

HOMAGE TO CLIO: THE HISTORICAL CONTINUITY FROM THE ARTICLES OF CONFEDERATION INTO THE CONSTITUTION

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Abstract: The nature of the United States continued even as the Articles of Confederation were replaced by the Constitution. The Constitution is a radical document, but unstated assumptions about political institutions continued from the Articles into the Constitution. Only the provisions that were challenged or changed were written down. Routine parts of what the Framers knew defied articulation.

Historical continuity explains why George Washington could be President, even though Virginia had not ratified the Constitution either when he was born or when the Constitution was adopted. The United States was the same United States before and after ratification.

Historical continuity implies that the ban in the Articles of Confederation on state discrimination against out-of-state citizens by taxation or regulation is part of the Constitution, although not stated. The norm was strongly felt, but unchallenged and so not written down in the Constitution.

Historical continuity implies that Congress may commandeer state officers as it did under the Articles. Tax requisitions were a commandeering of state officers for federal benefit under the Articles. The Framers assumed that requisitions of tax and similarly commandeering would continue under the Constitution.

Finally, historical continuity implies that Congress has the general power to adopt all appropriate measures “for the common Defence and general Welfare.” The debaters assumed that federal

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powers would be legitimate even though they were not enumerated so long as the powers fell appropriately within the national sphere. They removed the requirement in the Articles of Confederation that Congress have only the powers “expressly delegated” to it, and they defended that removal through the adoption of the Tenth Amendment.

I. INTRODUCTION

Constitutional Commentary some years back offered a prize to anyone who could answer the riddle of how George Washington could be eligible under the Constitution to be President.¹ The Constitution requires that the President of the United States must be either a natural born citizen or a citizen of the United States at the time of the adoption of the Constitution,² and Washington seemingly was neither. George Washington was born in the British colony of Virginia, long before there was a United States. When the Constitution was adopted, Washington’s state of Virginia had not yet ratified. By its own terms, the Constitution was established by the ratification of the ninth state, but only between states that had ratified it.³ The ninth state, New Hampshire, ratified the Constitution on June 21, 1788; Virginia did not ratify until four days later, on June 25, 1788.⁴ When the Constitution was adopted generally, the Constitution had not taken effect in Virginia. Washington was surely a citizen of Virginia at the time the Constitution was adopted, but if Virginia was not in the Union, how could Washington be a citizen of the United States on June 21? Since he was neither a citizen of the United States by birth nor a citizen at the time of the adoption of the Constitution, how did he ever get to be President?

The contest went unanswered for a number of years, but the answer to the riddle is that Washington was constitutionally eligible for the presidency because the United States was not formed by the adoption of the Constitution, but predated it and

1. See *Contest: Was Washington Constitutional?*, 12 CONST. COMMENT. 137 (1995).

2. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . .”).

3. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of the Constitution between the States so ratifying the Same.”).

4. ROBERT A. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788*, at 212, 250 (1966).

continued without break through the adoption of the Constitution. Virginia was part of the continuous United States for purposes of determining Washington's eligibility, even though it had not yet adopted the Constitution.

The "United States of America" was arguably formed in 1776 by Congress's declaration that the British colonies were states. Historian Richard Morris has argued that Congress created the states and not vice versa.⁵ The Continental Congress was formed from assemblies, conventions and revolutionary committees. In May 1776, two months before the Declaration of Independence, Congress instructed the "respective assemblies and conventions of the United Colonies" to take power from the Crown authorities 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."⁶ The earliest reference I have found to "United States" is a reference to the Congress of the "United States of North America" in secret instructions on March 1, 1776, telling agents of the Congress to buy war goods in Europe. The extra word "*North*" in the reference shows the terminology had not yet settled. Moreover, the instructions within a few lines refers to "*said United Colonies*" as if the draftsman thought he had said "United Colonies" rather than "United States" at the outset of the instructions.⁷

The United States might also have been formed by the act of states coming together. In a decision upholding an indictment for forgery and fraud against the United States, the Supreme Court of Pennsylvania reasoned that the United States necessarily became a body politic from the moment of the association of the states, without need of a charter or statute, just as the English crown, Commons, and Lords had formed a government without a written charter.⁸ At the latest, the Articles of Confederation established the United States upon ratification in 1781 by

5. See Richard Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1057 (1974).

6. Resolution of the Continental Congress, in 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 342 (May 10, 1776) (Worthington C. Ford et al. eds., 1904-37) [hereinafter JCC]. This source and other documentary collections like it are cited in full in this article's bibliographical appendix.

7. Enclosure to Letter of John Alsop et al. to Silas Deane (Mar. 1, 1776) in 3 LETTERS OF DELEGATES TO CONGRESS 1774-1789 314 (Paul H. Smith et al. eds., 1976) [hereinafter LETTERS OF DELEGATES]. The reference precedes the July 4 Declaration of Independence by four months.

8. *Respublica v. Sweers*, 1 U.S. 41, 44 (Pa. 1779).

providing that the “Stile of this Confederacy shall be The United States of America.”⁹

The Framers knew about both sides of the riddle. George Washington was widely expected to be the first President.¹⁰ The Framers also did not expect every state to ratify¹¹ and they required ratification by only nine of the thirteen states for the Constitution to become effective.¹² Virginia was Anti-Federalist enough to be a real risk. The Constitution, as a first priority, gave Congress the power to impose federal tax so as to have funds to pay the debts of the Revolution War and to provide for the common defense and general welfare in perpetuity.¹³ Virginia had earlier resolved that *any* federal tax would be inconsistent with the Virginia’s sovereignty.¹⁴ As it was, Virginia came close to refusing to ratify.¹⁵

The Framers nonetheless knew what the United States of America was and that Virginia was part of it. One does not notice the routine and ordinary things within one’s stock of common knowledge. That is what makes artificial intelligence so hard: the assumptions that make the world intelligible to a human cannot be articulated and written down so that a machine can understand. Most of anyone’s stock of knowledge and experience is assumed but unexpressed, perhaps even unexpressable. Only things that are challenged, things that are to be changed, or unusual new things get noticed and written down. Most of the truths assumed by the authors of the Constitution were unexpressed. Clio, the muse of history, must reveal the assumptions which could not be expressed.

9. ARTICLES OF CONFEDERATION *in* 19 JCC 214 (March 1, 1781).

10. *See, e.g.*, Letter of Pierce Butler (delegate to the Constitutional Convention from South Carolina) to Weedon Butler (May 5, 1788), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (arguing that delegates shaped the powers of the Presidency with a view that Washington would be elected the first President). JACK RAKOVE, ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 245, 404 (1996) properly warns that while many thought that Washington would be the first President, the debates over the powers of the Presidency were long and convoluted and that Pierce Butler was speaking from a position as an advocate of presidential power.

11. *See, e.g.*, George Washington, Letter to Congress by Unanimous Order of the Convention (Sept. 17, 1787), *in* 2 FARRAND’S RECORDS 667 (“That it will meet the full and entire approbation of every State is not perhaps to be expected”).

12. U.S. CONST. art. VII.

13. *Id.* art. I, § 8, cl. 1.

14. XI STATUTES OF VIRGINIA 171 (William Waller Henning, ed., 1782).

15. *See, e.g.*, JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 223-33 (1961) (arguing that Anti-Federalists were in a majority in Virginia, judged by the election campaign promises of the delegates).

The Founders, moreover, were building a nation that took several generations and across the replacement of the Articles by the Constitution. The Founders did not arrogantly claim God-like omniscience that would enable them to start from scratch. They were not acting like Penelope, who unraveled the cloth on her loom each night, to start afresh each morning. Instead, they were improving on the existing nation and national government. To use another analogy, the national government was like a medieval cathedral, started by one generation but not finished until the next. What the Founders knew resided in their experience and cultural heritage. They were who they were because of that experience and cultural heritage, without any need to restate it. What changes they made were incremental.¹⁶

The question, “Was Washington Constitutional?” was a riddle, at least amusing to the readers of *Constitutional Commentary*, because we have tended to think of the Constitution as a completely new start. In his *Commentaries on the Constitution*, Joseph Story argued in 1833 that the Articles of Confederation could not be used either to enlarge or to restrict the language of the Constitution. He ridiculed the idea of appending the Constitution “as a codicil, to an instrument, which it was designed wholly to supercede and vacate.”¹⁷ Story seemed to think that the American nation was, to borrow Edmund Burke’s derogatory metaphor, a blank piece of paper on which the drafters could scribble whatever they pleased.¹⁸ We seem to have adopted Story’s perspective. At very least, the prize for *Constitutional Commentary*’s contest went unclaimed for many years.

Story must have been wrong, however, because Washington could not have been President if the United States was formed completely from scratch or was formed anew on June 21, 1787. The nation did not stop and restart on June 21. It continued. For Washington’s presidency to have been constitutional, the United States, defined to include a Virginia that had not ratified the Constitution, had to carry over from the Articles of Confederation, if not earlier, and into the Constitution.

16. The example of Penelope is from Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1060 (1990) and the cathedral example is from *id.* at 1051-52. The entire paragraph is, of course, the philosophy of EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Conor O’Brien ed., 1969 (1790)), but Kronman reminded me of it and brought it into focus.

17. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 91 (1833).

18. BURKE, *supra* note 16, at 285.

Constitutional Commentary offered a green picture of George Washington suitable for a billfold for an explanation of whether George Washington was eligible for the Presidency. Years after the contest was announced, I won.¹⁹ The contest also offered a second dollar bill for the best explanation of how “great matters of Constitutional theory turn on the proper analysis of the Washington issue.”²⁰ *Constitutional Commentary* gave me that noble portrait of George Washington as well.²¹ More than was possible in a short answer to a riddle, this article explains the greater constitutional theory that allowed Washington to be President.

The greater constitutional theory that justifies Washington’s eligibility for the Presidency is the principle of historical continuity. The Founders were able to articulate and express only things that were challenged, changed or altogether new. The Articles of Confederation explain much of the historical context behind the Constitution. The unmentioned parts of the national government and cultural history of the United States continued from the Articles of Confederation into the Constitution. The words of the Constitution are a thin veneer on top of a thick layer of unstated experiences and collective assumptions. The Founders were building a national government across the period from the Articles of Confederation to the Constitution, and they did not need to restate everything they knew. Since most of the cultural experiences could not be and were not expressed, we need to scour history for the assumptions underlying the Constitution.

Historical continuity is ordinarily unexpressed because one does not notice and therefore cannot articulate the status quo. Changes or startling things get written down. Things that are challenged but retained get written down. But ordinary things that are neither challenged nor changed are typically left unexpressed. People build on what they know, without ever stating all that they know. Even in the most radical times, most ordinary knowledge and cultural heritage do not change. Most ordinary

19. Calvin Johnson, *Was Washington Constitutional?*, 18 CONST. COMMENT. 295 (2001).

20. *See Contest*, *supra* note 1, at 137.

21. At least I think I won both contests. After a long e-mail correspondence with Daniel Farber, the editor of *Constitutional Commentary*, over whether a claim for \$2 against the state of Minnesota could be enforced notwithstanding the Eleventh Amendment, I got a letter with two \$1 bills and an unsigned note saying, “Don’t tell any one you got this. You’ll ruin my rep.” (Copy on file with the author.) I responded with an e-mail to Professor Farber saying that I would treat this information with the usual modesty and reticence that I apply to all my really, really big wins.

knowledge and cultural experience remain as unexpressed assumptions.

What the Founders considered routine and ordinary was also the correct base for a constitution. The system of government appropriate for those people who lived in the United States at the time was better reflected in the wisdom of the ages. No one thinker or small group could do better starting over on all issues from scratch. That does not mean that the status quo was frozen. Those things that the Founders wanted to change, they did change. The Constitution makes many incremental changes. Aspects of the national government that they did not want to change, however, were retained without further notice.

This article discusses historical continuity from the Articles to the Constitution in general and then applies that principle to some interesting controversies. Historical continuity explains, for instance, that

- even without Congressional action, states are prohibited from imposing restrictions and taxes on out-of-state citizens that they do not impose on their own citizens,
- Congress can commandeer state officers, notwithstanding the Supreme Court's doubts, and
- Congress has a general power to regulate "for the common Defence and general Welfare."

Historical continuity is a stability-affirming norm of great persuasive power and many interesting applications.

II. FROM ARTICLES TO CONSTITUTION

A. THE CLEAN BREAK

The Constitution was not and could not have been an amendment of the Articles of Confederation. The Articles required that all amendments to the Articles had to be approved by all thirteen states.²² Both the Resolution of the Annapolis Convention that had called for a Federal Convention in Philadelphia²³ and the Congressional Resolution that had called upon the states to support the Annapolis Resolution²⁴ had said that

22. ARTICLES OF CONFEDERATION, art. XIII, para. 1, *in* 19 JCC 221 (Mar. 1, 1781).

23. Address of the Annapolis Convention *in* 3 THE PAPERS OF ALEXANDER HAMILTON 686 (Harold C. Syrett ed., 1961-79) [hereinafter HAMILTON PAPERS].

24. Resolution of Congress (Feb. 21, 1787), *in* 32 JCC 74.

the Philadelphia Convention would merely report a proposal that would be confirmed in every state, as required by the Articles. The Framers did not think they could not get unanimous ratification. The Constitution drafted in Philadelphia nationalized the “impost” or tax on imports so that the federal government would have funds to pay debts from the Revolutionary War.²⁵ The desperate need for federal revenue made a new constitution necessary. But Rhode Island, Virginia, and New York had vetoed prior proposals to give the impost to the federal government²⁶ and would probably veto again.²⁷

The Framers were not willing to let the unanimity requirement preclude changes “as may be necessary to the exigencies of the Union.”²⁸ “If one State . . . should suppose that they can dictate a Constitution to the Union,” George Washington wrote, “they will find themselves deceived.”²⁹ Rhode Island was beyond redemption, out of the family. Rhode Island, according to the Framers, was the “Quintessence of Villainy” and responsible for

25. U.S. CONST. art. I, § 8, cl. 1 (giving the federal government the power to lay imposts); *id.* § 10, cl. 3 (prohibiting states from laying imposts without Congressional approval).

26. See JOHN KAMINSKI, *GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC* 91 (1993) (discussing New York’s position that the power to tax New York harbor traffic was a “privilege Providence hath endowed [New York] with,” which should not be surrendered to Congress); IRVIN H. POLISHOOK, *RHODE ISLAND AND THE UNION, 1774-1795*, at 53-88 (1969) (describing Rhode Island’s decision to veto the impost). As noted, Virginia had refused the federal impost in 1782 on the ground that any federal tax would be inconsistent with Virginia’s sovereignty. See text accompanying *supra* note 14.

