

“IMPOST BEGAT CONVENTION”: ALBANY AND NEW YORK
CONFRONT THE RATIFICATION OF THE CONSTITUTION

*Calvin H. Johnson**

INTRODUCTION

The Philadelphia Convention framed the text of the U.S. Constitution in 1787 that was only a proposal to be given effect only by ratification by the states.¹ Ratification was debated in New York with partisan vigor; indeed, participants on either side of the divide were said to detest each other.² New York ratification is important enough to look at again, perhaps as a synecdoche for the whole, but at least to illuminate the meaning of the Constitution in one important segment of the ratification debates.

The critical framework for New York’s 1788 debates over ratification was set by the debates over the 1783 proposal to nationalize the tax on imports, called the “impost.”³ New York vetoed the 1783 impost proposal, according to the Federalists, to

* John T. Witt Chair, University of Texas Law School. This article originated as a presentation to the Society for Historians of the Early American Republic, which met in Springfield, Illinois, on July 17, 2009, to celebrate the publication of the five volumes of the New York debate in the multivolume: *Documentary History of the Ratification of the Constitution*. The author wishes to thank co-panelists Pauline Maier and John Kaminski for making this project so delightful. The author also wishes to thank participants in the Rothermere American Institute Ph.D. Colloquium, Oxford, UK, April 29, 2013, where a prior draft was presented.

¹ See, e.g., THE FEDERALIST NO. 40 (James Madison) (Jacob E. Cooke ed., 1961) (saying that the Constitution was merely “advisory and recommendatory” unless ratified); James Wilson, Speech before the Federal Convention, in 1 RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 266 (Max Farrand ed., rev. ed., 1937) (saying the convention had the power to propose anything because it had the power to conclude nothing).

² See De Witt Clinton, Journal (July 18, 1788), in 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2232 (John P. Kaminski et al. eds., 2009) [hereinafter DHRC]; Letter from Henry Van Shaack to Stephen Van Rensselaer (June 5, 1788), in 20 DHRC, *supra*, at 1131–32 (2004) (saying that the Massachusetts majority held New York Anti-Federalists in detestation).

³ See generally Calvin H. Johnson, *The Panda’s Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1, 8 (2004) [hereinafter Johnson, *The Panda’s Thumb*] (“The four most important [regulation of commerce] programs mentioned in the constitutional debates related to international trade: (1) nationalization of the state imposts; (2) retaliation against the British for restrictions on West Indies shipping; (3) port preferences; and (4) an American Navigation Act.”).

preserve the tax on imports coming through the New York harbor for selfish, exclusive New York State uses.⁴ Veto of the impost betrayed the great cause of the Revolution.⁵ The defeated proponents of the 1783 impost in New York became the Federalists in favor of the Constitution in 1788, and the party that had defeated the 1783 impost remained intact to become the Anti-Federalists in opposition to the Constitution in 1788.⁶

Nationalizing the state imposts was also the key economic necessity for the Constitution as a whole.⁷ The first mission of the Constitution, as the proponents understood it, was to give Congress a tax of its own to make payments on the debts of the Revolutionary War.⁸ In the next and inevitable war, Congress would need to borrow from the Dutch again.⁹ The impost was considered across the nation as the most appropriate tax under the mercantilist economics of the times and the easiest to collect.¹⁰ Without the veto of the impost proposals offered under the Articles of Confederation, it is fair speculation, although counterfactual, that the Constitution would not have proposed nor adopted such a measure.¹¹ The confederation mode of government under the Articles was a mere firm league of friendship between sovereign states and it would have survived, with minor modifications, had the national-level government been given its own sufficient source of tax. The confederate Congress would not have been replaced by the self-sufficient, vigorous, supreme national government that the Constitution formed, or at least not until some future crisis. As Hamilton appropriately put it: "Impost begat Convention."¹²

⁴ See *id.* at 11–12.

⁵ See CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* 3 (2005).

⁶ See, e.g., *id.* at 5 ("The program that gives the original meaning to the Constitution is also the proponents' program, rather than the opposition's. The Anti-Federalists did not write the Constitution, they opposed what they saw, and they lost in the only purpose that organized them—defeating ratification of the Constitution. . . . It is the Federalists' goals that give the Constitution its purposive meaning, even if the Federalists' goals had been wrong goals.").

⁷ See Johnson, *The Panda's Thumb*, *supra* note 3, at 8.

⁸ See *id.* at 8, 11.

⁹ See JOHNSON, *supra* note 5, at 16, 18.

¹⁰ See Johnson, *The Panda's Thumb*, *supra* note 3, at 8.

¹¹ See generally JOHNSON, *supra* note 5, at 3 ("If the Articles of Confederation had not required unanimity or the Framers had not been so angry, the Framers might well have tried to find a solution to the fiscal crisis within the confederate mode in a way that preserved state sovereignty.").

¹² See Convention Debates and Proceedings (July 17, 1788), in 23 DHRC, *supra* note 2, at 2197. The author thanks Richard Leffler of the *Documentary History of the Ratification of the Constitution* project for suggesting the salience of the Hamilton quote.

It is a subsidiary thesis here that rights talk was not key to the proposal or ratification of the Constitution. The New York Anti-Federalists offered a long series of amendments to the proposed Constitution to weaken the national government in favor of the states. The ideas in a quarter of their amendments were later reflected in the Bill of Rights. Both the Federalists proponents and Anti-Federalist opponents were part of the Revolutionary War generation that believed that independence was necessary for the protection of the rights of free men.¹³ The Federalists, however, considered the Anti-Federalist amendments in New York to be mere excuses offered in an endeavor to preserve state power.¹⁴ None of the Anti-Federalist amendments were incorporated into New York's ratification.¹⁵ Even within Anti-Federalism, the proposed amendments were candidly not considered worth secession from the Union.¹⁶

Our understanding of the ratification debate in New York has been greatly enhanced by the recent completion of publication of the five volumes on the New York debate in the massive *Documentary History of the Ratification of the Constitution*.¹⁷ The *Documentary History* has attempted to collect every scrap of surviving documents on ratification, and it greatly expands the archives, especially on the latter part of the New York ratification convention, where the official report is sparse.¹⁸ This article on New York ratification originated as a presentation on a panel held in celebration of the publication of the New York volumes of the *Documentary History*.¹⁹

This reading of the record in New York differs from prior ones in emphasizing the importance of the impost.²⁰ One hundred years

¹³ See, e.g., JOHNSON, *supra* note 5, at 161.

¹⁴ See *id.* at 140.

¹⁵ See *id.* at 171.

¹⁶ See The New York Convention 17 June–26 July 1788, in 22 DHRC, *supra* note 2, at 1673 (2008).

¹⁷ See, e.g., 19 DHRC, *supra* note 2, *passim* (2003); 21 DHRC, *supra* note 2, *passim* (2005); 20 DHRC, *supra* note 2, *passim*; 22 DHRC, *supra* note 2, *passim*; 23 DHRC, *supra* note 2, *passim*.

¹⁸ See Pauline Maier, *Reviews of Books*, 68 WM. & MARY Q. 155, 155, 157 (2011) (reviewing 19–23 DHRC, *supra* note 2 (2003–2009)) (applauding the documentary history, especially for filling in the two-thirds (four weeks) where the official reporter, Childs, is of little help).

¹⁹ Pauline Maier, a fellow panelist, published her simultaneous reading of the then newly published *New York Documentary History* volumes. See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 320 (2010).

²⁰ Several prior book-length discussions of New York's ratification exist. See, e.g., LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION (1966); CLARENCE E. MINER, THE RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1921); THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION (Stephen L. Schechter ed., 1987) [hereinafter RELUCTANT PILLAR].

after Charles Beard's *Economic History*,²¹ this reading emphasizes the predominant economic motivation in New York, albeit without making the Anti-Federalist opponents of the Constitution the heroes of the story, as Beard did.²² This piece turns Beard upside-down: the Federalist victors in New York are the heroes of the story and the fight over the impost is the primary economic driver behind the debates.

The New York Convention eventually ratified the Constitution, although over seventy percent of its delegates had been elected as Anti-Federalist opponents.²³ Eventually, a group of delegates led by Melancton Smith of Poughkeepsie moved over to ratify the Constitution, although they had been elected as opponents.²⁴ There was, however, a group of intransigent Albany Anti-Federalists who refused to ratify the Constitution. The Albany, intransigent wing, upped the ante and added a long list of mandatory amendments, just as their objective position deteriorated: the Constitution had been established by its own terms without New York. If New York City split off to rejoin the Union, as was plausible, Albany would have been a small and land-locked country that would have had to pay a New York City impost to import and export goods. Opposition to the Constitution, in any event, expired as a politically viable movement with establishment of the new national government, in spite of the partisan rancor of the New York debates.

I. THE VETOES OF THE IMPOST

The U.S. Constitution of 1787 was proposed and adopted first to give the federal government revenue to continue payments on the debts of the Revolutionary War by enough to restore the national government's ability to borrow again in the next inevitable war.²⁵ Under the Articles of Confederation, which preceded the Constitution, Congress was to collect the funds to pay for the common defense primarily by requisitions upon the states.²⁶ After

²¹ See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION v (1935).

²² See *id.* at 174, 175.

²³ See The New York Convention 17 June–26 July 1788, *supra* note 16, at 1669.

²⁴ See JOHNSON, *supra* note 5, at 171.

²⁵ See *id.* at 1, 2 (arguing that the primary purpose of the Constitution was to create a national government able to pay the debts of the Revolutionary War).

²⁶ See ARTICLES OF CONFEDERATION of 1781, art. VIII, para. 1. Congress also had power to sell Western land, ceded to it by the states, subject, however, to pre-existing Indian claims if respected. See generally Jerry A. O'Callaghan, *The Western Lands, 1776-1784: Catalyst for Nationhood*, 31 J. FOREST HIST. 137 (1987) (discussing Congress' sale of land acquired from states).

the end of the war, the states stopped paying their quotas of a requisition.²⁷ The requisition of 1786, the last before the Constitution, collected no money from any state.²⁸ The federal government, in the words of Alexander Hamilton, was "imbecilic" and "impotent" because it did not have its own power to tax and therefore could not pay its debts.²⁹

The primary need was to make payments on the Dutch debt.³⁰ Both the debts to domestic suppliers of war products and to veterans would have to be put off, given Congress's sparse funds.³¹ The French financing and troops had made victory possible in the Revolutionary War, but the French were bankrupt and could not lend again.³² But Congress could not default on payments to the Dutch.³³ In the coming inevitable wars, the nation would need to borrow from the Dutch again.³⁴ The Constitution was driven, not by creditors trying to get collections, but by debtors in distress, trying to restore public credit by enough to be able to borrow again.³⁵

The Founders had reason for fear. Their nation, spread out largely along the Eastern coastline, was vulnerable to three predator empires: Britain, Spain, and France.³⁶ Congress had the obligation to provide for the common defense, but it could not pay for a cannon, a soldier, or a sloop.³⁷ "Without a ship, without a soldier, without a shilling in the federal treasury, and without a . . . government to obtain one," as Edward Rutledge put it, "[W]e hold the property that we [do] at the courtesy of other powers."³⁸

A five percent tax on imports, called the "impost," collected by the federal government, had been proposed in 1781 and again in 1783.³⁹ The impost proposals, together with sale of Western land, would

²⁷ See JOHNSON, *supra* note 5, at 1.

