

## States Rights? What States' Rights?: Implying Limitations on the Federal Government from the Overall Design

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In recent years, the Supreme Court has been finding and strengthening judicial doctrines constraining the federal government in favor of the states, in ways which have no specific justification in the constitutional text. The Supreme Court has found, for example, that the federal government may not prohibit guns on school property,<sup>1</sup> may not create a federal civil damages remedy for rape,<sup>2</sup> and may not demand that local sheriffs check arrest records for federal gun control laws.<sup>3</sup> The states are newly immune from suit by individuals to enforce federal labor standards,<sup>4</sup> and federal trademark and patent remedies.<sup>5</sup> State agencies are immune from federal administrative process of an adjudicative nature.<sup>6</sup> There is a “relatively stable majority [of the Supreme Court], Professor Richard H. Fallon has concluded, “[that is] committed to enforcing limits on the

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1. *United States v. Lopez*, 514 U.S. 549, 551-52 (1995).

2. *United States v. Morrison*, 529 U.S. 598, 619 (2000).

3. *Printz v. United States*, 521 U.S. 898, 935 (1997). *See also* *New York v. United States*, 505 U.S. 144, 149 (1992) (federal government may not force states to take responsibility for nuclear waste).

4. *Alden v. Maine*, 527 U.S. 706, 732 (1999).

5. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999). *See* *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996), which is the seminal (as well as *Seminole*) case holding that the Eleventh Amendment gives the states substantive immunity that Congress can not abrogate.

6. *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (state sovereign immunity extends to federal administrative adjudication brought by private party). *But see*, *N. Ins. Co. of New York v. Chatham County*, 547 U.S. 189, 197 (2006) (sovereign immunity does not extend to counties).

federal power and to protecting the integrity of the states.”<sup>7</sup> In creating the new restrictions, the Court has been going beyond the words of the Constitution to find that the restraints on federal power are “fundamental postulates implicit in the constitutional design.”<sup>8</sup> The Supreme Court says that its newly found anti-federal, pro-state moves rest on the “overall structure and design,” “the plan of the convention,”<sup>9</sup> or “the system of federalism established by the Constitution.”<sup>10</sup>

In *Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution*<sup>11</sup> I argued that the newly found state immunities and constraints on the federal government do not have a reasonable foundation in the historical Constitution. The historical Constitution was a nationalizing act, written to empower an imbecilic and impotent confederation-level government, and to end the supremacy of the states. Our Constitution is first a historical document, a product with a specific program for a time and place. The historical Constitution was a nationalizing weapon directed against the states.

The purpose of the historical Constitution was to empower the national government, not to limit it. As James Wilson said to the Convention, “[i]t has never been a complaint agst. Congs. that they governed overmuch. The complaint has been that they have governed too little.”<sup>12</sup> Or

7. Richard H. Fallon, Jr., *The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002). Professor Gordon Wood has argued that no one has described the Constitution as having a design of limiting the federal government and protecting states rights. “This is news to me,” Wood said, “and not at all credible. *I know of no interpretation of the origins of the Constitution that has ever claimed such a thing.*” Gordon Wood, *How Democratic is the Constitution*, N.Y. REV. OF BOOKS, Feb. 23, 2006, at 25 (emphasis added) (reviewing my *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* 2005). Wood is an eminent historian, but he does not apparently recognize developments within the discipline of law.

8. *Alden v. Maine*, 527 U.S. 706, 729 (1999).

9. *Id.* at 730.

10. *Id.*

11. Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution* (2005) [hereinafter *RIGHTEOUS ANGER*].

12. James Wilson, *Address at the Federal Convention* (July 4, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 10 (Max Farrand ed., 1911) [hereinafter *FARRAND’S RECORDS*].

as Madison had to explain to Jefferson, when Jefferson returned to America, “[t]he evils suffered and feared from weakness in Government . . . have turned the attention more toward the means of strengthening the [government] than of narrowing [it].”<sup>13</sup>

As *Righteous Anger* argued,

The most pressing need for the historical Constitution was to give the federal government a source of revenue to restore its ability to borrow. Under the Articles of Confederation, which preceded the Constitution, the federal government had the responsibility for the common defense, but it had no power to raise money except by requisitions upon the states. When the Revolutionary War ended, the states stopped paying their requisitions. The Requisition of 1786, the last before the Constitution, “mandated” payments by the states, mostly to make current payments to the Dutch creditors to avoid default on the Revolutionary War debts. The requisition required payments of \$3.8 million, but collected only \$663. The federal government was destitute—“impotent” and “imbecilic” in the wording of the times.

There had been proposals in 1781 and in 1783 to give the federal government its own tax, a five percent “impost,” or tax on imports. The impost proposals required an amendment to the Articles of Confederation, however, and that in turn required unanimous ratification by the states. The impost proposals were vetoed, however, the first by Rhode Island and the second by New York.

The Founders were desperate. When war came again the federal government would need to borrow again. Without a source of revenue, the federal government could not borrow. This coastline nation was vulnerable to attack by sea by any of three rapacious empires and it could pay for neither a sloop nor a gun to defend itself.

The Founders were angry at the states for their defaults on the requisitions and for their vetoes of the federal impost. The failure of requisitions was due to *evil* and *shameful* acts by the states. Rhode Island’s veto of the 1781 impost was the “quintessence of *villainy*.” Rhode Island was a detestable little corner of the Continent that “injured the United States more than the worth of that whole state.”<sup>14</sup>

The states in their failure to pay requisitions and their vetoes of the best alternative were endangering the republican experiment. We had fought a long war for

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13. Letter from Madison to Jefferson (Feb. 4, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON 146, 150 (Julian P. Boyd ed., 1961).

14. RIGHTEOUS ANGER, *supra* note 11, at 1-2 (citations omitted).

independence against the most powerful nation on earth as “a band of brothers.”<sup>15</sup> The states were betraying the great cause of the Revolutionary War.

Any interpretation of the overall structure of the Constitution should be consistent with its historical programmatic meaning. If history determines these things and there is a conflict between state and federal government not governed by the writing, the presumption or default rule implied by the document as a historical act should be that the federal side wins the conflict. It should be very hard to find a hard constraint or limitation on the federal government or states’ rights from the overall design of a document that overall was trying so hard to invigorate the federal government and to transfer power from states to the new national government. The specifics of the issue of the conflict matter. Still if one is going use the grand design of the historical Constitution to generate a rule, all other things being equal, the result should favor the federal government in the conflict with the states.

In *Recovering “From the State of Imbecility,”*<sup>16</sup> Professor Keith Whittington,<sup>17</sup> reviewing *Righteous Anger at the Wicked States*, defended a vigorous sense of states rights and limitations on the federal government in favor of the states in the face of the argument in *Righteous Anger* that in the historical Constitution states rights were neither very vigorous nor important. Professor Whittington is a gracious reviewer. I am grateful for his kind descriptions of the book in passing.<sup>18</sup> He accepted, on his way, much of the argument

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15. A Citizen of New York (John Jay), Address to the People of the State of New York (Spring 1788), in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 496, 502 (Jonathan Elliot ed., 1901) [hereinafter ELLIOT’S DEBATES].

16. Keith Whittington, *Recovering “From the State of Imbecility,”* 84 Texas L. Rev. 1567 (2006) [hereinafter *Recovering*].

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18. Johnson is “admirably clear” and “marshals copious historical evidence.” *Recovering*, *supra* note 16, at 1570. *Righteous Anger* “deepen[s] our understanding of constitutionalism,” and is a “a useful corrective.” *Id.* at 1575, 1586.

of the book.<sup>19</sup> Still, Professor Whittington argued that (1) *Righteous Anger* did not give enough attention to the limitations of the Federal government in the words and text of the Constitution and in the source of Federal authority, and (2) that righteous anger at the states does not contribute very much to explaining why the Constitution was adopted. Whittington's objection (1) is about constitutional law and his objection (2), on causes of the Constitution, is about history. *Righteous Anger* is both a book about interpreting the legal meaning of the Constitution and a book of history on why the Constitution was adopted. I defend the *Righteous Anger* here, on both constitutional law and constitutional history. A final section here asks how valid constitutional history can be expected to relate to binding constitutional law and responds that history can correct errors, but is probably not binding on us.

#### I. WHAT IS THE OVERALL CONSTITUTIONAL DESIGN?

Constitutional limitations on the power given to the federal government are said to arise from the text of the Constitution, and from the legitimating source of the federal government. Whittington also argues that looking to the "pivotal voter" would rein in the nationalistic vigor of the Constitution, and that the purpose of all constitutions is to limit the power of the state. This section responds, finding no significant limitation on the federal government in any of the arguments.

##### A. *What Written Limitations?*

In *Recovering "From the State of Imbecility,"* Professor Whittington argued that *Righteous Anger* largely "ignores the constitutional text,"<sup>20</sup> "the details of the product of the Convention,"<sup>21</sup> and the "particular provisions of the Constitution as adopted."<sup>22</sup> That misstates the issue at stake

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19. "Granting that the movement to draft the Constitution was one directed to building a more powerful national state." *Id.* at 1578. "[T]he fiscal crisis . . . undoubtedly contributed to the creation of the Constitution." *Id.* at 1585-86 (emphasis added).

20. *Recovering, supra* note 16, at 1583.

21. *Id.* at 1586.

22. *Id.* at 1583.

here because the new “overall structure and design” doctrines are themselves not textual arguments relying on some specific words, sentences, or details. I do not mean to deny that proponents of an overall structure and design argument would say that their argument is *grounded* in the constitution in some way. Still, an overall-structure-and-design argument means the conclusion sought is not forced by specific words and you need to go beyond the words. Professor Whittington, in trying to find more state power, did not himself parse text, nor quote; did not cite nor rely on any text. *Recovering* cites the Constitution only once, and the cite is not to a *limitation* on the federal government.<sup>23</sup> The Supreme Court’s new doctrines are limitations found beyond or in spite of the writing.

Indeed, the most important limitation on the federal government, the enumerated power doctrine, has only dubious support in the constitutional text, and the most important written state power, the clause requiring states to give permission for loss of territory, was and remains of modest importance.

1. *Deletion and Defeat of “Expressly Delegated.”* The most important constitutional limitation on the federal government in favor of the states is the enumerated power doctrine, which holds that Congress has no implied or plenary power but only the powers written in the Constitution. The doctrine at best has a “dubious” grounding in the text.<sup>24</sup> Article I, section 8 of the Constitution does provide for a list of powers that the Congress is to have. The Constitution does not say, however, that the list is exhaustive. Indeed, the Framers, with care and deliberation, took out the language making the list in section 8 exhaustive and refused to put it back when challenged. Given the full history, the list of powers in section 8 seems best read as an illustrative list of the kinds of things that Congress might do for the common defense

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23. *Id.* at 1579 n.75 (citing U.S. CONST. art. VII to the effect that ratification required supramajority but not unanimous support, and citing U.S. CONST. art. I, § 7 to the effect that ordinary legislation required only majority support).

24. This section is a condensed version of the argument in Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005).

and general welfare—a list of campaign promises perhaps—but it is not an exhaustive list.

Article II of the predecessor Articles of Confederation had provided that Congress would have only the powers “expressly delegated” to it.<sup>25</sup> The limitation had been added to the Articles for fear that a future Congress could “explain away every right belonging to the States, and to make their own power as unlimited as they please.”<sup>26</sup> Before the “expressly delegated” limitation was added, John Dickinson’s 1776 draft of the Articles of Confederation had listed Congressional powers, without stating whether the list was exhaustive or illustrative.<sup>27</sup> Benjamin Franklin’s 1775 draft of the Articles had listed powers for the national Congress, but explicitly made the list *illustrative* rather than exhaustive.<sup>28</sup> In the final, ratified Articles, the listed powers were expressly exhaustive of all the powers Congress would have.

The Committee of Detail, which wrote the first draft of the Constitution in Philadelphia, copied the Articles in structure and language, but they took out the old “expressly delegated” language.<sup>29</sup> Governor Edmund Randolph of Virginia, who was on the Committee of Detail, explained to the Virginia Ratification Convention that the expressly-delegated limitation was removed because it had proved “destructive to the Union.”<sup>30</sup> Even the federal passport had been challenged, Randolph said.<sup>31</sup>

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25. Articles of Confederation art. II, in 19 J. CONTINENTAL CONG. 214 (1912).

26. Letter from Thomas Burke to Governor Richard Caswell of North Carolina (Apr. 29, 1777), in 6 LETTERS OF DELEGATES TO CONGRESS 671, 672 (Paul H. Smith et al. eds., 1980) [hereinafter LETTERS OF DELEGATES TO CONGRESS].

27. Josiah Bartlett’s and John Dickenson’s Draft Articles of Confederation, in 4 LETTERS OF DELEGATES TO CONGRESS, *supra* note 26, at 223, 246.

28. Franklin’s Articles of Confederation (July 21, 1775), in 1 J. CONTINENTAL CONG. 195, 196 (1905) (saying “such as” immediately before list of Congressional powers).

29. 2 FARRAND’S RECORDS, *supra* note 12, at 97.

30. 3 ELLIOT’S DEBATES, *supra* note 15, at 600-01.