27. Nathaniel Gorham, Speech at the Federal Convention (July 23, 1787), *in* 2 FARRAND’S RECORDS 90 (arguing that Rhode Island could be expected to “persist in her opposition to general measures” and that New York would veto because “[t]he present advantage which N. York seems to be so much attached to of taxing her neighbours”); James Wilson, Speech at the Federal Convention (Sept. 10, 1787), *in* 2 FARRAND’S RECORDS 562 (arguing that it was “worse than folly to rely on the concurrence of the Rhode Island members of Congs. in the plan”).

28. Address of the Annapolis Convention *in* 3 HAMILTON PAPERS 686 (calling for the Constitutional convention).

29. Letter from George Washington to Charles Carter, *VIRGINIA HERALD* (Dec. 27, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 612 (Bernard Bailyn ed., 1993) [hereinafter DEBATE ON THE CONSTITUTION]; see also James Iredell, North Carolina, Ratification Convention (July 31, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 229 (Jonathan Elliot ed., 1891) [hereinafter ELLIOT’S DEBATES]. (“The deputies from twelve states unanimously concurred in opinion that the happiness of all America ought not to be sacrificed to the caprice and obstinacy of so inconsiderable a part”); R.D. Spaight, Debate in the North Carolina Convention (July 30, 1788), *in* 4 ELLIOT’S DEBATES 207 (“The very refractory conduct of Rhode Island, in uniformly opposing every wise and judicious measure taught us how impolitic it would be to put the general welfare in the power of a few members of the Union”).

the “poverty of the Revolutionary soldiers, high taxes and the embarrassed state of public finances.”³⁰ Having “forfeited all claim to the confidence of the nation and of the whole world,” Rhode Island was “a disgrace to the human race.”³¹ Rhode Island was not the only wicked state, but Rhode Island was small, absent, and sufficient. The intransigence of wicked Rhode Island or New York for the smallest reforms, combined with the unanimity requirement for changes under the Articles, meant that a whole new constitution would be required. The Framers decided that ratification by merely nine of thirteen states would be sufficient to establish the Constitution among the states that had ratified. Nine of thirteen states had been the level required under the Articles, among other things, to borrow money or charge expenses to the common treasury.³² Nine-state ratification would mean, for example, that the states that had vetoed the impost—Rhode Island, Virginia, and New York—could not alone block the Constitution.

The Convention was not illegal, the Framers concluded, because the Convention was giving a mere recommendation that would be ratified by the people. “I never heard before,” James Wilson argued, “that to make a proposal was an exercise of power.”³³ The Constitution was “merely advisory and recommendatory,” the *Federalist* declared, and it would be of “no more consequence than the paper on which it is written” unless ratified.³⁴ The Constitution was legitimate, Alexander Hamilton

30. JOHN K. ALEXANDER, *THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE 23-24* (1990) (quoting a Salem, Massachusetts newspaper of 1787).

31. Samuel Huntington, Speech to the Connecticut General Assembly (May 11, 1787), *DOCUMENTARY HISTORY-MICROFICHE SUPPL. CONN.* 53.

32. ARTICLES OF CONFEDERATION, art. IX, *in* 19 JCC 220 (Mar. 1, 1781).

33. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 4, 1787), *in* 2 ELLIOT’S DEBATES 469; *accord* James Wilson In The Pennsylvania Convention (Nov. 26, 1787), *in* 3 FARRAND’S RECORDS 143 (saying that the Federal convention proceeded upon original principles and not in reliance on the powers given to them by the states, “and having framed a constitution which they thought would promote the happiness of their country, they have submitted it to their consideration, who may either adopt or reject it, as they please”).

34. THE FEDERALIST NO. 40, at 264 (James Madison) (Jan. 18, 1788) (Jacob E. Cooke ed., 1961) (a date in a cite to THE FEDERALIST will tell the date the essay was first published in a New York newspaper); *accord* THOMAS PAINE, RIGHTS OF MAN, PT. II (1792) *in* COLLECTED WRITINGS 377 (Eric Foner ed., 1995) (“This convention . . . having . . . agreed upon a constitution, . . . ordered it to be published, not as a thing established, but for the consideration of the whole people, their approbation or rejection. . . . When . . . the general opinion of the people in approbation of it was then known, the constitution was . . . proclaimed on the *authority of the people*” (emphasis added)).

argued, because the consent of the people is the “pure original fountain of all legitimate authority.”³⁵

Having rejected the possibility of merely amending the Articles of Confederation, the Framers, starting afresh, were able to be far more radical in proposing changes. The Articles of Confederation had been a compact among sovereign states. Congress under the Articles had been a mere assembly of diplomats, with no revenue source of its own. The states had been supreme and the Congress was just their agent. The Constitution replaced the confederation with a complete, three-part national government. The new national government was able to raise revenue on its own, to operate independently of the states, and to enact federal law supreme over the states. The preamble to the Articles of Confederation had identified the adopting actors as “Delegates of States.”³⁶ The parallel preamble to the Constitution identified the adopting actors as “We the People of United States,” who “ordain and establish this Constitution.”³⁷ “This . . . is not a government founded upon compact,” James Wilson told the Pennsylvania Ratifying Convention. “[I]t is founded upon the power of the people. They express in their name and their authority—‘We, the people, do ordain and establish . . .’”³⁸ Sovereignty, he said, “remains and flourishes with the people.”³⁹ Having been forced to start from scratch because unanimous ratification was unlikely, the Framers made fewer compromises with the status quo.

B. THE CONTINUITY FROM THE ARTICLES TO THE CONSTITUTION

Still, the Articles of Confederation were not only the document against which the Framers were reacting, but also the model from which they worked. Most assumptions, including assumptions about fundamental law, are unstated because the unchallenged parts of the status quo are hard to articulate. Any document, including a constitution, talks primarily about what needs to be changed. The Articles of Confederation had flaws,

35. THE FEDERALIST NO. 22, at 146 (Alexander Hamilton) (Dec. 14, 1787) .

36. ARTICLES OF CONFEDERATION, pmb. and art. XIII, in 19 JCC 214, 221.

37. U.S. CONST. pmb.

38. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 11, 1787), in 2 ELLIOT'S DEBATES 497-98.

39. James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 12, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 555 (Merrill Hanson ed., 1976) [hereinafter DOCUMENTARY HISTORY].

but that did not mean that the national government had to be destroyed, like Sodom and Gomorrah. The Articles had created a rickety national government and the Constitution would build on it. The Constitution, to quote Ernest Brown,

borrowed and carried forward from the text of the Articles of Confederation not only ideas and concepts but even, in many instances, the very wording, verbatim or only slightly adapted, of phrases or whole clauses. This is the way in which institutions built on the past are designed and constructed.⁴⁰

The Constitution assumed the national government under the Articles of Confederation and added to it. The national government was to have all of the powers under the Constitution that it had under the Articles of Confederation, plus more. Both the Virginia Plan and the very different New Jersey Plan gave the new Congress all the powers of the old.⁴¹ Likewise the full Convention later voted a supposedly binding resolution that the “National Legislature [would] possess the Legislative Rights vested in Congress by the Confederation.”⁴² The Founders never sought to cut back on the powers of Congress. As James Wilson said to the Convention, “It has never been a complaint against Congress that they governed overmuch. The complaint has been that they have governed too little.”⁴³ The delegates from Connecticut reported home that “a principal object that the states had in view in appointing the convention” was to give Congress “[s]ome *additional* powers.”⁴⁴ “The evils suffered and feared

40. Ernest Brown, *Book Review: Politics and the Constitution in the History of the United States*, 67 HARV. L. REV. 1439, 1441 (1954) (reviewing WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)).

41. Virginia Plan #6 (May 29, 1787), in 1 FARRAND’S RECORDS 21 (providing that the national legislature would “enjoy the Legislative Rights vested in Congress by the Confederation” plus added powers); see also vote of the Convention in Committee of the Whole (May 31, 1787), in 1 FARRAND’S RECORDS 47 (Madison notes) (9-0 vote, with Connecticut divided) (adopting the Virginia Plan #6 to give Congress all the powers vested by the Articles of Confederation plus the power to legislate where “the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation”); 3 FARRAND’S RECORDS 612 (showing the New Jersey Plan, which resolved “in Addition to the Powers vested in the United States in Congress by the present existing Articles of Confederation” the Congress would be given new powers).

42. July 16, 1787, in 2 FARRAND’S RECORDS 14 (Madison notes) (resolution adopted without opposition).

43. James Wilson, Speech at the Federal Convention (July 14, 1787), 2 FARRAND’S RECORDS 10.

44. Letter from Roger Sherman and Oliver Ellsworth, Connecticut Superior Court Justices, to Samuel Huntington, Governor of Connecticut, *The Report of Connecticut’s Delegates to the Constitutional Convention*, NEW HAVEN GAZETTE (Sept. 26, 1787) (em-

from weakness in Government,” Madison told Jefferson, “have turned the attention more toward the means of strengthening the [government] than of narrowing [it].”⁴⁵ “The basic change in the character of the government that the Framers conceived was designed to enhance the power of the national government, not to provide some new, unmentioned immunity for state officers.”⁴⁶ No one contested the obvious point that the Constitution was adding to the powers of Congress.

The Constitution as finally drafted also adopted the Articles of Confederation’s structure and much of their language to describe the powers of Congress. The first clause of the Constitution describing congressional power gives Congress the power to lay and collect taxes to “provide for the *common Defence and general Welfare* of the United States.”⁴⁷ The Articles of Confederation, Article VIII, had similarly allowed Congress to defray “expences that shall be incurred for the *common defence or general welfare*, and allowed by the united states in congress assembled,” from the common treasury.⁴⁸ “The objects for which Congress may apply monies,” the Connecticut Delegates reported home to their Governor, “are the same mentioned in the eighth article of the confederation, viz. for the *common defence and general welfare*.”⁴⁹ The common-defense-and-general-welfare language of the Constitution was later said to have the same meaning in the Constitution as it had under the Articles.⁵⁰

Similarly, the language and structure of other clauses regarding congressional power come from the Articles. Article IX of the Articles listed specific congressional powers including, for

phasis added), reprinted in 13 DOCUMENTARY HISTORY 470, 471.

45. Letter of James Madison to Thomas Jefferson, Feb. 4, 1790, in 16 THE PAPERS OF THOMAS JEFFERSON 146, 150 (Julian Boyd ed., 1950) [hereinafter JEFFERSON PAPERS].

46. United States v. Printz, 521 U.S. 898, 945 (1997) (Stevens, J. dissenting).

47. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

48. ARTICLES OF CONFEDERATION, in 19 JCC 217 (Mar. 1, 1781) (emphasis added).

49. Letter from Roger Sherman and Oliver Ellsworth to Samuel Huntington, *supra* note 44, at 471 (emphasis added).

50. THE FEDERALIST NO. 45, at 314 (James Madison) (Jan. 26, 1788). Madison later argued that “common defence and general welfare” had the same meaning in the Constitution as under the Articles, in order to restrain the power of Congress under the Constitution. James Madison, The Bank Bill, Speech to the House of Representatives (Feb. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 372, 375 (William T. Hutchinson & William M.E. Rachal eds., 1962-1991) [hereinafter MADISON PAPERS]; Madison, Report of 1800 (on the Virginia Resolutions) (Jan. 7, 1800), in 17 *id.* 303, 313; Letter from James Madison to Joseph C. Cabell (Oct. 30, 1828), in 9 THE WRITINGS OF JAMES MADISON 324, 325 (Gaillard Hunt ed., 1900-1910) [hereinafter WRITINGS OF JM].

instance, the powers to raise and support an army and navy, to establish a post office, to fix weights and measures, to coin money, and to regulate trade with the Indians.⁵¹ Article I, section 8 of the Constitution gives Congress all these powers. Section 8 also lists some new powers, including, for example, powers to regulate commerce with foreign nations and between the states, to pass uniform nationwide laws for bankruptcy and naturalization of citizens, to authorize patent and copyrights, and to establish a city for the federal capital.

The resolution that supposedly bound the drafting committees at the Convention had stated that the “National Legislature [would] possess the Legislative Rights vested in Congress by the Confederation” plus some new powers.⁵² That resolution was accomplished in substance by using the language of the old Articles and adding to it. The status quo would continue with augmentation of the powers of Congress. The text is sufficient, with the help of Clio, to give the new Congress all of the powers of the old.

The United States government under the Constitution, moreover, must be understood as a continuation of the United States government under the Articles. The edifice was improved, but it occupied the same location. The debts of the old government were made valid against the new government.⁵³ Real revolutions repudiate debt: The Russian Revolution broke the continuity of government, for instance, because the Soviet government in 1918 repudiated the debts of its czarist predecessor.⁵⁴

The new federal government also continued the activities of the old federal government, thin as they were. All of the executive departments organized in the first session of the new Congress were merely continuations of committees of the old Congress. The old congressional Offices of Foreign Affairs, Treasury, and War became executive offices in the new government. The staffs of the congressional offices of Indian Affairs, passports, and the post office continued as the staffs of the offices of the executive branch under the Constitution.⁵⁵ Congress

51. 19 JCC 219.

52. July 16, 1787, in 2 FARRAND'S RECORDS 14 (resolution adopted without opposition).

53. U.S. CONST. art. VI.

54. See *Bissell v. Commissioner*, 23 B.T.A. 572 (1931) (reporting the Soviet repudiation of Imperial Russian bonds in February 1918).

55. LEONARD DUPEE WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE*

adapted old statutes, such as the Northwest Ordinance and the Settlement of Accounts, to the fact that there was now a President, but in making adjustments for the new Constitution, the new Congress assumed the continued validity of the old Congress's acts.⁵⁶ The first Act of the new Congress on the post offices was styled an "establishment," but the Act provided that the rules for the post office would be "the same as they last were under the resolution or ordinances of the late Congress."⁵⁷

Even beyond the specific language, there must have been at least a presumption that the status quo continued. Formally, it is correct to say that the Articles of Confederation were superseded and vacated, but human experience and collective understandings are not discarded so simply. Political institutions carry on. The wisdom of the ages, beyond the capacity of any one person, persisted. The Constitution can change things by necessary implication. The Constitution, for example, created a presidency and ended the supremacy of the states. Such important changes will have unstated but necessary consequences. Nevertheless, the Constitution did not destroy the preexisting nation, national government, or culture.

III. APPLICATION OF THE CONTINUITY-OF-HISTORY PRINCIPLE

The principle that the government and collective experiences of the United States were continuous from the Articles of Confederation to the Constitution has a number of interesting applications. Under the principle of historical continuity, states are prohibited from discriminating against Americans from other states, just as they were under the Articles of Confederation. The federal government may commandeer state officers, just as they did under the Articles. Congress may exercise unenumerated powers appropriate to the national sphere, in part because the Framers removed the Articles' requirement that Congress would have only the powers expressly delegated to it.

HISTORY 200-01 (1948); U.S. PASSPORT OFFICE, *THE UNITED STATES PASSPORT: PAST, PRESENT, FUTURE* 8-9 (1976).

56. DAVID MATTESON, *THE ORGANIZATION OF THE GOVERNMENT UNDER THE CONSTITUTION* 269 (reprint 1970) (1941).

57. 1 Stat. 70 (Sept. 22, 1789).

