
Calvin H. Johnson, University of Texas at Austin

Calvin H. Johnson*

Abstract.

States Rights? What States argues that the Supreme Court has been finding restrictions on the federal government in favor of the states on the basis of the overall design of the Constitution, but not resting on any specific text. The historical Constitution, however, overall was a nationalizing weapon directed against the states, written to empower an imbecilic and impotent confederation-level government, and to end the supremacy of the states. Righteous anger at the states is a necessary element of the constitutional national revolution. If one is going use the grand design of the historical Constitution to generate a rule, the result should favor the federal government in a conflict with the states.

Real history quickly concludes that 1787 was a very different world from our own, and that they could not see the future and were not trying to solve our problems. Still, history is important at least to prevent counterfeit history from binding us.

Contents

I. What is the Overall Constitutional Design?
A. What Written Limitations?
   1. The Written State Right to Territory.
   2. The Enumerated Powers Doctrine.
      a. Deletion and defeat of "expressly delegated."
      b. Who Made Whom?
B. Constitutional Legitimacy.
C. The Pivotal Voter
D. Let’s Get Rid of “States’ Rights” Usage.
II. The Causes of the Constitution.
A. Necessary Anger.
B. Taxes instead?
   1. Unanimity.
   2. Direct tax.
      a. Direct tax impeded ratification.
      b. Direct tax not used.
      c. Direct tax not inconsistent with confederate mode.
      d. Not much difference between the sides.
C. Does History Matter?

* Professor of Law, University of Texas. The author wishes to thank Mitch Berman, Keith Whittington, Douglas Laycock, Lino Graglia, Sandy Levinson, and Scot Powe for helpful comments on an earlier draft.

In recent years, the Supreme Court has been finding and strengthening judicial doctrines constraining the federal government in favor of the states, in ways which have no specific justification in the constitutional text. The Supreme Court has found, for example, that the federal government may not prohibit guns on school property,1 may not create federal civil damages remedy for rape2, and may not demand that local sheriffs check arrest records for federal gun control laws.3 The states are newly immune from suit by individuals to enforce federal labor standards,4 and federal trademark and patent remedies.5 State agencies are immune from federal administrative process of an adjudicative nature.6 There is a "relatively stable majority [of the Supreme Court], Professor Richard H. Fallon has concluded, “[that is] committed to enforcing limits on the federal power and to protecting the integrity of the states.”7 In creating the new restrictions, the Court has been going beyond the words of the Constitution to find that

---

5 College Savings Bank v. Florida Prepaid Postsecondary Educ. Peens Bd., 119 S.Ct. 2219 (1999)). See Seminole Tribe v. Florida, 517 U.S. 44 (1996), which is the seminal (as well as Seminole) case holding that the eleventh amendment gives the states substantive immunity that Congress can not abrogate
7 Richard H. Fallon, Jr., The ‘Conservative’ Paths of the Rehnquist Court’s Federalism Decisions, 69 U. CHI. L. REV. 429 (2002). Professor Gordon Wood has argued that no one has described the constitution as having a design of limiting the federal government and protecting states rights. "This is news to me," Wood said, "and not at all credible. I know of no interpretation of the origins of the Constitution that has ever claimed such a thing." Gordon Wood, How Democratic is the Constitution, N.Y. REV. OF BOOKS (Feb. 23, 2005) (emphasis added) (reviewing my RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION). Wood is an eminent historian, but he does not apparently recognize arguments within the discipline of law.
the restraints on federal power are “fundamental postulates implicit in the constitutional design.”

The Supreme Court says that its newly found anti-federal, pro-state moves rest on the "overall structure and design", “the plan of the convention,” or “the system of federalism established by the Constitution.”

In Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution I argued that the newly found state immunities and constraints on the federal government do not have a reasonable foundation in the historical Constitution. The historical Constitution was a nationalizing act, written to empower an imbecilic and impotent confederation-level government, and to end the supremacy of the states. A "constitution" is supposed to be a fundamental document, supreme over mere legislation -- and our Constitution is that --, but the historical Constitution was also first a historical document, a product with a specific program for a time and place. The historical Constitution was a nationalizing weapon directed against the states.

The purpose of the historical Constitution was to empower the national government, not to limit it. As James Wilson said to the Convention, “[i]t has never been a complaint agst. Congs. that they governed overmuch. The complaint has been that they have governed too little.” Or as Madison had to explain to Jefferson, when Jefferson returned to America, “[t]he evils suffered and feared from weakness in Government . . .

---

10 Id.
12 J Wilson, Federal Convention, July 14, 1787, 2 FARRAND 10
have turned the attention more toward the means of strengthening the [government] than
of narrowing [it].”

As Righteous Anger argued,

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

There had been proposals in 1781 and in 1783 to give the federal
government its own tax, a 5% “impost,” or tax on imports. The impost proposals
required an amendment to the Articles of Confederation, however, and that in turn
required unanimous ratification by the states. The impost proposals were vetoed,
however, the first by Rhode Island and the second by New York.

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

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

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

---

13 Letter of Madison to Jefferson, Feb. 4, 1790, 16 PTJ 146, 150.
14 Righteous Anger at 1-2.
against the most powerful nation on earth as “a band of brothers.”\textsuperscript{15} The states were betraying the great cause of the Revolutionary War.

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

In Recovering "From the State of Imbecility,"\textsuperscript{16} Professor Keith Whittington\textsuperscript{17} reviewing Righteous Anger at the Wicked States, defended a vigorous sense of states rights and federal limitations in the face of the argument in Righteous Anger that in the historical Constitution states rights were neither very vigorous nor important. Professor Whittington is a gracious reviewer. I am grateful for his kind descriptions of the book in passing.\textsuperscript{18} He accepted, on his way, much of the argument of the book.\textsuperscript{19} Still, Professor

\textsuperscript{16} Recovering "From the State of Imbecility." 84 Texas L. Rev. 1567 (2006) (hereinafter "Recovering")
\textsuperscript{17} Professor, Princeton University; Visiting Professor (2005-2006), University of Texas Law School.
\textsuperscript{18} Johnson is "admirably clear" and "marshals copious historical evidence." Id. at 1570. Righteous Anger "deepens our understanding of constitutionalism" (id at 1575) and "a useful corrective." Id. at 1586,
Whittington argued that (1) *Righteous Anger* did not give enough attention to the limitations of the Federal government in the words and text of the Constitution and (2) that righteous anger at the states does not contribute very much to explaining why the Constitution was adopted. Whittington's objection (1) is about constitutional law and his objection (2), on causes of the Constitution, is about history. *Righteous Anger* is both a book about interpreting the legal meaning of the Constitution and a book of history on why the Constitution was adopted. I defend the *Righteous Anger* here, on both constitutional law and constitutional history.

I. What is the Overall Constitutional Design?

A. What Written Limitations?

In *Recovering "From the State of Imbecility,“* Professor Whittington argued that *Righteous Anger* largely “ignores the constitutional text,” ¹⁹ “the details of the product of the Convention,” ²⁰ and the “particular provisions of the Constitution as adopted.” ²¹ That misstates the issue because the new “overall structure and design” doctrines are themselves not textual arguments relying on some specific words, sentences or details. I do not mean to deny that proponents of an overall structure and design argument would say that their argument is *grounded* in the constitution in some way. Still, an overall-structure-and-design argument means the conclusion sought is not forced by specific words and you need to go beyond the words. Professor Whittington, in trying to find more state power, did not himself parse text, nor quote, cite nor rely on any text.

---

¹⁹ "Granted that the movement to draft the Constitution was one directed to building a more powerful national state ..." *(Id at 1578).* "[T]he fiscal crisis ... undoubtedly contributed to the creation of the Constitution." *(Id. at* ¹⁰ *Recovering* at 1583

²⁰ *Id.* at 1586.

²¹ *Id.* at 1583.

²² *Id.* at 1583.
Recovering cites the Constitution only once, and the cite is not to a limitation on the federal government. The Supreme Court’s new doctrines are limitations found beyond or in spite of the writing.

1. The Written State Right to Territory.

The most important written limitation of the federal government in favor of the states is Article IV, section 3, which requires that Congress must have permission of a state to take away some of its territory to create a new state. The limitation is modest, even trivial and we have not inflated its importance by interpretation.

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

When adopted, the constitutional requirement of state permission seems to have been mostly for show. There were a number of proposals for successions breaking up state territory in 1787. Georgia, North Carolina, and Virginia claimed the land west of their present borders at least to the Mississippi. Maine was still part of Massachusetts and New York still claimed Vermont. Vermont was the most serious issue. There had been serious bloodshed over Vermont succession, and Vermont had flirted with a British alliance to defend its succession. Governor George Clinton of New York had been

---

23 Id at 1579 n.75 citing U.S. CONST., art VII to the effect that ratification required supramajority but not unanimous support, and citing U.S. CONST., art I, §7 to the effect that ordinary legislation required only majority support.
24 ARTICLES OF CONFEDERATION, art. IX, 19 J. OF THE CONTINENTAL CONGRESS 21-219 (March 1, 1881).
outraged at Vermont “traitors,” and he might well have decided he was not a nationalist because the Confederation Congress did too little to stop Vermont succession. In the Article IV, state-permission clause, the Constitution took the side of the anti-successionists, as if to take the staunch anti-succession position of the period that “[w]e should fix the Boundaries and let the people know they are Citizens and must submit to their government.” The clause was also a favor to George Clinton and might perhaps have softened his anti-federalist stance.

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

The states’ right to permission as to territory, moreover, has not been given that much respect after the founding. The formation of West Virginia, for instance, had the

27 Id. Kaminski himself in conversation suggested that Clinton might have become an anti-federalist over the Vermont succession issue.
29 Luther Martin, Genuine Information (1788), reprinted in FOUNDERS’ CONSTITUTION, http://press-pubs.uchicago.edu/founders/documents/a4_3_1s6.html catalogs the disputes
permission of something called the "Reorganized Government of Virginia," meeting in Wheeling (now West Virginia) in 1862. The permission was a bit formalistic. The Richmond or regular branch of the government of the state of Virginia, then in rebellion, was not consulted and would not have consented to the transfer of territory. Virginia litigated the succession of West Virginia, after the end of the Civil War, and lost.

