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# Commandeering and Constitutional Change

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# THE YALE LAW JOURNAL

WESLEY J. CAMPBELL

## Commandeering and Constitutional Change

**ABSTRACT.** Coming in the midst of the Rehnquist Court's federalism revolution, *Printz v. United States* held that federal commandeering of state executive officers is "fundamentally incompatible with our constitutional system of dual sovereignty." The *Printz* majority's discussion of historical evidence, however, inverted Founding-era perspectives. When Federalists such as Alexander Hamilton endorsed commandeering during the ratification debates, they were not seeking to expand federal power. Quite the opposite. The Federalists capitulated to states' rights advocates who had recently rejected a continental impost tax because Hamilton, among others, insisted on hiring federal collectors rather than commandeering state collectors. The commandeering power, it turns out, was an integral aspect of the Anti-Federalist agenda because it facilitated federal use of state and local officers, thus ensuring greater local control over federal law enforcement and averting the need for a bloated federal bureaucracy. These priorities carried over into the First Congress, where Anti-Federalists were among the most vehement defenders of the federal power to commandeer state executive and judicial officers. Ironically, though understandably when viewed in context, it was Federalists who first planted the seeds of the anticommandeering doctrine. Incorporating recently uncovered sources and new interpretations, this Article aims to significantly revise our understanding of Founding-era attitudes toward federal commandeering of state officers. Moreover, the Article explains why early Congresses generally shunned the use of state officers and how this custom combined with shifting political priorities to quickly erode what once had been a strong consensus favoring commandeering's constitutionality.

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**INTRODUCTION**

The United States Constitution says little about who should enforce federal law. During the ratification debates, however, Federalists frequently remarked that the federal government would “make use of the State officers” for that purpose.<sup>1</sup> Indeed, one of the principal advantages of the proposed Federal Constitution over the Articles of Confederation, Alexander Hamilton argued in *Federalist No. 27*, was that the Constitution would not “only operate upon the States in their political or collective capacities” but would also “enable the [federal] government to employ the ordinary magistracy of each [state] in the execution of its laws.”<sup>2</sup> With “all officers legislative, executive and judicial in each State . . . bound by the sanctity of an oath” to observe federal law, Hamilton continued, “the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government . . . and will be rendered auxiliary to the enforcement of its laws.”<sup>3</sup> In other words, state officers would be duty bound to enforce federal law.

Over two centuries later, the Supreme Court rejected a federal power to require state executive officers to enforce federal law—a practice now known as commandeering—calling it “fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>4</sup> The Court dismissed Hamilton’s remarks as unrepresentative of broader Founding-era constitutional understanding, explaining that Hamilton’s statements reflected “the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power.”<sup>5</sup>

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1. THE FEDERALIST NO. 36, at 227-28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
  2. THE FEDERALIST NO. 27, *supra* note 1, at 174 (Alexander Hamilton).
  3. *Id.* at 175.
  4. *Printz v. United States*, 521 U.S. 898, 935 (1997). The anticommandeering doctrine also prevents Congress from imposing federal duties on state legislatures. *See New York v. United States*, 505 U.S. 144 (1992). Current doctrine allows commandeering of state judges in some circumstances. *See Haywood v. Drown*, 556 U.S. 729, 740 (2009) (“[H]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.”); *Printz*, 521 U.S. at 905-07 (distinguishing the federal duties placed on state courts from those placed on state executive officers). However, “there remain significant unanswered questions regarding the constitutional relationship between congressional power and state court jurisdiction.” Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 950 (2006).
  5. *Printz*, 521 U.S. at 915 n.9. Justice Scalia also asserted that what Hamilton *really* intended to say in *Federalist No. 27* was that state officers would “enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law.” *Id.* at 913. As a

Hamilton's opinions on federal power, of course, were not always consistent with the views of his colleagues.<sup>6</sup> But it would be deeply mistaken to discount his endorsement of commandeering. Hamilton was not trying to aggrandize federal power. Quite the opposite. He was offering a *concession* to those who feared greater centralized authority. After a bruising debate over federal power to collect tariffs—a controversy that had consumed continental politics for much of the 1780s—Hamilton was finally giving in. He was not about to repeat his prior political miscalculations, so he relented and gave the Anti-Federalists exactly what they wanted: an assurance that the federal government would commandeer state officers to enforce federal law.

The idea of using state officers to enforce federal law emerged well before 1787. While negotiations for an Anglo-American peace treaty were still ongoing in Europe, across the Atlantic a high-stakes controversy emerged over a proposal to amend the Articles of Confederation to give the Continental Congress the power to levy import duties on foreign goods. Proponents urged that the impost, as the tariff system was most commonly known, would provide the United States with revenue it desperately needed in order to repay its wartime debts. Leaders in Congress also recognized that collective-action failure plagued the existing system of state control over international trade regulations, thus limiting tariff revenues and preventing effective retaliation against onerous foreign duties and trade controls.<sup>7</sup>

For these reasons, most politicians in the 1780s agreed that Congress should have authority to establish an impost. Yet when it came to deciding how to collect the tax, deep divisions emerged. The nation's leading financial luminaries—Alexander Hamilton and Robert Morris—insisted on using “continental” officers accountable only to Congress. Others, though, worried that federal collectors would repeat the repressive colonial-era practices of their

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straightforward reading of the text suggests, however, that is not what Hamilton meant. See *infra* note 135.

6. Hamilton also was a shrewd politician who easily might have included a passage in *The Federalist* in hopes that it might someday reinforce his vision for a stronger national government. A particularly good example of such precedent setting is Hamilton's support for an excise tax. See Letter from Alexander Hamilton to George Washington (Aug. 18, 1792) (“[T]he authority of the National Government should be visible in some branch of internal Revenue; lest a total non-exercise of it should beget an impression that it was never to be exercised & next that it ought not to be exercised.”), in 12 THE PAPERS OF ALEXANDER HAMILTON 228, 237 (Harold C. Syrett ed., 1967).
7. See, e.g., Letter from James Madison to Thomas Jefferson (Jan. 22, 1786) (“The necessity of harmony in the com[m]ercial regulations of the States has been rendered every day more apparent. The local efforts to counteract the policy of G[reat] B[ritain] instead of succeeding have in every instance recoiled more or less on the States which ventured on the trial.”), in 8 THE PAPERS OF JAMES MADISON 472, 476 (Robert A. Rutland et al. eds., 1973).

British counterparts, who often failed to appreciate local circumstances and whose appointments were seen as feeding the contemptible appetite of a corrupt patronage system. Instead, these skeptics proposed giving Congress the power to collect import duties using only state officers.

The dispute over how to collect the continental impost ultimately ended in gridlock, but its legacy endured, overshadowing much of the ratification process. The typical narrative of the Constitution's genesis is that political affairs reached a crisis point, fatally undermining the Articles of Confederation and leading to vastly expanded, though still limited, federal powers. The impost story confirms this account in part, but it also calls for an important revision. With respect to the administration of federal law, rather than escalating their demands for greater federal power, Federalists framed the Constitution as conceding ground to the opponents of centralization. Particularly in the pivotal ratification contests in New York and Virginia, Federalists assured Convention delegates and the public that the federal government would generally rely on state officers rather than create new federal positions. And not lost in this debate was the premise that carried over from the impost controversy: federal duties would be legally binding.

Anti-Federalist support for commandeering—a label not yet employed in the eighteenth century—continued into the First Congress, where the usual characters struggled over the pivotal issue of who would enforce federal law. Notwithstanding Federalist promises during ratification, however, the federal government placed very few federal responsibilities on state officers. Examining the causes of this apparent bait and switch reveals a largely untold story about the origins of the federal bureaucracy. Ironically, Anti-Federalists' political miscalculations played a pivotal role in undermining their efforts to have state agents administer and enforce federal law.

The current conception of the anticommandeering doctrine as a centerpiece of the Rehnquist Court's federalism revolution may make this account difficult to believe. Indeed, our conventional assumption that Anti-Federalists must have opposed commandeering is a central premise of one of the best scholarly articles on this topic. According to Michael Collins, Anti-Federalist support for commandeering would have contradicted “their usual rhetoric championing state and local prerogative against centralized power.”<sup>8</sup> Commandeering is a type of centralized power, and thus “the absence of any outcry” from Anti-Federalists in opposition to commandeering, Collins asserts, “is itself strong evidence that such

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8. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 136.

a prospect was not part of the perceived message of *The Federalist*.”<sup>9</sup>

Collins’s argument has intuitive appeal, but overwhelming historical evidence demonstrates that his conventional assumptions about Anti-Federalist attitudes are mistaken. Indeed, the prevailing historical account gets this important feature of the ratification story backward. Anti-Federalists were actually among the strongest supporters of commandeering both before and after ratification. Rather than considering duties imposed on state officials as contrary to federalism principles, many Anti-Federalists viewed the federal-administration issue through the prism of their recent colonial experience—an experience that had also heavily influenced debates over the continental impost. State officers were drawn from local communities and were sympathetic to local needs, whereas federal employees, like their British predecessors, would be unforgiving, unaccountable, and perhaps even tyrannical. Proponents of state power genuinely (though at times hyperbolically) feared that a burgeoning federal bureaucracy would quickly become a “swarm of harpies, who, under the denomination of revenue officers, [would] range through the country, prying into every man’s house and affairs, and like a Macedonian phalanx bear down all before them.”<sup>10</sup> Limits on federal power existed largely to protect individual rights,<sup>11</sup> and commandeering advanced that goal by making law enforcement more accountable to local interests. Furthermore, Anti-Federalists feared that the absence of a federal commandeering power would lead to a bloated federal patronage system, thereby shifting popular loyalties toward the federal government and slowly undermining the importance of state governments.

Relying heavily on foundational assumptions about federal power supposedly underlying many Founding-era statements, prior scholars have offered conflicting accounts of the Founders’ attitudes about commandeering’s constitutionality. For instance, Sai Prakash argues that the Founders anticipated and accepted federal commandeering of state executive and judicial officers (though not state legislatures).<sup>12</sup> He points in particular to Hamilton’s

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9. *Id.* at 142.

10. 2 ANNALS OF CONG. 1844 (1791) (remarks of Rep. Josiah Parker).

11. This point is recognized in *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

12. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1960 (1993) (“Though the Founding Generation did not wish to permit coercion of states in their sovereign, legislative capacities, many individuals envisioned federal commandeering of state executive officers. Apparently, they saw no inconsistency in abandoning federal commandeering of state legislatures while at the same time permitting federal commandeering of state executives.”); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM.

and Madison's assurances that the new federal government would rely on state officers, arguing that these promises implicitly embraced commandeering. Disagreeing, Michael Collins argues that Hamilton and Madison referred only to the federal use of state officers with state permission, and that commandeering was *not* part of the original constitutional design.<sup>13</sup> His scholarship focuses primarily on federal commandeering of state judges,<sup>14</sup> but most of his evidence and analysis applies equally to commandeering of state executive officers.

This Article departs significantly from these prior studies. A substantial body of evidence not mentioned by Prakash and Collins focuses more directly on the issue of commandeering. The topic came up in a few early congressional debates, and it was also addressed in an 1802 federal circuit court opinion (long hidden in a Louisville archive) that is the only known Founding-era judicial opinion to squarely address the commandeering question presented in *Printz v. United States*.<sup>15</sup> These sources provide a clearer picture of what many of the Founders thought about commandeering's constitutionality. While Founding-era views were not unanimous, historical evidence strongly supports commandeering's constitutionality.

In addition to explaining *what* the Founders thought about commandeering, this Article also aims to reorient our understanding of *how* they approached the topic, including what they thought was at stake and which arguments they used to defend their views. For instance, the Oath Clause

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L. REV. 1001, 1046 (1995) (“[T]he Framers and early federal officials clearly contemplated interstitial enforcement of federal law by state executive as well as judicial officers.”); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652-64 (1993) (discussing historical evidence about commandeering). This Article focuses on federal commandeering of state executive and judicial officers rather than of state legislators or legislatures, though I broach the latter issue briefly at the end of the Article. See *infra* note 306. For an argument that historical evidence supports federal power to impose requisitions on state legislatures, see Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355 (1998).

13. Collins, *supra* note 8, at 136-37.

14. Collins's primary concern is not whether commandeering falls within Article I powers but rather whether Article III creates an independent requirement that Congress create (and vest federal jurisdiction in) federal courts. See *id.* at 43. For more recent contributions to this interesting debate, see Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515 (2005); and James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007). See generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 389-94 (6th ed. 2009).

15. 521 U.S. 898 (1997).

played a central yet unappreciated role in early debates about commandeering. Debates over financial compensation for state officials also offer revealing insights into Anti-Federalist support for commandeering. For example, perhaps the most persuasive modern critique of commandeering is that it would allow the federal government to impose administrative obligations without having to pay for them, thereby weakening political accountability. Yet Anti-Federalists seem not to have shared this concern. They instead worried that federal payments to state officers would render those officers reliant on federal income and would thus shift their loyalties away from state and local governments. Therefore, while many Anti-Federalists adamantly supported commandeering, they simultaneously took steps to ensure that the federal government would *not* pay for those additional burdens.

Finally, the existing literature fails to appreciate the relatively quick shift in views about commandeering between the late 1780s and the early nineteenth century. Although explicit and implicit endorsements of commandeering were common during ratification, no one asserted that such a power would violate federalism principles. By the early nineteenth century, however, commandeering's constitutionality was "liable to question, and [had], in fact, been seriously questioned" on exactly this ground.<sup>16</sup> Thus, the early intellectual history of anticommandeering exemplifies the dynamic nature of constitutional law in the early republic and illustrates how the rapidly changing political climate of the 1790s enabled novel constitutional principles to supplant ideas that had been broadly accepted just a few years prior. Views about commandeering have remained unstable ever since.

This Article is divided into four chronological parts. Part I describes the impost debates under the Articles of Confederation. When supporters of a stronger national government pushed for a new federal power to levy nationwide tariffs, a heated debate began over whether state or continental officers should collect the taxes. This controversy set the stage for the ratification showdown discussed in Part II, which reexamines the Federalists' ratification promises. Part III turns to the earliest congressional debates about commandeering and describes the impact of state legislation on congressional decisionmaking. It also explores the earliest-known judicial opinion to examine commandeering.

While federal power to commandeer state officers was generally accepted at the Founding, several factors combined in the late eighteenth and early

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16. Lucius Crassus [Alexander Hamilton], *The Examination No. VI*, N.Y. EVENING POST, Jan. 2, 1802, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 484, 488 (Harold C. Syrett ed., 1977).

nineteenth centuries to make its constitutionality far more contested. And shifts in commandeering doctrine did not stop there. The Supreme Court explicitly rejected the constitutionality of commandeering in the middle of the nineteenth century, shifted gears in the twentieth century, and then returned to an anticommandeering approach during the Rehnquist Court's federalism revolution. Part IV explores these developments and considers how the historical evidence presented throughout this Article might impact our understanding of the Constitution's original meaning. For those who privilege the Founders' understandings of federalism principles or their intentions and expectations about how the Constitution would operate in practice, this account undermines the Court's modern anticommandeering doctrine. At the very least, historical evidence suggests that commandeering of state executive and judicial officers should not be *categorically* unconstitutional.

### I. CONFEDERATION IMPOST DEBATES

The Articles of Confederation had many vices, but when James Madison prepared his famous list in the spring of 1787, the inability of the continental government to raise revenue topped them all. The refusal of states to turn over the taxes demanded by the continental government, he wrote, "may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System."<sup>17</sup> Indeed, the requisitions system had largely fallen apart, with most states lapsing on their obligatory payments<sup>18</sup> and Congress failing to service many of its foreign debts.<sup>19</sup>

As these defects emerged earlier in the decade, nationalists took swift action, pushing for a new congressional power to levy tariffs directly rather than relying on state legislatures for revenue. The idea of a federal impost power received broad support, but deep-seated divisions emerged over the proper method of collection. Nationalists insisted on hiring federal officers to collect the impost, but they met staunch (and ultimately unmovable) opposition.

Given the horrendous condition of government finances, the impost

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17. James Madison, Vices of the Political System of the United States (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975).