31. *Id.*

The Framers meant to allow the federal passport, Randolph's statement tells us, even though the federal passport was not a listed power. There had been a recent challenge to the federal passport in Pennsylvania. In 1782, citizens of Pennsylvania, relying on state law on capture of prizes, seized the British ship, *Amazon*, carrying supplies for the British prisoners of war held at Lancaster, Pennsylvania. Congress protested the seizure. The *Amazon* had been traveling under George Washington's passport. The Pennsylvania legislature receded, on the advice of its own Supreme Court, finding its own statute on seizure to be "*unconstitutional*" (before there was a written U.S. Constitution) by reason of its conflict with the federal passport.<sup>32</sup> The deletion of the expressly-delegated limitation was apparently meant to confirm that decision as a paradigm or core case.

The passport system was a powerful system of control of travel. The colonies had had passport systems to control fleeing debtors,<sup>33</sup> and the Confederation Congress had recently instituted a passport system for travel among the Indians.<sup>34</sup> Patrick Henry protested in Virginia, to no avail, that if the federal government could require passports by implication, it would emancipate the slaves by implication.<sup>35</sup> The passport system was apparently considered a strong but legitimate national power. The peacetime passport

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32. Debate in Continental Congress (Feb. 20, 1783), in 25 J. CONTINENTAL CONG. 905, 906 n.1 (1922) ("The Legislature in consequence having declared the law under which the goods were seized to be void as contradictory to the federal Constitution."); Elias Boudinot, Speech to the House of Representatives (Feb. 4, 1791), in 1 ANNALS OF THE CONG. OF THE UNITED STATES 1919, 1925 (Joseph Gales ed., 1834) (reporting that Pennsylvania judges declared the confiscation invalid because Congress was given the power over passports with the power to declare war); James Madison, Notes of the Continental Congress Debates (Feb. 25, 1783), in 19 LETTERS OF DELEGATES TO CONGRESS, *supra* note 26, at 731 (reporting that Pennsylvania legislature had settled the business by deciding that Pennsylvania law was unconstitutional in so far as it interfered with passports).

33. PASSPORT OFFICE, THE UNITED STATES PASSPORT: PAST, PRESENT, FUTURE (1976).

34. Ordinance for Dealing with the Indians (June 28, 1786), in 30 J. CONTINENTAL CONG. 368, 370 (1934).

35. Patrick Henry, Speech to the Virginia Ratification Convention (June 14, 1788), in 3 ELLIOT'S DEBATES, *supra* note 15, at 446.



system, however, was not enumerated, nor related to the enumerated powers.

The proponents of the Constitution were inconsistent on their intent to limit the Congress to the enumerated list. The claimed both that the “expressly delegated” limitation had been taken out because it had proved “destructive to the Union”<sup>36</sup> and also that the federal government was limited to those powers “expressly delegated” to it. The most important example of the latter was a speech by James Wilson in front of Independence Hall shortly after the convention ended, who said that “[t]he congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the [proposed Constitution].”<sup>37</sup> The most famous is Madison’s statement in *Federalist* No. 45 that “[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined, [while t]hose which are to remain in the State Governments are numerous and indefinite.”<sup>38</sup> The most blatantly inconsistent with the text and action is Charles Pinckney’s speech telling the South Carolina legislature that under the Constitution the Congress has only the powers to which they are “expressly delegated.”<sup>39</sup>

The deletion of the old “expressly delegated” limitation was a hotly debated issue during the ratification debates. The Anti-Federalists disagreed with the Federalist claim that the Constitution list of powers was exclusive. Jefferson, in his first reaction to the Constitution, thought the claim to an expressly delegated limit “might do for the [crowd before Independence Hall] to whom it was addressed, but is surely *gratis dictum*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation, which declared that in express

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36. Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), in 3 ELLIOT’S DEBATES, *supra* note 15, at 600-01.

37. James Wilson, Speech to Public Meeting in Philadelphia (Oct. 6, 1787), in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339 (Merrill Jensen et al. eds., 1976) [hereinafter DOCUMENTARY HISTORY].

38. FEDERALIST No. 45, at 315 (Madison) (Jacob E. Cooke ed., 1961) (Jan. 26, 1788). (Dates in parenthesis refer to date of original publication in New York newspapers.)

39. Charles Pinkney, Speech to the South Carolina House of Representatives (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 15, at 259.

terms.”<sup>40</sup> “If this doctrine is true,” said “A Democratic Federalist” in Pennsylvania, “it at least ought to have [been] clearly expressed in the plan of government.”<sup>41</sup> Arthur Lee wrote with distain in Virginia that “[Wilson’s] sophism has no weight with me when he declares . . . that in this Constitution we retain all we do not give up, because I cannot observe on what foundation he has rested this curious observation.”<sup>42</sup> As description of plain text, the Anti-Federalists have the better of the argument. If the Framers promised limitation of the federal government in favor of the states to the expressed powers, they did not do so in the writing of the Constitution.

The Tenth Amendment to the Constitution limits Congress to powers delegated to it, but importantly, it did not return to the “expressly delegated” language. Apparently, some unexpressed or implied powers have been delegated by the People to the Congress. When the Anti-Federalists tried to return the word “expressly” into the Tenth Amendment, they were defeated overwhelmingly.<sup>43</sup>

The Bill of Rights, as a whole, had symbolic value when offered, but in context it had very limited substantive importance. The Anti-Federalists considered the rights offered in the Bill of Rights to be a sop or diversion. Madison’s Bill of Rights, the Anti-Federalists argued, had been stripped of those “solid” amendments that would enhance the power of the states and preserve their uncontrolled constitutional rights.<sup>44</sup> The Tenth Amendment, absent “expressly,” looks especially “trivial and unimportant,” neglecting the fundamental issues of structure of government, just as the Anti-Federalists

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40. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 13, at 439, 440.

41. A Democratic Federalist, PENNSYLVANIA HERALD, Oct. 17, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 37, at 386, 387.

42. Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), reprinted in 13 DOCUMENTARY HISTORY, *supra* note 37, at 505, 506.

43. Aug. 18, 1789, 1 ANNALS OF CONG., *supra* note 32, at 761. See also Aug. 21, 1787, *id.*, at 797 (reporting that Elbridge Gerry’s proposal to add “expressly delegated” to the Ninth Amendment was defeated, 17-32, without debate).

44. Letter from Robert Yates and John Lansing, Jr., to Governor George Clinton, in Daily Advertiser (New York), Jan. 14, 1788), reprinted in 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 4.

charged.<sup>45</sup> In 1941 the Supreme Court said that the Tenth Amendment is truism that all is retained which has not been surrendered, and does not affect the power of the federal government.<sup>46</sup> Given the defeat of the “expressly delegated” limit and the context in which it was offered, that assessment seems true to the history.

With removal of the “expressly delegated” language, the list of Congressional powers granted by Article I, section 8, looks like an illustrative list. The appropriate Latin maxim is *ejusdem generis* (of the same class or kind), that is, that the list is illustrative of what Congress might do, rather than *expressio unius est exclusio alterius exclusio* (to express one thing excludes all others), which would make the list exhaustive. Maybe the list is also a list of campaign promises bragging about what Congress would be able to do if the Constitution were ratified. No politician would want the current list of promises to be the only promises ever available.

In theory, moreover, the Constitutional text as drafted by the drafting committees was supposed to be loyal to the motions and resolutions previously adopted by the whole federal convention. Interpreting the listed powers as not exhaustive is loyal to the successful motion at the convention offered by Gunning Bedford of Delaware to give Congress the power “to legislate in all cases for the general interests of the Union.”<sup>47</sup> The powers listed are illustrations of what Congress might do for the general interest, but they do not foreclose added implied powers. In any event, the deletion and defeat of the “expressly delegated” limitation leaves the constitutional text without a written limitation on the scope of the federal government.

If the written limitation on the federal government in the Constitution is inadequate, that is to be expected from the historical context. The Framers came together to reinvigorate an impotent national government. If the Framers failed to express the limitations on the federal government as well as proponents of states’ rights would like, it may well be because that it was just not the problem that the

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45. Staughton Lynd, *Abraham Yates’s History of the Movement for the United States Constitution*, 20 WM. & MARY L. REV. 223, 227 (1963).

46. *United States v. Darby*, 312 U.S. 100, 124 (1941).

47. Gunning Bedford, Motion of July 17, 1787, in 2 FARRAND’S RECORDS, *supra* note 12, at 26.

Constitution was written to fix. The historical Constitution is a weapon against the states. Except for the (modest) right of a state to veto loss of its territory, the *writing* of the writing of the Constitution gives little or no help to establish states' rights.

2. *The Modest Written State Right to Territory.* The most important *written* limitation on the federal government in favor of the states is Article IV, section 3, which requires that Congress must have permission of a state to take away some of its territory. The limitation is modest, even trivial. Its modest purpose was of no avail in the adoption of the Constitution and we have since interpreted away any significant substance in the clause.

State permission as to its territory was new in the Constitution. The Articles of Confederation had allowed Congress to set up a court to settle territorial disputes between the states,<sup>48</sup> and Congress could settle the dispute by taking away territory without a state's permission.

When adopted, the constitutional requirement of state permission seems to have been mostly for show. There were a number of proposals for successions breaking up state territory in 1787. Georgia, North Carolina, and Virginia claimed the land west of their present borders at least to the Mississippi. Maine was still part of Massachusetts and New York still claimed Vermont.<sup>49</sup> Vermont was the most serious issue. There had been serious bloodshed over Vermont succession, and Vermont had flirted with a British alliance to defend its succession.<sup>50</sup> Governor George Clinton of New York had been outraged at Vermont "traitors," and he might well have decided he was not a nationalist because the Confederation Congress did too little to stop Vermont

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48. ARTICLES OF CONFEDERATION, art. IX, in 19 J. OF THE CONTINENTAL CONGRESS, *supra* note 25, at 213-223.

49. Luther Martin, *Genuine Information*, FOUNDERS' CONSTITUTION, [http://press-pubs.uchicago.edu/founders/documents/a4\\_3\\_1s6.html](http://press-pubs.uchicago.edu/founders/documents/a4_3_1s6.html) (last visited Dec. 28, 2008), catalogs the disputes.

50. JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 63-77 (1993) [hereinafter KAMINSKI]; Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AMER. HISTORY 797 (1981).

succession.<sup>51</sup> In the Article IV, state-permission clause, the Constitution took the side of the anti-successionists, as if to take the staunch anti-succession position of the period that “[w]e should fix the Boundaries and let the people know they are Citizens and must submit to their government.”<sup>52</sup> The clause was also a favor to George Clinton and might perhaps have softened his anti-federalist stance.

On all the open issues, the state-permission clause accomplished nothing. Vermont succeeded because New York could or would not pull together a large enough state militia to re-conquer it. It was admitted as a separate state, the fourteenth, in 1791. Tennessee, Kentucky, Alabama, Mississippi, and Maine were formed out of land claimed by North Carolina, Virginia, Georgia, and Massachusetts respectively. George Clinton opposed the Constitution, notwithstanding the favor extended to him in the state-permission clause. Outside of New York, Anti-Federalist opponents found the state-permission clause to be yet another irritant. Luther Martin of Maryland, for instance, sympathized with all the succession movements and he argued that the state-permission clause sought to maintain large state power of states that were already too large and ought to be broken up.<sup>53</sup> Martin’s state, Maryland, had no claims beyond its present borders.

The states’ right to permission as to territory, moreover, has not been given much respect after the founding. The formation of West Virginia, for instance, had the permission of something called the “Reorganized Government of Virginia,” meeting in Wheeling (now West Virginia) in 1862.<sup>54</sup> The permission was a bit formalistic. The Richmond or regular branch of the government of the state of Virginia, then in rebellion, was not consulted and would not have consented to the transfer of territory. Virginia litigated the succession of West Virginia, after the end of the Civil War, and lost.

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51. KAMINSKI, *supra* note 50, at 63-77. Kaminski himself in conversation suggested that Clinton might have become an anti-federalist over the Vermont succession issue. *Id.* at 72.

52. Letter from John Jones to James Madison (Oct. 2, 1780), in 2 PAPERS OF JAMES MADISON, 1780-1781, at 106 (William T. Hutchinson & William M.E. Rachel eds., 1962) (on Vermont).

53. Martin, *supra* note 49.

54. *Virginia v. West Virginia*, 78 U.S. 39, 43 (1870).

Written constitutional clauses do sometimes have a halo or judicial gloss interpreting the clause to preserve some even more powerful underlying value. Perhaps in another jurisprudence, preservation of state "territory" could have been elevated to a more abstract and far more powerful concept of "sacred land and statehood." We might have found giants in the earth. But, as the West Virginia example shows, the territory clause has never meant much. Given the overall design and pattern of the Constitution, the state-permission clause was given what seems to be about the right amount of respect in the West Virginia succession. Even the most important written state's right is not all that important.

States are mentioned in the Constitution outside of the territorial permission clause, but the other provisions have not been a very important limitation on national power in favor of a state, nor comfortably described as "states' rights."<sup>55</sup>

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55. U.S. CONST. art. V allows two-thirds of the states to call a convention to propose constitutional amendments. A second constitutional convention, if called, could well be more important than the territory permission clause. Calling a convention is not a right of single state, however, since another thirty-three states must join to call the convention. It has also never been used or seriously threatened.