²⁸ See Report of the Board of Treasury (Sept. 28, 1787), in 33 J. CONTINENTAL CONG.: 1774-1789, at 572 (1936).

²⁹ See Alexander Hamilton, *The Defence of the Funding System* (July 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON 1, 22, 27-28 (Harold C. Syrett ed., 1973).

³⁰ See JOHNSON, *supra* note 5, at 237.

³¹ See *id.* at 23.

³² See *id.* at 237.

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.* at 2.

³⁷ See *id.*

³⁸ See Edward Rutledge, South Carolina (Jan. 16, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 275 (Jonathan Elliot ed., 2d ed. 1939) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS].

³⁹ See JOHNSON, *supra* note 5, at 1.

have allowed the confederation form to survive, with Congress making at least the required payments on the Dutch debt.⁴⁰ The impost proposals were considered, however, to require amendment to the Articles, which, under the Articles themselves, required unanimous consent of the states.⁴¹

Both the 1781 impost and the 1783 impost proposals were vetoed by at least one state.⁴² Rhode Island vetoed the 1781 impost on the grounds that any federal tax would violate its independence and sovereignty.⁴³ Virginia then withdrew its prior ratification, saying that giving Congress power over taxation was injurious also to Virginia's sovereignty.⁴⁴ "[H]ow all these sovereign people will agree in the establishment of national security," Oliver Wolcott reacted, "is difficult to say."⁴⁵

When Rhode Island vetoed the impost, the rest of the states were unforgiving. Rhode Island was thereafter "an evil genius" that had "injured the United States more than the worth of that whole state."⁴⁶ Rhode Island was a "cursed state,"⁴⁷ and a "perverse sister."⁴⁸ To Melancton Smith, a talented moderate New York Anti-Federalist, Rhode Island was an illustration of "political depravity," "genuine infamy," and "a wicked administration."⁴⁹ Rhode Island, according to the scholarly Noah Webster, was that "little detestable corner of the continent."⁵⁰

In 1783, Congress re-proposed the impost with some accommodating features. For example, the federal impost would expire after twenty-five years, so it would not be a permanent transfer of tax power to the Congress.⁵¹ Also, states were allowed to appoint the tax collectors, so the patronage would be on the state

⁴⁰ See *id.* at 224.

⁴¹ See ARTICLES OF CONFEDERATION OF 1781, art. XIII.

⁴² See JOHNSON, *supra* note 5, at 78.

⁴³ See *id.* at 27.

⁴⁴ See Virginia Act of October 1782, ch. XLII, *reprinted in* 11 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 171 (William Waller Henning ed., 1823).

⁴⁵ See Letter from Oliver Wolcott to Oliver Wolcott, Jr. (Feb. 19, 1783), *in* 19 LETTERS OF DELEGATES TO CONGRESS 1774-1789, at 715 (Paul H. Smith et al. eds., 2000).

⁴⁶ See JOHNSON, *supra* note 5, at 3.

⁴⁷ See Letter from John Montgomery to Edward Hand (July 26, 1784), *in* 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 575 (Edmund C. Burnett ed., 1963).

⁴⁸ See Letter from James Madison to Edmund Randolph (Nov. 19, 1783), *in* 5 THE PAPERS OF JAMES MADISON 289 (William T. Hutchinson & William M. E. Rachal eds., 1967).

⁴⁹ See 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 335.

⁵⁰ See Noah Webster, *America*, N.Y. DAILY ADVERTISER, Dec. 31, 1787, *in* 15 DHRC, *supra* note 2, at 201 (1984).

⁵¹ See Journals of Congress (Apr. 18, 1783), *in* 24 JOURNALS OF THE CONTINENTAL CONGRESS, at 258 (1922).

level.⁵²

For 1783, it was New York that did not consent.⁵³ New York had ratified the 1781 impost when New York City was still occupied by British troops, but by the time of its consideration of the 1783 impost proposal, New York had created a state impost of its own on the imports coming in through the New York harbor.⁵⁴ The state impost on the New York harbor supplied between a third to over half of New York's revenue, and it kept land taxes down and salaries for the state officers up.⁵⁵

New York put conditions on its acceptance of the 1783 impost, requiring that the impost be collected through normal New York tax administration, including juries and appeals, and allowing New York to pay over to Congress with its newly printed New York paper money.⁵⁶ Congress was unwilling to accommodate any further.⁵⁷ If Congress took New York paper money, it would have to take other states' paper, some in much worse shape than New York money.⁵⁸ State paper money could not be used to pay the highest-priority need: the Dutch debt.⁵⁹ New York, it was said, had gone "out of their way to give Congress a slap in the face."⁶⁰ A committee of Congress concluded that New York's conditions so essentially varied from the congressional system that they were not in compliance.⁶¹ In context, Hamilton said: "[The] propositions for altering the plan amounted to a positive rejection."⁶² New York refused to alter its position and the 1783 impost proposal was therefore dead.⁶³

The allies of George Clinton, governor of New York, were proud of

⁵² See *id.*

⁵³ See JOHNSON, *supra* note 5, at 78.

⁵⁴ See 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS: 1788-1790, at 194 (Gordon DenBoer ed., 1986) [hereinafter FIRST FEDERAL ELECTIONS].

⁵⁵ JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 90 (1993). Several prior discussions of the impost in New York exist. See, e.g., KAMINSKI, *supra*, at 90; JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION: 1781-1788, at 76, 97-99 (1961); DE PAUW, *supra* note 20, at 31-32; JOHNSON, *supra* note 5, at 140.

⁵⁶ See FIRST FEDERAL ELECTIONS, *supra* note 54, at 194-95; MAIN, *supra* note 55, at 74; JOHNSON, *supra* note 5, at 28 n.106.

⁵⁷ See MAIN, *supra* note 55, at 74; JOHNSON, *supra* note 5, at 235 ("[P]aper money anywhere was stigmatized by the collapse of the continental dollar.").

⁵⁸ See MAIN, *supra* note 55, at 73.

⁵⁹ See *Historical Affairs: America*, SCOTS MAG., Jan. 1783, at 267; JOHNSON, *supra* note 5, at 237.

⁶⁰ See KAMINSKI, *supra* note 55, at 94.

⁶¹ See 30 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 51, at 341 (1934).

⁶² See Alexander Hamilton, Speech at the N.Y. Ratifying Convention (June 28, 1788), in 5 THE PAPERS OF ALEXANDER HAMILTON, JUNE 1788-NOVEMBER 1789, at 114 (Harold C. Syrett ed., 1962).

⁶³ See FIRST FEDERAL ELECTIONS, *supra* note 54, at 194-95.

their victory over the federal impost. The revenue from the port of New York was a privilege, they said, that "Providence hath endowed us with. . . . Let our imposts and advantages be taken from us, [and we] shall be obliged to lay as heavy taxes as Connecticut [and] Boston."⁶⁴ Any national impost, Abraham Yates argued, was inconsistent with the state's sovereignty.⁶⁵ Congress, he said, was attempting to increase its power, just as the British ministry had tried to increase the prerogatives of the Crown.⁶⁶ Granting the Congress the impost would "sign the death warrant of American liberty."⁶⁷

Outside New York, the accepted diagnosis was that New York had refused the national impost for selfish advantage inconsistent with the united stand by which we had won the Revolutionary War. "[H]alf of New Jersey, a great part of Connecticut, the western part of Massachusetts, [and] Vermont, received their imported goods thro[ugh] New York, who put into her *own* treasury all the duties arising on the goods consumed in [these other] states."⁶⁸ Even within New York, it was argued that New Jersey and Connecticut made contributions to New York that should be credited to their accounts.⁶⁹ The dominant party in New York, Madison would write much later, had refused "even a duty of [five percent] on imports for the urgent debt of the Revolution, so as to tax the consumption of her neighbors."⁷⁰ The *Connecticut Courant* was irate, saying that those "gentlemen in New York who receive large salaries . . . know that their offices will be more insecure . . . when the expen[s]es of government shall be paid by their constituents, than while paid by us."⁷¹

New York was betraying the great cause, denying the Congress "the means of discharging those pecuniary engagements which purchased her Independence."⁷² New York was attempting "to demolish that fabric, on which our liberties depend, and which has

⁶⁴ See Letter from John Williams to His Constituents (Jan. 29, 1788), in JON L. WAKELYN, 2 BIRTH OF THE BILL OF RIGHTS: ENCYCLOPEDIA OF ANTIFEDERALISTS: MAJOR WRITINGS 328 (2004).

⁶⁵ See Abraham Yates, *Rough Hewer No. III*, N.Y. GAZETTEER (Alb.), Oct. 20, 1783.

⁶⁶ See Abraham Yates, Letter, N.Y. GAZETTEER (Alb.), Aug. 4, 1783.

⁶⁷ See Sidney, Letter, N.Y. PACKET, Mar. 13, 1785.

⁶⁸ See Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), in 15 DHRC, *supra* note 2, at 177 (1984); JOHNSON, *supra* note 5, at 140 n.59.

⁶⁹ See Gustavus, Letter, N.Y. J., Mar. 2, 1786.

⁷⁰ See JOHNSON, *supra* note 5, at 140.

⁷¹ Editorial, CONN. COURANT (Dec. 24, 1787); Letter from Timothy Pickering to John Pickering, in 15 DHRC, *supra* note 2, at 82 (1984).

⁷² See AM. HERALD (Bos.), Apr. 24, 1786.

cost so much blood and treasure in the rearing.”⁷³ “[D]efeating the British army was not more necessary to the establishment of this empire, than [paying the war] debt[s] is to its preservation.”⁷⁴ New York “h[ad] damned the congressional impost, for which they deserve the execration[s] of all honest men.”⁷⁵ Every good man, it was said at the time, “is wishing New York in Hell,” which is a sentiment sometimes repeated even now in the author’s home state of Texas.⁷⁶

New York thereafter replaced Rhode Island as the “evil genius” of America. Rhode Island, by vetoing the 1781 impost, had “injured the United States more than [the] worth of that whole state [a]nd New York, if she continues obstinate, will . . . run out her worth also.”⁷⁷

A federal impost was considered the easiest solution to the Congress’s fiscal crisis. The impost could be collected from merchants before the ships were unloaded and by relying on a handful of customs officers in the few deep-water ports.⁷⁸ The tax could be passed on immediately, just by tacking the tax onto the price of the goods, charged to buyers who had cash to buy foreign imports.⁷⁹ Internal taxes—that is, land taxes and excises—required an army of tax collectors to assess the value of land and collect the various taxes.⁸⁰ Land taxes arose, moreover, not from cash transactions, but at year-end or on some other date when the taxpayer might not have any money.⁸¹ When the continental dollar failed, when the states withdrew their paper moneys at the end of the war, and given that imports drew out the available specie, the country was desperately short of currency, so that an annual land

⁷³ *See id.*

⁷⁴ *See* Gustavus, Letter, N.Y. J., Feb. 23, 1786.

