inheritance interests from his relatives, appealed the decision.[21]

Writing for a unanimous court, Justice Catron went further than affirming the chancery court's decision; he emancipated *all* of Fisher's slaves.[22] Justice Catron buttressed the court's position that the only appropriate terms of manumission included "immediate removal beyond, not only [Tennessee], but beyond the limits of the United States of America,"[23] with rhetoric that would reappear in judicial opinions for the following few decades:

> The injustice of forcing our freed negroes on our sister states without their consent, when we are wholly unwilling to

14. *See, e.g.*, Wilson v. George, 2 Del. Cas. 413, 415 (1818) ("[W]hereas it is found by experience, that free Negroes and Mulattoes are idle and slothful, and often prove burthensome to the neighbourhood wherein they live, and are of evil example to slaves . . . ." (quoting 1 Del. Laws 214 (1787))); State v. Emmons, 2 N.J.L. 10, 12 (1806) ("The act of 1713-14 recites that it is found by experience that free negroes are an idle slothful people, and prove very often chargeable to the place where they are . . . .").

15. *Fisher's Negroes*, 14 Tenn. at 125.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 123.

20. *Id.*

21. *Id.* at 121.

22. *Id.* at 132.

23. *Id.* at 129.

be afflicted with them ourselves, is so plain and direct a violation of moral duty as to inhibit this court from taking such a step. . . . Would it not be treating the non-slaveholding states unjustly to force our freed negroes upon them without their consent? [A]nd would it not be treating the slaveholding states cruelly? We are ejecting this description of population, fearing it will excite rebellion among the slaves; or that the slaves will be rendered immoral to a degree of depravity inconsistent with the safety and interest of the White population. These are fearful evils. But are they not more threatening to Virginia (just recovering from the fright of a negro rebellion), to the Carolinas, to Georgia, Alabama, Mississippi, and Louisiana than to us? Compared with the Whites, most of them have two slaves to our one; some of them almost ten to our one. Even Kentucky has a higher proportion than Tennessee. How can we then, as honest men, thrust our freed negroes on our neighbors of the south?

Suppose the non-slaveholding states northwest of the Ohio were willing to receive our freed negroes (a supposition, by the way, wholly untrue), would it be good policy in us to locate them on our borders, beside our great rivers, forming wretched free negro colonies in constant intercourse with our slaves? . . . That such a population, inhabiting a country near us, would become a most dangerous receptacle to our runaway slaves, and a grievous affliction to the state where situated, as well as to ourselves, need only be stated to gain universal admission. The time would soon come when the attempt to seize on the harbored slaves would produce war with such a people, and serious collisions with the state within whose jurisdiction they resided. This it is our interest to avoid.

. . . [T]he black man is degraded by his color, and sinks into vice and worthlessness from want of motive to virtuous and elevated conduct. The black man in [free] states may have the power of volition. He may go and come when it pleaseth him, without a domestic master to control the actions of his person; but to be politically free, to be the peer and equal of the White man, to enjoy the offices, trusts, and privileges our institutions confer on the White man, is hopeless now and ever. . . . He is a reproach and a byword with the slave himself, who taunts his fellow slave by telling him "he is as worthless as a free negro." . . . The free black man lives amongst us without motive and without hope. He seeks no avocation, is surrounded with necessities, is sunk in degradation; crime can sink him no deeper, and he commits it of course. . . . In the non-slaveholding states the people are less accustomed to the squalid and dis-

> gusting wretchedness of the negro, have less sympathy for him . . . . Nothing can be more untrue than that the free negro is more respectable as a member of society in the non-slaveholding than the slaveholding states. In each he is a degraded outcast, and his fancied freedom a delusion.[24]

At least one case explicitly adopted Justice Catron's pronouncements on the dangers of free Blacks.[25] And *Fisher's Negroes*'s influence is plainly evident in numerous opinions by slave state high courts:

- "The conviction upon the public mind is settled and unalterable as to the evil necessarily attendant upon this class of population . . . —a class of people who are neither freemen nor slaves, their presence at all times deleterious and often dangerous to the public welfare."[26]
- "[F]ree negroes are vicious and dangerous . . . . The spirit and policy of the law aim at a restriction of emancipation, merely for the purpose of preventing the mischief of a free negro population."[27]
- "It was, indeed, early found in this State, as in most of the others, in which there is slavery, that the third class of free negroes was burdensome as a charge on the community, and, from its general characteristics of idleness and dishonesty, a common nuisance."[28]
- "The act of 1843 was not retaliatory, but a measure of self-defence, declaring that while this State will not be infested with the free negroes of other States, we will tolerate the evils resulting from the emancipation of our own slaves . . . ."[29]

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24. *Id*. at 129–31.

25. *See* Willis v. Jolliffee, 32 S.C. Eq. (11 Rich. Eq.) 447, 455–56 (1860) ("The evils of colonies of free negroes, near our borders, are well stated in Fisher's [N]egroes vs. Dobbs."). Several cases cite *Fisher's Negroes v. Dabbs* (or *Dobbs*), for its authoritativeness on the propriety of manumissions. Although these opinions lack Justice Catron's rhetorical flourish, the jurists citing the case likely shared Justice Catron's views.

26. Bryan's Heirs v. Dennis, 4 Fla. 445, 454 (1852).

27. Ross v. Vertner, 6 Miss. (5 Howard) 305, 347–48 (1840).

28. Cox v. Williams, 39 N.C. (4 Ired. Eq.) 15, 17 (1845).

29. Campbell v. Campbell, 13 Ark. 513, 521–22 (1853).

Free state courts and legislatures also expressed similar views. In *State v. Hoppess*,[30] Judge Reed[31] presided over the adjudication of whether a slave who escaped from a boat on the Ohio side of the Ohio River was a fugitive within the meaning of the United States Constitution and the Fugitive Slave Act of 1793. After expressing his deep regret that slavery existed,[32] Judge Reed concluded that such an escapee was a fugitive subject to those laws. He also acknowledged that attempts to reconcile slavery with the Bible were a "moral insanity, a breaking up, as it were, of the faculties to perceive or distinguish moral truth."[33] But Judge Reed did not exhort the state to recognize free Blacks as equals. Instead he espoused a tempered version of Justice Catron's rhetoric:

> The question is, if free what will you do with [Blacks?] No one scarcely would wish to confer upon [them] equal political rights, and none certainly would wish for social equality and the amalgamation of the races. So, if all were free, the presence of the negro among our people is a vast evil.
>
> . . . .
>
> It is to be furthermore observed that ours is a government of white men. That our liberties were achieved, and our government formed by white men and for white men. The negro was not included or represented—the hope then was as it now is—that the whole race of negroes should at some future time be removed to a country of their own, to be subject to their own government and laws.[34]

The concern with an influx of free Blacks may have been especially acute in slave and border states, but the belief that free Blacks were problematic stretched far beyond the Mason-Dixon line.

In 1833, the Connecticut legislature passed a law against establishing "any school, academy, or literary institution, for the instruction or education of coloured persons" who were not Connecticut residents.[35] That same year, the state prosecuted Prudence Campbell under this law.[36]

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30. State v. Hoppess, 2 W.L.J. 279 (Ohio 1848). Although this case does not appear in the Ohio reporter, Salmon P. Chase, one of the lawyers for the runaway slave, sent it to the Western Law Journal for publication.

31. In *Hoppess*, the Judge is referred to as Read. The correct spelling appears to be Reed. *See* ELLIOT HOWARD GILKEY, THE OHIO HUNDRED YEAR BOOK 470–71 (1901) (noting that Nathaniel C. Reed served on the Ohio Supreme Court from 1842 to 1849, when he resigned).

32. *Hoppess*, 2 W.L.J. at 286.

33. *Id.*

34. *Id.* at 286–87.

35. 1833 Conn. Pub. Acts. 425–26.