18. See E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790, at 224-28 (1961); Letter from James Madison to Thomas Jefferson (Mar. 18, 1786) ("The payments from the States under the calls of Congress have in no year borne any proportion to the public wants."), in 8 THE PAPERS OF JAMES MADISON, *supra* note 7, at 500, 502.

19. See FERGUSON, *supra* note 18, at 234-35.

controversy became a defining issue in American politics. As Henry Knox later observed, “The insurrections of Massachusetts, and the opposition to the impost by New York, have been the corrosive means of rousing America to an attention to her liberties.”<sup>20</sup> Although unmentioned in prior scholarship about commandeering, the impost controversy also formed the backdrop for subsequent ratification-era debates about federal use of state officers.

*A. The 1781 Impost Proposal*

Still in the midst of war, the Continental Congress formally requested in 1781 that each state “vest a power in Congress, to levy” a tariff of five percent on many foreign imports.<sup>21</sup> As Jack Rakove has noted, the proposal’s language—phrased as a constitutional guarantee of independent federal authority—was “apparently designed to obviate the possibility that the states could repeal their acts of authorization as they might any piece of legislation.”<sup>22</sup> Most histories of this episode recount that a majority of states quickly assented, with (in James Madison’s words) only the “obstinacy of Rhode Island” blocking the unanimous endorsement necessary to create a new congressional power under the Articles of Confederation.<sup>23</sup> But this nationalist-driven narrative is only partly true.<sup>24</sup> Some state legislatures quickly granted Congress

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20. Letter from Henry Knox to Benjamin Lincoln (June 13, 1788), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 176, 177 (John P. Kaminski et al. eds., 1995). The insurrection Knox refers to is now known as Shays’s Rebellion.

21. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 112 (Gaillard Hunt ed., 1912).

22. JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 283 (1979). The 1783 impost proposal made that guarantee explicit. See 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 259 (Gaillard Hunt ed., 1922) (“[A]fter . . . unanimous accession . . . [the amendment] shall be considered as forming a mutual compact among all the states, and shall be irrevocable by any one or more of them without the concurrence of the whole, or of a majority of the United States in Congress assembled.”).

23. Letter from James Madison to Edmund Randolph (Nov. 26, 1782), in 5 THE PAPERS OF JAMES MADISON 328, 331 (William T. Hutchinson & William M.E. Rachal eds., 1967). For one example of the blame placed on Rhode Island, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 11 (2010). On the necessity of unanimous consent, see JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 73 (1961).

24. Federalists continued to blame Rhode Island long after the 1781 impost proposal’s defeat. See, e.g., One of the People, *From the Pennsylvania Gazetteer to the Freeman of Pennsylvania*, AM. HERALD, Nov. 5, 1787, at 1, 4 (“When Congress, at the conclusion of the war, recommended a duty of five per cent. the trifling state of *Rhode-Island*, whose extent is not

the power to appoint and supervise impost collectors, yet not all states were so generous.<sup>25</sup> The method of collecting the impost proved controversial in many parts of the country, and impost supporters worried that bills moving through the various state legislatures might be “vitiating by the limitations with which they are clogged.”<sup>26</sup> Massachusetts, for example, gave its own legislature the power to appoint impost collectors.<sup>27</sup> Meanwhile, Connecticut’s legislature gave Congress authority to appoint collectors, but it also made them “liable to be suspended or removed from said office in case of misconduct therein by this Assembly.”<sup>28</sup> Georgia’s legislature chose not even to address the impost until 1783, at which point it voted by a wide margin to postpone further consideration of the idea until the next session.<sup>29</sup>

Objections to the impost varied, but as the conditions imposed by Massachusetts and Connecticut suggest, a common theme was that congressional power to appoint and supervise federal collectors might give way to tyranny and corruption. In a letter to Congress justifying its rejection of the

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greater than one of our counties, refused their acquiescence, and this prevented a measure most beneficial to these states . . .”).

25. The best summary of the impost controversy remains MAIN, *supra* note 23, at 72-102. For early state authorizations, see LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK STATE AND THE FEDERAL CONSTITUTION 33 (1966), which cites New York’s 1781 approval of federal duties “under such penalties and regulations, and by such officers, as Congress should from time to time make, order, and appoint” (quoting 1 DEALVA STANWOOD ALEXANDER, A POLITICAL HISTORY OF THE STATE OF NEW YORK 24 (1906)); and James Madison, Notes on Debates (Jan. 28, 1783), in 6 THE PAPERS OF JAMES MADISON 141, 152 n.29 (William T. Hutchinson & William M.E. Rachal eds., 1969). The initial 1781 proposal did not specify who would administer the collection, but the following year Congress prepared a draft ordinance that specified “that there shall be an officer appointed and commissioned by the United States of America in Congress assembled, for each of the confederate States, who shall be called the Collector of the customs, and shall be an Inhabitant and Citizen of the State for which he shall be appointed.” Draft Ordinance for the Impost of 1781, in 6 THE PAPERS OF ROBERT MORRIS, 1781-1784, at 683, 690 (John Catanzariti & E. James Ferguson eds., 1984). The proposal also mentioned the collectors’ “deputies, clerks and servants.” *Id.*
26. Letter from James Madison to Edmund Randolph (July 2, 1782), in 4 THE PAPERS OF JAMES MADISON 386, 387 (William T. Hutchinson & William M.E. Rachal eds., 1965).
27. John Catanzariti & E. James Ferguson, *Foreword* to Draft Ordinance for the Impost of 1781, *supra* note 25, at 684 (citing ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, 1780-1781, at 590-91 (1890)). Under the Massachusetts law, Congress could have appointed its own agents if the state legislature received notice of vacancies but failed to fill them within fifteen days. *Id.*
28. An Act To Vest in the Congress of the United States a Power To Levy Certain Duties in This State and for Appropriating the Same (Feb. 1781), *reprinted in* 3 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 314 (Charles J. Headly ed., 1922).
29. MAIN, *supra* note 23, at 96-97; 3 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 274-75 (Allen D. Candler ed., 1908).

impost, Rhode Island's legislature explained that "the recommendation proposed to introduce into [Rhode Island] and the other states, officers unknown and unaccountable to them, and so is against the constitution of this State."<sup>30</sup> A writer in Massachusetts concurred, warning that nationalists were trying to prevent "the same persons that collect the State taxes" from also collecting federal revenue. If "the collectors of the Continental tax must not be the *civil officers of the State*, but the *officers of Congress*," the writer warned, states would be forced to "*shamefully submit* to [tax collection] by collectors, whom the Congress, or the minister of Congress, or the deputy of the minister shall be pleased to appoint."<sup>31</sup> Similar worries cropped up in Virginia, where in October 1782 the legislature rescinded its previous approval of the impost.<sup>32</sup> Arriving later to the scene in Richmond, Edmund Pendleton reported "a fix'd Aversion in some Gent[lemen] to putting an independent Revenue into the hands of Congress, which say they, is necessary for no other purpose than to give them the appointment of a number of Officers dependent on them, [and] so to gain an undue Influence in the States."<sup>33</sup> In light of these objections, Rhode Island Congressman David Howell remarked that the impost would be more palatable if "each state retain[ed] the power of choosing the officers of the revenue to be collected within its jurisdiction."<sup>34</sup>

Skepticism about centralized appointments was nothing new; indeed, critiques of the corrupt British political system had often focused on the

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30. 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 788 (Gaillard Hunt ed., 1914); see also [David Howell], *Thoughts on the Five Per Cent.*, PROVIDENCE GAZETTE, Oct. 19, 1782 ("What can we promise ourselves [when taxes are] assessed upon us, to be collected by strangers . . . ?"). For a summary of the debates in Rhode Island, see IRWIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774-1795, at 53-101 (1969). For a concise summary of Howell's other objections, see Objections to the Impost in Rhode Island from David Howell, July/Aug. 1782, in 6 THE PAPERS OF ROBERT MORRIS, 1781-1784, *supra* note 25, at 113, 113-15.

31. *Argus*, NEW-ENG. CHRON., Apr. 26, 1782, at 2.

32. See An Act To Repeal the Act, Intituled, An Act To Enable the Congress of the United States To Levy a Duty on Certain Goods and Merchandizes, and Also on All Prizes (Oct. 1782), reprinted in 11 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 171 (Richmond, William Waller Hening ed., 1823).

33. Letter from Edmund Pendleton to James Madison (May 4, 1783), in 7 THE PAPERS OF JAMES MADISON 12, 12 (William T. Hutchinson & William M.E. Rachal eds., 1971). Interestingly, Patrick Henry—a leading proponent of states' rights—was apparently not among those who worried about federal collectors, jesting instead that states might eliminate "the danger of introducing continental officers for the collection of the impost . . . by drawing the teeth and cutting the nails of the officers." Letter from Edmund Randolph to James Madison (May 15, 1783), in 7 THE PAPERS OF JAMES MADISON, *supra*, at 44, 45.

34. See POLISHOOK, *supra* note 30, at 84.

monarchy's patronage power. As Gordon Wood has observed, Americans thought that the power to appoint officers was "the dynamo that converted royal energy into effective, although subtle, governmental power,"<sup>35</sup> and thus constituted "the most insidious and powerful weapon of eighteenth-century despotism."<sup>36</sup> Thomas Paine's *Common Sense*, for instance, described the "self-evident" fact that the Crown "derives its whole consequence merely from being the giver of places and pensions."<sup>37</sup> "[T]hough we have been wise enough to shut and lock a door against absolute Monarchy," Paine colorfully opined, "we at the same time have been foolish enough to put the Crown in possession of the key."<sup>38</sup> Corrupt royal patronage was also on the Declaration of Independence's list of grievances.<sup>39</sup> "The royal governors, as the Crown's vicegerents," Wood explains, "had continually sought to use their authority as the source of honor and privilege in the community to build webs of influence that could match those in effect in England."<sup>40</sup> Of course, the number of appointments was limited, but the monarchy exercised its power to maximum effect, especially by granting lucrative and prestigious posts to influential citizens.<sup>41</sup> The colonists had also complained that royal patronage led to appointments of officers from outside the community who failed to appreciate local circumstances and who were more likely to commit abuses.<sup>42</sup> No wonder state legislatures were apprehensive about unleashing a newly minted corps of

35. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 144 (2d ed. 1998).

36. *Id.* at 143.

37. THOMAS PAINE, *COMMON SENSE* (1776), *reprinted in* 1 *THE WRITINGS OF THOMAS PAINE* 69, 74 (Moncure Daniel Conway ed., 1906).

38. *Id.*

39. *THE DECLARATION OF INDEPENDENCE* para. 12 (U.S. 1776) (complaining that King George III had "erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance"). This grievance may have been directed particularly at the appointment of trade officials. *See* PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 110 (1997) (suggesting that the grievance "was probably prompted by the American Board of Customs Commissioners, which was located in Boston, and its dependents—clerks, surveyors, tide waiters and the like—whom the Bible-reading folk of Massachusetts considered much like an Old Testament plague of locusts"). However, the colonists had often decried all sorts of royal appointments. *See* WOOD, *supra* note 35, at 33, 42, 77-79, 111, 143-48.

40. WOOD, *supra* note 35, at 145.

41. *Id.* at 146-47.

42. *See, e.g.*, DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE* 122-33 (2005) (discussing the struggle between centralized royal control and so-called "creole" local control in New York). Notably, the impost proposal guaranteed the appointment of in-state collectors. *See supra* note 25.

continental officers to administer the impost. “Such fears,” Jack Rakove observes, “were directly evocative of the convictions that had led the Americans into revolution.”<sup>43</sup>

*B. The 1783 Compromise*

Faced with the defeat of their 1781 proposal, supporters of the impost initially held fast to the idea of using only federally appointed and supervised collectors. “The United States have a common interest in an uniform and equally energetic collection,” Congress explained in its formal reply to Rhode Island.<sup>44</sup> Appointing federal officers was therefore “an essential part” of the program, without which “it might in reality operate as a very *unequal tax*.”<sup>45</sup> Rhode Island’s legislature, however, refused to reconsider its decision.<sup>46</sup>

Resuming their efforts in 1783, delegates in the Continental Congress agreed that it was “indispensably necessary to the restoration of public credit, and to the punctual and honorable discharge of the public debts” to provide Congress “with a power to levy for the use of the United States” a system of import duties.<sup>47</sup> Again, though, the choice of how to collect the impost proved contentious. Eliphalet Dyer of Connecticut, for example, “expressed a strong dislike to a collection by officers appointed under Congress & supposed the States would never be brought to consent to it.”<sup>48</sup> Robert Morris, the Confederation’s Superintendent of Finance, offered a lengthy rebuttal. “[I]t is indispensable that all the Collectors be appointed by the authority of the United States,” he urged, primarily because “[e]xperience has shewn that Taxes heretofore laid in the States have not been collected.” Employing tax collectors who “consider the Circumstances of the People” when performing their duties, Morris argued, would condone “favor and Partiality.” In fact, the independence of federal collectors from local pressures was “the strongest Reason why the

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43. RAKOVE, *supra* note 22, at 315.

44. Report on a Letter from the Speaker of the Rhode Island Assembly (Dec. 16, 1782), in 3 THE PAPERS OF ALEXANDER HAMILTON 213, 217 (Harold C. Syrett ed., 1962).

45. *Id.*

46. POLISHOOK, *supra* note 30, at 86-93.

47. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 257 (Gaillard Hunt ed., 1922).

48. James Madison, Notes on Debates (Jan. 27, 1783), in 6 THE PAPERS OF JAMES MADISON 133, 136 (William T. Hutchinson & William M.E. Rachal eds., 1969); *see also* Madison, *supra* note 25, at 142 (noting that Congress reserved the issue of whether the impost would be “collected under the authority of Congress”).

Collectors should be appointed by and amenable to Congress.”<sup>49</sup>

Alexander Hamilton offered an additional rationale for making tax collectors accountable only to Congress. According to Madison’s notes on the congressional debates, Hamilton “signified that as the energy of the federal Govt. was evidently short of the degree necessary for pervading & uniting the States it was expedient to introduce the influence of officers deriving their emoluments from & consequently interested in supporting the power of, Congress.”<sup>50</sup> In other words, Hamilton thought that congressional appointments would serve as the basis for a federal patronage system, thus spawning a nationwide network of individuals loyal to Congress. This proposal was quite audacious given the staunch colonial opposition to royal appointments. Madison wryly commented in his notes that Hamilton’s remark was “imprudent & injurious to the cause . . . it was meant to serve.”<sup>51</sup> After all, the prospect of a federal patronage system, Madison wrote, “was the very source of jealousy which rendered the States averse to a revenue under the collection as well as appropriation of Congress. All the members of Congress who concurred in any degree with the States in this jealousy smiled at the disclosure.”<sup>52</sup> Madison’s colleagues from Virginia commented privately that “Mr. Hamilton had let out the secret.”<sup>53</sup>

Hamilton’s speech was imprudent, but it hardly should have been surprising. As one scholar writes, Hamilton “repeatedly insisted on the necessity of creating among the nation’s leadership a class of influentials tied to the federal government and capable of counterbalancing the influentials currently tied to the states.”<sup>54</sup> Just the previous summer, for instance, Hamilton had written in a New York newspaper that “[t]he reason of allowing Congress to appoint its own officers of the customs, collectors of taxes, and military officers of every rank, is to create in the interior of each state a mass of influence in favour of the Fœderal Government.”<sup>55</sup> The weakness of the

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49. Letter from Robert Morris to Elias Boudinot, President of Congress (Mar. 8, 1783), in 7 THE PAPERS OF ROBERT MORRIS 513, 527 (John Catanzariti et al. eds., 1988). Morris also argued that it was “a Kind of Absurdity . . . that Congress should have a Right to the Tax and yet no Right to send their Servants to receive it.” *Id.*

50. Madison, *supra* note 25, at 143.

51. *Id.*

52. *Id.*

53. *Id.*

54. Lance Banning, *James Madison and the Nationalists, 1780-1783*, 40 WM. & MARY Q. 227, 248 (1983).

55. [Alexander Hamilton], *The Continentalist No. VI*, N.Y. PACKET, July 4, 1782, reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON 99, 105 (Harold C. Syrett ed., 1962).