⁷⁵ *See Extract of a Letter from New York*, POL. INTELLIGENCER (New Brunswick, N.J.), Apr. 20, 1785.

⁷⁶ Robert A. Feer, *Shays’s Rebellion and the Constitution: A Study in Causation*, 42 NEW ENG. Q. 388, 390 (1969); *see* Sarah McCammon, *Will Cruz’s Distaste for “New York Values” Hurt Him with New York Voters?*, NPR (Apr. 7, 2016), <http://www.npr.org/2016/04/07/473328280/will-cruzs-distate-for-new-york-values-hurt-him-with-new-york-voters>.

⁷⁷ *See* N.Y. DAILY ADVERTISER, May 11, 1786.

⁷⁸ *See* Letters from the Federal Farmer to the Republican (Oct. 10, 1787), <http://www.constitution.org/afp/fedfar03.txt> [hereinafter Letters from the Federal Farmer]; Johnson, *The Panda’s Thumb*, *supra* note 3, at 15–16.

⁷⁹ *See* Letters from the Federal Farmer, *supra* note 78.

⁸⁰ *See id.*

⁸¹ *See* JOHNSON, *supra* note 5, at 228; *cf.* Max M. Edling, *Taxation, Public Finance, and Public Debt*, in 3 ENCYCLOPEDIA OF THE NEW AMERICAN NATION: THE EMERGENCE OF THE UNITED STATES: 1754-1829, at 258–59 (Paul Finkelman ed., 2006) [hereinafter ENCYCLOPEDIA OF THE NEW AMERICAN NATION] (noting the unpopularity of taxes).

tax and excises could be real hardship in terms of liquidity.⁸²

The impost was also considered to be a proper suppression of imports.⁸³ The 1780s was mercantilist in economic philosophy.⁸⁴ For both sides of the constitutional debate, imports needed to be suppressed so as to "preserve precious specie" for use in domestic trades.⁸⁵ As George Washington put it, imports were "luxury, effeminacy, [and] corruption."⁸⁶ "Both proponents and opponents of the Constitution condemned the 'wonton consumption' entailed by imported luxuries."⁸⁷ Both sides blamed economic hardship on the merchant who profited by encouraging too many imports.⁸⁸

The impost also had to be a national tax to maintain high revenue and suppression of imports.⁸⁹ With separate state taxes, the states with deep-water ports undercut each other to draw shipping into their harbors.⁹⁰ "For if one state makes a law to prohibit foreign goods of any kind, or to draw a revenue, from an imposition upon such goods, another state is sure to take the advantage, and to admit such goods free of costs."⁹¹ "[The imposts that] one state imposes, the neighbouring states enable the merchants to elude[.]"⁹²

⁸² See JOHNSON, *supra* note 5, at 208, 235.

⁸³ See *id.* at 192, 226.

⁸⁴ See *id.* at 192; Sean Patrick Adams, *Government and the Economy*, in 2 ENCYCLOPEDIA OF THE NEW AMERICAN NATION, *supra* note 81, at 134.

⁸⁵ See Johnson, *The Panda's Thumb*, *supra* note 3, at 6, 26; JOHNSON, *supra* note 5, at 192.

⁸⁶ Letter from George Washington to James Warren (Oct. 7, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 298, 299 (W.W. Abbot & Dorothy Twohig eds., 1994) [hereinafter WRITINGS OF WASHINGTON].

⁸⁷ JOHNSON, *supra* note 5, at 226.

⁸⁸ See James Wilson, Debates in the Convention of the State of Penn. on the Adoption of the Federal Constitution (Nov. 26, 1787), in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 431 (1939) ("[W]e could not prohibit the extravagance of our importations."); see also James Madison, Journal (Sept. 13, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 606 (Max Ferrand ed., 1911) ("[D]escanting on the [necessity of restricting the] excessive consumption of foreign superfluities . . . he moved that a committee be appointed to report articles of association for encouraging . . . [economy] frugality and [A]merican manufactures."); Letter from Comte de Moustier to Comte de Montmorin (June 25, 1787), in 18 DHRC, *supra* note 2, at 190 (1995) ("[The Antifederalists] are claiming that it is advisable for them to . . . not involve themselves . . . in the affairs of Europe, . . . which only furnish them with luxuries . . . that they must do without to live in the simplicity that befits a newborn state."); John Williams, The Debates in the Convention of the State of New York (June 17, 1788), in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 240 ("Let us . . . abandon all those foreign commodities which have hitherto deluged our country!"); Letter from John Howard to George Thatcher (Feb. 27, 1788), in 16 DHRC, *supra* note 2, at 230 (1986) (discussing that wise commercial regulations would reduce imports of foreign luxuries to one-tenth of what they are now).

⁸⁹ See JOHNSON, *supra* note 5, at 225–26.

⁹⁰ See *One of the Middle Interests*, MASS. CENTINEL, Dec. 5, 1787, in 4 DHRC, *supra* note 2, at 386, 387 (1997).

⁹¹ *Id.* at 387.

⁹² Z, PHILA. FREEMAN'S J. (May 16, 1787), in 13 DHRC, *supra* note 2, at 99 (1981).

State imposts were susceptible to smuggling or diverting the course of ships to other harbors.⁹³ "On the federal level, by contrast, [as Hamilton put it,] the impost could be collected easily by guarding but one side—the Atlantic."⁹⁴

Paying the Dutch debt, by any means, also had to be a national undertaking.⁹⁵ Individual states could not be expected to pay for their share of debt voluntarily.⁹⁶ Each state had an incentive to ride on the expenses borne by other states.⁹⁷ When the next war came, any state of the United States would be welcomed as a part of a united defense, even if they had previously paid nothing for the Revolutionary War debts held by the Dutch.⁹⁸ No state could maintain the payments on the Dutch debt alone, moreover, and a state's paying its fair share of the war debts would not alone prevent default.⁹⁹ "[I]t will be the interest of every state," as Hamilton said, "that the general government should be supplied with the revenues necessary for the national purposes; but it will be the particular interest of each state to pay as little itself and to let its neighbours pay as much as possible."¹⁰⁰ The states, in jealousy that they might pay more than their share of the burden, competed for the privilege of paying the least.¹⁰¹ A state might well have a political motive to buy debt owed to the veterans and suppliers within their own state, to cement the loyalty of those creditors to the governing party,¹⁰² but none of the political payoffs for absorbing the war debts applied to the critical Dutch creditors, who could not vote in any state elections.¹⁰³ The "common defense" was

⁹³ JOHNSON, *supra* note 5, at 226.

⁹⁴ *Id.*; THE FEDERALIST No. 12 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* Philip A. Crowl, *Charles Carroll's Plan of Government*, 46 AM. HIST. REV. 588, 588, 591 (1941) (outlining Carroll's July 23, 1787, plan to revise the Articles of Confederation, which asserted that Congress needed exclusive power over regulation of trade by duties on trade because uniformity in duties on imports from foreign countries was necessary for the effectual, non-oppressive collection of the duties).

⁹⁵ *See* JOHNSON, *supra* note 5, at 29–30.

⁹⁶ *See id.* at 30.

⁹⁷ *See id.*

⁹⁸ *See id.* at 29, 30.

⁹⁹ *See id.*

¹⁰⁰ Alexander Hamilton, N.Y. Assemb., Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON 71, 83 (Harold C. Syrett ed., 1962).

¹⁰¹ *See id.*

¹⁰² *See, e.g.*, Letter from Antoine de La Forest to Comte de Montmorin (Dec. 15, 1787), *in* 19 DHRC, *supra* note 2, at 424 (analyzing New York Anti-Federalism as arising from keeping the New York impost to allow for the purchase of federal debt).

¹⁰³ *See* JOHNSON, *supra* note 5, at 230.

a federal-level responsibility.¹⁰⁴ Anti-Federalists were commonly in favor of paying the war debt, except by bearing any tax necessary to pay it.¹⁰⁵

The New York veto of the national impost was the nearest cause of the abandonment of the confederation mode at the national level and the adoption of the Constitution in its stead: hence, "Impost begat Convention."¹⁰⁶ It was widely thought at the time that the five percent impost, together with the sale of Western land, would be sufficient to pay for the federal needs at least in peacetime.¹⁰⁷ That assumption might be true, although it would have required some "restatement" reducing the payments on the domestic debt, at least until imports grew substantially to be able to carry the burden.¹⁰⁸ Without the impost, however, there was no chance of restoring the federal credit with the critical Dutch lenders.¹⁰⁹

Collecting requisitions, which was the alternative to the impost, was not feasible.¹¹⁰ The Articles of Confederation required that the states pay their allocated quota of a requisition, but after the end of the war, the states stopped paying.¹¹¹ Trying to collect a requisition from a recalcitrant state, Hamilton argued, was "one of the maddest projects that was ever devised."¹¹² Trying to collect requisitions from a state that was in default would create a civil war, "a nation at war with itself."¹¹³ He said the requisitions were the "principal part of our calamities, . . . defective and rotten, and ought forever to

¹⁰⁴ See *id.* at 238.

¹⁰⁵ See, e.g., *id.* at 157, 159–60 (collecting Anti-Federalist opposition to tax).

¹⁰⁶ Alexander Hamilton, Notes for a Speech to the New York Convention (July 17, 1788), in 23 DHRC, *supra* note 2, at 2197.

¹⁰⁷ See, e.g., James Wilson, Speech in the State House Yard During the Penn. Convention (Oct. 6, 1787), in 2 DHRC, *supra* note 2, at 171 (1976) (arguing that the impost would probably be sufficient in ordinary times, although Congress needed internal tax in times of war); Letter from Edward Carrington to Thomas Jefferson (Apr. 24, 1788), in 9 DHRC, *supra* note 2, at 755 (1990) (stating that imposts plus the sale of Western lands would cover federal needs in peacetime, but not in time of war).

¹⁰⁸ In 1786, Congress in setting its (ignored) requisition, calculated necessary payments of \$1.7 million to Dutch and French creditors and \$1.6 million as interest only on the domestic debt. 31 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 51, at 462 (1934). As Secretary of Treasury in 1790, Hamilton projected revenue of \$2.8 million, mostly from the newly allowed impost. See JOHNSON, *supra* note 5, at 225. Hamilton was able to carry the debt until imports grew decisively in the mid-1790s only by restating domestic debt to reduce the interest and payments on the debt. See *id.* at 223–30, 233–35 (discussing the success of Hamilton's plans).