36. Crandall v. State, 10 Conn. 339, 369 (1834). Crandall was acquitted on a technicality. *Id.* at 369–71. The indictment omitted the fact that the school was unlicensed. *Id.*

Referencing the act's preamble, the court noted that the act's objective was "to prevent injurious consequences resulting from the increase of the coloured population."[37] Neither the preamble nor the opinion elaborated on the "injurious consequences" the legislators sought to avoid. But the desire to limit the growth of the free Blacks indicates that the Connecticut legislators did not view the state's existing Black population as a desirable group. Outlawing the education of non-resident free Blacks likely served two purposes. First, it made Connecticut a less attractive option to free Blacks seeking to emigrate from other states. Second, it placed those free Blacks who chose to immigrate to Connecticut at a competitive disadvantage. Because they lacked the opportunity to obtain formal education or instruction, this law ensured that newly immigrated free Blacks were at the bottom rung of the economy.

Prejudices against free Blacks persisted as the country expanded westward. In Oregon, free Blacks were *personae non gratae*. In 1844, Oregon's legislative body passed a bill that subjected any free Black over the age of 18 who failed to leave the state within two years to "not less than twenty nor more than thirty-nine stripes."[38] The provision was later amended to replace the whipping with forced labor followed by removal from the territory.[39]

These opinions and acts make it clear that slave states *and* free states regarded free Blacks as an "evil" to be avoided.[40] The intensity of these beliefs varied from state to state, but they formed the backdrop against which states passed all manner of laws concerning free Blacks, including tax legislation.

II. THE TAXATION OF FREE BLACKS

The primary purpose of taxation is to raise public revenue.[41] In this regard, the tax policies of slave and free states differed little from those of most governments throughout history.[42] For general, revenue-raising pur-

37. *Id*. at 367.

38. Quintard Taylor, *Slaves and Free Men: Blacks in the Oregon Country, 1840-1860*, 83 OR. HIST. Q. 153, 155–56 (1982).

39. *Id*.

40. Not all free state courts held that belief. *See* Judge Davis's Op., 44 Me. 576, 593-94 (1857) (lambasting the Supreme Court's *Dred Scott* decision as coming from an unintelligent, prejudiced mind). On the heels of the *Dred Scott* decision, Maine's Supreme Court declared that free Black males were citizens to the same extent as free White male citizens. Op. of the Supreme Judicial Court, 44 Me. 507 (1857).

41. *See* BLACK'S LAW DICTIONARY 1594 (9th ed. 2009) (defining tax as "[a] charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue."); *see also* Herbert E. Newman, *Objectives of Taxation*, 25 DEL. NOTES 1, 1–2 (1953), http://udspace.udel.edu/bitstream/handle/19716/4616/article1.pdf (noting that "the revenue objective" is a commonly offered rationale for the why governments levy taxes).

42. *See, e.g.*, ARK. CONST. of 1836, Revenue, § 1 ("All revenue shall be raised by taxation, to be fixed by law.").

poses, states often made no distinction between the races when taxing personal and real property.[43] And in some states, the taxable holdings of free Blacks were quite substantial.[44] This section compares and contrasts the ways states taxed free Blacks.

A. *Taxing Freedom: Slave States' Taxation of Free Blacks*

A few slave states—usually those further north—exempted free Blacks from paying certain taxes. For example, a few Maryland counties exempted free Blacks from paying school taxes for schools their children could not attend,[45] and North Carolina exempted free Blacks in the entire state from paying any school tax.[46] Tennessee's 1834 constitution exempted "[a]ll free men of color" from paying the poll tax.[47] But the slave states' overarching tax policies shared a common, non-revenue generating theme: They used a "freedom tax"[48] to discourage the growth of their free Black populations.

Because the contours and complexities of each state's system of taxation varied, this freedom tax took many forms. Sometimes it appeared through the application of facially race-neutral tax laws.[49] On other occasions, the states took a more direct approach by subjecting free Blacks to

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43. *See, e.g.*, James Martin Wright, *The Free Negro in Maryland 1634-1860*, 97 STUDS. IN HIST., ECON. & PUB. L. 515/125 (1921) ("Property holders in Maryland without distinction as to color contributed to the ordinary public revenues."); *Slavery and the Colored People in Delaware*, THE COLORED AMERICAN (New York), Aug. 12, 1837 ("The real and personal estate of people of color is assessed and subjected to taxation as according to valuation the same as any other[.]") (available through accessible.com). A few state constitutions from this period contain provisions to the effect that all species of property shall be taxed equally for general revenue purposes, so in those states, the constitutionality of varying general taxes based on the race of a property owner is questionable.

44. *See e.g.*, CARTER G. WOODSON, FREE NEGRO HEADS OF FAMILIES TOGETHER WITH A BRIEF TREATMENT OF THE FREE NEGRO xxxviii (1925) ("The Negroes of Philadelphia had taxable property to the amount of $350,000 in 1832, $359,626 worth in 1837, and $400,000 worth in 1847."). Free Blacks also had substantial amounts of taxable property in New Orleans, Louisiana and Charleston, South Carolina.

45. *E.g.*, 1838 Md. Laws 314, ch. 327, § 10 ("[A]ll tax . . . shall be levied on all the assessable property in said district, . . . excepting nevertheless, the property assessed to and actually owned by free negroes."); 1834 Md. Laws 2022, ch. 263, § 1 ("[T]he trustees . . . shall have power to levy upon all the taxable property in said districts, except the property of free persons of color, a sum not exceeding one hundred and fifty dollars for [school purposes.]"). These laws pertained to Kent and Montgomery counties, respectively. But not all counties created such tax exemptions. *See* WOODSON, *supra* note 44, at xxxii ("The Negroes in Baltimore paid $500 in school taxes in 1859, although their children could not attend the city schools.").

46. JOHN HOPE FRANKLIN, FREE NEGRO IN NORTH CAROLINA, 1790–1860 104 (1943).

47. TENN. CONST. art. IV, § 1 (1834).

48. The phrase "freedom tax" does not appear in the literature I have found discussing free Blacks and taxation, but I cannot think of a more apt phrase to describe what is happening here. Blacks could have their freedom, provided they paid *actual* taxes in various incarnations.

49. *See infra* notes 51–62 and accompanying text.

different taxes than their White counterparts.[50] But the freedom tax was a fact of life for free Blacks in every slave state.

Maryland v. Dorsey[51] provides an absurd example of how a facially race-neutral tax—Maryland's first inheritance tax—constituted a freedom tax. Around 1847, Nicholas Worthington manumitted his slaves through his will.[52] Maryland's inheritance tax required the executor of an estate to pay a 2.5 percent tax on the value of the estate before distributing it to the legatees.[53] But here, the legatees were themselves the estate. Maryland sued the executor of Worthington's estate for 2.5 percent of the slaves' appraised value, and the lower court held that "gift of freedom to the negroes in question, is not liable to the tax."[54]

The Court of Appeals reversed the lower court's decision after summarily reiterating slaves' firm status as property under Maryland law:

> It is therefore our opinion that the manumission, or bequest of freedom to a slave by last will and testament, confers on such slave the identical rights, interests and benefits, which would pass, if the testator had bequeathed the same slave to another person, and that such bequest to another would be a legacy. The conclusion, therefore, that a bequest of freedom to a slave is a legacy, is as clear as that things which are equal to the same thing, are equal to one another.[55]

The court's characterization of slaves as property and persons in almost the same breath is jarring, but it bore no legal significance.[56]

The aftermath of this ruling is unknown. The law required the executor to pay 2.5 percent of the slaves' appraised value—around $400—to the State within thirteen months or risk losing his commission.[57] It is unlikely that the executor simply paid the amount—today's equivalent of about $10,000—out of the goodness of his heart. It is much more plausible

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50. *See infra* notes 63–70 and accompanying text.

51. Maryland v. Dorsey, 6 Gill 388 (1848).

52. *Id.* at 388.

53. 1860 Md. Laws 581, art. 81, §§ 125-26.

54. *Dorsey*, 6 Gill at 389 (quoting the lower court opinion) (internal quotation marks omitted).

55. *Id.* at 390–91.

56. The Maryland Court of Appeals later clarified that the "identical rights, interests and benefits" language applied only to the property interest in the value of the slaves and did not elevate freed slaves to the status of free Whites. Spencer v. Negro Dennis, 8 Gill 314, 320–21 (1849).