Article V also says that state legislatures can be called upon to ratify amendments, by three-fourths. State legislatures represent the state in its corporate capacity. Congress can also bypass the state legislatures and get ratification from the requisite three quarters from a convention of the people of the states, as it did in 1933, to repeal prohibition. U.S. CONST. amend. XXI, § 3. A power of the state legislation over ratification that arises only under congressional choice can not be classified as a state's right against the federal Congress. Even if Congress chooses to use the state legislatures for ratification of amendments, ratification or defeat of ratification can not be achieved by a single state acting alone.

Before 1913, Article II, section 3, clause 1 provided that Senators would be chosen by the Legislatures of each state. That was ended by the Seventeenth Amendment in 1913, which provided for election of Senators directly by the people. Before the Seventeenth Amendment, the state legislatures had influence in the Senate decisions, but it still could be outvoted by Senators from other of the now fifty states. A constitutional right is usually thought of as something that prevails over legislation, and the power of the states, even before the Seventeenth Amendment, was an influence on congressional enactments, not a override in spite of congressional enactments.

### B. *Source of Federal Legitimacy*

1. *Who Made What?* A back up to the (nontextual) enumerated power doctrine is the argument that the states are primordial and doled out to the federal government only what powers they expressly gave. Since the federal government had only what was specifically given to it, the argument goes, it does not matter that the text does not state that the list of federal powers is exhaustive. If a power is not on the list, the federal government does not have it. Thus even the passport is not a federal power, unless it can be shoehorned into some other clause or clauses of the enumeration. The federal government has only those powers specifically enumerated not because that is what the Constitution says but because all that was not given away was retained by the states.

The American states came first, Professor Whittington argues.<sup>56</sup> They were founded long before the Revolutionary War. They did not need to be constituted; they needed only to declare their independence from the British Empire. They were the “relatively natural” political unit that emerged from Revolution. “They were the governments of general jurisdiction with all the accoutrements of sovereignty.”<sup>57</sup> The states largely did write state constitutions after independence, but Professor Whittington attributes this to just a “Lockean’ phase of ‘self-conscious’ constitutionalism,”<sup>58</sup> and the state constitutions did not create the states as legal entities.

The federal government is different, Professor Whittington argues. It was created not just by throwing off the crown by a declaration of independence. The Federalists were building something new. The federal government required a reallocation of the political authority already held and being exercised by officials in the states. The Federalists had to wrest *some* governmental power away to build the new national government.<sup>59</sup> “The Federalists needed to claim and delegate a specified quantum of

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56. *Recovering*, *supra* note 16, at 1575.

57. *Id.* at 1575.

58. *Id.* at 1576.

59. *Id.* at 1576 (emphasis added).

government power and no more.”<sup>60</sup> Whatever power the federal government might have, Whittington would say, had to be transferred from the states.

Whittington’s argument on primordial status has nothing to do with the written text of the Constitution, but if true it would add some context in support of the enumerated-power-doctrine position that the listed powers are exhaustive.

The contrary position, with fine support in the historical evidence, is Abraham Lincoln’s position that “[t]he Union is older than any of the States, and in fact, it created them as States.”<sup>61</sup> The federal Congress arose before the independence of the colonies, as a creation of extralegal revolutionary committees working outside of the authorization of the British colonial administration. Before independence, loyalty to the Congress held together the Revolution’s radicals who pushed for immediate independence and the moderates looking for some accommodation with Britain. The radicals and moderates might not be able to decide what to do, but both sides could agree to let the Congress decide. Allegiance to Congress became the primary test of the right to participate in the emerging Revolutionary polity.<sup>62</sup> Even before the Declaration of Independence, the Congress acted as sovereign to conduct first an embargo against Great Britain and then a Revolutionary, and serious, War.<sup>63</sup> Throughout the war and the prior embargo, the various revolutionary committees that took power from the Crown on the local and colony level looked to the Congress for decisions and authority. Congress was acting as the *de facto* sovereign even before July 4, 1776.

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60. *Id.* at 1576.

61. Abraham Lincoln, Special Session Message (July 4, 1861), in 7 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 3228 (James D. Richardson ed., 1897).

62. JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS 66 (1979).

63. Richard Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabed*, 74 COLUM. L. REV. 1056, 1057, 1068-1071 (1974); RICHARD MORRIS, THE FORGING OF THE UNION: 1781-1789, at 55-79 (1987).



The colonies became states under congressional authorization. The colonies looking to write constitutions, not dependent on British control, solicited authorization from the federal Congress.<sup>64</sup> In 1775, Congress responded to requests from Massachusetts, New Hampshire, and South Carolina for how to proceed after taking power.<sup>65</sup> Then in May, 1776, the Congress gave general instructions to the respective assemblies and conventions in every colony to suppress the “exercise of every kind of authority under the [Crown]”<sup>66</sup> and to “adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”<sup>67</sup> John Adams called the May resolution, giving instructions to the colonies to form themselves into independent states, the “most important . . . ever taken in America.”<sup>68</sup>

There were continuities from colonies to states. Connecticut, for instance, was so effectively self-governing as a colony that the last elected colonial governor, Jonathan Trumbull, a strong advocate of independence, continued as governor after independence. Connecticut’s venerated 1662 Charter remained untouched, except for amendments to take out references to the king.<sup>69</sup>

Whittington appeals to the “accoutrements” of sovereignty of the states before the Revolution. No colony,

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64. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 47 (Rita Kimber & Robert Kimber trans., 2001) [hereinafter Adams].

65. Recommendation of Congress to the Massachusetts Bay Convention (June 9, 1775), in 2 J. CONTINENTAL CONG. 83-84 (1905) (resolving that since no obedience is due to British governor, Massachusetts should govern itself under its charter as if he was absent); Recommendation of Congress to the Provincial Convention of New Hampshire (Nov. 3, 1775), in 3 J. CONTINENTAL CONG. 319, 326-27 (1905) (resolving that assembly should take power from the British administration and form the best government for the people); Recommendation of Congress to the Convention of South Carolina (Nov. 4, 1775), in 2 J. CONTINENTAL CONG. 292-93 (1905).

66. Preamble Resolution (May 10, 1776), in 4 J. CONTINENTAL CONG. 358 (1906).

67. *Id.* at 341.

68. Letter from John Adams to James Warren (May 15, 1776), in 3 LETTERS OF DELEGATES TO CONGRESS, *supra* note 26, at 676.

69. Adams, *supra* note 64, at 27.

however, had “sovereignty” before the Revolution. “Sovereignty” is a synonym for “supremacy” and no “colony” has supremacy. That is why they are “colonies.” If the colonies really passed on their status without break, then the states are still like colonies, accustomed by long practice to a subordinate position.

Those colonies that wrote new constitutions were of course doing so as a part of the revolutionary break from Crown and Parliament. When Whittington calls these constitutions “Lockean” that means the writers perceived themselves as in the state of nature without a legitimate current government and that the consent to government needed to be achieved anew.<sup>70</sup> The state constitutions were not just empty symbolism. The first state constitutions were tantamount to declared independence and read like declarations of independence. They created new legal entities, not resting on British authority. The states by their original constitutions were breaking the continuity with the subordinate British colonial entity that had occupied the same territory as before. And the colonies becoming states wrote their constitutions under the authority and instructions of the pre-existing Congress.

It also seems fair as a matter of history to describe the formation of the state and federal governments in more muddled terms as both products of small experimental steps pushing each other and evolving together.<sup>71</sup> Neither federal nor state government was hatched full grown, and neither is primordial. Power was taken from the British authorities in steps. The formation of a Continental Congress with a sovereign’s power to make war and treaties was an early and important part of the process, and undertaken before the states had independence or constitutions. One can emphasize the local aspects of the seizure of power or the

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70. See, e.g., JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1965) (saying all men are naturally in the state of nature, until their own consents make them members of some politick society). The Rhode Island town of Scituate, in most Lockean terms, instructed the state assembly that the king had violated the charter of government, so power reverted to the people, and Rhode Island would thus need a new constitution to give legal basis to the government. See ADAMS, *supra* note 64, at 65. Rhode Island, however, continued to use its colonial charter, only deleting its references to the king.

71. ADAMS, *supra* note 64, at 48.

national aspects. De facto independence at the township level was achieved early in many colonies. Still, what states rights advocates need from the foundational myth is not just a muddle, or joint development, true to the history, but a legal primacy or “sovereignty” for states, because there is nothing helpful for the states’ power or enumerated power doctrine in the written Constitution. Primordial supremacy of the states, however, is asking more than the history will bear.

Judicial doctrine, whatever the history, also says that sovereignty over external affairs transferred from the Crown directly to the national government, not to the states. In 1936, the Supreme Court held that the President had implied powers over foreign affairs beyond those listed, so as to be able to ban export of military goods:

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.<sup>72</sup>

If external sovereignty passed from Crown to national government, then plausibly the power to govern the nation during war—internal sovereignty—passed over directly as well. The Congress as a matter of practice certainly exercised war powers domestically in the War for Independence, even before the Declaration of Independence.

Similarly, the Courts recognized the federal government as a plenary state without the need for a writing. The Articles of Confederation were ratified almost at the end of

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72. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936) (citing *Penhallo v. Doane*, 3 U.S. 54, 80-81 (1795)).

the Revolutionary War.<sup>73</sup> The Congress directed the war from the first fighting in April 1775 until March 1781 without the Articles, and the national government needed judicial recognition, to run a war, long before ratification. In the 1779 Pennsylvania decision of *Respublica v. Sweers*, for instance, the defendants Sweers had defrauded the Continental Army by forging a bigger number for the payment in their contract to provide supplies, and they challenged their criminal prosecution on the ground that there was no United States of America to defraud. The Supreme Court of Pennsylvania reasoned that the United States was a plenary government by the mere act of the states coming together:

From the moment of their association, the United States necessarily became a body corporate: for there was no superior from whom that character would otherwise be derived. In England, the king, lords & commons are certainly a body corporate; and yet there was never any charter or statute by which they were expressly created.<sup>74</sup>

Under Pennsylvania law, contrary to Whittington's argument, the National government was a plenary government without any need for a written confirmation of it.

The Articles of Confederation indeed adopted the theory that states gave power to the federal Congress. On its face, the Articles of Confederation identified the adopting actors of the Articles as "Delegates of States," authorized to act on behalf of the states.<sup>75</sup> The national government under the Articles was nothing but a firm league of friendship.<sup>76</sup> But

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73. The primary cause of the delay in ratification was Maryland's insistence that Virginia give up its claim to Western land. Maryland finally ratified, apparently because the French wondered why its navy should defend a state that had not ratified the Articles of Confederation. See RAKOVE, *supra* note 62, at 285-88.

74. *Respublica v. Sweers*, 1 U.S. (1 Dall.) 41, 44 (Pa. 1779) (upholding an indictment for forgery and fraud on the United States); see also *Penhallow v. Doane's Adm'rs.*, 3 U.S. 54 (1795) (holding that the Continental Congress had the authority, before the Articles of Confederation were ratified, to institute a tribunal for determining prizes at sea and to hear appeals).

75. ARTICLES OF CONFEDERATION, pmbl. and art. XIII, in 19 J. CONTINENTAL CONG., *supra* note 25, at 214, 221-22.

76. ARTICLES OF CONFEDERATION, art. III, in 19 J. CONTINENTAL CONG., *supra* note 25, at 214.

the Articles also simultaneously limited state sovereignty, requiring that the states have no control over war and foreign relations. The states were prohibited from signing treaties or sending ambassadors and their power to raise armies and ships was restricted.<sup>77</sup> As to the rest of the world, the United States alone was the sovereign entity and it had no divisions that other nations could recognize.

The major difficulty, however, in relying on the Articles to determine authority of the national and state government is that they have been superseded as a matter of law by the Constitution itself and, as discussed next, the Constitution does not rest upon the states. Indeed, when talking about *constitutional* law it seems that the Constitution supersedes all of the history that precedes it. Continuities from the prior history might help us understand the context, but there is no binding constitutional effect to *preconstitutional* law. State power before this 1787 Constitution does not matter.

2. *The Constitution's Claim to Legitimacy.* On its own terms, the Constitution claims its power from the sovereign people, and not by transfer or delegation from the pre-existing states. The Constitution says that it is ordained and established by "We, the People."<sup>78</sup> The Articles, as noted, had said they were established by authorized delegates of the states. The Framers intentionally bypassed the states for ratification of the Constitution, and went instead to conventions of the people, meeting by state because only the people could give the Constitution supremacy over state ordinary law.

The resting of legitimacy of the Constitution upon "We, the People" was a contested issue in the ratification debates. The Anti-Federalists objected that the Framers were supposed to have based their authorization of the Constitution on "We, the States" instead of "We, the People." Resting the Constitution upon the sovereignty of the People, the Anti-Federalists claimed, proved that the

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77. ARTICLES OF CONFEDERATION, art. VI, *in* 19 J. CONTINENTAL CONG., *supra* note 25, at 216.