A. DORMANT COMMERCE CLAUSE

The Articles of Confederation prohibited a state from imposing a tax or restriction on an out-of-state citizen that it was unwilling to impose on its own citizens:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union,

the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states;

and the people of each state shall have free ingress and regress to and from any other state,

and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively⁵⁸

The Constitution does say that citizens of one state shall be “entitled to all Privileges and Immunities” in the several states,⁵⁹ but it omits the language saying that out-of-state Americans will be subject to the same duties, impositions, and restrictions as in-state Americans.

The omission arguably does little harm. The federal courts have actively developed what is called the “dormant commerce clause” to prevent discrimination directed toward out-of-staters.⁶⁰ Some commentators have, however, opposed the application of an antidiscrimination norm, at least in its strongest versions, on the ground that the Constitution did not include it in the text.⁶¹ Justices Scalia and Thomas are unwilling for the courts

58. ARTICLES OF CONFEDERATION, art. IV, in 19 JCC 214-15 (emphasis added and paragraph breaks added). In the deleted language, the Articles allowed restrictions on the movement of paupers, vagabonds, and fugitives from justice, allowed restrictions to prevent the removal of property from out of a state, and prohibited taxes and restrictions on property of another state or of the United States.

59. U.S. CONST. art. IV, § 2, cl. 1.

60. For a review of the literature on state discrimination against out-of-staters, see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, 1029-43 (3d ed. 2000). Compare Richard Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (defending the need of the courts to prevent discrimination and to protect the economic union) with Lisa Heinzerling, *The Commercial Clause*, 1995 SUP. CT. REV. 217, 222 (expressing skepticism that the dormant commerce clause serves efficiency, democracy, or national union).

61. See, e.g., Lino Graglia, *The Supreme Court and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE*, supra note 60, at 67, 70 (arguing that in the absence of text, the federal government should not police discrimination against out-of-staters); Martin H. Redish & Shane V. Nugent, *The Dormant Com-*

to apply a balancing test under the dormant commerce clause when the state statute is not discriminatory on its face, in part because there is no authority for judicial review in the constitutional text.⁶² Congress can regulate commerce between the states, because the specific words of Article I, section 8, clause 3 give Congress that power. On the other hand, the dormant commerce clause, which gives the judiciary the responsibility of enforcing nondiscrimination norms among the states in the absence of federal legislation, must rest on norms not expressed in the Constitution, even though they were clearly expressed in the Articles of Confederation.⁶³

The prohibition on discrimination against out-of-state citizens embodied in the dormant commerce clause continues by implication from the Articles of Confederation into the Constitution. Article IV of the Articles of Confederation formally recognized the constitutional value condemning discrimination against out-of-staters. Formal embodiment in text eliminates ambiguity over the norm's status and extent. The debates over the Constitution indicate that antidiscrimination was strongly felt. There was no articulated opposition. Indeed, the prohibition against state regulations or taxes that discriminate against out-of-state citizens seems to have been left unexpressed only because it was not challenged and was not at issue.

The norm condemning discrimination against out-of-staters appeared often in the Convention and subsequent ratification debates as the rationale explaining provisions that the Framers adopted. The Constitution nationalized state imposts, for example, relying in part on the argument that the state imposts allowed the states with good deep-water harbors—especially New York—to tax neighboring states without good harbors.⁶⁴ The

merce Clause and Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 570-71 (arguing that the dormant commerce clause lacks basis in the text or structure of the Constitution).

62. See, e.g., *Oklahoma Tax Commn. v. Jefferson Lines Inc*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring, joined by Thomas, J.); *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 94-95 (1987) (Scalia, J., concurring).

63. Mark Gergen, *The Selfish State and The Market*, 66 TEX. L. REV. 1097, 1117-18 (1988) would find the prohibition against discrimination in Article IV, section 2's proviso that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." That language needs to be stretched, however, to reach corporations as well as individual citizens, to reach goods as well as citizens, and to focus on accomplishing an economic union rather than preserving individual "rights." See Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003).

64. See, e.g., THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (Nov. 17, 1787) (saying that some states, such as New York, have the opportunity of rendering others,

Constitution also prohibited export taxes to prevent the deep-water “commercial” states from taxing exports produced by their “uncommercial neighbors.”⁶⁵ The Constitution prohibits “preference . . . to the ports of one state over those of another”⁶⁶ because such preferences would affect the States unevenly.⁶⁷

Consistently, the Constitution’s protection for creditors’ rights was justified in part in terms of justice across state lines. Article I, section 9 prohibits states from impairing contracts and from issuing paper money. The constitutional debates described those prohibitions as necessary to prevent “aggressions on the

Connecticut and New Jersey, tributary to them by laying duties on imports); Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), *in* 15 DOCUMENTARY HISTORY 177 (attacking New York because it put into her own treasury all the duties arising on goods consumed in Connecticut, New Jersey, Vermont, and western Massachusetts); THE FEDERALIST NO. 42, at 283 (James Madison) (Jan. 22, 1788) (saying that the power to regulate commerce between the states was adopted to prevent commercial states from collecting improper and unfair contributions from their noncommercial neighbors); Letter from James Madison to J.C. Cabell (Feb. 13, 1829), *in* 3 FARRAND’S RECORDS 478 (saying that power to regulate commerce was intended to prevent the injustice among the states by which importing states taxed non-importing states); James Madison, Preface to Debates in the Convention of 1787 (*circa* 1830), *in* 3 FARRAND’S RECORDS 542 (attributing the Constitution in part to the fact that some of the States had no convenient ports for foreign commerce and were therefore subject to taxation by their neighbors, through whose ports their commerce was conducted); *id.* (“New Jersey, placed between Philadelphia and New York, was likened to a Cask tapped at both ends.”); *id.* at 547 (arguing that Rhode Island was “well known to have been swayed by an obdurate adherence to an advantage which her position gave her of taxing her neighbors through their consumption of imported supplies”).

65. Gouverneur Morris, Speech in the Federal Convention (Aug. 21, 1787), *in* 2 FARRAND’S RECORDS 360 (Madison notes) (arguing that deep-water harbor states absent prohibition on state export taxes will tax the produce of their noncommercial neighbors); James Wilson, Speech at the Federal Convention (Aug. 16, 1787), *in* 2 FARRAND’S RECORDS 307 (Madison notes) (opposing a prohibition on export taxes but dwelling on the “injustice and impolicy of leaving N. Jersey Connecticut &c any longer subject to the exactions of their commercial neighbours”); Roger Sherman, Speech at the Federal Convention (Aug. 16, 1787), *in* 2 FARRAND’S RECORDS 308 (Madison notes) (supporting a prohibition of export taxes, but saying that the oppression of uncommercial states by commercial states was offset against by Congress’s power to regulate trade between the states).

66. U.S. CONST. art. I, § 9, cl. 6.

67. See Charles Carroll & Luther Martin (Aug. 25, 1787), *in* 2 FARRAND’S RECORDS 417 (Madison notes) (arguing that Congress might enact port preferences, requiring “vessels belonging or bound to Baltimore, to enter and clear at Norfolk”). As the “centerpiece” of his economic program, James Madison had sponsored a Virginia port preference scheme requiring that all imports into and exports from Virginia should move only through Norfolk or Alexandria. See BRUCE A. RAGSDALE, A PLANTERS’ REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA 269 (1996). George Mason hated the Virginia port preference restrictions, likening them to a chain across Virginia’s finest rivers. Protest by a “Private Citizen” Against the Port Bill (Nov.-Dec. 1786), *in* 2 THE PAPERS OF GEORGE MASON 859 (Robert A. Rutland ed., 1970).

rights of other States”⁶⁸ and “injury to the citizens of other States.”⁶⁹ Paper money was a trick, Gouverneur Morris explained, “by which Citizens of other States may be affected.”⁷⁰ Prohibitions on state debtor relief were similarly thought necessary as a security for commerce, stated Roger Sherman and Oliver Ellsworth, in that the “interest of . . . citizens of different states may be affected.”⁷¹ Similarly, federal courts were given jurisdiction over suits between citizens of different states, Madison told Virginia, to protect the commercial states by allowing creditors to avoid state courts, where creditors’ remedies might be “imaginary and nominal.”⁷²

The norm of parity between states was also cited by opponents of provisions that were adopted. The Constitution allows Congress to enact an American Navigation Act, which would give United States ships a monopoly on carrying American commodities. Opponents wanted to require a two-thirds vote for passage of a Navigation Act, arguing that a simple majority vote would violate interstate justice because by allowing a “few rich merchants” from New York, Philadelphia, and Boston to plunder the South.⁷³ As it turned out, the fight over a two-thirds requirement did not matter because Congress never passed an American Navigation Act even though the Constitution allowed it by simple majority.⁷⁴

68. James Madison, *Vices of the Political System of the United States*, April 1787, in 9 *MADISON PAPERS* 349.

69. *THE FEDERALIST* NO. 44, at 300-01 (James Madison) (Jan. 25, 1788) (arguing that if states were given the power to issue money, “the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured; and animosities be kindled among the States themselves”).

70. Gouverneur Morris (July 17, 1787), in 2 *FARRAND’S RECORDS* 26 (Madison notes).

71. Letter from Roger Sherman & Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), in 3 *DOCUMENTARY HISTORY* 352.

72. James Madison, *Debate in the Virginia Ratification Convention* (June 20 1788), in 3 *ELLIOT’S DEBATES* 534, 535.

73. George Mason, *Speech before the Federal Convention* (Sept. 15, 1787), in 2 *FARRAND’S RECORDS* 631 (Madison notes); *cf.* Letter from Richard Henry Lee to George Mason (Oct. 1, 1787), in 13 *DOCUMENTARY HISTORY* 28 (“Whilst the Commercial plunder of the South stimulates the rapacious Trader”).

74. The early tax statutes did impose higher tax rates on imports carried by foreign ships than on imports carried by U.S.-owned ships. *See, e.g.*, An Act for imposing duties on tonnage, 1 Stat. 27, ch. 3 (July 20, 1789) renewed, An Act imposing duties on the tonnage of ships or vessels, 1 Stat. 135, ch. 30 (July 30, 1790) (tonnage fees imposing a tax of 6 cents per ton on U.S.-owned ships, but 50 cents per ton on foreign-owned ships), but those preferences were gutted by the Jay Treaty of 1786 with Great Britain, which obligated the United States and Great Britain to stop putting higher taxes on each other’s ships. Treaty of Amity, Commerce and Navigation [Jay Treaty], art. III, XV (concluded Nov. 19, 1794, ratified Feb. 1795, and promulgated Feb. 29, 1796), in *SAMUEL FLAGG*

Sometimes the norm against discrimination led to overreaction. In August 1787, for example, the Framers worried that “tonnage fees”—imposed on ships according to their weight to pay for the upkeep of the harbor, wharves, and lighthouses—might be used to discriminate against out-of-staters. The Constitution as drafted prohibits states from imposing tonnage fees, in absence of Congressional approval.⁷⁵ Some discrimination in favor of local shipping makes sense because the tonnage rates appropriate for vessels carrying full cargoes across the Atlantic that visited no more than twice a year would be far too high for local or short-haul vessels that were in and out of the harbor with partial cargoes many times a week. The states imposing the tonnage fees, moreover, would be expected to dredge the harbors, erect the lighthouses, and maintain the piers and wharves by state taxes alone. Plausibly tonnage was a fine way to get the users to pay for the state’s services.⁷⁶ The prohibition on tonnage fees was thus probably an overreaction, driven by the strong nondiscrimination norms. The states would impose discriminatory burdens if allowed to.

Advocates of the Constitution also argued that the existing protections against discrimination would disappear if ratification failed. “Publicola” argued that if North Carolina did not ratify, then other states would “treat us as foreigners” and preclude commerce with them or impose imposts that would annihilate North Carolina’s trade.⁷⁷ In *Federalist No. 22*, Hamilton argued that if the Constitution were not ratified, the various states would impose multiple duties on interstate transportation, much as the separate German states imposed tolls on the great rivers that flow through Germany.⁷⁸ These arguments should be considered scare tactics. Tolls on interstate commerce would have

BEMIS, JAY’S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 333-35 (1921). Discrimination as to all foreign ships seems to have been ended generally in 1799. An Act to regulate the collection of duties on imports and tonnage, ch. 22, § 61, 1 Stat. 673 (Mar. 2, 1799) (imposing tax of 10 percent of cost).

75. See U.S. CONST. art. I, § 10; see James Madison, Speech at the Federal Convention (Sept. 15, 1787), in 2 FARRAND’S RECORDS 625 (arguing “that the regulation of commerce was in its nature indivisible and ought to be wholly under one authority”).

76. See James McHenry, Notes of the Federal Convention (Sept. 4, 1787), in 2 FARRAND’S RECORDS 504 (McHenry notes) (“[It] does not appear that the national legislature can erect light houses or clean out or preserve the navigation of harbours”). See also James McHenry & Charles Carroll (Sept. 15, 1787), in 2 FARRAND’S RECORDS 625 (Madison notes) (moving unsuccessfully that “no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses”).

77. *Publicola: Address to the Freemen of North Carolina*, STATE GAZETTE OF NORTH CAROLINA (Mar. 27, 1788), reprinted in 16 DOCUMENTARY HISTORY 495.

78. THE FEDERALIST NO. 22, at 137 (Alexander Hamilton) (Dec. 14, 1787).

required not just a failure to ratify the Constitution, under Hamilton's argument, but also a repeal of the Articles of Confederation's prohibition on interstate barriers as well as an overriding of the "genius of the [American] people."⁷⁹

The nondiscrimination norm seems to have been quite well respected in the Confederation. Consistent with the Articles, state imposts almost always exempted American source goods from tax.⁸⁰ Violations of the nondiscrimination norm were quite minor. Before a 1788 revision, Virginia imposed a 1 percent impost on goods from "any port or place whatsoever,"⁸¹ which violated the normal rule that goods of American origin should not bear state imposts. Virginia was shamed into compliance in January 1788 when it increased the tax to 3 percent but exempted goods of American growth and manufacture.⁸² Even at a modest 1 percent, the Virginia tax seems to have been the most serious violation of the norm against taxes on out-of-state Americans.⁸³

The text of the Constitution dropped the prohibition against state-imposed taxes and state regulations of out-of-state citizens not imposed on the state's own citizens. The omission was not a rejection of the norm. Rather because the norm had become routine, it was so firmly accepted within the stock of ordinary knowledge that it was hard to articulate.