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

States are mentioned in the Constitution outside of the territorial permission clause, but the other provisions have not been a very important limitation on national power in favor of a state, nor comfortably described as “states’ rights.”

---

30 Virginia v. West Virginia, 78 U.S. 39, 43 (1870).
31 U.S. CONST., art. V allows two-thirds of the states to call a convention to propose constitutional amendments. A second constitutional convention, if called, could well be more important than the territory permission clause. Calling a convention is not a right of single state, however, since another 33 states must join to call the convention. It has also never been used or seriously threatened.

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

Before 1913, Article II, section 3, clause 1 provided that Senators would be chosen by the Legislatures of each state. That was ended by the Seventeenth Amendment in 1913, which provided for
2. The Enumerated Powers Doctrine.

   a. Deletion and defeat of "expressly delegated."

   The most important constitutional limitation on the federal government in favor of the states is the enumerated power doctrine, which holds that Congress has no plenary power but only the powers expressed in the Constitution. The doctrine at best has what a "dubious" grounding in the text.\(^\text{32}\) Article I, section 8 of the Constitution does provide for a list of powers that the Congress is to have. The Constitution does not say, however, that the list is exhaustive. Indeed, the Framers, with care and deliberation, took out the language making the list in section 8 exhaustive and refused to put it back when challenged. Given the full history, the list of powers in section 8 seems best read as an illustrative list of the kinds of things that Congress might do for the common defense and general welfare, but not an an exhaustive list..

   Article II of the predecessor Articles of Confederation had provided that Congress would have only the powers "expressly delegated" to it.\(^\text{33}\) The limitation had been added to the Articles for fear that a future Congress could "explain away every right belonging to the States, and to make their own power as unlimited as they please."\(^\text{34}\) Before the "expressly delegated" limitation was added, John Dickinson's 1776 draft of the Articles of Confederation had listed Congressional powers, without stating whether the list was

---

32 This section is a condensed version of the argument in Calvin Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENTARY 25 (2005).
33 ARTICLES OF CONFEDERATION, art. II, (March 1, 1781), 19 J CONTINENTAL CONG. 214 (Worthington C. Ford et al. 1904-37 (hereinafter JCC)
34 Thomas Burke to Governor Richard Caswell of North Carolina (Apr. 29, 1777), 6 LETTERS OF DELEGATES TO CONGRESS, at 672.
exhaustive or illustrative. Benjamin Franklin 1775 draft of the Articles had listed powers for the national Congress, but explicitly made the list *illustrative* rather than exhaustive. In the Articles, the listed powers were expressly exhaustive of all the powers Congress would have.

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

Randolph said that the Constitution took out the “expressly limited” language in part to allow the Congress to use the unexpressed power to require passports. There had been a recent challenge to the federal passport in Pennsylvania. In 1782, citizens of Pennsylvania, relying on state law on capture of prizes, seized the British ship, *Amazon*, carrying supplies for the British prisoners of war held at Lancaster, Pennsylvania. Congress protested the seizure. The *Amazon* had been traveling under George Washington's passport. The Pennsylvania legislature receded, on the advice of its own Supreme Court, finding its own statute on seizure to be "*unconstitutional*" (before there was a written U.S. Constitution) by reason of its conflict with the federal passport.

---

35 June 17, 1776, *4 LETTERS OF DELEGATES* 250 (Article 19)
36 July 21, 1775, 1 JCC 196 (saying "such as" immediately before list of Congressional powers).
37 2 FARRAND’S RECORDS 97.
38 Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), in 3 ELLIOT’S DEBATES 600-601.
39 *Id.*
40 *Debate in 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
deletion of the expressly-delegated limitation was apparently meant to confirm that
decision as a paradigm or core case.

The passport system was a powerful system of control of travel. The colonies had
had passport systems to control fleeing debtors, and the Confederation Congress had
recently instituted a passport system for travel among the Indians. Patrick Henry
protested in Virginia, to no avail, that if the federal government could require passports
by implication, it would emancipate the slaves by implication. The passport system
was apparently considered a strong but legitimate national power. The peacetime
passport system, however, was not enumerated, nor related to the enumerated powers.

The deletion of the old "expressly delegated" limitation was a hotly debated issue
during the ratification debates. The proponents of the Constitution claimed inconsistently
both that the “expressly delegated” limitation had been taken out because it had proved
“destructive to the Union” and that the federal government was limited to those
powers “expressly delegated” to it. The most important example of the latter was a
speech by James Wilson in front of Independence Hall shortly after the convention
ended, who said that “[t]he congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the [proposed Constitution].”

The most famous is Madison’s statement in FEDERALIST No. 45 that “[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined, [while t]hose which are to remain in the State Governments are numerous and indefinite.”

The Anti-Federalists opponents would have none of it. Jefferson in his first reaction thought the claim to an expressly delegated limit "might do for the [crowd before Independence Hall] to whom it was addressed, but is surely *gratis dictum*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation, which declared that in express terms.”

“If this doctrine is true,” said “A Democratic Federalist” in Pennsylvania, “it at least ought to have [been] clearly expressed in the plan of government.”

Arthur Lee wrote with distain in Virginia that "[Wilson's] sophism has no weight with me when he declares … that in this Constitution we retain all we do not give up, because I cannot observe on what foundation he has rested this curious observation.”

As description of plain text, the Anti-Federalists have the better of the argument. If the Framers promised limitation of

---

47 The Federalist No. 45, at 315 (Madison)(Jan. 26, 1788). The most blatantly inconsistent with the deletion of the expressly delegated phrase is Charles Pinkney, *Speech to the South Carolina House of Representatives*, (Jan. 16, 1788) in 4 Elliot’s Debates 259, where he tells South Carolina that under the Constitution the Congress has only the powers to which they are expressly delegated.
50 Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), in 13 DOCUMENTARY HISTORY 505, 506.
the federal government in favor of the states, they did not do so in the writing of the Constitution.

The Tenth Amendment to the Constitution limits Congress to powers delegated to it, but importantly, it did not return to the "expressly delegated" language. When the Anti-Federalists tried to return the word "expressly" into the 10th Amendment, they were defeated overwhelmingly. The Bill of Rights, as a whole, had symbolic value when offered, but in context it had very limited substantive importance. The Anti-Federalist considered the rights offered in the Bill of Rights to be a sop or diversion. Madison’s Bill of Rights, the Anti-Federalists argued, had been stripped of those "solid" amendments that would enhance the power of the states and preserve their uncontrolled constitutional rights. The Tenth Amendment, absent "expressly," looks especially “trivial and unimportant,” neglecting the fundamental issues of structure of government, as the Anti-Federalists charged. In 1941 the Supreme Court said that the Tenth Amendment is truism that all is retained which has not been surrendered, and does not affect the power of the federal government. Given the defeat of the "expressly delegated" limit and the context in which it was offered, that assessment seems true to the history.

With removal of the expressly delegated list, the list of Congressional powers granted by Article I, section looks like an illustrative list. The appropriate Latin maxim is *ejusdem generis* (of the same class or kind), that is, that the list is illustrative of what Congress might do, rather than *expressio unius est exclusio alterius exclusio* (to express

---

51 August 18, 1789, 1 ANNALS 790, 1st Cong., 1st Sess, http://memory.loc.gov. see also August 21, 1787, in 1 ANNALS 797, 1st Cong., 1st Sess. (reporting that Elbridge Gerry’s proposal to add “expressly delegated” to the Ninth Amendment was defeated, 17-32, without debate).
52 ROBERT YATES AND JOHN LANSING, JR., TO GOVERNOR GEORGE CLINTON, DAILY ADVERTISER (NEW YORK) (Jan. 14, 1788), reprinted in 2 DEBATE ON THE CONSTITUTION 4.
54 United States v. Darby, 312 U.S. 100, 124 (1941).
one thing excludes all others), which would make the list exhaustive. Maybe the list is also a list of campaign promises bragging about what Congress would be able to do if the Constitution were ratified. The listed powers, however, are not exhaustive. I have argued elsewhere that I think the language of the final Constitution is loyal to the successful motion at the convention offered by Gunning Bedford of Delaware to give Congress the power "to legislate in all cases for the general interests of the Union." The powers listed are illustrations of what Congress might do for the general interest, but they do not foreclose added implied powers. Even if I am wrong about the overall standard of federal power, the deletion and defeat of the "expressly delegated" limitation leaves the constitutional text without a written limitation on the scope of the federal government.

If the written limitation on the federal government in the Constitution is inadequate, that is to be expected from the historical context. The Framers came together to re-invigorate an impotent national government. If the Framers failed to express the limitations on the federal government as well as proponents of states' rights would like, it may well be because that it was just not the problem that the Constitution was written to fix. The historical Constitution is a weapon against the states. Except for the right of a state to veto loss of its territory, the writing of the writing of the Constitution, in any event, gives little or no help to establish states' rights.

b. Who Made Whom?

---

55 Gunning Bedford, Motion of July 17, 1787, 2 FARRAND’S RECORDS 26.
A back up to the enumerated power doctrine is the argument that the states are primordial and doled out to the federal government only what powers they expressly gave. The American states came first, Professor Whittington argues. They were founded long before the Revolutionary war. They did not need to be constituted; they needed only to declare their independence from the British Empire. They were the "relatively natural" political unit that emerged from Revolution. "They were the governments of general jurisdiction with all the accoutrements of sovereignty." The states largely did write state constitutions after independence, but Professor Whittington attributes this to just a "Lockean" phase of 'self-conscious' constitutionalism, and the state constitutions did not create the states as legal entities.

The federal government is different, Professor Whittington argues. It was created not just by throwing off the crown by a declaration of independence. The Federalists were building something new. The federal government required a reallocation of the political authority already held and being exercised by officials in the states. The Federalists had to wrest some governmental power away to build the new national government. "The Federalists needed to claim and delegate a specified quantum of government power and no more." Whatever power the federal government might have, Whittington would say, had to be transferred from the states. Whittington’s argument on primordial status has nothing to do with the written text of the Constitution, but if true it would add some context in support of the enumerated power doctrine position that the listed powers are exhaustive.