78. U.S. CONST. pmb1.

Framers intended a perfect consolidation and annihilation of the states.<sup>79</sup>

The Federalist proponents, on their side, celebrated that the Constitution was “founded upon the power of the people.”<sup>80</sup> “[I]n this government,” James Wilson told the Pennsylvania Ratification Convention, “the supreme, absolute and uncontrollable power remains in the people.”<sup>81</sup> The people were the supreme power “from which there is no appeal.”<sup>82</sup> The consent of the people, Hamilton stated in *Federalist* No. 22, is that “pure original fountain of legitimate authority.”<sup>83</sup>

The U.S. Constitution had to be ratified by the people and not by the state legislatures in order to achieve supremacy and permanency. As Jefferson had argued when Virginia formed its constitution, a constitution could not be enacted by ordinary state legislatures because no legislature could pass an act to transcend the power of future legislatures.<sup>84</sup> Madison wrote to Jefferson in his preparation for the Convention, consistently, that the new system he was advocating would have to be ratified by the people of the several states to render the national Constitution paramount over state legislatures and state

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79. John Smilie, Pennsylvania Convention Debates (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 37, at 382, 407-09; Patrick Henry, Virginia Convention (June 4, 1788), in 3 ELLIOT'S DEBATES, *supra* note 15, at 22-23; Samuel Nasson, Massachusetts Convention, (Feb. 1, 1788), in 2 ELLIOT'S DEBATES, *supra* note 15, at 134; John Lansing, Debate in the Federal Convention (June 16, 1787), in 1 FARRAND'S RECORDS, *supra* note 12, at 257.

80. See James Wilson, Pennsylvania Ratification Convention (Dec. 11, 1787), in 2 ELLIOT'S DEBATES, *supra* note 15, at 497-98.

81. *Id.* at 431. See also *id.* at 433 (saying that if there can not be two sovereigns, then the people and not the states have the sovereignty); *Id.* at 457-58 (saying “[m]y position is, sir, that, in this country, the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments; but that the fee-simple continues, resides, and remains, with the body of the people.”).

82. *Id.* at 432.

83. FEDERALIST No. 22, *supra* note 38, at 146 (Hamilton) (December 14, 1787).

84. Thomas Jefferson, Draft of a Constitution for Virginia (June 1783), in 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 13, at 285; THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), available at <http://www.yale.edu/lawweb/avalon/jevifram.htm>.

constitutions.<sup>85</sup> The Articles of Confederation had the radical vice, Madison said, of “want of ratification by the people.”<sup>86</sup> The defect resulted in the “evil” that “[w]henever a law of a State happens to be repugnant to an act of Congress . . . it will be at least questionable whether the latter must not prevail.”<sup>87</sup> No state could be given the power to infringe this Constitution nor the power to amend it alone by a subsequent legislation. The States, indeed, plausibly did not have the power to ratify the Constitution or give power to the national government because they had been given their power by the sovereign people and were not at liberty to redirect any of that power over to some other body. No state could ratify this Constitution and no state did. “No State, in its corporate capacity,” William Pinckney of South Carolina would later argue, “ratified [this Constitution].”<sup>88</sup>

Both the Resolution of Congress that authorized the Philadelphia Convention and the Resolution of the Annapolis Convention that called for the Philadelphia Convention had required that the Convention’s proposal be ratified by every state legislature, as required by the Articles of Confederation for amendments to the Articles.<sup>89</sup> The Federalists overrode their instructions. The Federalists argued that the Convention was not illegal, although it had ignored its empowering resolutions, because the Constitution was merely a proposal when the writing was finished in Philadelphia. “I have never heard before,” Wilson argued before Pennsylvania, “that to make a

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85. Letter from James Madison to Thomas Jefferson (March 19, 1787), in 9 PAPERS OF JAMES MADISON, *supra* note 52, at 318.

86. James Madison, Vices of Political System 8, in 9 PAPERS OF JAMES MADISON, *supra* note 52, at 345, 352.

87. *Id.* Madison was worried especially because the question of supremacy of state law over acts of Congress would be decided by the “Tribunals of the State, [which] will be most likely to lean on the side of the State.” *Id.*

88. William Pinckney, Argument before the Supreme Court in *McCullough v. Maryland*, 17 U.S. (Wheat.) 316, 377 (1819).

89. Alexander Hamilton, Address of the Annapolis Convention (Sept. 14, 1786), in 3 THE PAPERS OF ALEXANDER HAMILTON 686 (Harold C. Syrett ed., 1966) [hereinafter HAMILTON PAPERS]; Resolution of Congress (Feb. 21, 1787), in 32 J. CONTINENTAL CONG., *supra* note 25, at 74.

proposal was an exercise of power.”<sup>90</sup> The Constitution would be given effect only if ratified by the people at large.

Ratification by the people also had a necessary strategic element to it. The Founders did not think they could get ratification from state legislators who would lose power if the Constitution went into effect. The opposition to the Constitution would come most likely, Governor Randolph said, from “the local demagogues who will be downgraded by it from the importance they now hold.”<sup>91</sup> The Founders did not think they could get unanimity. Rhode Island, New York and Virginia had vetoed the five percent impost proposals, the easiest remedies for the federal destitution, and would most likely veto any more comprehensive change. Since the Framers did not think they could get ratification from the states, they went to people instead. Opposition would come, James Wilson predicted, from “interested men,” but the people “will follow us into a national Govt.”<sup>92</sup> The Framers used the People against the states. They ended state supremacy over the national government on the authority of the sovereignty of the People.

Under the Constitution itself, no state would be bound by the Constitution until that state’s convention had ratified.<sup>93</sup> Ratification of the Constitution, moreover, was by state, with a minimum of nine states required, and not by a consolidated vote along the country. The people of each state met in a separate convention. Nonetheless, the Framers were using the conventions of the people of the state as tool or weapon against the government of the state. Under the Articles, the state governments had been supreme over the Congress and the Congress was the agent of the state governments, but when the ratification of the Constitution was completed, by the People, the state governments were made subject to the supremacy of the federal government.

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90. James Wilson, Pennsylvania Ratification Convention (Dec. 4, 1787), in 2 ELLIOT’S DEBATES, *supra* note 15, at 469.

91. Edmund Randolph, Speech to the Federal Convention (July 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 12, at 89.

92. James Wilson, Speech to the Federal Convention (June 16, 1787), in 2 FARRAND’S RECORDS, *supra* note 12, at 253.

93. U.S. CONST. art. VII.



Thus under the history, the text and the intellectual arguments, there is no supremacy of states or states' rights.

C. *The Pivotal Voter*

Whittington criticizes *Righteous Anger* on the ground that it draws the Constitution's meaning from the strongest proponents of nationalization, often as indicated by their concerns going into the Philadelphia convention. Whittington claims that the Philadelphia convention "significantly blunted" Madison's nationalizing impulses and that nationalists including Madison had to make compromises to satisfy the pivotal voter. Whittington argues that the pivotal voter is closer to the decentralizing concerns of Roger Sherman than to the national enthusiast James Madison.<sup>94</sup>

The pivotal voter in the ratification of the Constitution has to be understood as deeply within a nationalistic consensus. Delegates representing sixty-five percent of the electorate (weighing states by population) ultimately voted to ratify the Constitution.<sup>95</sup> All regions supported the Constitution at near landslide levels: New England voted fifty-nine percent for ratification; Mid-Atlantic was sixty-six percent for ratification and South was sixty-three percent for ratification. Opponents to ratification garnered just over a third of the delegates (weighted by population) overall. The Constitution got more popular as time went on. The Anti-Federalists started with a majority in the Anti-Federal states of New York and Virginia, but even New York and Virginia ratified after the debates. Even Anti-Federal Rhode Island and North Carolina eventually ratified. Once the Constitution was ratified, Anti-Federalism shrank to a

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94. *Recovering*, *supra* note 16, at 1583-84 n.102.

95. The sixty-five percent figure is an average weighted by population. It is computed by multiplying the population of each state by the percentage of delegates in favor of ratification, then adding the products, then dividing the sum by the population as a whole. See *RIGHTEOUS ANGER*, *supra* note 11, at 129 for population figures. The Constitution by its own terms required only nine states for ratification and the Framers did not expect ratification by all. If we exclude the four closest states, Rhode Island (fifty-two percent), Virginia (fifty-two percent), Massachusetts (fifty-three percent) and New York (fifty-four percent), the minimum nine states needed for ratification went seventy-six percent for the Constitution. Calculations, based on 1790 census, are on file with the author.

stigmatized minority and then disappeared. In the First Congress, Anti-Federalist held only fifteen percent of the voting power, and could get nothing that the Federalists did not want.<sup>96</sup> By 1790, opposition to the new Constitution, as Jefferson himself put it, “almost totally disappeared.”<sup>97</sup> The new Constitution and new President were idolized. Once the country got used to the new Constitution, it is clear that the pivotal voter would have tolerated a far more radical change than the Constitution in fact effected. Pivotal voter talk does not undercut its nationalist vigor.

Roger Sherman of Connecticut is not at the center on the votes on federalism, as Whittington argues, except when he became a driving nationalist. Roger Sherman, for example, made a motion in the Convention to deny the federal government power to lay “direct” or internal taxes, but he lost on his motion overwhelmingly, two states in favor to eight states against.<sup>98</sup> Both proponents and opponents of the Constitution called Federal power to lay direct tax the key issue of the ratification debates.<sup>99</sup> Sherman said in defense of his motion that he wanted to prevent the national government from intruding on the “Government of the individual States in any matters of internal police.”<sup>100</sup> The eight-to-two state majority of the

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96. RIGHTEOUS ANGER, *supra* note 11, at 131.

97. Letter from Thomas Jefferson to Lafayette (April 2, 1790), in 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 13, at 292, 293.

98. 2 FARRAND'S RECORDS, *supra* note 12, at 25-26.

99. See, e.g., Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), in 30 WRITINGS OF GEORGE WASHINGTON: FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 82-83 (John C. Fitzpatrick ed., 1944), available at <http://etext.lib.virginia.edu/washington> (saying that the Anti-Federalist amendment to prevent federal direct taxes was the only amendment to which he really objected but it was the one most strenuously insisted upon by the Anti-Federalists); Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 12 DOCUMENTARY HISTORY, *supra* note 37, at 332 (saying that denying Congress the power to lay direct taxes was the “most popular topic among the adversaries”); James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 37, at 1109 (saying that to render the Congress “safe and proper, I would take from it one power only—I mean that of direct taxation”); see also Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 15-24 (1998).

100. Roger Sherman, Federal Convention (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 12, at 25.

Convention seems to have thought instead, that “[t]here are instances without number, where acts necessary for the general good . . . *must* interfere with internal police of the states.”<sup>101</sup> Sherman was in the overwhelmed minority on the key issue.

Sherman seems to have moved more toward nationalism than he moved the convention. His close Connecticut colleague, Oliver Ellsworth, for instance, early in the Convention moved to strike the word “national” from the early Virginia-Plan proposal to create a “national government” because Ellsworth wanted to preserve the “confederation” mode.<sup>102</sup> The Convention, however, thereafter began to use the word “national” as if Ellsworth had never spoken.<sup>103</sup> By the end of June, Ellsworth himself said he wanted to establish a *national* legislature, executive, and judiciary to preserve peace and harmony.<sup>104</sup> By the time of the Connecticut Ratification Convention, Ellsworth was saying that the Constitution was based on “the necessity of combining our whole force and, as to *national* purposes, becoming one state.”<sup>105</sup> The joint report of Ellsworth and Sherman to the Governor of Connecticut takes a position that was anathema to the later Jeffersonians, that is, that tax may be used for the general

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101. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 HAMILTON PAPERS, *supra* note 89, at 402.

102. Oliver Ellsworth, Federal Convention, June 20, 1787, in 1 FARRAND’S RECORDS, *supra* note 12, at 335.

103. *See, e.g.*, William Johnson, Federal Convention (June 21, 1787), in 1 ELLIOT’S DEBATES, *supra* note 15, at 431 (describing New Jersey plan as creating a distinct *national* government, but one that is not totally independent of that of the states); *id.* at 226 (debating whether members of the *national* legislature should be paid out of the *national* treasury); *id.* at 215 (unanimously passing resolution that the legislative, executive, and judiciary powers of the *national* government, ought to be bound by oath to support the articles of the union”); *id.* at 219 (passing resolution that a *national* executive be instituted to consist of a single person to be chosen by the *national* legislature); *id.* at 209 (unanimously passing resolution that a *national* judiciary be established).

104. Oliver Ellsworth, Federal Convention (June 29, 1787), in 1 ELLIOT’S DEBATES, *supra* note 15, at 465.

105. Oliver Ellsworth, Connecticut Ratification Convention (January 4, 1788), in 2 ELLIOT’S DEBATES, *supra* note 15, at 186.

welfare and not just for enumerated powers.<sup>106</sup> By the time of the debate over the Tenth Amendment, Roger Sherman, who had once advocated an exclusive enumeration of Congress' power,<sup>107</sup> was contributing to the defeat of an Anti-Federalist attempt to limit Congress to the powers expressly delegated to it.<sup>108</sup> If Sherman is viewed as the champion of decentralized power in the Convention, then, best viewed, he lost on that side and thereafter moved over to the nationalist side.

Madison did lose in the Convention on issues that were important to him, as *Righteous Anger* discussed at some length.<sup>109</sup> Madison hated the malapportionment of the Senate, the rule giving the same voting weight to tiny states as to large ones. It was "magic and not reason," James Wilson had said, that "annexing the name of 'State' to ten thousand men, should give them equal right with forty thousand."<sup>110</sup> Madison was consistent, saying among other things that equal votes for large and small states was the "radical vice" of a confederation system.<sup>111</sup> Madison, nonetheless, lost on the voting rule in the Senate.