Confederation government, he argued, made it imprudent to worry that Congress “will ever become formidable to the general liberty.”<sup>56</sup> These views, as well as their frosty reception in Congress, later informed Hamilton’s strategy during ratification.

In the end, though, Congress rejected Hamilton’s uncompromising position and recommended that “the collectors of the said duties shall be appointed by the states, within which their offices are to be respectively exercised, but when so appointed, shall be amendable to, and removable by the United States in Congress assembled, alone.”<sup>57</sup> In making this proposal—widely known as the Impost of 1783—Congress noted that it had “not been unmindful of the objections which heretofore frustrated the unanimous adoption” of the 1781 impost plan. “If the strict maxims of national credit alone were to be consulted,” the delegates explained, collection of the revenue would have been placed entirely under the authority of Congress.<sup>58</sup>

Neither side was particularly happy with the compromise. Hamilton, who along with Madison had been on the committee that drafted the proposal, voted in protest against it. Although he urged New York’s legislature to accept the compromise, Hamilton also worried privately that “it will in a great measure fail in the execution.”<sup>59</sup> Meanwhile, Rhode Island’s delegates reported back to their governor: “It would have been less exceptionable to us, had the Officers for collecting the Revenues been under the Controul as well as the

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56. *Id.*

57. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 258 (Gaillard Hunt ed., 1922). The proposal also provided that “in case any State shall not make such appointment within one month after notice given for that purpose, the appointment may be made by the United States in Congress assembled.” *Id.*

58. *Id.* at 278.

59. DE PAUW, *supra* note 25, at 33-34. When the delegates originally voted for this compromise on February 12, 1783, the New York and Pennsylvania delegations dissented, probably because Hamilton and James Wilson had been pushing for the collectors to be federal appointees. See James Madison, Notes on Debates (Feb. 12, 1783), in 6 THE PAPERS OF JAMES MADISON 225-26, 227 n.15 (William T. Hutchinson & William M.E. Rachal eds., 1969). About a month later, Hamilton and Wilson jointly moved

to strike out the clauses relative to the appointment of Collectors, and to provide that the Collectors shd be inhabitants of the States within which they sd. collect; should be nominated by Congs. and appointed by the States, and in case such nomination should not be accepted or rejected within {blank} days it should stand good.

James Madison, Notes on Debates (Mar. 11, 1783), in 6 THE PAPERS OF JAMES MADISON 322, 323 (William T. Hutchinson & William M.E. Rachal eds., 1969). The motion barely failed by a vote of “5 ays & 6 noes.” *Id.*

Appointment of the State . . . .”<sup>60</sup> Nevertheless, they suggested that “a Deviation so far as relates to the Controul of the Officers may be made [by the state legislature], with a probability of its being acquiesced in by Congress.”<sup>61</sup>

*C. Defeat in New York*

Although Congress had reached a compromise, the proposal still needed unanimous state approval. This time around, the stiffest opposition came from New York, though again modern scholars have generally adopted the Federalist narrative and overlooked the substantial diversity of opinion in other states.<sup>62</sup> Signs of trouble in New York were apparent from the outset. In March 1783, just a month before announcement of the new proposal, New York’s assembly rejected by a single vote a bill to curtail the state’s prior endorsement of the 1781 plan. The narrowly defeated measure would have given the state veto power over congressional appointments of revenue officers assigned to work in New York.<sup>63</sup>

Leading the charge against the federal impost power was Abraham Yates, Jr.<sup>64</sup>—a vocal supporter of New York’s powerful governor, George Clinton. In a series of publications, Yates raised the specter of a large federal bureaucracy, including “all the collectors, deputy collectors, comptrollers, clerks, tide-waiters, and searchers, for the collection and after management of a vast revenue.”<sup>65</sup> Why was a large federal bureaucracy so inherently dangerous?

60. Letter from the R.I. Delegates to William Greene, Gov. of R.I. (Apr. 23, 1783), in 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 147, 147 (Edmund C. Burnett ed., 1934).

61. *Id.* at 148.

62. For summaries of the 1783 impost controversy, see FERGUSON, *supra* note 18, at 165-67, 220-42; MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789, at 407-21 (1950); JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC 89-96 (1993); and MAIN, *supra* note 23, at 72-102.

63. MAIN, *supra* note 23, at 98.

64. See DE PAUW, *supra* note 25, at 35, 42. Yates had been previously overlooked for an appointment as a continental receiver, which “may have helped to convert Yates into a militant opponent of further congressional powers.” RAKOVE, *supra* note 22, at 310. Whatever Yates’s own motives, opposition to federal collectors was conventional and prevailed in several state legislatures during the 1780s.

65. [Abraham Yates], A Rough Hewer, *Advocates for a Congressional Revenue in the State of New-York* (Mar. 17, 1785), in POLITICAL PAPERS, ADDRESSED TO THE ADVOCATES FOR A CONGRESSIONAL REVENUE 5 (New York, S. Kollock 1786); see also A Countryman, CONN. GAZETTE & UNIVERSAL INTELLIGENCER, Nov. 22, 1782, at 2 (“True, say they, it must lie entirely with Congress what number of officers of the customs (sufficient to guard every

Yates tied his argument to the recent colonial opposition to British revenue agents. “The power of collecting and managing the British revenues, . . . being vested in the crown,” he observed, “has proved a source of corruption, and a means of extending the influence of prerogative; and however unquestionable the virtue of our present rulers, are they not men? . . . Will not a court interest soon be created and intriguing and caballing for offices ensue [under the new government]?”<sup>66</sup> “[T]rusting the means of undue influence and inordinate power in the hands of Congress,” another commenter admonished, “will be productive of the same consequences as we have seen in Great-Britain.”<sup>67</sup>

For Yates, the 1783 compromise was insufficient to calm these fears. Simply giving states the “pitiful privilege” of appointing federal revenue officers, he argued, “is too thin a covering to deceive even children in politics. If they are only accountable to Congress, they are only the servants of that body: After a man has climbed the ladder of preferment, he kicks it down as no longer useful.”<sup>68</sup> In other words, so long as Congress had the power to fire revenue officers, those officers would effectively be congressional agents. Yates also warned that merchants would thereafter be “subjected to the power and caprice of every petty officer of the customs; and over whom neither yourselves nor your state will have any controul; for they are *to be amendable to Congress only*.”<sup>69</sup> In a revealing passage, he then asked rhetorically: “How degrading this idea to a sovereign and independent state?”<sup>70</sup>

Opponents of the impost were not united in offering a counterproposal,

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river, creek, bay or inlet, in a coast nearly 2000 miles in length) and pensioners shall be supported upon the duties proposed . . .”).

66. Yates, *supra* note 65, at 6; *see also* Casca, PROVIDENCE GAZETTE & COUNTRY J., Oct. 11, 1783, at 1 (remarking that the British tax collection system was “the parent of corruption—the power and prevailing instrument of pernicious influence, in the supreme executive power”); *Remarks and Observations on the Articles of Confederation of the Thirteen United States of North-America. No. II.*, AM. MERCURY (Hartford, Conn.), Oct. 11, 1784, at 2 (“[I]ncreasing the number of *placemen* and *pensioners*, tends to enlarge the powers of government beyond their proper bounds and to render them sovereign, arbitrary, and despotic.”).

67. Casca, *supra* note 66, at 1.

68. Yates, *supra* note 65, at 15; *see also* A Republican, *To the Public*, N.Y. J., Oct. 12, 1786 (suggesting that when collectors “exceed or abuse their authority,” the provision making them amendable to Congress alone might leave them free from suit); Dixit Senex, *The Plain Dealer, No. XI*, PROVIDENCE GAZETTE & COUNTRY J., May 10, 1783, at 1 (“The pitiful privilege of *appointing* Collectors, who are to be *amenable only to Congress*, will afford little security to the States against *the abuse of office*; it will rather be an aggravation to be insulted by creatures of our own *make*, after it is not in our power to *unmake* them; for my own part, I never wish for *the power of raising devils I have not the power of laying*.”).

69. Yates, *supra* note 65, at 16.

70. *Id.* at 16.

but they did agree that additional federal power was needed and should include commandeering of some sort.<sup>71</sup> Following the usual practice under the Articles of Confederation, George Clinton apparently thought that Congress should use requisitions – that is, legally binding demands that state legislatures turn over impost revenue.<sup>72</sup> Understandably, this view was not widely endorsed. As Alexander Hamilton later remarked in *Federalist No. 15*, “though in theory [congressional] resolutions . . . are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations, which the States observe or disregard at their option.”<sup>73</sup> Another idea was to give the Continental Congress the power to impose duties on state officers directly, thus making those officers (contrary to the 1783 compromise) not federal officers dependent on Congress “alone” but rather state officers with federal duties.<sup>74</sup> But nobody seems to have fleshed out how Congress might ensure compliance from uncooperative state officers, and ensuring compliance from uncooperative states was a perilous endeavor.<sup>75</sup> Still, opponents of the 1783

71. See, e.g., MAIN, *supra* note 23, at 101 (“[O]pposition was not so much to *an* impost as to *the* impost – in the form recommended and insisted upon by Congress.”).

72. New York Ratification Convention Debates and Proceedings (June 28, 1788) (remarks of Gov. George Clinton) (“I believed that granting the revenue, without giving the power of collection or a controul over our state officers, would be the most wise and prudent measure.”), reprinted in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1976, 1980 (John P. Kaminski et al. eds., 2008). Hamilton later decried Clinton’s position on the impost as “a subterfuge.” Alexander Hamilton, *H. G. Letter No. VII* (Feb. 28, 1789), reprinted in 5 THE PAPERS OF ALEXANDER HAMILTON 277, 277 (Harold C. Syrett ed., 1962). “To oppose . . . the specific plan offered, and yet pretend to be a friend to the thing in the abstract,” Hamilton wrote, “deserves no better name than that of hypocrisy.” *Id.* at 277–78. Yates perceived a state constitutional bar against “delegat[ing]” or “transfer[ring]” legislative power to Congress. See [Abraham Yates], *Rough Hewer III*, N.Y. GAZETTEER, Oct. 20, 1783, at 19. This non-delegation concern stemmed from a view that sovereignty ultimately rested in the *people themselves*, not state governments. See WOOD, *supra* note 35, at 362. The Framers famously avoided this problem by vesting the ratification power in the people themselves of each state, thus making the Constitution a pact among “We the People” as well as among the states.

73. THE FEDERALIST NO. 15, *supra* note 1, at 93 (Alexander Hamilton).

74. For the reference to supervision by Congress “alone,” see *supra* note 57 and accompanying text. For an example of support for a federally mandated duty administered by state officers, see *infra* note 87 and accompanying text. See also *Remarks and Observations on the Articles of Confederation of the Thirteen United States of North-America. No. II.*, *supra* note 66, at 2 (“Will a collector of duties . . . be vested with more ample powers; if appointed by, or made amenable to Congress, and removable by their authority . . . than if appointed by our honourable Assembly . . . ?”).

75. Confederation-era and Founding-era debates did, however, often mention prophylactic remedies the continental government might use with respect to noncompliant state

impost proposal thought that state sovereignty militated in favor of commandeering, thereby avoiding the need for potentially intrusive federal officers. That priority is hardly surprising, though, given that commandeering of state legislatures was the default means of exercising many continental powers under the Articles of Confederation.

New York faced the ire of the cosmopolitan press, but some New Yorkers were incredulous that their efforts to secure a state-based collection system were being labeled obstructionist. In an extended essay originally printed in the *New-York Journal*, one writer pointed out that “the acts passed by the several states, in consequence of the [congressional] recommendation, vary as much from each other as from the terms of the resolutions upon which they are founded.”<sup>76</sup> Indeed, states had limited their authorization bills in various ways.<sup>77</sup> New Jersey, for instance, withheld congressional power to make appointments if the state refused.<sup>78</sup> Meanwhile, the three southernmost states prohibited impost collectors from holding other state or federal positions.<sup>79</sup> And most state authorization bills either included a detailed list of protected individual rights<sup>80</sup> (most of which later appeared in the Federal Bill of Rights) or simply ensured, in the words of Maryland’s bill, that the “ordinances, regulations and arrangements” that Congress found “proper or necessary for the faithful and punctual payment and collection of the said duties” must “not

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legislatures. See Bradford R. Clark, *The Eleventh Amendment and the Nature of Union*, 123 HARV. L. REV. 1817, 1839-62 (2010).

76. A Republican, *supra* note 68. This essay was reprinted in a pamphlet by “a number of Friends to Liberty and Government.” See THE RESOLUTIONS OF CONGRESS OF THE 18TH OF APRIL, 1783; RECOMMENDING THE STATES TO INVEST CONGRESS WITH THE POWER TO LEVY AN IMPOST FOR THE USE OF THE STATES; AND THE LAWS OF THE RESPECTIVE STATES, PASSED IN PURSUANCE OF THE SAID RECOMMENDATION 50-63 (New York, Carroll & Patterson 1787) [hereinafter RESOLUTIONS OF CONGRESS].
77. The various state authorization bills were helpfully collected in RESOLUTIONS OF CONGRESS, *supra* note 76.
78. *Id.* at 22.
79. *Id.* at 42 (North Carolina); *id.* at 45 (South Carolina); *id.* at 48 (Georgia).
80. *Id.* at 7 (New Hampshire); *id.* at 10 (Massachusetts); *id.* at 13 (Rhode Island); *id.* at 31 (Pennsylvania); *id.* at 40 (Virginia); *id.* at 44 (South Carolina); *id.* at 48 (Georgia). Interestingly, all seven of these authorization bills included an explicit warrant requirement for searches of buildings. *Contra* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 763 (1994) (“[A]lthough many [state constitutions] featured language akin to the Fourth Amendment, none had a textual warrant requirement. . . . Nor have proponents of a warrant requirement uncovered even a handful of clear [Founding-era] statements of the ‘requirement’ . . .”).

be repugnant to the constitution of this state.”<sup>81</sup>

New York’s legislature eventually granted Congress the power to levy an impost, but the state’s acceptance was contingent on amendments widely acknowledged to “render it inadmissible by Congress.”<sup>82</sup> In particular, the legislature stipulated that it would maintain supervision over the collectors, and that duties collected within New York would be payable in the state’s paper currency.<sup>83</sup> According to a congressional committee’s evaluation, the sole authority of Congress to supervise collectors “must be considered as an essential part of the plan.”<sup>84</sup> Failure to provide that authority would “destroy the equality of the tax, and might, in a great measure, defeat the revenue.”<sup>85</sup> Therefore, the committee resolved that New York’s nominal acceptance “so essentially varies from the system of impost recommended by the United States in Congress . . . that the said act is not, and cannot be considered as a compliance with the same.”<sup>86</sup>

In 1787, Alexander Hamilton joined the New York Assembly and spearheaded what became the final effort to approve the impost under the Articles of Confederation. On February 15, by a single-vote majority, the

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81. RESOLUTIONS OF CONGRESS, *supra* note 76, at 37. Delaware similarly gave Congress the power to pass “necessary and expedient” rules and ordinances “not repugnant to the constitution and laws of this state.” *Id.* at 32. These bills and their conditions offer a useful reminder that the impost proposal was not isolated to tax collection but also encompassed the related implied powers to enforce the collection through various means, such as the creation of federal courts or the use of state courts.

82. Letter from Henry Lee, Jr. to George Washington (Apr. 21, 1786), in 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 26 (W.W. Abbott et al. eds., 1995).

83. See An Act for Giving and Granting to the United States in Congress Assembled, Certain Imposts and Duties on Foreign Goods Imported into this State, for the Special Purpose of Paying the Principal and Interest of the Debt Contracted in the Prosecution of the Late War with Great Britain (May 4, 1786), reprinted in 2 LAWS OF THE STATE OF NEW YORK 320-22 (Albany, Weed, Parsons & Co. 1886); see also KAMINSKI, *supra* note 62, at 92 (discussing New York’s 1786 impost bill).

84. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 532 (John C. Fitzpatrick ed., 1934).

85. *Id.* The committee report noted that New York’s impost bill does not make the collectors of the said duties amendable to and removable by the United States in Congress assembled; but ordains, that upon conviction [in New York state court] . . . for any default or neglect in the execution of the duties required of them . . . they shall be removed from office . . . which is a material departure from the plan recommended by Congress.