¹⁰⁹ See JOHNSON, *supra* note 5, at 225–26, 237–38.

¹¹⁰ See *id.* at 159.

¹¹¹ See *id.* at 15.

¹¹² Alexander Hamilton, Remarks During Convention Debates at the N.Y. Convention (June 20, 1788), in 22 DHRC, *supra* note 2, at 1724.

¹¹³ *Id.*

be banished from our government."¹¹⁴ Requisitions, once the war ended, as Washington wrote, were a "perfect nihility."¹¹⁵

The Constitution, as written in a convention in Philadelphia in 1787, was a revolutionary document, a weapon directed against the states.¹¹⁶ The Articles of Confederation, by its terms, had created only a "firm league of friendship" between the states.¹¹⁷ The confederation-level government, under the Articles, was only a assembly of diplomats from sovereign states.¹¹⁸ The Congress was composed of "delegates" subject to instantaneous recall by their sovereigns.¹¹⁹ The Constitution, by contrast, created a strong three-part national government, resting not on the power given by the states, but directly on the sovereignty of the People.¹²⁰ The signatories to the Articles of Confederation were ratified as delegates fully authorized by their respective state legislatures.¹²¹ The parallel in the Constitution is: "We the People . . . do ordain and establish this Constitution."¹²²

The Constitution gave Congress the ability to collect taxes directly for the common defense and general welfare, as Congress saw fit.¹²³ The Congress, under the Constitution, had no need ever to return to the states to ask for money. The new national government was also given power to nationalize state militias.¹²⁴ Congress was also able to enact laws supreme over state law and state Constitutions.¹²⁵ The Constitution ended the supremacy of the states and replaced it with a strong national government supreme over the states and resting directly on the sovereignty of the people.

II. RATIFICATION IN NEW YORK

The impost battle set the framework for New York's ratification of the Constitution. The Hamiltonian allies in favor of the 1783 national impost led the charge in 1788 in favor of the Constitution's

¹¹⁴ *Id.* at 1981.

¹¹⁵ See Letter from George Washington to John Jay, Secretary for Foreign Affairs (Aug. 15, 1786), in 4 WRITINGS OF WASHINGTON, *supra* note 86, at 212–13.

¹¹⁶ See JOHNSON, *supra* note 5, at 1.

¹¹⁷ ARTICLES OF CONFEDERATION of 1781, art. III.

¹¹⁸ *Id.* art. V, para. 1.

¹¹⁹ See *id.* art. V, para. 1.

¹²⁰ See U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art. III, § 1.

¹²¹ See ARTICLES OF CONFEDERATION of 1781, pmbl.

¹²² See U.S. CONST. pmbl.

¹²³ See U.S. CONST. art. I, § 8, cl. 1.

¹²⁴ See U.S. CONST. art. I, § 8, cl. 15; U.S. CONST. art. II, § 2, cl. 1.

¹²⁵ See U.S. CONST. art. VI, cl. 2.

creation of a self-sufficient national government. The allies of Governor Clinton, who defeated the 1783 impost, became Anti-Federalists against the Constitution, at least before enough of them moved over to allow ratification so that New York would stay in the Union.¹²⁶

The two parties distrusted and disliked each other, with a mixture of policy and personal rancor.¹²⁷ Anti-Federalist Nathan Dane of Massachusetts thought that the sides were more fixed in New York than in any other state in the Union.¹²⁸ The great issue of the Constitution was whether a self-sufficient national government would be established to take power away from the states.¹²⁹ In partisan New York, that great question was translated into the critical question of politics: "Do your people or my people get control?"¹³⁰ Clintonians trusted New York State government because George Clinton ran it.¹³¹ Alexander Hamilton was not "my people" to the New York opponents of the Constitution, which was alone sufficient for opposition.¹³²

Notwithstanding the partisan rancor, the two sides shared important values. For both sides, there was no monarchy or hereditary aristocracy in the country and no need here for either of them.¹³³ Both sides shared the premise that the legitimacy of government arose from the People,¹³⁴ and simultaneously both sides were distrustful of the People at a time when "democracy" was still a stigmatizing epithet.¹³⁵ Anti-Federalists as well as Federalists blamed the inevitable foolishness of the People when a political

¹²⁶ See Dan T. Coenen, *A Rhetoric for Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L. J. 469, 476–77 (2006).

¹²⁷ See JOHNSON, *supra* note 5, at 138–40.

¹²⁸ Letter from Nathan Dane to Samuel Holten (June 14, 1788), in 20 DHRC, *supra* note 2, at 1168. Pennsylvania and Virginia were also divided by pre-existing parties, and plausibly, the debates there were at least as rancorous as in New York. See JOHNSON, *supra* note 5, at 141–43.

¹²⁹ See JOHNSON, *supra* note 5, at 138.

¹³⁰ See *id.* at 141.

¹³¹ See *id.* at 139.

¹³² See *id.* at 139–40.

¹³³ See *id.* at 177–78; Robert R. Livingston, Remarks During N.Y. Convention Debates (June 19, 1788), in 22 DHRC, *supra* note 2, at 1682–83.

¹³⁴ THE FEDERALIST NO. 22 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); Livingston, *supra* note 133, at 1682–83 ("[A]ll power is derived from the people."); John Lansing, Jr., Remarks During N.Y. Convention Debates (July 10, 1788), in 22 DHRC, *supra* note 2, at 2119 ("[A]ll power is . . . derived from the people.").

¹³⁵ See JOHNSON, *supra* note 5, at 176, 177, 178–79.

decision went against them.¹³⁶

Both sides were also committed to fortification of the rights of the People. They were all of the Revolutionary generation that had fought a war dedicated to the protection of the basic rights of free men.¹³⁷ The sides disagreed, however, as to whether the state or new national government would be the better protector of individual rights.¹³⁸ Madison's theory in *Federalist No. 10* sought to prove "in contradiction to . . . theoretical writers" that the republic form of government "must operate not within a small but an extensive republic."¹³⁹ Tyranny could be avoided only if factions offset each other in a large diverse republic.¹⁴⁰ Governor Clinton's position, by contrast, was that the state was the "only stable security for the liberties of the people against the encroachments of power."¹⁴¹

The Philadelphia framers who wrote the Constitution did not expect unanimous ratification of the Constitution, at least, because of New York's attachment to its impost.¹⁴² The country should not await unanimity, given New York's attachment to "taxing her neighbours []by the regulation of her trade."¹⁴³ At minimum, New York's "selfish spirit" meant ratification would be a "severe struggle."¹⁴⁴ The Articles of Confederation could be amended, by its own terms, only by the consent of all the state legislatures.¹⁴⁵ Given the vetoes of even the least damaging revenue source, the impost,

¹³⁶ George Clinton, Remarks During N.Y. Convention Debates (June 28, 1788), in 22 DHRC, *supra* note 2, at 1980 ("The people . . . in the moment of frenzy, be guilty of the most imprudent and desperate measures. . . . I know the people are too apt to vibrate from one extreme to another."); Melancton Smith, Remarks During N.Y. Convention Debates (June 25, 1788), in 22 DHRC, *supra* note 2, at 1880 ("[T]he impulses of the multitude are inconsistent with systematic government. The people are frequently incompetent to deliberate discussion.").

¹³⁷ See JOHNSON, *supra* note 5, at 181.

¹³⁸ See *id.* at 164–65.

¹³⁹ Letter from James Madison to Thomas Jefferson (Oct. 14, 1787), in 10 THE PAPERS OF JAMES MADISON 205, 212 (Robert A. Rutland et al. eds, 1977).

¹⁴⁰ THE FEDERALIST NO. 10 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁴¹ George Clinton, Remarks on the Mode of Ratifying the Constitution (July 17, 1788), in 23 DHRC, *supra* note 2, at 2221.

¹⁴² See, e.g., Letter from the President of the Federal Convention to the President of Congress (Sept. 17, 1787), http://avalon.law.yale.edu/18th_century/translet.asp ("That [the Constitution] will meet the full and entire approbation of every state is not perhaps to be expected.").

¹⁴³ See Nathaniel Gorham, Speech to the Federal Convention (July 23, 1787), in 2 RECORDS OF THE FEDERAL CONSTITUTION OF 1787, *supra* note 1, at 90; Johnson, *The Panda's Thumb*, *supra* note 3, at 9, 12, 17 (collecting cites to "regulation of commerce" as synonym for taxing imports).

¹⁴⁴ Letter from Timothy Pickering to John Pickering (Dec. 29, 1787), in 19 DHRC, *supra* note 2, at 482.

¹⁴⁵ ARTICLES OF CONFEDERATION of 1781, art. XIII.

unanimity for the new Constitution could not be expected. The Constitution, by its own terms, was established by the ratification of nine states, that is, a “respectable majority.”¹⁴⁶ The respectable majority could be achieved without the help of Rhode Island, Virginia, and New York, which had vetoed the impost at one point or another.¹⁴⁷ New York would not be subject to the new national government, however, until New York itself had ratified.¹⁴⁸

The elections for delegates to the New York ratification convention went strongly against the Constitution. Anti-Federalists won forty-six of sixty delegates (seventy-one percent).¹⁴⁹ The split was geographical: New York City and Westchester County just to its north elected the nineteen Federalist delegates (twenty-nine percent).¹⁵⁰ The delegates who were elected as Anti-Federalists but switched over to allow ratification were from Queens and Dutchess counties, just beyond Federalist New York City.¹⁵¹ Albany, the most populous county at the time, was entirely Anti-Federalist.¹⁵² The counties did not split their delegations.¹⁵³ The Anti-Federalists offered amendments to the proposed Constitution, but ultimately enough Anti-Federalists voted to ratify the proposed Constitution without amendment (or abstained or were absent)¹⁵⁴ that notwithstanding the elections, New York ratified by a final vote of thirty to twenty-seven.¹⁵⁵

¹⁴⁶ U.S. CONST. art. VII (stating that nine states must establish the Constitution among the states that ratify); THE FEDERALIST No. 22, *supra* note 134.

¹⁴⁷ See THE FEDERALIST No. 22, *supra* note 134.

¹⁴⁸ See 22 DHRC, *supra* note 2, at 1672.

¹⁴⁹ Cecil L. Eubanks, *New York Federalism and the Political Economy of Union*, in RATIFYING THE CONSTITUTION 300, 317 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

¹⁵⁰ MAIER, *supra* note 19, at 341.

¹⁵¹ ORIN GRANT LIBBY, THE GEOGRAPHICAL DISTRIBUTION OF THE VOTE OF THE THIRTEEN STATES ON THE FEDERAL CONSTITUTION, 1787-1788, at 18 (1894).