57. 1860 Md. Laws 581, art. 81, § 127.

that the executor hired out the slaves[58] or sold one or two of them of them to raise the required tax.[59] Regardless, the court literally taxed freedom.

The Maryland Court of Appeals again held that a manumitted slave was subject to an inheritance tax on his freedom in *Spencer v. Negro Dennis*.[60] Instead of simply citing *Dorsey* as controlling precedent, it expounded on the soundness of its holding:

> But is there, in point of fact, any injustice or hardship in this tax? [O]r, have manumitted slaves any right to complain of it? We think not. . . . [The State] has imposed a tax of two and a half per cent. on legacies, and we regard the bequest of freedom to a slave, as a legacy equal to the amount of his appraised value. If such a bequest be not a legacy, what is it? It would puzzle the most astute and learned lawyer to find any other head, in a legal nomenclature, under which it could be classed. It was declared to be a legacy by Chancellor Bland, in [*Hammond v. Hammond*, 2 Bland 306, 314]. "That every devise and every bequest, including the emancipation of slaves, for the gift of freedom to a slave, is a most precious, specific legacy, are specific legacies." That distinguished jurist, the late William Pinkney, in his celebrated speech before the General Assembly of Maryland, in 1789, in favor of testamentary emancipation, spoke of manumission as a "specific legacy." And this court have so treated it in the case of [*Cornish v. Wilson*, 6 Gill 299 (Md. 1848)].
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> Of what special injustice or hardships had the manumitted slavery in the case of [*Dorsey*], a right to complain? They had accepted of a bequest, charged with a small and reasonable incumbrance, which ought to be discharged, and they are amply reimbursed for its imposition, by the increased value of their labor resulting from the incumbrance.
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> The acts of Assembly of Maryland, authorising the manumission of slaves, were not passed . . . to confer benefits upon slaves, and promote their comforts and happiness; because all

58. It was common practice for slave owners to hire out their slaves. JENNY BOURNE WAHL & CHRISTOPHER TOMLINS, THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY 204 (2002). In addition, there is at least one reported instance where a master "provided in his will that his slaves be allowed to work to meet the debts of the estate, after which they could chose freedom in Liberia or remain slaves in Virginia." PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 279 (2014) (citing Elder v. Elder's Ex'or, 31 Va. (4 Leigh) 252 (1833)). Therefore, it is not beyond the pale to think that this practice could carry over into paying certain taxes.

59. *See* 1860 Md. Laws 581, art. 81, § 126 ("[E]very executor shall have power, under the order of the Orphans' Court, to sell if necessary so much of said property as will enable him to pay said tax.").

60. Spencer v. Negro Dennis, 8 Gill 314, 317 (Md. 1849).

> observation and experience, in Maryland, had demonstrated, that the reverse would be the result; that slaves, for the most part, were far better fed and clothed; more contented and happy; and in point of sobriety, virtue and moral character, far above the free coloured population of the State. But the design of these enactments was to gratify the masters of slaves, to enlarge their privileges, and to give them an authority to dispose of their slaves, in a way which otherwise they did not possess.[61]

Dorsey and *Spenser* appear to be the only two published cases addressing this issue, and sometime between 1849 and 1860, Maryland's inheritance tax was amended to include the words "this not to apply to negroes manumitted by deed or will."[62] But this was not the only incarnation of a freedom tax in the slave states.

Some municipalities in slave states imposed taxes on free Blacks that they did not impose on Whites. For example, St. Augustine, Florida imposed a $3 tax on all free Black males and a $1.50 tax on all free Black females who stayed in the city for a period of two weeks or longer.[63] Some states imposed special free Black taxes. Virginia, for instance, imposed a special tax on free Blacks to raise funds to transplant them to Liberia as soon as practicably possible.[64] In addition to taxing freedom, this tax actively sought to fund the forced removal of free Blacks from the state.

The poll tax was the most direct freedom tax slave states imposed. Because of the Twenty-Fourth Amendment and Voting Rights Act, the poll tax has been relegated to discussions about voter suppression. But poll taxes need not be tied to the act of voting. Poll taxes—also known as a head and capitation taxes—are simply "fixed tax[es] levied on each person within a jurisdiction."[65] Poll taxes were a flat income tax of sorts—if you

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61. *Id.* at 317–19. It is interesting to note what the court omitted from its opinion in *Spencer*. It paraphrases *Hammond v. Hammond* for the proposition that the emancipation of slaves is a legacy, no different than any other bequest. Chancellor Bland went on to say that other beneficiaries of a will "might be compelled to contribute toward the satisfaction of the testator's debts to the whole amount of the property given to them, before the donations to the wife and freed slaves . . . could be at all molested." He then stated that if the testator's intention is "unequivocally clear," it does not "leave room for the smallest doubt upon the subject." Hammond v. Hammond, 2 Bland 306, 314 (Md. High Ct. Ch. 1830).

62. 1860 Md. Laws 581, art. 81, § 124.

63. Dorothy B. Porter, *Library Sources for the Study of Negro Life and History*, 5 J. NEGRO EDUC. 232, 235 (1936) (citing David Y. Thomas, *Report upon the Historic Buildings, Monuments, and Local Archives of St. Augustine, Florida*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1905 347 (1906)).

64. 1849 Va. Acts 8 ("[A]n annual tax of one dollar shall be and the same is hereby levied upon every free male negro of the age of twenty-one years and under fifty-five years . . . . The fund arising from this source shall be applied to the removal of free negroes from this commonwealth [to Africa].").

65. BLACK'S LAW DICTIONARY 1596 (9th ed. 2009) (defining poll tax).

resided in the state, county, or municipality that imposed the tax, you had to pay it.

Some states imposed poll taxes on their inhabitants in a race-neutral manner.[66] But well before the Fourteenth Amendment rendered the practice unconstitutional, slave states routinely levied poll taxes on their inhabitants in an unequal manner based on race. For example, Alabama's 1852 poll tax established the following rates:

- "On every white male inhabitant between the ages of twenty-one and forty-five years; fifty cents.
- "On every male free negro between twenty-one and fifty years of age; two dollars.
- "On every female free negro between twenty-one and forty-five years of age; one dollar."[67]

And Mississippi levied similar poll taxes:

- "A poll tax of forty cents on each free white male person, between the ages of twenty-one and fifty years.
- "A poll tax of one dollar on every free, colored male person, between the ages of twenty-one and fifty years."[68]

To add insult to injury, some free Blacks who failed to pay taxes became quasi-slaves through states' debt collection schemes.[69]

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66. *See, e.g.*, 1846 Ark. Acts 857 (levying "on each free male over the age of twenty-one years and under sixty, a poll tax, not exceeding one dollar").

67. 1852 Ala. Acts 130, § 391. Note that the laws make no mention of free White females. Alabama's earlier poll taxes maintained the same 1:4 ratio for poll taxes on free White males versus free Black males, levied a poll tax on slaves, and made no mention of free women of either race. 1836 Ala. Acts 650 (An Act to raise a revenue for the support of government, until otherwise altered by law. Jan. 10, 1835 (§ 3)) ("for each [slave] over ten and under sixty, twenty-eight cents; for all free male negroes and mulattoes, over twenty-one years, fifty cents each; for all free white males above the age of twenty-one years, and not exceeding forty-five, twelve and a half cents each"). By 1852, Alabama and many other slave states had moved to an ad valorem system of taxation for their slaves. *See generally* DONALD C. BUTTS, A CHALLENGE TO PLANTER RULE: THE CONTROVERSY OVER THE AD VALOREM TAXATION OF SLAVES IN NORTH CAROLINA, 1858-1862 (1978) (discussing dynamics of the poll tax and the ad valorem tax).

68. 1857 Miss. Laws 73; *see also* 1823 Miss. Laws 285 ("the sum of seventy-five cents shall be assessed and collected on each slave; the sum of seventy-five cents on every free White male, above the age of twenty-one and under fifty years; the sum of three dollars on *each and every* free man of color, over the age of twenty-one and under fifty years") (emphasis added).