*Id.* at 533.

86. *Id.* at 534.

assembly gave Congress the power to levy an impost.<sup>87</sup> Yet again, however, the legislature refused to turn over sole authority to supervise the collectors. In fact, the assembly rejected by a vote of thirty-eight to nineteen a proposal to make the collectors “accountable to, and removeable by the United States in Congress assembled.”<sup>88</sup> Hamilton vehemently protested. All the other states that had accepted the 1783 compromise, he argued, were “conscious of energy in their own administration” and would refuse to accept a plan “which left the collection of the duties in the hands of each state, and of course subject to all the inequalities which a more or less vigorous system of collection would produce.”<sup>89</sup> “If any state should incline to evade the payment of the duties, having the collection in its own hands,” he warned, “nothing would be easier than to effect it, and without materially sacrificing appearances.”<sup>90</sup> Hamilton’s comments were impassioned but ultimately unavailing. Following his speech, New York’s assemblymen again rejected the 1783 compromise, this time by a vote of thirty-six to twenty-one.<sup>91</sup>

National leaders had reached a precipice. Before the impost’s final defeat, the central government had already become imperiled. “Congress have kept the Vessel from sinking,” Madison remarked to Jefferson in 1785, “but it has been by standing constantly at the pump, not by stopping the leaks which have endangered her.”<sup>92</sup> “The failure of the impost coupled with the dissolution of the public debt,” James Ferguson writes, “seemed to portend an immediate and perhaps final decline of the central government.”<sup>93</sup> And along with that demise, Madison feared, would go the fate of the American democratic experiment. The “unfavorable balance” of trade stemming from the “anarchy of our commerce,” he explained in 1786, had prompted an exodus of hard currency, thus furnishing “pretexts for the pernicious substitution of paper money, for indulgences to debtors, for postponements of taxes. In fact most of our political evils may be traced up to our commercial ones, as most of our moral

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87. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK 51 (New York, Samuel & John Loudon 1787).

88. *Id.* at 52.

89. Alexander Hamilton, Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 71, 88 (Harold C. Syrett ed., 1962).

90. *Id.*

91. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, *supra* note 87, at 52.

92. Letter from James Madison to Thomas Jefferson (Oct. 3, 1785), in 8 THE PAPERS OF JAMES MADISON, *supra* note 7, at 373.

93. FERGUSON, *supra* note 18, at 242.

may to our political.”<sup>94</sup> In no uncertain terms, the young Republic was in crisis.

## II. THE CONSTITUTION

As events unfolded, Federalists adeptly used the national crisis to their advantage, pushing for a broad reform agenda that culminated in a sweeping proposal to replace the Articles of Confederation. After the failure of the impost plan, delegates from every state except Rhode Island gathered in Philadelphia, ostensibly to propose amendments to the Articles of Confederation. Records from the Constitutional Convention are mostly silent with respect to commandeering of state executive and judicial officers, but a couple of rejected proposals mentioned the idea. The New Jersey Plan, for instance, called for bringing certain federal cases in “the Common law Judiciarys of the State in which any offence . . . shall have been committed.”<sup>95</sup> Roger Sherman apparently drafted a separate proposal that “the laws of the United States ought, as far as may be consistent with the common interests of the Union, to be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required.”<sup>96</sup> These proposals were undoubtedly meant to appease skeptics who were worried about expanding the size of the federal government. In the end, however, the convention delegates left for future Congresses to decide what means were “necessary and proper” for administering federal laws.<sup>97</sup> As Jerry Mashaw notes, “The Constitution provided a legislature, a Supreme Court, and two

94. Letter from James Madison to Thomas Jefferson (Mar. 18, 1786), *supra* note 18, at 502.

95. James Madison, Notes on the Ratification Convention Debates (June 15, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 242, 243 (Max Farrand ed., 1911).

96. Sherman’s Proposals, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615, 616 (Max Farrand ed., 1937). Justice O’Connor cited this document in her majority opinion in *New York v. United States*, 505 U.S. 144, 164-65 (1992). Sherman may have offered this proposal at the convention in mid-July. See THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 71 n.32 (1993).

97. See U.S. CONST. art. I, § 8. On several occasions, the delegates debated whether the states should have a role in appointing federal officers, but none of these discussions mentions commandeering. See, e.g., James Madison, Notes on the Ratification Convention Debates (Aug. 23, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 384, 387-88; James Madison, Notes on the Ratification Convention Debates (Aug. 24, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 400, 405-06. Other discussions touched on legislative requisitions. See Clark, *supra* note 75, at 1843-53.

executive officers. Administration was missing.”<sup>98</sup>

Though little discussed in Philadelphia in the summer of 1787, the topic of federal administration came up often during the ratification debates. The typical narrative of the Constitution’s genesis is one of Federalist advancement, with Hamilton and Madison consistently advocating for greater federal power. Anti-Federalist assemblymen framed the debate in this way from the very outset of the ratification contest. The rhetorical jousting started when a group of Anti-Federalists dramatically boycotted the Pennsylvania legislative session in an effort to deny the legislature a quorum and thus block the delegates from convening a ratification convention.<sup>99</sup> Repeating an argument they had won several times before, the absentee legislators explained to their constituents: “You can . . . best determine . . . whether a continental collector assisted by a few faithful soldiers will be more eligible than your present collectors of taxes.”<sup>100</sup> But Federalists did not take the bait. As they set out from Philadelphia to sell their new proposal to the public, Federalists retreated in an important way, consistently arguing that the Framers had adopted the basic Anti-Federalist position with respect to the administration of federal law. The impost controversy, in other words, critically shaped the subsequent ratification-era debates about federal use of state officers.

#### *A. Ratification Debates*

Shortly after the Constitutional Convention adjourned, publishers began printing a series of essays opposing ratification. Federalists labeled the authors of these essays Anti-Federalists—a term they intended to be disparaging.<sup>101</sup> These Anti-Federalist writers were generally opposed to the proposed constitution—at least without amendments—but they were by no means a homogenous or cohesive group.<sup>102</sup> Nonetheless, common themes run through

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98. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1266 (2006).

99. See MAIER, *supra* note 23, at 63–64.

100. An Address of the Subscribers Members of the Late House of Representatives of the Commonwealth of Pennsylvania to Their Constituents (Sept. 29, 1787), in 3 *THE COMPLETE ANTI-FEDERALIST* 11, 15 (Herbert J. Storing ed., 1981). Some scholars have framed the ratification contest in the same way. See, e.g., HULSEBOSCH, *supra* note 42, at 221 (“The primary theme of the ratification debate was simple: Who would rule and where? . . . The Federalists hoped to create a cosmopolitan, interstate governing class, which they thought possible only with strong federal institutions.”).

101. See MAIER, *supra* note 23, at 92–95.

102. See *id.*

many of their writings. Given the earlier opposition to the impost under the Articles of Confederation, it is no surprise that the administration of federal law quickly emerged as a major rallying point for Anti-Federalist opposition.

Anti-Federalists frequently volleyed attacks on the federal power to lay and collect taxes, a power they said would lead to an oppressive cadre of federal collectors. An author who used the pseudonym Brutus—perhaps New York politician Robert Yates,<sup>103</sup> who was the nephew of New York’s leading opponent of the impost, Abraham Yates—warned that the “great latitude” of the power to lay and collect taxes “opens a door to the appointment of a swarm of revenue and excise officers to pray [sic] upon the honest and industrious part of the community.”<sup>104</sup> “[I]t will be the policy of this government to multiply officers in every department,” the dissenters at Pennsylvania’s ratification convention explained, and therefore “judges, collectors, tax-gatherers, excisemen and the whole host of revenue officers will swarm over the land, devouring the hard earnings of the industrious. Like the locusts of old, impoverishing and desolating all before them.”<sup>105</sup> Anti-Federalists particularly worried that nationally appointed collectors would abuse their positions with impunity, seeking safe haven in federal courts.<sup>106</sup>

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103. For discussions of the authorship of the Brutus essays, see 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 358; 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 411 (John P. Kaminski et al. eds., 1981); and Michael P. Zuckert & Derek A. Webb, *Introduction* to THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, at xi, xxi-xxix (Michael P. Zuckert & Derek A. Webb eds., 2009).

104. *Brutus No. V*, N.Y. J., Dec. 13, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 388, 390 (alteration in original). As the backdrop for much of *The Federalist*, the Federal Farmer and Brutus essays play a leading role in this Article. But these works are not always representative, see SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 25-26 (1999), and this Article draws on diverse Anti-Federalist sources.

105. The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 12, 1787), *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 145, 165.

106. See, e.g., Virginia Ratification Convention Debates (June 9, 1788) (remarks of Patrick Henry) (“The Sheriff comes today as a State collector—next day he is federal—How are you to fix him? . . . When you fix him, where are you to punish him? For, I suppose, they will not stay in our Courts: They must go to the Federal Court; for, if I understand that paper right, all controversies arising under that Constitution; or, under the laws made in pursuance thereof, are to be tried in that Court.”), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1050, 1065 (John P. Kaminski et al. eds., 1990); *Brutus No. VI*, N.Y. J., Dec. 27, 1787 (“They will have authority to farm the revenues and to vest the farmer general, with his subalterns, with plenary powers to collect them, in any way which to them may appear eligible. And the courts of law, which they will

This Anti-Federalist critique, of course, merely repeated arguments frequently made during the impost controversy. This time, though, Alexander Hamilton adopted a different response. Rather than reiterating the critical importance of having federal officers enforce federal law, Hamilton instead emphasized the role that state officers would play in collecting federal taxes. If feasible, Hamilton assured the readers of his *Federalist* essays, the federal government “will make use of the State officers and State regulations, for collecting the additional imposition. This will best answer the views of revenue, because it will save expence in the collection, and will best avoid any occasion of disgust to the State governments and to the people.”<sup>107</sup> Similarly, James Madison wrote that “the eventual collection [of taxes] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States.”<sup>108</sup>

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be authorized to institute, will have cognizance of every case arising under the revenue laws, the conduct of all the officers employed in collecting them; and the officers of these courts will execute their judgments.”), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 393, 395; *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787 (“[S]uppose the excise or revenue officers (as we find in Ward’s case) – that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift, – suppose, I say, that they commit similar, or greater indignities, in such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same: but what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government . . . ?”), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 58, 61; Luther Martin, *Genuine Information VI*, BALT. MD. GAZETTE, Jan. 15, 1788 (“[A]ll the officers for collecting these taxes, stamp duties, imposts and excises, are to be appointed by the general government, under its direction, not accountable to the States; nor is there even a security that they shall be citizens of the respective States, in which they are to exercise their offices; at the same time the construction of every law imposing any and all these taxes and duties, and directing the collection of them, and every question arising thereon, and on the conduct of the officers appointed to execute these laws, and to collect these taxes and duties so various in their kinds, are taken away from the courts of justice of the different States, and confined to the courts of the general government . . . .” (emphases omitted)), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 374, 377 (John P. Kaminski et al. eds., 1984).

107. THE FEDERALIST NO. 36, *supra* note 1, at 227-28 (Alexander Hamilton); see also New York Ratification Convention Debates (June 21, 1788) (remarks of Alexander Hamilton) (“They will appoint the officers of revenue agreeably to the spirit of your particular establishments; or they will make use of your own.”), reprinted in 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1745, 1790 (John P. Kaminski et al. eds., 2008).

108. THE FEDERALIST NO. 45, *supra* note 1, at 313 (James Madison); see also North Carolina Ratification Convention Debates (July 28, 1788) (remarks of Archibald Maclaine) (“The [federal] laws can, in general, be executed by the officers of the states. State courts and state officers will, for the most part, probably answer the purpose of Congress as well as any other. . . . State officers will as much as possible be employed, for one very considerable

In addition to worrying about abuses of power by tax collectors, Anti-Federalists also feared that a burgeoning federal bureaucracy would undermine support for state governments. Echoing earlier concerns about royal patronage, one prominent Anti-Federalist pamphleteer warned that federal collection of taxes would lead to a bureaucratic “system of influence.”<sup>109</sup> Hamilton responded, but again he significantly changed his tune, avoiding his prior rhetoric about creating a large corps of individuals loyal to the federal government. If the federal government wanted to expand its influence, Hamilton now explained in *Federalist No. 36*, it would try to “employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments.”<sup>110</sup> In other words, an ambitious federal government would likely try to co-opt the loyalties of state collection agents by giving them generous compensation for performing federal duties. But, he asserted, this scheme would actually increase the influence of states, because the federal government would become reliant on state officers.<sup>111</sup> Hamilton was

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reason—I mean, to lessen the expense.”), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787, at 140 (Jonathan Elliot ed., n.p., 2d ed. 1836); Virginia Ratification Convention Debates (June 12, 1788) (remarks of James Madison) (“Is it not in the power of the General Government to employ the State officers? Is nothing to be left to future legislation, or must every thing be immutably fixed in the Constitution?”), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1184, 1203 (John P. Kaminski et al. eds., 1993).

109. *Federal Farmer No. III* (Oct. 10, 1787) (“Should the general government think it politic, as some administrations (if not all) probably will, to look for a support in a system of influence, the government will take every occasion to multiply laws, and officers to execute them . . . .”), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 234, 240; *see also, e.g., Candidus No. II* (Dec. 20, 1787) (“The Constitution proposed . . . may give an undue influence to Congress, by the appointment of a numerous Body of officers.”), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 130, 135. As with the authorship of the Brutus essays, *see supra* note 103, scholars have debated Federal Farmer’s identity. Traditionally, scholars most often attributed the essays to Richard Henry Lee of Virginia. *See* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 215. But the modern trend is to attribute the essays to leading New York Anti-Federalist Melancton Smith. *See* Michael P. Zuckert & Derek A. Webb, *Introduction to THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, *supra* note 103, at xiv-xxi, xxvii-xxix (arguing that Smith’s authorship is more likely than Lee’s, though also positing that Smith may instead be the author of the Brutus essays).
110. THE FEDERALIST NO. 36, *supra* note 1, at 228 (Alexander Hamilton).
111. The Justices in *Printz* cited *Federalist No. 36* but misinterpreted Hamilton’s point. Justice Scalia concluded that the passage “surely suggests inducing state officers to come aboard by paying them, rather than merely commandeering their official services.” *Printz v. United States*, 521 U.S. 898, 914 (1997). In dissent, Justice Souter commented that he understood the passage to indicate that Congress could demand state administrative support but had

going out of his way to highlight the active role that state officers would play in the new government.

Debates about the judiciary repeated the same themes. For instance, George Mason, a leading Anti-Federalist in Virginia, warned his colleagues that the Constitution would “absorb and destroy the Judiciaries of the several states” by replacing them with federal courts.<sup>112</sup> Responding directly to Mason’s objection, Oliver Elsworth observed that “all the cases, except the few in which [the federal Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in the state courts and those trials be final except in cases of great magnitude.”<sup>113</sup> Edmund Pendleton, Virginia’s highest judicial officer, reiterated that argument at the ratification convention in Richmond. “For the sake of œconomy,” he stated, Congress might appoint state courts as inferior federal courts. “There is no inconsistency, impropriety, or danger,”

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“an obligation to pay fair value for it.” *Id.* at 975-76 (Souter, J., dissenting). But Hamilton was merely explaining how a power-seeking federal government would seek influence—namely, by paying state officers. From this assumption, Hamilton argued that states should not fear a federal spoils system, because it would only increase state influence. Of course, forcing state officers to perform federal duties without compensation would have been a less effective way of winning their loyalties.