Edmund Kitch has argued that the dormant commerce clause is unnecessary today because the states will negotiate free trade policies among themselves without the warping interference from the federal government.⁸⁴ I am less sanguine than Kitch that an "invisible hand" will make free trade triumph in

79. *Id.*

80. 1 LAWS OF THE STATE OF NEW YORK (1774-84), March 22, 1784, p. 599, ch. x, II (exempting goods of American growth or manufacture from New York impost); Act of Dec. 23, 1780, ch. 190, § 21; FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 427 (1984) (same); ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, ch. 12, p. 17 (1783) (same). *See also* FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 18 (1985) (saying that sister states were exempted from restrictions against foreigners); Edward Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 9, 17-19 (A. Dan Tarlock, ed. 1981) (saying that the only example of a discriminatory state tax was New York's attempt to prevent end runs around its anti-British tax).

81. 11 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 38, § 14 at 70 (1781).

82. 12 HENNING'S STATUTES AT LARGE OF VIRGINIA, ch. 1, § 5 at 416 (1788).

83. *See, e.g.*, Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 470 (1940-41) ("The first thing that strikes one's attention in seeking references directed to interstate commerce is their paucity").

84. *See* Edward Kitch, *supra* note 60, at 17-19.

the long run. The problem of discrimination against out-of-staters is endemic. State legislators are always looking for ways to protect the in-state citizens who elect them and to tax and restrict out-of-state citizens who cannot and do not vote in state. The unrestrained political economy of federalism favors discrimination, even though that hurts the total system. Even if there are other mechanisms, including negotiations between the states, that *might* advance the nondiscrimination norm, help from the courts would further the norm even more. The issue here, in any event, is not the political science of free trade, but the history and interpretation of the text of the Constitution. Given the principle of continuity from the Articles of Confederation to the Constitution, the Articles of Confederation's express prohibition on discriminatory taxes and regulations authorizes the contemporary dormant commerce clause.

B. COMMANDEERING

The Supreme Court has recently created a new doctrine prohibiting the federal government from commandeering states or state officers to accomplish federal goals. "The Federal Government," the Court has said, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."⁸⁵ In *Printz v. United States*,⁸⁶ for example, the Supreme Court in 1997 held, by a 5-4 vote, that Congress could not require a county sheriff to conduct background checks on would-be handgun purchasers. The federal "Brady Bill" had prohibited gun dealers from selling handguns to fugitives from justice, persons committed to mental hospitals, and persons convicted of crimes of domestic violence, among others. The Brady Bill required gun dealers to suspend sale of a handgun for five business days and to ask the chief local law enforcement officer to check records. The Brady Bill directed the local officer to make reasonable efforts within those five days to ascertain the buyer's ineligibility to buy a gun. *Printz* invalidated the requirement that the local officers make reasonable efforts to conduct the background checks. Justice Scalia's majority opinion purported to rely on historical understanding and practice and on the structure of the Constitution, as well as

85. *Printz v. United States*, 521 U.S. 898, 935 (1997).

86. 521 U.S. 898 (1997).

on the Court's prior decisions.⁸⁷ Justice O'Connor's concurrence concluded that the federal law's provisions "utterly fail to adhere to the design and structure of our constitutional scheme"⁸⁸ In the subsequent case of *Alden v. Maine*,⁸⁹ which barred the enforcement of federal fair labor standards in state courts, Justice Kennedy argued that the state immunity stemmed from "fundamental postulates implicit in the constitutional design."⁹⁰

At the time of the Constitution, congressional impressments of state and local officers to accomplish national goals was part of the accepted tradition.⁹¹ The Continental Congress conducted first an embargo against British goods and then a full war against Great Britain without any employees of its own, save for a few clerks to transcribe congressional orders.⁹² To put its laws into effect, the Continental Congress had to impress state officials and local committees. Congress gave instructions to local committees, who were not its employees.⁹³ The federal government, such as it was, was too thin to accomplish anything in any other way.

Under the Articles, which were ratified late in the war, Congress was just an assembly of delegates from sovereign states, and not a full government. The Articles provided, for instance, that Congressmen were appointed by the states and subject to recall by them at any time.⁹⁴ Even after ratification of the Articles of Confederation, Congress could not effect any of its laws, except by impressing state officers. The status quo at the time of the Constitution was one in which the small federal gov-

87. *Id.* at 905.

88. *Id.* at 936 (O'Connor, J. concurring).

89. 527 U.S. 706 (1999).

90. *Id.* at 729.

91. See *Printz*, 521 U.S. at 939 (Stevens, J. dissenting) (arguing that the early history of the Nation means that Congress may impose affirmative obligations on executive and judicial officers of state and local governments).

92. See, e.g., David Conway, *Development of a Revolutionary Organization, 1765-1775*, in JACK P. GREENE & J.R. POLE, *THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION* 223, 228 (1991) (observing that committees of inspection at the town level went beyond enforcement of embargo against British); Rebecca Starr, *Political Mobilization, 1765-1776*, in GREENE & POLE, *supra*, at 231, 236 (observing that Congress supervised committees of enforcement in towns throughout nation, which adapted enforcement of the embargo of British goods to local needs); JACK RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS* 49-52, 66-69 (1979) (saying that the local committees deferred to Congress and were not yet willing to rely on popular support alone, and that popular deference was accorded to Congress and not to the local committees).

93. See ROBERT MIDDLEKAUF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 248 (1982).

94. ARTICLES OF CONFEDERATION, art. V in 19 JCC 215 (Mar. 1, 1781).

ernment operated, without a significant payroll, strictly by commandeering state actors. The commandeering of state actors was part of the normal world the Founders knew.

The debates show that the Founders assumed that normal impressments of state and local officers would continue, without any need for explicit provision in the Constitution. The Constitution uses impressment of state officers to accomplish most of what the federal government was expected to do. On the core government functions of war, law enforcement and taxes, commandeering is permitted.

On taxes, Congress was given the option, but not the obligation, to impress state officials by continuing the requisition system. The Constitution did allow Congress, for the first time, to collect taxes without going through the states. Under the Articles of Confederation, Congress had no independent taxing power and had to finance the war by issuing continental dollars,⁹⁵ and by requisitions of specie⁹⁶ and supplies from the states. The states were required, in theory, to pay their share to redeem the Continental dollars.⁹⁷ The Continental dollar would have held its value if the states had imposed taxes to absorb excess dollars beyond the amount needed for trade, but the states were not willing to tax.⁹⁸ The system of requisitioning specific supplies from the states was used after the Continental dollar had become worthless in 1780. The system of requisitions of specific supplies was always unsatisfactory and often disastrous. States

95. The states were required, in theory, to pay their share to redeem the Continental dollars. Thomas Jefferson Notes on Debates on the Continental Congress (July 29, 1775), in 2 JCC 221 (resolving that “each colony provide ways and means to sink its proportion of the bills ordered to be emitted by this Congress, in such manner as may be most effectual and best adapted to the condition and circumstances, and usual mode of levying taxes in such colony”); see EDMOND BURNET, *THE CONTINENTAL CONGRESS* 215-20 (1941); RAKOVE, *supra* note 92, at 205-15. The dollar would have held its value. Continental dollars would have held their value if the states had imposed taxes to absorb the excess of dollars beyond the amount needed for trades, but the states were not willing to tax. Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. ECON. HIST. 47, 59-60 (1988).

96. ARTICLES OF CONFEDERATION, art. VIII in 19 JCC 217 (March 1, 1781) (providing that all expenses for the common defence or general welfare be charged to a common treasury, supplied by each state in proportion to the value of its land, building, and improvements).

97. See Thomas Jefferson Notes on Debates on the Continental Congress (July 29, 1775), in 2 JCC 221 (resolving that “each colony provide ways and means to sink its proportion of the bills ordered to be emitted by this Congress, in such manner as may be most effectual and best adapted to the condition and circumstances, and usual mode of levying taxes in such colony”); EDMOND BURNET, *THE CONTINENTAL CONGRESS* 215-20 (1941); RAKOVE, *supra* note 92, at 205-15.

98. Calomiris, *supra* note 95, at 59-60.

were always late at best and commonly fully remiss.⁹⁹ The requisition of specie contributions never achieved the funds that were needed for the war and as time went on the requisition system failed entirely. The Requisition of 1786, just before the Constitution, for instance, mandated contributions of \$3.8 million, and collected just \$663.¹⁰⁰

The continental dollar, the system of specific impressments of supplies and the requisition system of specie were commandeering systems, under which Congress captured the state tax systems to collect revenue to turn over to the united cause. A state was required to redeem its quota of continental dollars or pay its requisition quota, but the state decided the objects to be taxed and used state employees for a federal purpose. The states were forced to absorb the costs of raising taxes and would take the blame for the burdens and defects of the tax law.¹⁰¹ The union-level government reaped the benefits. The Constitution changed the Articles of Confederation in giving Congress the option, but not the obligation, to collect revenue directly. The Constitution gave Congress the power to collect taxes by the ordinary process of law, whereas Congress could collect delinquent requisitions from the states only by coercive military action, perhaps even civil war.¹⁰²

Giving the Congress the power to tax directly was not thought at the time to end Congress's use of requisitions. The Anti-Federalists strenuously opposed the switch from requisitions to federal direct tax. The Federalists responded by saying that requisitions would assuredly continue within a state that

99. E. WAYNE CARP, *TO STARVE THE ARMY AT PLEASURE: CONTINENTAL ARMY ADMINISTRATION AND AMERICAN POLITICAL CULTURE, 1775-1783*, at 87-88, 171-87 (1984).

100. See ROGER H. BROWN, *REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION* 26 (1993). The Board of Treasury reported zero receipts from the Requisition of 1786 just after the close of the Constitutional Convention, “[n]o State having complied with the terms of it” (Sept. 29, 1787), *in* 33 JCC 569, 572. Brown relies on Treasury Reports ending earlier, March 31, 1787, and the difference is apparently a judgment about credit given for prior state expenditures. The bridge between \$663 and zero, in any event, can be comfortably spanned by rounding.

101. ARTICLES OF CONFEDERATION, art. VIII *in* 19 JCC 217 (Mar. 1, 1781) (providing that the taxes for paying each state's requisition quota shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the federal Congress). *But cf.* *Printz v. United States*, 521 U.S. 898, 930 (1997) (arguing that commandeering is unconstitutional because it forces the states to absorb the costs and take the blame for the burdens and defects of a federal program).

102. Alexander Hamilton, Speech to the New York Ratification Convention (June 20, 1788), *in* 2 ELLIOT'S DEBATES 232 (saying that coercion to enforce requisitions was “one of the maddest projects that was ever devised”).

paid its requisitions. The Anti-Federalists objected to replacing requisitions with federal taxes because the objects of tax would be decided not by state officials familiar with the community, but by remote federal officials. Under requisitions, George Mason said, taxes are raised “by those who know how it can best be raised, by those who have a fellow-feeling for us.”¹⁰³ Southern Anti-Federalists were especially afraid that Congress would tax the slaves to the point of manumission.¹⁰⁴ The Anti-Federalists advocated an amendment that would have required the federal government to rely on requisitions only within any state that paid its quota.¹⁰⁵ The amendment forcing the federal government to rely first on requisitions was the Anti-Federalists’ single most important issue, according to both Washington and Madison.¹⁰⁶

The proponents of the Constitution assuring the Anti-Federalists that Congress would continue to collect revenue by requisitions within a state that was willing to pay its quota. Tench Coxe told Pennsylvania that if states raised their quotas of a requisition in the easiest and most expeditious way, a federal government with “the least degree of policy [, reason,] or virtue, would never attempt to interfere.”¹⁰⁷ James McHenry assured

103. George Mason, Debate in the Virginia Ratification Convention (June 4, 1788), in 3 ELLIOT’S DEBATES 31; see also John DeWitt IV, *To the Free Citizens of the Commonwealth of Massachusetts*, AMERICAN HERALD (Nov. 19, 1787), reprinted in 4 DOCUMENTARY HISTORY 265, 269 (arguing that federal tax assessors will have interests “distinct from yours”).

104. See, e.g., Patrick Henry, Speech to the Virginia Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 456 (arguing that Congress might lay such heavy taxes on slaves, amounting to emancipation, “that this property would be lost to the country”).

105. The Anti-Federalist amendment, to prohibit the federal government from laying internal or direct taxes within a state that paid its quota of a requisition, was recommended by the ratification conventions of seven states: (1) Massachusetts (Feb. 7, 1788), in 1 ELLIOT’S DEBATES 322, 323; (2) South Carolina (May 23, 1788), in 1 ELLIOT’S DEBATES 325; (3) New Hampshire (June 21, 1788), in 1 ELLIOT’S DEBATES 325, 326; (4) Virginia (June 27, 1788), in 10 DOCUMENTARY HISTORY 1550, 1556; (5) New York (July 26, 1788), in 1 ELLIOT’S DEBATES 327, 329; (6) North Carolina (Aug. 1, 1788), in 4 ELLIOT’S DEBATES 245; and (7) Rhode Island (May 29, 1790), in 1 ELLIOT’S DEBATES 336.

106. Letter from James Madison to George Washington (Dec. 5, 1789), in 12 MADISON PAPERS 458, 459 (describing Anti-Federalist opposition was reducible “to a single point, the power of direct tax”); Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 12 DOCUMENTARY HISTORY at 332 (saying that the Anti-Federalists’ restraints on federal direct tax were the “most popular topic among the adversaries”); Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), in 30 THE WRITINGS OF GEORGE WASHINGTON 82-83 (John C. Fitzpatrick ed., 1931-1944) (presuming that the Anti-Federalist amendment that goes to the prevention of direct taxation would be the most-strenuously-insisted-on amendment).

107. Tench Coxe, *To the Minority of the Convention of Pennsylvania: A Freeman III*, PENNSYLVANIA GAZETTE (Philadelphia) (Feb. 6, 1788), reprinted in 16 DOCUMENTARY

Maryland that Congress would not exercise its power over direct taxes if the states would raise their quotas “in any other manner more suitable to their own inclinations.”¹⁰⁸ The Connecticut delegates to the Federal Convention promised Connecticut that Congress need not exercise its authority over direct tax if each state will furnish its quota.¹⁰⁹ Publius (Hamilton) anticipated that Congress’s power to tax would induce greater compliance with requisitions because the “States know that the Union can supply itself without their agency.”¹¹⁰ Publius (Madison) consistently, assuaged the country:

It is true, that [Congress] is to possess, and may exercise, the power of collecting internal . . . taxes throughout the States: But it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States.¹¹¹

Because requisitions were the familiar status quo, continuation of requisitions reassured the Anti-Federalists.

The Anti-Federalists also argued that federal direct taxes would unleash two sets of awful tax collectors. The Federalists responded that state officers alone would be sufficient to collect federal tax. In New York, Melancton Smith objected that giving Congress the power to impose direct taxes would mean that both state and federal officials would seek to seize the same horse.¹¹² Anti-Federalist John DeWitt objected in Massachusetts: “A new set of Continental pensioned Assessors will be introduced into your towns, whose interest will be distinct from yours. They will be joined by another set of Continental Collectors. . . .”¹¹³

HISTORY 49, 51.