---

56 *Recovering* at 1575.
57 *Id.* at 1575
58 *Recovering* at 1576.
59 *Id.* at 1576 (emphasis added)
60 *Id.* at 1576.
The contrary position, with fine support in the historical evidence, is Abraham Lincoln’s position that “[t]he Union is older than any of the States, and in fact, it created them as States.” The federal Congress arose before the independence of the colonies, as a creation of extralegal revolutionary committees working outside of the authorization of the British colonial administration. Before independence, loyalty to the Congress held together the Revolution’s radicals who pushed for immediate independence and the moderates looking for some accommodation with Britain. The radicals and moderates might not be able to decide what to do, but both sides could agree to let the Congress decide. Allegiance to Congress became the primary test of the right to participate in the emerging Revolutionary polity. Even before the Declaration of Independence, the Congress acted as sovereign to conduct first an embargo against Great Britain and then a Revolutionary, and serious War. Throughout the war and the prior embargo, the various revolutionary committees that took power from the Crown on the local and colony level looked to the Congress for decisions and authority. Congress was acting as the *de facto* sovereign even before July 4, 1776.

The colonies became states under congressional authorization. The colonies looking to write constitutions, not dependent on British control, solicited authorization from the federal Congress. In 1775, Congress responded to requests from Massachusetts, New Hampshire and South Carolina for how to proceed after taking

---

Then in May, 1776, the Congress gave general instructions to the respective assemblies and conventions in every colony to suppress the "exercise of every kind of authority under the [Crown]" 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." John Adams called the May resolution, giving instructions to the colonies to form themselves into independent states, the "most important … ever taken in America."

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

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

---

65 Massachusetts, June 9, 1775, 2 J. CONTINENTAL CONGRESS, CONGRESS, 1774-1789, ed. (Worthington C. Ford et. al. ed., 1904-37), at 82-83 (hereinafter “JCC”) (resolving that since no obedience is due to British governor, Massachusetts should govern itself under its charter as if he was absent); New Hampshire, Nov. 23, 1775, 3 JCC 319, 326-27 (resolving that assembly should take power from the British administration and form the best government for the people); South Carolina Nov. 4, 1775, 2 JCC at 292-93 (similar resolution),

66 Preamble to Resolution, 4 JCC. 358 (May 15, 1776).

67 Resolution, 4 JCC 341 (May 10, 1776)


69 WILLI PAUL ADAMS, supra note 64, at 27
Those colonies that wrote new constitutions were of course doing so as a part of the revolutionary break from Crown and Parliament. When Whittington calls these constitutions "Lockean" that means the writers perceived themselves as in the state of nature without a legitimate current government and that the consent to government needed to be achieved anew. The state constitutions were not just empty symbolism. State constitutions were tantamount to declared independence. They created new legal entities, not resting on British authority. The states by their original constitutions were breaking the continuity with the subordinate British colonial entity that had occupied the same territory as before. And the colonies becoming states wrote their constitutions under the authority and instructions of the Congress.

It also seems fair as a matter of history to describe the formation of the state and federal governments in more muddled terms as both products of small experimental steps pushing each other and evolving together. Neither federal nor state government was hatched full grown, and neither is primordial. Power was taken from the British authorities in steps. The formation of a Continental Congress with a sovereign’s power to make war and treaties was an early and important part of the process, and undertaken before the states had constitutions. One can emphasize the local aspects of the seizure of power or the national aspects. De facto independence at the township level was achieved early in many colonies. Still, what states rights advocates need from the foundational myth is not just a muddle, or joint development, true to the history, but a legal primacy or

70 See, e.g., John Locke, Second Treatise of Government §15 in TWO TREATISES OF GOVERNMENT (Peter Laslett, ed. 1965) (saying all men are naturally in the state of nature, until their own consents make them members of some politic society). The Rhode Island town of Scituate, in most Lockean terms, instructed the state assembly that the king had violated the charter of government, so power reverted to the people, and Rhode Island would thus need a new constitution to give legal basis to the government. Instructions of Town of Scituate, cited in WILLI PAUL ADAMS, supra note 64, at 65. Rhode Island, however, continued to use its colonial charter, only deleting its references to the king.

71 WILLI PAUL ADAMS, supra note 64, at 48.
"sovereignty" for states, because there is nothing helpful for the states’ power or enumerated power doctrine in the written Constitution. Primordial supremacy of the states, however, is asking more than the history will bear.

Judicial doctrine, whatever the history, also says that sovereignty over external affairs transferred from Crown directly to the national government. In 1936, the Supreme Court held that the President had implied powers over foreign affairs beyond those listed, so as to be able to ban export of military goods:

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

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

Similarly, the Courts recognized the federal government as a plenary state without the need for a writing. The Articles of Confederation were ratified almost at the end of the Revolutionary War. The Congress directed the war from the first fighting in April 1775 until March 1781, without the Articles and the national government needed judicial

---

73 The primary cause of the delay in ratification was Maryland’s insistence that Virginia give up its claim to Western land. Maryland finally ratified, apparently because the French wondered why its navy should defend a state that had not ratified the Articles of Confederation. See RAKOVE, supra note 62, at 285-288.
recognition, to run a war, long before ratification. In the 1779 decision of *Respublica v. Sweers*, for instance, the defendants Sweers had defrauded the Continental Army by forging a bigger number for the payment in their contract to provide supplies, and they challenged their criminal prosecution on the ground that there was no United States of America to defraud. Supreme Court of Pennsylvania had reasoned that the United States was a plenary government by the mere act of the states coming together:

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

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

The Articles of Confederation indeed adopted the theory that states gave power to the federal Congress. On its face, the Articles of Confederation identified the adopting actors of the Articles as “Delegates of States,” authorized to act on behalf of the states.\(^75\)

The national government under the Articles was nothing but a firm league of friendship.\(^76\) But the Articles also simultaneously limited state sovereignty, requiring that the states have no control over war and foreign relations. The states were prohibited from signing treaties or sending ambassadors and their power to raise armies and ships was restricted.\(^77\)

---

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

\(^75\) *ARTICLES OF CONFEDERATION*, preamble and Article XIII, in 19 JCC 214, 221-22.

\(^76\) *Id.*, art. III, in 19 JCC 214.

\(^77\) *Id.*, art. VI, in 19 JCC 216.
As to the rest of the world, the United States alone was the sovereign entity and it had no divisions that other nations could recognize.

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

B. Constitutional Legitimacy.

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

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

---

78 U.S. CONST., preamble.
the Anti-Federalists claimed, proved that the Framers intended a perfect consolidation and annihilation of the states. 79

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

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

80 See James Wilson, Pennsylvania Ratification Convention (Dec. 11, 1787), in 2 ELLIOT’S DEBATES 497–498.
81 Wilson, Pennsylvania Convention (Nov. 26, 1787), in 2 ELLIOT’S DEBATES 431. See also Wilson, (Dec. 1, 1787), in 2 id at 433 (saying that if there can not be two sovereigns, then the people and not the states have the sovereignty); Wilson (Dec. 4, 1787), in 2 id. 457–458 (saying “[m]y position is, sir, that, in this country, the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments; but that the fee-simple continues, resides, and remains, with the body of the people”).
82 Wilson, Pennsylvania Convention (Oct. 6, 1787), in 2 ELLIOT’S DEBATES 432.
83 THE FEDERALIST NO. 22, at 146 (Hamilton)(December 14, 1787).
legislatures and state constitutions.\textsuperscript{85} The Articles of Confederation had the radical vice, Madison said, of “want of ratification by the people.”\textsuperscript{86} The defect resulted in the “evil” that “[w]henever a law of a State happens to be repugnant to an act of Congress . . . it will be at least questionable whether the latter must not prevail.”\textsuperscript{87} No state could be given the power to infringe this Constitution nor the power to amend it alone by a subsequent legislation. The States, indeed, plausibly did not have the power to ratify the Constitution or give power to the national government because they had been given their power by the sovereign people and were not at liberty to redirect any of that power over to some other body. No state could ratify this Constitution and no state did. “No State, in its corporate capacity,” William Pinckney of South Carolina would later argue, "ratified [this Constitution].”\textsuperscript{88}

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

\textsuperscript{86} Madison, Vices of Political System 8, in 9 MADISON PAPERS 345, 352. 
\textsuperscript{87} Id. Madison was worried especially because the question of supremacy of state law over acts of congress would be decided by the “Tribunals of the State, [which] will be most likely to lean on the side of the State.” Id. 
\textsuperscript{88} William Pinckney, Argument before the Supreme Court in McCullough v. Maryland, 17 U.S. (Wheat) 316, 377 (1819).  
\textsuperscript{89} Address of the Annapolis Convention in 3 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1961-87) at 686 (hereinafter “HAMILTON PAPERS”); Resolution of Congress (Feb. 21, 1787), in 32 JCC 74.
Pennsylvania, “that to make a proposal was an exercise of power.”\textsuperscript{90} The Constitution would be given effect only if ratified by the people at large.

Ratification by the people also had a necessary strategic element to it. The Founders did not think they could get ratification from state legislators who would lose power if the Constitution went into effect. The opposition to the Constitution would come most likely, Governor Randolph said, from “the local demagogues who will be downgraded by it from the importance they now hold.”\textsuperscript{91} The Founders did not think they could get unanimity. Rhode Island, New York and Virginia had vetoed the 5\% impost proposals, the easiest remedies for the federal destitution, and would most likely veto any more comprehensive change. Since the Framers did not think they could get ratification from the states, they went to people instead. Opposition would come, James Wilson predicted, from “interested men,” but the people “will follow us into a national Govt.”\textsuperscript{92} The Framers used the People against the states. They ended state supremacy over the national government on the authority of the sovereignty of the People.

