Early Customs Laws and Delegation

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Abstract

This past Term the Supreme Court reexamined the nondelegation doctrine, with several justices concluding that in the proper case, the Court should consider significantly strengthening the doctrine in its contemporary form. Adherents to the doctrine question whether Congress has developed a practice of improperly delegating to administrative agencies the legislative power that Congress alone must exercise under the Vesting Clause of Article I of the Constitution. Many scholars have debated the extent of the historical or textual basis for the doctrine. Instead, this Article examines interactions between executive and legislative actors during the first congressional debates on the Impost, Tonnage, Registration, and Collection of Duties Acts. In addition to revealing Congress's central role early on, this story shows the relevance of state and congressional district interests to the legislative agreements concerning customs laws. The rich depth of these varied interests suggests that nondelegation limitations might not be inherent in the Vesting Clause alone, but may be innate to the federal government's tripartite and federalist structural design itself.

The Constitution carefully provided significant protection for state interests through diverse representation schemes in the House and the Senate. Beyond the textual limitation of exclusive vesting of the legislative power in Congress, separation of powers principles help ensure all people's interests are represented in a way that would not be possible via a singular, centralized administrative entity. The acts of such administrative entities are accountable, if at all, to just one centralized elected official, not to multiple elected decisionmakers representing states and regional interests. Consequently, enforcement of relatively strict nondelegation principles may be critical to preserving the structural constitutional principle that the federal government must reflect the interests of both individual members of the electorate as well as the states and regional electoral districts.

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Introduction

This past Term, in *Gundy v. United States*,[1] the Supreme Court reevaluated the question of whether Congress has developed a practice of enacting statutes with such broad terms that it has improperly delegated its legislative power to administrative agencies.[2] This claim, known colloquially as the "nondelegation doctrine,"[3] contends that because Article I of the Constitution vests legislative power exclu-

1 139 S. Ct. 2116 (2019).

2 *See* Brief for Petitioner at 2, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086) (contending that Congress improperly authorized the Attorney General to decide whether to impose sex offender registration requirements on hundreds of thousands of individuals convicted before the 2006 enactment of the Sex Offender Registration and Notification Act); *see also* Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 Geo. Mason L. Rev. 1, 1 (2018) (providing analysis of the case).

3 *See* Mascott, *supra* note 2, at 1.

sively in Congress,[4] Congress lacks authority to delegate that policymaking power to the executive branch or anyone else.[5]

When evaluating statutory grants of discretion to administrative actors, however, the challenge is assessing whether the discretion involves perfectly permissible executive authority to enforce and carry out legislative commands or, instead, improperly authorizes legislative-style policymaking by administrative agencies. The line between the two is often not immediately clear.[6]

Some scholars suggest this is because there is no inherent constitutional nondelegation principle and broadly worded statutes have always been permissible.[7] On the opposite end of the spectrum, advocates for constrained administrative power at times are perceived as suggesting that executive agencies must exercise next to no discretionary power.[8]

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4 U.S. CONST. art. I, § 1 ("All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

5 *See* Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 66 (2018) ("Collective representation in the legislature serves the beneficial purpose of providing a 'constitutional averaging process' that weighs and balances various interests in order to produce legislation. This process was designed to legislate for the general good by mediating the interests of factions, thwarting oppressive majorities, and controlling powerful minorities." (quoting H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 938, 1036 (1975))).

6 *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 338–43 (2002) (describing broad parameters of distinctions between legislating and exercising executive power).

7 *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 44–50 (2012) (discussing legislation in the areas of Revolutionary War-era pension payments, creation of the mint and national bank, and executive-focused areas like regulation of patents and licenses for trading with Native American tribes); *id.* at 5 (contending that "Congress delegated broad authority to administrators" starting from "the earliest days of the Republic"); *cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (contending that "a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power" because executive "agents acting within the terms of such a statutory grant are exercising executive power, not legislative power"). *But see* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 83–110 (2014) (disputing these characterizations and distinguishing between (i) permissible executive discretion in matters like licensing and interpreting regulations that govern executive officers versus (ii) legislative issuance of binding rules for the public); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 74–79 (2017) (countering that none of the apparently broad early statutory provisions involved delegations of legislative authority to create new binding rules on the public).

8 *See, e.g.*, Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing HAMBURGER, *supra* note 7) (contending that Hamburger's "dark vision" is that "American administrative law is 'unlawful' root and branch").

The truth probably lies somewhere in between.[9] And the appropriate breadth of discretion allocated to administrative agencies likely turns on whether Congress is authorizing agency action to engage in executive functions like distributing benefits or imposing new policy requirements that bind the public.[10] Under modern doctrine, statutes enacted by Congress give agencies sufficiently detailed guidance so long as those statutes contain an "intelligible principle" to guide an agency's actions to implement the law.[11] In contrast, the original dividing line between legislative and executive power embodied in constitutional separation of powers more likely required Congress to generate the rules and policies imposing new limitations and obligations on private actors.[12]

To be sure, Congress has been legislating broadly worded provisions since 1789.[13] For example, when the First Congress authorized a superintendent to negotiate trading terms with Native American tribes—power then seen as foreign affairs-related[14]—Congress empowered the presidentially appointed officer to issue licenses to "any proper person" subject to an approved bond arrangement and "such rules and regulations as the President shall prescribe."[15]

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9 *See* HAMBURGER, *supra* note 7, at 4 ("What exactly were the binding acts that the executive traditionally could not adopt? The secretary of the treasury, for example, could authorize the distribution of government largess, and could make regulations that instructed treasury officers, but he could not promulgate regulations altering tax rates. Although the Post Office could refuse a request to mail a letter, it could not issue regulations requiring subjects to avoid private carriers; and although the Interior Department could deny access to confidential government information, it could not issue an order compelling a business to supply information.").

10 *Id.*

11 Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

12 *See* POSTELL, *supra* note 7, at 74–75 (discussing the distinct character of executive and legislative power and its relevance to assessing the legitimacy of congressional authorization of executive branch power); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1227 (1985) ("The test of permissible delegation should look not to what quantity of power a statute confers but to what kind—statutes should be permitted to create an occasion for the exercise of executive or judicial power, but not to delegate legislative power.").

13 *See* MASHAW, *supra* note 7, at 5, 44–48.

14 *See* Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38 (addressing "trade and intercourse" with Native American tribes); Act of Aug. 20, 1789, ch. 10, § 1, 1 Stat. 54, 54 (referring to "negotiating and treating with the Indian tribes"); HAMBURGER, *supra* note 7, at 104–05 (describing the licensing scheme involving trade with Native American tribes as "govern[ing] traders who often were not clearly subject to the law of the United States").

15 Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137; *see also* POSTELL, *supra* note 7, at 74–75 (identifying this example of a broadly worded provision and detailing the distinctions between executive discretion and legislative policymaking).

But when Congress stepped away from foreign affairs negotiations and other more executive functions like administration of debt repayment,[16] and into areas related to new obligations on private citizens,[17] Congress often legislated with rigorous specificity. For example, when regulating access to governmental records, Congress specified that the Secretary of State must publish every enacted law in at least three public U.S. newspapers, deliver printed copies to every senator and representative, send "two printed copies duly authenticated" to every state executive, and "carefully preserve" and record the originals "in books to be provided for the purpose."[18] The public could pay the Secretary 10 cents per 100-word sheet to acquire copies of these records; an "officer of the United States," requesting records related to his duties, could get them for free.[19]

On other occasions, when Congress chose not to enact new policies from scratch, it enacted legislation that incorporated preexisting bodies of law—still declining to authorize new administrative entities to broadly regulate private behavior. For example, in the Act regulating interactions with Native American tribes, Congress provided that U.S. residents who committed crimes against "peaceable and friendly Indian[s]" in Native American territory would be subject to the criminal laws, punishments, and procedures of the state or district in which they lived.[20] Despite enacting statutory authority for the President and Superintendent to regulate trade, Congress did not authorize them to criminalize behavior or to generally regulate matters like trespass on Native American-owned land.

To further explore the distribution of legislative and executive power in the First Congress, this Article will take a close look at early customs laws. These laws were of paramount importance to the First

16 *See, e.g.*, Act of Aug. 4, 1790, ch. 34, 1 Stat. 138.

17 *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring) ("[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct."); HAMBURGER, *supra* note 7, at 84 ("In general, the natural dividing line between legislative and nonlegislative power was between rules that bound subjects and those that did not. Legal obligation seemed by nature to require consent. It therefore was assumed that the enactment of legally binding rules could come only from a representative legislature and that the resulting rules could bind only subjects, not other peoples."); POSTELL, *supra* note 7, at 74–75 (describing Gary Lawson and Philip Hamburger's delineations between executive and legislative power and positing that, if they are correct, "[o]nly those regulations that are legislative in nature—creating and establishing binding rules of conduct—are examples of delegations of legislative power").

18 Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68, 68.

19 Act of Sept. 15, 1789, ch. 14, § 6, 1 Stat. 68, 69.

20 Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138.

Congress as it faced the pressing problem of raising enough revenue to repay wartime debts.[21] Consequently, the initial law providing for customs duties on imported goods was just the second measure enacted by Congress[22]—second only to the law governing administration of the constitutional oath of office to government officials.[23] The early customs laws addressed four separate areas: the rates of customs duties on various goods,[24] tonnage-based fees on ships entering port,[25] ship registration requirements,[26] and the mechanics of collection of impost and tonnage fees.[27] The initial versions of these statutes are rich and detailed,[28] as is some of the legislation amending them[29] after the federal apparatus began to take shape with the creation of the Treasury Department[30] and other executive departments.[31]

Examination of these statutes offers a glimpse into the legislative mindset of the First Congress. The statutes represent a relatively significant proportion of the First Congress's legislative business. Six of the 26 statutes enacted in that first session of the First Congress involved customs operations,[32] and 37 of the 96 days of recorded legislative business in the session involved debate on customs laws.[33]

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21 *See infra* note 142 and accompanying text.

22 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

23 *See* Act of June 1, 1789, ch. 1, 1 Stat. 23.

24 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

25 *See* Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1790).

26 *See* Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

27 *See* Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790).

28 *Compare infra* Section II.A (describing the detailed nature of early customs laws), *with* 47 U.S.C. § 201(b) (2012) (authorizing the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter").

29 *See, e.g.*, Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799).

30 *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

31 *See* Act of Sept. 15, 1789, ch. 14, § 1, 1 Stat. 68, 68 (renaming the "Department of Foreign Affairs" the "Department of State"); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (establishing the "Department of War"); Act of July 27, 1789, ch. 4, 1 Stat. 28, 28 (amended 1789) (establishing the "Department of Foreign Affairs"); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 510–11 (2018) (describing the basic structure of the major executive departments created by the First Congress).

32 *See* List of the Public Acts of Congress, Acts of the First Congress of the United States, 1 Stat. xvii–xviii (listing acts regulating "Duties on Merchandise imported into the United States," "Duties on Tonnage," "Regulation of the Collection of Duties on Tonnage and on Merchandise," the "Registering and clearing of Vessels," partial suspension of the "Act for the Collection of Duties on Tonnage," and the amendment of an "Act for the Registering and Clearing [of] Vessels").

33 *See* DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA (4 Mar. 1789–3 Mar. 1791), *reprinted in* 10 DEBATES IN THE HOUSE OF REPRESENTATIVES lxi, lxi–lxiv (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DE-

Congressional debates about the crafting of these statutes, and Treasury Secretary Alexander Hamilton's later implementation of them, demonstrate that the nondelegation doctrine inheres in both federalism and the overall constitutional structure of separated powers—beyond the technical contours of the Article I vesting authority typically identified as the source of the limitation. When Congress engages in the rough and tumble of statutory drafting and legislative compromise, citizens from geographic regions, congressional districts, and states throughout the country receive electoral representation in a way that centralized administrative agencies simply cannot replicate. And the legislative rulemaking process faces the limits of the stringent Article I, Section 7 lawmaking procedures designed to work in tandem with Article I's limited enumeration of powers[34] to ensure that federal policymaking efforts do not subsume the authority of the states.[35]

As an initial matter, the early customs laws were highly detailed.[36] Congress felt it was so critical to quickly raise revenue that it enacted laws imposing customs duties prior to establishing the Treasury Department and other executive agencies.[37] But even after the Treasury Department had been established, with the strong, and some might say, domineering leadership[38] of Secretary Alexander Hamilton,[39]

BATES] (listing subjects including the "Revenue system," the "Impost Act," the "Collection Bill," and the "Tonnage Act," on 37 of the 96 days of legislative business in the first session of the first Congress). This series contains a set of 20 volumes published between 1972 and 2012, now considered the most comprehensive record of the first congressional debates.

34 U.S. CONST. art. I, § 1 (vesting Congress with only those legislative powers "herein granted" in Article I).

35 *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–27 (2001) (describing how limits on federal power "safeguard federalism by permitting designated agents of the federal government to adopt federal law only if they employ procedures that 'impose burdens . . . that often seem clumsy, inefficient, even unworkable'" (citation omitted)).

36 *See* POSTELL, *supra* note 7, at 75 (quoting Professor Louis Jaffe as observing that "Congress for many years wrote every detail of the tariff laws").

37 *Compare* Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1790) (imposing tonnage duties), *and* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790) (imposing duties on goods and merchandise), *with* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (establishing the Treasury Department), *and* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 (establishing the Department of War), *and* Act of July 27, 1789, ch. 4, 1 Stat. 28 (amended 1789) (establishing the Department of Foreign Affairs).

38 *See* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 58 (1948) (recounting observations made at the time that Secretary Hamilton "dominated" House legislative procedure by preparing matters, helping to influence the makeup of membership on congressional committees, and attending committee hearings); *id.* at 70–74 (describing congressional efforts to ensure that executive recommendations were not given too much weight in congressional decisionmaking in part to make sure that the laws themselves were being "framed by the Legislature").

39 *See infra* text accompanying notes 106–07.

Congress continued to engage in detailed legislating.[40] Congress turned to the Treasury Department for Secretary Hamilton's expertise on developing a strong economy and paying down Revolutionary War debt.[41] Rather than employing that expertise through policy delegations to the Treasury Department, Congress solicited reports and recommendations from Secretary Hamilton to rely on in its legislation, at times adopting wholesale legislative proposals proffered by the Secretary.[42] Congress believed input and expertise from Secretary Hamilton was crucial. But statements by both Secretary Hamilton and Congress suggest they thought it was important for Congress as the legislative body to take legislative action to impose such proposals, not the Treasury Department.[43] Certain statements and actions from this era further suggest an understanding that not only was Congress the preferable body to take action, but that regulation by legislation was constitutionally required.[44]

To peel back the curtain on legislating by this first body, closest in time to the Constitution's ratification, this Article examines interactions between executive and legislative actors as told through the first congressional debates on the Impost, Tonnage, Registration, and Collection of Duties acts. In addition to revealing Congress's central role early on, this story shows the relevance of state and regional interests to the legislative agreements struck on customs laws. The rich depth of these varied interests suggests that nondelegation limitations might not be inherent in the Article I Vesting Clause alone, but may be innate to the structural design of the federal government itself. The Constitution carefully constructed the federal government to provide significant protection for state interests, through each state's equal representation in the makeup of the Senate, and for geographically diverse individual interests via direct election of House representatives from every region and district in the country.

Beyond the textual limitation of exclusive vesting of "legislative power[]" in Congress,[45] structural separation-of-powers principles help ensure that the representative interests of people electing legislators from throughout the country are represented in policy proposals in a way that would not be possible via regulatory decisions made by a

40 *See infra* text accompanying notes 70–71.

41 *See infra* text accompanying notes 426–31.

42 *See infra* text accompanying notes 408–24.

43 *See id.*; *infra* text accompanying notes 435–43.

44 *See infra* text accompanying notes 444–80.

45 U.S. CONST. art. I, § 1.

singular, centralized administrative entity.[46] The acts of such administrative entities are accountable, if at all, back to just one centralized elected official, not to elected decisionmakers from throughout the nation.[47] Consequently, enforcement of relatively strict nondelegation principles may be critical to preserving the structural constitutional principle that the federal government is to reflect the interests of both individual members of the electorate as well as the interests of the states.

Part I of this Article briefly describes modern delegation doctrine and the constitutional groundings for suggesting that a more restrained approach is required. Part II describes the detailed early customs laws and the debates over their enactment, showing how congressional representatives' motivated electoral representation of constituents from diverse geographic regions and districts guided their crafting of legislative compromises. Finally, Part III describes aspects of the Treasury Department's implementation of customs laws that revealed the preeminence of legislators in policy settings as well as several non-customs-related legislative debates that showed a similar commitment to legislative nondelegation.