108. James McHenry, Debate in the Maryland House of Representatives (Nov. 29, 1787), in 3 FARRAND’S RECORDS 149.

109. Letter from Roger Sherman and Oliver Ellsworth to Samuel Huntington, *supra* note 44, at 471.

110. THE FEDERALIST NO. 36, at 227 (Alexander Hamilton) (Jan. 8, 1788), cited by United States v. Printz, 521 U.S. 898, 947 (1997) (Stevens, J., dissenting).

111. THE FEDERALIST NO. 45, at 312-13 (James Madison) (Jan. 26, 1788); accord James Madison, Debates in the Virginia Ratification Convention (June 6, 1788), in 3 ELLIOT’S DEBATES 95-96 (arguing that it was safe and just to trust the federal government with direct tax, which is likely to be used only in war).

112. Melancton Smith, Speech to the New York Convention (June 27, 1788), in 2 ELLIOT’S DEBATES 333.

113. DeWitt, *supra* note 103, at 269.

George Mason asked in Virginia, “Will the people of this great community submit to be individually taxed by two different and distinct powers? Will they suffer themselves to be doubly harassed?”¹¹⁴ Patrick Henry pointed to the “dreadful oppression” of two sets of tax collectors, one state sheriff and one federal sheriff.¹¹⁵ “Double sets of collectors will double the expenses,” Henry objected.¹¹⁶

Federalists responded by reassuring the country that a single local sheriff could collect both federal and state taxes.¹¹⁷ Publius (Hamilton) argued that if items were subject to both federal and state tax, the United States would probably “make use of the State officers and State regulations” because “it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people.”¹¹⁸ Madison said that execution on a single property by two sets of officers could be avoided “because [taxes] are executed by the same officer.”¹¹⁹ Within the ratification debates, federal impressment of state officers to collect federal tax was considered to be the lesser intrusion upon the states. Duplication of officers was considered the dreadful oppression that the proponents said that the new government would avoid.

On war, the Constitution expressly allows the impressment of state officers. Under the Constitution, the officers of the militia are appointed by the state,¹²⁰ but the federal government has the power to nationalize the state militia, “calling forth the Militia to execute the Laws of the Union.”¹²¹ The militia in the service of the United States, Joseph Story said in 1827, is subject to the same rules and articles of war as the troops of the United States Army.¹²² As the Supreme Court wrote in 1820,

The President’s orders may be given to the chief executive magistrate of the State, or to any militia officer he may think

114. George Mason, Debate in the Virginia Ratification Convention (June 4, 1788), in 3 ELLIOT’S DEBATES 29.

115. Patrick Henry, Speech to the Virginia Ratification Convention (June 5, 1787), in 3 ELLIOT’S DEBATES 57.

116. *Id.* (June 6, 1787), in 3 ELLIOT’S DEBATES 147, cited in *United States v. Printz*, 521 U.S. 898, 947 n. 5.

117. Robert Livingston, Speech to the New York Convention (June 27, 1788), in 2 ELLIOT’S DEBATES 346.

118. THE FEDERALIST NO. 36, at 227-8 (Alexander Hamilton) (Jan. 8, 1788).

119. James Madison, Speech before the Virginia Ratification Convention (June 12, 1788), in 3 ELLIOT’S DEBATES 305-306.

120. U.S. CONST. art. I, § 8, cl. 16.

121. *Id.* art. I, § 8, cl. 15.

122. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 35 (1827) (Story, J.).

proper; neglect, or refusal to obey orders, is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence and punishment.¹²³

State officers, including the governor, must follow federal orders or face general court martial, and the general court martial can inflict the death penalty for disobedience.¹²⁴

On administration of justice, the constitutional structure also allows the Congress to impress state judges and other court employees into enforcing federal goals. Article III, section 1 of the Constitution allows but does not require Congress to create a system of lower federal courts below the Supreme Court. Early in the Philadelphia convention, John Rutledge of South Carolina won a close vote on a motion to deprive Congress of the ability to create lower federal courts.¹²⁵ Rutledge argued that state court trials, with appeal to the Supreme Court, would be sufficient to secure “national rights & uniformity of Judgmts.”¹²⁶ Roger Sherman of Connecticut agreed with Rutledge, arguing that lower federal courts would be too expensive “when the existing State Courts would answer the same purpose.”¹²⁷ When Rutledge’s motion prevailed, Madison and James Wilson countered with a motion that Congress should be empowered, but not required, to establish inferior federal courts, thereby leaving the issue to the discretion of some future Congress. The Madison–Wilson motion succeeded and became part of Article III, section 1 of the Constitution. That history suggests that Congress may avoid creating lower courts all together, even if the motive is just to save the federal expense. The Founders considered the impressing of state courts to enforce federal law to be a lesser intrusion on states than the creation of lower federal courts.¹²⁸ Rutledge and Ellsworth’s skepticism about national power made the impressing of state courts for federal law a federal option. It took the nationalists Madison and Wilson another step to give Congress the option to use judges who were not state officers.

Article VI, section 2 of the Constitution provides that any laws passed by Congress shall be the supreme law of the land.

123. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 15 (1820).

124. See 32 U.S.C.A. § 92 (2000).

125. John Rutledge (June 5, 1787), in 1 FARRAND’S RECORDS 124 (Madison notes) (Rutledge’s motion to remove the clause establishing lower federal court).

126. *Id.*

127. Roger Sherman, Debate in the Federal Convention (June 5, 1787), in 1 FARRAND’S RECORDS 125 (Madison Notes).

128. John Rutledge, Debate in the Federal Convention (June 5, 1787), in *id.* at 124.

Judges in every state are bound by federal law, notwithstanding any statute or constitution to the contrary. “The obvious necessity of a controul on the laws of the States, so far as they might violate the Constn. & laws of the U.S.,” Madison explained, “left no option.”¹²⁹ A state court cannot refuse to enforce a right arising from federal law because of “conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.”¹³⁰ A state court may not treat federal law as if it were the law of some foreign sovereign or some other state.¹³¹ State officers, Publius said, will enforce “the law of the land, from whatever source it might emanate.”¹³²

Once Congress could involuntarily impress on state officers the core governmental functions of taxation, administration of justice, and war, there is not very much left that the federal government was doing at the time. The debaters on both sides, however, also generalized beyond the specific examples of tax, law and war and assumed that all federal law would be accomplished through state actors. Anti-Federalist Agrippa objected strenuously that the fact that all the state officers were bound by oath to support the Constitution would lead them “to execute the continental laws in their own proper departments within the state.”¹³³ Federalist William McClaine agreed with Agrippa’s interpretive conclusion but liked the result, saying that the laws can, in general, be executed by the officers of the states: “State courts and state officers will, for the most part, probably answer the purpose of Congress as well as any other.”¹³⁴ Publius argued that the ability of the federal government to use the local officials of each state would influence public opinion and “give the Federal Government the same advantage for securing a due obedience to its authority, which is enjoyed by the government of each State.”¹³⁵ The use of state officials, Hamilton said, would give the federal government the “power to call to its assistance

129. Letter from James Madison to N.P. Trist (Dec. 1831), in 3 FARRAND’S RECORDS 516.

130. *Testa v. Katt*, 330 U.S. 386, 388-89 (1947) (holding that a state court may not refuse to enforce a federal law on the ground that it is “a penal statute in the international sense”).

131. *Id.*

132. THE FEDERALIST NO. 16, at 104 (Alexander Hamilton) (Dec. 4, 1787).

133. *Agrippa V*, MASS. GAZETTE (Dec. 11, 1787), reprinted in 4 DOCUMENTARY HISTORY 406, 407.

134. William McClaine, Speech at the North Carolina Ratification Convention (July 28, 1788), in 4 ELLIOT’S DEBATES 140.

135. THE FEDERALIST NO. 27, at 174 (Alexander Hamilton) (December 25, 1787) (Jacob E. Cooke, ed. 1961).

and support the resources of the whole Union.”¹³⁶ Indeed, Hamilton *reassured* the skeptics that the federal government would not destroy the state governments, because destroying the state governments would lose an indispensable support, a “necessary aid in executing the laws.”¹³⁷

The Supreme Court’s decision in *Printz* seems to mandate the very two sets of sheriffs that Patrick Henry and the other Anti-Federalists condemned and the Constitution’s proponents promised to avoid. Both the plaintiffs who objected to the background checks in *Printz* were sheriffs of sparsely populated western counties. Graham County, in the high desert of southeast Arizona, has a population density of about 7 people per square mile.¹³⁸ Ravalli County, in southwestern Montana’s Bitterroot River Valley, has a population density of 11 people per square mile.¹³⁹ County sheriffs are not quite the only law west of the Pecos, but there is not much other law and that is probably the way most people like it. A single set of sheriffs applying all governing law is a fine system.

The ratification debates considered a second set of federal officers to be a worse intrusion. Local sheriffs, to quote George Mason, “know how [the law] can best be [enforced]” and “have a fellow-feeling for us.”¹⁴⁰ The federal agencies that could be brought to bear to enforce the Brady Bill are the FBI, tainted by Ruby Ridge in the eyes of many gun control opponents,¹⁴¹ and the Bureau of Alcohol, Tobacco, and Firearms, tainted in those eyes by the siege of the Branch Davidians in Waco.¹⁴² Letting local sheriffs enforce the paramount law of the land may be the lesser intrusion even today.

136. *Id.*

137. Alexander Hamilton, Speech before the New York Ratification Convention (June 27, 1788), in 2 ELLIOT’S DEBATES 353.

138. Official City Sites: Arizona, at <http://officialcitysites.org/county.php3?st=AZ&countyname=Graham> (accessed June 15, 2001) (based on 1998 estimate of population).

139. Ravalli County, Montana, at <http://www.usacitiesonline.com/mtravallcounty.htm> (accessed June 15, 2001).

140. George Mason, Debate in the Virginia Ratification Convention (June 4, 1787), in 3 ELLIOT’S DEBATES 31.

141. See *The Federal Raid on Ruby Ridge: Hearings before the Subcomm. on Terrorism, Technology, and Government Information of the Judiciary Comm.*, 104th Cong., 1st Sess. (Sept.-Oct., 1995).

142. *Materials Relating to the Investigation into the Activities of Federal Law Enforcement Agencies toward the Branch Davidians by the Judiciary Committee*, 104th Cong., 2d Sess. (1997).

The Montana and Arizona sheriffs who won *Printz* also objected to the policy of the Brady Bill, not to law enforcement in general.¹⁴³ Still, state law officers are supposed to be agents of the law of the land, “from whatever source it might emanate.”¹⁴⁴ State opposition to federal law because of “conceptions of impolicy or want of wisdom on the part of Congress in having to called into play its lawful powers” has never been grounds, and can not be grounds, for state refusal to enforce federal law.¹⁴⁵

The Supreme Court in *Printz* attempted to distinguish state judges’ enforcement of federal law, which is required by Article III, from sheriffs’ enforcement of federal law. But both judges and sheriffs are equally officers of the law. Checking arrest records is certainly within the ordinary business of a sheriff. Jay Printz’s office in Ravalli County checks arrest records for the U.S. military free of charge.¹⁴⁶ Local sheriffs cannot pick and choose, checking arrest records for federal laws they like, while ignoring the laws they do not like. Federal law, including the Brady Bill, is not some alien intervention from some other state, country, or planet. Under the supremacy clause of Article VI, the Brady Bill was the supreme law of the land. That should have been sufficient.

In *Printz*, the Supreme Court erroneously said that powers of Congress under the Articles of Confederation do not carry over into the Constitution unless the Constitution specifically grants it.¹⁴⁷ The Founders by contrast argued in their debates that the new Congress would have at least all of the powers of the old Congress under the Articles of Confederation, *plus* some new powers.¹⁴⁸ Far from imposing new limitations, the Constitution increased the powers of the old Congress. That is also not how Clio works. Most items in the collective experience of a culture continue from one period to the next. Even impressment, allowed before the Constitution, continued to be allowed after its adoption. It may be that if the Founders had had the 200 additional years of wisdom that we enjoy, they would have realized

143. 521 U.S. at 957-58 n. 18 (Stevens, J. dissenting).

144. THE FEDERALIST NO. 16, at 104 (Alexander Hamilton) (Dec. 4, 1787).

145. *Testa v. Katt*, 330 U.S. 386, 393 (1947) (citing *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916)).

146. Ravalli County, Sheriff’s Office, at http://www.co.ravalli.mt.us/ps_sheriff.htm (accessed June 14, 2002).

147. 521 U.S. 898, 921, n.10 (1997) (citing Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1972 (1993)).

148. Letter of James Madison to Thomas Jefferson (Feb. 4, 1790) 16 JEFFERSON PAPERS 146, 150 and other sources cited *supra* notes 41-46.

that requisitions would not be extensively used under the new Constitution. In fact, however, the Founders drew their wisdom from their own experience and part of that wisdom was that requisitions, if made enforceable, were good tools.

In concluding that the powers of Congress under the Articles did not carry over into the Constitution, the *Printz* Court relied primarily on a law review article, *Field Office Federalism*, by Saikrishna Prakash.¹⁴⁹ Prakash mistakenly thought that the Founders relinquished the power of requisitions and *substituted* direct taxation by Congress on individuals and transactions: “The lack of clear requisitioning authority strongly suggests that the Constitution does not permit federal requisitioning from state legislatures.”¹⁵⁰ The premise of the argument, however, is wrong. The proponents of the Constitution promised the skeptics that requisitions would continue, which clearly assumes that requisitions were available, although not mentioned specifically in the document. Within the context of the debates, the continuation of requisitions was a promise or assurance.

Justice Scalia, speaking for the majority in *Printz*, also argued that the historical instances in which the federal government used state officers depended upon the states’ consent. Justice Scalia argued that neither the suggestions that requisitions would continue, nor the more general statements that the Congress would use state officers, established “the critical point here—that Congress could impose these responsibilities *without the consent of the States*.”¹⁵¹ Those statements, he reasoned, appeared instead “to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government.”¹⁵²

The option to commandeer state officers or to use federal officers belongs exclusively to the federal government. The proposition that the states cannot be forced to do anything against their will is easily falsified. Nationalization of state militias is not by consent of the state, enforcement of federal law by state courts is not by consent of the state courts, and requisitions of federal tax revenue were not by consent. On their face, the Articles of Confederation made requisitions mandatory. A req-

149. See Prakash, *supra* note 147.

150. *Id.* at 1972; see also *id.* at 1975-88 (arguing that the Framers surrendered the power of requisitions); *id.* at 2033 (“the Constitution abandoned the idea of instructing legislatures on how to legislate”).

151. 521 U.S. at 910-11 (emphasis in original).

152. *Id.*

quisition impressed a state's tax collectors for a federal mission and drained its tax resources for a federal purpose. The object financed by tax, that is, the victory of independence in the Revolutionary War, was a national purpose, funded by state tax and tax effort. Indeed, the experience leading up to the Constitution in which the states chose to avoid paying the requisitions that were *de jure* mandatory indicates that the states were not *consenting* to paying requisitions. The wicked states did not want to pay their share of the Revolutionary War debts in 1787, and getting them to pay was the proximate cause of the Constitution. A state could avoid requisitions by paying federal direct tax instead, but in the ratification debates, federal tax was considered to be the more draconian alternative. If the draconian alternative of federal direct tax induced the states to impress their tax systems for the Union cause by requisitions, that does not mean that the impressment was by consent.