Under the Constitution itself, no state would be bound by the Constitution until that state’s convention had ratified.\textsuperscript{93} Ratification of the Constitution, moreover, was by state, with a minimum of nine states required, and not by a consolidated vote along the country. The people of each state met in a separate convention. Nonetheless, the Framers were using the conventions of the people of the state as tool or weapon against the government of the state. Under the Articles, the state governments had been supreme over the Congress and the Congress was the agent of the state governments, but when the

\textsuperscript{90} Wilson, Pennsylvania Ratification Convention (Dec. 4, 1787), \textit{in 2 Elliot’s Debates} 469.
\textsuperscript{91} Edmund Randolph, Speech to the Federal Convention (July 23, 1787), \textit{in 2 Farrand’s Records} 89.
\textsuperscript{92} James Wilson, Speech to the Federal Convention (June 16, 1787), \textit{in 2 Farrand’s Records} 253.
\textsuperscript{93} U.S. CONST., art. VII.
ratification of the Constitution was completed, by the people, the state governments were made subject to the supremacy of the federal government.

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

C. The Pivotal Voter

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

Madison did lose in the Convention on issues that were important to him, as *Righteous Anger* discussed at some length.95 Madison hated the malapportionment of the Senate, the rule giving the same voting weight to tiny states as to large ones. It was “magic and not reason,” James Wilson had said, that “annexing the name of ‘State’ to ten thousand men, should give them equal right with forty thousand.”96 Madison was consistent, saying among other things that equal votes for large and small states was the “radical vice” of a confederation system.97 Madison, nonetheless, lost on the voting rule in the Senate.

---

94 *Recovering* at 1583, 1583-84 n. 102.
95 *Righteous Anger*, chapter 5 (“Partial Losses”).
96 Wilson, Continental Congress (Aug. 1, 1776), *in* 6 JCC 1105.
97 James Madison, Federal Convention (Jun 30, 1787) *in* 1 FARRAND’S RECORDS 485.
Madison also wanted a national veto over state laws to prevent their frequent and flagrant violations of individual rights and their wicked failures as to their national duties.\textsuperscript{98} He did not get it, notwithstanding his many tries and his passion. Of course the Constitution is interpreted to include Madison’s losses. There is no federal veto over state law “in any case whatsoever” for the protection of individual rights, as Madison had wished. The Senate is as it is. Still the changes that Madison accomplished are, to use Gordon Wood’s description, “breathtaking” in comparison to the Articles of Confederation that went before.\textsuperscript{99} The losses upset Madison, but the hole in his donut does not in the end dominate the donut.

The Constitution indeed needs to be interpreted by looking at the pivotal voters, but Roger Sherman of Connecticut is not at the center on the votes on federalism, as Whittington argues, except when he became a driving nationalist. Roger Sherman, for example, made a motion in the Convention to deny the federal government power to lay “direct” or internal taxes, but he lost 2 states to 8 states against.\textsuperscript{100} Both proponents and opponents of the Constitution called Federal power to lay direct tax the key issue of the ratification debates\textsuperscript{101} Sherman said in defense of his motion that he wanted to prevent

\textsuperscript{98} See, e.g., Letter of James Madison to Thomas Jefferson (Oct. 24, 1787) in 10 MADISON PAPERS 209, 212.
\textsuperscript{100} Federal Convention (July 17, 1787), in 2 FARRAND’S RECORDS 25-26.
\textsuperscript{101} See eg. Letter from George Washington to Thomas Jefferson (August 31, 1788), 30 WRITINGS OF GEORGE WASHINGTON 82-83 (John C. Fitzpatrick’s 1931-1944) <http://etext.lib.virginia.edu/washington/> (saying that the Anti-Federalist amendment to prevent federal direct taxes was the only amendment to which he really objected but it was the one most strenuously insisted upon by the Anti-Federalists); James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), in 9 DOCUMENTARY HISTORY OF RATIFICATION 1109 (saying that to render the Congress “safe and proper, I would take from it one power only—I mean that of direct taxation”); see Calvin H. Johnson, Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution, 7 WM & MARY L. J. 15-24 (1998).
\textsuperscript{Id.}
the national government from intruding on the “Government of the individual States in any matters of internal police.” The 8-2 state majority of the Convention seems to have thought instead, to quote Hamilton, that “[t]here are instances without number, where acts necessary for the general good... must interfere with internal police of the states.” Sherman was in the overwhelmed minority on the key issue.

Sherman seems to have moved more toward nationalism than he moved the convention. His close Connecticut colleague, Oliver Ellsworth, for instance, early in the Convention moved to strike the word “national” from the early, Virginia-Plan proposal to create a “national government” because Ellsworth wanted to preserve the “confederation” mode. The Convention, however, thereafter began to use the word “national” as if Ellsworth had never spoken. By the end of June, Ellsworth himself said he wanted to establish a national legislature, executive, and judiciary to preserve peace and harmony. By the time of the Connecticut Ratification Convention, Ellsworth was saying that the Constitution was based on “the necessity of combining our whole force and, as to national purposes, becoming one state.”

---

101 See, e.g., Letter from James Madison to Edmund Randolph (Dec. 2, 1787), in 12 Documentary History of the Ratification of the Constitution at 332 (saying that denying Congress the power to lay direct taxes was the “most popular topic among the adversaries”);
102 Roger Sherman, Federal Convention (July 17, 1787), id 2 Farrand’s Records 25.
103 Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 Hamilton Papers 402.
104 Oliver Ellsworth, Federal Convention, June 20, 1787, in 1 Farrand 335.
105 See, e.g., William Johnson (Conn.), Federal Convention (June 21) in 1 Eliot’s Debates 431 (describing New Jersey plan as creating a distinct national government, but one that is not totally independent of that of the states); Convention, June 23, 1 Eliot’s Debates 226 (debating whether members of the national legislature should be paid out of the national treasury); Convention, July 23, 1 Eliot’s Debates 216 (unanimously passing resolution that the legislative, executive, and judiciary powers of the national government, ought to be bound by oath to support the articles of the union”); Convention, July 27, 1 Elliot’s Debates 220 (passing resolution that a national executive be instituted to consist of a single person to be chosen by the national legislature); Convention, July 18, 1 Elliot’s Debates 210 (unanimously passing resolution that a national judiciary be established).
106 Oliver Ellsworth, Federal Convention (June 29, 1787) in 1 Eliot’s Debates 465.
107 Oliver Ellsworth, Connecticut Ratification Convention (January 4, 1788), in 2 Eliot’s Debates 186.
Jeffersonians, that is, that tax may be used for the general welfare and not just for enumerated powers. By the time of the debate over the Tenth Amendment, Roger Sherman, who had once advocated an enumeration of congress’ power, was contributing to the defeat of an Anti-Federalist attempt to limit Congress to the powers expressly delegated to it. If Sherman is viewed as the champion of decentralized power in the Convention, then, best viewed, he lost on that side and thereafter moved over to the nationalist side.

Once the Constitution reached the public and the country got used to it, it is clear that the pivotal voter would have tolerated a far more radical change than the Constitution effected. Delegates representing 65% of the electorate (weighing states by population) ultimately voted to ratify the Constitution. All regions supported the Constitution at near landslide levels: New England voted 59% for ratification; Mid-Atlantic was 66% for ratification and South was 63% for ratification. Opponents to ratification garnered just over a third of the delegates (weighted by population) overall. The Constitution got

---

108 Letter of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut (Sept. 26, 1787) in 3 FARRAND’S RECORDS 99 (saying that “[t]he objects, for which congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defence and general welfare”).

For Jeffersonian opposition of use of tax justified only by the general welfare, see, e.g Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), in 12 JEFFERSON PAPERS 71-73 (enumerated powers provide an “exact definition” power to tax for the general welfare); Letter from James Madison to Andrew Stevenson (Nov. 17, 1830), in 3 FARRAND’S RECORDS 494 (“Common defence and general welfare [are used] as general terms, limited and explained by the particular clauses subjoined to the clause containing them.”).

109 July 17, 1787, 2 FARRAND’S RECORDS 26 (saying that Sherman “in explanation of his ideas read an enumeration of powers”).

110 1 ANNALS OF CONGRESS 790, 1st Cong., 1st Sess (Joseph Gale, ed. 1834-1856); see also August 21, 1787, in 1 id. at 797. (reporting that Elbridge Gerry’s proposal to add “expressly delegated” to the Ninth Amendment was defeated, 17-32, without debate).

111 The 65% figure is an average weighted by population. It is computed by multiplying the population of each state by the percentage of delegates in favor of ratification, then adding the products, then dividing the sum by the population as a whole. See Righteous Anger at 129 for population figures. The Constitution by its own terms required only 9 states for ratification and the Framers did not expect ratification by all. If we exclude the four closest states, Rhode Island (52%), Virginia (52%), Massachusetts (53%) and New York (54%), the minimum nine states needed for ratification went 76% for the Constitution. Calculations, based on 1790 census, are on file with the author.
more popular as time went on. The Anti-Federalists started with a majority in the Anti-
Federal states of New York and Virginia, but even New York and Virginia ratified after
the debates. Even Anti-Federal Rhode Island and North Carolina eventually ratified.
Once the Constitution was ratified, Anti-Federalism shrank to a stigmatized minority and
then disappeared. In the First Congress, Anti-Federalist held only 15% of the voting
power, and could get nothing that the Federalists did not want.\textsuperscript{112} By 1790, opposition to
the new Constitution, as Jefferson himself put it, “almost totally disappeared.”\textsuperscript{113} The
new Constitution and new President were idolized.

With this level of ultimate support, one must go deep into the nationalist coalition
to find the pivotal voter, passing over many less nationalistic proponents. The pivotal
voter had a committed, nationalist frame of mind. The Constitution should not be
interpreted as any more nationalist than it is, of course, even if the pivotal voter would
have tolerated more. Still “pivotal voter” talk does not reduce the Constitution’s
nationalistic vigor.