I. Modern Delegation Doctrine and Constitutional Foundations

The early practice of customs legislation is substantially distinct from modern practice. In the 20th and 21st centuries, the Supreme Court has concluded that laws containing any kind of "intelligible principle" are constitutionally sound.[48] Congress has enacted statutes authorizing action "based on the 'public interest, convenience, or necessity'" and granting administrative authority to establish "fair and equitable" prices.[49] And the Supreme Court has found these provisions lawful, concluding only twice, more than 80 years ago in 1935, that a statutory provision violated delegation constraints.[50] Even a jurist who is generally skeptical of administrative power described the

46 *Cf.* Lawson, *supra* note 6, at 332 ("The delegation phenomenon raises fundamental questions about democracy, accountability, and the enterprise of American governance.").

47 *See id.* (describing the nondelegation doctrine as a "substantial portion of the foundation of American representative government").

48 *See id.* at 328–29.

49 *See id.* at 328 (citations omitted).

50 *See id.* at 370–71 (explaining that the Court invalidated provisions of the *National Industrial Recovery Act in Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935)).

1935 decisions as long since discarded "relics of an overly activist anti–New Deal Supreme Court."[51]

That said, state and lower federal courts have more frequently identified delegation concerns, with one study suggesting that "seventeen percent of all nondelegation cases between 1789 and 1940 resulted in the invalidation of a state or federal statute."[52] And the Supreme Court's cases from the 19th century suggest the Court at that time understood there to be limits on the type of power permissibly delegated by Congress.[53]

Further, political scientist Joseph Postell suggests that the 17% invalidation rate may be deceptively low as it cannot possibly reflect how many state and federal statutes evaded challenges altogether by containing substantial legislative detail.[54] If delegation constraints represented an accepted norm at the time, there might have been few broad legislative delegations to find unlawful. In his historical description of congressional and administrative practice in *Bureaucracy in America*, Postell describes numerous early American legislative debates that reflected the importance of nondelegation constraints in the formulation of early statutory provisions.[55] Moreover, Postell suggests that the practice of legislating in a way that confined administrative delegation was a practice that continued for many years.[56] Some might contend that the early Congresses legislated with specificity because national problems were less vast at the time and such small bore legislating is no longer possible in light of complexities of the modern economy. But the First Congress faced problems that were pressing and far-reaching. The fledgling nation had to pay down crushing war-

51 *In re* Aiken County, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see* PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (describing independent agencies as "a headless fourth branch of the U.S. Government").

52 Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 619–22 (2017) (concluding that the doctrine "has thrived at the state level" even though it "has disappeared at the federal level"); *see also* Mascott, *supra* note 2, at 24; Joseph Postell & Paul D. Moreno, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41, 41–42 (2018).

53 *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892) (disputing the characterization of an 1890 trade measure as vesting legislative power in the President and explaining "[t]hat congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution"); Schoenbrod, *supra* note 12, at 1227–28 (discussing how the court in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), had embraced the distinction of limiting statutory grants of discretionary authority to exercises of executive, and not legislative, power).

54 *See* Postell & Moreno, *supra* note 52, at 43.

55 *See* POSTELL, *supra* note 7, at 78–79.

56 *See id.*

time debt and more effectively unify the states. Despite the urgent need for raising revenue, Congress nonetheless struck the hard policy compromises itself, legislating trade policy and enacting detailed revenue-raising measures on its own, before venturing to create even a single administrative agency.

The text and debate surrounding the early customs laws reveal them to be a key example of Congress legislating with specificity in the early years under the new Constitution. Further, congressional representatives' focus on the disparate interests of constituents from various states and regions during legislative debate on the customs laws reveals that nondelegation principles may have grounding beyond that of the Article I legislative Vesting Clause. The idea that Congress should not delegate legislative power to another branch does not just formalistically derive from Article I's one-sentence authorization for Congress,[57] and it alone, to legislate. Rather, legislative nondelegation constraints reflect the nature of the constitutional system and its federal representative nature. The structure of the House of Representatives provides for direct electoral representation of individuals from varied geographical regions and districts.[58] And the Senate's makeup of two elected officials from each state irrespective of size helps ensure that small states receive Senate representation equal to that of large states.[59] This equalization of state interests in the Senate was motivated by the understanding that some states might have very different interests from others and these distinct interests are all worthy of representation.[60] Similarly, geographically diverse citizens have their interests represented in the House through the election of House members, district-by-district and state-by-state, who bring their competing, geographically diverse views to bear in the crafting of legislative compromise.

Restricting legislative policy determinations to congressional actors preserves these means for reflecting each state, region, and district's varied interests in a way that administrative or executive branch policy determinations never can. Executive branch officials act at the behest of one central executive, not of the states.[61] And the independent structure of many modern administrative agencies keeps many of

57 *See* U.S. CONST. art. I, § 1.

58 *See* U.S. CONST. art. I, § 2.

59 *See* U.S. CONST. art. I, § 3; *infra* notes 132–37 and accompanying text.

60 *See* Clark, *supra* note 35, at 1357–67.

61 *See infra* notes 308–12 and accompanying text (noting the inability of contemporary administrative agency policymaking procedures to collectively reflect the electoral will of each congressional district).

those entities from even directly reflecting the electoral will of the people via close supervision by the chief executive.[62] Therefore, delegation of policy determinations to administrative actors bypasses the role of key state and regional interests in the formulation of legislative compromises made with the interests of the local citizenry in mind.

II. The Customs Laws and Legislative Debates

This Part of the paper examines the exquisitely detailed customs-related statutes of the First Federal Congress to evaluate what, if any, lessons they may provide about the early Congress's view of the necessary rigor of legislative provisions. The revenue-raising measures were critical to the operation of the still-fledgling new nation as the federal and state governments had accrued millions of dollars in wartime debt.[63]

Three of the first five pieces of legislation enacted by the new Congress involved revenue collection related to the importation of goods and merchandise.[64] The Customs Bill, Tonnage Act, and the Act Regulating the Collection of Duties were the only statutes on the books by the end of July 1789, along with the act creating the Foreign Affairs Department and the statute regulating constitutional oaths.[65] A statute to regulate registration of ships entering U.S. harbors to unload goods was enacted soon thereafter, on September 1, 1789.[66] This registration act was the 11th measure signed into law.[67] The bill to establish the Treasury Department followed immediately, being signed into law the very next day.[68]

Collectively the customs laws were highly specific and complex, with Congress hammering out vigorously debated legislative compromises on customs rates and defining the boundaries of customs districts in intricate detail. Because the initial customs, tonnage, collection, and registration acts were all enacted prior to the existence

62 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495–98 (2010) (explaining the diminished electoral accountability that results when executive officials are increasingly insulated from presidential removal authority).

63 *See infra* note 307 and accompanying text.

64 *See* List of the Public Acts of Congress, *supra* note 32, at xvii (listing the act regulating the oath of office, an act imposing duties on goods and merchandise, "[a]n act imposing duties on tonnage," the act creating the Department of Foreign Affairs (soon renamed the Department of State), and "[a]n act to regulate the collection of [] duties" as the First Congress's first five legislative acts, enacted between June 1 and July 31, 1789).

65 *See id.*

66 *See* Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

67 *See* List of the Public Acts of Congress, *supra* note 32, at xvii.

68 *See id.*

of the Treasury Department, Congress was the governmental body reaching the decisions on the intricacies of customs policy. But it is telling that Congress prioritized crafting a detailed customs collection framework before taking the time to set up a Treasury Department, choosing to figure out the initial customs rules itself rather than first establishing a federal financial officer to provide expertise.

Even after Treasury Secretary Hamilton and his department had been installed, Congress continued to make tough, detailed customs decisions. After Secretary Hamilton's confirmation on September 11, 1789,[69] the First Congress passed 11 additional statutes relating to the imposition of customs duties and their collection,[70] one of which was sufficiently detailed that it spanned 20 pages in the statutes-at-large.[71] Once Treasury Secretary Hamilton was in office, Congress turned to him for his expertise, soliciting detailed reports and legislative recommendations on customs, financing, and other policies.[72] Nonetheless, Congress ultimately took the required policymaking action, enacting whichever proposals it concluded were appropriate.[73] And, despite how detailed the text of the customs laws already were in many respects, when Hamilton repeatedly happened upon questions of statutory construction or contradiction in the course of his department's execution of the laws, Hamilton raised the problem with Congress and asked it to provide a resolution.[74]

Secretary Hamilton was notoriously eager to influence financial policy in any way possible,[75] so it is revealing that even his approach was to turn to Congress as the ultimate and authoritative decisionmaker on new policy measures. If the late 18th-century Congress and executive branch had believed it was permissible to delegate away decisions on matters like customs duties and the location of customs districts, a robust Treasury Department and engaged Treasury Secretary were in place to make such determinations. Nonetheless, Con-

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69 *See* S. JOURNAL, 1st Cong., 1st Sess. 25 (1789).

70 *See* Act of Mar. 3, 1791, ch. 26, 1 Stat. 219; Act of Mar. 2, 1791, ch. 13, 1 Stat. 198; Act of Jan. 7, 1791, ch. 2, 1 Stat. 188; Act of Dec. 27, 1790, ch. 1, 1 Stat. 188; Act of Aug. 10, 1790, ch. 39, 1 Stat. 180; Act of July 20, 1790, ch. 30, 1 Stat. 135; Act of May 26, 1790, ch. 12, 1 Stat. 122; Act of Apr. 15, 1790, ch. 8, 1 Stat. 112 (repealed 1790); Act of Sept. 29, 1789, ch. 22, 1 Stat. 94 (repealed 1793); Act of Sept. 16, 1789, ch. 15, 1 Stat. 69; Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799).

71 *See* Act. of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799) (updating the Collection Act).

72 *See* WHITE, *supra* note 38, at 74.

73 *See id.* at 70–74.

74 *See infra* note 432–38 and accompanying text.

75 *See supra* note 38 and accompanying text.

gress slogged through the process of hammering out legislative compromises on intricate details like the appropriate duties on specific categories of goods and the precise boundary lines for each customs district.

A. Arc of Development of the Customs Laws

On July 4, 1789, Congress passed the first of its four initial major customs laws in a measure that imposed duties on imported goods.[76] Congress hoped this bill would serve the twin purposes of protecting domestic manufacturers by favoring their goods over foreign products while also raising significant revenue.[77] In what has become known as the Tariff Act of 1789,[78] Congress imposed a detailed scheme of duties on "goods, wares, and merchandises imported into the United States."[79] Even though this legislation ended up lasting only one year—it was replaced by a new set of duties enacted on August 7, 1790[80]—Congress nonetheless legislated with specificity and care. For instance, the legislation included finely grained distinctions in its treatments of various categories of products. The duty on "distilled spirits of Jamaica proof" was 10 cents per gallon, but other distilled spirits received an eight-cent-per-gallon duty.[81] Brown sugars were subject to a one-cent-per-pound duty and loaf sugars to three cents per pound, but "all other sugars" were under a 1.5-cent-per-pound rate.[82] Candles of tallow were subject to a different duty rate than candles made of wax.[83] And the list goes on.[84]

The Act also specified numerous additional details such as that teas imported from China or India in ships owned by U.S. citizens would be subject to one set of duties—subdivided into four different categories of tea subject to four distinct customs rates.[85] Those same four categories of teas would then be subject to entirely different duties if they had instead originated in Europe.[86] Teas arriving on ships

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76 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790); *supra* notes 24–27 and accompanying text.

77 *See infra* notes 151–52 and accompanying text.

78 Ben Baumgartner, *Chewing it Over: Determining the Meaning of* Edible *in the Harmonized Tariff Schedule of the United States*, 64 U. KAN. L. REV. 293, 295 & n.26 (2015).

79 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

80 *See* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799).

81 Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25 (repealed 1790).

82 *Id.*

83 *See id.*

84 *See id.*

85 *See id.*

86 *See id.* at 25–26.

owned by non-citizens were subject to yet a third distinct set of tariffs.[87] Then, in contrast, certain goods were subject to one flat impost duty regardless of their provenance. For example, Congress imposed a 10% *ad valorem* duty on goods such as "all looking-glasses, window and other glass (except black quart bottles)," on "all paints ground in oil," and on "shoe and knee buckles."[88] In contrast, a 7.5% *ad valorem* duty was imposed on certain other categories of goods such as "all writing, printing or wrapping paper, paper-hangings and pasteboard."[89] Congress was very precise. These detailed specifications were just several of the many intricate customs provisions imposed by this early law.

Congressional debate within the House of Representatives on this and related measures may provide clues as to why Congress not only wanted to immediately enact legislation to generate federal revenue but also why Congress legislated with fine-tuned precision right from the start, rather than legislating in generalities. Some representatives had proposed the initial imposition of one flat *ad valorem* rate on all imported articles.[90] But some members of Congress objected, contending that Congress should tailor the amount of duties to favor certain categories of goods that were domestically manufactured.[91] In addition, one member went further and contended that congressional specification of itemized rates was critical to make sure that there were fewer determinations "left to the discretion of the officers employed in the business."[92] He thought that specific enumeration of articles subject to a per-pound or per-volume charge would leave less room for corruption by customs officers than just charging a duty based on an item's purported value.[93]

One even more fundamental concern undergirding customs-related deliberations was trying to assess the impact that customs policies would have on the distinct kinds of goods produced by different states. In addition to imposing duties on the goods themselves, Congress also imposed duties based on the tonnage of ships and vessels entering the United States.[94] When deliberating over this policy, members of the House addressed the particularized concerns that repre-

87 *See id.* at 26.

88 *Id.*

89 *Id.*

90 *See* 10 DEBATES, *supra* note 33, at 24.

91 *See id.*

92 *Id.*

93 *See id.*

94 *See, e.g.*, Act of July 20, 1789, ch. 3, 1 Stat. 27 (repealed 1790).

sentatives from various states might maintain about tonnage charges. In determining what position to take on tonnage-related legislation, representatives from South Carolina and Virginia would have to "determine, whether their valuable and important staples, whether even their rice and tobacco, which have no rival in the European markets, will or possibly can bear such an excessive burthen[.]"[95] In contrast, representatives from "the middle states" might determine that their own domestic agricultural industry was sufficiently flourishing that their residents would not be too drastically burdened by a heavy duty on ships.[96] In contrast, representatives from any state whose residents relied on their articles being sold overseas might find that tonnage duties "will produce the most mischievous consequences."[97]

One additional category of painstakingly detailed customs-related laws from the First Congress was the legislation establishing various customs districts. The Massachusetts-related component of the first collections act creating customs districts is illustrative.[98] Congress created 20 districts and ports of entry within Massachusetts. It specified which towns were to constitute one port. The legislation also annexed groups of towns to various districts and specified that certain towns or landing places were to be just ports of delivery rather than ports of entry.[99] The legislation also specified precisely which of the three types of customs officers were to reside within the various towns and customs districts. Not every district was to have all three kinds of customs officers—collectors, surveyors, and naval officers.[100] The Act explicitly specified which of the three kinds of officers were to work within each district, how many of each type of officer the district would contain, and where in the district (*i.e.*, within which town) each officer was to reside.[101] The fourth major customs-related measure established rules for how domestic ships were to be registered as Ameri-

95 10 DEBATES, *supra* note 33, at 415–16.

96 *Id.*

97 *Id.*

98 *See* Act of July 31, 1789, ch. 5, 1 Stat. 29, 30 (repealed 1790).

99 *See id.* §§ 1–2, 1 Stat. at 30–31.

100 *See id.* § 1, 1 Stat. at 29–35.

101 *See, e.g.*, *id.* § 1, 1 Stat. at 30 (This passage is representative of the provisions within this statute, which established ports and districts for each of the then–existing 11 states: "To the district of Newburyport shall be annexed the several towns or landing places of Almsbury, Salisbury, and Haverhill, which shall be ports of delivery only; and a collector, naval officer and surveyor for the district, shall be appointed, to reside at Newburyport. To the district of Gloucester shall be annexed the town of Manchester, as a port of delivery only; and a collector and surveyor shall be appointed, to reside at Gloucester.").

can-owned and built, so they could qualify for the reduced tonnage rates imposed on American ships.[102]

Soon after these customs laws were on the books, Congress established the Treasury Department on September 2, 1789.[103] In contrast to the other two executive departments created by the First Congress, which were staffed by only a Secretary and a set of clerks,[104] the Treasury Department contained multiple high-level officials such as a comptroller, auditor, treasurer, and register.[105] In his detailed historical study of the Federalist era of administration, scholar Leonard White detailed how Treasury Secretary Alexander Hamilton worked to solidify his influence in Congress, lobbying for an organic statute that ultimately put him at the top of a department with significant reach.[106] Secretary Hamilton acquired influence by positioning himself to provide direct reports to Congress and to offer proposals for legislative policies that he thought would provide for the best management of federal monetary resources.[107] Still, even with Secretary Hamilton's attempt to acquire a heavy hand in influencing congressional policies, the legislation governing his department did not give him lawmaking or policymaking authority. Congress assigned the Treasury Secretary duties such as "prepar[ing] plans for the improvement and management of the revenue," preparing and reporting estimates of public revenue and expenditures, executing services related to the sale of federal lands, and superintending revenue collection—not enacting new policies to bind private rights.[108]

Even after the establishment of the Treasury Department, Congress continued to legislatively impose customs duties in great detail. By 1790, Congress had determined that customs duties had to be increased to help discharge more of the federal government's debts.[109] To do so, Congress once again specified very particularized rates of duties on many different categories and subcategories of goods.[110] This time, Congress provided even more specificity, including the manner

102 *See generally* Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

103 *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

104 *See* Mascott, *supra* note 2, at 510–15 (describing the personnel structure within the Department of War and the Department of State in contrast to the personnel structure within the Treasury Department).