Printz cited several constitutional provisions that purportedly “presuppose[] the continued existence of the states” and presuppose that they have residual sovereignty.¹⁵³ With an exception that proves the rule, however, all of the provisions cited by *Printz* in fact overrode the will of the states. Diversity jurisdiction, which *Printz* cited as evidence of residual state sovereignty, gives the federal courts jurisdiction to hear lawsuits between citizens of different states.¹⁵⁴ Diversity jurisdiction arose from distrust of the states and was designed to counteract the tendency of state courts to favor their own citizens *vis-a-vis* out-of-staters.¹⁵⁵ A state court might render biased decisions in favor of its own state's interests and diversity takes away that possibility. Similarly, Article IV, section 2, also cited by *Printz* as evidence of state sovereignty, in fact mandates that a state extend the “privileges and immunities” of its own citizen to citizens of other states. It too was written as an anti-state rule to counteract the natural tendency of elected state officials to favor in-state voters, at the expense of nonvoting rivals from out-of-state. Ar-

153. *Id.* at 919.

154. U.S. CONST. art. III, § 2.

155. See THE FEDERALIST NO. 80, at 537-38 (Alexander Hamilton) (May 28, 1788) (arguing that a federal court is the proper place to hear suits by out-of-staters against a state because the state tribunal could not be “supposed to be impartial” due to the “strong predilection” of state judges, “as men . . . to [favor] the claims of their own government”); James Wilson, Speech to the Pennsylvania Ratification Convention (Dec. 7, 1787), in 2 ELLIOT'S DEBATES 491 (“[Since] impartiality is the leading feature in this Constitution . . . [w]hen a *citizen* has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing” (emphasis added)).

title IV, section 4, which guarantees each state a republican form of government, was written to prevent a state from using its sovereignty to become a monarchy or aristocracy, and to recognize that the people were sovereign over the state.¹⁵⁶ The republican guarantee makes the federal constitution the guarantor that the states will always be inferior to the sovereign people. All of these provisions, which *Printz* cited as signs of respect for state sovereignty were in fact adopted to curb state power.

Article IV, section 3 does require state consent for a reduction or combination of state territory. The Articles of Confederation had given Congress power to adjudicate territorial disputes without the consent of either state.¹⁵⁷ The state consent required by Article IV is therefore new. Under the maxim *expressio unius est exclusio alterius*,—to express one thing is to exclude another—, Article IV implies that when the Constitution wants to require state consent, it does so expressly. A requirement of consent by the states beyond what was expressed could never be implied under the Founders’ understanding.¹⁵⁸

Whether to use federal taxes or requisitions, federal lower courts or state lower courts, or the federal army or a nationalized state militia is a federal decision under the Constitution. Federal decision are reached democratically by majority vote. There is no Calhounian nullification on the state level if the states disagree with the federal decision.¹⁵⁹ The choice of whether to

156. THE FEDERALIST NO. 43, at 291 (James Madison) (Jan. 23, 1788) (saying that “the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations”); Tench Coxe, “An Examination of the Constitution of the United States of America” (Fall 1787) *reprinted in* THE FOUNDER’S CONSTITUTION (Philip P. Kurland and Ralph Lerner eds., 1986) *available at* http://press-pubs.uchicago.edu/founders/documents/a4_4s4.html (describing the republican guarantee clause as preventing the taking of power out of the hands of the people and vesting powers in hereditary governors, whether as Kings or Nobles).

157. ARTICLES OF CONFEDERATION, art. IX ¶¶ 2-3 *in* 19 JCC 218.

158. Both the O’Connor and Thomas concurrences describe *Printz* as holding that the Brady Bill’s background check requirement violates the Tenth Amendment. 521 U.S. at 936 (O’Connor, J. concurring opinion); *id.* (Thomas, J. concurring opinion). The Tenth Amendment, however, is subservient to any powers granted by the body of the Constitution or by other amendments, whether those powers are explicit or unexpressed. A power that the federal government exercises under the authority of a fly’s weight still outweighs the Tenth Amendment. *United States v. Darby*, 312 U.S. 100, 124 (1941) (saying that the Tenth Amendment “states but a truism that all is retained which has not been surrendered”); Charles A. Lofgren, *The Origins of the Tenth Amendment*, *in* CONSTITUTIONAL GOVERNMENT IN AMERICA 331 (R. Collins, ed. 1980) (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

159. David F. Ericson, *The Nullification Crisis, American Republicanism, and the Force Bill Debate*, 61 J. S. HIST. 249 (1995) describes the Nullification Crisis.

commandeer state officers or use federal employees is made on the national level, without state participation.

C. THE END OF THE EXPRESSLY DELEGATED LIMITATION¹⁶⁰

The Constitution's description of the powers of Congress comes from the Articles of Confederation. In using the structure and language of the Articles, however, the Constitution deleted the Articles' limitation that Congress would have only the powers "expressly delegated" to it. The Framers defended the deletion of the "expressly delegated" through the adoption of the Tenth Amendment. The specific intent of this omission was to allow the federal passport system, which was not enumerated in either the Articles or the Constitution. More generally, the Founders seem to have intended to allow Congress some unstated powers considered to fall appropriately within the national sphere. The generally accepted understanding of what was appropriately a national function is described by the phrase, drawn from the Articles, that the Congress had power "to provide for the common defense and general welfare."

Article IX of the Articles of Confederation, as noted, had given Congress a list of powers, including the power to raise and support an army and navy, to establish post offices, to fix weights and measures, to coin money and to regulate trade with the Indians.¹⁶¹ Separately, Article VIII had allowed Congress to defray expenses "incurred for the common defence or general welfare" from the common treasury.¹⁶² Article II of the Articles then provided that each state retains "every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the . . . Congress."¹⁶³

The Constitution adopted the structure of the Articles and much of its language, but it omitted the "expressly delegated" limitation. Article I, section 8 repeated all of the powers listed in Article IX, and adds some new powers. The first clause of sec-

160. The material from this section summarizes Calvin Johnson, *The General Federal Power "to Provide for the Common Defence and General Welfare of the United States,"* (forthcoming, 21 CONST. COMMENT. 2004).

161. ARTICLES OF CONFEDERATION, in 19 JCC 219 (Mar. 1, 1781).

162. *Id.* at 217.

163. *Id.* at 214. The "expressly delegated" limitation of Article II of the Articles of Confederation arose from a motion by Thomas Burke of North Carolina. See Letter from Thomas Burke to Governor Richard Caswell of North Carolina (Apr. 29, 1777), in 2 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 345-46.

tion 8 carries over old Article VIII to allow Congress to tax and spend for the common defense or general welfare. There is, however, no provision confining Congress only powers expressly delegated to it.¹⁶⁴

The Anti-Federalist opponents of the Constitution vigorously protested the deletion of the “expressly delegated” limitation. The Articles said at the outset that what is not expressly given is reserved, Cincinnatus complained, but the “Constitution makes no such reservation. The presumption therefore is that the framers of the proposed constitution did not mean to subject it to the same exception.¹⁶⁵ The absence of the “expressly delegated” limitation, Brutus objected, meant that “[i]t is as much one complete government as that of New York or Massachusetts [and] has as absolute and perfect powers to make and execute all laws.”¹⁶⁶ But Edmund Randolph defended the omission, before the Virginia ratification convention, because the “expressly delegated” limitation had proved to be “destructive” to the Union. Even the passport system, Randolph said, had been challenged under the Articles because it was not expressly authorized.¹⁶⁷ The proponents of the Constitution also wanted the Congress to have unexpressed or implied powers to enforce requisitions by force if necessary.¹⁶⁸

A recent controversy, well known to the Framers, confirmed the federal government’s power to control movement by

164. The specific language of Article I, section 8 was drafted at the Philadelphia convention by a series of drafting committees, starting with the Committee of Detail, supposedly on the basis of mandatory resolutions adopted by the convention as a whole. None of the resolutions included the Article II’s “expressly delegated” restriction, nor did any of the surviving early drafts presented to the Committee of Detail by Edmund Randolph and James Wilson. 2 FARRAND’S RECORDS 129-75.

165. *Cincinnatus I: To James Wilson, Esquire*, N.Y. JOURNAL (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY 529, 531.

166. *Brutus I*, NEW YORK JOURNAL (Oct. 18, 1787), reprinted in 13 DOCUMENTARY HISTORY 411, 414; see also *Centinel II*, PHILADELPHIA FREEMAN’S JOURNAL (Oct. 24, 1787), reprinted in 13 DOCUMENTARY HISTORY 457, 460 (objecting to the absence of “expressly delegated” and to fact that infinite federal law was made paramount over state law); *A Democratic Federalist*, PENNSYLVANIA HERALD (Oct. 17, 1787), reprinted in 13 DOCUMENTARY HISTORY 386, 387 (objecting that limitation of the federal government should have been “clearly expressed in the plan of government”).

167. Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), in 3 ELLIOT’S DEBATES 600-601. Edmund Randolph served on the five-man Committee of Detail at the Philadelphia convention. See 2 FARRAND’S RECORDS 97. That committee removed the “expressly delegated” language from the Constitution. Randolph’s statement was also a kind of declaration against interest because it is not the kind of understatement of the Constitution’s impact that the Federalists used to secure ratification.

168. See, e.g., Edmund Randolph, Reasons for not Signing the Constitution (Dec. 27, 1787), in 8 DOCUMENTARY HISTORY 260, 263.

passport. In late 1782, a group of Pennsylvanians, accounting under color of Pennsylvania law, seized goods from the sailing ship *Amazon* as enemy contraband. The *Amazon* was carrying supplies under a federal passport issued by General Washington for British and Hessian prisoners of war held in Lancaster, Pennsylvania. The seizure occurred after the provisional treaty of peace had been signed, and long after Yorktown ended the actual fighting.¹⁶⁹ Congress, led by a committee that included Madison, objected that the *Amazon* passport had been validly issued by the Commander in Chief.¹⁷⁰ Ultimately, the Pennsylvania legislature sought advice from the Pennsylvania Supreme Court. The state court and legislature agreed that the federal passport was valid, concluded that the Pennsylvania law requiring seizure of contraband was unconstitutional as applied to the *Amazon*, and ordered the seized goods to be returned.¹⁷¹ The Pennsylvania decision is an early quasijudicial precedent establishing the supremacy of federal over state law.¹⁷²

169. Cornwallis surrendered on September 19, 1781. JAMES THOMAS FLEXNER, *GEORGE WASHINGTON AND THE AMERICAN REVOLUTION* 461 (1968). The provisional treaty of peace was signed in Paris on November 30, 1782, although cessation of arms was not announced by the Continental Congress until April 11, 1783. 24 JCC 238.

170. Madison, Notes of the Continental Congress Debates (Jan. 24, 1783), in 19 *LETTERS OF DELEGATES* at 608 (reporting that a Committee of Rutledge, Madison and Wolcott had concluded that the power of granting passports for the feeding of the prisoners was inseparable from the power of war); Letter of Oliver Wolcott to Matthew Griswold (Jan. 22, 1783) 18 *id.* at 601 (saying that if Pennsylvania were permitted to commit such an atrocious violation of the principles of the confederation, no one would trust the passport); John Mercer (Pa.), Debate in the Congress of the Confederation (Feb. 20, 1783), in 5 *ELLIOT'S DEBATES* 54 (reporting the resolution of Congress).

171. John Dickinson, Report to the Pennsylvania General Assembly (Jan. 20, 1783), in *MINUTES OF THE FIRST SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA* 783 (reporting the conflict between the passport and Pennsylvania law); *MINUTES OF THE SECOND SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA* 834 (Feb. 18, 1783) (resolving also that Pennsylvania citizens should be reimbursed for the returned goods because the seizure had taken place pursuant to 1782 Pennsylvania law); Note in manuscript of the Journals of the Continental Congress (Feb. 20, 1783), in 25 JCC 906, n.1 ("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 (New Jersey), Speech to the House of Representative (Feb. 4, 1791), in 1 *ANNALS OF CONGRESS 1795-1976* (Joseph Gales ed., 1790) [hereinafter *ANNALS OF CONGRESS*] (reporting that Pennsylvania judicial officers declared the confiscation invalid because Congress' power to declare war included the power over passports); Madison, Notes of the Continental Congress Debates (Jan. 25, 1783), in 19 *LETTERS OF DELEGATES* 608 (reporting that the Pennsylvania legislature decided that Pennsylvania law was unconstitutional insofar as it interfered with federal passports).

172. The author has not been able to locate the opinion of the Pennsylvania Supreme Court to the Pennsylvania legislative committee in either the Pennsylvania State archives in Harrisburg, Pennsylvania, or the Pennsylvania Historical Society archives in Philadelphia, assuming that it has survived.

Passports started under the Confederation as a wartime measure. Between 1776 and 1781, Congress voted a number of resolutions for identifying specific individuals facing hardship who would be allowed to cross the lines of war¹⁷³ or to bring their families and household goods from outside the United States.¹⁷⁴ Article IX of the Articles expressly allowed Congress to set the rules for and direct the operations of the land and naval forces.¹⁷⁵ That language comfortably covers the wartime passports issued by the Commander in Chief. Prisoners of war are distinctly a wartime phenomenon. Congress continued passports in peacetime, however. In 1786, long after the end of the War, Congress expanded the system to require passports co-signed by the Superintendent for Indian Affairs for travel among the Indians.¹⁷⁶ The passport office continued into the constitutional period, without disruption of the employees or activities.¹⁷⁷ Once the peace came, however, there is no enumerated power under Article IX or under the Constitution that could plausibly justify passports, even of the quite traditional kind. Passports would then have to be justified only under Congress's general power to pay expenses for "common Defence and general Welfare."

In the Virginia ratification convention, Anti-Federalist Patrick Henry protested that if the federal government could require passports by implication, it could emancipate the slaves by implication.¹⁷⁸ The peacetime passport is a significant governmental power; it has been described as the means by which government monopolizes the legitimate means of movement of individuals, much as government is described as monopolizing the

173. Resolution (May 9, 1776), *in* 4 JCC 341 (granting a passport to Mrs. Bellevs to come to Philadelphia); Resolution (May 24, 1776), *in* 4 JCC 385 (granting a passport to Mrs. Grant to return to her husband in London); Resolution (May 5, 1778), *in* 11 JCC 458 (granting a passport to Mrs. Prevost to return to Europe); Resolution (Apr. 25, 1780), *in* 16 JCC 391 (granting a passport to allow Mrs. Ridley and family to travel from London to New York, with protection against capture by any vessel of war, privateer, or letter of marque belonging to the United States); Reference (Oct. 3, 1781), *in* 21 JCC 1033 (referring a proposal for passport to allow Mrs. Webb to travel to Connecticut to the War Board for approval on the condition that the British also approve a passport).