D. Let’s Get Rid of “States’ Rights” Usage.

Professor Whittington argues that the primary function of “constitutionalism” is to
protect individual rights against the power of government.\textsuperscript{114} "A true constitution,”
Giovanni Sartori has said, "is defined by its aims of limiting government."\textsuperscript{115} The

\textsuperscript{112} Righteous Anger at 131.
\textsuperscript{113} Thomas Jefferson to Lafayette (April 2, 1790) in 16 JEFFERSON PAPERS 292, 293
\textsuperscript{114} Recovery at 1586.
\textsuperscript{115} Recovery at 1569 n. 13 citing Giovanni Sartori, Constitutionalism: A Preliminary Discussion, 56 AM.
POL. SCI. REV. 853, 860 (1962).
Constitution's "essential quality", according to Charles McIlwain, is "legal limitation on government," 116 and "true safeguards of liberty against arbitrary government. 117

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

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

States' rights have often been the enemy of individual rights since the founding debates. For the twentieth century, "states rights" was a code word for preserving white

116 Recovery at 1568, quoting CHARLES HOWARD MCIWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 24 (1940).
117 Id. at 145 cited by Recovering at 1568.
118 Righteous Anger at 51-57.
power and segregation. The "civil rights" movement achieved racial equality before the law and some measure of respect for the dignity of racial minorities only by pushing back "states rights." Before the civil war, the most important "state right" was, to quote the constitution of the Confederacy, "the right of property in negro slaves."119 Southern elites were afraid that a national majority would impair or end slavery. Since they wanted protection to own other people, destroying the rights of those other people, it was important that their state government rather the national government decide the issue.120

States rights plausibly still defeat individual rights. Professor Jed Rubenfeld speculates that the Supreme Court's current federalism cases are pretextual and that the real motive is to prevent the expansion of anti-discrimination remedies that the Court is not comfortable with.121 In University of Alabama v. Garret122 the Court gave the state of Alabama immunity from suit under a federal statute protecting rights of disabled persons, and in Morrison v. United States,123 the Supreme Court held that Congress could not provide a civil cause of action by which a rape victim could sue the football player who had raped her. Both cases might be described as continuing the tradition by which "states rights" restrictions get in the way of individual rights. It is hardly a necessary conclusion, in any event, that state powers or immunities enhance individual rights or are identical with individual rights.

Federalism issues of conflicts between federal and state governments are important issues. They seem to fall within what Professor Whittington calls the

119 Constitution of the Confederate States of America, art II, §9, cl. 4 (Feb. 28, 1861), 1 J. OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861-1865, at 915
120 ROBIN EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 8 (2006).
121 JED RUBENFELD, REVOLUTION BY JUDICIARY 195-179 (2005).
123 529 U.S. 598.
"uninteresting" and "commonplace" issues of government power,\textsuperscript{124} rather than the individual rights sector, but power and its allocation is not \textit{entirely} without interest. As a matter of unrestrained policy – on fresh canvas --, the question of whether the national or state governments should decide an issue is often a hard question and the answer varies from issue to issue.\textsuperscript{125} "States rights," however, is not a constructive tool to analyze the issues, especially for that collection of decisions that are better made on the national level, and especially for those issues in which the states are abusing individual rights.

States, plausibly, should not even be considered to be rights-bearing entities. Nazi regimes might give the Reich rights over individuals, and Communist regimes might give the Soviet all power over individuals, but in the America, a liberal democracy, individuals are sovereign over the state. Individuals, and not Reichs, Soviets or States, bear rights. States may have powers, but not rights. If the states serve as some kind of proxy for individuals, we would do better to look through the states to the individual

\begin{flushright}
\textsuperscript{124} \textit{Recovery} at 1576.
\textsuperscript{125} The policy of federalism is way beyond what can be covered in a short response, but these are notes: Sometimes, we need to avoid a national majority imposing a single solution on a nation-wide basis. The diversity of tastes across the country should imply that each local group, broken down into groups much smaller even than a state, should be able to decide a question to its own tastes \textit{--chacun à son goût}. Indeed, sometimes decisions should be left to each individual consumer and not decided by a group or any government at all. Even if the decision is formally allocated to the national level by tradition or Constitution, one would hope that a national decision would recognize the diversity of individual tastes. Sometimes, no uniform national rule should prevail.

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

There is no general solution to determine whether decisions should be made nationally (or even globally), on the one hand, or by locality or individual, on the other. I find it plausible that neither the text nor history of the Constitution sorts out the allocation of power in the way that fits the best policy for every issue. We may sometimes need to rely on the good sense of the legislature. Binding constitutional law and policy may not be the same. Still, neither \textit{Righteous Anger} nor the \textit{Recovering from Imbecility} review has much constructive to say about the policy of allocating decision-making authority.
rights, or at least recognize that the states are at best imperfect proxies for individuals.
As long as there exists a case in which a state right conflicts with an individual right, the term “state rights” obscures the conflict. "States' rights" indeed is arguably an offensive grammar, an oxymoron, because "rights" belong to the people, not to governmental units. "States rights" do not deserve the prestige accorded to the rights given to real individuals.

II. The Causes of the Constitution.

Righteous Anger is first an endeavor within constitutional law, skeptical as to “states’ rights” [sic]. It is also, however, a history of the Constitution that tries, sincerely, to figure out what factors contributed to the adoption of the Constitution and what weight to give to the causes that have been offered over the last 220 years. History, including a weighing of causes, should be germane to the interpretation of the legal effect of the Constitution, at least as to overall effect, and at least for those branches of “constitutionalism” that purport to rely on originalism. But perhaps not. Constitutional interpretation in law does depart from history, often, and law does not become respectable history, even with a few adornments quoting old documents. Still, even while history is not the same as law, the Constitution is our foundational document and its history is of continuing interest, just because the nation wants to understand its roots. Our history provides object lessons of bad behavior, to be avoided, as well as valuable traditions and binding law, but both bad and binding history are of interest and should be written honestly.

The historiography of the Constitution is filled with attempts to explain the Constitution in terms of a dominating or overall cause that purportedly gives meaning to
the whole. Many of the offered overall explanations are distinctly unsympathetic to the Constitution. Jefferson seems to have thought the Constitution was written to scare Shaysites into submission and he understood Shaysites to be yeoman farmers rebelling with justice for better terms on taxes and debts. Jefferson to William Stephens Smith (Nov. 13, 1787), in 12 Thomas Jefferson Papers 356–7 (saying the Constitution was a kite, a small hawk, sent up to scare the henhouse). Righteous Anger argued that Shays’ Rebellion was not very important to the adoption of the Constitution and indeed that Shays’ worked better on the Anti-Federalist side to show the vigor of state governments. Charles Beard interpreted the Constitution as a conservative economic document written to suppress paper money so as to make debts harder to pay.

*Righteous Anger* argued that paper money was not important in the debates, primarily because Anti-Federalists as well as Federalists condemned paper money, from the lesson of the failure of the Continental dollar.

*Righteous Anger* also argued that other issues were less import to the adoption of the Constitution than others have said. *Righteous Anger* argues, moreover, that individual rights, slavery and democracy are very important issues, but that they were not issues that were implicated in the adoption of the Constitution.

Whittington cares about checks and balances, but *Righteous Anger* argued that the Framers were skeptical about “checks and balances,” considering them more appropriate to a monarchial system than to a republic. I found regulation of commerce to be a “modest little power”

---

126 Jefferson to William Stephens Smith (Nov. 13, 1787), in 12 Thomas Jefferson Papers 356–7 (saying the Constitution was a kite, a small hawk, sent up to scare the henhouse).
127 *Righteous Anger* at 213-22.
128 *Charles Beard, An Economic Interpretation of the Constitution of the United States* (1913) at 154, 324.
129 *Righteous Anger* at 207-10.
130 *Righteous Anger* at 163-186.
131 *Righteous Anger* at 68,166. Whittington attacks *Righteous Anger* for “dismiss[ing] as a sideshow” the “‘clever combination of New World gears and gadgets’ that occupied so much of the framers’ time.’ *Recovering* at 1585, quoting Akhil Reed Amar, *America’s Constitution* 87 (2005). I am in fact more skeptical about value of “checks and balances” than other scholars. A separate executive seems to
contributing almost nothing to the adoption of the Constitution. Righteous Anger examined these and other theories about the formation of the Constitution and concluded that there was not much weight to these theories or the causes they cite.

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

A. Necessary Anger.

Righteous Anger concluded that righteous anger at the wickedness of the states was a necessary cause of the Constitution. Anger was necessary, first, to overcome the norm strong at the time that changes had to be unanimous. Both the Articles of Confederation and the resolutions that empowered the Convention, as noted, required

have arisen more for efficiency than as a “check.” Madison told Jefferson before the Convention that he wanted a separate executive so that as congressional powers increased, there would not be mismanagement. Letter of James Madison to Thomas Jefferson (March 19, 1787) in 9 MADISON PAPERS 318. The Framers in Philadelphia dismissed John Adams, who represented “checks and balances” as too monarchical in favoring a balanced or mixed Constitution. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 567–592 (1968). Consistently, John Quincy Adams was an Anti-Federalists before ratification because he found the Constitution inconsistent with his father’s book that emphasized separation of powers. Letter of John Quincy Adams to William Cranch, October 14, 1787, 4 DOCUMENTARY HISTORY 75. The Founders did distrust direct democracy, leading them, for example, to the ill-advised Electoral College. I did not mean to dismiss “checks and balances” entirely, however, and there is no question that “checks and balances” shows up in the debate in ways that Righteous Anger did not discuss.

132 Righteous Anger at 189-201. Professor Whittington argues that an important part of “regulation of commerce” was a program to retaliate against foreign powers that excluded American ships from their ports. Recovering at 1580. Whittington argues the failure to exercise the power to retaliate was due to changed circumstances. Id. 1t 1580-81 n. 83. At the first chance in the first new session, however, Congress rejected retaliation against the British because the British could too easily react by excluding American ships from the English ports. The rejection of retaliation is contemporaneous and reflects the considered judgment that those who live in glass houses should not throw penalty imposts. Righteous Anger at 194-95.
approval of any changes to the Articles by all of the states. 133 Before the Articles and the empowering resolutions, moreover, the Revolutionary War had also been fought under the assumption that the states would reach a united consensus.