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106. Letter from Roger Sherman and Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787), in 3 FARRAND'S RECORDS, *supra* note 12, at 99 (saying that "[t]he objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare").

For Jeffersonian opposition of use of tax justified only by the general welfare, see Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 13, at 71-73 (enumerated powers provide an "exact definition" power to tax for the general welfare); 3 FARRAND'S RECORDS, *supra* note 12, at 494 ("Common defence and general welfare [are used] as general terms, limited and explained by the particular clauses subjoined to the clause containing them.").

107. 2 FARRAND'S RECORDS, *supra* note 12, at 26 (saying that Sherman "in explanation of his ideas read an enumeration of powers").

108. 1 ANNALS OF CONG. 790 (Joseph Gales ed., 1834). *See also id.* at 797 (reporting that Elbridge Gerry's proposal to add "expressly delegated" to the Ninth Amendment was defeated, 17-32, without debate).

109. RIGHTEOUS ANGER, *supra* note 11.

110. James Wilson, Continental Congress (Aug. 1, 1776), in 6 J. CONTINENTAL CONG., *supra* note 25, at 1105.

111. James Madison, Federal Convention (Jun 30, 1787), in 1 FARRAND'S RECORDS, *supra* note 12, at 485].

Madison also wanted a national veto over state laws to prevent their frequent and flagrant violations of individual rights and their wicked failures as to their national duties.<sup>112</sup> He did not get it, notwithstanding his many tries and his passion. Of course the Constitution is interpreted to include Madison's losses. There is no federal veto over state law "in any case whatsoever" for the protection of individual rights, as Madison had wished. The Senate is as it is. Still the changes that Madison accomplished are, to use Gordon Wood's description, "breathtaking" in comparison to the Articles of Confederation that went before.<sup>113</sup> The losses upset Madison, but the hole in his donut does not in the end dominate the donut.

#### D. *Let's Get Rid of "States' Rights" Usage*

Professor Whittington argues that the primary function of "constitutionalism" is to protect individual rights against the power of government.<sup>114</sup> "A true constitution," Giovanni Sartori has said, "is defined by its aims of limiting government."<sup>115</sup> The Constitution's "essential quality", according to Charles McIlwain, is "legal limitation on government,"<sup>116</sup> and "true safeguards of liberty against arbitrary government."<sup>117</sup>

"States rights"—the limitations of the federal government in favor of the states— are, however, a very different thing from individual rights, limiting the federal government in favor of individuals. "States rights" have often been the enemy of individual rights. Conflating "states rights" with "individual rights" is a terrible mistake because makes it impossible to see the conflict between a state and individuals.

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112. See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 PAPERS OF JAMES MADISON, *supra* note 52, at 209, 212.

113. Gordon Woods, *Ideology and the Origins of Liberal America*, 44 WM. & MARY L. REV. 633 (1987).

114. *Recovering*, *supra* note 16, at 1586.

115. *Id.* at 1569 n.13 (citing Giovanni Sartori, CONSTITUTIONALISM: A PRELIMINARY DISCUSSION, 56 AM. POL. SCI. REV. 853, 860 (1962)).

116. *Id.* at 1568 (quoting CHARLES HOWARD McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 24 (1940)).

117. *Id.* at 1568.

A large segment of the debate over the ratification of the Constitution was whether the federal or state government would be a better protector of individual rights. James Madison's theory of the extended republic that supported ratification was a "proof" that the *federal* government was better protector of individual rights than were the states. For Madison, the states were the paradigm rights abusers. Patrick Henry in Virginia, for example, sought to tax all for the support of ministers and he prevented out-of-state creditors access to Virginia courts. In a reasonable sense, the Constitution can be viewed as revenge upon Henry for all the issues Madison had lost to him in the prior decade.<sup>118</sup> The Anti-Federalist opponents of the Constitution did indeed contest the claim that the Federal government would be the better protector of individual rights. Still, for those who were in favor of ratification, the new national government would better protect individual rights.

States' rights have often been the enemy of individual rights since the founding debates. For the twentieth century, "states rights" was a code word for preserving white power and segregation. The "civil rights" movement achieved racial equality before the law and some measure of respect for the dignity of racial minorities only by pushing back "states rights." Before the civil war, the most important "state right" was, to quote the constitution of the Confederacy, "the right of property in negro slaves."<sup>119</sup> Southern elites were afraid that a national majority would impair or end slavery. Since they wanted protection to own other people, destroying the rights of those other people, it was important that their state government rather than the national government decide the issue.<sup>120</sup>

States rights plausibly still defeat individual rights. Professor Jed Rubenfeld speculates that the Supreme Court's current federalism cases are pretextual and that the real motive is to prevent the expansion of anti-discrimination remedies that the Court is not comfortable with.<sup>121</sup> In *University of Alabama v. Garret*<sup>122</sup> the Court gave

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118. RIGHTEOUS ANGER, *supra* note 11, at 51-57.

119. CONST. OF THE CONFEDERATE STATES OF AMERICA, art. II, § 9, cl. 4, reprinted in THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 15 (James M. Mathews ed., 1988).

120. Robin Einhorn, American Taxation: American Slavery 8 (2006).

121. JED RUBENFELD, REVOLUTION BY JUDICIARY (2005).

the state of Alabama immunity from suit under a federal statute protecting rights of disabled persons, and in *Morrison v. United States*,<sup>123</sup> the Supreme Court held that Congress could not provide a civil cause of action by which a rape victim could sue the football player who had raped her. Both cases might be described as continuing the tradition by which “states rights” restrictions get in the way of individual rights. It is hardly a necessary conclusion, in any event, that state powers or immunities enhance individual rights or are identical with individual rights.

Federalism issues of conflicts between federal and state governments are important issues. They seem to fall within what Professor Whittington calls the “uninteresting” and “commonplace” issues of government power,<sup>124</sup> rather than the individual rights sector, but power and its allocation is not *entirely* without interest. As a matter of unrestrained policy—on fresh canvas—the question of whether the national or state governments should decide an issue is often a hard question and the answer varies from issue to issue.<sup>125</sup> “States rights,” however, is not a constructive tool

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122. *Bd. of Trs. of the Univ. of Ala. v. Garret*, 531 U.S. 356 (2001).

123. *United States v. Morrison*, 529 U.S. 598 (2000).

124. *Recovering*, *supra* note 16, at 1576.

125. The policy of federalism is way beyond what can be covered in a short response, but these are notes:

Sometimes, we need to avoid a national majority imposing a single solution on a nation-wide basis. The diversity of tastes across the country should imply that each local group, broken down into groups much smaller even than a state, should be able to decide a question to its own tastes—*chacun à son goût*. Indeed, sometimes decisions should be left to each individual consumer and not decided by a group or any government at all. Even if the decision is formally allocated to the national level by tradition or Constitution, one would hope that a national decision would recognize the diversity of individual tastes. Sometimes, no uniform national rule should prevail.

Some decisions, by contrast, get worse when they are balkanized because balkanization separates the beneficiaries and bearers of any cost. States and localities try to impose costs and harms on their neighbors, who they can disregard because they do not vote. Small groups try to avoid taxes and responsibilities. All states naturally try to export their taxes onto out-of-state nonvoters and to protect their local voters from out-of-state nonvoters. The behavior arises naturally from politicians’ need to get elected by voters, but not by nonvoters. Small groups compete destructively to profit from havens and immunities from quite reasonable responsibilities. Indeed the Constitution was necessary as a historical document because states refused to pay their share of

to analyze the issues, especially for that collection of decisions that are better made on the national level, and especially for those issues in which the states are abusing individual rights.

States, plausibly, should not even be considered to be rights-bearing entities. Nazi regimes might give the Reich rights over individuals, and Communist regimes might give the Soviet all power over individuals, but in the America, a liberal democracy, individuals are sovereign over the state. Individuals, and not Reichs, Soviets or States, bear rights. States may have powers, but not rights. If the states serve as some kind of proxy for individuals, we would do better to look through the states to the individual rights, or at least recognize that the states are at best imperfect proxies for individuals. As long as there exists a case in which a state right conflicts with an individual right, the term "state rights" obscures the conflict. "States' rights" indeed is arguably an offensive grammar, an oxymoron, because "rights" belong to the people, not to governmental units. "States rights" do not deserve the prestige accorded to the rights given to real individuals.

## II. THE CAUSES OF THE CONSTITUTION

*Righteous Anger* is first an endeavor within constitutional law, skeptical as to states' rights. It is also, however, a history of the Constitution that tries, sincerely, to figure out what factors contributed to the adoption of the Constitution and what weight to give to the causes that have been offered over the last 220 years. History, including a weighing of causes, should be germane to the interpretation of the legal effect of the Constitution, at least as to overall effect, and at least for those branches of "constitutionalism" that purport to rely on originalism. But

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the common defense and they vetoed the impost, by which the national government could pay for the common defense on its own.

There is no general solution to determine whether decisions should be made nationally (or even globally), on the one hand, or by locality or individual, on the other. I find it plausible that neither the text nor history of the Constitution sorts out the allocation of power in the way that fits the best policy for every issue. We may sometimes need to rely on the good sense of the legislature. Binding constitutional law and policy may not be the same. Still, neither *Righteous Anger* nor the *Recovering from Imbecility* review has much constructive to say about the policy of allocating decision-making authority.



perhaps not. Constitutional interpretation in law does depart from history, often, and law does not become respectable history meeting professional standards of history, even with a few adornments quoting old documents. Still, even while history is not the same as law, the Constitution is our foundational document and its history is of continuing interest, just because the nation wants to understand its roots. Our history provides object lessons of bad behavior, to be avoided, as well as valuable traditions and binding law, but both bad and binding history are of interest and should be written honestly.

The historiography of the Constitution is filled with attempts to explain the Constitution in terms of a dominating or overall cause that purportedly gives meaning to the whole. Many of the offered overall explanations are distinctly unsympathetic to the Constitution. Jefferson seems to have thought the Constitution was written to scare Shaysites into submission and he understood Shaysites to be yeoman farmers rebelling with justice for better terms on taxes and debts.<sup>126</sup> *Righteous Anger* argued that Shays' Rebellion was not very important to the adoption of the Constitution and indeed that Shays' worked better on the Anti-Federalist side to show the vigor of *state* governments.<sup>127</sup>

Charles Beard interpreted the Constitution as a conservative economic document written to suppress paper money so as to make debts harder to pay.<sup>128</sup> *Righteous Anger* argued that paper money was not important in the debates, primarily because Anti-Federalists as well as Federalists condemned paper money, from the lesson of the failure of the Continental dollar.<sup>129</sup> Madison's core argument, in *Federalist* No. 10, was that the Federal government would inevitably do a better job of protecting minority voters than would the state governments.

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126. Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 13, at 356-57 (saying the Constitution was a kite, a small hawk, sent up to scare the henhouse).

127. RIGHTEOUS ANGER, *supra* note 11, at 213-22.

128. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES, 154, 324 (1913).

129. RIGHTEOUS ANGER, *supra* note 11, at 207-10.

*Righteous Anger* also argued that other issues were less important to the adoption of the Constitution than others have said. Individual rights, slavery and democracy are very important issues, but that they were issues pushed to the back burner because of the paramount need to create a strong national government to restore the federal credit and serve the national defense.<sup>130</sup> Whittington cares about checks and balances, but *Righteous Anger* argued that the Framers were skeptical about “checks and balances,” considering them more appropriate to a monarchical system than to a republic.<sup>131</sup> I found regulation of commerce to be a “modest little power” contributing almost nothing to the adoption of the Constitution.<sup>132</sup> *Righteous Anger* examined

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130. RIGHTEOUS ANGER, *supra* note 11, at 163-86.

131. RIGHTEOUS ANGER, *supra* note 11, at 68, 166. Whittington attacks RIGHTEOUS ANGER for “dismiss[ing] as a sideshow” the “clever combination of New World gears and gadgets’ that occupied so much of the framers’ time.” *Recovering*, *supra* note 16, at 1585 (quoting AKHIL REED AMAR, AMERICA’S CONSTITUTION 87 (2005)). I am in fact more skeptical about value of “checks and balances” than other scholars. A separate executive seems to have arisen more for efficiency than as a “check.” Madison told Jefferson before the Convention that he wanted a separate executive so that as Congressional powers increased, there would not be mismanagement. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 9 PAPERS OF JAMES MADISON, *supra* note 52, at 318-19. The Framers in Philadelphia dismissed John Adams, who represented “checks and balances” as too monarchical in favoring a balanced or mixed Constitution. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 567-92 (1969). Consistently, John Quincy Adams was an Anti-Federalist before ratification because he found the Constitution inconsistent with his father’s book that emphasized separation of powers. Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), in 4 DOCUMENTARY HISTORY, *supra* note 37, at 75. The Founders did distrust direct democracy, leading them, for example, to the ill-advised Electoral College. I did not mean to dismiss “checks and balances” entirely, however, and there is no question that “checks and balances” shows up in the debate in ways that RIGHTEOUS ANGER did not discuss.