69. *See, e.g.*, Cooper v. Mayor of Savannah, 4 Ga. 68 (1848) (noting that the state may not jail Blacks for failure to pay taxes but may hire them out for the amount that is due); State v. Davis, 52 N.C. (7 Jones) 52, 52 (1859) ("[A]ll free negroes, who have not paid their taxes, shall be made to work on the streets two days for each and every dollar of tax due the town by them . . . ." (quoting a Newbern, N.C. ordinance)); State v. Graham, 20 S.C.L. (2 Hill) 457, 457 (1834) (noting that the law authorized the state "to seize and sell [free Blacks who refused to pay their taxes] for a term of time sufficient to satisfy [the debt] not exceeding one year"); JOHN CODMAN HURD, 2 THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 8 (Boston,

B. *Separate But (Mostly) Equal: Free States' Taxation of Free Blacks*

In the free Mid-Atlantic States and New England (with the exception of Connecticut and Rhode Island), all inhabitants were equal in terms of taxation. In those states, free Whites and Blacks paid the same property taxes,[70] poll taxes,[71] and special taxes.[72] The same was true in Minnesota, Wisconsin, and Michigan.[73]

Only a few free states subjected free Blacks to different taxes than their White counterparts. Indiana, while it was still a territory, levied an annual poll tax of three dollars on free Black males between the ages of twenty-one and fifty-five.[74] But Indiana, like Tennessee, exempted free Blacks from paying the poll tax that served as a voting prerequisite.[75]

The California and Oregon legislatures also passed systems of discriminatory taxation. California's 1862 passage of "An Act To Protect Free

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Little, Brown & Co. 1862) (noting that Virginia passed a law in 1820 making it lawful to hire out "negroes and mulattoes" who did not pay their taxes); *see also* Wright, *supra* note 43 ("It was held that many free negroes [in Maryland] paid no taxes . . . and that it was but reasonable that they should contribute to repairing the public roads.").

70. Free Blacks appear on the tax rolls of each of these states. *See, e.g.*, CITY OF BOSTON, A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE STATISTICS OF THE UNITED STATES' DIRECT TAX OF 1798, AS ASSESSED ON BOSTON; AND THE NAMES OF THE INHABITANTS OF BOSTON IN 1790, AS COLLECTED FOR THE FIRST NATIONAL CENSUS 121 (1910) ("Joseph Almsly and Thomas Freeman, owners; Joseph Almsly and Thomas Freeman, Negro, occupiers; brick dwelling; Fronting on a passage way; East on Richardson; Northerly & Westerly on J. Kirkwood; South on Charter Street. Land, 420 square feet; house, 420 square feet; 2 stories, 10 windows; Value, $750."). I have not been able to find an indication on the tax rolls or a mention in any judicial opinion or newspaper to suggest that their general taxation differed from that of their White counterparts.

71. *See, e.g.*, 1840 Me. Laws 94 (making no mention of race with regard to paying a poll tax); *see also* Op. of the Supreme Judicial Court, 44 Me. 507, 515 (1857) (stating that Maine's constitution did "not discriminate between the different races of people which constitute the inhabitants of [Maine]").

72. Unlike some slave states and several other free states, it appears as though free Blacks contributed to the payment of school taxes even though their children could not attend the schools. *See, e.g.*, MARY FRANCES BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA 46 (1982) (noting the story of Robert Purvis, a free Black in Philadelphia who refused to pay school taxes for schools his offspring could not attend).

73. This is not too surprising, considering Minnesota, Wisconsin, and Michigan had fewer than 300, 1,200, and 3,000 free Black inhabitants in 1860, respectively. *See infra* TABLE VIII.

74. 1813 Ind. Territorial Laws 485. The money was used for general county revenue purposes, with the exception of Knox County, where the funds were used for a school. Three dollars was also the amount set by the Indiana legislature for many criminal fines and penalties. *See, e.g.*, 1816 Ind. Acts 95 (fining individuals who gambled no less than three and no more than twenty dollars); 1816 Ind. Acts 37 (fining individuals between one and three dollars for breaching the peace).

75. *See* 1816 Ind. Acts 128 (levying a fifty-cent "poll tax on every actual citizen qualified to vote"); *see also* 1825 Ind. Acts 23 (levying a "fifty cents poll tax on each white male inhabitant" of Marion, Hamilton, and Allen counties for county purposes).

White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California"[76] charged Chinese laborers—and those who hired them—exorbitant monthly taxes.[77] California's "Anti-Coolie Act" was short lived,[78] but it served as the inspiration for Oregon's discriminatory poll tax[79]:

> *Be it enacted by the legislative assembly of the state of Oregon*, That each and every negro, Chinaman, kanaka and mulatto, residing within the limits of this state, shall pay an annual poll tax of five dollars, for the use of the county in which such negro, Chinaman, kanaka and mulatto may reside.[80]

Taking a cue from slave states, the sheriff could force individuals who did not pay these taxes to work on the highways to pay the taxes.[81] This law was not repealed until Oregon ratified the Fourteenth Amendment in 1866.[82] Oregon's disdain for free Blacks was well known,[83] but the influx of Chinese and Hawaiian labor competition most likely formed the primary impetus for this tax; only 128 free Blacks resided in Oregon in 1860.[84]

Several free states exempted free Blacks from the payment of school taxes. Ohio, the free state with the largest Black population outside of New England and the Mid-Atlantic, initially gave free Blacks a partial exemption from the school tax. Counties in Ohio could not levy taxes on free Blacks for the general schools, but they could levy taxes on free Blacks if the trustees decided to use it towards the education of free Blacks.[85] Two years later, Ohio repealed this act and simply exempted free Blacks from

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76. 1862 Cal. Stat. 462.

77. *See* Lin Sing v. Washburn, 20 Cal. 534, 564 (1862) (noting that the monthly charges were two dollars and fifty cents).

78. The act passed in April of 1862 and was pronounced unconstitutional in the same year. *Id*. at 581–82.

79. *Compare* 1862 Cal. Stat. 462 (describing the receipt of payment to be used), *with* 1862 Or. Laws 76–77 (same).

80. 1862 Or. Laws 76.

81. *Id*. at 77.

82. HUBERT HOWE BANCROFT & FRANCES FULLER VICTOR, 2 HISTORY OF OREGON 666 (San Francisco, The Hist. Co. 1888).

83. *See Crafting the Oregon Constitution: Blacks in Oregon Meet Hostility*, OREGON STATE ARCHIVES, http://arcweb.sos.state.or.us/pages/exhibits/1857/before/slavery.htm (last visited Jan. 31, 2015).

84. *See infra* TABLE VIII.

85. STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST 34 (1993) ("[N]othing in this act contained shall be so construed as to compel . . . [blacks or mulattoes] to pay any tax for the support of such schools; but all taxes assessed on their property, for school purposes, . . . shall be appropriated . . . for the education of said black and mulatto persons therein, and for no other purpose whatever.") (quoting "An act to provide for the support and better regulation of common schools," Feb. 10, 1829, Laws of Ohio)).

paying a school tax.[86] This remained the law until 1847, when Ohio established schools for Black children.[87] In 1847, Illinois made special provisions to return the school taxes taken from free Blacks.[88] And in 1851, Iowa exempted all of the property belonging to free Blacks "from taxation for school purposes."[89] Indiana exempted free Blacks from paying school taxes in 1853.[90] Kansas did not exempt free Blacks from paying school taxes, but it specified that any taxes collected from free Blacks should be used to educate the children of free Blacks.[91]

Rhode Island and Connecticut were the only states to completely exempt the property of free Blacks from taxation.[92] Rhode Island's free Black tax exemption was short-lived.[93] Because it lasted only two years, it does not appear to have generated any published cases.

Copp v. Town of Norwich[94] appears to be the only other reported case besides *Johnson v. Town of Norwich*[95] that involved Connecticut's tax exemption. In *Copp*, the plaintiff, a White male, held land in trust for three minors who were "lighter than mulattos, and darker than whites."[96] The court held that because the minor children did not have a present interest in the taxable property, the plaintiff could not claim the "free persons of color tax exemption" on their behalf.[97] It declined to adjudicate whether the children qualified as "persons of color, within the meaning of the statute,"[98] because it was unnecessary to answer that question to solve the issue before the court. But when presented with the question five years later, the court held that anyone with a "distinct, visible admixture of African blood"[99] qualified as a person of color within the meaning of the statute.