The Framers overrode the prior understanding demanding unanimity, ignored their instructions and ripped up the Articles. They were angry enough at the states that they presumed that at least one state would reject the minimum necessary changes in bad faith and they were angry enough at the states that they decided they did not need unanimity. The Framers provided that the Constitution would go into affect with ratification by only nine states. They also sent the Constitution for ratification by the people rather than the state legislatures because they thought that state office holders would try to retain their power, in bad faith, and veto a nationalizing document. Without the justifiable anger and the reasons for it, the book argued, the Framers could have drafted the needed fiscal reforms within the confederation mode. Without the anger they would have drafted a Constitution that compromised enough with the opponents to get their acquiescence, a Constitution more agreeable to the states and less radical in its nationalist vigor.

The Framers of the Constitution were angry at the states for betraying the great cause of the Revolutionary War. The states had betrayed their duties to the great republican cause by failing to supply Washington’s Army. Their contribution was far below what reasonably could have been expected. The states continued to breach their sacred duties by failing to pay their requisitions and by vetoing the best tax, the federal impost, which might replace requisitions. The Founders expressed their anger at the treachery of the states in immoderate moral and even religious terms. Failure to pay the

133 See supra footnote 89, and accompanying text.
war debts was both a moral issue and a strategic one. In the next, inevitable war the nation would need to borrow again and to borrow there would need to be a source of funds to repay at the national level.

*Righteous Anger* also argues that the Constitution went further than needed to solve the fiscal crisis. The proximate cause of the Constitution was the need to give the national government a tax power sufficient to continue payments on the war debts by enough to restore the public credit. But Hamilton, as first Secretary of the Treasury, was able to allow the federal government to borrow again with taxes of 75 cents per capita per year, about a day and a half of labor wages. Hamilton’s taxes were only on things considered properly suppressed, hard liquor and imports. Hamilton’s taxes were so easy, in retrospect, that they could easily have been adopted while preserving the confederation mode. Restoration of the public credit did not require a revolutionarily more powerful three-part national government and the end of state sovereignty. If Rhode Island had not vetoed the 1781 impost, the confederation form of government and the preservation of state sovereignty could have survived. A federal impost and sale of western land would have carried the war debts. But the veto dammed up the pressure, and when the dam burst, *Righteous Anger* argued, the constitutional revolution went further than it needed to go if it was just a matter of making payments on the war debts.

B. Taxes instead?

Professor Whittington argues that the emotion of anger is not necessary or helpful to explain the adoption of the Constitution. Congress did need the power to tax to restore the public credit, he concedes. But “[t]o explain the constitutional change in
regard to taxation powers,” he says, “anger seems superfluous. To explain the rest of the Constitution, anger seems unhelpful.”  Similarly, Professor Whittington argues, the Framers needed to break the unanimity requirement to achieve a national tax, but they did not need anger to know they needed a national tax. Righteous Anger argued that ‘[i]f the Articles of Confederation had not required unanimity or the Framers had not been so angry, the Framers might well have tried to find a solution to the fiscal crisis within the confederation mode in a way that preserved state sovereignty” and Whittington’s response is that “[t]he first condition alone seems to have been sufficient.” The necessity of the national tax power, in sum, and the need to override the one-state veto allowed by the Articles of Confederation crowds out anger as a necessary element.

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

---

134 Recovering at 1578.
135 Righteous Anger at 3.
136 Id at 1579.
137 Id. at 1580
land were ever not sufficient. The direct tax was the one power that the Anti-Federalists 
would not concede to the new national government and direct tax was the one federal 
power that the Federalists would not give up.\textsuperscript{138} The Federalists needed the full three-part powerful national government if that government was going to collect internal tax, 
Whittington argues. The importance of direct tax crowds out anger as a necessary 
explanation for the strong national government, even though the impost and whiskey tax 
turned out to be so small.

Emotions --including anger-- and cold rationality -- including calculating the 
needs for self defense-- are complementary rather than competitive explanations. One 
should by and large expect emotions to follow self interest, or calculation to serve deeper 
emotional needs. Whichever is described first, reason and underlying emotion are as 
inseparable as quarks. Perhaps Professor Whittington and I are saying the same 
nationalistic things about the formation of the Constitution with different vocabulary, his 
from the calculating brain lobe, and mine from the other emotional lobe. Professor 
Whittington does, however, sometimes seem to see a difference. He criticizes the theme 
of righteous anger at the states as emphasizing "a moral principle of honoring contracts 
rather than the instrumental calculation of maintaining creditworthiness so as to borrow 
in future wars."\textsuperscript{139} The Founders said that failure to pay the war debts was \textit{both} a sign of 
moral depravity\textsuperscript{140} and a dangerous dallying with national safety,\textsuperscript{141} with apparent

\textsuperscript{138} See sources cited, \textit{supra} note 101.
\textsuperscript{139} \textit{Recovering} at 1579.
\textsuperscript{140} See, e.g., An Address to the Nation from the Congress (Madison) (Apr. 26, 1783), in 24 JCC 281 
saying the defaults dishonored the "great cause," "the last and fairest experiment in favor of the right of 
human nature"); An Address from the United States in Congress Assembled to the Legislatures of the 
several States (Oct. 6, 1786), in 31 JCC 747–748 (with the most pain anxiety, the Congress is compelled to 
warn that the most fatal evils will speedily and inevitably flow from a breach of public faith and a violation 
of the principles of justice) and authorities cited, \textit{Righteous Anger} 20-24.
sincerity on both arguments and without any inconsistency. The Founders were
desperate about the destitute government’s inability to borrow for defense, but the
desperation contributed to the anger.

Using national tax as an explanation does not seem to make the Constitution any
less a nationalizing document than does anger. If national direct tax were strong enough
to crowd out anger, than it must be a dominating factor, perhaps not so strong to be a
“uni-causal explanation” for the Constitution, but still important. If direct tax is at the
core of the Constitution, it harder to justify, e.g. Pollock v. Farmers’ Loan Trust,142 where
the Court overruled a hundred years of doctrine to find an income tax unconstitutional,
under what is a decidedly pro-tax Constitution.143 Current Anti-Federalists looking to
decentralize power will not be pleased by an argument that the Constitution draws its
programmatic meaning from its pro-federal-tax drives. A pro-tax explanation of the
Constitution also does not provide a useful platform for constitutionalism’s treating the
document as primarily a limitation on government. Tax and anger are also such
intertwined explanations and close allies in any contemporary debate about what use to
make of the causes of the Constitution that perhaps I should just concede Professor
Whittington’s point and we would be (almost) perfect allies.

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

1. Unanimity.

141 See, e.g., Oliver Ellsworth, Connecticut Ratification Convention (Jan 4, 1788) in 2 ELLIOT’S DEBATES
189 (asking if war breaks out, how are we to defend ourselves, since the government “has not the means to
enlist a man or buy an ox”) and illustrations, Righteous Anger at 18-19 and 151..
143 See, e.g., Calvin Johnson, Fixing the Constitutional Absurdity of the Apportionment of Direct Tax, 21
CONSTITUTIONAL COMMENTARY 295 (2004) (arguing that Pollock was wrongly decided).
It is quite plausible that the Founders needed anger to reject the single state veto allowed by the Articles of Confederation. Unanimity was an important value through the Revolution, holding together diverse states under the motto that won the war, “United, We Stand.” The Founders might well have been able to achieve unanimity for nationalizing the 5% impost if they had only not been so mad.

John Kaminski, the long time director of the Documentary History of the Ratification of the Constitution project, has argued that Congress should have accepted New York’s counter-offer as to the 1783 impost and that if it had, the country would have moved in salutary directions. Rhode Island vetoed the 1781 proposal for a 5% federal impost and Virginia then quickly retracted its prior approval. The desperate Congress returned again in 1783, however, this time limiting the 5% impost to a 25 year duration and dedicating the money only to the existing war debts. By May 1786, all of the states, except New York, had ratified the 1783 proposal, including both Rhode Island and Virginia, the vetoing states of the 1781 proposal. By 1786, however, New York had established its own state impost on traffic through New York harbor, and it was unwilling to cede nationalization of the impost without conditions.

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

---

145 Address to the States, by the United States in Congress Assembled (Apr. 26, 1783), in 24 JCC 279.
146 Id. at 5.
Professor Kaminski argues that Congress should have accepted New York’s counter offer or at least continued conciliatory negotiations, as, for instance, James Monroe recommended. 147 “Had Congress followed this advice,” Kaminski says, “its financial needs would have been met and no federal convention would have been called to meet in Philadelphia in the Spring of 1787.” 148 With the impost and sale of western land, the federal government could have made the minimal payments on the war debts until imports grew important enough to carry the debt comfortably.

Kaminski believes that confederation form of government would have been better for 1787 America than was the strong national government the Constitution ordained. He believes that Congress would have evolved into a Parliamentary form of government with John Jay, as prime minister. 149 The Founders would have avoided an imperial President, modeled on the King.