132. RIGHTEOUS ANGER, *supra* note 11, at 189-201. Professor Whittington argues that an important part of “regulation of commerce” was a program to retaliate against foreign powers that excluded American ships from their ports. *Recovering*, *supra* note 16, at 1580. Whittington argues the failure to exercise the power to retaliate was due to changed circumstances. *Id.* at 1580-81 n.83. At the first chance in the first new session, however, Congress rejected retaliation against the British because the British could too easily react by excluding American ships from the English ports. The rejection of retaliation is contemporaneous and reflects the considered judgment that those who live in glass houses should not throw penalty imposts. That was the situation as the

these and other theories about the formation of the Constitution and concluded that there was not much weight to these theories or the causes they cite.

There was no a priori reason to downgrade or disregard any of these factors. But the downgrading was the appropriate conclusion from the surviving evidence carefully and neutrally re-examined. Not every judgment *Righteous Anger* reached is critical to the overall force of the Constitution. On the history, *Righteous Anger* was just trying to understand the causes of the Constitution in its own times and for its own sake from a fresh look at all the available original-source evidence. The history of the Constitution is of interest for its own sake even it has no impact on the law.

#### A. *Necessary Anger*

*Righteous Anger* concluded that righteous anger at the wickedness of the states was a necessary cause of the Constitution. Anger was necessary, first, to overcome the norm strong at the time that changes had to be unanimous. Both the Articles of Confederation and the resolutions that empowered the Convention, as noted, required approval of any changes to the Articles by all of the states.<sup>133</sup> Before the Articles and the empowering resolutions, moreover, the Revolutionary War had also been fought under the assumption that the states would reach a united consensus.

The Framers overrode the prior understanding demanding unanimity, ignored their instructions, and ripped up the Articles. They were angry enough at the states that they presumed that at least one state would reject in bad faith the minimum necessary changes and they were angry enough at the states that they decided they did not need unanimity. The Framers provided that the Constitution would go into affect with ratification by only nine states. They also sent the Constitution for ratification by the people rather than the state legislatures because they thought that state office holders would try to retain their power, in bad faith, and veto a nationalizing document. Without the anger and the reasons for it, the

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Constitution was drafted and not a changed circumstance. *RIGHTEOUS ANGER*, *supra*, at 194-95.

133. *See supra* note 89 and accompanying text.

book argued, the Framers could have drafted the needed fiscal reforms within the confederation mode. Without the anger they would have drafted an alternative Constitution that compromised enough with the opponents to get their acquiescence, and that alternative Constitution would have been more agreeable to the states and less radical in its nationalist vigor.

The Framers of the Constitution were angry at the states for betraying the great cause of the Revolutionary War. The states had betrayed their duties to the great republican cause by failing to supply Washington's Army. Their contribution was far below what reasonably could have been expected. The states continued to breach their *sacred* duties by failing to pay their requisitions and by vetoing the best tax, the federal impost, which might replace requisitions. The Founders expressed their anger at the treachery of the states in immoderate moral and even religious terms. Failure to pay the war debts was both a moral issue and a strategic one. In the next, inevitable war the nation would need to borrow again and to borrow there would need to be a source of funds to repay at the national level.

*Righteous Anger* also argues that the Constitution went further than was required by the fiscal crisis. The proximate cause of the Constitution was the need to give the national government a tax power sufficient to continue payments on the war debts by enough to restore the public credit. But Hamilton, as first Secretary of the Treasury, was able to allow the federal government to borrow again with taxes of seventy-five cents per capita per year, equal to about a day and a half of labor wages. Hamilton's taxes were only on things considered properly suppressed, hard liquor and imports. Hamilton's taxes were so easy, in retrospect, that they could easily have been adopted while preserving the confederation mode. Restoration of the public credit did not require a revolutionarily more powerful three-part national government and the end of state sovereignty. If Rhode Island had not vetoed the 1781 impost, the confederation form of government and the preservation of state sovereignty could have survived. A federal impost and sale of western land would have carried the war debts. But the veto dammed up the pressure, and when the dam burst, *Righteous Anger* argued, the constitutional revolution went further than it needed to go if it was just a matter of making payments on the war debts.

B. *Taxes instead?*

Professor Whittington argues that the emotion of anger is not necessary or helpful to explain the adoption of the Constitution. Congress did need the power to tax to restore the public credit, he concedes. But “[t]o explain the constitutional change in regard to taxation powers,” he says, “anger seems superfluous. To explain the rest of the Constitution, anger seems unhelpful.”<sup>134</sup> Similarly, Professor Whittington argues, the Framers needed to break the unanimity requirement to achieve a national tax, but they did not need anger to know they needed a national tax. *Righteous Anger* argued that “[i]f the Articles of Confederation had not required unanimity or the Framers had not been so angry, the Framers might well have tried to find a solution to the fiscal crisis within the confederate mode in a way that preserved state sovereignty,”<sup>135</sup> and Whittington’s response is that the impossible unanimity requirement alone was sufficient to end the articles, without any anger.<sup>136</sup> The necessity of the national tax power, in sum, and the need to override the one-state veto allowed by the Articles of Confederation crowds out anger as a necessary element.

Even the fact that federal credit could be restored with modest taxes, Whittington argues, does not undercut the importance of tax or require anger. “The impost power was sufficient by itself to repay the existing debts and restore the creditworthiness of the nation in 1787,” he says, but the Federalists wanted not just to recover from the last war but also prepare for the next one.<sup>137</sup> The next full war might well require tax even greater than the Revolution required. In war, an enemy strong at sea would make imports and the revenue from taxing imports shrivel. Thus the Federalists wanted not just the impost, the external or indirect tax, but they also wanted federal power over internal or “direct taxes.” The hardest fought issue in the ratification debate, *Righteous Anger* itself argued, was over federal power to lay direct or internal taxes. The Anti-Federalists wanted the federal government to go back to the states for revenue if

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134. *Recovering*, *supra* note 16, at 1578.

135. *RIGHTEOUS ANGER*, *supra* note 11, at 3.

136. *Recovering*, *supra* note 16, at 1579.

137. *Id.* at 1580.

the impost and sale of western land were ever not sufficient. The direct tax was the one power that the Anti-Federalists would not concede to the new national government and direct tax was the one federal power that the Federalists would not give up.<sup>138</sup> The Federalists needed the full three-part powerful national government if that government was going to collect internal tax, Whittington argues. The importance of direct tax crowds out anger as a necessary explanation for the strong national government, even though the impost and whiskey tax turned out to be so small.

Emotions—including anger—and cold rationality—including calculating the needs for self defense—are complementary rather than competitive explanations. One should by and large expect emotions to follow self interest, or calculation to serve deeper emotional needs. Whichever is described first, reason and underlying emotion are as inseparable as quarks. Perhaps Professor Whittington and I are saying the same nationalistic things about the formation of the Constitution with different vocabulary, his from the calculating brain lobe looking for tax revenue, and mine from the other emotional lobe. Professor Whittington does, however, sometimes seem to see a difference.

Professor Whittington criticizes the theme of righteous anger at the states as emphasizing “a moral principle of honoring contracts rather than the instrumental calculation of maintaining creditworthiness so as to borrow in future wars.”<sup>139</sup> The Founders said that failure to pay the war debts was *both* a sign of moral depravity<sup>140</sup> and a dangerous dallying with national safety,<sup>141</sup> with apparent sincerity on

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138. See *supra* note 101.

139. *Recovering*, *supra* note 16, at 1579.

140. See, e.g., James Madison, An Address to the States from the Congress (Apr. 26, 1783), in 24 J. CONTINENTAL CONG., *supra* note 25, at 283 (saying the defaults dishonored the “great cause,” “the last and fairest experiment in favour of the right of human nature”); An Address from the United States in Congress Assembled to the Legislatures of the several States (Oct. 6, 1786), in 31 J. CONTINENTAL CONG., *supra* note 25, at 747-48 (with the most plain anxiety, the Congress is compelled to warn that the most fatal evils will speedily and inevitably flow from a breach of public faith and a violation of the principles of justice) and authorities cited in RIGHTEOUS ANGER, *supra* note 11, at 20-24.

141. See, e.g., Oliver Ellsworth, Connecticut Ratification Convention (Jan. 4, 1788), in 2 ELLIOT’S DEBATES, *supra* note 15, at 189 (asking if war breaks out,

both arguments and without any inconsistency. The Founders were desperate about the destitute government's inability to borrow for defense, but the desperation contributed to the anger.

Using national tax as an explanation does not seem to make the Constitution any less a nationalizing document than does anger. If national direct tax were strong enough to crowd out anger, than it must be a dominating factor in the adoption of the Constitution. If direct tax is at the core of the Constitution, it harder to justify, e.g. *Pollock v. Farmers' Loan Trust*,<sup>142</sup> where the Court overruled a hundred years of doctrine to find an income tax unconstitutional, under what is a decidedly pro-tax Constitution.<sup>143</sup> Current Anti-Federalists looking to decentralize power will not be pleased by an argument that the Constitution draws its programmatic meaning from its pro-federal-tax drives. A pro-tax explanation of the Constitution also does not provide a useful platform for constitutionalism's treating the document as primarily a limitation on government. Tax and anger are intertwined explanations.

Plausibly, however, neither beating unanimity nor direct tax were necessary to the situation.

1. *Unanimity*. It is quite plausible that the Founders needed anger to reject the single state veto allowed by the Articles of Confederation. Unanimity was an important value through the Revolution, holding together diverse states under the motto that won the war, "United, We Stand." The Founders might well have been able to achieve unanimity for nationalizing the five percent impost if they had only not been so mad.

John Kaminski, the long time director of the Documentary History of the Ratification of the Constitution project, has argued that Congress should have accepted

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how are we to defend ourselves, since the government "has not the means to enlist a man or buy an ox") and illustrations, RIGHTEOUS ANGER, *supra* note 11, at 18-19 and 151.

142. 157 U.S. 429 (1895), *and reh'g*, 158 U.S. 601 (1895).

143. See, e.g., Calvin Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295 (2004) (arguing that *Pollock* was wrongly decided).

New York's counter-offer as to the 1783 impost and that if it had, the country would have retained the confederation format and avoided a too-powerful national government.<sup>144</sup> Rhode Island vetoed the 1781 proposal for a five percent federal impost and Virginia then quickly retracted its prior approval. The desperate Congress returned again in 1783, however, this time limiting the five percent impost to a twenty-five year duration and dedicating the money only to the existing war debts.<sup>145</sup> By May 1786, all of the states, except New York, had ratified the 1783 proposal, including both Rhode Island and Virginia, the vetoing states of the 1781 proposal. By 1786, however, New York had established its own state impost on traffic through New York harbor, and it was unwilling to cede nationalization of the impost without conditions.

In response to the 1783 impost proposal, New York made a counter offer. Payments would be made in New York paper dollars, discounted if necessary to their worth in specie. Merchants would have procedural rights including the right to jury on contested issues. Congress considered the conditions unacceptable and asked New York to reconsider. In February 1787 the New York Assembly refused to alter its stance.<sup>146</sup>

Professor Kaminski argues that Congress should have accepted New York's counter offer or at least continued conciliatory negotiations, as, for instance, James Monroe recommended.<sup>147</sup> "Had Congress followed this advice," Kaminski says, "its financial needs would have been met and no federal convention would have been called to meet in Philadelphia in the Spring of 1787."<sup>148</sup> With the impost and sale of western land, the federal government could have

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144. John Kaminski, *Empowering the Constitution*, (July 23, 2005), (unpublished manuscript presented to the Society for Historians of the Early American Republic, Philadelphia, on file with the Buffalo Law Review.

145. Address to the States, by the United States in Congress Assembled (Apr. 26, 1783), in 24 J. CONTINENTAL CONG., *supra* note 25, at 278.

146. Kaminski, *supra* note 144 at 5.

147. Kaminski, *supra* note 144, at 5; Letter from James Monroe to New York Governor George Clinton (Aug. 16, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, *supra* note 26, at 479-80. (saying Congress should proceed *with temper* to conciliate and gain the confidence of New York) (emphasis added).

148. Kaminski, *supra* note 144, at 5.



made the minimal payments on the war debts until imports grew important enough to carry the debt comfortably.

Kaminski believes that the confederation form of government would have been better for America than was the strong national government the Constitution ordained. He believes that Congress would have evolved into a Parliamentary form of government, with John Jay as prime minister.<sup>149</sup> The Founders would have avoided an imperial President, modeled on the King.

The Congress, however, rejected New York's conditions. The Federalists interpreted the New York conditions as pretextual, tantamount to veto. The New York delegate to Congress, Melancton Smith, made a case for accepting the conditions, which did not describe them as vetoing,<sup>150</sup> but the Federalist interpretation was that New York was vetoing the national impost, in bad faith, just to keep the revenue from the New York harbor for its own selfish purposes.<sup>151</sup> "The dominant party in New York" Madison would say, "had refused even a duty of five percent on imports for the urgent debt of the Revolution, so as to tax the consumption of her neighbors." Neighboring Connecticut reacted angrily at having to pay a New York state impost on goods passing through New York harbor bound for Connecticut: "Those gentlemen in New-York who received large salaries," editorialized the *Connecticut Courant*, "know that their offices will be more insecure . . . when the expences of government shall be paid by their constituents,

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149. Kaminski, *supra* note 144, at 7. In discussion of Kaminski's thesis at the Society of Historians of the Early American Republic, Philadelphia, July 25, 2005, Professor Pauline Maier of MIT took issue with the argument that the Congress under the Articles would have evolved into a parliamentary-prime minister system, in part because not even England had evolved into a parliamentary-prime minister system at the time.