¹⁵² *Delegates to the New York Convention*, in 22 DHRC, *supra* note 2, at 1676; Stephen Bielinski, *Albany County*, N.Y. STATE MUSEUM, <http://exhibitions.nysm.nysed.gov/albany/albanycounty.html> (last updated Mar. 11, 2017).

¹⁵³ See MAIER, *supra* note 19, at 341.

¹⁵⁴ See *Editorial Introduction*, 22 DHRC, *supra* note 2, at 1673–74. Eleven delegates elected as Anti-Federalists, voted for ratification and eight delegates were not present at the final vote. Of the six delegates elected as Anti-Federalists who were absent from the final vote, three were from Albany County, which was adamantly Anti-Federalist and one each were from Dutchess, Suffolk, and Orange counties just outside the inner parameter (Queens and Westchester) around New York City that voted Federalist. See *id.* at 1676–77.

¹⁵⁵ See *id.* at 1674.

A. *The Great Question: A National Government?*

The great issue of the Constitution, whether a vigorous three-part national government should replace the confederation of sovereign states, was settled before New York came to the vote. Ratification by New Hampshire, on June 21, 1788, provided the ninth state necessary to put the new Constitution into effect, and the most populous state, Virginia, ratified on June 25.¹⁵⁶ News of Virginia’s ratification reached the convention by July 2.¹⁵⁷ New York would not reach its decision until July 25.¹⁵⁸ If the New York State convention had met in fall or winter of 1787, rather than in June and July of 1788, then the establishment of the national government would have still been an open question. By July 1788, the new government was substantially established. New York Anti-Federalists tried to convince themselves that they could demand their amendments to the Constitution as a condition for their ratification,¹⁵⁹ but once the Constitution was established it would take ten states, nine besides New York, to ratify any change, and the Anti-Federalists did not have that level of votes.¹⁶⁰ The choice was this Constitution and hope for amendment, or secession.¹⁶¹ The delegates elected as opponents, but who nonetheless voted to ratify, should probably be understood as not willing to risk that New York would be left out of the Union.

What secession would be like was a black unknown. John Lansing tried to convince the convention that New York could form a confederate union with friendly New England states,¹⁶² but the New England states had already joined the United States under its

¹⁵⁶ See JOHNSON, *supra* note 5, at 129.

¹⁵⁷ *Editorial Introduction*, *supra* note 154, at 1672.

¹⁵⁸ See JOHNSON, *supra* note 5, at 129.

¹⁵⁹ See, e.g., Letter from Melancton Smith to Nathan Dane (June 28, 1788), in 22 DRHC, *supra* note 2, at 2015 (discussing the conditioning of New York’s ratification upon the acceptance of conditional amendments to the proposed Constitution); *News Paper Report of Amendments Proposed to the Constitution by Antifederalist Convention Delegates between 20 and 26 June 1788*, in 22 DRHC, *supra* note 2, at 2028 (explaining that New York had proposed five amendments to the Constitution prior to its ratification).

¹⁶⁰ See THE FEDERALIST No. 85 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *News Paper Report of Amendments Proposed to the Constitution by Antifederalist Convention Delegates between 20 and 26 June 1788*, *supra* note 159, at 2029 (opining that the New York antifederalists believed that they could dictate conditional amendments to the Constitution despite their clear mathematical disadvantage in delegates); Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 727 (2011).

¹⁶¹ See PROVIDENCE GAZETTE (July 5, 1788), in 25 DHRC, *supra* note 2, at 347 (2009).

¹⁶² See John Lansing, Comments at the Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution (June 17, 1788).

new national government and the New York impost had not left New York many friends in Connecticut or western Massachusetts.¹⁶³ Vermont and New York had special enmity toward each other because Vermont had seceded from New York over the bitter opposition of Governor Clinton, and with bloodshed had defeated the New York militia's attempt to reintegrate Vermont back into New York State.¹⁶⁴ If New York State became an independent nation, Congress and its offices would move out of New York City. Federalist New York City would plausibly split off to adhere to the Union, leaving Anti-Federalist upstate New York as a land-locked nation, much like Vermont, which would pay tribute taxes to New York City to use the Hudson River and the city's deep-water docks. There probably would not be cannons along the Byram River, which separates New York from Connecticut, nor along the New Jersey palisades above New York. Still, the Anti-Federalists were probably always bluffing on secession.¹⁶⁵ "In all our late political discussions," as Anti-Federalist Nathan Dane wrote to Melancton Smith, "a separation of the states, or separate confederacies, have scarcely, to my knowledge ever been . . . mentioned."¹⁶⁶

B. The Impost in 1788

From 1783 through 1787, before the national Philadelphia Convention became committed to its product, the Anti-Federalists could plausibly have had a continuation of the confederation form of government, just by supporting the national impost. In retrospect, they probably would have wanted to take back the opposition because by July 1788, they seemed willing to give up the state impost to block ratification, but by then giving up on the impost issue was not enough.

The proposed Constitution gave the Congress the power to lay imposts with a uniform tax rate along the entire coast, and prohibited the states including New York from imposing their own

¹⁶³ See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 485 (1995); Calvin H. Johnson, *States Rights? What States' Rights?: Implying Limitations on the Federal Government from the Overall Design*, 57 BUFF. L. REV. 225, 265–66 (2009) [hereinafter Johnson, *States Rights?*].

¹⁶⁴ See KAMINSKI, *supra* note 55, at 65–77.

¹⁶⁵ *Accord*, Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, from the Antifederalists? The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*, 79 TEX. L. REV. 849, 892 (2001).

¹⁶⁶ Letter from Nathan Dane to Melancton Smith (July 3, 1788), in 21 DHRC, *supra* note 2, at 1254–55.

imposts.¹⁶⁷ As noted, nationalization of the impost was an important economic issue in New York, supplying between a third and over half of New York State revenue¹⁶⁸ and the impost was important nationally because a five percent impost was expected to be, and turned out to be, the primary source of funds to maintain payments on the war debts.¹⁶⁹

Outside of New York, New York's opposition to ratification of the Constitution as a whole was interpreted as just a continuation of the same selfish arguments behind the veto of the 1783 impost.¹⁷⁰ New York, it was said (again), had "the sole principle of retaining that power which they now have to oppress New Jersey and Connecticut in their commerce."¹⁷¹ The other states, John Jay told to New York, "now consider your opposition as dictated more by your fondness for your impost, than for those rights [of sovereignty]."¹⁷² The French reported home that the New York State officers had personal motives in that the application of money arising from the state impost allowed New York to buy up the speculative holdings of the public debt held by New York citizens.¹⁷³

The New York Anti-Federalists never formally gave up on New York State's claim to the revenue from the New York harbor impost, but there is evidence that they might have been willing to relinquish the claim at least in barter.¹⁷⁴ Lansing and Yates, Clinton's loyal lieutenants, stomped out of the Philadelphia Convention in opposition to the proposed consolidated government, but they were nonetheless willing to concede that "a mode might have been devised, of granting to the Confederacy, the [moneys] arising from a general system of revenue."¹⁷⁵ Since the impost was

¹⁶⁷ See U.S. CONST. art. I, § 8, cl. 1 (relating to congressional power); U.S. CONST. art. I, § 10, cl. 2 (relating to prohibition of state imposts).

¹⁶⁸ See KAMINSKI, *supra* note 55, at 90.

¹⁶⁹ See Letter from James Madison to Edmund Randolph, *supra* note 48, at 289.

¹⁷⁰ See Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 87–88 (2005).

¹⁷¹ Letter, CHARLESTON COLUMBIAN HERALD (June 19, 1788), in 21 DHRC, *supra* note 2, at 1204.

¹⁷² See John Jay, *A Citizen of New York: An Address to the People of the State of New York* (Apr. 15, 1788), in 20 DHRC, *supra* note 2, at 939.

¹⁷³ Letter from Antoine de La Forest, Vice Consul for the U.S., to Comte de Montmorin (Dec. 15, 1787), in 19 DHRC, *supra* note 2, at 424.

¹⁷⁴ See KAMINSKI, *supra* note 55, at 95 (noting that the federal impost had little chance); see also Johnson, *The Panda's Thumb*, *supra* note 3, at 17 (discussing the federal impost debate in New York and surrounding states).

¹⁷⁵ Letter from Robert Yates & John Lansing to George Clinton, Governor of N.Y. (Dec. 21, 1787), in 19 DHRC, *supra* note 2, at 458.

considered the easiest tax,¹⁷⁶ that concession might well have meant that they would have allowed a national impost, perhaps even an exclusive one. Anti-Federalist DeWitt Clinton, nephew of the Governor, said even before the start of the New York Convention that it was agreed that the “one source of revenue[that] the general government ought to have the sole controul of . . . [was] an impost upon all goods imported from foreign countries.”¹⁷⁷ Even before the convention, an Anti-Federalist called “A Plebeian,” supported the granting to the general government of the power to lay imposts both to regulate trade (that is, to suppress imports) and to raise revenue.¹⁷⁸ Governor Clinton, in the convention, mis-claimed that he had always been in favor of a national impost, albeit one collected by state officers.¹⁷⁹ The 1783 impost proposal differed from the 1781 proposal by giving patronage to the state to appoint the collection officers, so Clinton is inaccurate in his memory.¹⁸⁰ Still, he was acquiescing by June 1788 in the nationalization of the New York impost, at least in principle. Anti-Federalists’ acquiescence to the impost in New York, if complete, brought them into line with the usual Anti-Federalist stance in the other states.¹⁸¹

Anti-Federalists were also apparently willing to give up the impost as a bargaining chip. Governor Clinton was said to have offered New Jersey half the revenue from the New York harbor impost if New Jersey would just deny ratification, although it is not clear how much credence we should give to the report.¹⁸² By the middle of July 1788, Melancton Smith would argue that Congress would admit them, even with conditional amendments, because Congress “will wish to have our impost.”¹⁸³

The New York Anti-Federalists could have had a continuation of the confederation, at least until the Philadelphia Convention settled on a self-sufficient national government, just by supporting the

¹⁷⁶ Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 47 (1998) [hereinafter Johnson, *Apportionment of Direct Taxes*].

¹⁷⁷ See *Brutus VII*, N.Y. J. (Jan. 3, 1788), in 20 DHRC, *supra* note 2, at 570.

¹⁷⁸ *A Plebeian, An Address to the People of the State of New York* (Apr. 17, 1789), in 17 DHRC, *supra* note 2, at 146, 160 (1995).

¹⁷⁹ George Clinton, Remarks During N.Y. Convention Debates (June 28, 1788), in 22 DHRC, *supra* note 2, at 1977.

¹⁸⁰ See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L. J. 1106, 1119 (2013).