The Congress, however, rejected New York’s conditions. The Federalists interpreted the New York conditions as pretextual, tantamount to veto. The New York delegate to Congress, Melancton Smith, made a case for accepting the conditions, which did not describe them as vetoing, 150 but the Federalist interpretation was that New York was vetoing the national impost, in bad faith, just to keep the revenue from the New York

---

147 James Monroe to Governor George Clinton, New York, Aug. 16, 1786, 23 LETTERS OF THE DELEGATES 479-80 (saying that Congress should proceed with temper to conciliate & gain the confidence of New York) (emphasis added).
148 Kaminski, supra note 144, at 5.
149 Kaminski, supra note 144, at 7. In discussion of Kaminski’s thesis at the Society of Historians of the Early American Republic, Philadelphia, July 25, 2005, Professor Pauline Maier of MIT took issue with the argument that the Congress under the Articles would have evolved into a parliamentary-prime minister system, in part because not even England had evolved into a parliamentary-prime minister system at the time.
harbor for its own selfish purposes. 151 “The dominant party in New York” Madison would say, “had refused even a duty of 5 percent on imports for the urgent debt of the Revolution, so as to tax the consumption of her neighbors.” Neighboring Connecticut reacted angrily at having to pay a New York state impost on goods passing through New York harbor bound for Connecticut: “Those gentlemen in New York who received large salaries,” editorialized the Connecticut Courant, “know that that their offices will be more insecure.. when the expenses of government shall be paid by their constituents, than while paid by us.”152 When New York vetoed the 1783 impost, it was said that every “liberal good man, .. [wished] New York [should rest] in Hell.153

A polity that is built on consensus and unanimity needs to negotiate to work out the differences and needs to compromise to pull in all the votes. In 1787, Congress was too angry at New York to perform its function within a consensus system and to negotiate any further and it did not care to see any reason in New York’s counter-offer. One does not need to believe that New York was right on the merits or that the Articles would have evolved into a superior form of government to accept that some other factor, such as anger, was necessary for the rejection of New York’s offer that in fact occurred. The need for the impost did not strictly require rejecting the unanimity norm, but to get the impost from New York, the nationalists would have had to let go of their anger, and

151 See, e.g., Letter of James Madison to George Washington, Feb. 21, 1787, 9 MADISON PAPERS 285 (saying New York has put a definitive veto on the impost).
152 Editorial, NEW ENGLAND COURANT (Dec. 24, 1787) reprinted in 15 DOCUMENTARY HISTORY 82.
negotiate, as Monroe put it “with temper to conciliate.” The Federalists went to the
Convention instead. As Hamilton truly wrote, “Impost Begat Convention.”

2. Direct tax.

The proximate cause of the Constitution was the desperate need to pay for the
debts of the Revolutionary War. The Constitution might reasonable be called, first, a tax
document, a pro-tax document. The Federal government needed the impost that New
York had vetoed, almost everyone outside of New York agreed. Within tax, federal
power over direct tax was the issue that most clearly divided opponents from proponents
of the Constitution. As Whittington notes, the Federalist proponents of the Constitution
wanted Congress to be able to lay a direct or dry-land tax in times of emergencies and the
Anti-Federalist opponents uniformly wanted to deny Congress the power to tax internally
except via requisitions upon the states. Both proponents and opponents of the
Constitution called Federal power to lay direct tax the key issue of the ratification
debates, and sometimes as the only issue that separated Federalists and Anti-
Federalists.

A “direct tax” at the time of debates was a kind of quasi-requisition, apportioned

---

154 James Monroe, supra note 147, at 479-80
155 Hamilton, Notes for Second Speech of July 17, 1788 to New York Ratification Convention, 5
HAMILTON PAPERS 173.
156 See eg. Letter from George Washington to Thomas Jefferson (August 31, 1788), 30 WRITINGS OF
GEORGE WASHINGTON 82-83 (John C. Fitzpatrick's 1931-1944)
<http://etext.lib.virginia.edu/washington/> (saying that the Anti-Federalist amendment to prevent federal
direct taxes was the only amendment to which he really objected but it was the one most strenuously
insisted upon by the Anti-Federalists); James Monroe, Debates in the Virginia Ratification Convention
(June 10, 1788), in 9 DOCUMENTARY HISTORY OF RATIFICATION 1109 (saying that to render the Congress
“safe and proper, I would take from it one power only–I mean that of direct taxation”); Letter from James
Madison to Edmund Randolph (Dec. 2, 1787), in 12 DOCUMENTARY HISTORY OF THE RATIFICATION OF
THE CONSTITUTION at 332 (saying that denying Congress the power to lay direct taxes was the “most
popular topic among the adversaries”); see Calvin H. Johnson, Apportionment of Direct Taxes, supra note
among the states. For a requisition, the states would determine the subjects of tax. A direct tax would have to be apportioned among states like a requisition, but the federal government would determine the things taxed. Originally “direct tax” meant all taxes except for the tax on imports or “imposts,” and “direct tax” and “internal tax” were synonyms.

It is difficult nonetheless to take the direct tax issue very seriously because
(1) direct tax did not help ratification because the majority of the country was skeptical of the need for federal direct tax, and indeed
(2) direct tax was never important over the next seventy-five years. If there was no welled up anger, the country could have solved its fiscal problems without a federal power over direct tax.
(3) Had the direct tax power been what the country wanted, it could have been accomplished within the confederation mode. Replacing the confederation with a strong national government, supreme over the states, was not required by tax or direct tax alone.
(4) For all the heat, the proponents and opponents of the federal direct tax ultimately took positions that were not very different from each other.

a. Direct tax impeded ratification. The Constitution was ratified in spite of the federal power over direct tax, and not because of it because the majority of the country was skeptical that is was needed. Skepticism as to the need for federal direct tax seems to

---

157 U.S. CONST. art. I, §2, cl. 3 & §9, cl. 4. The Constitutional formula for apportionment of direct tax was a formula worked out in 1783 for requisitions, but never adopted because of New York’s veto of the 1783 proposal. Calvin H. Johnson, supra note 100, at 19-20.
describe the majority of the country. In Virginia, a majority of the ratification convention was opposed to federal direct tax. The Virginia Anti-Federalists recommended an amendment to the Constitution that would have prohibited the federal government from laying a direct tax, unless a state was in default in paying its quota of a requisition. The federal government would have had to rely on requisitions letting the states choose what to tax and using state officers. The Federalists challenged the amendment, but lost the challenge. The Federalists won a close majority in Virginia for ratification of the Constitution overall, but they lost on the vote on their challenge to restrictions on federal direct tax.\(^{159}\)

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

To the Anti-Federalists, there was no need for emergency taxes. “The truth is,” said Anti-Federalist Brutus in New York, “no such necessity exists.” Some of the European nations might attack us, Brutus conceded, but if so, “they will have to transport their armies across the Atlantic, at immense expense, while we should defend ourselves in our own country.”\(^{161}\) Where is the danger that imposes disagreeable taxes on us?, asked

---

\(^{159}\) Virginia Ratification Convention, (June 27, 1788) *in Elliot’s Debates* 661 (reporting that challenge lost 65-85)

\(^{160}\) *Righteous Anger* at 157 has a tally. The direct tax restriction failed in two early states, Pennsylvania and Maryland, and was not offered in four early conventions, Delaware, New Jersey, Georgia and Connecticut, but it won in seven of the last eight conventions.

another Anti-Federalist. From abroad, we have nothing to fear because the European powers’ attentions are engaged with each other. “[A]t home we are in a state of perfect tranquility.”162 The savage Indians would destroy us, Patrick Henry conceded, but our settlers are stronger than they are and the threat is as to deprecations on the frontier and not to the safety of the continent as a whole.163 The states could give the federal government reasonable means for the common defense when and if a necessity did arise.164 In New York, the most important subject in the opening essays of the Federalist is financing of war. But the Federalist apparently convinced no one at the time, Linda DePauw has concluded, and in fact drove some fence sitters to the other side. Publius seemed to be raising the specter of a standing national army, when few in quiet New York could see the need for a standing army.165

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

b. Direct tax not used. Although the Federalist proponents asked for and got federal power over direct tax, the power never amounted to much. The Founders did not have 20-20 foresight about the future to know that, but the perspective time gives supports skepticism that direct tax was all that important even in 1787. As noted,

---

163 Patrick Henry, Speech to the Virginia Ratification Convention (June 9, 1788) in 9 DOCUMENTARY HISTORY 1054; Brutus VII, supra note 161, at 238.
164 Brutus VII, supra note 161, at 238.
Hamilton was able to restore the public credit without relying on direct tax. The first Congress adopted the 5% impost, blocked by New York in 1783, and later adopted a whiskey tax to pay off the state as well as the federal war debts. Hamilton rejected direct taxes and land taxes. Internal tax, first, required the construction of a nation-wide administrative structure of appraisers and tax collectors, whereas imposts could be collected out of few customs houses. Hamilton chose the easier way, the customs houses. Under the Constitution, moreover, direct taxes need to be apportioned among the states by population, and when the tax base is not equal per capita among the states, apportionment is a perverse requirement that makes the tax rates high in some states and low in others. The direct tax power turned out to be too bulky to use.

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

166 Righteous Anger at 224-28.
167 U.S. CONST., art. I, §2, cl. 3; §9, cl. 4.
168 See, e.g., Calvin Johnson, supra note 143, at 322-23. Connecticut has rough twice the per capita wealth or income of Mississippi. Tax rates for an apportioned wealth or income tax would have to be twice as high in Mississippi, because Mississippi has a half as large tax base over which to spread her quota.
169 Jefferson to John Taylor (Nov. 26, 1798) in 8 WORKS OF THOMAS JEFFERSON (Paul Leicester Ford, ed., 1904-05), 481 (emphasis in original).
170 Articles of Confederation, art. VIII (March 1, 1781), 19 JCC 220 (requiring approval by nine of the thirteen states for borrowing on credit of the united states). Cf. art. XII, id. at 221 (pledging the credit of the United States to all debts contracted under the authority of congress before the Articles of Confederation).
domestic and dry land affairs to the states. Jefferson might have expressed the views of the majority of America from the start.