105 *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

106 *See* WHITE, *supra* note 38, at 58, 70–74.

107 *See supra* note 38 and accompanying text.

108 Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65–66.

109 *See generally* Act of Aug. 10, 1790, ch. 39, 2 Stat. 180 (amending some of the customs rates).

110 *See id.* § 1, 2 Stat. at 180.

in which such goods should be measured for the purpose of calculating customs charges. The duties on alcoholic beverages are a representative example of the level of specificity of the 1790 statute. Congress established one customs rate for Madeira wine "of the quality of London particular," a separate rate for Sherry wine, and a third rate for "other wines, per gallon."[111] Distilled spirits were divided into seven different categories subject to distinct duties based on their percentage proof as measured by an instrument called "Dycas's hydrometer."[112] Beer, ale, and porter were subject to an entirely distinct set of duties.[113]

B. The Earliest Customs Laws Debates

The House of Representatives engaged in extensive and telling debate leading to the formation of the first customs laws as reported in the *Documentary History of the First Federal Congress*.[114] The Constitution instated a heightened role for the influence of representative elections in development of revenue policy by requiring revenue-raising legislation to originate in the House.[115] At the time the House of Representatives was the only directly elected federal entity, as senators were appointed by state legislatures[116] and the President, then as now, was selected by the electoral college.[117]

The House of Representatives acquired a quorum on April 1, 1789 to begin legislative business.[118] The first record of substantive House debate is from one week later, on April 8, when members began to deliberate over the state of the nation's finances and Representative James Madison of Virginia raised the need for effective collection of revenue.[119] He suggested "a general system of impost on articles of importation."[120]

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111 *Id.*

112 *Id.*

113 *See id.*

114 *See* 1–20 DEBATES, *supra* note 33; *see also* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1026 & n.29 (2006) (discussing some of the relatively new insight available from this set of volumes).

115 *See* U.S. CONST. art. I, § 7, cl. 1.

116 *See id.* art. I, § 3, cl. 1. This requirement was later overturned by the 17th Amendment, requiring the popular election of Senators. *See id.* amend. XVII.

117 *See id.* art. II, § 1.

118 *See* 1 ANNALS OF CONG. 96 (1789) (Joseph Gales ed., 1834).

119 *See* 10 DEBATES, *supra* note 33, at 1.

120 *Id.*

The original Constitution, prior to ratification of the 16th Amendment,[121] had forbidden the imposition of direct taxes "unless in Proportion to the Census or Enumeration herein before directed to be taken."[122] So the members fairly quickly coalesced around the imposition of duties and imposts to pay off the nation's debts.[123]

The rates of customs duties had to be "uniform throughout the United States"[124]—Congress could not charge a five-cent duty on barrels of molasses entering Massachusetts and eight cents on barrels arriving in Virginia. And no preference could be "given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[125] But there was no constitutional requirement that residents from each state fork over to the federal government the same amount of revenue from duties on each item, or revenue from each item that matched the state's proportion of the national population. It was fine, in other words, for the total revenue from molasses duties to be $20,000 from Massachusetts imports but only $15,000 from Maryland, regardless of the size of each state's population.

That said, the Constitution's attention to the need for fairness and uniformity in national revenue policies revealed the finely wrought balance between national and state interests finally struck in the formulation of the Constitution. On one hand, national standards of fairness would be administered and respected through the various principles of uniformity imposed via the described revenue-related provisions. Further, states could not disrupt interstate or national harmony by imposing any duty on imports or exports without congressional consent, "except what may be absolutely necessary for executing [the state's] inspection laws."[126] And states could not "lay

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121 U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census of enumeration.").

122 *Id.* art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in the Proportion to the Census of Enumeration herein before directed to be taken.").

123 *See generally* 10 DEBATES, *supra* note 33, at 1–6 (discussing, on April 8, the mechanics of customs duties and the appropriate rate to impose on each item but not challenging the general presumption that customs duties would be the initial means for raising national revenue).

124 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

125 *Id.* art. I, § 9, cl. 6.

126 *Id.* art. I, § 10, cl. 2 ("No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or

any duty of tonnage" without congressional consent[127] or obligate any "vessels bound to, or from, one State," to "enter, clear, or pay duties in another."[128] At the same time, each individual state's interests were observed via constitutional prohibitions on revenue-related discrimination against particular states. For example, the Constitution barred commerce and revenue regulations that favored "the ports of one State"[129] and the imposition of taxes or duties on "articles exported from any State."[130] The Constitution also applied to the federal government, as well as to the states, the limitation that "vessels bound to, or from, one State" shall not "be obliged to enter, clear, or pay duties in another."[131]

This reflection of state interests, moreover, is inherent in the foundation of the constitutional framework through the structure of the Senate. At the founding, the role of state interests in legislation was apparent through state legislatures' selection of their U.S. senators.[132] Even after the 17th Amendment altered this arrangement by providing for popular election of senators in 1913,[133] statewide constituencies continued to maintain legislative influence through the Senate's continued constitution of two senators per state irrespective of population.[134] Small states have just as much voting influence in the U.S. Senate as states with the largest populations, ensuring that this legislative chamber reflects views beyond the interests of just a national popular majority.[135] The importance of the Senate's reflection

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exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.").

127 *Id.* art. I, § 10, cl. 3 ("No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.").

128 *Id.* art. I, § 9, cl. 6.

129 *Id.*

130 *Id.* art. I, § 9, cl. 5.

131 *Id.* art. I, § 9, cl. 6.

132 *See id.* art. I, § 3; *infra* note 135 and accompanying text; *see also* U.S. CONST. amend. XVII, cl. 1; *id.* art. V.

133 *Id.* amend. XVII, cl. 1.

134 *Compare id.* amend. XVII, cl. 1, *with id.* art. I, § 3, cl. 1.

135 The states that benefited most from this arrangement at the time were Rhode Island and Delaware, each of which had sufficiently large populations to acquire only one House representative. *See* MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESSES 1–2 (1998). Georgia and New Hampshire also were better off with the Senate's equal-state-representation approach, as those two states merited only three House members out of the total 63 representatives that served in the 1789 House. *See id.* New Jersey, too, received a slight windfall, having a large enough population to win only four of the 63 House seats. *See id.* at 1. The biggest losing

of state interests to the federal constitutional order is underscored by the fact that one of only three subject-matter limits on constitutional amendments is the restriction that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[136] And this limitation is the only one that remains in perpetuity; the other two subject-matter restrictions expired in 1808, 20 years after the Constitution's ratification.[137]

The importance of state and regional interests[138] to the development of policymaking was also evident at a number of points throughout the early legislative debates within the House of Representatives.[139] For example, during the second day of debate on the initial Tariff Act of 1789, Representative Thomas Tudor Tucker of South Carolina expressed concern that he was the only member present for the debate from any of the states south of Virginia.[140] There was a concern among the members about proceeding to consideration of the important customs business without anyone present in the House to represent the interests of the people from certain states.[141]

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state based on equal state representation in the Senate in 1789 was Virginia, which had the largest number of House representatives at 10. *See id.* at 2. The next closest behind were Pennsylvania and Massachusetts, each of which had large enough populations to merit eight representatives. *Id.* at 1–2.

136 *See* U.S. CONST. art. V.

137 *See id.* art. V.

138 In several states at the time, the House representation of the electorate would have been more statewide rather than districtwide. Six of the 13 states' congressional delegations represented their members "at large" rather than according to geographically based, subdivided districts within the state. In these states, constituents voted for their House members on a general statewide ticket. In two of these at-large states—Rhode Island and Delaware—the statewide and district-based approach would have resulted in the same electoral outcome in any event because the states had only one House representative.

139 There are some records of Senate business within the First Congress that also shed light on early customs laws. But the early records of Senate debates are relatively sparse. Even the comprehensive 20-volume *Documentary History of the First Federal Congress* contains only one volume on the Senate legislative journal, which primarily consists of procedural notes about the dates on which bills were passed by the Senate, returned to the House, and signed by the President, or a list of Senate-proposed amendments to various bills and the House's response to them. *See* 10 DEBATES, *supra* note 33, at 1, 9. Therefore, this Article focuses primarily on the House legislative records, which include many detailed excerpts on the House's debates. *See id.* at 10–14. These debates are also richly relevant to customs legislation particularly because the House is the constitutional originator of such legislation. *See* U.S. CONST. art. I, § 7, cl. 1.

140 *See* 10 DEBATES, *supra* note 33, at 11–12.

141 *See, e.g.*, *id.* and accompanying text; *id.* at 209 (Rep. Hartley of Pennsylvania suggesting that debate should be put on hold when the Massachusetts House delegation was absent during House deliberations on an important subject impacting their state); *id.* at 223 (Rep. Laurance of New York indicating that he also thought it made little sense to decide important questions related to Massachusetts in the delegation's absence); *cf. id.* at 16 (Rep. Boudinot of New Jersey expressing a desire to have more information before deciding on customs policy and expressing

When the members first began discussing the need for raising revenue from customs duties—an objective that eventually was accomplished via enactment of the Tariff Act in July 1789—several members expressed the urgency of action to pay off wartime debt.[142] They believed that customs requirements must be on the books before the end of the spring importation season to ensure the federal government did not lose out on that important source of revenue.[143] To get a system of customs rates quickly in place, Madison recommended that the House rely for a starting point on a 1783 tariff proposal introduced under the Articles of Confederation.[144] Representative Elias Boudinot of New Jersey praised this approach, pointing out that the 1783 rates had "appeared to be agreeable to the citizens of the United States" and "the legislatures of every state" and thus would probably meet with the approval of their constituents now.[145] In particular, Boudinot noted that Madison wanted to ensure that whatever revenue system was selected would "not be oppressive to our constituents."[146]

In response, on the second day of debate on Madison's impost and tonnage proposal, some members urged caution. Representative Alexander White of Virginia, for example, said that circumstances might have changed to warrant different tariff rates than those proposed in 1783 and the House should take more time "to consider the subject with more attention."[147]

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that he would be very happy to comply with Rep. Tucker's request to wait for more members to be in attendance if the policy voted on was to be permanent rather than just temporary); *id.* at 207 (Rep. Fitzsimons of Pennsylvania lamenting that representatives from Massachusetts were not in attendance during a discussion of drawbacks of customs duties for rum exports because he believed the Massachusetts representatives could have provided information relevant to the discussion).

142 *See, e.g.*, *id.* at 5 (Rep. Madison of Virginia describing the situation as "admitting of no delay"); *id.* at 10 (Rep. Laurance of New York referring back to the statements of members who had said it was urgent to act in time to collect customs revenue from the spring importation season); *id.* at 4 (reporting the support of two members for Rep. Madison's motion to rapidly develop customs duty legislation).

143 *See, e.g.*, *id.* at 13 (Rep. Madison of Virginia: "The great point was this: the strongest motives to bring in revenue; the harvest of spring importations vanishing out of our hands."); *id.* at 10 (Rep. Laurance of New York: describing statements during the debate about the need to "adopt some mode to embrace spring importations, and [the] earlier the better").

144 *See id.* at 2–3.

145 *Id.* at 3, 6. The 1783 proposal had not been enacted under the old regime because the Articles of Confederation had to be amended to authorize the levying of an impost. *See id.* at 2 n.2. Amendments to the Articles required unanimous ratification by all 13 states, which failed to occur "because of unacceptable conditions imposed by Pennsylvania and New York." *Id.*

146 *Id.* at 5.

147 *Id.* at 6.

Representative John Laurance of New York was concerned the House might not have enough information to enact the optimal detailed customs rates and to determine whether the initial customs system should consist primarily of an enumerated list of articles subject to specific rates or one flat *ad valorem* rate that would apply to many different articles.[148] Further, he opined that the House at that early date lacked the expertise to know how to establish proper modes of collection for the duties.[149] He "wish[ed] to have a consideration of the circumstances."[150] The two major objectives of the customs rates as discussed and deliberated by various members included the raising of revenue and "encouraging the production and protecting manufactures of [the] United States."[151] One core discussion point that would emerge throughout the debates was how steep of a customs duty should be imposed to encourage the domestic manufacturing or growth of certain goods.[152]

Very early on in the debate Representative Tucker of South Carolina raised the significance of the broad-based interests impacted by the tariff policies under debate. He emphasized that "it is necessary to provide for [the] interest of all parts of [the] union and collect the opinions of members of several states."[153] Tariff policies are "important to every part" of the union and all states are "not on equal footing" under various customs rates.[154] Moreover, he insisted that "[w]e should have a full house before taking the matter up in its fullest extent."[155] He pointed out that the interests of the citizens of each state would be best known, and represented, by the members elected from those states "who were immediately the representatives of [their] interests."[156] Tucker underscored that, even though he had his own personal policy views on what customs policies might work best, he was ill-equipped to understand the relevant interests of people from other states who would be best served by their own members' representation of their views.[157]

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148 *See id.* at 10–11.

149 *See id.* at 10.

150 *Id.* at 11.

151 *Id.* at 11 (summarizing remarks by Rep. Thomas Fitzsimons of Pennsylvania); *see also, e.g.*, *id.* at 580 (Rep. Sherman of Connecticut noting that the restoration of public credit was "one of the chief ends of our appointment").

152 *See id.*

153 *Id.* at 12.

154 *Id.*

155 *Id.*

156 *Id.* at 19.

157 *See id.*

Tucker also urged further, and more considered, deliberation on Madison's additional proposal to impose tonnage rates on ships entering U.S. ports in addition to just the customs duties on imported goods and merchandise. Tucker contended that tonnage rates in particular would "bear[] heavier on some states than others."[158] Some states would wish for "very high tonnage" to preclude foreign ships from entering U.S. ports; others would benefit from a more minimal tonnage rate because the rate would indirectly increase the prices of the goods the states were trying to export.[159] He urged caution in congressional action "upon these matters, which so intricate[ly] and differently concern the different parts of the union."[160] Tucker believed that the "tranquility of the states" would rest on the substance of the initial measures adopted by Congress at the start of this new system; the House's legislative resolutions "should give satisfaction to their constituents."[161]

These constituent views would likely differ significantly from one region of the country to another, with "the representatives of the eastern states" much more likely to favor high tonnage rates than representatives from the southern region ever possibly could, even though the southern states would try to accommodate the eastern states' interests as much as possible.[162] But in the end, those states with a sufficient supply of ships "to carry on their whole trade within themselves" would favor high tonnage, whereas states without a shipping supply would be loath to absorb the cost of Congress imposing a high tonnage rate on the foreign ships they needed to hire to export their products.[163] Tucker observed that "[w]here different interest[s] prevail, . . . all that can be expected is such a degree of accommodation as to insure the greatest degree of general good with the least possible

158 *Id.* at 12.

159 *Id.* Rep. Bland from Virginia agreed, contending "that it was well known that America did not furnish a number of ships sufficient for the transportation of its products," and thus a high duty on tonnage would harm the agriculture industry. *Id.* at 91.

160 *Id.* at 12.

161 *Id.* at 19.

162 *Id.* at 20. Many individuals at the time viewed the country as comprised of four general regions—the West, Eastern States, Middle States, and Southern States. The Eastern States included the area of the country commonly known as "New England," including Connecticut, the District of Maine, Massachusetts, New Hampshire, and Rhode Island. The Middle States region was a little more loosely defined. Some thought of it as including the states from New York down to Maryland, although New York was also sometimes delineated as an Eastern State. States south of the Potomac were considered part of the Southern State region. Maryland was considered part of either the middle or the southern region. *See id.* at 20 n.5.

163 *Id.* at 31.

evil to the individuals of the political community."[164] It is clear from Tucker's reasoning through the development of impost and tonnage policies that he viewed the law's impact on various states and geographic regions to be a crucial consideration—and a consideration that would be best evaluated by the members elected specifically to represent the interests of those parts of the country.