112. George Mason, *Objections to the New Constitution*, MASS. CENTINEL, Nov. 21, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 149, 150 (John P. Kaminski et al. eds., 1983); see also Martin, *supra* note 106, at 379 (“[T]o have inferior courts appointed under the authority of Congress in the different States, would eventually absorb and swallow up the State judiciaries . . . [and] unduly and dangerously increase the weight and influence of Congress in the several States, be productive of a prodigious number of officers, and be attended with an enormous additional and unnecessary expence . . .” (emphasis omitted)).
113. [Oliver Elsworth], *A Landholder VI*, CONN. COURANT, Dec. 10, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 487, 490 (Merrill Jensen et al. eds., 1978); see also Civis Rusticus, *To Mr. Davis*, VA. INDEP. CHRON., Jan. 30, 1788 (“The judiciary of the United States have original jurisdiction only, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party—The convention has only crayoned the outlines, it is left to the Congress, to fill up and colour the canvas.” (emphasis omitted)), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 331, 336 (John P. Kaminski et al. eds., 1988). *But cf.* *Federal Farmer No. II* (Oct. 9, 1787) (“It is however to be observed, that many of the essential powers given the national government are not exclusively given; and the general government may have prudence enough to forbear the exercise of those which may still be exercised by the respective states. But this cannot justify the impropriety of giving powers, the exercise of which prudent men will not attempt, and imprudent men will, or probably can, exercise only in a manner destructive of free government.”), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 230, 233.

Pendleton argued, “in giving the State Judges the Federal cognizance.”<sup>114</sup>

Responding to some of these statements, modern proponents of the anticommandeering rule have rightly pointed out that Federalist promises regarding federal *use* of state officers do not necessarily presuppose that the federal government may *commandeer* those officers.<sup>115</sup> Perhaps, as Michael Collins argues, the Founders shared an implicit understanding that federal use of state officers required state permission, or at least was subject to state refusal. According to Collins, Federalists were “reluctant to mention the coercion word in connection with their suggestions, lest Anti-Federalist sensibilities be offended” by assertions of federal power.<sup>116</sup> Moreover, he posits, “the absence of any outcry” from Anti-Federalists in opposition to commandeering “is itself strong evidence that such a prospect was not part of the perceived message of *The Federalist*.”<sup>117</sup> Collins acknowledges that some proponents of states’ rights had previously pushed for commandeering, but he argues that these steps were otherwise unwanted concessions offered as “a quid pro quo for the Constitution’s noninclusion of any reference to lower federal courts.”<sup>118</sup> Once the Framers explicitly referred to inferior federal courts in Article III, Collins asserts, the proponents of states’ rights surely must have abandoned their support for commandeering.<sup>119</sup>

Collins, however, misappraises the Anti-Federalists’ priorities. During the impost controversy, defenders of state autonomy had insisted that hiring

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114. Virginia Ratification Convention Debates (June 20, 1788), reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE UNITED STATES CONSTITUTION 1412, 1427 (John P. Kaminski et al. eds., 1993).

115. See, e.g., *Printz*, 521 U.S. at 910-11 (“[N]one of these statements necessarily implies – what is the critical point here – that Congress could impose these responsibilities without the consent of the States. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government . . . .” (emphasis omitted)); Collins, *supra* note 8, at 140 (arguing that Prakash and others “move too quickly from the prospect that the federal government was empowered to seek assistance from, and to rely on, state officials to enforce and administer federal law, to the conclusion that state officials would be compelled to accept such employment”).

116. Collins, *supra* note 8, at 136.

117. *Id.* at 142.

118. *Id.* at 144.

119. *Id.* Collins’s principal argument is that it “would have been difficult for Anti-Federalists to argue in favor” of commandeering “given their usual rhetoric championing state and local prerogative against centralized power.” *Id.* at 136. Elsewhere, though, Collins dismisses the relevance of Roger Sherman’s support for commandeering as “the views of the losers.” *Id.* at 143 n.298 (quoting Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 774 n.111 (1984)).

federal collectors posed a greater threat to state sovereignty than commandeering state collectors. With the impost controversy coloring the entire debate, it was unnecessary for Federalists to explain that state officers would be compelled to enforce federal law. And surely contemporaries would not have thought that Federalist silence signaled a tacit denial of federal commandeering power.

Less clear was the availability of enforcement mechanisms to compel state officials to perform their legal duties. The legacy of the impost controversy strongly suggested that state officials would be legally obliged to enforce federal law, but as Hamilton once explained, “If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.”<sup>120</sup> Federalists said little in the ratification debates about what penalties might attach if state officers disobeyed federal commands. In one respect, though, the Constitution itself facilitated state-officer compliance, and Federalists and Anti-Federalists alike often pointed to that provision when referring to the federal commandeering power.

### *B. The Oath Clause*

By itself, evidence about implicit assumptions should not be dispositive of the Constitution’s original meaning. Direct acknowledgments of commandeering authority, however, arose during discussions about the Oath Clause. That provision declares that “Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”<sup>121</sup> Today we think of this Clause as requiring federal and state officers to swear allegiance to the United States.<sup>122</sup> For instance, current federal law requires officeholders to swear or affirm to “support and defend the Constitution of the United States against all enemies, foreign and domestic”—a phrasing that elides an implication of affirmative legal duties.<sup>123</sup> Indeed, understanding the federal

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120. THE FEDERALIST NO. 15, *supra* note 1, at 95 (Alexander Hamilton).

121. U.S. CONST. art. VI.

122. See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 301 (2005) (describing the Oath Clause as “oblig[ing] a host of state and federal policymakers to take personal oaths of allegiance”).

123. 5 U.S.C. § 3331 (2006). Of course, Founding-era judges also famously argued that taking an oath required them to assess the constitutionality of laws. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803); *Bayard v. Singleton*, 1 N.C. (Mart) 5, 6 (Super. Ct. L. &

oath as merely an oath of allegiance is so well ingrained that none of the existing literature identifies the Oath Clause as having any relevance to the Founders' views about commandeering.<sup>124</sup> Yet it was commonly thought at the Founding that an oath to "support" the Constitution implied that state officers would have to execute federal laws. Some Founders took the expansive view that a state officer's duty to enforce federal laws stemmed from the oath itself and therefore operated even without congressional direction. Others viewed the Oath Clause as affirming the duty of state officers to execute federal laws *when specifically directed* by Congress. Either way, though, ratification-era commentaries about the Oath Clause are inconsistent with the idea that commandeering is "fundamentally incompatible with our constitutional system of dual sovereignty."<sup>125</sup>

In the late 1780s, most state constitutions required that state and local officers take two oaths: an oath of allegiance and an oath of office.<sup>126</sup> An oath of allegiance generally required those officers to remain faithful to the state, whereas an oath of office was a promise to perform official duties. The Federal

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Eq. 1787) ("[T]he Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion . . .").

124. Cf. Prakash, *supra* note 12, at 1992-93 ("Although state judges are bound to the 'Constitution, and the Laws of the United States,' state executives are only bound by oath to support the Constitution, and not federal law.").

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

126. See, e.g., DEL. CONST. of 1776, art. 22 (providing that all public officials swear or affirm to "bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced," and that "all officers shall also take an oath of office"); MASS. CONST. of 1780, ch. VI, art. I (providing that all public officials take separate oaths to "bear true faith and allegiance to the said commonwealth" and to "faithfully and impartially discharge and perform all the duties incumbent on me"); MD. CONST. of 1776, art. XXXV ("That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion."); N.C. CONST. of 1776, art. XII ("That every person, who shall be chosen a member of the Senate or House of Commons, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall take an oath to the State; and all officers shall also take an oath of office."); PA. CONST. of 1776, § 40 (providing that all public officers take separate oaths to "be true and faithful to [the] commonwealth of Pennsylvania" and to "faithfully execute the office . . . according to law"); S.C. CONST. of 1778, ch. 2, art. XXXVI (providing that all public officers take an oath to "support, maintain, and defend the said State" and "serve the said State . . . with fidelity and honor, and according to the best of my skill and understanding"); see also VT. CONST. of 1786, art. XXVI (requiring all officeholders to take separate oaths of allegiance and office); cf. GA. CONST. of 1777, art. XIV (requiring all enfranchised persons, upon request, to take an oath "that I do owe true allegiance to this State, and will support the constitution thereof").

Constitution, however, required only that all legislative, executive, and judicial officers “shall be bound by Oath or Affirmation, to support this Constitution.”<sup>127</sup> When referring to federal officers, the Founders understood that the federal oath incorporated the guarantees of an oath of allegiance *and* an oath of office.<sup>128</sup> The Oath Clause, however, applied to officers “both of the United States and of the several States.”<sup>129</sup> Thus, as a textual matter, it is easy to see why some Founders thought that the Oath Clause implied that state and local officers would have affirmative federal duties.

Indeed, some members of the Founding generation suggested that the Oath Clause implied a presumptive duty to enforce all federal laws, even without direction from Congress. “All the state officers,” Anti-Federalist James Winthrop stated, “are . . . bound by oath to support this constitution.” Combined with the Supremacy Clause, he asserted, this provision “cannot be understood otherwise than as binding the state judges and other officers, to execute the continental laws in their own proper departments within the state.”<sup>130</sup> Prakash dismisses Winthrop’s argument out of hand, stating that

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127. U.S. CONST. art. VI, cl. 3. This provision originated with the Virginia Plan, which provided that “the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 22. My point is that many members of the Founding generation cited the Oath Clause when describing state-officer duties to enforce federal law. I am *not* arguing that the Framers of this provision intended (or did not intend) for the Oath Clause to imply such duties. For a useful summary of convention debates on this topic, see 2 JOHN R. VILE, THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING 539-40 (2005).
128. See *New-York, April 9*, N.Y. DAILY GAZETTE, Apr. 9, 1789 (noting that each congressman took the following “oath of office”: “I . . . a Member of the House of Representatives of the United States, do swear, (or affirm, as the case may be) that I will support the Constitution of the United States”), reprinted in 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 3, 4 (Charlene Bangs Bickford et al. eds., 1992). One grand jury in western Virginia described the oath requirement in the same terms with respect to state officials. See PAPERS OF THE CONTINENTAL CONGRESS, No. 78, VI, folio 373 (presenting as a grievance the state legislature’s failure to pass a law “prescribing the oath of fidelity & office under the federal Government”).
129. U.S. CONST. art. VI, cl. 3.
130. [James Winthrop], *Agrippa V*, MASS. GAZETTE, Dec. 11, 1787, reprinted in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 406, 407 (John P. Kaminski et al. eds., 1997). Winthrop made this observation in the context of a somewhat convoluted critique of the new federal judicial system and its potential displacement of state law. He did not, however, criticize the possibility that the federal government would require state executive officers to administer federal programs. Judge Samuel Spencer of North Carolina similarly observed that state officers “are to take an oath to carry into execution this general government.” North Carolina Ratification Convention Debates (July 29, 1788), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE

“state executives and legislatures are only bound to the Constitution and not to federal law.”<sup>131</sup> Many Founders, however, thought that the Oath Clause also applied to federal *laws* passed pursuant to valid constitutional authority.<sup>132</sup>

Several weeks after Winthrop’s editorial, Hamilton articulated in *Federalist No. 27* what seems to be a slightly different understanding of the Oath Clause. The Constitution, he wrote, would give the federal government power “to employ the ordinary magistracy of each [state] in the execution of its laws.”<sup>133</sup> Like Winthrop, Hamilton derived that power from the combined effect of the Supremacy Clause and the Oath Clause:

[T]he laws of the confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which, all officers legislative, executive and judicial in each State, will be bound by the sanctity of an oath. Thus the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its*

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FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787, at 153 (Jonathan Elliot ed., n.p., 2d ed. 1836). This followed Archibald Maclaine’s response to the argument that “the oath to be taken by [state] officers will tend to the subversion of our state governments and of our liberty.” North Carolina Ratification Convention Debates (July 28, 1788) (remarks of Archibald Maclaine), *supra* note 108, at 140. Maclaine, who had just explained that state officers would generally be used to administer federal law, *see supra* note 108, asked rhetorically, “Can any government exist without fidelity in its officers? Ought not the officers of every government to give some security for the faithful discharge of their trust?” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787, *supra* note 108, at 140.

131. Prakash, *supra* note 12, at 2001 n.231.

132. *See, e.g.,* De Witt Clinton, *A Countryman No. IV*, N.Y. J., Jan. 10, 1788 (“I find too, that all our state officers are to take an oath or affirmation to support this new constitution – now as they are bound by an oath to support our state constitution too . . . one day he may be bound by oath to observe a law made by his own government, and the next day out comes a law or treaty from the general government, by which he is obliged by oath to do the contrary . . .”), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 597-98 (John P. Kaminski et al. eds., 2004). For other examples, *see infra* pp. 1135-1137, 1149-1151, 1159, 1166, 1169. Clinton’s comment raises the interesting issue – unexplored in this Article – of commandeering under the treaty power. *Compare* A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 904 (2000) (“[The] record suggests that the Framers assumed that the power to make treaties was . . . the power to impose at least limited duties on non-federal officials.”), *with* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 426 (2003) (“[T]he evidence regarding the role of state officials in founding-era consular treaties . . . is deeply ambiguous.”).

133. THE FEDERALIST NO. 27, *supra* note 1, at 174 (Alexander Hamilton).

*just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.*<sup>134</sup>

According to Hamilton, the Oath Clause was not an independent source of authority for the government to legislate on particular topics. All national laws would still have to fit within “enumerated and legitimate” federal powers, such as taxation, coinage, and commerce. But within these areas, the Oath Clause implied (and would help effectuate) federal authority to commandeer state officers.<sup>135</sup>

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134. *Id.* at 174-75. Hamilton included a footnote saying: “The sophistry which has been employed to show that this will tend to the destruction of the State Governments will, in its proper place, be fully detected.” *Id.* at 175 n.\*. Hamilton’s reference is not entirely clear, but he may have been referring to Brutus’s remark that federal implied powers “would totally destroy all the powers of the individual states.” *Brutus No. V*, *supra* note 104, at 391; *see also Brutus No. I* (Oct. 18, 1787) (arguing that the Constitution would lead to “a complete consolidation of the several parts of the union into one complete government”), *reprinted in 2 THE COMPLETE ANTI-FEDERALIST*, *supra* note 100, at 363, 368. Brutus had also criticized the Constitution’s grant of “force at the command of the government, to compel obedience,” which he thought “destroys every idea of a free government; for the same force that may be employed to compel obedience to good laws, might, and probably would be used to wrest from the people their constitutional liberties.” *Brutus No. IV* (Nov. 29, 1787), *reprinted in 2 THE COMPLETE ANTI-FEDERALIST*, *supra* note 100, at 382, 384. A couple of days after Hamilton published *Federalist No. 27*, Brutus expanded upon his argument that the Federal Constitution would “totally destroy all the power of the state governments.” *Brutus No. VI*, *supra* note 106, at 394. Hamilton responded about a week later. *See THE FEDERALIST NO. 31*, *supra* note 1, at 196-98 (Alexander Hamilton).

135. The *Printz* majority said that understanding *Federalist No. 27* as endorsing commandeering would make “state legislatures subject to federal direction.” *Printz v. United States*, 521 U.S. 898, 912 (1997). Perhaps that is true, but it would hardly be inconsistent with Hamilton’s views. Just two weeks after writing *Federalist No. 27*, Hamilton plainly endorsed commandeering of state legislatures. *See THE FEDERALIST NO. 36*, *supra* note 1, at 226 (Alexander Hamilton) (“[T]he Fœderal Government may . . . have recourse to requisitions . . . .”). Earlier in the same essay Hamilton remarked, “The national Legislature can make use of the [tax-collection] system of each State within that State.” *Id.* While this passage might seem to refer to commandeering, Hamilton’s point was that the federal government need not develop its own system for assessing property values (for the purpose of levying direct taxes) because it could simply adopt state assessments as its own.