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

c. Direct tax not inconsistent with confederate mode. Direct tax was also not inconsistent with state sovereignty, if the country had wanted direct tax. Congress’s 1783 proposal to be allowed federal tax, which New York vetoed, included both the 5% impost and a requisition upon the states, with a tilt, five-eighths of total revenue, to come from the direct tax. The term, “direct tax” arose in this period to refer to the requisition part of the 1783 proposal, that is, what was called “direct taxes on each state, justly proportioned” The 1783 proposal had no effect on the framework of the confederation mode of government and state supremacy or sovereignty, guaranteed by the Articles of Confederation. Hamilton’s tax package was more modest than the 1783 impost proposal that New York vetoed, in many ways, so if the 1783 package allowed state sovereignty and a continuation of the confederation form of government, so did

---

171 See, e.g., First Annual Message to Congress, in BASIC WRITINGS OF THOMAS JEFFERSON 334, 337 (saying that federal government should have power only over foreign affairs, leaving domestic affairs to the states, and calling for repeal of internal taxes).
172 Address to the States, by the United States in Congress Assembled (Apr. 26, 1783), in 24 JCC 279.
173 Letter of Eliphalet Dyer to Jonathan Trumbull, Sr., March 18, 1783, 20 LETTERS OF DELEGATES 45 (emphasis added)
174 “Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled,” Articles of Confederation, art. II, in 19 JCC 214
Hamilton’s taxes. Replacing the confederation with a strong national government supreme over the states would not required by direct taxes alone.

d. **Not much difference between the sides.** The difference between a direct tax, which Anti-Federalists opposed, and a requisition upon the states, which Anti-Federalists favored, is only as to which level chooses the objects to be taxed. Both direct taxes and requisitions had to be apportioned among the states and indeed, a direct tax should be understood as a kind of requisition. The Anti-Federalist proposed amendments, which would have restricted federal power to lay direct tax, conceded the need for federal revenue, at least in form.\(^{175}\) In New York, for example the amendment required the federal government to use a requisition first and then provided that if a state was in default of its quota under the requisition, the federal government could collect direct tax within the state with its own officers and with a 6% penalty level interest.\(^{176}\) Under the Virginia version, the state could suspend federal collection of a direct tax by passing a legislation for the collection of its quota by state-chosen means. Whether the requisition or direct tax was used, the amount and need for the tax would be set by the federal Congress, and both the Constitution and the Anti-Federalist substitutes accepted the premise that the tax would be collected one way or the other. Once the battle lines were set, the two sides were not far apart.

The conflict did make a difference as who would make a decision as to what to tax. For requisitions, it would be the state that decided what to tax. For direct tax, it

---

\(^{175}\) _See Righteous Anger_ at 156-57.

\(^{176}\) New York resolution, New York Ratification Convention (July 26, 1788), 1 ELLIOT’S DEBATES 329. The version of the amended offered in Virginia required Congress to notify the state governor when it proposed a direct tax. The state could then suspend collection of the federal tax if the state passed legislation for collection of the state’s quota by state-chosen means. There was no 6$ penalty interest. Resolution in the Virginia Convention (June 27, 1788) in 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1553-54.
would be Congress that decided what to tax. In the South, at least, it is plausible that the
direct tax debate is another disguised skirmish over slavery. George Mason argued in the
Virginia ratification convention that if the Constitution were adopted, Congress could use
its tax powers to lay such heavy tax on slaves as to amount to manumission. Southern
slaveholders in charge of the state legislatures would never impose too heavy a tax on
slaves. Requisitions were superior, according to Patrick Henry, because the states would
do a better job to accommodate tax to the convenience of the people.

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

C. Does History Matter?

The needs of history and the needs of constitutional law are profoundly different,
perhaps irreconcilable. For constitutional law and political science, the Constitution is

---

177 George Mason, Virginia Ratification Convention (June 17, 1788) in 3 ELLIOT’S RECORDS 452.
178 Patrick Henry, Debate in the Virginia Ratification Convention (Jun 12, 1788) in 3 ELLIOT’S DEBATES 320.
179 See, e.g., ROBIN EINHORN, AMERICAN TAXATION AMERICAN SLAVERY 112 , 158, 189-94, 198 (2006)
(Discussing direct tax in the post-constitutional period).
not just a historical event, but it is a foundational document, more important than mere legislation and amendable only by a nearly impossible process. A strategically placed 2% of the voters can defeat any amendment.\textsuperscript{180} The critical 2% tends to come from sparsely settled states and it surely not a representative sample.\textsuperscript{181} The Constitution, unamended, is binding on us, against the will of the majority, and the majority can be as large as 98% of the voters and still lose. If the Constitution is foundational, the Constitution has to be wise, based on eternal verities, to fill the needs. Law and political science can not take the Constitution as a curious historical artifact, filled with partisan errors or misjudgments, because the stakes are too high.

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

Solving 21st century problems with eternal verities was in fact not a very important part of what the Founders were trying to do. The Framers wrote the Constitution to solve the problems of 1786, which they knew well, but they knew nothing even about January 1788 because it had not happened yet. Given the direction of time, anything after January 1788 was a black hole to them. The Constitution is first a historical weapon written to accomplish programs, the most important of which was to

\textsuperscript{180} The Constitution requires ratification by three-quarters of the states. The population of the quarter (13) least populated states is 13 million, and a majority is 6.5 million can defeat the 75% requirement. The 6.5 million, mostly from sparsely populated states, represents 2.2% of a total 2004 national population of 293 million. U.S. CENSUS DEP’T., Table 17, Resident Population—States: 1980 to 2004, STATISTICAL ABSTRACT OF THE UNITED STATES (2005).

\textsuperscript{181} Perhaps they lack a gregarious nature or are not attracted to the excitement of big cities. If there is a problem in densely populated areas that sparsely populated states are indifferent or hostile to, no amendment can be expected.
get the war debts paid. To understand the meaning of the words in strict historical context, one must strip away the cover of words and look at the programs underneath. Words do have radiating ripples beyond the specific programs, but the further we go from the hard rock of the programs, the less energy there is in the ripples. Even to understand the penumbra of the programs covered by the words, one must first understand the core programs that the words were intended to accomplish. The words just allow us to make analogies to the core the programs.

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

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

182 See, e.g., Charles Pinckney (South Carolina) (Aug. 22, 1787), in 2 FARRAND’S RECORDS 371 (slavery sanctioned by Greece, Rome and modern states).
183 See NATIONAL GAZETTE (Sept. 1791, Nov. 1791), reprinted in 6 WRITINGS OF JAMES MADISON 68, 81, 114 (Gaillard Hunt, ed. 1900-1910) (saying the states were the repositories of republican virtue because they are homogeneous, which is exactly the opposite of Federalist 10’s position that diversity yielded better protection of individual rights). See Douglas Jaenick, Madison v. Madison: the Party Essays v. the
was the Articles of Confederation, and while the Articles pledged an eternal
confederation, they were badly in need of amendment when ratified and they lasted only
from 1781 to 1788 before they were replaced.\textsuperscript{184} Be skeptical when the Founders in fact
appealed to eternal truths because their most profound eternal truths sometimes were of
four to seven years duration.

History as a professional discipline has a profound distrust for “presentism,”
declared as using historical facts to solve current problems. The past is a very different
place, and using twenty-first century frameworks imposed as a template on 1787 makes it
difficult, perhaps impossible to understand the very different framework of 1787.
Lawyers and political scientists are strictly presentists. They care almost not at all about
careful reconstruction of a strange different age unless it generates useful lessons for
today.

The framework of looking for lessons for today ruins the possibility of
understanding the past in its own terms. Indeed, one can gain only limited understanding
from reading a historical text, over and over again, far removed from the context in which
it was written.\textsuperscript{185} With each reading the historical text gets warped to a 21st century
meaning. With each reading the text picks up a new current meaning so that by the fifth
read, the text is solving marriage problems. To understand the historical meaning, we

\textit{Federalist Papers, in Reflections on the Constitution: The American Constitution after Two
Hundred Years} 116 (Richard Maidment & John Zvesper, eds. 1989) (contrasting the nationalism of
Madison in the Constitutional period with the state focus after breaking with Hamilton)
\textsuperscript{184} The Congress offered amendments to the Articles to allow a federal 5% impost and to allow seizures of
merchandise to enforce state requisitions within a month of ratification of the Articles. Righteous Anger at
84
\textsuperscript{185} Quentin Skinner, \textit{Meaning and Understanding in the History of Ideas, in Meaning and
Context: Quentin Skinner and His Critics} 152 (James Tully, ed., 1988)
have to look, not for the connotations or abstractions of words in the twenty-first century, but for the programs that gave the words their concrete meaning in 1787–1788.

Professor Whittington dislikes a history of the Constitution loyal to its times. “The oddity of Righteous Anger from an originalist perspective,” he writes, “is that it tends to render the Constitution irrelevant to modern politics. The Constitution is not a timeless document; it had exhausted its purpose by 1791.”186 “The transformation of texts taken to be timeless documents into something of only antiquarian interest,” he also says, “is a recurrent risk of those adopting the Skinnerian approach to history.”187 “The oddity created by the reduction of the meaning of the Founders’ Constitution to taxes and anger,” he says, “is that it effectively seals the Constitution off from subsequent political developments, and the founding begins to seem trivial. Righteous Anger has less to say about the ways in which the Constitution continued to matter in politics than it should.”188

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

They [e.g. lawyers and political scientists] do not want to hear about the unusability and pastness of the past or about the latent limitations within which people in the past were obliged to act. They do not want to hear about the blindness of people in the past or about the inescapable boundaries of their actions. Such a history has no immediate utility and is apt to remind us of our own powerlessness, of our own inability to control events and predict the future.189

186 Recovering at 1584.
187 Id. at 1584 n.107.
188 Id. at 1585.
The historical Constitution was a product of a time and place very different from our own and the historical Constitution can not be shoehorned into a twenty-first century framework that nobody knew anything about at time with any benefit to us. The Constitution was a weapon in a partisan war, a war I think the Federalists needed to win, but still a partisan war. As a historical event, the Constitution was not written to provide lessons for today because that was not and could not have been a very important part of what the Federalists were trying to do. We can learn from traditions, stories and history. Still, I think we decide what use we want to make of the ancient Greeks and other history; the ancient Greeks do not decide for us.

Still it is rather not cricket in a Democracy to make up the history to win a current partisan fight, on the constitutional level, trumping a majority, that can be as large as 98% majority at the limits, with false claims of binding constitutional law. The Supreme Court in finding states’ rights in this Constitution is finding fake artifacts, planted by the Court in the history shortly before they are unearthed. It is a bit like burying Barbie Dolls at an archeological site and then pretending that you have discovered something profound when they are unearthed a few days later. Made up history should not be binding us, reversible only by amendments supported by 98% of the population. Righteous Anger did not make a very good case for originalism, that is, that the decisions of 1787 should lead us now. But perhaps it can perform a negative function, preventing fake history from binding us now -- ignoring Barbie Dolls in the archeological dig and the like.