Representative Thomas Hartley of Pennsylvania agreed with members like Tucker and Laurance that Congress should take more time to fully investigate appropriate customs policy before enacting a new law and that various aspects of the customs proposal should remain with the committee of the whole "for some time."[165] But he urged the committee to move forward with measures that would promote and protect the interests of another distinct group within the country: "domestic manufacture[r]s."[166] He believed that the committee should gather information to figure out how best to encourage its "manufactures" by imposing "partial duties" that would "assist and support" domestic industry "without oppressing the other parts of the community."[167]

Madison waded back into the debate soon thereafter. He explained that his initial intention was to put only a temporary system in place, but he understood why members felt Congress should take more time to deliberate.[168] Nonetheless, Madison questioned whether Tucker was too exclusively focused on state interests rather than what was best for the nation as a whole.[169] Madison agreed it was "[n]ecessary to weigh and regard the sentiments of gentlemen from different parts of [the] United States."[170] On the other hand, however, Madison insisted the House must also "consider[] the national import" of customs policies.[171] Consideration and accommodation of the "different interests of the states" should be limited to the achievement of policies and objects that are "compatible with the general advantage of the Union."[172] And he felt that all members of the union

164 *Id.* at 32.

165 *Id.* at 20–21.

166 *Id.* at 32.

167 *Id.* at 20–21, 32–33.

168 *See id.* at 27.

169 *See, e.g.*, *id.* ("[Madison] admitted there was force in the observations of the Hon. Gentleman from South-Carolina, but that *national* objects were paramount to all local considerations.").

170 *Id.* at 13.

171 *Id.* at 13–14.

172 *Id.* at 21–22.

should be willing to suffer for the country's sake, if that was what was required.[173]

That said, even when Madison urged representatives to keep the good of the nation in mind and not just focus on what was good for their state to the exclusion of any others, Madison recognized that the collective interest of the nation was grounded to a large degree on what was good for each state or for groups of states. For example, Madison suggested that state and national interests must be balanced by "mutual concession."[174] This may mean that some states pay an "undue proportion" of customs-related revenue, but it is likely also true that these same "parts of [the] union" are the "parts which [are] most thinly planted and stand most in need of national protection."[175] In other words, the states paying the largest share of federal revenue may also be the states receiving the most federal support.

One way in which Madison emphasized that individual state interests remained highly relevant was with respect to states' expectations about what they might gain in exchange for ratifying the Constitution.[176] States had to give up their ability to engage in protectionist policies and impose tariffs favoring their products when they joined the new, stronger federal system under the Constitution. According to Madison's remarks, several states were "advanced and ripe for encouraging manufactures," and thus would have been able to start domestically producing more manufactured goods of their own.[177] Madison says those states must have been willing to give over their regulatory authority "into other hands" in the expectation that the federal government would be a good steward of their interests.[178] Thus, federal customs policies must therefore keep in mind the interests of these technologically advanced states with significant manufacturing capacity.[179]

Toward the end of deliberations on April 9, Representative Boudinot echoed some of Madison's sentiments about the interests of the union, stating that he "trust[s] we all have the same object in view, namely, the public good of the United States" and thus we must be "mutually inclined to sacrifice local advantages for the accomplish-

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173 *See id.* at 15.

174 *See id.* at 13–14.

175 *Id.* at 14.

176 *See id.*

177 *Id.*

178 *Id.*; *see also id.* at 16 ("That some parts of states deprived themselves of supporting their opinion by adopting this establishment—and therefore they ought not to be disappointed.").

179 *See id.*

ment of this great purpose."[180] This theme recurred within the legislative debates on various impost and tonnage rates. Members spent vast quantities of time discussing the interests of the various states and regions that would be impacted by discriminating among foreign and domestic ships in tonnage rates or laying imposts on certain goods over others. The interests that members from throughout the country raised on behalf of their constituents were critical to the legislative debates and undoubtedly critical to the legislative policies the House ultimately adopted. These members vigorously represented their state or district's views in a way that a single national actor representing a general electorate could not reproduce. In the end, various members pointed out that the legislative body must come together and hammer out a compromise that supported the varied interests within the whole. These many actors, elected from many different districts and states, formed new policy for the one new union.[181]

Representative Boudinot played a key role in the discussion that day. To figure out how to best formulate a permanent collection system, Boudinot and others proposed that the House gather information from various state laws, merchants throughout the union who might have relevant expertise, and state executives who could report how much revenue had been raised under each state's customs laws.[182] The information, however, should be evaluated not based exclusively on "the local interests of a few individuals, or even individual states,"[183] but based on what would benefit "the general good of the whole."[184] He pointed out the difficulty of devising a system to enforce the collection of customs duties in a country with jagged and lengthy shorelines.[185] Further, he noted that a member like himself, from an agricultural state, may not be as well-suited to craft good policy as members from more commercial states who may be more "materially injured" if Congress enacted an "improper regulation."[186] Even as he highlighted the need for an eventual compromise policy that benefited the national good rather than just parochial interests, Boudinot's re-

180 *Id.* at 37–38.

181 *See id.* at 460 (Rep. Madison: "I am persuaded that less contrariety of sentiment has taken place than was supposed by gentlemen, who did not chuse to magnify the causes of variance; . . . the importance of the union is justly estimated by all its parts; this being founded upon a perfect accordance of interest, it may become perpetual.").

182 *See id.* at 41, 48, 57 (referencing the collection of information from state executives).

183 *Id.* at 63.

184 *Id.* at 42.

185 *See id.*

186 *Id.* at 62–63.

marks demonstrated the essentiality of legislation being formulated by a body of representatives culled from every region of the country.

Around this time, Tucker offered a motion to split up the proposal into a bill imposing duties on goods and a separate bill regarding tonnage, as he believed the interests of various states diverged considerably regarding the proper level of tonnage rates.[187] The members also devoted some discussion to the best method for gathering the necessary information to craft a permanent customs bill. Besides the suggestions offered by Representative Boudinot, Representative Roger Sherman of Connecticut posited that one member from each state could gather information on the perspectives of members from that state.[188]

Members spent a fair amount of time discussing how the uniform customs rates would nonetheless affect distinct parts of the country very differently, in part because some parts of the country might consume a disproportionately high amount of the good being taxed.[189] Therefore, some members suggested, where one part of the country is disparately impacted by the duty on a particular article, the House should consider addressing that inequity by then also imposing a duty on a good that the region uses less.[190]

C. Contested Customs Rates on Specific Articles: Rum and Molasses, Steel, and Salt

After discussing some general principles for how to evaluate the proper level of customs duties to impose on the public, the members got down to discussing the appropriate customs rates for specific articles. Much of the members' debate time centered around a few particularly hotly contested items. Individual articles drew strong debate where different regions of the country would face great disparity in how much they would be harmed, or helped, based on whether a heavy or light duty was imposed on a given article. This Section of the Article highlights the debates over just a couple of representative articles that revealed how members' strong advocacy for the interests of one region of the country over another impacted the ultimate policy decision and legislative compromise on the relevant customs rate.

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187 *See id.* at 49.

188 *See id.* at 46.

189 *See id.* at 51.

190 *See id.*

1. Rum and Molasses

When the members started to debate customs rates on specific articles on April 14, the first goods that received great attention were rum and molasses.[191] During the debate over the proper tariff rate for spirits, several members expressed an interest in imposing a high tariff rate to discourage the consumption of this immoral "poison," and a rate of 15 cents per gallon on rum was proposed.[192] Other members objected that this duty was too high, at least insofar as the duty would impact the use of molasses, which was used in parts of the country to make rum.[193] Molasses was also used by some citizens as a sugar substitute and, thus, fell under the category of a "necessary" household item.[194] Members suggested it would be inappropriate, and harmful to those of lesser means, to tax a household necessity like molasses,[195] or sugar, at a high rate.[196]

A significant portion of the debate over duties on rum and molasses, however, was about the disparate impact of the proposed duties on various states and regions. Representative Laurance of New York, for example, opposed the high 15-cent duty per gallon of rum because his state imported such a large amount of the product. He recommended instead a lower duty of only eight cents.[197] Representative Benjamin Goodhue of Massachusetts, one of the "eastern states," raised similar concerns about charging too high of a tax on molasses because Massachusetts imported a higher quantity of the product than did any other state.[198] Goodhue tried to make his concerns more generally applicable by picking up on the theme that a tax on molasses would hurt families with fewer resources who could not afford sugar and used raw molasses as a substitute instead.[199] Further, the manufac-

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191 *See id.* at 70, 74.

192 *Id.* at 56, 79; *see, e.g.*, *id.* at 73 (Rep. Fitzsimons of Pennsylvania); *id.* at 74 (Rep. Boudinot of New Jersey, referring to the "discourage[ment] [of] the use of ardent spirits in the different states"); *id.* at 75 (Rep. Parker, expressing a desire to discourage the use of rum).

193 *See, e.g.*, *id.* at 75–76 (Rep. Madison, advocating a 12-cents-per-gallon rate).

194 *Id.* at 77.

195 *See id.* (Rep. Benjamin Goodhue of Massachusetts: "It is considered as a raw material and—used by [the] poor class of people to a considerable degree."); *id.* at 75 (Rep. Laurance: "[I]f [a] tax [is] too high, [it] becomes too burden[some] on them in some states. It is much used by the poor of our country.").

196 *See id.* at 75.

197 *See id.* at 74.

198 *See id.* at 77.

199 *See id.* at 89.

turers in his state used molasses to distill spirits and thereby grow and expand domestic industry.[200]

Madison squarely disagreed. He believed that Congress should impose "as high a duty as can be collected"[201] on distilled spirits. He had concluded that this was consistent with "the sense of the people of America," based on "what we have heard and seen in the several parts of the union."[202] Madison had earlier pointed out that the higher molasses duties paid by some states would even out in the end.[203] Because the citizens in those states used molasses as a sweetener instead of sugar, they would save revenue by not having to pay the duty on sugar. Some states' residents would pay customs duties on molasses, and others, on sugar.[204]

Later in the debate, Representative Fisher Ames of Massachusetts introduced an additional reason why Massachusetts representatives found it critically important to advocate for a relatively low duty on molasses. West Indies traders provided one of the few markets for New England codfish.[205] The traders would give molasses or rum to Massachusetts merchants in exchange for their fish.[206] If Massachusetts residents had to pay a high duty to accept the molasses imports, they would not be able to as easily offload the fish.[207] According to the Massachusetts representative, this market loss would cause "devastation through New England."[208] Ames contended that the West Indies rum formed a "material link in navigation" necessary for "the chain of trade" and "manufactures throughout the United States."[209]

But these strong claims were met with significant pushback. Representative Fitzsimons of Pennsylvania stated that it was the duty of the committee of the whole to evaluate the best policy for the country, not just evaluate local interests.[210] And he was not convinced that Ames was right about his claims of the molasses duty's harm to Massachusetts's commerce, in any event. Fitzsimons contended that Pennsylvania would owe in taxes on sugar about what Massachusetts would

200 *See id.*
201 *Id.* at 93.
202 *Id.*
203 *Id.* at 89–90.
204 *See id.* at 77.
205 *See id.* at 328.
206 *See id.*
207 *See id.* at 78.
208 *Id.*
209 *Id.*; *see also id.* at 101.
210 *See id.* at 79.

pay in molasses taxes.[211] In his view, the sugar duties paid by the "middle and southward states," which used it as a staple, would bring equilibrium with the eastern states' duty on molasses.[212]

In the end, the committee of the whole recommended the higher 15-cent-per-gallon duty "[u]pon all spirits of Jamaica proof," a 12-cent-per-gallon duty on "all other spirituous liquors," and a six-cent-per-gallon duty on molasses.[213] The House members observed, among several other factors that they considered, that the one-cent rate made the sugar duty roughly equivalent to a six-to-eight cent duty on molasses—the use of approximately one gallon of molasses as a sweetener was thought to be equivalent to about six to eight pounds of sugar.[214] This weighing of the duty on molasses against the charge on sugar demonstrates the way in which the members' motivated electoral advocacy for the interests of their constituencies impacted the details of legislative compromises along the way to finalizing the first Tariff Act that was enacted into law on July 4, 1789.[215]

This compromise was just one step in the development of the ultimate comprehensive set of duties that the bill imposed.[216] But it was an informative window into the way in which the formulation of multi-

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211 *See id.* at 80.

212 *See id.* at 98.

213 *Id.* at 87–88.

214 *See id.* at 88 (Rep. Fitzsimons); *id.* at 111 (Rep. Fitzsimons of Pennsylvania, supporting the 1-cent sugar duty because it is "on an equality with molasses"); *id.* at 105 (Rep. Boudinot of New Jersey: "6 cents were therefore a more equitable rate than 8 cents were . . . this might also be near what is intended to be charged on sugar; by fixing it at this rate the necessity of lowering the duty at some future day would be avoided . . ."); *cf. id.* at 335 (Rep. Goodhue of Massachusetts, describing the selection of a 1-cent duty on brown sugar as an attempt to bring equivalence with the 6-cent duty on molasses).

215 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

216 A few days later, on April 25, the House voted to decrease the rates of duties on distilled spirits based on concerns that the duties were so high they would encourage smuggling and, in the end, result in the collection of less revenue. *See* 10 DEBATES, *supra* note 33, at 289–96. The enacted 1789 Tariff Act imposed an eight-cent rate on all distilled spirits other than those of Jamaica proof and only a 2.5-cent tariff on molasses. *See* Act of July 4, 1789, ch. 2, § 1, 1 Stat. at 24, 25 (repealed 1790). Distilled spirits of Jamaica proof, in the end, received a 10-cent-per-pound duty rather than the original 15 cents per pound approved by the House on April 15. *Id.* Brown sugars were subject to a one-cent-per-pound charge, loaf sugars to three cents per pound, and all other sugars to a 1.5-cent-per-pound duty. *Id.* The members decided to distinguish between the duty on Jamaica-proof spirits and all others out of a desire to give somewhat favorable treatment to their allies. Great Britain had imposed some harmful trade policies on the United States. *See infra* note 326. The higher duty on spirits from a British colony was one way for the United States to indicate to other countries the potential benefit of maintaining positive reciprocal trade agreements with the United States. *See* 10 DEBATES, *supra* note 33, at 316–19 (explaining the vote to impose what at that stage in the process was a 12-cent duty on Jamaica-proof spirits but only a 10-cent duty on other categories of spirits).

ple legislative provisions was directly influenced by advocacy on behalf of one's constituents. National policy that was to benefit the entire country,[217] and enable the repayment of Revolutionary War debt, built upon and reflected the capacity and economic interests of the states.

The contentious issue of the proper rate for the molasses duty was vigorously deliberated. Reports of the debate over molasses on just one single date in April extended for close to 50 pages.[218] And the decision that month to retain the six-cent molasses duty was not the final word. The Tariff Act in the end included only a 2.5-cent-per-barrel duty on molasses.[219]

2. Steel

As the debate over the Tariff Act wore on, members continued to discuss the impact of the suggested rates of duties on specific articles in light of their impact on particular states.[220] For example, on April 15, Representative Fitzsimons of Pennsylvania accused Representative Tucker of South Carolina of objecting to duties on *any* article imported by South Carolina. Tucker quickly objected, describing himself as a proponent of "moderate taxation."[221] He contended that he was just trying to ensure that customs policy was equivalent toward all the states and that South Carolina was charged her "due proportion of tax" and no more.[222] He also intimated that Fitzsimons could not credibly evaluate his position, as Fitzsimons would not know as well as he how various duties would impact Tucker's state.[223]

Like with the discussion of molasses and rum duties, the divergent perspectives of representatives from various states were critically relevant to deliberations about what duty, if any, to impose on steel.[224]

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217 *Cf.* 10 DEBATES, *supra* note 33, at 342, 348 (Rep. Madison of Virginia, expressing contempt for the Massachusetts' representatives seemingly singular focus on their state's interests during various stages of the molasses debate and describing some of their statements as "pathetic exclamations"); *id.* at 357 (Rep. Boudinot of New Jersey, echoing Madison's concern that the Massachusetts members might not be sufficiently focused on the overall national good and claiming that he thought of himself as a representative of all the states—of Massachusetts just as much as his home state).

218 *See id.* at 338–86.

219 *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

220 *See, e.g.*, 10 DEBATES, *supra* note 33, at 116 (recording a disagreement between Rep. Fitzsimons of Pennsylvania and Rep. Tucker of South Carolina).

221 *Id.*

222 *Id.*

223 *See id.* (Rep. Tucker, replying to one of Rep. Fitzsimons' criticisms sarcastically: "Glad to know what article the state I represent is not concerned in.").

224 *See id.* at 117.