174. Reference (June 3, 1779), *in* 14 JCC 678-679 (referring to the Marine Committee a petition from Robert Harris to bring goods from Nova Scotia into the United States); Resolution (Aug. 23, 1781), *in* 21 JCC 906 (allowing the War Board to decide whether to grant a passport to Muscoe Livingston to move his family and goods from Jamaica).

175. 19 JCC 219 (March 1, 1781).

176. Ordinance for Dealing with the Indians (June 1786), *in* 30 JCC 370.

177. See U. S. PASSPORT OFFICE, *supra* note 55, at 8-9.

178. See Patrick Henry (June 24, 1788), *in* 3 ELLIOT'S DEBATES 623.

legitimate means of violence.¹⁷⁹ Nevertheless, the Virginia Anti-Federalists apparently were convinced by the need for the federal passport. Other states had endorsed an Anti-Federalist sponsored amendment to limit Congress to “expressly delegated” powers, as in old Article II.¹⁸⁰ In Virginia, however, the Anti-Federalists acceded to the deletion of “expressly delegated,” apparently in reliance on Randolph’s argument that stripping the government of all unexpressed power would render even the passport illegitimate.¹⁸¹

Federalist proponents of the Constitution often spoke as if the old “expressly delegated” limitation had remained. Charles Pinckney, for example, told the South Carolina House that the federal government could execute “no powers . . . but such as were expressly delegated.”¹⁸² In a speech in front of Independence Hall, James Wilson argued that the states had plenary powers, but the federal government did not. “[T]he congressional authority is to be collected, not from tacit implication,” Wilson said, “but from the positive grant expressed” in the proposed Constitution.¹⁸³ The states could have powers not mentioned in any document. For the federal government, however, Wilson said, “everything which is not given, is reserved.”¹⁸⁴ Madison, in *Federalist No. 45*, gave a famous version of the argument: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”¹⁸⁵

179. See JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 4 (2000).

180. The Massachusetts (2 ELLIOT’S DEBATES 131), New York (2 ELLIOT’S DEBATES 406), Maryland (2 ELLIOT’S DEBATES 550) and North Carolina ratification conventions (4 ELLIOT’S DEBATES 249) recommended an amendment providing that “all powers not expressly delegated to Congress are reserved to the several states.”

181. See James Madison, Speech in the House of Representatives (Aug. 18, 1789), in 1 ANNALS OF CONGRESS 790 (successfully resisting the insertion of the word “expressly” into what became the Tenth Amendment.) Anti-Federalist amendments in Virginia are listed in 3 ELLIOT’S DEBATES 659 (June 17, 1788). The list of Anti-Federalist amendments in Virginia is at Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 659. The Massachusetts (2 ELLIOT’S DEBATES 177), New York (2 ELLIOT’S DEBATES 406), Maryland (2 ELLIOT’S DEBATES 550) and North Carolina Ratification Conventions (4 ELLIOT’S DEBATES 249) recommended an amendment providing that “all powers not expressly delegated to Congress are reserved to the several states.”

182. Charles Pinckney, Speech to the South Carolina House of Representatives, Jan. 16, 1788, in 4 ELLIOT’S DEBATES 259.

183. James Wilson, Speech to Public Meeting in Philadelphia (Oct. 6, 1787), in 13 DOCUMENTARY HISTORY 339.

184. *Id.* See generally RAKOVE, *supra* note 10, at 143-46 (describing the importance of Wilson’s speech to the entire ratification debate).

185. THE FEDERALIST NO. 45, at 313 (James Madison) (Jan. 26, 1788). Madison repeated the argument in his attempt to defeat the National Bank in 1791. James Madison,

When Thomas Jefferson first heard the argument that the Constitution prevented unenumerated federal powers, he dismissed it as a gratuitous remark:

To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience 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 [Article II], which had declared that in express terms.¹⁸⁶

The text of the Constitution does not have the limitation that Wilson and other Federalists claimed.

The Anti-Federalists also argued that the enumerated limitation was inconsistent with the structure of Article I of the Constitution. Section 9 of Article I, for instance, prohibits Congress from enacting *ex post facto* laws or bills of attainder, from giving titles of nobility. The Anti-Federalists deduced that there was no need for the express prohibitions of section 9 unless Congress had an implied power to do these things.¹⁸⁷ “Where is the power [to give of titles of nobility] expressly given to Congress by the new constitution?” asked A Republican. “[I]f it is not, then the

Debate in the House of Representative (Feb. 2, 1791), in 2 ANNALS OF CONGRESS 1945 (saying that the Constitution “is not a general grant, out of which, particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands”); see also James Madison, Address to the People of Virginia (Jan. 23, 1799), in 6 WRITINGS OF JM 333-36:

For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution by an affectation of defining powers. . . . [T]he preamble would admit a construction which would erect the will of Congress into a power paramount in all cases, and therefore limited in none. [But] the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of power granted to the Federal Government; reserving all others to the People, or to the States.

186. Letter from Thomas Jefferson to James Madison (Dec. 10, 1787), in 11 JEFFERSON PAPERS 438, 440. LATIN WORDS AND PHRASES FOR LAWYERS 99 (B. S. Vasan ed., 1980) translates *gratis dictum* as a “voluntary statement or assertion to which a person may not be legally bound.”

187. Letter from Thomas B. Wait to George Thatcher (Jan. 8, 1788), in 15 DOCUMENTARY HISTORY 284, 285 (pointing to prohibitions on the suspension of habeas corpus, *ex post facto* laws, bills of attainder, titles of nobility, and payment from Treasury without appropriation as powers that must have been in the power of Congress by implication because they are specifically prohibited); *Brutus II*, NEW YORK JOURNAL (Nov. 1, 1787), reprinted in 13 DOCUMENTARY HISTORY 524, 528 (“If every thing which is not given is reserved, what propriety is there in these exceptions [no bill of attainder, title of nobility and etc]?”); Patrick Henry, Speech to the Virginia Ratification Convention (June 17, 1788), in 3 ELLIOT’S DEBATES 461 (saying that Congress’ ability to suspend habeas corpus in circumstances where not prohibited “destroys their doctrine” of strictly enumerated powers).

exceptions must be to guard against an incidental or implied power.”¹⁸⁸ To be sure, the Articles of Confederation also barred Congress from giving titles of nobility¹⁸⁹ and, simultaneously, said that Congress would have only the powers expressly delegated to it. However, there is no listed power in the Articles to give titles of nobility that had to be countermanded by the Articles’ specific prohibition.

The Tenth Amendment to the Constitution provides that powers not delegated to the government of the United States by the Constitution are reserved, *either* to the states or to the people.¹⁹⁰ The Tenth Amendment is a symbolic gesture to the Anti-Federalist objections that the Framers should not have removed Article II’s old limitation, but it does not adopt that limitation. First, the Tenth Amendment does not necessarily empower the states as the Anti-Federalists had sought. Its language reserves power either to the people or the states, and it can be read as reserving nothing for the states but all for the people. In the debate over the Tenth Amendment, the Anti-Federalists tried to modify the Amendment to reinsert the word “expressly” so that Congress would once again be limited to powers “expressly delegated” to it. Madison recited the history of the Virginia ratification convention as Anti-Federalist acquiescence in the omission of “expressly.”¹⁹¹ The proposed insertion was rejected, Chief Justice Marshall would later say, because it was perceived “that it would strip the government of some of its most essential powers.”¹⁹² “The men who drew and adopted [the Tenth] amendment,” Marshall wrote, had “experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments.”¹⁹³ Under that history, the Tenth Amendment allows some unexpressed or implied powers, especially the unenumerated peacetime passport.¹⁹⁴

That there are some implied federal powers, however, does not mean that the federal government was intended to be plenary. Madison wanted to give the federal government the power

188. *A Republican I: To James Wilson, Esquire*, NEW YORK JOURNAL (Oct. 25, 1787), reprinted in 13 DOCUMENTARY HISTORY 477, 479.

189. ARTICLES OF CONFEDERATION, art. VI in 19 JCC 216.

190. U.S. CONST. amend. X.

191. See *supra* note 181 and accompanying text.

192. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 384 (1819).

193. *Id.* at 406-07.

194. See Lofgren, *supra* note 158, at 331 (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

to veto state legislation “in all cases whatsoever,” so as to protect both federal interests and individual rights from wayward state legislatures.¹⁹⁵ The Convention would have none of it.¹⁹⁶ The drafting history of the Constitution can be read as giving Congress the power to legislate for all issues appropriately in the national sphere by any appropriate means, but not unlimited power.

The language of the Constitution was drafted by a series of committees, which were instructed to draft language “conformable to the Resolutions passed by the Convention.”¹⁹⁷ The drafting committees were not to effect policy, according to Washington, but to “arrange, and draw into method & form the several matters which had been agreed to by the Convention.”¹⁹⁸ The binding resolution on the scope of the Federal Government was offered by Gunning Bedford of Delaware. It gave Congress all the powers it had under the Articles of Confederation and authorized Congress further “to legislate in all cases for the general interests of the Union.”¹⁹⁹ The full scope of the federal power under the Virginia plan as augmented by the Bedford Resolution was that

the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the

195. Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 *MADISON PAPERS* 382-85; *see also* Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), *in* 9 *MADISON PAPERS* 317, 318 (outlining Madison’s “immoderate digression” in defense of the veto).

196. *See* Debates of June 8, 1787, *in* 1 *FARRAND’S RECORDS* 167 (Madison notes) (motion to extend the Negative to all cases defeated by 3 states to 7 states against.)

197. July 24, 1787, *in* 2 *FARRAND’S RECORDS* 106 (Madison notes).

198. George Washington, Diary (July 27, 1787), *in* 3 *FARRAND’S RECORDS* 65; *see also* Letter from Hugh Williamson to James Iredell (July 22, 1787), *in* 3 *FARRAND’S RECORDS* 61 (observing that the drafting committees were instructed to ensure that the Constitution was “properly dressed”).

199. Gunning Bedford, Motion of July 17, 1787, Federal Convention *in* 2 *FARRAND’S RECORDS* 26.

United States may be interrupted by the Exercise of individual Legislation.²⁰⁰

While it has been said that the final Constitution is disloyal to the mandate of the supposedly mandatory Resolution,²⁰¹ a better reading, it is contended here, is that the language of the Constitution in fact complies with the Bedford Resolution to give the Congress the power to legislate for the general interest on the Union.

There were proponents at the Convention of an exhaustive listing or enumeration of the powers of Congress, but they seem to have lost in the votes on the Bedford Resolution and apparently on the constitutional text as well. John Rutledge of South Carolina called for an enumeration of powers early in the Convention.²⁰² South Carolina voted against both the Bedford Resolution and the whole Virginia Plan once the Bedford Resolution was added. Randolph and Mason of Virginia also objected to giving the National Government general powers of indefinite extent late in the Convention.²⁰³ The Virginia delegation voted by majority against the addition of the Bedford Resolution, but then voted for the full language of the Virginia Plan resolution as amended by the Bedford Resolution. Overall, the Bedford Amendment passed by six states to four²⁰⁴ and the full language as amended by the Bedford Resolution then passed by eight to two, with only South Carolina and Georgia dissenting.²⁰⁵

The Constitution, appropriately read gives Congress the power “to provide for the common Defence and general Welfare.” That phrase limits Congress to *common* and *general* programs, that is, to those programs that belong in the national sphere. The drafters apparently attempted to replicate the Bedford Resolution, allowing Congress to legislate for the general interests of the Union, while using the wording from the Articles of Confederation. Borrowing from the Articles forced an unfortunate awkwardness and ambiguity, but it seems to have been appealing to the Framers as a signal of historical continuity.

200. Resolutions presented to the Committee of Detail, *in id.* at 131-32.

201. See John C. Hueston, *Altering the Course of the Constitutional Convention: The Role of the Committee of Detail in the Balance of State and Federal Powers*, 100 YALE L.J. 765 (1990) (arguing that the Committee of Detail shifted the Constitution toward less federal power).

202. May 31, 1787, in 1 FARRAND'S RECORDS at 53.

203. See text accompanying *infra* notes 212-214.

204. 2 FARRAND'S RECORDS at 27. Connecticut, Virginia, South Carolina, and Georgia were the dissenting states.

205. *Id.*

Whatever the Articles had meant, so meant the Constitution, except that in the Constitution not everything about federal power had to be written down.

The phrase “to provide for the common defense and general welfare” was inserted into the Constitution on September 4, 1787, near the end of the Convention, by a drafting “Committee of Eleven,” chaired by David Brearly of New Jersey.²⁰⁶ The structure of enumerated powers, now in Article I, section 8, clauses 2-18 of the Constitution, was already in place. The phrase “common Defence and general Welfare” is a substitute and apparently a synonym for “necessities” or “exigencies” of the union. The Annapolis Resolution of 1786 had said that delegates from the states should meet in Philadelphia to “render the constitution of the Federal Government adequate to the exigencies of the Union.”²⁰⁷ Edmund Randolph’s first draft of the Constitution for the Committee of Detail had provided that the Congress would have, first, the power to “raise money by taxation, unlimited as to sum, for the past or future debts and necessities of the union.”²⁰⁸ The Brearly Committee seems to have adopted the Randolph idea, except that instead of Randolph’s “necessities of the union” language or the Annapolis Convention’s “exigencies of the Union,” the Committee used synonymous language from the Articles of Confederation, that is, “common Defence and general Welfare.”

The proponents of the Constitution commonly described the Constitution as giving the federal government “*every power requisite for general purposes*, [while leaving] to the States every power which might be most beneficially administered by them.”²⁰⁹ John Jay’s Address to the People of New York was de-

206. Report of the Brearly Committee of Eleven (Sept. 4, 1787), in 2 FARRAND’S RECORDS at 497 (Madison notes).

207. Report of the Commissioners assembled at Annapolis Convention, in 31 JCC 680 (Sept. 20, 1786). The Congressional Resolution endorsing the call for a Constitutional Convention (Feb. 21, 1787, 32 JCC 74) had said exigencies of “Government” instead of exigencies of the “Union.”

208. 2 FARRAND’S RECORDS 142.

209. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 205, 208 (emphasis added). Madison said that the majority was “finally for a limited power without the negative,” *id.*, at 209, and then launched an “immoderate digression” on the need for the negative, but even without the negative loss, he thought the drafted Constitution gave Congress every power for requisite general purposes.

scribed at the time as having an “astonishing influence in converting Antifederalists”²¹⁰ said it said that “the Convention concurred in opinion with the people that a national government *competent to every national object*, was indispensably necessary.”²¹¹ Even opponents who had trouble with giving the national government power over national issues described the Constitution as so providing. George Mason of Virginia wanted alterations, in August 1787, so that “the object of the National Government, [would] be expressly defined, instead of indefinite power, under an arbitrary Constructions of general clauses.”²¹² Edmund Randolph, initially refused to sign the Constitution, because of “the latitude of the general powers”²¹³ and because the “cover of general words” allowed the Congress to swallow up the states.²¹⁴ Randolph served on the Committee of Detail and there is no evidence of any dissatisfaction he had with that Committee’s work. His stance on the final language seems to have arisen from the Brearly Committee’s addition of what he called a general power—that is, the power to provide for the common defense and general welfare. Randolph ultimately came to support the Constitution, primarily because he came to view the issue as this Constitution or disunion. He then became a very effective proponent of the Constitution.²¹⁵

A consensus that the federal government should have the powers appropriate to the exigencies of the Union does not, however, imply that there was a precise consensus as to what was appropriately within that national sphere. When the Convention debated restrictions on slavery in August 1787, for example, Abraham Baldwin of Georgia protested he “had conceived na-

210. Letter from Samuel Webb to Joseph Barrell (Apr. 27, 1788) *quoted in* editorial note, 17 DOCUMENTARY HISTORY 101, 103; *see also* other sources cited in editorial note, *id.* at 105, 106. Editor John Kaminski also calls the John Jay address far more important than *The Federalist* in getting New York to ratify. John Kaminski, *New York: The Reluctant Pillar*, in *THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION* 72 (Stephen L. Schechter ed., 1985).

211. A Citizen of New York (John Jay), Address to the People of the State of New York (Apr. 15, 1787), in 17 DOCUMENTARY HISTORY 101, 111 (emphasis in the original).

212. George Mason, Alterations Proposal (Aug. 31, 1787) in SUPPLEMENT TO MAX FARRAND’S *THE RECORDS OF THE FEDERAL CONVENTION* 25 (James H. Hutson ed., 1987).

213. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) in 10 MADISON PAPERS 205, 215.

214. Edmund Randolph, Reasons for Not Signing the Constitution (Dec. 27, 1787) in 8 DOCUMENTARY HISTORY 260, 273.

215. *See, e.g.*, Edmund Randolph, Speeches to the Virginia Ratification Convention (June 6, 9, 10, 1788), in 3 ELLIOT’S DEBATES 65-71, 187-94, 194-207 (speaking for the preservation of the union).

tional objects to be before the Convention” and that slavery was of a local nature: “Georgia was decided on this point.”²¹⁶ The question of whether slavery was a local or a national issue was settled only by civil war.

Clause 1 of section 8, literally, authorizes Congress only to tax “to provide for the common Defence and general Welfare.” But the distinction between tax and other government instrumentalities was always a weak one at best. Madison, in his initial explanation of the Constitution to Jefferson, said that the “line . . . between the power of regulating trade and that of drawing revenue from it, which was once considered as the barrier to our liberties was found on fair discussion, to be absolutely undefinable.”²¹⁷

The debaters in the ratification process seem to have assumed that if Congress were allowed to tax for the general welfare, then lesser government instruments would follow as a matter of course. Tax was the most feared instrument of government. “Regulation” would be swept into the federal power if taxation were allowed. James Monroe, an Anti-Federalist in the debates, thought that the federal government should of course have the power to regulate commerce, but that the federal government should not get the revenue from the taxation of commerce unless the states specifically ceded that revenue.²¹⁸ In the constitutional debates, it is also common to find speakers switching “taxation” and “regulation” as if they were synonyms.²¹⁹ Tax was sometimes one of the powers within

216. Abraham Baldwin, Speech to the Federal Convention (Aug. 22, 1788), in 2 FARRAND’S RECORDS 372.

217. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 MADISON PAPERS 205, 211.

218. Letter of James Monroe to Thomas Jefferson (Dec. 14, 1784), in 22 LETTERS OF DELEGATES 72 (saying that Congress will distinguish between revenue and regulation of commerce, “the former unless ceded by the State to go to the State”); see also Letter of Charles Thomson (Pennsylvania) to John Dickinson (Dec. 25, 1780), in 16 LETTERS OF THE DELEGATES 492 (disapproving of taxes for revenue, but approving of taxes “on foreign articles of luxury which we can well do without” as a “regulation of trade”).

219. See, e.g., Anti-Federalist Rawlins Lowndes, Debate in the South Carolina Legislature (Jan. 16, 1788), in 2 DEBATE ON THE CONSTITUTION 21 (calling the 1783 proposal to give Congress the power to tax imports a power “to regulate commerce”); Nathaniel Gorham, Speech before the Federal Convention (July 23, 1787), in 2 FARRAND’S RECORDS 90 (calling New York state’s tax on imports through New York harbor a regulation of trade); THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (Nov. 17, 1787) (calling all state taxes on imports “opportunities, which some States would have of rendering others tributary to them, by *commercial regulations*” (emphasis added)); THE FEDERALIST NO. 12, at 78 (Alexander Hamilton) (Nov. 27, 1787) (calling a tax on “ardent spirits” a “federal regulation”).

the power to regulate commerce²²⁰ and regulation was sometimes a subdivision of the power to tax.²²¹

The Anti-Federalists also argued that taxation was the whole issue. Even if its “common defense and general welfare” were limited to tax, Congress could use taxation to turn a federation into a consolidated government.²²² If Congress were granted the power to tax, the Anti-Federalists argued, Congress would draw all other powers after it.²²³ The “common defence and general welfare” language was said to allow the federal legislature to “pass any law which they may think proper”²²⁴ and to have power “co-extensive with every possible of human legislation.”²²⁵ The Federalists usually agreed. If the people will trust the Congress on matters of money and revenue, Roger Sherman told the Convention, “they will trust them with any other necessary powers.”²²⁶ Once the federal government was allowed the

220. Hugh Williamson, Speech at Edenton, North Carolina (Nov. 8, 1787), *printed in THE DAILY ADVERTISER* (New York) (Feb. 25-27, 1788), *reprinted in* 2 *DEBATE ON THE CONSTITUTION* 231 (saying that sundry regulations of commerce will give the government power not only to collect a vast revenue, but also to secure the carrying trade in the hands of citizens in preference to strangers); *THE FEDERALIST* NO. 22, at 137 (Alexander Hamilton) (Nov. 27, 1787) (arguing that if the Constitution is not ratified, the states might increase their “interfering and unneighborly regulations” and pointing to the German taxes on river commerce to illustrate the danger); *THE FEDERALIST* NO. 84 at 581-83 (Alexander Hamilton) (May 28, 1788) (arguing that national legislature will be able to acquire enough information to regulate commerce, even for internal collections of tax); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 9 *WRITINGS OF JM* 316, 334 (arguing that Congress may regulate Commerce, not just to raise revenue, but also to encourage domestic manufacture).

221. Edmund Randolph, Draft of the Constitution, Committee of Detail, *in* 2 *FARRAND’S RECORDS* 142-43 (outlining congressional “regulation of commerce” as a subdivision of the power to raise money by taxation).

222. George Mason, Debate in the Virginia Ratification Convention (June 4, 1788), *in* 3 *ELLIOT’S DEBATES* 29 (“The assumption of this power of laying direct taxes does, of itself, entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it.”)

223. *Brutus I*, *NEW YORK JOURNAL* (Oct. 18, 1787), *reprinted in* 13 *DOCUMENTARY HISTORY* 411, 415.

224. John Williams, Debate in the New York Ratification Convention (June 26, 1787), *in* 2 *ELLIOT’S DEBATES* 330; *see also id.* at 338 (arguing that the common defense and general welfare language implies that state governments will be essentially destroyed); *see also* Samuel Bryan, *Centinel I*, *PHILADELPHIA INDEPENDENT GAZETTEER* (Oct. 5, 1787), *reprinted in* 1 *DEBATE ON THE CONSTITUTION* 53, 57 (“the celebrated Montesquieu establishes it as a maxim, that legislation necessarily follows the power of taxation”).

225. Letter from Richard Henry Lee to Gov. Edmund Randolph, *PETERSBURG VIRGINIA GAZETTE* (Dec. 6, 1787), *reprinted in* 14 *DOCUMENTARY HISTORY* 364, 368; *cf.* Elbridge Gerry, *Columbian Patriot* 9 (1788), *reprinted in* *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 1, 9 (Paul Leicester Ford ed., 1888) (“there are no well defined limits of the judiciary powers, [which] seem to be left . . . boundless”).

226. Roger Sherman, Speech to the Federal Convention (June 20, 1787), *in* 1

power of taxation, it would be allowed all powers of regulation short of that.

The necessary and proper clause, finally, apparently allows the federal government to operate in the appropriately national sphere beyond taxation. In 1819 in *McCulloch v. Maryland*,²²⁷ the Supreme Court rejected the Constitutional challenge to the first national bank on the ground that the bank was necessary and proper to the other powers given to Congress: “Let the end be . . . within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²²⁸ Jefferson would have found no creditable connection between the national bank and any of the enumerated clauses.²²⁹ The bank could not be a strictly taxation power, or its origin in the Senate would have condemned it.²³⁰ In 1830 Madison argued that if Congress could tax for the general welfare, then the “necessary and proper clause” at the end of section 8²³¹ would allow the Congress to advance the common defense and general welfare by any instrument necessary and proper to that goal.²³² Madison made the argument in an attempt to limit taxation to only the goals enumerated in clauses 2-17 of section 8, but his textual argument nonetheless has some force to it.

The deletion of the “expressly delegated” requirement appropriately leaves the Constitution’s enumeration of the powers of Congress as illustrative but not exhaustive of powers appropriate to the national sphere. The correct maxim of interpretation for the list of powers in article I, section 8 of the Constitution is not *expressio unius est exclusio alterius*, but rather *eiusdem generis*. To state one power in the Constitution does not automatically exclude all others. Rather, although unstated items

FARRAND’S RECORDS 342.

227. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

228. *Id.* at 421.

229. Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 JEFFERSON PAPERS 275, 276.

230. *Id.*

231. U.S. CONST. art. I, § 8, cl. 18 (“[Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

232. James Madison, Supplement to the Letter of November 27, 1830, to Andrew Stevenson, On the Phrase “Common Defence and General Welfare,” in 2 THE FOUNDERS CONSTITUTION 453, 458 available at http://press-pubs.uchicago.edu/founders/documents/al_8_1s27.html; 9 WRITINGS OF JM 411-17.

covered by the general standard must be of the same class as the enumerated items, the enumerated items themselves are not exclusive.²³³ The general power of the federal government that unifies the illustrative listed powers is the power “to provide for the common Defence and general Welfare.”²³⁴

The Constitution omitted language from the Articles of Confederation, even while carrying over much of the structure and language. Sometimes the omission is explained by the fact that the omitted norm was routine and went without saying. The Articles’ prohibition on a state’s discrimination against out-of-state citizens fails in that category. But sometimes a phrase was not carried over from the Articles because the intent was to repeal the norm. Although old Article II had provided that Congress would have only the powers expressly delegated to it, the Framers deleted the limitation in order to give Congress some powers that were not expressed. Continuity of the rule and repeal of the rule are opposites from the same act, namely, the failure to repeat the Articles’ language in the Constitution.

Still, contemporaneous debates and letters seem to specify without serious ambiguity whether continuity or change was intended. The Framers intended that Congress would wield only powers appropriate to the national sphere, but Article II, confining Congress to “expressly delegated” powers was intended to be erased. The federal passport was specifically considered to be a legitimate federal power.

IV. CONCLUSION

The United States as a nation and the national government continued from the Articles of Confederation to the Constitution. The Articles of Confederation embodied the status quo. The Constitution added to the powers of the national government and improved the political system. The Founders were not so arrogant as to believe that they were writing on a blank piece

233. See 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.17, at 188-200 (5th ed. 1992). While *ejusdem generis* cases are often ones in which the general standard follows enumerated items, it applies as well to cases in which the general standards precede the enumerated items as well. *Id.* at 188.

Ejusdem generis is said to accomplish “the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions . . . to everything embraced in that class, though not specifically named by the particular words.” *National Bank of Commerce v. Estate of Ripley*, 161 Mo. 126, 131, 61 S.W. 587, 588 (1901) cited in SINGER, *supra*, at 189.

234. U.S. CONST. art. I, § 8, cl. 1.

of paper or that they could ignore the cultural heritage and the wisdom built into the current system. The continuity from the Articles to the Constitution went unstated. Common knowledge and experience is very hard to articulate. Only challenged or new items get noticed and written down. We need Clio, the muse of history, to explain the unstated wisdom upon which the Constitution rests.

The Articles of Confederation supplied a ratified context to help us better understand the Constitution. This article has used the Articles' historical context to reach a number of conclusions.

First, we can use the articulation of the dormant commerce clause in the Articles. States are prohibited from imposing regulations or taxes on out-of-staters that they are unwilling to impose on their own citizens. That norm was settled and articulated by the Articles of Confederation, and it continued undiminished into the Constitution.

Second, the national government can legitimately commandeer state officials under the original meaning of the Constitution, because commandeering was a necessary tool under the Articles and because the Framers assumed that the commandeering would continue.

Third, the passport system is legitimate although it not an enumerated power in either the Articles of Confederation or the Constitution. Congressional activities under the Articles are legitimate precedents for congressional activity under the Constitution. Congress may "provide for the common Defence and general Welfare" by any means. Congress has powers within the properly national sphere, although they are not enumerated. The listed powers in Article I, section 8 are not exhaustive.

Finally, the presidency of George Washington was legitimate. George Washington was a citizen of Virginia when the Constitution was ratified and Virginia was part of the United States at ratification, notwithstanding that Virginia had not ratified. Virginia was a part of the United States before the Constitution and continued to be part of the United States after ratification of the Constitution. The United States of America as a nation and as a national government continued from the Articles of Confederation into the Constitution.

BIOGRAPHICAL APPENDIX:
SHORT FORM CITES TO DOCUMENTARY
COLLECTIONS

Short Cite	Full Cite
DOCUMENTARY HISTORY	DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976-), 24 volumes
DEBATE ON THE CONSTITUTION	THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION (Bernard Bailyn ed., 1993)
ELLIOT'S DEBATES	DEBATES IN THE CONVENTIONS OF THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 1907), 5 volumes
FARRAND'S RECORDS	RECORDS OF THE FEDERAL CONSTITUTION OF 1787 (Max Farrand ed., rev. ed. 1937), 4 volumes
LETTERS OF DELEGATES	LETTERS OF DELEGATES TO CONGRESS, 1774-1789 (Paul H. Smith et al. eds., 1976-2000), 25 volumes
JCC	JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, ed. (Worthington C. Ford et al. ed., 1904-37), 34 volumes
HAMILTON PAPERS	THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1961-87), 27 volumes
MADISON PAPERS	PAPERS OF JAMES MADISON (William T. Hutchinson & William M.E. Rachal eds., 1962-1991), 17 volumes
JEFFERSON PAPERS	THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1950-), 21 volumes