What Hamilton meant to say in *Federalist No. 27*, the *Printz* majority asserted, is that state officers must “enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law.” 521 U.S. at 913. The phrases “incorporated into the operations of the national government” and “rendered auxiliary to the enforcement of its laws,” however, plainly indicate state *participation* in administering federal laws, not just non-obstruction of the federal government’s own efforts. Moreover, Hamilton was showing that the Constitution “enable[s] the [federal] government to employ the ordinary magistracy of each [state] in the execution of its laws.” *THE FEDERALIST NO. 27*, *supra* note 1, at 174 (Alexander Hamilton). The *Printz* majority, by contrast, described these passages as

Madison also mentioned the Oath Clause in the context of commandeering, though his views are decidedly less clear. In *Federalist No. 44*, he briefly explained each of the constitutional provisions “by which efficacy is given to all the rest.”<sup>136</sup> The list of enabling provisions included the Necessary and Proper Clause, the Supremacy Clause, the federal executive and judicial branches, and the Oath Clause.<sup>137</sup> In his discussion of the Oath Clause, Madison explained why federal officers did not have a comparable duty to swear an oath to support state constitutions. State officials must take the federal oath, he argued, because they “will have an essential agency in giving effect to the Federal Constitution.”<sup>138</sup> Federal officials, by contrast, would not be required to enforce state laws. As an example, Madison commented that federal elections “will probably, for ever be conducted by the officers and according to the laws of the States.”<sup>139</sup> Like Hamilton, Madison was taking advantage of every available opportunity to emphasize the active role states would play in the federal system. His example of “essential agency,” however, was a *constitutional* duty of state officials rather than a duty imposed by Congress. Therefore, *Federalist No. 44* does not reveal Madison’s views regarding statutory commandeering.<sup>140</sup>

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Hamilton’s effort to explain “why the new system of federal law directed to individual citizens, unlike the old one of federal law directed to the States, will ‘bid much fairer to avoid the necessity of using force’ against the States.” 521 U.S. at 913 (quoting THE FEDERALIST NO. 27, *supra* note 1, at 174 (Alexander Hamilton)). In that excerpt, however, Hamilton was explaining why the Framers wanted to avoid a system in which the federal government could “only operate upon the States” through requisitions. THE FEDERALIST NO. 27, *supra* note 1, at 174 (Alexander Hamilton) (emphasis added). Moreover, “force” in this passage refers to military power—not legal compulsion. Cf. THE FEDERALIST NO. 15, *supra* note 1, at 95 (Alexander Hamilton) (discussing the possible use of federal “military force” against the states).

136. THE FEDERALIST NO. 44, *supra* note 1, at 302 (James Madison).

137. *Id.* at 302-05 (Necessary and Proper Clause); *id.* at 305-06 (Supremacy Clause); *id.* at 307-08 (executive and judicial branches); *id.* at 306-07 (Oath Clause).

138. *Id.* at 307.

139. *Id.*; see also Rufus King & Nathaniel Gorham, *Response to Elbridge Gerry’s Objections* (“[T]he Time place & manner of electing Representatives must in the first instance be prescribed by the state Legislatures . . . . [I]t is not a very probable supposition that a law of this Nature shd. be enacted by the Congress . . . .”), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 550, 550-51 (John P. Kaminski et al. eds., 1981).

140. *Federalist No. 44* was not a tacit acknowledgment of commandeering’s unconstitutionality, as the *Printz* Court believed. See 521 U.S. at 915 (“It is most implausible that the person who labored for that example of state executive officers’ assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws.” (emphasis added)). Instead, Madison’s decision to emphasize the role of state officials in organizing and administering federal elections had a compelling political rationale. Namely,

As just shown, the Oath Clause occasionally came up during the ratification debates as a textual clue to how the new government would operate. The Clause's role was relatively minor, though, because no one was openly questioning federal power to commandeer state executive and judicial officers. The argument enjoyed greater prominence during the First Congress, when such doubts began to appear. During ratification, however, the Anti-Federalists did question one form of federal power in a way that subtly revealed Founding-era attitudes and assumptions about commandeering. The issue surfaced during debates about the *posse comitatus*.

### C. *The Posse Comitatus*

Though mostly silent about which officers would enforce federal law, the Constitution explicitly gave Congress the power to “provide for calling forth the Militia to execute the Laws of the Union.”<sup>141</sup> Anti-Federalists generally preferred state administration of federal laws, and many worried that the power to call on state militias implied a corresponding lack of power to use civilian modes of law enforcement. Federal Farmer,<sup>142</sup> for instance, excoriated the Framers for choosing military rather than civilian means for enforcing federal laws:

I see no provision made for calling out the *posse committatus* [sic] for executing the laws of the union, but provision is made for congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military

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he was responding to the Anti-Federalists' allegations that “[t]he controul given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage.” Virginia Ratification Convention Debates (June 5, 1788) (remarks of Patrick Henry), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 943, 964 (John P. Kaminski et al. eds., 1990); *see* Virginia Ratification Convention Debates (June 14, 1788) (remarks of George Mason) (alleging that Congress may “take away the right of representation; or render it nugatory, despicable, or oppressive” by ordering that elections be held outside of the state, in which case citizens “should have to go so far that the privilege would be lost altogether”), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1258, 1291 (John P. Kaminski et al. eds., 1993); *see also* *Brutus No. IV*, *supra* note 134, at 386 (discussing the potential for abuse of the federal power to regulate elections); *Cato No. VII* (same), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 123, 124-25; Letter from Elbridge Gerry to the General Court (Oct. 18, 1787) (objecting that the people “have no security for the right of election”), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 94, 98 (John P. Kaminski et al. eds., 1997).

<sup>141</sup>. U.S. CONST. art. I, § 8.

<sup>142</sup>. For sources discussing Federal Farmer's identity, *see supra* note 109.

officers, instead of the sheriff to enforce an execution of federal laws, in the first instance and thereby introduce an entire military execution of the laws.<sup>143</sup>

In an era without public police forces, calling upon the *posse comitatus* was a universally accepted practice whereby a sheriff temporarily conscripted local citizens to assist him in enforcing the law.<sup>144</sup> Disobedience to state and local authorities was quite common, and therefore sheriffs often called upon the *posse*.<sup>145</sup> Federal Farmer did not explicitly endorse federal commandeering of citizens and their local sheriffs; rather, he criticized the Constitution for *omitting* such a power. Why should Congress be able to call upon militias when local *posses* would have been sufficient? Surely, Federal Farmer implied, this incongruity exposed invidious Federalist designs to usurp control over state militias.

Hamilton replied in *Federalist No. 29*. Federal Farmer's argument, he stated, exposed "a striking incoherence in the objections which have appeared . . . The same persons who tell us in one breath that the powers of the federal government will be despotic and unlimited, inform us in the next that it has not authority sufficient even to call out the POSSE COMITATUS."<sup>146</sup> Hamilton then put to rest any uncertainty regarding such a federal power:

It would be . . . absurd to doubt that a right to pass all laws *necessary* and *proper* to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be entrusted with the execution of those laws . . . . What reason could

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143. *Federal Farmer No. III*, *supra* note 109, at 242; *see also Brutus No. IV*, *supra* note 134, at 386 ("This power [to use the militia to enforce the law] is a novel one, in free governments—these have depended for the execution of the laws on the Posse Comitatus, and never raised an idea, that the people would refuse to aid the civil magistrate in executing those laws they themselves had made.").

144. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*343 (noting that, in executing his duties, the sheriff "may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county"). *See generally* Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 9-19 (2008) (discussing the history of the *posse comitatus*). Congress granted this power to federal marshals in the 1792 militia bill. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 355-56 (2002).

145. There is a well-developed literature on popular resistance to law enforcement in late-eighteenth-century America. *See, e.g.*, PAUL A. GILJE, RIOTING IN AMERICA 35-59 (1996).

146. THE FEDERALIST NO. 29, *supra* note 1, at 182 (Alexander Hamilton).

there be to infer that force was intended to be the sole instrument of authority merely because there is a power to make use of it when necessary?<sup>147</sup>

The context of Hamilton's exchange with Federal Farmer suggests that Hamilton was implicitly supporting federal commandeering of state executive officers. Federal Farmer's critique was that Congress could call on state militias but not on state civil law enforcement—namely, local sheriffs assisted by citizens of the county. In *Federalist No. 29*, Hamilton clarified that the Necessary and Proper Clause provides for implied federal power over civil law enforcement analogous to the enumerated federal power over state militias. In other words, Congress can require local *posses* to enforce federal laws just as it can require state militias to enforce federal laws.

Two counterarguments are worth considering. First, perhaps Hamilton was asserting congressional power to commandeer *citizens* but not state law-enforcement officers. Indeed, he specifically mentioned “requiring the assistance of the citizens.” Hamilton, however, plainly considered it within Congress's power to commandeer the *posse comitatus*, which was *always* led by public officials.<sup>148</sup> If anything, his reference to “the officers who may be entrusted with the execution of those laws” only clarifies his argument in *Federalist No. 27* that the Supremacy Clause and the Oath Clause would render state and local officers auxiliary to the enforcement of federal laws.

One might also object that the officers entrusted with the execution of the laws could have been federal marshals instead of local sheriffs.<sup>149</sup> Therefore,

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147. *Id.* at 182-83.

148. See Rao, *supra* note 144, at 11 (“[S]heriffs, constables, selectmen, jailers, bailiffs, and coroners” could call the *posse comitatus* “as a vital tool for enforcing the state’s vaunted powers to protect the citizenry’s health, safety, and property.”); *cf.* *Coyles v. Hurtin*, 10 Johns. 85, 87-89 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (holding that a valid *posse comitatus* requires that the sheriff be in the county and personally engaged in the enforcement action, but he need not always be in the immediate presence of the *posse*); *id.* at 89 (Spencer, J., dissenting) (noting that a sheriff cannot “authorize an arrest, by parol, he being absent at the time”).

149. For two ratification-era examples of Anti-Federalists anticipating federal sheriff positions, see Virginia Ratification Convention Debates (June 5, 1788), *supra* note 140, at 962, where Patrick Henry remarked that “the people will find two sets of tax-gatherers—the State and the Federal Sheriffs”; and *Federal Farmer No. XIII* (Jan. 14, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 301-02, which notes that “[t]o discern the nature and extent of this power of appointments, we need only to consider the vast number of officers necessary to execute a national system in this extensive country . . . these necessary officers [include] judges, state’s attorneys, clerks, sheriffs, [etc.] in the federal supreme and inferior courts . . .”

perhaps Hamilton was not presuming federal power over state officials. While plausible, this argument runs contrary to the context of Hamilton's debate with Federal Farmer. Their discussion centered on federal power over one state-based institution (the militia) and whether comparable power would exist over another state-based institution (the local *posse*).<sup>150</sup> Thus, when Federal Farmer mentioned sheriffs enforcing federal law, his readers would most likely have understood him as referring to local sheriffs, who were the only sheriffs then in existence.<sup>151</sup> The discussion in *Federalist No. 29* is not dispositive, but it supports the view that Hamilton envisioned Congress invoking the Necessary and Proper Clause to commandeer state officers.

Debates in the Virginia ratification convention paralleled the exchange between Federal Farmer and Publius. Several days into the convention, Anti-Federalist Green Clay voiced his concern that the power of Congress to call upon the militia to execute federal law needlessly risked "the establishment of a military Government."<sup>152</sup> Instead, the Framers should have provided "that the sheriff might raise the *posse comitatus* to execute the laws."<sup>153</sup> Clay then asked "why [militia enforcement] was preferred to the old established custom of executing the laws?"<sup>154</sup>

Madison was the first to respond. Civil law enforcement would not always be sufficient, he stated, "as the sheriff must be necessarily restricted to the *posse* of his own county."<sup>155</sup> Cases of necessity, he argued, may therefore compel Congress to use state militias to enforce federal law. But Madison clarified that he "did not by any means admit, that the old mode was superceded by the introduction of the new one."<sup>156</sup> That is, existing state civilian institutions would remain the primary mode of law enforcement. Madison's reference to county boundaries seems to clarify that the Virginia delegates were discussing the role of *local* sheriffs and their *posses*, not federal marshals.

Patrick Henry—the leading Anti-Federalist at the Virginia ratifying convention—was unsatisfied. In his reply to Madison, Henry seemingly took

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150. Although *posses* were local in character, the power to call upon the *posse* was a common law component of the police powers belonging to state governments.

151. See, e.g., Virginia Ratification Convention Debates (June 14, 1788), *supra* note 140, at 1274 (remarks of James Madison) (noting that a sheriff was limited to operating within county borders).

152. *Id.* (remarks of Green Clay).

153. *Id.*

154. *Id.*

155. *Id.* (remarks of James Madison).

156. *Id.*

for granted federal authority over state officials by virtue of the Oath Clause, but he rejected a comparable federal authority over “the civil power” of the people themselves. He began by criticizing the Constitution for not limiting federal uses of the militia to cases of necessity.<sup>157</sup> Henry, however, further asserted that “[t]he civil power is not to be employed at all . . . . I read [the Constitution] attentively, and could see nothing to warrant a belief, that the civil power can be called for. I would be glad to see the power that authorises Congress to do so.”<sup>158</sup> Instead, he warned, “[t]he sheriff will be aided by military force. The most wanton excesses may be committed under colour of this. For every man in office, in the States, is to take an oath to support it in all its operations.”<sup>159</sup> With these statements, Henry casually acknowledged that the debate was really about federal power to commandeer individual citizens. Neither Madison nor Henry expressed any doubt that the federal government could compel state officers to enforce federal law.

Echoing Madison’s earlier rebuttal, other Federalist delegates uniformly rejected Henry’s denial of federal power to call upon local *posses*. George Nicholas stated that “[t]he civil officer is to execute the laws on all occasions; and if he be resisted, this auxil[i]ary power is given to Congress, of calling forth the militia to execute them, when it shall be found absolutely necessary.”<sup>160</sup> Governor Edmund Randolph agreed:

Ought not common sense to be the rule of interpreting this Constitution? Is there an exclusion of the civil power? Does it provide that the laws are to be inforced by military coercion in all cases? No,

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157. *Id.* at 1277 (remarks of Patrick Henry) (“[M]ilitary power ought not to interpose till the civil power refused.”). The Founders, of course, would readily have anticipated disobedience of this kind, especially in light of Shays’s Rebellion. See, e.g., Diary of William Maclay (Feb. 9, 1791) (“[I]n my Opinion, [an excise law] could not be enforced by Collectors or Civil Officers of any kind [in western Pennsylvania] be they ever so numerous And that nothing Short of a permanent Military force could effect it.”), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 377, 377-78 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

158. Virginia Ratification Convention Debates (June 14, 1788), *supra* note 140, at 1277 (remarks of Patrick Henry). Two days later, Madison responded:

There is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the Sheriff or Constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause.

*Id.* at 1303.

159. *Id.* at 1277 (remarks of Patrick Henry).

160. *Id.* at 1281 (remarks of George Nicholas).

Sir. All that we are to infer, is, that when the civil power is not sufficient, the militia must be drawn out.<sup>161</sup>

At the end of this onslaught, Green Clay responded that “he might be mistaken with respect to the exclusion of the civil power in executing the laws.”<sup>162</sup>

Building on Hamilton’s argument in *Federalist No. 29*, the Virginia Federalists vehemently rejected any notion that Congress would lack authority to employ the usual mode of enforcing the law. Their views strongly suggest a federal power to commandeer local sheriffs. Yet perhaps the most significant feature of these debates is how they reflect the Anti-Federalists’ broader priorities. Federal Farmer, Green Clay, and Patrick Henry, among others, criticized the Constitution not because it provided for the commandeering of state militias but because it omitted a comparable power over more benign methods of state law enforcement.<sup>163</sup> In other words, as with the debate over federal tax collection, disputes over federal power to call upon local *posses* reflected different federalism concerns than those most prevalent today.

### III. EARLY CONGRESSIONAL PRACTICE

Given Federalists’ repeated promises to enforce federal laws using state officers, one might have expected the new government to do just that. Yet these assurances went unfulfilled. Instead, Federalists quickly reverted to the position they had taken during the impost controversy, overwhelmingly

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161. *Id.* at 1288; *see also id.* at 1293 (remarks of Henry Lee) (“But Gentlemen say, that we must apply to the militia to execute the constitutional laws, without the interposition of the civil power, and that a military officer is to be substituted to the Sheriff in all cases . . . I am astonished that Gentlemen should attempt to impose so absurd a construction upon us.”).

162. *Id.* at 1294 (remarks of Green Clay).