Representative Richard Bland Lee of Virginia opined that the country used so much steel that it was a "necessary" item that should not be taxed.[225] He believed it was not yet "in [the] power of [the] union to furnish" steel to all of the states throughout the country.[226] So the imposition of any duty on steel in effect would be a tax on the nonmanufacturing agricultural states unable to produce it for themselves.[227] Tucker agreed that it was impossible in several states to acquire steel from anywhere but foreign countries and these states should not be disadvantaged by having to pay a duty to import it.[228]

But Representative George Clymer, from the more industrial state of Pennsylvania, flatly disagreed with the analysis of the representatives from the southern, more agricultural states. In his view, the fact that steel was beginning to be manufactured in at least some parts of the union meant that Congress should impose a duty on imported steel to encourage U.S. residents to purchase from domestic steel manufacturers. He believed that the "encouragement of [the] legislature" would "extend" the steel industry beyond its "infancy" so that it could begin to supply the steel needs of other states.[229]

Fitzsimons of Pennsylvania echoed these comments, emphasizing that the steel industry was one of the great areas of manufacturing and it would be critical for any nation to support this industry, which he hoped would soon reach the point where it could meet the needs of the entire union through domestic production.[230] He thought the industry would need encouragement via customs policies, however.[231] And he was very "sorry to hear doctrines laid down" in the debate that were not best for the "good of [the] country."[232] He said that every state would find itself "particularly oppressed by [a] duty on some article."[233] But the members should lay aside their "local distinctions" and support impost rates that are best for the nation as a whole as long as one state is not materially disadvantaged by them and the burden among states is relatively equalized.[234] Once again, however,

225 *Id.*

226 *Id.*

227 *See id.* at 117–18.

228 *See id.* at 118 (Rep. Madison of Virginia, agreeing that it would be improper to impose a duty on steel that would encourage manufacturing at the great expense of the interests of agriculture).

229 *Id.* at 117.

230 *See id.* at 117–18.

231 *See id.* at 118.

232 *Id.*

233 *Id.*

234 *See id.* at 118–19.

even though Fitzsimons's remarks sounded primarily national in focus, he identified the national interest in part by considering the aggregate effect of the contested policy on the group of states constituting the union.

Lee of Virginia and Tucker of South Carolina would have preferred no duty,[235] and Bland of Virginia suggested a compromise of 40 cents.[236] In the end, the concerns raised over too burdensome a steel tariff led to a 15% decrease from Fitzsimon's initial proposal of 66 cents per 112 pounds of steel.[237] And Boudinot's motion for 56 cents won consensus.[238]

3. Salt

Salt is an additional article that received intense House debate, similar to the rigorous discussion of distilled spirits and molasses. This debate also revealed the back-and-forth vying between different states and geographical sections of the country that was part and parcel of reaching consensus in favor of the national interests relevant to each piece of legislation. When the customs discussion turned to salt during the middle of debate on April 16, Representative Aedanus Burke of South Carolina weighed in for just the second time since the session's legislative business had begun.[239]Burke did not mince words. He said that charging a duty on salt would be "oppressive."[240] Salt was a "[n]ecessary of life," in his view.[241] And stock and cattle "can't thrive without it."[242] Those earning lesser incomes needed salt, and sometimes it had to be transported hundreds of miles to reach South Carolina and Georgia residents.[243] After its carriage in wagons and along

235 *See id.* at 117, 124 (rejecting Lee's no-steel-tariff proposal).

236 *See id.* at 119.

237 *See id.*

238 *See id.* at 131. The 56-cent compromise remained in the final enacted Tariff Act. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24 (repealed 1790).

239 *Compare* 10 DEBATES, *supra* note 33, at 144 (Rep. Burke), *with id.* at 139 (Rep. Burke); *see also* Online Query of *Documentary History of the First Federal Congress*, HATHITRUST (insert "Burke" in the "Search in this text" field) https://babel.hathitrust.org/cgi/pt/search?id=mdp.39015021636868;view=1up;seq=7;q1=burke;start=41;sz=10;page=search;orient=0 (listing references to pages 139 and then 144 as the first recorded mentions of Burke's name once the volumes' House debate records begin). One of the additional reports on that day's legislative business, carried in the *Gazette of the United States*, indicated that Rep. Daniel Huger of South Carolina also joined Burke in his opposition to any impost on salt. *See* 10 DEBATES, *supra* note 33, at 153.

240 *Id.* at 144.

241 *Id.*

242 *Id.*

243 *See id.*

long, difficult, and narrow rivers, ordinary people would be unable to afford the skyrocketing costs that salt would bear if a new customs duty were factored in on top of preexisting transportation costs. With salt's already high price, a duty would be "odious."[244]

Representative Laurance of New York quickly replied. He acknowledged that the duty should not "be so high as to make it oppressive."[245] That said, salt was used a lot throughout the nation and a duty on salt would raise significant revenue. He believed that salt was used roughly equivalently in the interior and exterior parts of the country[246] and that its "consumption is regular" and a duty would "not operate oppressively on any class."[247] Further, Laurance argued, the higher economic burden of salt on internal, rural communities due to combined high transportation costs and a possible new customs charge would be counterbalanced by the fact that people living far from the seacoast generally tended to purchase fewer imported goods[248] and, thus, overall would pay fewer customs duties. Thus, in his view a duty on salt would evenhandedly impact regions and states throughout the union and should be used to raise critically needed federal revenue. He moved for a duty of six cents per bushel.[249]

Tucker of Georgia protested that not only did "[t]he poor consume more salt provisions than rich," salt generally was "used more in interior parts of [the] country" and therefore it was yet another duty that would disproportionately bear on one region of the country more than another.[250] Tucker was so convinced of a salt duty's disproportionate impact on his part of the country that he claimed he was "more averse to this article than any other whatever."[251] Representative Thomas Scott of Pennsylvania also professed opposition to the salt duty. But his language was more tempered. He conceded that the country could raise a lot of revenue from taxing this article that enjoyed "universal demand and utility."[252] But he did not think that was

244 *Id.*

245 *Id.* at 162.

246 *See id.* at 162–63.

247 *Id.* at 144.

248 *See, e.g.*, *id.* at 162 ("The remote settler does not pay on other articles equal to the inhabitant who resides near the Atlantic—he does not consume the linen and cloath of Europe, the tea of the East, the sugar and spirits of the West-Indies in any thing like such proportion . . . .").

249 *See id.* at 144.

250 *Id.* at 144–45.

251 *Id.* at 145.

252 *Id.* at 145, 163.

sufficient reason to do so.[253] Scott explained that 800 to 1,000 miles separated the two closest (adjoining) entry points from which residents of the West could import salt and it was arduous to transport salt over land, on the backs of horses.[254] He feared that imposition of a duty on the article would "have [a] tendency to shake the very foundations of [the] present system," which was critical to "political salvation."[255] He recommended that Congress raise the duty on different articles instead.[256]

Representative Andrew Moore of Virginia picked up on the theme that a duty on salt would have an unreasonably severe impact on certain states within the union. Some states just did not have a "sufficient stock" of salt for the "consumption of [their] own inhabitants," he observed.[257] And, in contrast to the rough equivalence wrought by the sugar duty paid in some parts of the country as balanced against the molasses duty,[258] Moore could think of "no article which will compensate those who are to be injured by the tax on salt."[259] He also mentioned that the duty on salt would be a harsh burden on the residents of North Carolina,[260] who had not yet agreed to join the new constitutional union.[261]

Representative William L. Smith of South Carolina also offered his two cents, even though his constituents did not particularly oppose the salt duty. He believed the "upper country of Carolina" was already "rather averse to the present government"; why "entangle ourselves in the shoals of discontent" by imposing this duty that they would find to be grievous?[262]

After hearing all of the opposition, Representative Laurance suggested that the House had "[b]etter rise and reflect" to take time to examine those concerns.[263] The next day, April 17, the House entered the committee of the whole and Burke of South Carolina again moved to have the duty on salt expunged from the listed articles in the draft

253 *See id.* at 145.

254 *See id.* at 145–46, 163.

255 *Id.* at 145–46.

256 *See id.* at 164 (warning that a duty on salt would be one of the least popular means for raising revenue).

257 *Id.* at 146.

258 *See supra* notes 204–12 and accompanying text (describing the debate over rates of duties on sugar and molasses).

259 10 DEBATES, *supra* note 33, at 147.

260 *See id.* at 146–47.

261 See *id.*

262 *Id.* at 147.

263 *Id.*

bill.[264] Representative Nicholas Gilman of New Hampshire seconded the motion.[265]

Laurance again spoke early on in the debate. He began by acknowledging the claims that a duty on salt disproportionately impacted the poor—operating as a poll tax—and consequently should be rejected.[266] But he supposed that all taxes were met with opposition.[267] And a tax on salt had been "levied in some states, to the general satisfaction of the people."[268] People in his state of New York had opposed New York's imposition of a tax on salt but there had been no disturbance because of it and the administration of collection of the tax had been relatively straightforward.[269] He just could not conclude that the interior parts of the country would be disproportionately hardest hit by a customs duty on salt.[270] Those who lived closer to seaports on the coast simply would find it easier to consume more of it because of the absence of burdensome delivery costs.[271] And, in any event, he continued to point out that residents living near the coast likely consumed more imported goods in general so any disproportionate burden that interior residents suffered from the duty on salt would be counterbalanced by the duties that seacoast residents paid on other imported goods.[272] In fact, to his mind it was possible that paying a duty on salt might be just about the only contribution that interior residents[273] would make to the federal revenue, as they consumed so few other imported goods.[274] Laurance said he would support such a contested tax only if he had concluded that "it would be productive and satisfactory to the people at large."[275]

Moore of Virginia agreed that the proposed duty would not endanger the new government's stability, but still he thought it would "cause much dissatisfaction among the people in the western country"

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264 *See id.* at 179.

265 *Id.*

266 *See id.*

267 *See id.*

268 *Id.*

269 *See id.*

270 *See id.* at 179–80.

271 *See id.*

272 *See id.* at 180 ("The number of people on the sea coast was so much greater than in the back parts of the Carolinas, that there was no comparison as to the share of the burthen which would fall on the one and on the other.").

273 When the members referred to citizens living in the "interior" parts of the country or in the more western areas, they were apparently referring to residents of "the western parts of Pennsylvania, Virginia, and Carolina." *Id.* at 188 (Rep. Laurance of New York).

274 *See id.* at 180.

275 *Id.*

and "[t]heir peculiar situation ought not to be disregarded."[276] Madison rose and urged circumspection.[277] He first addressed the claim that a tax on salt was "unequal" and "unjust" because it disproportionately impacted "different descriptions of people."[278] In Madison's view, this claim should not have been evaluated by looking at just the duty on salt in isolation but by looking at the treatment of various groups under the comprehensive customs system as a whole.[279] He thought that as the customs provisions currently stood, certain groups paid more than their fair share and a duty on salt might in fact help equalize the burden.[280] Further, the duty on salt itself operated with nearly equal impact in the "northern and southern districts of the union."[281] As for the interior-seacoast divide, Madison acknowledged that interior residents consumed more salt.[282] But he believed "there were many objects of taxation for which the western country would pay less" and in that sense the tax on salt brought equality to the draft customs plan in its entirety.[283]

Closing out the debate several members gave more abbreviated remarks, showing a range of views. Representative Benjamin Huntington of Connecticut thought that every tax was bound to face some kind of opposition and this particular tax was appropriate, reasonable, and moderate.[284] He reported that in his state, "constituents would enquire the reasons why it was imposed, and when they found it was from principles of justice, and to promote the public good, they would pay it without reluctance."[285]

Representative Alexander White of Virginia disagreed with the continued inclusion of the duty on salt.[286] He had doubts about the tax at the start of the debate and now thought the duty on salt should be eliminated.[287] He believed that people expected relief as a result of

276 *Id.*

277 *See id.*

278 *Id.* at 181.

279 *See id.*

280 *See id.*

281 *Id.*

282 *See id.*

283 *Id. But see id.* at 183 (Rep. Scott of Pennsylvania, speaking for the residents of western Pennsylvania where he lived, disputed this assessment, explaining that residents of the western region consumed imported goods such as wine and other luxuries and members should not vote based on the erroneous contention that westerners would pay no duties but for the tariff on salt).

284 *See id.* at 182.

285 *Id.* at 190.

286 *See id.* at 182–83.

287 *See id.*

formation of the federal government and "[t]he first end of the government should be to avoid all acts which any considerable bodies of the people would consider as unjust."[288] There were those trying to encourage Americans to oppose their new government, and White believed that the new government should be cautious so as not to play into their hands.[289] Further, he cautioned that Congress not take any action that discouraged Kentucky from joining the union.[290] Even within some of the current states, he reflected, the Constitution had been "adopted by a small majority . . . and in the opinion of many is not so favourable to the rights of the citizens as could be desired."[291] Therefore, Congress should avoid any measure that might seem oppressive.[292]

The last recorded extended statement was by Fitzsimons, a comember of the Pennsylvania delegation along with Scott.[293] Fitzsimons supported the duty as beneficial for revenue.[294] He estimated it would raise $200,000 a year, and the federal government should not give up that revenue so long as it was derived from a generally fair revenue policy.[295]

A vote on Burke's motion to eliminate the salt tax followed.[296] It lost by a vote of 19 to 21.[297] Representative Benjamin Goodhue of Massachusetts then continued the deliberation on customs laws and salt by moving that the committee of the whole should approve a drawback for salted provisions and fish.[298] This would enable citizens who used salt for preserving goods that were then re-exported to con-

288 *Id.* at 183.

289 *See id.*

290 *See id.* at 191.

291 *Id.*

292 *See id.*

293 *See id.* at 111.

294 *See id.* at 183.

295 *See id.*

296 *See id.*

297 *See id.* at 184.

298 *See id.* at 186. The enacted Tariff Act authorized a drawback of the duties paid on all goods except certain types of distilled spirits if the goods were re-exported within 12 months of their initial importation. The drawback was reduced by a one-percent charge to cover the cost of administration related to the initial collection of the duty. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24, 26–27 (repealed 1790). Drawbacks on certain types of salted goods eventually were subject to a somewhat different approach. On May 14, the House voted in the committee of the whole to approve a five-cent bounty on the exportation of every quintal of dried fish and every barrel of salted provisions or pickled fish. *See* 10 DEBATES, *supra* note 33, at 667. The bounty provisions were enacted in the final version of the Tariff Act to serve in lieu of collection of the drawback on exports of salt. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24, 27 (repealed 1790). The five-cent bounties again showed the federal Congress looking out for regional interests—they served the

tinue in their livelihood without the duty on salt becoming prohibitively burdensome.[299] The committee voted in favor of the drawback of salt duties for citizens who re-exported the salt in the form of another good. The committee next voted in favor of Laurance's original motion that the duty on salt be six cents per bushel.[300]

There are many examples besides the two vignettes on the salt and molasses debates during which members deliberated carefully over the details of customs policy with a careful eye toward representing state and regional interests while ensuring that policies beneficial to the greater union were approved. There were discussions including state interests and customs duties on coal,[301] cotton,[302] wool-cards,[303] and glass.[304] The debates over just the customs provisions within the Tariff Act themselves spanned hundreds of pages.[305] Scores more pages recorded the representatives' deliberations over the related Tonnage Act, which would authorize the raising of revenue from the entry of the trade ships themselves into American ports.[306] As of 1789, the United States was millions of dollars in debt.[307] The elected representatives helped ensure their constituents' particular well-being and interests were preserved while also working to shepherd the new nation, as a unified whole, through its formative first years.

Throughout the House debates on the proper rates of duties, there was impassioned and rigorous discussion by members who understood that their constituents' interests were at risk.[308] These members, elected to represent the interests of a specific geographic group

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purpose of preventing the duty on salt from hindering the commercial interests of the eastern fisheries. *See* 10 DEBATES, *supra* note 33, at 667 n.20.

299 *See* 10 DEBATES, *supra* note 33, at 667 n.20.

300 *See id.* at 186; *see also* Act of July 4, 1789, ch. 2, 1 Stat. 24, 25 (repealed 1790) (imposing a six-cent duty on each bushel of salt in the final enacted version of the Tariff Act).

301 *See, e.g.*, 10 DEBATES, *supra* note 33, at 199, 206.

302 *See, e.g.*, *id.* at 201.

303 *See, e.g.*, *id.* at 202–03.

304 *See, e.g.*, *id.* at 171–75.

305 *See generally id.* at 10–221.

306 *See generally id.* at 221–50.

307 *See Estimates for the Year 1789, in* 1 AMERICAN STATE PAPERS: FINANCE 11–12 (1790) (reporting that the amount of interest and installment payments due that year on the foreign and domestic debt was more than $3.2 million dollars).