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86. *Id.* at 35 (quoting "An act to provide for the support and better regulation of common schools," Mar. 10, 1831, Laws of Ohio.).

87. *Id.* at 37 (quoting "An act to provide for the establishment of Common Schools for the education of children of black and mulatto persons," Feb. 24, 1848, Laws of Ohio).

88. WOODSON, *supra* note 44, at liii–liv.

89. IOWA CODE § 1160 (1851).

90. WOODSON, *supra* note 44, at liii.

91. 1862 Kan. Sess. Laws 395–96.

92. 1841 R.I. Pub. Laws 82 (Jan. adjourned sess.) ("The real and personal estate of blacks and other people of color not freemen of this state or of any town thereof, shall not be liable to town or state taxes in any manner whatever."); 1844 Conn. Pub. Acts 36–37 ("[T]he personal and real estate of any person of color in this state shall be exempt from taxation.").

93. 1843 R.I. Pub. Laws 44 (Jan. adjourned sess.) (repealing the tax exemption for Blacks and other persons of color).

94. Copp v. Town of Norwich, 24 Conn. 28 (1855).

95. Johnson v. Town of Norwich, 29 Conn. 407 (1860).

96. *Copp*, 24 Conn. at 29.

97. *Id.* at 32.

98. *See id.* at 29 (describing the children as one-fourth Black because their father was White, and their mother was half Black and half White).

99. *Johnson*, 29 Conn. at 408.

III. REVOLUTIONARY ROOTS: BLACK TAX OBJECTORS

After Thomas Paine's *Common Sense*, John Dickinson's *Letters from a Farmer in Pennsylvania* was the most widely read pamphlet in the period leading up to the Revolutionary War.[100] In a series of letters, Dickinson articulated the reasons why the taxes the British imposed on the colonies were unjust. He concluded one of those letters with the following message:

> Those who are taxed without their own consent, given by themselves, or their representatives, are slaves. We are taxed without our own consent, given by ourselves or our representatives. We are therefore—I speak with grief—I speak with indignation—we are slaves.[101]

In the period between the Revolutionary and Civil Wars, this message resonated with free Blacks across the country and appeared in several variations.

In 1780, a group of free Blacks from Massachusetts petitioned the state's House of Representatives to be exempt from paying poll and property taxes. They mentioned several reasons why such an exemption would be expedient, but a strong undercurrent of "no taxation without representation" ran throughout the petition:

> The petition of several poor negroes and mulattoes, who are inhabitants of the town of Dartmouth, humbly showeth:
>
> That we being chiefly of the African extract, and by reason of long bondage and hard slavery, we have been deprived of enjoying the profits of our labor or the advantage of inheriting estates from our parents, as our neighbors the whit people do, having some of us not long enjoyed our own freedom; yet of late, *contrary to the invariable custom and practice of the country, we have been, and now are, taxed both in our polls and that small pittance of estate* which, through much hard labor and industry, we have got together to sustain ourselves and families withall. We apprehend it, therefore, to be hard usage, and will doubtless (if continued) reduce us to a state of beggary, whereby we shall become a burthen to others, if not timely prevented by the interposition of your justice and power.
>
> Your petitioners further show, that we apprehend ourselves to be aggrieved, in that, while *we are not allowed the privi-*

100. Pierre Marambaud, *Dickinson's "Letters from a Farmer in Pennsylvania" as Political Discourse: Ideology, Imagery, and Rhetoric*, 12 EARLY AMERICAN LITERATURE 63, 63 (1977).

101. JOHN DICKINSON, LETTER VII, LETTERS FROM A FARMER, IN PENNSYLVANIA, TO THE INHABITANTS OF THE BRITISH COLONIES 74–77 (Philadelphia printed, London reprinted for J. Almon 1774).

> *lege of freemen of the State, having no vote or influence in the election of those that tax us*, yet many of our color (as is well known) have cheerfully entered the field of battle in the defence of the common cause, and that (as we conceive) against a similar exertion of power (in regard to taxation) too well known to need a recital in this place.
>
> We most humble request, therefore, that you would take our unhappy case into your serious consideration, and, in your wisdom and power, *grant us relief from taxation*, while under our present depressed circumstances . . . .[102]

This petition was unsuccessful—the House of Representatives took no action to exempt either the petitioners or free Blacks as a class from taxation.[103] But Massachusetts's first constitution, adopted later that same year, did not use race as a voting qualification.[104]

In 1815, a group of property-owning free Blacks filed a similar petition with Connecticut's general assembly.[105] Like the Massachusetts petitioners, these men did not ask for the right to vote. Instead, they sought a tax exemption, again appealing to the revolutionary mantra of "no taxation without representation."[106] Additional groups of Connecticut free Blacks filed similar petitions,[107] and the state finally exempted the property of free persons of color from taxation in 1844.[108]

These petitions did not enjoy unanimous support within the Black community. *The Colored American*, a New York newspaper run by free Blacks, ran an editorial criticizing Rhode Island's Blacks for their successful petition to be relieved of taxation if the state would not extend the right to vote to them.[109] The editorial characterized the move as "bad

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102. Petition of John Cuffe, et. al (Feb. 10, 1780) (*reprinted in* GEORGE WASHINGTON WILLIAMS, HISTORY OF THE NEGRO RACE IN AMERICA FROM 1619 TO 1880: NEGROES AS SLAVES, AS SOLDIERS, AND AS CITIZENS 126 (New York, G.P. Putnam's Sons 1883)) (emphasis added).

103. *See id.* at 126–27.

104. *See* MASS. CONST. art. II, § 2 (1780) (granting suffrage to "every male inhabitant of twenty-one years of age and upwards" who fulfilled certain property ownership requirements).

105. *See* Petition by Bias Stanley and William Lanson, New Haven-dwelling, property owning, "men of color," to the Conn. Gen. Assemb. (October 1815); *see also infra* note 107.

106. *See* JAMES M. ROSE & ALICE EICHHOLZ, BLACK GENESIS: A RESOURCE BOOK FOR AFRICAN AMERICAN HISTORY 87 (2d ed. 2003) (briefly describing the petition).

107. These petitions are available on micro-film through the Connecticut State Library, but I was not able to obtain them through the Inter-Library Loan program. Instead I relied on the library's descriptions of the petitions. *See* Research Guide to African-American Genealogical Resources at the Connecticut State Library, CONN. ST. LIB., https://web.archive.org/web/20130408144014/http://www.cslib.org/blagen.htm (last visited Jan. 31, 2015).

108. *See* 1844 Conn. Pub. Acts, *supra* note 92.

109. The Colored People of Rhode Island, THE COLORED AMERICAN (New York, N.Y.), Mar. 27, 1841.

policy, calculated most successfully to defeat their objective" of obtaining suffrage.[110] It expressed the view that exempting Blacks from taxation provided Whites "with a pretence to withhold . . . the elective franchise."[111] The paper feared that Whites would make the following argument: "[W]hy, we have released them from taxation as an offset, at their request; what more do they want? They ought to be satisfied."[112]

Adopting *The Colored American*'s policy position, Pennsylvania's free Blacks did not place a tax exemption option on the table. Instead, "no taxation without representation" became an atmospheric element used to tie their struggle for suffrage to the Revolutionary War.[113] Ohio's free Blacks sounded a similar note in their resolutions for equal rights.[114]

And in a slightly more activist variant, some advocated the civil disobedience of withholding taxes until states granted free Blacks the right to vote. The abolitionist Charles Lennox Remond was perhaps the most prominent of these figures.[115] A few individuals actually adopted his suggestion. In 1857, for example, some Black businessmen in California refused to pay poll taxes so long as they were unable to vote:

> During a residence of seven years in California, we, with hundreds of other colored men, have cheerfully paid city, State and county taxes on real estate and merchandise, as well as licenses to carry on business, and every other species of tax that has been levied from time to time for the support of the government, save only the 'poll-tax'—that we have persistently re-

110. *Id.*

111. *Id.*

112. Id.

113. *See, e.g., Liberty Movements: Convention in Bradford County, Pa.*, THE NATIONAL ERA (Washington, D.C.), Sep. 30, 1847 ("Resolved, That the fifty thousand citizens of Pennsylvania, who are disfranchised by the odious white clause in our State Constitution, are living witnesses of the cruel prejudice, injustice, and imbecility of Pennsylvania; and, until she permits them to exercise the elective franchise, she dishonors the memory of the 'illustrious dead' of our country, who sealed with their blood the doctrine, that *taxation and representation* should go together."); *Suffrage*, THE NORTH STAR (Rochester, New York), Dec. 8, 1848 ("Taxation, without representation, was the exact fact by which 'Britain's King lost States thirteen;' and the principle that 'all governments derive their JUST powers from the CONSENT of the governed,' was the very fulcrum of the revolutionary lever which overthrew the tyranny of the past ages. Can the DEMOCRACY of Pennsylvania any longer sin against its own soul?" (reprinted from the PHILADELPHIA REPUBLIC)).