¹⁸¹ JOHNSON, *supra* note 5, at 153–55 (collecting the Anti-Federalist concession on the national impost, including from “Brutus” and “Federal Farmer,” who may be New Yorkers).

¹⁸² PENN. J. (Dec. 19, 1787), reprinted in 19 DHRC, *supra* note 2, at 444.

¹⁸³ Melancton Smith, Remarks During N.Y. Convention Debates (July 15, 1788), in 23 DHRC, *supra* note 2, at 2182–83.

national impost on top of whatever the state would impost.¹⁸⁴ By July 1788, however, giving up the New York impost was not sufficient to defeat the proposed Constitution.¹⁸⁵

C. The Anti-Federalist Amendments

Just as news arrived on July 2 that Virginia had ratified the Constitution, the Anti-Federalists began offering amendments to the Constitution as the Philadelphia convention had proposed it.¹⁸⁶ By my count, there were forty-one different Anti-Federalist amendments, but the amendments were not offered in one package, and a different way to consolidate or separate the ideas might come up with a different count.¹⁸⁷ Some of the ideas were important and unacceptable to the Federalists, for instance, the proposed prohibition on national taxes beyond the impost, the requirement that Congress have only the powers “expressly delegated” by the text, and the requirement that Congress have a two-thirds majority to borrow.¹⁸⁸ Just under a quarter of the ideas (nine) are recognizable in the Bill of Rights that was ultimately adopted.¹⁸⁹ Some of the proposals are quite petty. Congress was given the power to establish post roads in the proposed Constitution, for example, but an amendment would prohibit Congress from repairing or altering any road once established.¹⁹⁰ While there are a few of the amendments that would hobble the new national government, most of them seem to accept the core idea that a national government would be established, but tinker in ways that are not very important. The Anti-Federalists amendments do seem to have descended into the trivia. Nathan Dane, a moderate Massachusetts Anti-Federalist delegate to Congress, wrote Smith as the ratification vote drew near concluding, reasonably, that there was “too little in reality . . . to be gained by the amendments to justify parties . . . carrying matters to extremities—nor [should] any

¹⁸⁴ See Johnson, *States Rights?*, *supra* note 163, at 260, 263–64.

¹⁸⁵ See *id.* at 248; JOHNSON, *supra* note 5, at 129.

¹⁸⁶ See Letter from DeWitt Clinton to Charles Tillinghast (July 3, 1788) in 22 DHRC, *supra* note 2, at 2082.

¹⁸⁷ Cf. New York Convention Debates and Proceedings from July 2–July 10, 1788, in 22 DHRC, *supra* note 2, at 2030, 2069, 2077, 2088–2101, 2107–11, 2119–27 (listing various amendments, but the full list is not repeated here; although, the most important ones are discussed).

¹⁸⁸ See *id.* at 2121–23.

¹⁸⁹ See U.S. CONST. amends. I–X.

¹⁹⁰ See U.S. CONST. art. I, § 8, cl. 7; N.Y. DAILY ADVERTISER (July 8, 1788), in 22 DHRC, *supra* note 2, at 2079.

one, two, or three states ever expect the others to meet them in [the] amendments."¹⁹¹ The Federalists stopped discussing or responding to the amendments after the first week of July.¹⁹²

1. Direct Tax

The most important amendment, as the proponents saw it in all the state debates, was a proposed restriction on Congress's power to lay direct or internal taxes.¹⁹³ The New York variation would have required Congress to raise internal or dry-land taxes, first, by requisitions upon the states, and would allow Congress to lay a direct tax instead of the requisition only if the state was in default of paying its quota of the requisition.¹⁹⁴ After default, a state's quota would be collected by federal agents and would include a penal six percent interest charge.¹⁹⁵ Congress was also prohibited from laying excise taxes on goods of American growth or manufacture.¹⁹⁶

Nation-wide, the direct tax issue separated Anti-Federalists from Federalists absolutely: no Anti-Federalist could concede the direct tax to the federal government, and no Federalist could let go of it.¹⁹⁷ For George Washington, the restriction on direct tax went to the heart of the purpose of the Constitution. As he explained to Thomas Jefferson: "For myself, . . . there are scarcely any of the amendments . . . to which I have *much* objection, except that which goes to the prevention of direct taxation; and that, I presume, will be more strenuously advocated and insisted upon . . . than any other."¹⁹⁸ For Washington, a federal direct tax was expected to "do justice to the public creditors and retrieve the national character, but [he said that] if no means [we]re to be employed but requisitions

¹⁹¹ Letter from Nathan Dane to Melancton Smith (July 3, 1788), in 21 DHRC, *supra* note 2, at 1257. The author agrees with this assessment.

¹⁹² Cf. 1 ANNALS OF CONG. 467–68, 685–86 (Joseph Gales ed., 1834).

¹⁹³ See letter from James Madison to Edmund Randolph (Dec. 2, 1787), *supra* note 48, at 290 ("The power of taxing any thing but imports appears to be the most popular topic among the adversaries.").

¹⁹⁴ See George Clinton, Ratifications—New York (July 26, 1788), in 1 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 329.

¹⁹⁵ *Id.*

¹⁹⁶ See *id.*

¹⁹⁷ See THE FEDERALIST NO. 30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Money is, with propriety, considered as the vital principle of the body politic A complete power, therefore, to procure a regular and adequate supply of it . . . may be regarded as an indispensable ingredient in every constitution.").

¹⁹⁸ Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), in 30 WRITINGS OF WASHINGTON, *supra* note 86, at 82–83.

. . . [they] may as well recur to the old confederation."¹⁹⁹

The Federalists argued, moreover: "Money lying in the hands of any state, at six or twelve per cent, will not pay an army on the march, nor contribute to expedite a naval armament."²⁰⁰ Since people must actually pay the tax, Hamilton asked: "What, then, will be the disadvantage of its being levied and collected by Congress, in the first instance?"²⁰¹

From his side of the debate, Anti-Federalist James Monroe argued in Virginia that to render the new federal government "safe and proper, I would take from it one power only . . . that of direct taxation."²⁰² Restrictions on direct tax were recommended by a majority of states as they ratified the Constitution and in another posture, the restriction would have been adopted by at least a majority vote.²⁰³

"Direct tax" was coined after 1781 as a synonym for requisitions, and by the time of the Constitution, a direct tax included not just requisitions directly on the states but also taxes in which Congress apportioned among the states, but kept the power to decide what would be the subject of tax within the state.²⁰⁴ Direct taxes were quasi-requisitions: the formula used for both requisitions and direct tax was an attempt to ascertain the relative wealth of a state using population as a proxy for wealth.²⁰⁵ Congress had access to no better measure of relative state wealth, although it had tried. The formula also reflected a treaty between the slave and non-slave states under which the wealth of a state would be ascertained by counting all of the free population, but only three-fifths of the slaves.²⁰⁶

Ironically, given its importance in the ratification debates, direct taxes meant very little once the Constitution was ratified without the proposed restriction.²⁰⁷ Apportionment among the states

¹⁹⁹ *Id.*

²⁰⁰ Extract of a Letter from a Correspondent, MD. J. (Sept. 12, 1788), in 23 DHRC, *supra* note 2, at 2467.

²⁰¹ Alexander Hamilton, Remarks During the New York Ratification Convention (June 28, 1788), in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 367.

²⁰² James Monroe, Remarks During the Debate at the Va. Convention (June 10, 1788), in 9 DHRC, *supra* note 2, at 1109.

²⁰³ JOHNSON, *supra* note 5, at 156–57 (cataloging adoption of the recommendation for prohibition of federal direct tax in a majority of the ratifying states).

²⁰⁴ See Johnson, *Apportionment of Direct Taxes*, *supra* note 176, at 78 (discussing the meaning of "direct tax").

²⁰⁵ See *id.* at 19.

²⁰⁶ *Id.* at 21; Calvin H. Johnson, *The Four Good Dissenters in Pollock*, 32 J. SUP. CT. HIST. 162, 162 (2007).

²⁰⁷ See Johnson, *Apportionment of Direct Taxes*, *supra* note 176, at 22.

required for direct taxes turned out to be an absurd requirement, for reasons that the Founders did not see, whenever the tax base was uneven per capita in different states.²⁰⁸ A poor state with half the per capita wealth or income of a rich state, for instance, would necessarily face tax rates two times higher.²⁰⁹ The result is forced "because the poorer state has a smaller tax base over which to spread its quota."²¹⁰ Since the Framers were using population as a measure of wealth,²¹¹ by absence of a better alternative, they never saw how apportionment would apply to a tax base that was not even per person. Under the Constitution, Congress was able to impose internal taxes only within some exception, found by construction, that the internal tax was somehow not a direct tax.²¹² Given the absurdity of apportioned taxes on items not held equally per capita in the states, it is difficult to see why either the Federalist or Anti-Federalists considered the direct tax issue to be so important, but they said they did.²¹³

2. Borrowing

Another important Anti-Federalist amendment that was unacceptable to the Federalists would have prohibited federal borrowing except by approval of two-thirds of both congressional houses.²¹⁴ The United States had won the Revolutionary War with borrowed money, including the debt of soldiers' unpaid wages and debts owed to suppliers of war materials.²¹⁵ Nothing came of the proposal, but it might have proved critical, even crippling, in some future emergency.

3. Expressly Delegated

The Articles of Confederation had limited the Congress to powers "expressly delegated" to it.²¹⁶ According to Governor Edmund

²⁰⁸ *Id.* at 3, 12.

²⁰⁹ *Id.* at 14.

²¹⁰ *Id.*

²¹¹ *Id.* at 19.

²¹² *See, e.g.*, *Springer v. United States*, 102 U.S. 586, 600 (1881) (finding the Civil War income tax to be not a direct tax because apportionment would be absurd); *Hylton v. United States*, 3 U.S. 171, 174 (1796) (finding a carriage tax to be not a direct tax, although it was listed on a Treasury inventory of direct taxes because apportionment would be absurd).

²¹³ Johnson, *Apportionment of Direct Taxes*, *supra* note 176, at 55, 60.

²¹⁴ John Lansing Jr. & John Jay, Remarks During the Debates at the N.Y. Convention (July 2, 1788), in 22 DHRC, *supra* note 2, at 2069.

²¹⁵ *See* Johnson, *Apportionment of Direct Taxes*, *supra* note 176, at 34 n.80.

²¹⁶ ARTICLES OF CONFEDERATION of 1781, art. II.