163. Indeed, many Anti-Federalists supported federal power to call upon state militias. *See, e.g.*, Madison, *supra* note 95, at 245 (reporting the New Jersey Plan’s proposal that “if any State, or any body of men in any State shall oppose or prevent [the] carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth [the] power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties”); James Madison, Notes on the Ratification Convention Debates (Aug. 18, 1787) (“Mr. Mason introduced the subject of regulating the militia. He thought such a power necessary to be given to the Genl. Government.”), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 324, 326; The Political Club of Danville, Kentucky, Debates over the Constitution (Feb. 23-May 17, 1788) (“Mr Innes etc contended that the P[osse] Com[itatus] is to all intents a Military Force & such force necessary to enforce the Collection of Taxes.”), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 408, 414 (John P. Kaminski et al. eds., 1988).

supporting the creation of federal offices. To some extent this move was predictable. Hamilton, for instance, made his sentiments well known during the impost debates. But the Federalist agenda also benefitted from Anti-Federalist missteps—particularly their ham-fisted efforts to stave off dual office holding<sup>164</sup>—leaving Federalists able to achieve their policy objectives with little political cost.

Still, Anti-Federalists did not roll over without a fight. Anti-Federalist congressmen urged their colleagues to use state officers rather than create a federal bureaucracy. And when Federalists responded with apprehension, Anti-Federalists insisted that state officers would be compelled by law and bound by their oaths to follow through on their federal responsibilities. That is, Anti-Federalists cited the same commandeering power that Hamilton had described in *Federalist No. 27*.

*A. Federalist Ambitions*

With the nation's finances in shambles, the Washington Administration and its Federalist allies in Congress predictably put a federal impost atop their legislative agenda. Madison seems to have retained hope that the new government would use state officers to collect the tax.<sup>165</sup> Most of his colleagues,

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164. Dual office holding, as the name suggests, refers to the holding of two offices by the same individual. The practice was of particular concern to the Founding generation, as the King and his subordinates had obtained great influence over many officeholders by giving them a title or office that was prestigious or lucrative. See *supra* notes 35-43 and accompanying text. For later steps against dual office holding, see *infra* note 209 and accompanying text.

165. See H.R. Debate (May 9, 1789) (remarks of Rep. James Madison) (“A duty collected under the feeble operation of the state governments, cannot be supposed beyond our powers, when those duties have been collected by them, with feeble powers, but under a competition, not to say opposition of the neighbouring states.”), reprinted in 12 THE PAPERS OF JAMES MADISON 144, 145 (Charles F. Hobson & Robert A. Rutland eds., 1979). Madison’s reference here is to *effective* federal power, not legal authority. Arthur Lee described Madison’s apparent change of opinion on the subject of state collectors:

The first business of the House of Representatives was the impost[.] They were proceeding on a temporary Bill . . . . But Mr. Fitzsimmons arriving from Philadelphia turnd Madison directly about & with him the House, so that abandoning the temporary plan they proceeded upon discussing at leisure, a permanent system of enumerated Articles, penal Laws &c. &c. which will involve the appointment of all the officers . . . .

Letter from Arthur Lee to Francis Lightfoot Lee (May 9, 1789), in 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 491, 491-92 (Charlene Bangs Bickford et al. eds., 2004). The next day, Madison reported:

however, disagreed. When the House of Representatives briefly considered a bill in May 1789 providing that “the regulations *and the officers* of [states with impost taxes] should be made use of for federal purposes,”<sup>166</sup> the Federalist response was overwhelmingly hostile. John Laurance of New York argued that the proposal “was radically bad and defective.”<sup>167</sup> State collections would be insufficient given that “the duties imposed in the different states [were] . . . upon [a] . . . much lower scale than the federal system,” and that “[t]he modes of collection in the different states were also very dissimilar.”<sup>168</sup> Such a system would thus lead to “great inequality in the general collection.”<sup>169</sup> Instead, Laurance “wished that the government would set out in the first instance with a general and original system of regulations, operating uniformly, and embracing all the states and all objects alike.”<sup>170</sup> A chorus of representatives enthusiastically agreed.<sup>171</sup>

Later debates over the Judiciary Act of 1789 demonstrated persistent Federalist opposition to entrusting state officials with federal duties. “[I]t would be [suicide] to trust the collection of the revenue of the United States to the state judicatures,” William Loughton Smith proclaimed, because “[t]he disinclination of the judges to carry the law into effect, their disapprobation of a certain duty, the rules of the court or other obvious causes might delay or

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The plan of temporary collection, by a general adoption of the existing regulations of the States is also before the H. of Reps. A Uniform plan will in a day or two follow it from the Committee appointed to report the proper mode. The House will be able to make their election, between the two.

Letter from James Madison to Edmund Randolph (May 10, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 7, at 147, 147 (Charles F. Hobson & Robert A. Rutland eds., 1979).

166. H.R. Debate (May 18, 1789) (emphasis added), *reprinted in* 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, *supra* note 128, at 714, 714. The proposal was apparently spearheaded by Elbridge Gerry. See LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 391-92 (1948).
167. H.R. Debate (May 18, 1789), *supra* note 166, at 714. For the political leanings of the various members of Congress mentioned throughout this Article, see Office of the Clerk of the U.S. House of Representatives, *Biographical Directory of the United States Congress, 1774 to Present*, CONGRESS.GOV, <http://bioguide.congress.gov> (last visited Oct. 29, 2012). Organized political parties did not emerge until later in the 1790s, but the labels “Federalist” and “Anti-Federalist” remain useful as easily understood markers of an individual’s political leanings.
168. H.R. Debate (May 18, 1789), *supra* note 166, at 714 (remarks of Rep. John Laurance).
169. *Id.*
170. *Id.* at 715.
171. *Id.* Some congressmen also argued that the bill was unconstitutional because it did not create a *uniform* system of taxation. See, e.g., *id.*

frustrate the collection of the revenue, and embarrass the national government.”<sup>172</sup> Theodore Sedgwick concurred, emphasizing that state agents would remain accountable primarily to state authorities: “Suppose a state government was inimical to the federal government, and its judges were attached to the same local policy, they might refuse or neglect to attend to the national business.”<sup>173</sup> Without the power to remove disobedient state officers, Sedgwick claimed, the federal government should doubt state officers’ commitment to federal objectives.<sup>174</sup> At no point, however, did Smith or Sedgwick say that state officials could, consistent with their legal duties, simply refuse to enforce federal law.<sup>175</sup>

What had become of the Federalists’ ratification promises? Some scholars have treated these prior assurances as reflecting Federalists’ genuine desire to entrust federal responsibilities to state officers.<sup>176</sup> This reliance on the Federalists’ public statements is misplaced. For Federalists such as Hamilton who had long been committed to creating federal offices, their ratification-era assurances seem to have been little more than a necessary political compromise. Indeed, it would have been tactically foolish for Hamilton and his political allies not to yield some ground regarding federal use of state officers after recent attempts to amend the Articles of Confederation had failed largely because of New York’s refusal to back down on precisely that issue. Once ratification had been secured, though, Federalists had little reason to actually use state officers. Madison, on the other hand, showed greater willingness after ratification to consider using state officers to enforce federal law,<sup>177</sup> thus

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172. H.R. Debate (Aug. 29, 1789) (remarks of Rep. William Loughton Smith), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1348, 1350 (Charlene Bangs Bickford et al. eds., 1992).

173. *Id.* (remarks of Rep. Theodore Sedgwick).

174. *Id.* at 1369; *see also* William Paterson, Notes for the Debate on the Judiciary Act (June 23, 1789) (“Shall we suffer Men so situated to mingle in our federal Adm[inistratio]n . . . Do not give up the Power of collecting your own Revenue – you will collect Nothing – The State Officers will feel it their Interest to consult the Temper of the People of the State in which they live rather than that of the Union.”), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 475, 476 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

175. The Founders, of course, were all too familiar with this distinction between *lawful* authority and *effective* authority.

176. *See, e.g.,* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 117 (2003) (“In enforcing the law, the Federalists wished to avoid the construction of dual sets of *administrations*, one federal and one state, in favor of employing the same officers in dual *capacities*.”).

177. *See* H.R. Debate (May 9, 1789), *supra* note 165, at 145-46 (remarks of Rep. James Madison).

suggesting that his earlier protestations may have been more heartfelt, or at least that he continued to feel politically constrained.

In addition to their policy arguments, Federalists in the House also cited a range of constitutional objections to using state judges. Egbert Benson of New York, for example, posited that “the words in the constitution are plain and full” with respect to establishing inferior courts and therefore “must be carried into operation.”<sup>178</sup> Meanwhile, Fisher Ames and James Madison insisted that Article III mandated that the judges presiding over federal cases must have life tenure and protected salaries. Because most state judiciaries did not have these protections, Ames and Madison argued, inferior federal courts were constitutionally necessary.<sup>179</sup> Then, in what seems to have been the first articulation of the anticommandeering doctrine, Ames remarked:

In some of the States I know the judges are highly worthy of trust; they are safeguards to government, and ornaments of human nature. But whence would they get the power of trying the supposed action? The States under whom they act, and to whom alone they are amenable never had any such power to give, and this government never gave them any. We may command individuals: But what right have we to require the servants of the States to serve us[?]<sup>180</sup>

Several days later Ames commented in a letter to a friend that “if the servants of the states are of course, or can be made by law, the servants of the U.S. it will produce a strange confusion of offices & ideas.”<sup>181</sup> Federal power to compel state court jurisdiction over federal cases, he argued, would suggest analogous power to mandate state treasurers “to keep & pay out our money—or the

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178. H.R. Debate (Aug. 29, 1789), *supra* note 172, at 1368 (remarks of Rep. Egbert Benson).

179. *Id.* at 1358 (remarks of Rep. Fisher Ames); *see also* H.R. Debate (Aug. 29, 1789) (remarks of Rep. James Madison) (observing that “he did not see how it could be made compatible with the constitution, or safe to the federal interests to make a transfer of the federal jurisdiction to the state courts,” especially because federal judges were required to have life tenure and protected salaries), *reprinted in* 12 THE PAPERS OF JAMES MADISON 367, 368 (Charles F. Hobson & Robert A. Rutland eds., 1979); Letter from Fisher Ames to John Lowell (July 28, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1155, 1156-57 (Charlene Bangs Bickford et al. eds., 2004); Letter from Fisher Ames to John Lowell (July 11, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1002, 1003 (Charlene Bangs Bickford et al. eds., 2004).

180. H.R. Debate (Aug. 29, 1789), *supra* note 172, at 1358 (remarks of Rep. Fisher Ames).

181. Letter from Fisher Ames to John Lowell (Sept. 3, 1789), *in* 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1456, 1457 (Charlene Bangs Bickford et al. eds., 2004).

sheriff to keep our rogues, & declare their bonds valid to secure their doing it.”<sup>182</sup> Ames, in other words, was openly questioning federal commandeering power. But, he observed shortly afterward, “the house did not appear to understand my doctrine.”<sup>183</sup>

Anti-Federalists rebuffed these constitutional arguments. Michael Stone of Maryland, for instance, argued that the Federalists’ own proposal granted concurrent state court jurisdiction, thus undercutting Ames’s and Madison’s argument that state courts were barred by Article III from hearing federal cases. Moreover, he asserted, the Constitution recognized that Congress “may delay from time to time, the institution of national courts,” thus indicating that lower federal courts are not required at all. Such delay in creating federal courts, Stone said, would be perfectly acceptable because “state judges are bound to take cognizance of the laws of the United States, and are sworn to support the general government.”<sup>184</sup> Samuel Livermore of New Hampshire agreed that Congress may compel state judges to hear federal cases. “It has been said that this government cannot be carried into execution, unless we establish inferior courts,” he remarked, “because the state judges would not be bound to carry our laws into execution. I will just read a few words in the constitution in order to determine this point.”<sup>185</sup> Livermore then read the Oath Clause, followed by the Supremacy Clause, and remarked that they provided “a clear answer to all the objections drawn from that source.”<sup>186</sup> Elbridge Gerry did not disagree but pointed out that if a state prohibited its judges from hearing federal cases, a federal law that nonetheless imposed duties on state courts would have to be “necessary to carry into operation the constitution of the union.”<sup>187</sup> In other words, Congress may commandeer state officers, but if

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182. *Id.* at 1457. Ames continued: “If Judicial officers are not bound to execute our laws, as our servants, we cannot trust them—and if they are, why are ministerial officers less our servants? It seems to me that the Argumentum, ex absurdo, will be found to have some force.” *Id.*

183. Letter from Fisher Ames to John Lowell (Sept. 13, 1789), *quoted in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 507 n.3 (Maeva Marcus et al. eds., 1992).

184. H.R. Debate (Aug. 29, 1789), *supra* note 172, at 1372 (remarks of Rep. Michael Stone).

185. H.R. Debate (Aug. 31, 1789) (remarks of Rep. Samuel Livermore), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1375, 1389.

186. *Id.* at 1390 (remarks of Rep. Samuel Livermore). Interestingly, Livermore later denied the power of the federal government to enforce state laws. *See* 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS 64 (1997).

187. H.R. Debate (Aug. 31, 1789), *supra* note 185, at 1390 (remarks of Rep. Elbridge Gerry) (commenting that Livermore “extended the sixth article of the constitution too far, for the

a state refuses to cooperate, Congress must satisfy the Necessary and Proper Clause in order to override state law. For Gerry, commandeering was not inherently improper.<sup>188</sup>

During these debates, Anti-Federalists cited the Oath Clause in two interrelated ways. First, the Oath Clause helped them respond to the Federalist criticism that reliance on state courts would be plagued by the “disinclination of [state] judges to carry the law into effect.”<sup>189</sup> The national government did not need direct supervisory control over state officers, Anti-Federalists argued, because these officers were bound by oath to fulfill their federal responsibilities. But this is not all they were arguing. Anti-Federalists were also responding to Fisher Ames’s doubts about federal power “to require the Servants of the States to serve us.”<sup>190</sup> The Oath Clause helped answer that objection by showing that the Constitution had actually anticipated that state “servants” would serve the federal government. In other words, the Oath Clause both implied and helped effectuate federal commandeering power.

Senate debates on the Judiciary Act also included a brief exchange about commandeering. Like his colleagues in the House, Anti-Federalist Richard Henry Lee of Virginia argued that the jurisdiction of federal courts should be limited to admiralty cases.<sup>191</sup> Senator William Maclay, a Federalist from Pennsylvania, replied that this proposal was unconstitutional because Article III had “expressly extended” the jurisdiction of federal courts to all federal questions, thus precluding state court jurisdiction over federal issues.<sup>192</sup> Lee responded that Maclay’s interpretation of the Constitution was untenable

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state judges would not be bound by any law altering the state constitution, unless such law was necessary to carry into operation the constitution of the union”). Gerry had stated earlier in the debate that “the laws and constitutions of some states expressly prohibit the state judges from administering, or taking cognizance of foreign matters.” *Id.* at 1386.

188. One could argue that Gerry was talking about implementing the Constitution itself rather than federal law, but that reading would be in deep tension with Gerry’s reference to the Supremacy Clause and the Necessary and Proper Clause—both of which explicitly mention federal law—and with Gerry’s later endorsement of commandeering. *See infra* note 252 and accompanying text.

189. *See supra* note 172 and accompanying text.

190. *See supra* note 180 and accompanying text.

191. Diary of William Maclay (June 22, 1789), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 85, 85 (Kenneth R. Bowling & Helen E. Veit eds., 1988). Virginia also proposed a constitutional amendment prohibiting Congress from creating inferior courts other than admiralty courts. *See* Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of its History*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, at 153 (Washington, D.C., Gov’t Printing Office 1897).

192. Diary of William Maclay (June 22, 1789), *supra* note 191, at 85.

because “the State Judges would be all Sworn to support the Constitution” and must “of course execute the Federal laws.”<sup>193</sup> In other words, Lee was repeating the expansive interpretation of the Oath Clause that Anti-Federalist James Winthrop had articulated over a year earlier.<sup>194</sup>

Once more, Maclay stood to speak. “[T]he Oath taken by the State Judges,” he opined, “would produce quite a contrary effect.”<sup>195</sup> Because the Constitution vested federal jurisdiction solely in federal courts, he argued, “of Course the State Judges in Virtue of their Oaths, would abstain from every Judicial Act under the federal laws, and would refer all such Business to the federal Courts.”<sup>196</sup> Although the contemporary records are somewhat unclear, Maclay (or perhaps one of his colleagues) may also have observed that Lee’s argument with respect to the Oath Clause “proves too much . . . . The Oath is in Nature of an Oath of Allegiance, and not an Oath of Office.”<sup>197</sup> Therefore, Congress “[c]annot compel [state judges] to act—or to become our Officers.”<sup>198</sup> No further debates are recorded on this issue, so it is unclear how

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193. Diary of William Maclay (June 23, 1789) (punctuation edited for clarity), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 86, 87 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

194. *See supra* note 130 and accompanying text.