308 *See, e.g.*, 10 DEBATES, *supra* note 33, at 141 (Rep. Ames of Massachusetts, arguing that if any manufacturing industry deserves imposition of a protective tariff it is manufactured nails, which has "been carried on in every family" and is "prodigiously great"); *id.* at 163–64 (Rep. Scott of Pennsylvania, warning Congress not to "stretch out the hand of oppression" through a duty on salt); *id.* at 153 (Rep. Tucker of South Carolina, describing the "extreme injury" he believed the duty on salt "would produce to the poorer part of the people in the southern states").

of citizens, had relevant information about how to meet their constituents' needs from having lived in the district whose needs they represented.[309] But even more importantly, their political future was tied to how well they ensured national legislation preserved their constituents' interests, financial or otherwise.[310] This level of sparring over electorally based interests is absent from administrative-based regulatory data collection, provision of expertise, and solicitation of public comment.[311] There is a uniquely driven vigorous debate that occurs when an outcome rests not on successful decisionmaking by a centralized agency but on whether a group of decisionmakers has meaningfully represented the deep-seated interests of a particular district or state.[312]

D. Tonnage Act

On April 21, the House turned its attention to one of the remaining four key components of customs policy established by the First Congress: the Tonnage Act.[313] The terms of the Tonnage Act are not nearly as complex nor as detailed as the Tariff Act, but the measure received similarly significant in-depth debate on the House floor. The Tonnage Act imposed a tax on ships and vessels entering the United

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309 *See, e.g.*, *id.* at 129 (Rep. Clymer of Pennsylvania, describing the steel production in Philadelphia for the purpose of informing debate over the proper rate of a potential duty on steel).

310 *See* THE FEDERALIST NO. 51, at 118 (James Madison) (Neill H. Alford, Jr. et al. eds., 1983) (observing that separation-of-powers conflicts between the federal branches of government are merely an "auxiliary precaution" and that "[a] dependence on the people is no doubt the primary control on the government").

311 *See* Jennifer L. Mascott, *The Alternative Separation of Powers in Constitutional Coup*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 26, 2018), http://yalejreg.com/nc/the-alternative-separation-of-powers-in-constitutional-coup/ [https://perma.cc/W4HU-VY4J] (critiquing an attempt to draw parallels between the constitutional accountability mechanism of representative elections and the modern administrative mechanisms of rulemaking public comment periods and tenure-protected civil servants).

312 During the First Congress, many House members were elected statewide rather than by one congressional district. At-large representatives served in Connecticut, New Hampshire, New Jersey, and Pennsylvania. Rhode Island and Delaware also had "at-large" House representation at the time but their states would have constituted just one congressional district in any event. *See* KENNETH C. MARTIS, THE HISTORICAL ATLAS OF UNITED STATES CONGRESSIONAL DISTRICTS, 1789–1983 (1982).

313 *See* 10 DEBATES, *supra* note 33, at lxi (listing April 21, 1789, as the first day of the Tonnage Act debate); *id.* at 223 (labeling the beginning of the Tonnage Act deliberations). The other two measures—the Collection Act delineating ports of entry and delivery and creating the customs collection personnel apparatus and the Registration Act requiring ships to acquire certificates to land and unload goods—did not receive as much recorded debate as the Tariff and Tonnage Acts.

States based on the number of tons of carrying capacity of the ship.[314] The legislation was enacted on July 20, 1789, two and a half weeks after enactment of the Tariff Act,[315] but did not take effect until August 15, 1789.[316]

The Tonnage Act was the First Congress's third enacted bill.[317] It provided for three distinct tonnage rates: (1) ships owned by a U.S. citizen and built domestically or owned by a U.S. citizen as of May 29, 1789 had to pay a duty of six cents per ton to enter the United States[318] due only once a year,[319] (2) ships built in the United States and owned by "subjects of foreign powers" were charged a rate of 30 cents per ton,[320] and (3) all other ships owed a 50-cent-per-ton duty to enter the United States.[321] Any ship that carried U.S. goods that was not both built in the United States and owned by a U.S. citizen had to pay the 50-cent rate each time it entered a U.S. port.[322] Like the Tariff Act deliberations, debate over the Tonnage Act incorporated advocacy from various members attempting to preserve some protection for their constituents' interests in this measure to further the twin national goals of raising funds to pay off debt and creating conditions where the domestic shipbuilding industry could further develop and flourish.

There were several key competing considerations that became focal points during the House debates on the legislation. There was a recognized need for the country to build more U.S. ships.[323] It needed more U.S.-controlled ships to help outfit a navy in the event of future military conflict.[324] And it needed more ships to transport American

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314 *See* Act of July 20, 1789, ch. 3, 1 Stat. 27, 27–28 (repealed 1790).

315 *Compare id.*, *with* Act of July 4, 1789, ch. 2, 1 Stat. 24, 24–27 (repealed 1790).

316 *See* Act of July 20, 1789, ch. 3, § 4, 1 Stat. 27, 28 (repealed 1790).

317 *See* List of the Public Acts of Congress, *supra* note 32, at xvii–xviii.

318 *See* Act of July 20, 1789, ch. 3, § 1, 1 Stat. 27 (repealed 1790). Members believed that this very modest tonnage rate on U.S.-owned vessels would help to pay for necessary expenses like the maintenance of lighthouses. *See, e.g.*, 10 DEBATES, *supra* note 33, at 225, 241 (Rep. Fitzsimons).

319 *See* Act of July 20, 1789, ch. 3, § 2, 1 Stat. 27 (repealed 1790).

320 *Id.* § 1, 1 Stat. at 27.

321 *See id.*

322 *See id.* § 3, 1 Stat. at 27–28.

323 *See* 10 DEBATES, *supra* note 33, at 241 (Rep. Goodhue of Massachusetts, describing ship building as "of the utmost importance to this country").

324 *See id.* at 496 (Rep. Madison, observing that the object of the tonnage duties is to encourage the building of new ships and to "lay[] the foundation for a marine"); *id.* at 497 (Rep. Madison, explaining that his concern in making sure the tonnage duties are sufficiently high is not to raise revenue but "to provide a maritime defence against a maritime danger"); *id.* at 517 (Rep. Madison, favoring a relatively high tonnage duty to encourage shipbuilding because "[a]

goods and products so U.S. farmers and manufacturers could be free from reliance on foreign ship owners to transport their goods to market.[325] Domestic ship production would preclude any foreign nation from having the potential to interrupt U.S. commerce by refusing to permit its ships to carry U.S.-made goods in the event of conflict. It would also mean that U.S. residents were benefiting from the commerce on the ships rather than paying non-U.S. owners of vessels to carry their goods.

House members suggested that one way Congress could encourage more U.S.-built ships was to impose a high tonnage rate on foreign-owned vessels.[326] But, although this proposal would help the states that already had enough ships to carry their goods or the states that had the capacity to engage in shipbuilding, several states feared immediate harm from a high tonnage rate on foreign ships.[327] Certain states, especially those whose economies were centered around agricultural production, relied extensively on the use of foreign-owned ships to export their produce.[328] They strongly objected to a protectionist impulse to charge discriminately high tonnage rates on the for-

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maritime force is essentially necessary to the United States, and in time of war will be particularly employed in defence of the weaker part").

325 *See id.* at 514 (Rep. Fitzsimons of Pennsylvania, expressing concern that the states had made little progress in ship-building when "[a]t the conclusion of the last war, we were left without shipping and from our inability to carry on commerce by reason of the oppression we were subjected to, by foreign powers"); *see also id.* at 227 (Rep. Laurance: "It is known that in different parts of [the] union we have [a] variety of articles obliged to export, rice and tobacco and lumber and potash and other bulky articles. The fact is [that] we have not shipping at present sufficient for them. We must look to foreigners for ships or articles [will] perish in our hands.").

326 During the tonnage debates, members also discussed whether the tonnage rates should discriminate between nations in alliance with the United States and those that were not. *See, e.g.*, *id.* at 242, 245–50. In particular, the members described deep displeasure over certain negative trade policies that Britain had been imposing on American ships. *See id.* at 245 (Rep. Madison). In the end, the Tonnage Act did not discriminate among various foreign nations—non-U.S. owned and built ships were subject to the same tonnage policies regardless of the identity of the foreign country with which they were associated. *Cf. id.* at 244–45 (Rep. Benson of New York, questioning whether it was wise policy to discriminate between nations allied with us and those that were not and urging the House to acquire information to study the question). But members ultimately did discriminate against Great Britain through the rates of duties that they imposed on distilled spirits in the Tariff Act. *See supra* note 216. The Act charged 10 cents per gallon on spirits of Jamaica proof but only eight cents per gallon on "all other distilled spirits." Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 25 (repealed 1790).

327 *See, e.g.*, 10 DEBATES, *supra* note 33, at 245 (Rep. Burke).

328 *See, e.g.*, *id.* at 229 (Rep. Burke of South Carolina, describing how southern agricultural products had been sitting and laying waste in warehouses and expressing concern that high tonnage rates would make it worse as there were not enough U.S. ships to transport all of the southern states' produce).

eign vessels that they were using to export their goods.[329] They feared they would be the bearers of the vessels' high tonnage costs through increased shipping charges.[330]

Here again, on tonnage policies, members representing one set of states' interests were jockeying against the interests of another. The agricultural states generally cautioned against high tonnage rates because they relied on foreign-owned ships to take their products to market,[331] while the eastern states with their own supplies of ships tended to favor the high tonnage rates on nondomestic ships.[332] They all had to work together to develop national policy that would serve the union's need to raise revenue and increase its shipping capacity while not overly burdening the varied commercial needs and interests of its citizens.

During the course of debate over the tonnage bill, several members supported intermediate proposals to tone down the 60-cent tonnage rate on foreign vessels that Representative Goodhue of Massachusetts had proposed. Representatives Boudinot of New Jersey and Laurance of New York recommended a moderate tonnage rate like 30 cents per ton.[333] Tucker of South Carolina suggested that the tonnage duty on nondomestic ships should be just 20 cents per ton.[334] Others, like Representative Smith of South Carolina, suggested a multitiered approach. He recommended retaining the six-cent charge for domestic ships, charging 20 cents a ton for allies, and 30 cents a ton on British ships.[335]

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329 *See, e.g.*, *id.* at 244 (Rep. Tucker of Georgia "could not consent to such a duty as [it] would bear heavy on certain parts of the union, while it would operate as a bounty upon others. He would agree to a small additional duty on foreign ships, tho' he was confident it would be wholly paid by particular states . . . . By the calculation which he made of the tonnage employed by the town of Charleston alone, the proposed duty would amount to 40 or 50,000 dollars a year, not more than two thirds of which would go into the federal treasury.").

330 *See id.* at 227 (Rep. Laurance of New York: "If not ships of own [we] must have foreigners to transport the articles. Consequently they will charge more; our necessities form the disadvantage; so will eventually fall on ourselves.").

331 *See, e.g.*, *id.* at 229 (Rep. Burke of South Carolina: "The tonnage . . . carries extensive mischief. Every gentleman knows the nature of production of southern states. Well known fall in prices. Tobacco in warehouses, and rice loss for want of shipping. You will hurt this production.").

332 *See, e.g.*, *id.* at 242 (Rep. Goodhue of Massachusetts, proposing a 60-cent duty on tonnage because, in his view, a lower rate like 30 cents per ton would not give an advantage to our own domestic ships).

333 *See id.* (Rep. Boudinot of New Jersey, suggesting a rate of 30 cents); *id.* at 227 (urging that Congress "take care when [it] make[s] a distinction in favor of our own vessels" that it does not create a burden so high that it destroys the agriculture industry).

334 *See id.* at 444.

335 *See id.* at 441.

Anything higher—like 30 cents for allies and 50 cents for the British—would cause severe damage to his state.[336] He said that South Carolina's economy currently was in "deplorable condition."[337] The state owed large domestic and foreign debts and was relying on the exportation of its produce to pay it down.[338] Tonnage on foreign vessels so disproportionately impacted the southern states, in his view, that the duty essentially required the southern states, who lacked a supply of vessels of their own, to pay a bounty to the northern and eastern states that were supplied with ships.[339] He urged Congress to remember that the issue of tonnage was one of the potential objections that had discouraged certain states from joining the constitutional system and it would be wise for the House not to confirm that earlier opposition.[340]

Madison introduced a potential compromise. He pointed out that the states had not actually been at odds as much as they could have been.[341] And he believed that the states from the different regions throughout the country ultimately would find that their interests could be compatible.[342] He pointed out that as the economy improved and developed, the northern and eastern states would be able to build more American ships and more easily supply southern shipping needs.[343] According to Madison's research,[344] he concluded that the country already had more capacity to ship domestic goods than some of the states had previously thought. To give the southern states time to find replacements for their previous foreign shipping ties and allow for the further development of American shipbuilding, Madison pro-

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336 *See id.* at 439, 441.

337 *Id.* at 450.

338 *See id.*

339 *See id.* at 450–51; *see also id.* at 454 (Rep. Jackson, explaining that the southern states rely primarily on foreign shipping whereas the northern states "have nearly vessels enough of their own to carry on all their trade, consequently the loss sustained by them [from high tonnage rates on foreign vessels] will be but small").

340 *See id.* at 451; *see also id.* at 229 (Rep. Tucker of Georgia, imploring that a 60-cent duty would "be intolerable to the states without shipping.").

341 *See id.* at 460. *But see id.* at 517 (Rep. Smith of South Carolina replying to Rep. Madison's suggestion that high tonnage rates would favor the south because they would enable the building of a fleet for national defense by countering: "I would as soon be persuaded to throw myself out of a two-story window, as to believe a high tonnage duty was favourable to South-Carolina.").

342 *See id.* at 460.

343 *See id.* at 461.

344 *See id.* (reporting data from seven states regarding their domestic and foreign shipping needs but noting that he could not acquire data from four states).

posed that tonnage duties should be minimal until January 1, 1791.[345] At that time, he suggested, it would be easier for southern states to withstand the foreign tonnage duties because they would have built up more domestic resources to meet their shipping needs.[346] A compromise similar to this suggestion ended up in the final version of the Tonnage Act, which made the bill effective as of August 15, 1789.[347]

E. Collection and Registration Acts

On May 18, the House entered the committee of the whole to consider a measure to regulate the collection of customs duties.[348] The bill's establishment of a temporary collection system employing state revenue officers and collection methods was quickly rejected in favor of "a general and original system of regulations, operating uniformly, and embracing all the states and all objects alike."[349] After rejecting the temporary use of state revenue collection systems and deciding to start over with a federal collection system, the House tabled discussion of the collections act for a few days.[350] On June 1, it resumed consideration of the measure and began to deliberate the proper location of ports of entry and delivery for ships unloading goods[351] and several other issues such as the proper means to secure payments of duties.[352]

The issue of the effectiveness of the currently proposed customs rates came to the forefront during debate on the collection bill.[353] Representative Tucker of South Carolina pointed out that because Congress lacked experience in setting up any customs collection apparatus, its initial regulations to prevent smuggling might be suboptimal.[354] Therefore, Congress should make sure that any potential susceptibility of the system to smuggling was not exacerbated by rates that were too high.[355] The members discussed potential aspects of the

345 *See id.*

346 *See id.*; *see also id.* at 513 (Rep. Ames of Massachusetts, opining that the eastern states should be able to significantly increase their shipping capacity within one year and praising the southern states for their patriotism in "declar[ing] themselves willing to encourage American shipping and commerce").

347 *See* Act of July 20, 1789, ch. 3, § 3, 1 Stat. 27, 28 (repealed 1790).

348 *See* 10 DEBATES, *supra* note 33, at 714.

349 *Id.* at 715 (Rep. Laurance of New York).

350 *See id*.

351 *See* 11 DEBATES, *supra* note 33, at 795.

352 *See id.* at 840–41.

353 *See, e.g.*, 10 DEBATES, *supra* note 33, at 522–25.

354 *See id.* at 527.

355 *See id.*

proposed rates that could be further decreased to avoid any undue incentives for people to smuggle goods.[356] And they concluded that if Congress ever found it had erred by setting customs duties too low in this initial legislation, Congress could always fix the error by regulating a system of higher duties in the future.[357] Further, at an earlier point in a debate over whether duties on distilled spirits were so high that citizens would smuggle goods to avoid them, Madison had rejected a comparison to smuggling under British leadership by saying that citizens now had much less incentive to smuggle because under the Constitution each citizen "has an equal voice in every regulation."[358] In contrast, under British rule, the people "conceived themselves at that time oppressed by a nation in whose councils they had no share."[359] These statements suggest that Congress, as the elected representative body of the people, believed it was in charge of ensuring a cohesive plan for effective and adequate customs collection. It was not the job of an administrative apparatus to establish policies to do so.[360]

Madison also made a statement touching on the relative role of the legislature versus the executive branch when the House took a hiatus from debating customs laws to discuss the proposed constitutional amendments that became the Bill of Rights.[361] At least with regard to policymaking, Madison said:

> [I]t is, perhaps, less necessary to guard against the abuse in the executive department . . . because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least [control] . . . .[362]

F. Electoral Accountability and Governmental Constraints

Members not only deliberated in a way that would ensure their constituents' interests were reflected in governmental policy, but they also expressed concern about protecting the House's institutional role

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356 *See, e.g.*, *id.* at 526–27 (statement of Rep. Tucker of South Carolina).