114. *See Meeting of Colored Citizens*, THE N. STAR (Rochester, New York), Jan. 12, 1849 ("Whereas we believe with the 'Fathers of 76,' that taxation and representation ought to go together—Resolved, That we very much doubt about paying any tax upon which representation is based, until we are permitted to be represented.").

115. *See* SPEAK OUT IN THUNDER TONES: LETTERS AND OTHER WRITINGS BY BLACK NORTHERNERS, 1787-1865 109 (Dorothy Sterling ed. 1973) ("Let every colored man called upon to pay taxes to an institution in which he is denied its privileges, withhold his taxes, though it cost [him] imprisonment.").

> fused. On the day before yesterday, the Tax Collector called on us, and seized and lugged off twenty or thirty dollars' worth of goods, in payment, as he said, of this tax.
>
> Now, while we cannot understand how a "white" man can refuse to pay each and every tax for the support of government, under which he enjoys every privilege—from the right to rob a negro up to that of being Governor of the State—we can perceive and feel the flagrant injustice of compelling "colored men" to pay a special tax for the enjoyment of a special privilege, and then break their heads if they attempt to exercise it. We believe that every voter should pay poll-tax, or every male resident who has the privilege of becoming a voter; but regard it as low and despicable, the very quitescense of meanness, to compel colored men to pay it, situated as they are politically. However, if there is no redress, the great State of California may come around annually, and rob us of twenty or thirty dollars' worth of goods, as we will never willingly pay three dollars as poll-tax as long as we remain disfranchised, oath-denied, outlawed colored Americans.[116]

Even seventy-five years after the revolution, the spirit behind John Dickinson's words encouraged free Blacks to challenge what they saw as very similar injustices to those imposed by the British during colonial times.

IV. UNDERSTANDING THE STATES' VARYING TAXATION SCHEMES

What accounted for the proliferation of discriminatory taxes? Why did many states exempt free Blacks from paying school taxes and some poll taxes? How did free Blacks in Rhode Island and Connecticut succeed in their bids to secure tax exemptions or suffrage while the pleas of those in other states fell on deaf ears? One can explain the variance between how the states treated free Blacks for taxation purposes by using a combination of napkin-and-pen economics, geography, demographics, and history.

A. *Taxing Free Blacks to Protect Slave Assets*

If, to paraphrase Justice Catron, free Blacks were idle, incapable of earning a living, and threatened to become a burden on the state, why charge them higher poll taxes? Why not tax them the same rates as Whites or exempt them from paying taxes altogether? Because slave states never intended these taxes to be revenue generating. These taxes were economic

116. Lester & Gibbs, *Letter to the Editor*, THE LIBERATOR, July 3, 1857, *reprinted in* SPEAK OUT IN THUNDER TONES, *supra* note 115, at 120-21.

deterrents to the growth of the size and wealth of the free Black population.[117]

For slave states, deciding whether to impose freedom taxes was not a difficult task. Slaveholdings represented vast amounts of wealth.[118] And according to popular belief, free Blacks posed a threat to slavery as an institution.[119] In addition, economically handicapping free Blacks fed the popular narrative that slaves—with masters who fed them, clothed them, housed them, and paid taxes on them—led better lives than free Blacks who struggled to obtain those necessities.[120] And in a purely economic sense, this was likely true throughout many of the slaveholding states for the average laborer. A free Black would need a substantial amount of wealth to pay the extra taxes and still live a comfortable life.[121] Under these circumstances, the only way for a free "person of color" to escape discriminatory taxes was to leave the state, return to slavery,[122] or pass as White or some acceptable non-Black race.[123] To the average slave state legislator, any of these options would have been more desirable than an increase in the free Black population's wealth.

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117. *See* WOODSON, *supra* note 44, at xxxii ("Virginia made further discrimination in capitation taxes in 1813 when it laid a special poll tax of one dollar and fifty cents on all free Negroes above sixteen years of age when not bound out as apprentices. The idea here was not so much to increase the revenue of the [s]tate as it was to get rid of this class of population."); George Ruble Woolfolk, *Taxes and Slavery in the Ante Bellum South*, 26 J. S. HIST. 180, 188 (1960) ("The relatively small number of free Negroes in the Southern population makes clear that regulation rather than revenue was the chief purpose."); cf. Leiper v. Hoffman, 26 Miss. (4 Cushm.) 615, 616 (1853) ("[T]here . . . [was] a great spirit . . . to remove from the [s]tate all free persons of color.").

118. By some estimates, slaves represented as much as forty-four percent of all wealth in parts of the South. Roger Ransom & Richard Sutch, *Capitalists Without Capital: The Burden of Slavery and the Impact of Emancipation*, 62 AGRIC. HIST. 133, 138–39 (1988).

119. *See supra* Part I.

120. *See supra* Part I and the discussion in *Spencer v. Negro Dennis*, 8 Gill 314 (Md. 1849).

121. Indeed, there are several instances of free Blacks, especially women, petitioning the government to repeal or exempt them from onerous taxes. *See, e.g.*, Race, Slavery, and Free Blacks: Series I, Petitions to Southern Legislatures, 1777–1867, http://cisupa.proquest.com/ksc_assets/catalog/1543.pdf at 117, 164.

122. There are several instances of free Blacks petitioning slave state legislative bodies to voluntarily enter into slavery. *See, e.g.*, Petition of Joe Bird (1859) (asking to be "elevate[d] . . . from his present condition [of freedom] into slavery"). This petition and several others are available through ProQuest at http://cisupa.proquest.com/ksc_assets/catalog/1543.pdf.

123. In states like South Carolina, several individuals challenged being subject to the payment of poll taxes on account of interesting racial histories. *See, e.g.*, Johnson v. Basquere, 28 S.C.L. (1 Speers) 329, 330 (1843) (noting that some individuals "were not subject to be taxed as free persons of African origin, but that they were exempt from such a tax, as the descendants of Egyptians"). It is unlikely that these individuals were actually descendants from Egyptians, instead inventing the story to avoid being a "person of color" within the meaning of the law. For more discussion on this issue, see Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007).

The taxes did not succeed in completely ridding the slave states of the "grievous affliction" of free Blacks, but they helped slow their growth and, in the case of Mississippi, reduce their ranks.[124]

B. *A Delicate Balancing Act: The Varying Taxation of Free Blacks in Free States*

Free states did not necessarily share the slave states' vested interest in maintaining the institution of slavery. But free states' views on free Blacks differed from their slave state peers' only in the timbre of their rhetoric. Free-state legislators and jurists believed free Blacks would corrupt the morals and the economies of their states. In general, free states used taxes, in concert with disenfranchisement, bonds,[125] and general threats[126] to perform a delicate balancing act.

Unlike the slave states, free states had a greater interest in preventing destitution among their free Black populations than maintaining the allure of slavery. Free states did not want to force free Blacks into a position where they would become drains on the government or social liabilities out of necessity. They gained little from making the lives of free Blacks unbearable. This likely accounts for the overwhelming absence of blatantly discriminatory taxes in most free states. California and Oregon are the exceptions, and their discriminatory taxes were primarily directed at the Chinese, not free Blacks.