Randolph, who wrote the first draft of the Constitution,²¹⁷ the Framers had taken the limitation out because it proved "destructive" to the Union, and because Congress was to have the un-enumerated power to require passports.²¹⁸ An Anti-Federalist amendment in New York would have returned the expressly delegated limitation,²¹⁹ but it failed to be adopted both in New York and subsequently in the Bill of Rights debate.²²⁰ Ironically, under the "enumerated powers" doctrine, the Constitution has come to be interpreted as if the expressly delegated limitation had succeeded, without regard to the drafting decisions and the absence of foundation for the limitation in the text.²²¹

4. Bill of Rights

Just under a quarter, that is, nine, of the Anti-Federalist proposals bore some overlap of ideas with what became the adopted Bill of Rights.²²² Various bills of rights had been common throughout the Revolutionary period,²²³ and the New York set is not unique. The earliest state Constitutions, like the Declaration of Independence, listed rights to show that the Crown had so abused traditional rights of free man so as to justify independence.²²⁴ New York, whose Constitution was later than the initial round, did not have a constitutional bill of rights.²²⁵ The Bill of Rights that was ultimately incorporated into the U.S. Constitution was written as the first ten amendments to the Constitution in the first Congress.²²⁶ Federalists formed the large majority of the first

²¹⁷ William Ewald, *The Committee on Detail*, 28 CONST. COMMENT. 197, 220 (2012) (identifying the first draft of the Constitution as in Randolph's handwriting).

²¹⁸ See Edmund Randolph, Va. Ratification Convention (June 24, 1788), in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 38, at 601.

²¹⁹ John Lansing, Remarks During the Debates at the N.Y. Convention (July 3, 1788), in 22 DHRC, *supra* note 2, at 2089.

²²⁰ 1 ANNALS OF CONG. 790 (Joseph Gales ed., 1834) (1789).

²²¹ See Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 81–83 (2005) (arguing that the enumerated powers contained in clauses 2–17 of Article I of the Constitution are not exhaustive, but rather, illustrative, extending to all issues of common defense and general welfare).

²²² Compare Proposed Amendments to the Constitution (July 1788), in THE ANTI-FEDERALIST WRITINGS OF MELANCTON SMITH CIRCLE 341–46 (Michael P. Zuckert & Derek A. Webb eds., 2009), and U.S. CONST. amends. I–X.

²²³ See JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 306, 308 (Alfred A. Knopf ed., 1996) (discussing states' proposed bills of rights and highlighting the problems associated therewith).

²²⁴ See *id.* at 306.

²²⁵ See *id.* at 309.

²²⁶ See *Primary Documents in American History*, LIBRARY CONG., <https://www.loc.gov/rr/>

Congress.²²⁷ The Anti-Federalists opponents held only about fifteen percent of the votes in the first Congress, weighting Senate and House equally, and they were a stigmatized minority, on their way to extinction as an organized political group.²²⁸ The Federalists, however, shared the Revolutionary ideals of protection of what were once called the basic rights of Englishmen,²²⁹ even when the colonies were no longer trying to be Englishmen. Indeed, Madison's fundamental philosophy justifying the new national government, reflected in *Federalist No. 10*, was that the diversified national government was necessary to protect the rights of individuals against abuse by the oligopoly-dominated states.²³⁰ The Federalists considered their side to be the better protector of individual rights.²³¹ In his first inaugural address, Washington called for amendments to make certain that "the characteristic rights of freemen" might be more "impregably fortified."²³²

In April 1788, before the New York convention, Madison had said, plausibly, that Anti-Federalist amendments were offered insincerely, "their objections being leveled against the very essence of the proposed government."²³³ Anti-Federalists Lansing and Yates had opposed any establishment of a national government as provided by the Constitution, "however guarded by declarations of rights or cautionary provisions."²³⁴ Anti-Federalists said they were looking for amendments, "the leading feature" of which was "the preservation of the individual states, in their uncontrolled constitutional rights," not of individuals.²³⁵

Madison's Bill of Rights did not protect the states. Madison's proposals that became the Bill of Rights did not include the structural amendments calculated to "strike at the essence of the system,"²³⁶ to "throw back *essential* powers into the state

program/bib/ourdocs/billofrights.html (last updated Feb. 9, 2017).

²²⁷ ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 144 (1997).

²²⁸ JOHNSON, *supra* note 5, at 170.

²²⁹ See, e.g., RAKOVE, *supra* note 223, at 293 (arguing that the War for Independence grew originally as a movement to give the colonies the fundamental rights of Englishmen).

²³⁰ THE FEDERALIST No. 10, *supra* note 140.

²³¹ See JOHNSON, *supra* note 5, at 164.

²³² George Washington, First Inaugural Address (Apr. 30, 1789), http://avalon.law.yale.edu/18th_century/wash1.asp.

²³³ Letter from James Madison to Edmund Randolph (Apr. 10, 1788), in 17 DHRC, *supra* note 2, at 63.

²³⁴ Letter from Robert Yates & John Lansing to George Clinton (Dec. 21, 1787), in 19 DHRC, *supra* note 2, at 458.

²³⁵ *Id.*

²³⁶ Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 14 DHRC, *supra* note

legislatures,"²³⁷ or to prevent "justice to the public creditors,"²³⁸ as the Anti-Federalists wanted. Abraham Yates termed the Bill of Rights amendments Madison proposed to be "trivial and unimportant," seeking to protect only the liberty of the individual, and neglecting the more fundamental task of changing the structure of the new government.²³⁹ The Virginia Anti-Federalists called the Bill of Rights a sop or diversion, "good for nothing," or doing more harm than good.²⁴⁰ They "shall affect personal liberty alone," they argued, "leaving the great points of the judiciary [and] direct taxation etc., to stand as they are."²⁴¹ The Virginia Anti-Federalists so disliked Madison's amendments that they defeated the Bill of Rights in Virginia when it was first proposed.²⁴²

D. Melancton Smith

Ultimately, enough delegates who were elected as Anti-Federalists switched sides or were absent to allow ratification in New York without any of the proposed amendments.²⁴³ The most prestigious of the delegates who moved over was Melancton Smith of Poughkeepsie, who had served as New York's delegate to the Confederation Congress.²⁴⁴ Under pseudonyms, Smith wrote articulate explanations of why the Constitution should not be ratified.²⁴⁵ Smith's *Address to the People of New York*, before the convention, had opposed the Constitution primarily because under

2, at 396 (1983).

²³⁷ See Letter from James Madison to Thomas Jefferson (Aug. 10, 1788), in 23 DHRC, *supra* note 2, at 2451.

²³⁸ Letter from George Washington to Thomas Jefferson (Aug. 31, 1788), in 6 WRITINGS OF WASHINGTON, *supra* note 86, at 493.

²³⁹ See Staughton Lynd, *Abraham Yates's History of the Movement for the United States Constitution*, 20 WM. & MARY Q. 223, 227 (1963).

²⁴⁰ Letter from William Grayson to Patrick Henry (June 12, 1789), in CREATING THE BILL OF RIGHTS 300 (Helen E. Veit et al. eds., 1991).

²⁴¹ Letter from William Grayson to Patrick Henry (Sept. 29, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 240, at 248–49.

²⁴² See NORMAN RISJORD, *CHESAPEAKE POLITICS 1783-1800*, at 356–57 (1978).

²⁴³ See James M. Banner, *Melancton Smith*, 20 AMER. NAT. BIOGRAPHY 255, 257 (1999).

²⁴⁴ See *id.* at 256–57.

²⁴⁵ See, e.g., Melancton Smith, *An Address to the People of the State of New York*, in PAMPHLETS OF THE CONSTITUTION OF THE UNITED STATES 87 (Paul Leicester Ford ed., 2000) (writing under the pseudonym of "A Plebian"); Robert H. Webking, *Melancton Smith and the Letters from the Federal Farmer*, 44 WM. & MARY Q. 510, 511 (1987) (suggesting that Smith is most likely the author of the very influential "Federal Farmer" essays); THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 418–19 (Michael P. Zuckert & Derek A. Webb eds., 2009) (arguing that Melancton Smith or someone very close to him was the author of the very influential "Brutus" and "Federal Farmer" essays, but that the same author would not have written both the Brutus and Federal Farmer essays).

the Constitution, "taxes must be enhanced."²⁴⁶ Smith added: "This you ought to know, and prepare yourselves to submit to."²⁴⁷ For Melancton Smith, the unamended Constitution gave the general government vague and implied powers that might impair the state government.²⁴⁸

In the New York ratification convention, Smith offered a series of amendments to the proposed Constitution,²⁴⁹ none of which were adopted and none, in the end, preventing his own decision to vote for ratification without amendment.²⁵⁰ The fundamental problem was that the Constitution was already established under its own terms by the ratification by the ninth state, New Hampshire.²⁵¹ If one accepts that establishment, then New York's ratification would determine whether or not New York would remain or secede from the Union, but not whether the Constitution would go into effect. Smith struggled to find a formula that would allow him both to ratify the Constitution and also to force his amendments. He proposed first that New York adopt the Constitution only on the condition that his amendments were incorporated.²⁵² He was ultimately convinced, however, that Congress could not amend the Constitution on its own.²⁵³ Even if Congress proposed amendments, they would be part of the already established Constitution only if ratified by three-quarters, that is, ten, of the states.²⁵⁴ He then proposed to require that Congress call a second convention to work

²⁴⁶ Smith, *supra* note 245, at 108.

²⁴⁷ *Id.*

²⁴⁸ Melancton Smith, Remarks During the Debates at the N.Y. Convention (July 1, 1788), in 22 DHRC, *supra* note 2, at 2034.

²⁴⁹ Smith's proposed five amendments were: (1) to reduce the constituency size for the House of Representatives from 30,000 people to 20,000; (2) to prohibit the re-election of a U.S. Senator beyond the six-year term; (3) to prohibit Congress from altering any state-adopted regulation respecting the time, place, or manner for holding elections; (4) to prohibit a Congressman from holding another federal office; and (5) to prohibit the federal government from laying an internal or direct tax, except once a state had failed to pay its quota of a requisition. See Convention of New York, N.Y. J. (June 30, 1788), in 22 DHRC, *supra* note 2, at 2030-31.

²⁵⁰ See Banner, *supra* note 243, at 256-57.

²⁵¹ U.S. CONST. art VII.

²⁵² Mr. Smith's Motion in Convention, in 23 DHRC, *supra* note 2, at 2202-03 (making a motion to ratify on the express condition of adoption of amendments); Letter from Adrian Bancker to Evert Bancker (July 3, 1788), in 21 DHRC, *supra* note 2, at 1253 ("[T]he northern members seem to be obstinately bent to oppose or retard the adoption of the new Constitution by insisting on amendments to be conditional to the ratification, instead of recommendatory.").

²⁵³ N.Y. Convention Debates and Proceedings (July 17, 1788), in 23 DHRC, *supra* note 2, at 2212.