357 *See id.* at 529.

358 *Id.* at 297 (statement of Rep. Madison of Virginia).

359 *Id.*

360 There is no real detail in the legislative debate records about deliberations over registration act requirements regulating how domestic ships were to register as U.S.-built ships to get the benefits to which they were entitled under U.S. law. *See* Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

361 *See* 11 DEBATES, *supra* note 33, at 822.

362 *Id.*

in the policy setting.[363] A number of members wanted to be sure the House did not impose any more taxes or legislative burdens on people than the national interest required.[364] But they also wanted to be sure they preserved their key decisionmaking role because they were cognizant that their frequent two-year direct elections meant their actions were more likely to reflect the representative will of the people than actions taken by other governmental entities.[365]

Overall, the members were so concerned about restraining the expansion of government that many of them were leery of enacting customs provisions that would operate in perpetuity. For example, Representative Madison suggested that either the Tariff Act should have an end date or the imposition of customs duties requirements should be tied to expenditure of a particular set of appropriations.[366] He wanted to make sure that Congress was not authorizing the federal government to collect revenue for things it did not need.[367] The money should be raised either to pay down the debt or to pay for a particular expense that Congress had settled on and authorized.[368] He suggested that Congress should not just give an open-ended grant of authority to indefinitely collect customs revenue.[369] Representative Lee also recommended that the Tariff Act have a termination date of three to five years in the future so that Congress could amend certain provisions if experience revealed that they were not working well.[370]

These ideas nonetheless received significant pushback.[371] Representative Ames was concerned that the United States would never be able to gain the confidence of its creditors if it failed to enact an indefinite source of revenue.[372] Other members believed that enactment of a tariff bill with no end date would be essential to the federal government's ability to acquire essential loans.[373]

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363 *See generally* 10 DEBATES, *supra* note 33.

364 *Id.*

365 *Id.*

366 *See id.* at 673.

367 *See id.*

368 *See id.*

369 *See id.*; *id.* at 676 (Rep. Madison of Virginia: "[I]t would justly alarm the apprehensions of the people, should Congress pass a law which might exist perpetually for raising taxes, subject to the adventitious [control] and direction of future administrations, without appropriations . . . .").

370 *See id.* at 671.

371 *See, e.g.*, *id.* at 677–79 (Rep. Ames of Massachusetts, advocating for a perpetual revenue measure as he believed the country would always need a source of revenue).

372 *See, e.g.*, *id.* at 677–68 (Rep. Ames of Massachusetts: "[C]ould this government secure the creditor on good ground with a fund which a few years might annihilate?").

373 *See, e.g.*, *id.* at 679 (statement of Rep. Fitzsimons of Pennsylvania); *id.* at 681 (statement

In response, some of the members favoring inclusion of an end date in the Tariff Act suggested that an even more important consideration was the House maintaining absolute control over its Article I, Section 7 authority to serve as the originator of revenue bills.[374] They contended that the power to originate revenue bills was one of the House's key powers, the power most clearly distinguishing the House from the Senate.[375] The members feared that enactment of a perpetual revenue-raising bill would shift the power over revenue legislation to one-third of the Senate and the President who could veto any future attempt by the House to amend the original bill.[376] In Madison's view, this shift in power could render government funding "independent of the people," potentially leading to "oppression."[377] If the House instead enacted just a temporary measure, the House would hold all the power to determine whether to ever initiate enactment of a new revenue measure. On May 16, the House voted 41 to 8 in favor of including a termination date in the Tariff Act.[378]

This debate, like many other components of debate over the revenue bill, shows the early Congress's understanding that accountability was key to the development and crafting of legislation. In addition to believing that the plain constitutional text mandated that the House was required to maintain core control over creation of revenue measures, members also observed that this role for the House of Representatives gave the electorate more influence over the provisions that

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of Rep. Sinnickson of New Jersey); *id.* at 683 (statement of Rep. Boudinot of New Jersey) ("He considered the want of public credit as one of the greatest evils the legislature had to encounter . . . ."); *id.* at 684 (statement of Rep. Laurance of New York).

374 *See, e.g.*, *id.* at 676 (statement of Rep. Madison); *cf. id.* at 688 (Rep. Smith of South Carolina: "[I]t would be unconstitutional to make the law perpetual . . . .").

375 *See, e.g.*, *id.* at 676 (statement of Rep. Madison); *id.* at 680 (Rep. White of Virginia, observing that the power of origination "places an important trust in our hands . . . [that] we ought not to part with").

376 *See, e.g.*, *id.* at 686 (Rep. Gerry of Massachusetts: "But what are their immediate representatives to do in case you make the bill perpetual? [T]hey may be convinced that a repeal is just, is necessary, but it will not be in their power to remedy the grievances of their constituents however desirous they may be of doing so; for although this house may originate and carry a bill unanimously through for the repeal, yet it lay in the power of the President, and the minority of the other branch of Congress, to prevent a repeal."); *id.* at 676–77 (Rep. Madison of Virginia: "[I]f there was no limitation specified, however oppressive and unequal the operation of the law, it might become perpetual, for it would not be in the power of the representatives to effect an alteration, as The President, with one third of the Senate, at any time might prevent a repeal or alteration of the act . . . .").

377 *Id.* at 676–77.

378 *See id.* at 701. The enacted bill provided that it would be in force until June 1, 1796 "and from thence until the end of the next succeeding session of Congress which shall be held thereafter, and no longer." Act of July 4, 1789, ch. 2, § 6, 1 Stat. 24, 27 (repealed 1790).

would impact their wallets.[379] During debate several members argued that the Constitution had given the House the preeminent revenue-raising role precisely because the House was the body closest to the people.[380] In contrast, the President was selected by the electoral college and Senators at the time were chosen by state legislatures only every six years. The House members, voted into office directly by the public every two years, were the best suited to reflect the public's interests. Hence, policies developed and voted on by House members would best reflect the interests of the citizenry.[381]

When they were legislating prior to the existence of any executive department, the members at times would turn to the states for helpful information about the potential impact of a certain policy or regulation. For example, they sometimes turned to background data on how much revenue their state had raised from imposing duties on a certain article to help decide what rate to impose on that article in the federal Tariff Act.[382] During the House's extensive deliberations on the proper rate of duties on molasses, the committee on the whole even postponed its business to wait for Massachusetts to collect information from state records as Massachusetts felt it would be heavily impacted by the duty on molasses.[383] The attempt to acquire information was unsuccessful; the legislative business had to move forward without

379 *See, e.g.*, 10 DEBATES, *supra* note 33, at 685 (Rep. Bland of South Carolina: "The Constitution had particularly entrusted the [H]ouse of Representatives with the power of raising money; great care was necessary to preserve this privilege inviolate, it was one of the greatest securities the people had for their liberties under this government.").

380 *See, e.g.*, *id.* at 676 (Rep. Madison of Virginia: "[T]he House of Representatives was vested with the sole power of originally applying to the pockets of the people—that on the retaining this power, inviolate, depended their most essential rights—that on this account principally, the democratic branch of the Legislature consisted of the greater number, chosen for a shorter period than the other, and consequently reverted more frequently to the mass of the citizens . . . ."); *id.* at 686 (Rep. Huntington of Connecticut, describing a perpetual bill as "parting with the power which the Constitution gave to the [H]ouse of Representatives, in authorising them solely to originate money bills").

381 *Cf. id.* at 684 (Rep. Laurance of New York, explaining that he opposed a termination date for the Tariff Act not because he believed it was permissible for the electorate to lose any influence over their government but because he believed the people were wise enough to choose solid representatives who would pass responsible appropriations and revenue-raising measures in the future).

382 *See, e.g.*, *id.* at 332 n.30 (describing the amount of revenue that states had been collecting from duties on goods like spirits, sugars, and molasses); *cf. id.* at 328 (Rep. Goodhue of Massachusetts, referring to lack of communication from his state, which meant that the House would now have to "take into consideration the article in what light we have in [our] own minds").

383 *See id.* at 334 (Rep. Goodhue of Massachusetts: "The committee ha[s] postponed the consideration of this subject, in order to indulge the members of Massachusetts with an opportunity to get information, that so they might meet the discussion with greater ability.").

it.[384] In addition to turning to the states for background data, the members also sometimes looked for a point of comparison to the actual customs policies implemented by the states with respect to certain articles.[385] From this information, the House members could get a sense of how much revenue might be raised from various states if the federal government imposed a similar duty.[386] Or the members might be able to predict how congenially states would respond to various customs rates based on the extent to which the proposed federal policy differed from former state law.[387]

A few weeks later, on May 12, Representative Gerry of Massachusetts again made remarks that touched on the issue of how Congress would get information to help formulate effective and appropriate legislation. In a debate about whether Congress needed to significantly decrease the proposed duties under consideration to make collection more certain, Gerry suggested that the enactment of somewhat initially restrained legislation was the more prudent way to govern and build a body of beneficial policies.[388] He said that before Congress imposed tough duties on important goods, it should have more information.[389] Such information could be gathered by the enactment of relatively cautious duties that could then be gradually increased through subsequent legislation if the nation could bear it.[390] So, here again, rather than reliance on a developed administrative apparatus, members were viewing congressional legislation as the vehicle for development of national policy and economic regulation.

Throughout their efforts to establish a revenue system, the members were attentive to constitutional restraints. Beyond keeping their focus on the reasons why the states and citizens had agreed to hand over some of their power to join the new system in the first place,[391] members also wanted to be sure their new laws did not extend beyond the limits of their constitutional power. One such consideration arose

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384 *See id.*

385 *See, e.g.*, *id.* at 335 (noting the impost rate on molasses in New York, Virginia, and Massachusetts).

386 *See id.*

387 *See id.* (Rep. Goodhue of Massachusetts, intimating that Massachusetts residents might take "umbrage" at a high impost on a good for which their state had previously imposed no charge).

388 *See id.* at 612–13. This debate occurs while the House is in a committee of the whole to reexamine the previous decision to impose a six-cent duty on molasses. That same day the committee voted to change the duty from six cents to five. *See id.* at 607, 612–13, 622–23.

389 *See id.*

390 *See id.* at 612.

391 *See, e.g.*, *supra* note 340 and accompanying text.

in the specific context of the customs laws. Several members wanted to be sure that the draft committee provision imposing a six-cent tonnage rate on U.S.-owned ships did not transgress the Article I, Section 9 admonition, "nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another."[392] This debate arose on May 4 when the House took up the committee of the whole's recommended tonnage provision imposing the six-cent-per-ton rate on domestic ships.[393]

Representative Laurance of New York observed that if Representative Bland's concerns about the constitutionality of tonnage were warranted, tonnage would be constitutionally prohibited with respect to foreign vessels as well as domestic ships.[394] Representative Madison of Virginia also pointed out that the section 9 provision had to be read in light of the Constitution's authorization for Congress to regulate interstate and foreign commerce.[395] Innate to that power was the ability to collect duties, which necessarily would involve requiring vessels to enter and clear ports.[396] The members rejected Bland's concerns almost immediately. They concluded that the section 9 restriction meant just that vessels traveling from one state to another or traveling between a state and a foreign country could not be required to enter and pay a duty at a third, intermediate location.[397]

III. Delegation Limits, Extended Beyond the Customs Debates

The day after enactment of the final component of the first set of customs laws, the House enacted legislation to establish the Treasury Department.[398] Soon after Treasury Secretary Hamilton's confirmation on September 11, 1789,[399] the House began to turn to him for his expertise on revenue-related matters. But the interaction between Congress and Secretary Hamilton ultimately further underscored Congress's exclusive role as the decisionmaking body for creation of new rules and binding policies.

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392 U.S. Const. art. I, § 9; *see, e.g.*, 10 Debates, *supra* note 33, at 394, 408 (Rep. Bland of Virginia, raising the question and Rep. Fitzsimons of Pennsylvania, noting the question whether the Constitution permits a tonnage requirement on vessels).

393 *See* 10 Debates, *supra* note 33, at 391–96.

394 *See id.* at 394.

395 *See id.* at 395.

396 *See id.*

397 *See id.* at 408.

398 *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

399 *See* S. Journal, 1st Cong., 1st Sess. 25 (1789).

A. Treasury Act

The members did not begin discussion of legislation to establish the Treasury Department until late May. The debate began with a brief deliberation about whether the Treasury office should be headed by a single individual or a multimember board.[400] Representative Gerry of Massachusetts believed that a board should run the department because the initial motion to establish the Treasury office gave it duties that were "too numerous and complicated to be discharged and executed by any one."[401] Gerry's motion for a multimember board was rejected "without a dissenting vote."[402] Gerry's understanding of the powers to be held by the head Treasury officer included the power to examine the public debt, receive and then disburse federal revenue, govern federal finances, and recommend plans to improve and expand the federal revenue system.[403] In addition, the Treasury head would superintend all of the department's lower-level officials including customs collectors at scores of ports.[404]

Gerry was particularly concerned about the possible unchecked power of such an officer, including concern that the office might lend itself too easily to embezzlement of funds.[405] Representative Abraham Baldwin of Georgia proposed that these accountability concerns could be addressed by restrictions keeping financial accounts out of the control of the Treasury Secretary himself. Specifically, he recommended that "[t]he settling of the accounts should be in the auditors and comptroller, the registering them to be in another officer, and the cash in the hands of one unconnected with either."[406] The act creating the Treasury Department reflected these concerns, imposing these kinds of constraints to greatly reduce the possibility for financial corruption.[407]

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400 *See* 10 DEBATES, *supra* note 33, at 741–42.

401 *Id.* at 741.

402 *Id.* at 742.

403 *See id.* at 746.

404 *See id.*

405 *See id.* at 741, 746–49.

406 *Id.* at 755; *see also id.* (Rep. Madison of Virginia, making similar suggestions and supporting Baldwin's proposal).

407 The act creating the Treasury Department incorporated these suggestions in large measure, splitting up the responsibility for the maintenance and recording of public accounts. *See generally* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 66. And in places where the Treasury Secretary did have control over disbursement of federal funds, such as the authority to sign warrants for money issued from the federal Treasury, these warrants had to be countersigned by another official, the Comptroller. *See id.* §§ 2, 3, 1 Stat. at 66. The actual disbursement of the money itself

Still, Gerry contended, the proposed Treasury legislation would put the Secretary in charge of devising plans to "improve the revenue," which he had taken "to be the peculiar business of the federal legislature."[408] Members advocating for a Treasury Secretary like this were essentially supporting the creation of a one-man legislature, he complained.[409]

The House's Treasury legislation ended up addressing this concern. Even though the House did not adopt Gerry's initial proposed solution of dividing the leadership of the executive department among several coequal board members,[410] the Treasury Act responded by making clear that the Treasury Secretary was to recommend measures to Congress rather than have any kind of decisive weight over legislative proposals.[411] When the House resumed consideration of the bill to create the Treasury Department on June 25, Representative Page of Virginia moved to strike the provision authorizing the Treasury Secretary "to digest and report plans for the improvement and management of the revenue and the support of public credit."[412] He thought it was the House's duty "to originate all plans for raising a revenue, and that it was unnecessary and improper that an executive officer should have this power."[413] Representative Tucker also thought the clause as originally drafted might be interpreted to hand over to an executive official the kind of policy developing power that should be exercised by the House of Representatives.[414] Further, Tucker believed "it was the business of the President to submit measures to the legislature" and that the Secretary should work through the President even if the Secretary were to make recommendations.[415]

Several members disagreed and believed it was fine for the Treasury Secretary to propose plans or provide information to the House.[416] For example, Representative Ames of Massachusetts said, "If the secretary of the treasury might be presumed to have the best knowledge of the finances of this country, and if this house was to act

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was made by yet a different officer, the Treasurer. *See id.* § 4. And a fourth officer, the Register, was to keep a record of the warrants for payments of federal funds. *See id.* § 6, 1 Stat. at 67.

408 10 DEBATES, *supra* note 33, at 756.

409 *See id.*

410 *See id.* at 742.

411 *See* 11 DEBATES, *supra* note 33, at 1076.

412 *Id.* at 1045.