150. The Resolutions of Congress, Of the 18th of April, 1783: Recommending the States to invest Congress With the Power to Levy an Impost, for the Use of the States; and the Laws of the respective States, passed in pursuance of the said Recommendation. Together with Remarks on the Resolutions of Congress, and Laws of the different States, By A Republican (New York, 1787) (cited by Kaminski, *supra* note 144, at 5).

151. See, e.g., Letter from James Madison to George Washington (Feb. 21, 1787), in 9 PAPERS OF JAMES MADISON, *supra* note 52, at 285 (saying New York has put a definitive veto on the impost).

than while paid by us.”<sup>152</sup> When New York vetoed the 1783 impost, it was said that every “liberal good man is wishing New York in Hell.”<sup>153</sup>

A polity that is built on consensus and unanimity needs negotiation to work out differences and needs to compromise to pull in all the votes. In 1787, Congress was too angry at New York to perform its function within a consensus system and to negotiate any further and it did not care to see anything attractive in New York’s counter offer. One does not need to believe that New York was right on the merits or that the Articles would have evolved into a superior form of government to accept that some other factor, such as anger, was necessary for the rejection of New York’s offer that in fact occurred. The need for the impost did not require rejecting the unanimity norm, but to get the impost from New York, the nationalists would have had to let go of their anger, and, as Monroe put it, negotiate “with temper . . . to conciliate.”<sup>154</sup> The Federalists went to the Convention instead. As Hamilton put it, “Impost Begat Convention.”<sup>155</sup>

2. *Direct tax.* The proximate cause of the Constitution was the desperate need to pay for the debts of the Revolutionary War. The Constitution might reasonably be called, first, a tax document, a pro-tax document. The Federal government needed the impost that New York had vetoed, almost everyone outside of New York agreed. Within tax, federal power over direct tax was the issue that most clearly divided opponents from proponents of the Constitution. As Whittington notes, the Federalist proponents of the Constitution wanted Congress to be able to lay a direct or dry-land tax in times of emergencies and

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152. Editorial, *New England*, CONNECTICUT COURANT (Dec. 24, 1787) reprinted in 15 DOCUMENTARY HISTORY, *supra* note 37, at 82.

153. Letter from Henry Jackson to Henry Knox (April 23, 1786), quoted in Robert Feer, *Shay’s Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 390 (1969).

154. Letter from James Monroe to New York Governor George Clinton (Aug. 16, 1786), in 23 LETTERS OF DELEGATES TO CONGRESS, *supra* note 26, at 479-80.

155. Alexander Hamilton, Notes for Second Speech of July 17, 1788, to New York Ratification Convention, in 5 HAMILTON PAPERS, *supra* note 89, at 173.

the Anti-Federalist opponents uniformly wanted to deny Congress the power to tax internally except via requisitions upon the states. Both proponents and opponents of the Constitution called Federal power to lay direct tax the key issue of the ratification debates, and sometimes as the only issue that separated Federalists and Anti-Federalists.<sup>156</sup> A “direct tax” at the time of debates was a kind of quasi-requisition, apportioned among the states. For a requisition, the states would determine the subjects of tax. A direct tax would have to be apportioned among states like a requisition,<sup>157</sup> but the federal government would determine the things taxed. Originally “direct tax” meant all taxes except for the tax on imports or “imposts,” and “direct tax” and “internal tax” were synonyms.<sup>158</sup>

It is difficult nonetheless to take the direct tax issue very seriously for the following reasons, explained below:

(1) Direct tax did not help ratification because the majority of the country was skeptical of the need for federal direct tax, and indeed;

(2) Direct tax was never important over the next seventy-five years. If there was no welled up anger, the country could have solved its fiscal problems without a federal power over direct tax.

(3) Had the direct tax power been what the country wanted, it could have been accomplished within the confederation mode. Replacing the confederation with a strong national government, supreme over the states, was not required by tax or direct tax alone.

(4) For all the heat, the proponents and opponents of the federal direct tax ultimately took positions that were not very different from each other.

a. *Direct tax impeded ratification.* The Constitution was ratified in spite of the federal power over direct tax, and not because of it. The majority of the country was skeptical

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156. See, e.g., sources cited *supra* note 99.

157. U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 4. The Constitutional formula for apportionment of direct tax was a formula worked out in 1783 for requisitions, but never adopted because of New York's veto of the 1783 proposal. Johnson, *Apportionment*, *supra* note 101, at 19-20.

158. Calvin Johnson, *The Four Good Dissenters in Pollock*, 32 SUP. CT. HIST. 162, 165-68 (2007).

that is was needed. In Virginia, a majority of the ratification convention was opposed to federal direct tax. The Virginia Anti-Federalists recommended amendment to the Constitution that would have prohibited the federal government from laying a direct tax, unless a state was in default in paying its quota of a requisition. The federal government would have had to rely on requisitions, letting the states chose what to tax and using state officers. The Federalists challenged only that direct tax amendment of all the amendments the Anti-Federalists offered, but lost the challenge. The Federalists won a close majority in Virginia for ratification of the Constitution overall, but they lost on the vote on their challenge to restrictions on federal direct tax.<sup>159</sup>

Beyond Virginia, the Anti-Federalists, once they got organized, offered their amendment restricting direct tax in nine states with later conventions and they won a recommendation for the amendment in seven of the nine states where the recommendation was made.<sup>160</sup> Had federal direct tax been offered to the ratification conventions in a way in which it could have been voted on separately, the federal direct tax would not have been part of the Constitution.

To the Anti-Federalists, there was no need for emergency taxes. "The truth is," said Anti-Federalist Brutus in New York, "no such necessity exists."<sup>161</sup> Some of the European nations might attack us, Brutus conceded, but if so, "they will have to transport their armies across the atlantic, at immense expence, while we should defend ourselves in our own country."<sup>162</sup> Where is the danger that imposes disagreeable taxes on us?, asked another Anti-Federalist. "From abroad, we have nothing to fear" because the European powers' attentions are engaged with each

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159. See Virginia Ratification Convention, (June 27, 1788), in 3 ELLIOT'S DEBATES, *supra* note 15, at 661 (reporting that challenge lost by vote of 65 to 85).

160. RIGHTEOUS ANGER, *supra* note 11, at 157, has a tally. The direct tax restriction failed in two early states, Pennsylvania and Maryland, and was not offered in four early conventions, Delaware, New Jersey, Georgia and Connecticut, but it won in seven of the last eight conventions. *Id.*

161. Brutus VII, NEW YORK JOURNAL (Jan. 3, 1788), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 37, at 238.

162. *Id.*

other.<sup>163</sup> “[A]t home we are in a state of perfect tranquility.”<sup>164</sup> The savage Indians would destroy us, Patrick Henry conceded, but our settlers are stronger than they are and the threat is as to deprecations on the frontier and not to the safety of the continent as a whole.<sup>165</sup> The states could give the federal government reasonable means for the common defense when and if a necessity did arise.<sup>166</sup> In New York, the most important subject in the opening essays of the *Federalist* is financing of war. But the *Federalist* apparently convinced no one at the time, Linda DePauw has concluded, and in fact drove some fence sitters to the other side. *Publius* seemed to be raising the specter of a standing national army, when few in quiet New York could see the need for a standing army.<sup>167</sup>

The country was willing to give the federal government power to pay the current war debts, but the country as a whole was not in favor of giving it money for a standing army nor for a speculated war long before the event. The Constitution was adopted in spite of federal direct tax and not because of it. Federal direct tax snuck through, even with a majority in opposition, but it had no mandate from the people.

b. *Direct tax not used.* Although the Federalist proponents asked for and got federal power over direct tax, the power never amounted to much. The Founders did not have 20-20 foresight about the future to know that, but the perspective of time gives support to skepticism that direct tax was all that important even in 1787. As noted, Hamilton was able to restore the public credit without relying on

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163. Anonymous, *Reply to Medium by a Citizen*, N.Y. JOURNAL, Nov. 24, 1787, reprinted in THE COMPLETE ANTI-FEDERALIST 47 (Herbert J. Storing ed., 1981).

164. *Id.*

165. Patrick Henry, Speech to the Virginia Ratification Convention (June 9, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 37, at 1054; see Brutus VII, NEW YORK JOURNAL (Jan. 3, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 37, at 238.

166. Brutus VII, NEW YORK JOURNAL (Jan. 3, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 37, at 238.

167. LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION 114 (1966) (pointing especially to *Federalist* No. 9 (Hamilton) as raising the specter of standing army and making enemies).

direct tax. The first Congress adopted the five percent impost, blocked by New York in 1783, and later adopted a whiskey tax to pay off the state as well as the federal war debts.<sup>168</sup> Hamilton rejected direct taxes and land taxes. Internal tax, first, required the construction of a nation-wide administrative structure of appraisers and tax collectors, whereas imposts could be collected out of a few customs houses. Hamilton chose the easier way, the customs houses. Under the Constitution, moreover, direct taxes need to be apportioned among the states by population,<sup>169</sup> and when the tax base is not equal per capital among the states, apportionment is a perverse requirement that makes the tax rates high in some states and low in others.<sup>170</sup> The direct tax power turned out to be too bulky to use.

When Thomas Jefferson was elected, direct tax had an ideological opponent. Thomas Jefferson believed fervently in decentralizing the financing of war. In 1798, during the false war with France and as military expenses were mounting, he proposed an Amendment to the Constitution whereby the national government would be prohibited from borrowing, even for war, and would have to rely on the states to "bid *their credit* in borrowing quotas."<sup>171</sup> Even the failed Articles of Confederation had allowed the federal government to borrow on its own.<sup>172</sup> Under Jeffersonian ideology, any federal dry-land or internal taxes invaded the domain of the states. Jefferson first message to Congress after he was elected in 1800 called for the repeal of all federal internal taxes, leaving domestic and dry land affairs

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168. *RIGHTEOUS ANGER*, *supra* note 11, at 224-28.

169. U.S. Const., art. I, § 2, cl. 3; art I. § 9, cl. 4.

170. *See, e.g.*, Johnson, *supra* note 143, at 322-23. Connecticut has roughly twice the per capita wealth or income of Mississippi. Tax rates for an apportioned wealth or income tax would have to be twice as high in Mississippi, because Mississippi has a half as large tax base over which to spread her quota. *Id.*

171. Jefferson to John Taylor (Nov. 26, 1798), in 8 *WORKS OF THOMAS JEFFERSON* 481 (Paul Leicester Ford, ed., 1904-05), (emphasis in original).

172. *ARTICLES OF CONFEDERATION*, art. IX, in 19 *J. OF THE CONTINENTAL CONG.*, *supra* note 25, at 220 (requiring approval by nine of the thirteen states for borrowing on credit of the United States); *cf.* *ARTICLES OF CONFEDERATION*, art. XII, *id.* at 221 (pledging the credit of the United States to all debts contracted under the authority of congress before the Articles of Confederation).

to the states.<sup>173</sup> Jefferson might have expressed the views of the majority of America from the start.

Internal revenue did not turn out to be a very important source of revenue until 1913, far distant in the future in 1787, and only after the Sixteenth Amendment to the Constitution was adopted. Emergencies call for extraordinary remedies, and the country, or at least a majority of it, would have been willing to wait for the emergency to give Congress the direct tax and then amend the Constitution to authorize the tax. In the meantime, Congress could rely on imposts, excises, and requisitions.

*c. Direct tax not inconsistent with confederate mode.* Direct tax was also not inconsistent with state sovereignty, if the country had wanted direct tax. Congress's 1783 proposal to be allowed federal tax, which New York vetoed, included both the five percent impost and a requisition upon the states, with a tilt, five-eighths of total revenue, to come from the direct tax.<sup>174</sup> The term, "direct tax" arose in this period to refer to the requisition part of the 1783 proposal, that is, what was called "direct taxes on each *state*, justly proportioned."<sup>175</sup> The 1783 proposal had no effect on the framework of the confederation mode of government and state supremacy or sovereignty, guaranteed by the Articles of Confederation.<sup>176</sup> Hamilton's tax package, adopted under the Constitution, was more modest than the 1783 impost proposal that New York vetoed, in many ways. If the 1783 package allowed state sovereignty and a continuation of the confederation form of government, then so did Hamilton's

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173. See, e.g., Thomas Jefferson, First Annual Message to Congress, in *BASIC WRITINGS OF THOMAS JEFFERSON* 334, 337 (Philip S. Foner, ed., 1944) (saying that federal government should have power only over foreign affairs, leaving domestic affairs to the states, and calling for repeal of internal taxes).

174. Address to the States, by the United States in Congress Assembled (Apr. 26, 1783), in 24 *J. CONTINENTAL CONG.* 279, *supra* note 25.

175. Letter from Eliphalet Dyer to Jonathan Trumbull, Sr. (Mar. 18, 1783) in 20 *LETTERS OF DELEGATES TO CONGRESS*, *supra* note 26, at 41, 45 (emphasis added).