²⁵⁴ U.S. CONST. art. V.

out the details and possible conflicts in the proposals,²⁵⁵ and then was convinced that under the established Constitution, Congress could call a second convention only by application from legislatures (or conventions) of three-quarters or, again, ten, of the states.²⁵⁶

Lansing proposed that New York would withdraw from the Union if the amendments were not adopted within some years.²⁵⁷ Smith was convinced that the Constitution allowed no withdrawal and with a claim to withdrawal, New York would not join.²⁵⁸ The Constitution was perpetual. The new United States with a paramount national government would get along without New York.²⁵⁹ Congress would leave New York City and the state would have no further influence on its deliberations.²⁶⁰ In the end, Melancton Smith and an allied group of delegates allowed ratification of the Constitution with a statement that the convention acted "in confidence" of "early and mature consideration" of the proposed amendments, but without any legally binding requirement that any amendment to the Constitution was to be had or even considered.²⁶¹

The other states did not take up New York's invitation for a second convention or for immediate amendments.²⁶² Madison took the position that: "The great danger in the present crisis is that if another convention should be soon assembled, it would terminate in discord, or in alterations of the federal system[,] which would throw

²⁵⁵ Mr. Smith's Motion in Convention, *supra* note 252, at 2202–03 (proposing that ratification of the Constitution be made on express condition that proposed amendments be submitted to a second convention).

²⁵⁶ Convention Debates and Proceedings, *supra* note 253, at 2211–12 (saying that Smith was convinced that Congress could not take a ratification conditioned on the calling of a second convention).

²⁵⁷ Convention Debates and Proceedings (July 24, 1788), in 23 DHRC, *supra* note 2, at 2290.

²⁵⁸ See Convention Debates and Proceedings (July 25, 1788), in 23 DHRC, *supra* note 2, at 2301 (showing that the convention defeated Lansing's motion to allow withdrawal, 28-31, with Smith joining in the negative); see also Convention Debates and Proceedings, *supra* note 257, at 2291 ("[T]he terms of the Constitution import a perpetual compact between the different states.").

²⁵⁹ Banner, *supra* note 243, at 256.

²⁶⁰ *Id.*; see Letter from James Madison to Thomas Jefferson (Aug. 10, 1788), in 25 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 286 (Paul H. Smith & Ronald M. Gephart eds., 1998).

²⁶¹ Newspaper Reports of Convention Debates (July 23, 1788), in 23 DHRC, *supra* note 2, at 2283 (accepting that Smith would look for amendments under the method allowed by the Constitution itself); Convention Debates and Proceedings, *supra* note 257, at 2307 ("[The Constitution is adopted by this resolution] in confidence that the [proposed] amendments . . . will receive an early and mature consideration.").

²⁶² Banner, *supra* note 243, at 257.

back *essential* powers into the state legislatures.”²⁶³ Massachusetts resolved that a second convention would be “expensive and dangerous,” and South Carolina stated that it would be “inexpedient.”²⁶⁴ Anti-Federalist Virginia, under Patrick Henry’s leadership, agreed with the New York call for a second convention, but with the required level for amendment at ten states, Virginia and New York were not sufficient. While just under a quarter of the proposed amendments do show up in the Bill of Rights, that has to be attributed to Federalist support for the rights of freemen and not to the stigmatized, small minority of Anti-Federalist opponents who were looking for a restructuring of the framework in favor of the states.

Melancton Smith was a worthy profile of courage in that his switch enabled the ratification of the Constitution in New York. He might well have expected to be appointed as one of New York’s two Senators or run for the new House of Representatives, since he had been a New York delegate to Congress under the Articles, but that was not possible once he broke with Governor Clinton and the Albany wing on ratification.²⁶⁵ When Smith voted for ratification, as Anti-Federalist DeWitt Clinton put it: “Some detest[ed him] . . . as much as Hamilton.”²⁶⁶

E. The Albany Wing

An intransigent, or “Albany Wing,” of the Anti-Federalists, led by Governor Clinton, refused to ratify the Constitution even after their position looked untenable. Even after the Constitution was established, on its own terms, Governor Clinton’s position was that it could not be put into operation without the consent of every state.²⁶⁷ Clinton said: “[I]t is essential to a verdict that the jury must be unanimous,” and the eleven “verdicts” favoring ratification were not sufficient, in his mind.²⁶⁸ The Albany Wing seems to have been committed to their amendments on their merits, but they did not have an effective forum or fulcrum upon which to lever. After the establishment of the Constitution, ten states had to agree (nine

²⁶³ Letter from James Madison to Thomas Jefferson, *supra* note 260, at 286.

²⁶⁴ *New York Recommends the Calling of a Second Constitutional Convention*, in 23 DHRC, *supra* note 2, at 2508–09.

²⁶⁵ See Banner, *supra* note 245, at 257.

²⁶⁶ Journal of DeWitt Clinton (July 18, 1788), in 23 DHRC, *supra* note 2, at 2232.

²⁶⁷ See George Clinton’s Remarks on the Mode of Ratifying the Constitution, *supra* note 141, at 2223.

²⁶⁸ *Id.*

outside of New York) to effect an amendment.²⁶⁹ New York's impost had not made New York popular among its neighbors.²⁷⁰ As noted, if New York had not ratified, New York City would have plausibly split off to adhere to the Union.²⁷¹ That would have left Albany as a separate country forced to pay imposts on both exports and imports coming through the New York harbor, a land-locked country without a friend in the world—especially not neighboring Vermont.²⁷² The New York Anti-Federalists do not seem to have been in a dialogue or in an effective forum even for those ideas that were or could reasonably have been adopted. Bitter partisan pride seems necessary to explain their position. As Melancton Smith explained the case to Nathan Dane: "You have had too much experience in public life not to know, that pride, passion, and interested motives have great influence in all public bodies."²⁷³ But Anti-Federalist pride, passion, and interest were insufficient to prevent ratification. The Federalists did not usually bother to address the amendments.²⁷⁴

When the New York Convention was over, with the Constitution ratified and New York in the Union, Anti-Federalists, including Melancton Smith, met at Fraunces Tavern in New York City and resolved to continue their fight for amendments.²⁷⁵ They scheduled a second meeting for two weeks hence, but at that second meeting they failed to reach a quorum and adjourned, never to re-meet.²⁷⁶ As noted, Anti-Federalists elected only fifteen percent of the first Congress, weighing the houses equally, which was not enough to influence the debates, except by provoking reaction.²⁷⁷ With the establishment of the new national government, organized opposition to the Constitution expired.²⁷⁸

Secession does not now look like a credible stance for the Albany

²⁶⁹ U.S. CONST. art. VII.

²⁷⁰ See Johnson, *States Rights?*, *supra* note 163, at 265–66.

²⁷¹ See, e.g., Michael J. Klarman, Book Review, *The Founding Revisited*, 125 HARV. L. REV. 544, 548 (2011) (reviewing MAIER, *supra* note 19).

²⁷² Convention Debates and Proceedings (July 11, 1788), in 22 DHRC, *supra* note 2, at 2141; KAMINSKI, *supra* note 55, at 63, 74.

²⁷³ Letter from Melancton Smith to Nathan Dane (June 28, 1788), in 22 DHRC, *supra* note 2, at 2015.

²⁷⁴ See RISJORD, *supra* note 242, at 291.

²⁷⁵ New York Antifederalist Society, Proceedings of Meetings on Calling a Second Convention, 30 October–14 November 1788, in 23 DHRC, *supra* note 2, at 2475.

²⁷⁶ *Id.* at 2475, 2480.

²⁷⁷ JOHNSON, *supra* note 5, at 170.

²⁷⁸ See *id.* at 170–71 (noting that after the venue for ratification of Amendments to the Constitution moved to the first Congress, the Anti-Federalists did not have the power to modify Amendments nor propose others).

or Clintonian intransigents. If New York City split off to adhere to the Union, as was plausible, then the northern counties against ratification could have formed their own republic. Once outside the Union, however, those counties would probably have had to pay tribute taxes to New York City for use of the Hudson River and New York City docks, just as New Jersey and Connecticut had done.²⁷⁹

On the moral level, moreover, the grand maxim that had won independence, was: "United we stand, divided we fall."²⁸⁰ The maxim had continuing appeal. We were, as John Jay put it, a "band of brothers," who had joined together to fight the most powerful nation on earth and prevailed.²⁸¹ Ultimately, the call of: "United we stand" won not just the War for Independence, but the war for ratification of the Constitution as well.

The Albany wing, more plausibly than secession, seems to have just wanted the old way, with New York supremacy, and Congress as just an assembly of sovereigns, and New York in the Union.²⁸² According to the rest of the country, the ideology of New York Anti-Federalism was simply that the New York impost was intended to benefit New York, and New York alone.²⁸³ That ideology had no appeal beyond the New York borders and it was not considered a high road appeal even within New York. All of the talk of New York sovereignty and rights was treated outside of New York as just excuse for New York's economic selfishness.²⁸⁴

The New York Anti-Federalists could have maintained a confederate form of government in which the national level was just an assembly of diplomats from sovereign states.²⁸⁵ They could have maintained the power of George Clinton's New York State government.²⁸⁶ They would have, however, had to ratify the 1783 impost proposal.²⁸⁷ In retrospect, refusing the 1783 impost as offered was a tactic mistake for the maintenance of their position of

²⁷⁹ Cf. *id.* at 191.

²⁸⁰ See, e.g., "The Liberty Song" (1768), DICKINSON COLL. (2005), <http://archives.dickinson.edu/sundries/liberty-song-1768> ("The most famous passage in the song is the source of a phrase known to many Americans centuries after: 'By uniting we stand, by dividing we fall.'").

²⁸¹ Jay, *supra* note 172, at 941.

²⁸² See David J. Siemers, *Anti-Federalists*, in 1 ENCYCLOPEDIA OF THE NEW AMERICAN NATION, *supra* note 81, at 135.

²⁸³ See Johnson, *States Rights?*, *supra* note 163, at 265.

²⁸⁴ *Id.* ("[T]he Federalist interpretation was that New York was vetoing the national impost, in bad faith, just to keep the revenue from the New York harbor for its own selfish purposes.").

²⁸⁵ *Id.*

²⁸⁶ See KAMINSKI, *supra* note 55, at 4–5.

²⁸⁷ See Johnson, *The Panda's Thumb*, *supra* note 3, at 17; Johnson, *States Rights?*, *supra* note 163, at 265.

maintaining state power and preventing the creation of a new self-sufficient, and paramount, national government. By 1788, they were apparently willing to allow a national impost and a prohibition on a state impost just to defeat the national government, but once the Constitution was established by the ratification of the ninth and tenth state, it was then too late.

CONCLUSION

New York’s parties that separated on the issue of ratification of the Constitution were formed by the disagreement over whether the impost on imports coming through the New York City harbor would be a national or state tax. The overriding need for the Constitution was to pay the debts of the Revolutionary War so that in the coming inevitable war, the United States could borrow again. A national impost, uniform along the full Atlantic coast, was the easiest source of revenue, consistent with the mercantile economics of the time that imports needed to be regulated downward. In the end, the proponents of nationalizing the New York harbor impost prevailed by the ratification of the U.S. Constitution, including within New York itself.