413 *Id.*

414 *See id.*

415 *Id.*

416 *See, e.g.*, *id.* at 1045 (recording Benson and Goodhue's support for the measure as originally drafted).

on the best information, it seemed to follow logically, that the house must obtain intelligence from that officer."[417]

But rather than debating whether the Treasury Secretary could develop and adopt new financial regulations on his own,[418] they debated whether the Secretary could provide the House with relevant factual data and recommendations that Congress might choose to adopt.[419] For example, one of the defenders of the original language protested that "it was carrying jealousy too far to contend that all the information which was requisite in forming systems of revenue, should be drawn from no foreign quarter, but should originate within these walls."[420] This debate was a far cry from the deliberations in contemporary practice about what portion of the policymaking *decisions* can be made by the executive branch rather than the legislature.[421]

The members at the time were concerned about the Treasury Secretary having too much power over legislation even through the submission of *recommended* policy measures.[422] In the end, members generally favored the ability of the House to receive information and advice from the Secretary and many members thought it was constitutionally permissible for the Secretary to propose revenue plans to the

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417 *Id.* at 1046.

418 *See id.* at 1048 (Rep. Sedgwick of Massachusetts, noting that the House would have "a spirit of independence" that the executive branch could not subsume even though he also believed it would be close to impossible for a diverse legislative body from a diverse group of states to come up with one cohesive revenue plan in the first place, apparently suggesting that the House could use the benefit of a financial export to provide it with recommended revenue plans).

419 *Compare, e.g.*, *id.* at 1045–46 (Rep. Page of Virginia, opining that it is the duty of the representatives "to inform themselves" and that they could establish a congressional finance committee to craft legislative proposals), *with id.* at 1047–48 (Rep. Sedgwick, contending that development of a revenue system "was a subject which required the closest application, the longest study, and the most extensive survey of things, to render persons adequate to the task"). *See also* POSTELL, *supra* note 7, at 76–77 (describing multiple congressional debates over requests for reports and recommendations from executive officials and noting that the government officials "defending these practices did not reject the principle of nondelegation" but "affirmed the propriety of relying on information received from department heads" only if "Congress had the last word in passing legislation in response to the information"); WHITE, *supra* note 38, at 72–73 (indicating that even the members who supported solicitation of data and recommendations from the Treasury Secretary "warmly supported the capacity of Congress to decide on the virtue of the plans presented to it and to work out alternatives").

420 11 DEBATES, *supra* note 33, at 1044–45.

421 *See supra* text accompanying note 2; *cf.* 11 DEBATES, *supra* note 33, at 1045 (Rep. Benson, questioning "whether the public credit would ever be restored, unless an individual had the management of the business").

422 *See generally* 11 DEBATES, *supra* note 33.

House.[423] So the House eventually voted on June 25 to amend the original draft bill and permit the Secretary only to "digest and *prepare* plans for the improvement and management of the revenue"—not to *report* plans.[424]

B. Actual Treasury Practice: Hamilton Reports

Once Secretary Hamilton was in office, the House took full advantage of its decision to statutorily authorize the Treasury Secretary to report information and prepare recommended revenue plans.[425] The House repeatedly ordered the Secretary to report complex data and provide policy recommendations.[426] And the Secretary complied, at times with enormous depth and a great level of detail.[427] For example, he submitted reports on matters ranging from estimated projections of federal expenditures[428] to legislative proposals on public credit,[429] and from a national bank[430] to development of a recommendation about federal assumption of state debts.[431]

Hamilton's 1790 report on the collection of customs duties over the first few months of the collection and tariff acts' operation was particularly informative regarding the early relationship between Congress's enactment of policies and the executive branch's role in carrying them out.[432] At several points in this report Hamilton referred to questions of legal interpretation that had arisen in the course of carrying out customs operations.[433] He turned to Congress to provide an-

423 *See, e.g.*, *id.* at 1060 (Rep. Benson of New York, pointing out that none of the Secretary's plans would be effective unless approved and enacted by the House).

424 *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (emphasis added) ("[I]t shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue . . . ."). This vote followed on the heels of a vote to reject Rep. Page's more far-reaching motion to strike the "digest and prepare plans" clause entirely. *See* 11 DEBATES, *supra* note 33, at 1075–76.

425 *See, e.g.*, Alexander Hamilton, *Money Received from, or Paid to, the States* (1790), *in* 5 AMERICAN STATE PAPERS, 1789–1815, at 52 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) [hereinafter Hamilton, *Money Received*]; Alexander Hamilton, *Public Credit* (1790), *in* 5 AMERICAN STATE PAPERS, 1789–1815, at 15 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) [hereinafter Hamilton, *Public Credit*].

426 *See, e.g.*, Hamilton, *Money Received*, *supra* note 425.

427 *See id.*

428 *See, e.g.*, *id.* at 52–62.

429 *See* Hamilton, *Public Credit*, *supra* note 425, at 15–23.

430 *See id.* at 25.

431 *See id.*

432 *See generally* Alexander Hamilton, *Operation of the Act Laying Duties on Imports* (1790), *in* 5 AMERICAN STATE PAPERS, *supra* note 425, at 45, 45–52 [hereinafter Hamilton, *Duties on Imports*].

433 *See id.* at 45 ("The Secretary, conceiving it to be a clear point, that the duties, imposed

swers and legislate solutions.[434] For example, the Tariff Act expressly imposed specific tariff rates on hemp and cotton starting December 1, 1790.[435] But the act had also expressly exempted cotton from a catch-all five percent *ad valorem* duty effective on all unenumerated goods as of August 1, 1789.[436] Secretary Hamilton pointed out that the combination of the two provisions suggested that, unlike cotton, hemp was nonexempt from the five-percent duty during the 1789–1790 time period.[437] But Secretary Hamilton inquired of Congress whether that was the correct interpretation.[438]

At other points Hamilton identified ambiguities in the customs laws. In contrast to practice today, which assumes that gaps delegate authority to administrative agents to take a range of acceptable actions, Secretary Hamilton reported back to Congress for guidance. Specifically, section 12 of the Collection Act provided that ships may unload goods only in "open day."[439] Hamilton suggested it would be helpful for Congress to clarify this command by specifying that the term "day" included "particular hours for the purpose, according to different seasons of the year."[440]

Finally, soon after the customs laws were in full operation, weather started to become a hindrance to unloading goods at the Philadelphia port. Customs officials wanted to authorize the unloading of goods at a nearby port not impacted by the weather. Rather than believing themselves to have the discretion to slightly alter the location of one of the customs ports of delivery, the Treasury Department turned to Congress for a legislative fix. On December 29, 1790, the committee of the whole considered a bill to authorize the Philadelphia collector "to permit the landing of merchandize below the city when ice impedes the navigation."[441] The members also considered amendments to grant that same authority to collectors in other U.S. ports facing similar situations,[442] and the bill was enacted on January 7,

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by the first mentioned act, accrued as debts to the United States, on all goods imported after the day specified for their commencement. . . . The enforcement of the claim would therefore be likely to be thought rigorous. . . . There must also be difficulty in ascertaining the sums which ought to be paid.").

434 *See id.*

435 *See* Act of July 4, 1789, ch. 2, § 2, 1 Stat. 24, 26 (repealed 1790).

436 *See id.* § 1, 1 Stat. at 26.

437 *See id.*

438 *See id.*

439 Hamilton, *Duties on Imports*, *supra* note 432, at 48.

440 *Id.*

441 14 DEBATES, *supra* note 33, at 206.

442 *See id.*

1791.[443] This episode shows not only that Congress and the Treasury Secretary collectively believed that it was Congress's responsibility to change laws even for matters as relatively minor as slightly altering the location of the unloading of goods; it also demonstrates that Congress, when it believed it had to carry out such a task, was able to complete the job. It offers an example of the use of administrative expertise to help identify a needed rule change and convey that need to Congress. Congress in turn acted on the agency expertise by legislating the required regulatory update.

C. Nondelegation Outside of the Customs Laws

In addition to the legislative-executive branch revenue practices that revealed a shared understanding of limits on Congress's power to delegate policymaking authority, members of Congress discussed constitutional delegation restraints in other legislative contexts as well. Following are several examples.

1. Land Office

On June 29, 1789, the House briefly discussed a committee report on legislation to address "the state of the unappropriated lands in the western territory."[444] The land legislation was connected to the Treasury bill in that the draft bill authorized the Secretary "to conduct the sale of the lands belonging to the United States, in such a manner as he shall be by law directed."[445] Softening the Secretary's power a bit, the House changed the provision to authorize the Secretary to "execute such services respecting the sale of the lands" as the law required.[446]

Further, in late December 1790, the House took up consideration of a report from the Treasury Secretary regarding the establishment of offices to manage land sales in the northwestern territory.[447] Various members objected to the idea that land office officials could fix the sale price for the federal land.[448] Instead of leaving the price-setting, or even establishment of a range of prices, up to the land office, the

443 *See* Act of Jan. 7, 1791, ch. 2, 1 Stat. 188.

444 11 DEBATES, *supra* note 33, at 1079.

445 *Id.*

446 *Id.*

447 *See* 14 DEBATES, *supra* note 33, at 196.

448 *See id.* at 196–200.

members voted to sustain an earlier legislative proposal that had set the price of 30 cents per acre to be paid in either silver or gold.[449]

2. *Postal Routes*

Similarly, during the April 1790 debate over legislation to establish the post office under the new government, some members raised concerns over delegating too much authority to executive branch actors. For example, when Congress took up a draft post office bill during its second session, there was a motion early on to strike out a draft clause that "empower[ed] the President of the United States, to establish post-offices and post roads."[450] Those supporting the measure observed that "this is a power vested in Congress by an express clause in the Constitution and therefore cannot be delegated to any person whatever; the objects that are connected with this power are of great weight in themselves and are properly cognizable by the Legislature of the Union only."[451]

The Senate, when it considered the House bill, had amended it with a provision giving the Postmaster General discretion over selecting postal routes.[452] Some House members agreed with this approach, believing that the Postmaster General had beneficial relevant expertise.[453] But in the end, the House rejected the Senate's approach.[454] Some members observed that individual local representatives would be better equipped to understand which parts of the country were in most need of postal routes.[455] And another explicitly cited the difficulty that the President would have in representing, and responding,

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449 *See id.* at 196–205 (explaining the original proposal and recording the rejection of attempts to give the land office discretion in price-setting).

450 13 DEBATES, *supra* note 33, at 1011.

451 *Id.*

452 *See id.* at 1691.

453 *See id.* at 1686.

454 *See id.* at 1691 (rejecting various Senate amendments authorizing executive discretion); *cf. id.* at 1570 (rejecting House members' recommendations to give the Postmaster General more discretion in selecting routes).

455 *See generally id.* at 1686 (summarizing views during a relevant House debate in July 1790). *But see id.* (indicating that at least two members thought the Postmaster General would have the most relevant expertise in selecting postal routes). *See also* WHITE, *supra* note 38, at 77–79, 78 n.6 (describing these debates and reporting that "the Federalists tried on five successive occasions to vest the [postal route] power in the executive but without success" and that Congress repeatedly reaffirmed this stance in subsequent years, retaining broad policymaking power over the post office and authorizing executive discretion only for basic administrative matters).

to the needs of the far reaches of the country "least favoured" by the bill, which would take up a great deal of time.[456]

The First Congress never reached consensus on a measure to create a permanent new post office institution or specify the postal routes under the new government. Instead, in 1789, 1790, and 1791, Congress passed measures authorizing the post office to temporarily continue operating under the postal regulations instituted by the former government under the Articles of Confederation.[457] When Congress did reach agreement to enact substantive new legislation establishing postal routes in 1792, Congress acted in great detail.[458] The measure extended over seven pages in the statutes-at-large and contained 29 sections.[459] It specified the starting and ending point for each postal road and detailed which towns and cities must be included along each route.[460]

3. Boundary Setting for the Future Capital City

Some members also raised concerns about delegating too much broad decisionmaking authority to the executive in the context of debates over the Residence Act, which provided for the establishment of a permanent seat of government.[461] When the committee of the whole first reported the measure to the full House, the legislation provided "[t]hat the permanent seat of the government of the United States, ought to be at some convenient place on the east bank of the river Susquehanna, in the state of Pennsylvania."[462] The bill authorized the President to appoint commissioners, and together with them, decide where along the Susquehanna the capital city should be built.[463] Representative Tucker objected that the bill was "totally inadmissible."[464] He contended that the bill in its current form gave a "discretionary power, to the president of the United States," that should belong to

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456 14 DEBATES, *supra* note 33, at 357 (Rep. Sherman, speaking in a relevant debate in the third session of the First Congress).

457 *See* Act of Mar. 3, 1791, ch. 23, 3 Stat. 218; Act of Aug. 4, 1970, ch. 36, 2 Stat. 178; Act of Sept. 22, 1789, ch. 16, 1 Stat. 70.

458 *See generally* Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

459 *See id.*

460 *See id.* at § 1, 1 Stat. at 232.

461 *See* 11 DEBATES, *supra* note 33, at 1464.

462 *Id.* at 1469.

463 *See id.* at 1464 (Rep. Tucker of South Carolina, referring to the bill as fixing "a line, on some part of which the commissioners are authorised, by and with the advice and consent of the president, to purchase such quantity of land as they think proper").

464 *Id.*

the legislature alone.[465] As initially drafted, the bill would authorize selection of the new national capital anywhere along a line of 500 to 600 miles in length.[466] Tucker pointed out that creation of the permanent seat of government was "to be a matter of great consequence to every part of the union" and "no body of men ought to exercise" that discretionary power, "but ourselves, with the other branch of the legislature."[467] That said, when Tucker made a motion that the commissioners be required to report to Congress to make the ultimate decision on the new capital's boundary lines, rather than reporting to the President, the House rejected the measure by a vote of 21 to 29.[468]

Nonetheless, later that month, when the House resumed its consideration of the measure, Representative Smith of Maryland proposed to limit the President and commissioners' choice of land to "the banks of the Susquehanna, between Checkiselungo-creek and the mouth of the river."[469] Representative Joshua Seney of Maryland seconded the measure, and Representative Thomas Hartley of Pennsylvania also expressed support for restraining the President and commissioners' choice in the matter to "as near the spot contemplated as possible."[470] The legislation eventually passed the House still containing the original language that gave the President broad discretion in selecting the permanent location for the nation's capital.[471] But after the Senate considered the measure and conferred with the House, the measure in its final form more substantively restrained the President's choice.[472] In the end, the enacted legislation provided that "a district of territory, not exceeding ten miles square" be located "on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue."[473] Within those boundaries, the commissioners were authorized to purchase "such quantity of land on the eastern side of the said river . . . as the President shall deem proper for the use of the United States."[474]

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465 *Id.*

466 *See id.*

467 *Id.*

468 *See id.* at 1464–65.

469 *Id.* at 1492.

470 *Id.*

471 *See, e.g.*, *id.* at 1506 (describing the Senate's amendment to significantly restrain discretion in selection of the capital location).

472 *See id.* at 1506–07 ("A district, of ten miles square; bounded, on the south, by a line running parallel at one mile's distance from the city of Philadelphia; on the east, by the river Delaware, and extending northerly and westerly, so as to include Germantown.").

473 Act of July 16, 1790, ch. 28, § 1, 2 Stat. 130, 130.

474 *Id.* § 3.

4. Accounting Statements

Various reports contained within the *American State Papers* also suggest that the early understanding was that Congress must legislate in great detail. In May 1790, the Treasury Secretary complied with a House of Representatives order to submit a statement accounting for the money that each state had repaid into the federal treasury.[475] In the report the Secretary and Register of the Treasury expressed concern that Congress had not legislatively specified the proper conversion rate for calculating the value of old continental bills of credit.[476] The treasury officers had tried to prepare as accurate a report as possible but were not sure how to calculate the debts repaid by the states without legislative specification of the proper valuation of continental bills.[477] The treasury officers reported that they had made their statements "as accurate as the treasury records will admit, yet, as there is no legislative guide on a question of so great importance, the treasury officers have felt themselves exceedingly embarrassed."[478] They were bound to create the report required by the House but they believed "they could not presume to affix a scale not warranted by any act of the Legislature."[479] Rather than use their own discretion to discern a proper conversion rate, they "on this occasion, governed themselves by the only existing regulation of the late Congress."[480]

This modest determination is telling. Even in an area where one might think that Treasury officials would have particular expertise—determination of the proper valuation of currency—high-level treasury officials nonetheless declined to exercise such discretion. Instead they felt compelled to rely on a legislative determination of the proper valuation of old continental currency.

Conclusion

The members of the First Congress shared a significantly different expectation of their role than contemporary legislators. They turned to the executive branch for information and to receive recommendations. But members of Congress viewed themselves as the actors responsible for reaching finely grained policy determinations that would impact and bind the public. They understood this as their con-

475 *See id.*

476 *See id.* ("[T]here is no legislative guide on a question of so great importance . . . .").

477 *See id.*

478 *Id.*

479 *Id.*

480 *Id.*

stitutionally mandated role. The key role of legislative agreement reached through compromises among often-conflicting electoral interests was essential to the federal separation of powers and to preservation of the interests of states and citizens from diverse regions and districts throughout the union.