At the same time, free states did not want to make themselves attractive destinations for free Black immigration. In essence, these competing motivations would encourage states to pursue policies that allowed free Blacks to survive, not thrive. This may explain, in part, the reticence of all but two of the free states to extend general tax exemptions to free Blacks.

C. *Understanding the Free Black Tax Exemptions*

Between the Revolutionary and Civil Wars, the states extended two types of tax exemptions to free Blacks: (1) specific tax exemptions for voting-related poll taxes and school taxes and (2) general tax exemptions for all personal and real property. Specific tax exemptions were found in slave

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124. *See infra* TABLES I–VIII (enumerating the number of free blacks in each state). *But cf.* WOODSON, *supra* note 44, at xxxii ("[T]he records show that the Negroes generally met this obligation and thereby made it impossible for any large number to suffer the penalty of being reduced to a state of servitude.").

125. Illinois and a handful of other states required free Blacks entering the state to post bonds to protect against becoming wards of those states. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 220–21 (2010) (noting bond requirements in Illinois and Cincinnati).

126. *See* Oregon's short-lived "lash law," which threatened free Blacks who did not leave the state with up to thirty-nine lashes reoccurring every six months. *Crafting the Oregon Constitution: Blacks in Oregon Meet Hostility*, OREGON STATE ARCHIVES, http://arcweb.sos.state.or.us/pages/exhibits/1857/before/slavery.htm (last visited Jan. 31, 2015).

and free states,[127] while the general exemptions were limited to Connecticut and Rhode Island.[128]

School and voting-related poll tax exemptions were likely acceptable because the taxes were collected for specific, narrowly defined purposes. The Indiana and Tennessee poll taxes were voting prerequisites,[129] and the school taxes were used exclusively for the development and maintenance of educational institutions.[130] Legislators and laypeople would have understood social mores to preclude free Blacks from voting and Black children from attending white schools. And although the unfairness of these social conventions was lost on the vast majority of the lawmaking population during this time period, the unfairness of charging an individual a tax for something that he, by law, has absolutely no possibility of enjoying may have been more difficult to overlook.

By contrast, the Rhode Island and Connecticut free Black tax exemptions were likely due, in large part, to economics, history, and geography. Both of these states had free Black populations of around three percent when their legislatures passed the tax exemptions.[131] A cursory analysis suggests that these states would not have lost a substantial amount in revenue,[132] but that their populations were potentially large enough to create an unwelcome social disturbance if their grievances were not addressed. Neither was located especially close to a slave state, allaying fears of readily attracting downtrodden free Blacks. And finally, the republican theme of "no taxation without representation" appears to have resonated with the states' legislators, perhaps because they were part of the original colonies.[133]

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127. *See supra* Part II. Maryland, North Carolina, and Tennessee exempted free Blacks from certain taxes. It is not surprising that no Deep South states exempted free Blacks from specific taxation, as they had the largest vested interest in maintaining the superior status of the slave, and any tax exemption necessarily made the lives of free Blacks easier.

128. *See supra* notes 92–99 and accompanying text.

129. *See supra* notes 47 & 75 and accompanying text.

130. *See supra* notes 85–91 and accompanying text.

131. *See infra* TABLE VI.

132. An analysis of 1860 Maryland's free Black taxpayers shows that they accounted for approximately twelve percent of the population but held less than 0.5 percent of the total assessed property in the state, accounting for about three percent of what a normal distribution would expect. Wright, *supra* note 43, at 580/190. Even if we assume that free Blacks in Rhode Island and Connecticut were four times as wealthy as those in Maryland, their impact on tax revenue would have had a similar effect.

133. At the dawn of the Civil War, free Blacks could vote in New York, Massachusetts, Rhode Island, Vermont, Maine, and New Hampshire. These were the only states where free Blacks could vote, and it is not difficult to attribute this fact to their participation in the Revolutionary War.

CONCLUSION

Taxes are primarily tools to raise revenue, but they also play a role in effecting social policies. Both free states and slave states used taxes and tax exemptions as tools to affect the lives of free Blacks.

Why didn't more states offer general tax exemptions? In slave states, the answer is easy: To encourage and support a free Black population in any manner would have been viewed as economic suicide. Tax exemptions would have effectively increased free Blacks' wealth, strengthening this undesirable population.

In the few free states that extended the franchise to free Blacks, exempting their property from taxation would have severed the implied connection between the right to vote and payment of taxes that resonated with many in the young country.[134] In the remaining free states, economics ruled out tax exemptions as an unobjectionable policy choice. By 1850, the free Black populations in Pennsylvania, Ohio, and New Jersey were too sizeable to write off the revenue the states generated from their taxes.[135] And by 1860, the free Black populations in California, Illinois, Indiana, Iowa, Kansas, Minnesota, Nebraska, Nevada, and Oregon had not yet achieved the critical mass necessary for those states' respective legislatures to seriously consider protestations of "no taxation without representation."[136]

Whether providing free Blacks with tax exemptions would have been sound economic policy for more states is less clear-cut. Answering this question would require aggregating substantial amounts of data on tax collections from free Blacks and tax expenditures on the same group. Considering the fact that only one in seventy-three free Blacks owned taxable property in one study,[137] it is not difficult to imagine a situation where a state's tax revenue would have been less than its expenditures, and exempting free Blacks from property taxes would have offset the state's costs. But economics does not always drive policy decision, and given the political climate, the optics of such an exemption may have been difficult for even the most affable legislator to overcome.

This Essay provides a small window into the subject, which is ripe for more research.[138] The information gleaned from these studies provides additional context for understanding the period between the Revolutionary

134. *See supra* notes 100–01 and accompanying text.

135. *See infra* TABLE VII.

136. *See infra* TABLE VIII.

137. *See* Wright, *supra* note 43, at 582/192 (discussing the tax payments of free negroes in Baltimore).

138. Locating primary source documents regarding manumitted slaves who were subjected to inheritance taxes on their freedom or conducting an in-depth analysis of the cause and effects of Connecticut's tax exemption for persons of color are two potentially article-worthy topics. And because so much taxation occurred at the city and county level, aggregating those tax lists could provide data for more detailed economic analysis.

and Civil Wars. It will hopefully never have direct applicability to contemporary events, but it can provide some insight into the debates surrounding current and future tax policies and the extent to which history, prejudice, and economic concerns may combine to shape policymakers' decisions.[139] "History doesn't repeat itself, but it rhymes."[140]

TABLES

I. POPULATION DATA FROM THE 1790 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Connecticut	5,330	951	251,002
Delaware	6,153	8,268	64,273
Georgia	1,919	59,699	162,686
Kentucky	741	40,343	220,955
Maine	818	0	151,719
Maryland	19,587	105,635	341,543
Massachusetts	6,452	0	422,845
New Hampshire	852	8	183,858
New Jersey	4,402	12,422	211,149
New York	10,374	20,613	586,182
North Carolina	7,073	133,296	478,103
Pennsylvania	14,564	1,706	602,365
Rhode Island	3,304	380	69,122
South Carolina	3,185	146,151	345,591
Tennessee	309	13,584	105,602
Vermont	557	0	154,465
Virginia	20,493	346,671	885,171

139. For example, during the 2012 presidential campaign, President Barack Obama's message of making the wealthy "pay their fair share" struck a chord with the populist campaign for the ad valorem taxation of slavery in North Carolina during the period leading up to the Civil War. *Compare* David Jackson, *Obama: Millionaires should pay 'fair share,'* USA Today, Apr. 11, 2012, http:/content.usatoday.com/communities/theoval/post/2012/04/obama-live-on-the-buffett-rule/1#.UMTbR5PjnXN, *with* DONALD C. BUTTS, A CHALLENGE TO PLANTER RULE: THE CONTROVERSY OVER THE AD VALOREM TAXATION OF SLAVES IN NORTH CAROLINA: 1858–1862 (1978).