176. "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." *ARTICLES OF CONFEDERATION*, art. II, in 19 *J. OF THE CONTINENTAL CONG.*, *supra* note 25, at 214.

taxes. Replacing the confederation with a strong national government supreme over the states was not required by direct taxes alone.

d. *Not much difference between the sides.* The difference between a direct tax, which Anti-Federalists opposed, and a requisition upon the states, which Anti-Federalists favored, is only as to which level chooses the objects to be taxed. Both direct taxes and requisitions had to be apportioned among the states and indeed, a direct tax should be understood as a kind of requisition. The Anti-Federalist, in proposing amendments that would have restricted federal power to lay direct tax, conceded the need for federal revenue, at least in form.<sup>177</sup> In New York, for example the amendment required the federal government to use a requisition first and then provided that if a state was in default of its quota under the requisition, the federal government could collect direct tax within the state with its own officers and with a 6 percent penalty level interest.<sup>178</sup> Under the Virginia version, the state could suspend federal collection of a direct tax by passing a legislation for the collection of its quota by state-chosen means. Whether the requisition or direct tax was used, the amount and need for the tax would be set by the federal Congress, and both the Constitution and the Anti-Federalist substitutes accepted the premise that the tax would be collected one way or the other. Once the battle lines were set, the two sides were not far apart.

The conflict did make a difference as to who would make a decision as to what to tax. For requisitions, it would be the state that decided what to tax. For direct tax, it would be Congress that decided what to tax. In the South, at least, it is plausible that the direct tax debate is another disguised skirmish over slavery. George Mason argued in the Virginia ratification convention that if the Constitution

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177. See *RIGHTEOUS ANGER*, *supra* note 11, at 156-57.

178. New York Resolution, New York Ratification Convention (July 26, 1788), in 1 *ELLIOT'S DEBATES*, *supra* note 15, at 329. The version of the amendment offered in Virginia required Congress to notify the state governor when it proposed a direct tax. The state could then suspend collection of the federal tax if the state passed legislation for collection of the state's quota by state-chosen means. There was no penalty interest. Resolution in the Virginia Convention (June 27, 1788) in 10 *DOCUMENTARY HISTORY*, *supra* note 37, at 1550, 1553-54.



were adopted, Congress could use its tax powers to lay such heavy tax on slaves as to amount to manumission.<sup>179</sup> Southern slaveholders in charge of the state legislatures would never impose too heavy a tax on slaves. Requisitions were superior, according to Patrick Henry, because the states would do a better job to accommodate tax to the convenience of the people.<sup>180</sup>

Notwithstanding the federal victory on the issue of direct tax, however, Congress never in fact taxed the slaves to manumission. Direct taxes were tried a bit the post-constitutional period, but they never collected much revenue.<sup>181</sup> Given the modesty of direct taxes, it is difficult to imagine the country would have been very much different had the Anti-Federalist amendments had passed. The Constitution did not in fact protect slavery as the Anti-Federalists asked, but Congress did not in fact go after it either. Whittington argues that anger is not needed to explain the Constitution, because the Federalists wanted the federal power over direct tax in case of emergencies. In case of emergencies, under the Anti-Federalist amendments, the Congress would have requisitions. There is not enough in the differences between the lines as to the direct tax, to explain very much or to block out other arguments, including, for instance, anger.

### III. IS VALID HISTORY BINDING?

The needs of history and the needs of constitutional law are profoundly different, perhaps irreconcilable. For constitutional law and political science, the Constitution is not just a historical event, but it is a foundational document, more important than mere legislation and amendable only by a nearly impossible process. A strategically placed two percent of the voters can defeat an

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179. George Mason, Virginia Ratification Convention (June 15, 1788), in 3 ELLIOT'S DEBATES, *supra* note 15, at 452.

180. Patrick Henry, Debate in the Virginia Ratification Convention (June 12, 1788) in 3 ELLIOT'S DEBATES, *supra* note 15, at 320.

181. *See, e.g.,* EINHORN, *supra* note 120, at 112, 158, 189-94, 198 (2006) (discussing direct tax in the post-constitutional period).

amendment.<sup>182</sup> The critical two percent tends to come from sparsely settled states and is surely not a representative sample.<sup>183</sup> The Constitution, unamended, is binding on us, against the will of the majority, and the majority can be as large as ninety-eight percent of the voters and still lose. If the Constitution is foundational, the Constitution has to be wise, based on eternal verities, to fill the needs. Law can not take the Constitution as a curious historical artifact, filled with partisan errors or misjudgments, because the stakes are too high.

The Founders had a handicap in the writing of foundational law in that they could not foresee the next 220 years of developments. We do not have that handicap—the next 220 years are past history to us—and we too often forget that they could not see the obvious next steps. So we impute unto the Founders the ability to write eternal verities that solve our problems—because like it or not, they have to.

Solving twenty-first century problems with eternal verities was in fact not a very important part of what the Founders were trying to do. The Framers wrote the Constitution to solve the problems of 1786-1787, which they knew well, but they knew nothing even about January 1788 or thereafter because it had not happened yet. Given the direction of time, anything after September 1787 was a black hole to them. The Constitution is first a historical weapon written to accomplish programs, the most important of which was to get the war debts paid. To understand the meaning of the words in strict historical context, one must strip away the cover of words and look at the programs underneath. Words do have radiating ripples beyond the specific programs, but the further we go from

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182. The Constitution requires ratification by three-quarters of the states. The population of the quarter of the least populated states is thirteen million (in thirteen states), and a majority of 6.5 million in those states can defeat the seventy-five percent requirement. The 6.5 million, mostly from sparsely populated states, represents 2.2 percent of a total 2004 national population of 293 million. See U.S. CENSUS DEP'T., *Table 17, Resident Population—States: 1980 to 2004*, STATISTICAL ABSTRACT OF THE UNITED STATES (2006), available at <http://www.census.gov/compendia/statat/2006/2006edition.html>.

183. Perhaps they lack a gregarious nature or are not attracted to the excitement of big cities. If there is a problem in densely populated areas that sparsely populated states are indifferent or hostile to, no amendment can be expected.

the hard rock of the programs, the less energy there is in the ripples. Even to understand the penumbra of the programs covered by the words, one must first understand the core programs that the words were intended to accomplish. The words just allow us to make analogies to the core the programs. The primary purpose of the Constitution was accomplished by 1790, when the United States could borrow on the Dutch market at rates appropriate to secure loans,<sup>184</sup> and the new three-part national government is up and running. The Founders' intent to accomplish something was satisfied mostly by 1790, and their intent has attenuated strength after that date.

Indeed try a thought experiment. Take the most important current hard-fought partisan issue. Write an editorial, or an op-ed piece, showing how your opponents badly misunderstand the issue and that if the issue were only seen right, there is a solution. Appeal to any reason, authority or eternal verity that you want to persuade the pivotal voter. Now expand the piece, while solving the current issue, to solve the foundational problems of the year 2228 as well. Not so easy is it? The future is hard to predict, as Yogi said, because it has not happened yet.

The Founders did appeal to eternal verities. Slaveholders were willing to take and offer proofs that slavery was consistent with all of human history and the wisdom of all countries.<sup>185</sup> The Founders and Anti-Federalists cited Montesquieu and Locke so long as they served their agenda. But the Founders did not have any loyalty to philosophic verities and they discarded the verities as soon as they were inconvenient. The most interesting systematic argument in the debates is Madison's *Federalist* No. 10 proof of the superiority of the federal government, and he discarded the proof by 1791, four years after these eternal truths were written, because he wanted, not to defend the federal government, but to attack its

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184. James C. Riley, *Foreign Credit and Fiscal Stability: Dutch Investment in the United States, 1781-1794*, 65 J. AMER. HIST. 654, 668-69 (1978).

185. See, e.g., Charles Pinckney (South Carolina) (Aug. 22, 1787), in 2 FARRAND'S RECORDS, *supra* note 12, at 371 (slavery sanctioned by Greece, Rome and modern states).

programs.<sup>186</sup> The foundational document for the Framers was the Articles of Confederation, and while the Articles pledged an eternal confederation, they were badly in need of amendment when ratified and they lasted only from 1781 to 1788 before they were replaced in full.<sup>187</sup> Be skeptical when the Founders in fact appealed to eternal truths because their most profound eternal truths sometimes were of four to seven years duration.

History as a professional discipline has a profound distrust for “presentism,” defined as using historical facts to solve current problems. The past is a very different place. Using twenty-first century frameworks imposed as a template on 1787 arguments makes it difficult, perhaps impossible to understand the very different context of 1787. Lawyers and political scientists are strictly presentists. They care almost not at all about careful reconstruction of a strange different age unless it generates useful lessons for today. The framework of looking for lessons for today, however, ruins the possibility of understanding the past in its own terms. Indeed, one can gain only limited understanding from reading a historical text, over and over again, far removed from the context in which it was written.<sup>188</sup> With each reading the historical text gets warped to a twenty-first century meaning. With each reading the text picks up a new current meaning so that by the fifth read, the text is solving marital problems. To understand the historical meaning, we have to look, not for the

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186. See NATIONAL GAZETTE (Dec. 1791, Jan. 1791, Sept. 1792), reprinted in 6 WRITINGS OF JAMES MADISON 68, 81, 114 (Gaillard Hunt ed., 1901) (saying the states were the repositories of republican virtue because they are homogeneous, which is exactly the opposite of *Federalist* No. 10's position that diversity yielded better protection of individual rights). See Douglas Jaenick, *Madison v. Madison: the Party Essays v. the Federalist Papers*, in REFLECTIONS ON THE CONSTITUTION: THE AMERICAN CONSTITUTION AFTER TWO HUNDRED YEARS 116 (Richard Maidment & John Zvesper, eds. 1989) (contrasting the nationalism of Madison in the Constitutional period with the state focus after breaking with Hamilton).

187. The Congress offered amendments to the Articles to allow a federal five percent impost and to allow seizures of merchandise to enforce state requisitions within a month of ratification of the Articles. RIGHTEOUS ANGER, *supra* note 11, at 84.

188. See Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 29 (James Tully, ed., 1988).

connotations or abstractions of words in the twenty-first century, but for the programs that gave the words their concrete meaning in 1787-1788.

Professor Whittington dislikes a history of the Constitution loyal to its times. “The oddity of *Righteous Anger* from an originalist perspective,” he writes, “is that it tends to render the Constitution irrelevant to modern politics. The Constitution is not a timeless document; it had exhausted its purpose by 1791.”<sup>189</sup> “The transformation of texts taken to be timeless documents into something of only antiquarian interest,” he also says, “is a recurrent risk of those adopting the Skinnerian approach to history.”<sup>190</sup> “The oddity created by the reduction of the meaning of the Founders’ Constitution to taxes and anger,” he says, “is that it effectively seals the Constitution off from subsequent political developments, and the founding begins to seem trivial. *Righteous Anger* has less to say about the ways in which the Constitution continued to matter in politics than it should.”<sup>191</sup>

Alas, for better or worse, Whittington’s indictment is probably true of all accurate history, certainly all professional history. Gordon Wood comments about the role of history is an apt reply:

They [e.g. lawyers and political scientists] do not want to hear about the unusability and pastness of the past or about the latent limitations within which people in the past were obliged to act. They do not want to hear about the blindness of people in the past or about the inescapable boundaries of their actions. Such a history has no immediate utility and is apt to remind us of our own powerlessness, of our own inability to control events and predict the future.<sup>192</sup>

If you want to understand the historical Constitution in its own genuine terms, it cannot be shoehorned into a twenty-first century framework. The historical Constitution

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189. *Recovering*, *supra* note 16, at 1584.

190. *Id.* at 1584 n.107.

191. *Id.* at 1585.

192. Gordon S. Wood, *The Creative Imagination of Bernard Bailyn*, in *TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 16, 46 (James A. Henretta et al. eds., 1991) *See also* Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 *FORDHAM L. REV.* 1587 (1997).

was a product of a time and place very different from our own. As one literary critic put it, “interpreting the text is not simply a matter of providing ‘context’ and ‘background.’ “Instead, it is more exactly in . . . coming to know again those beliefs, dreads, unscrutinized expectations which may differ from our own.”<sup>193</sup>

The Constitution was a weapon in a partisan war, a war I think the Federalists needed to win, but still a partisan war. As a historical event, the Constitution was not written to provide lessons for today because that was not and could not have been a very important part of what the Federalists were trying to do. We can learn from traditions, stories and history. Still, I think we decide what use we want to make of the ancient Greeks and other history; the ancient Greeks do not decide for us.

It is, however, rather not cricket in a Democracy to make up the history to win a current partisan fight, on the constitutional level, trumping a majority, that can be as large as ninety-eight percent majority at the limits, with false claims of binding constitutional law. The Supreme Court in finding states’ rights in this Constitution is finding fake artifacts, planted by the Court in the history shortly before they are unearthed. It is a bit like burying Barbie Dolls at an archeological site and then pretending that you have discovered something profound when they are unearthed a few days later. Made up history should not be binding us, reversible only by amendments supported by ninety-eight percent of the population. *Righteous Anger* did not make a very good case for originalism, that is, that the decisions of 1787 should lead us now. But perhaps it can perform a negative function, preventing fake history from binding us now—ignoring Barbie Dolls in the archeological dig and the like.

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193. Gillian Beer, *Representing Women: Re-presenting the Past*, in *THE FEMINIST READER* 63, 68 (Catherine Belsey & Jane Moore eds., 2d ed. 1997). I am thankful to Sarah Bilston of Trinity College, Hartford, for the lovely quote, which changed my thinking.