140. This quote is often attributed to Mark Twain. Eugene Volokh, *History Doesn't Repeat Itself, But It Rhymes*, THE VOLOKH CONSPIRACY (Feb. 18, 2005, 1:51 PM), http://www.volokh.com/posts/1108756279.html.

II. POPULATION DATA FROM THE 1800 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Connecticut	5,330	951	251,002
Delaware	6,153	8,268	64,273
Georgia	1,919	59,699	162,686
Kentucky	741	40,343	220,955
Maine	818	0	151,719
Maryland	19,587	105,635	341,543
Massachusetts	6,452	0	422,845
New Hampshire	852	8	183,858
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New York	10,374	20,613	586,182
North Carolina	7,073	133,296	478,103
Pennsylvania	14,564	1,706	602,365
Rhode Island	3,304	380	69,122
South Carolina	3,185	146,151	345,591
Tennessee	309	13,584	105,602
Vermont	557	0	154,465
Virginia	20,493	346,671	885,171

III. POPULATION DATA FROM THE 1810 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Connecticut	6,453	310	261,942
Delaware	13,136	4,177	72,674
Georgia	1,801	105,218	252,433
Kentucky	1,713	80,561	406,511
Maine	969	0	228,705
Maryland	33,927	111,502	380,546
Massachusetts	6,737	0	472,040
New Hampshire	970	0	214,460
New Jersey	7,843	10,851	245,562
New York	25,333	15,017	959,049
North Carolina	10,266	168,824	555,500
Ohio	1,899	0	230,760
Pennsylvania	22,492	795	810,019
Rhode Island	3,609	108	76,931
South Carolina	4,554	196,365	415,115
Tennessee	1,317	44,535	261,727
Vermont	750	0	217,913
Virginia	30,570	392,518	974,622

IV. POPULATION DATA FROM THE 1820 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Alabama	633	47,449	144,317
Connecticut	7,870	97	275,248
Delaware	12,958	4,509	72,749
Georgia	1,763	149,656	340,989
Illinois	457	917	55,211
Indiana	1,230	190	147,178
'Kentucky	2,759	126,732	564,317
Louisiana	10,897	69,064	153,407
Maine	929	0	298,335
Maryland	39,730	107,398	407,350
Massachusetts	6,740	0	523,287
Mississippi	458	32,814	75,448
Missouri	347	10,222	66,586
New Hampshire	786	0	244,161
New Jersey	12,460	7,557	277,575
New York	29,279	10,088	1,372,812
North Carolina	14,612	205,017	638,829
Ohio	4,723	0	581,434
Pennsylvania	30,202	211	1,549,458
Rhode Island	3,554	48	83,059
South Carolina	6,714	251,783	490,309
Tennessee	2,727	80,107	422,813
Vermont	903	0	235,764
Virginia	36,889	425,153	1,065,379

V. POPULATION DATA FROM THE 1830 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Alabama	1,572	117,549	309,527
Arkansas	141	4,576	30,388
Connecticut	8,047	25	297,675
Delaware	15,855	3,292	76,748
Georgia	2,486	217,531	516,823
Illinois	1,637	747	157,445
Indiana	3,629	3	343,031
Kentucky	4,917	165,213	687,917
Louisiana	16,710	109,588	215,529
Maine	1,190	2	399,455
Maryland	52,938	102,994	447,040
Massachusetts	7,048	1	610,408
Michigan	261	32	31,639
Mississippi	519	65,659	136,621
Missouri	569	25,096	140,455
New Hampshire	604	3	269,328
New Jersey	18,303	2,254	320,823
New York	44,870	75	1,918,608
North Carolina	19,543	245,601	737,987
Ohio	9,568	6	937,903
Pennsylvania	37,930	403	1,348,233
Rhode Island	3,561	17	97,199
South Carolina	7,921	315,401	581,185
Tennessee	4,555	141,603	681,904
Vermont	881	0	280,652
Virginia	47,348	469,757	1,211,405

VI. Population Data from the 1840 Census

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Alabama	2,039	253,532	590,756
Arkansas	465	19,935	97,574
Connecticut	8,105	54	310,015
Delaware	16,919	2,605	78,085
Florida	817	25,717	54,477
Georgia	2,753	280,944	691,392
Illinois	3,598	331	476,183
Indiana	7,165	3	685,866
Iowa	172	16	43,112
Kentucky	7,317	182,258	779,828
Louisiana	25,502	168,452	352,411
Maine	1,355	0	501,793
Maryland	62,078	89,737	470,019
Massachusetts	8,669	0	737,699
Michigan	707	0	212,267
Mississippi	1,366	195,211	375,651
Missouri	1,574	58,240	383,702
New Hampshire	537	1	284,574
New Jersey	21,044	674	373,306
New York	50,027	4	2,428,921
North Carolina	22,732	245,817	753,419
Ohio	17,342	3	1,519,467
Pennsylvania	47,854	64	1,724,033
Rhode Island	3,238	5	108,830
South Carolina	8,276	327,038	594,398
Tennessee	5,524	183,059	829,210
Vermont	730	0	291,948
Virginia	49,852	449,087	1,239,797
Wisconsin	185	11	30,945

VII. POPULATION DATA FROM THE 1850 CENSUS

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Alabama	2,265	342,844	771,623
Arkansas	608	47,100	209,897
California	962	0	92,597
Connecticut	7,693	0	370,792
Delaware	18,073	2,290	91,532
Florida	932	39,310	87,445
Georgia	2,931	381,682	906,185
Illinois	5,436	0	851,470
Indiana	11,262	0	988,416
Iowa	333	0	192,214
Kentucky	10,011	210,981	982,405
Louisiana	17,462	244,809	517,762
Maine	1,356	0	583,169
Maryland	74,723	90,368	583,034
Massachusetts	9,064	0	994,514
Michigan	2,583	0	397,654
Minnesota	39	0	6,077
Mississippi	930	309,878	606,526
Missouri	2,618	87,422	682,044
New Hampshire	520	0	317,976
New Jersey	23,810	236	489,555
New York	49,069	0	3,097,394
North Carolina	27,463	288,548	869,039
Ohio	25,279	0	1,980,329
Pennsylvania	53,626	0	2,311,786
Rhode Island	3,670	0	147,545
South Carolina	8,960	384,984	668,507
Tennessee	6,422	239,459	1,002,717
Texas	397	58,161	212,592
Vermont	718	0	314,304
Virginia	54,333	472,528	1,421,661
Wisconsin	635	0	305,391

VIII. Population Data from the 1860 Census

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Alabama	2,690	435,080	964,201
Arkansas	144	111,115	435,450
California	4,086	0	379,994
Connecticut	8,627	0	460,147
Delaware	19,829	1,798	112,216
Florida	932	61,745	140,424
Georgia	3,500	462,198	1,057,286
Illinois	7,628	0	1,711,951
Indiana	11,428	0	1,350,428
Iowa	1,069	0	674,913
Kansas	625	2	107,206
Kentucky	10,684	225,483	1,155,684
Louisiana	18,647	331,726	708,002
Maine	1,327	0	628,279
Maryland	83,942	87,189	687,049
Massachusetts	9,602	0	1,231,066
Michigan	6,799	0	749,113
Minnesota	259	0	172,023
Mississippi	773	436,631	791,305
Missouri	3,572	114,931	1,182,012
Nebraska	67	15	28,841
Nevada	45	0	6,857
New Hampshire	494	0	326,073
New Jersey	25,318	18	672,035
New York	49,005	0	3,880,735
North Carolina	30,463	331,059	992,622
Ohio	36,673	0	2,339,511
Oregon	128	0	52,465
Pennsylvania	56,949	0	2,906,215
Rhode Island	3,952	0	174,620
South Carolina	9,914	402,406	703,708

VIII. POPULATION DATA FROM THE 1860 CENSUS (CONTINUED)

State/Territory	No. of Free Blacks	No. of Slaves	Total Population
Tennessee	7,300	275,719	1,109,801
Texas	355	182,566	604,215
Vermont	709	0	315,098
Virginia	58,042	490,865	1,596,318
Wisconsin	1,171	0	775,881