195. Diary of William Maclay (June 23, 1789), *supra* note 193, at 87.

196. *Id.* (punctuation edited for clarity). Maclay remarked that Lee’s argument was “very singular.” *Id.* The only unusual aspect of Lee’s argument, however, was his view that the Oath Clause itself imposed obligations on state officials. The idea that the oath *implied* federal power to commandeer state officials by statute was, if anything, conventional.

197. William Paterson’s Notes on Judiciary Bill Debate and William Paterson’s Notes for Remarks on Judiciary Bill (June 22, 1789), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 183, at 410, 412.

198. *Id.* The entire excerpt from this section reads as follows:

Cannot compel them to act—or to become our Officers—

How as to Jayls—what Power over Sheriffs—  
Gov. of Laws.

When a Crime is created, who shall have Jurisd<sup>n</sup> of it—you must enlarge the  
Jurisd<sup>n</sup> of a State Court.

The Const<sup>n</sup> points out a Number of Articles, which the federal Courts must  
take up.

The objects are not different—they legislate upon Persons and Things—  
Corporations shew the actual Existence of distinct Jurisd<sup>ns</sup>

The Const<sup>n</sup> has made the Judges of the several States the Judges of the  
Union; because they have taken an Oath to observe the Const<sup>n</sup>—  
This proves too much—

Instance the State Legislatures.

other Senators viewed federal power to commandeer state judges. When Congress finally passed the Judiciary Act several months later, however, it

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The Oath is in Nature of an Oath of Allegiance, and not an Oath of Office—

*Id.*; see also Paterson, *supra* note 174, at 477 (same). Placing this excerpt atop his 158-page article, Collins attributes these words to William Paterson—one of the authors of the Supremacy Clause. See Collins, *supra* note 8, at 40 & n.1. Later, Collins states that “[g]iven Paterson’s relationship to the [Supremacy] [C]lause, his views provide especially compelling evidence of contemporary understandings on the issue of state court duties.” *Id.* at 153 n.325. It is doubtful, however, that Paterson ever uttered these words. As William Casto has observed, these notes “are either Paterson’s random ideas that he decided not to incorporate in the final draft of his speech or his notes of points made by other Senators during the initial debates.” William R. Casto, *The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction*, 26 B.C. L. REV. 1101, 1127 (1985). Indeed, Paterson often took notes “without indicating who was speaking.” Kenneth R. Bowling & Helen E. Veit, *Afterword* to H.R. Debate (June 23, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, *supra* note 128, at 483, 483 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

My own interpretation of these materials is consistent with Casto’s. Paterson took abbreviated notes of Senate debates on roughly legal-sized sheets of paper, with each page recording approximately forty to fifty lines. Casto, *supra*, at 1136-41. On the pages identified with the debates of June 22-23, lines 1 to 23 record debates preceding Paterson’s speech notes. *Id.* at 1128-29. Lines 24 to 45 are a very brief sketch of Paterson’s speech, which is outlined in more detail from lines 46 to 142. Compare *id.* at 1129 (line 25), with *id.* at 1130 (lines 93-103), and *id.* at 1134-35 (lines 82-91). Lines 143 to 180 then bounce between topics. Based on a comparison of Paterson’s and Maclay’s notes, lines 151 to 167 of Paterson’s notes may be notes of a Maclay speech on June 23. Compare *id.* at 1132 (lines 165-67) (“The Const<sup>n</sup>. points out a Number of Articles, which the federal Courts must take up.”), with Diary of William Maclay (June 23, 1789), *supra* note 193, at 86 (“I rose and read over from the Constitution a number of the powers of Congress—Viz. collecting Taxes duties imposts, ~~reg~~ naturalization of Foreigners [etc.] . . . [and] declared that no force of Construction. could bring these Cases within Admiralty or maritime Jurisdiction—and Yet all these Cases, were most expressly the Province of the Federal Judiciary.”). Then, perhaps lines 168 to 175 are notes of Lee’s reply. Compare Casto, *supra*, at 1132 (“The Const<sup>n</sup>. has made the Judges of the several States the Judges of the Union; because they have taken an Oath to observe the Const<sup>n</sup>.”), with Diary of William Maclay (June 23, 1789), *supra* note 193, at 87 (“Mr. Lee after some time opposed me with a very singular argument, He rose and Urged that the State Judges would all be Sworn to support the Constitution. That they must obey their Oath, and of course execute the Federal laws . . .”). Then, lines 176 to 180 may represent Maclay’s rejoinder. Compare Casto, *supra*, at 1132 (“Instance the state legislatures. The Oath is in Nature of an Oath of Allegiance, and not an Oath of Office—”), with Diary of William Maclay (June 23, 1789), *supra* note 193, at 87 (“I rose and opposed to this. that ~~the very Effect~~ ~~of~~ the Oath taken by the States Judges, would produce quite a contrary effect.”). Line 180 was Paterson’s 56th line on the back of his second page. Perhaps he then continued recording the June 23 debates on a new sheet. This hypothesis fits harmoniously with Casto’s identification of a new sheet on which Paterson recorded the debate following the discussion of the Oath Clause. See Casto, *supra*, at 1137. Regardless of whether my suppositions are accurate, though, Paterson’s notes on the Oath Clause probably reflect one senator’s views on the subject. Whether Paterson shared these views is unknown.

rejected both Maclay's and Lee's proposals, instead giving federal courts exclusive jurisdiction over some federal claims but also giving state courts concurrent jurisdiction over others.<sup>199</sup>

Modern defenders of anticommandeering doctrine acknowledge some support for commandeering among states' rights proponents during the Articles of Confederation and at the 1787 Constitutional Convention. Nonetheless, they argue that this support was simply "a quid pro quo" in exchange for constitutional constraints against the development of a federal bureaucracy, and that Anti-Federalist support for commandeering evaporated after such constraints were rejected under the new Federal Constitution.<sup>200</sup> This argument has logical appeal, but it is resoundingly disproved by historical evidence. Anti-Federalists in the First Congress did not back away from their prior support for commandeering. Their continued reliance on commandeering suggests that they never viewed that power as simply a pre-ratification bargaining chip. Rather, commandeering remained an integral part of their argument for limiting the size of the federal government.

Although perhaps counterintuitive, it is crucial to realize that federal commandeering power actually *bolstered* the Anti-Federalist agenda. Federalist leaders, "recalling the feebleness of the Confederation in its relations with the states, did not look with favor upon further reliance on state officers."<sup>201</sup> The Anti-Federalists knew this. They were not idiots or ideologues, and they understood that voluntary compliance was not a recipe for effective government. If federal duties placed on state officials were always subject to the whims of state politics, the Federalists in Congress would surely have avoided state-based law enforcement. But with Congress able to compel state-officer compliance, moderates like Madison might go along. In other words, commandeering remained essential to the political viability of the Anti-Federalists' agenda. Having your hands tied, they wisely recognized, is not always a disadvantage.

### *B. Virginia's Disqualifying Act*

Though Anti-Federalists in Congress were pushing for state-based administration of federal law, other Anti-Federalists took steps that had the unintended effect of frustrating that agenda. About six months after Virginia

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199. Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79.

200. See, e.g., *Haywood v. Drown*, 556 U.S. 729, 748 n.2 (2009) (Thomas, J., dissenting) (citing Collins, *supra* note 8, at 144).

201. WHITE, *supra* note 166, at 390-91.

had ratified the Constitution, the state's Anti-Federalist legislature passed a bill "to disable certain officers under the continental government, from holding offices under the authority of this commonwealth."<sup>202</sup> The statute (the "Disqualifying Act") provided that any state officer receiving a commission or payment from the federal government would immediately forfeit his state office, though it also specified that "such disqualification shall not extend to militia officers, or the magistrates of county courts."<sup>203</sup> This Act assisted the Federalist agenda by creating a substantial barrier to the effective federal use of state officers.

On its face, the Disqualifying Act was perfectly consistent with commandeering, and indeed both were aimed at lessening the potential for federal influence. Proponents of the bill worried that the federal government would use offices and salaries to co-opt the loyalties of state officers—an understandable concern given Hamilton's comments to that very effect in *The Federalist*.<sup>204</sup> During the ratification debates, for instance, Patrick Henry had warned of "rich, fat Federal emoluments" tied to "your rich, snug, fine, fat Federal offices."<sup>205</sup> Compared to "Federal allurements," he lamented, state

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202. Act of Dec. 8, 1788, reprinted in 12 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 32, at 694-95. The bill stated, in relevant part:

[W]hereas it is judged expedient and necessary, that all those who shall be employed in the administration of the said [federal] government, ought to be disqualified from holding, or administering any office, or place whatsoever, under the government of this commonwealth: *Be it therefore enacted by the General Assembly*, That the members of the congress of the United States, and all persons who shall hold any legislative, executive, or judicial office, or other lucrative office whatsoever, under the authority of the United States, shall be ineligible to, and incapable of holding any seat in either house of the general assembly, or any legislative, executive, or judicial office, or other lucrative office whatsoever, under [sic] the government of this commonwealth: *Provided nevertheless*, That such disqualifications shall not extend to militia officers, or the magistrates of county courts.

*Id.* The bill passed by a vote of seventy-one to fifty-two in Virginia's House of Delegates. See Letter from Edward Carrington to James Madison (Nov. 18, 1788), in 11 THE PAPERS OF JAMES MADISON, at 351, 351-52 (Robert A. Rutland & Charles F. Hobson eds., 1977).

203. See Act of Dec. 8, 1788, *supra* note 202.

204. See, e.g., THE FEDERALIST NO. 36, *supra* note 1, at 228 (Alexander Hamilton) (noting the possibility that the federal government might want "to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments"); see also THE FEDERALIST NO. 73, *supra* note 1, at 493 (Alexander Hamilton) ("[A] power over a man's support is a power over his will.").

205. Virginia Ratification Convention Debates (June 12, 1788), *supra* note 108, at 1217 (remarks of Patrick Henry). Henry also worried that even "Justices of the Peace and militia

compensations were “poor” and “contemptible.”<sup>206</sup> If state judges gained federal commissions, Henry warned, they would “combine against us with the General Government.”<sup>207</sup> These same concerns had animated the Virginia legislature’s revocation of its impost authorization just six years earlier, when state legislators feared that congressmen were seeking “the appointment of a number of Officers dependent on them, & so to gain an undue Influence in the States.”<sup>208</sup> Virginia’s Anti-Federalists, in other words, were acting on longstanding Whig fears of dual office holding, not out of any opposition to commandeering. In fact, Anti-Federalists’ support for commandeering and their simultaneous moves to prevent dual office holding were common efforts to stem the corrupting effect of federal patronage.<sup>209</sup>

But however well intentioned the idea might have been, many Federalists smelled a sinister effort to undermine the nascent federal government. Edward Carrington, one of Madison’s friends serving in the Virginia assembly, described the Disqualifying Act as “the most striking evidence of Phrenzy, that madmen could have given, because it discovers the most wicked design to

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officers . . . are bound by oath in favour of the Constitution. A constable is the only man who is not obliged to swear paramount allegiance to this beloved Congress.” *Id.*

206. *Id.*

207. Virginia Ratification Convention Debates (June 20, 1788), *supra* note 114, at 1419. Henry seems to have been the bill’s most important advocate; Virginia Governor Edmund Randolph wrote to Madison that the legislature was considering “excluding all federal officers, except the military, from posts in the states: The patrons differ in the principles, and the scheme may possibly be abortive from this cause. But [Patrick] H[enr]y is decided in its favor; and all powerful.” Letter from Edmund Randolph to James Madison (Nov. 5, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 7, at 335, 336 (Robert A. Rutland & Charles F. Hobson eds., 1977). I examined the Patrick Henry Papers and Richard Henry Lee Papers at the Library of Congress and the Lee Papers at the University of Virginia but did not uncover any additional evidence regarding Anti-Federalist motives. I cannot tell whether Anti-Federalists understood the negative repercussions the bill would have in Congress.

208. Letter from Edmund Pendleton to James Madison (May 4, 1783), in 7 THE PAPERS OF JAMES MADISON, *supra* note 7, at 12, 12 (William T. Hutchinson & William M.E. Rachal eds., 1971).

209. For a discussion of the conventional Whig aversion to dual office holding, see WOOD, *supra* note 35, at 156-59, 452. For the close link between this fear and the appointment power, see *id.* at 146-47. For prior bans on dual office holding in state impost bills, see *supra* note 79. Several other states soon passed similar laws barring dual office holding. See U.S. CONSTITUTION SESQUICENTENNIAL COMM’N, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 435-45 (1941); see also 19 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1069-82 (Charlene Bangs Bickford et al. eds., 2012) (collecting correspondence that discusses a dual-office-holding dispute in New York). Interestingly, the North Carolina House of Commons also rejected by a vote of fifty-five to twenty-six a proposal to administer federal oaths to state legislators and the governor, as mandated under the Federal Constitution. See 21 THE STATE RECORDS OF NORTH CAROLINA 1021 (Goldsboro, N.C., Nash Bros., Walter Clark ed., 1903).

embarrass the New Govt.”<sup>210</sup> According to Edmund Pendleton, the Act was intended “to realize those high drawn pictures of War between the fœdral & State Judges, & the Officers of both employed in levying Executions & Collecting taxes.”<sup>211</sup> Similarly, Alexander Hamilton claimed that the Constitution’s “efficacy was to be destroyed by throwing obstacles in the way of the administration of the system.”<sup>212</sup>

Notwithstanding their vocal objections, however, Federalists saw an opportunity to achieve their political goals while blaming the Anti-Federalists for a larger-than-promised federal bureaucracy. “The conduct of the last [Virginia] Assembly may very easily be used in favor of the new government and made to prove that their conduct proceeded from a wish not to amend but

210. Letter from Edward Carrington to Henry Knox (Dec. 30, 1788), in 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 384, 385 (Gordon DenBoer ed., 1984).

211. Letter from Edmond Pendleton to James Madison (May 3, 1789), in 17 THE PAPERS OF JAMES MADISON, at 534, 534 (David B. Mattern et al. eds., 1991); see also A True Federalist, DAILY ADVERTISER (N.Y.), Jan. 7, 1789 (“[The Act was] dictated rather by the acrimony of revenge than a zeal for the public good. It looked like the last effort of a disappointed party, which attempted to clog the operations of a government, the establishment of which it could not prevent.”), reprinted in 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, *supra* note 210, at 387, 390. “A True Federalist” was Richard Bland Lee, “perhaps in collaboration with [George Lee] Turberville and [Edward] Carrington.” Robert A. Rutland & Charles F. Hobson, *Afterword* to Letter from Richard Bland Lee to James Madison (Dec. 12, 1788), in 11 THE PAPERS OF JAMES MADISON 391, 392 n.1 (Robert A. Rutland & Charles F. Hobson eds., 1977). Similarly, “an Extract of a late letter, from a Member of our House of Delegates”—quoted by George Mason in a letter to a friend—stated that “the Feds have swallowed [the Disqualifying Act and other Anti-Federalist bills] like Wormwood.” Letter from George Mason to John Francis Mercer (Nov. 26, 1788), in 3 THE PAPERS OF GEORGE MASON: 1725-1792, at 1132, 1133-34 (Robert A. Rutland ed., 1970). Wormwood is often referenced biblically for its bitterness. See, e.g., *Proverbs* 5:4 (King James) (“But her end is bitter as wormwood . . . .”); *Lamentations* 3:15 (King James) (“He hath filled me with bitterness, he hath made me drunken with wormwood.”). Speaking generally of legislative affairs at this time, James Madison remarked:

My information from Richmond is very unpropitious to federal policy. . . . A decided and malignant majority may do many things of a disagreeable nature; but I trust the Constitution is too firmly established to be now materially vulnerable. . . . Indeed Virginia is the only instance among the ratifying States in which the Politics of the Legislature are at variance with the sense of the people expressed by their representatives in Convention.

Letter from James Madison to George Washington (Nov. 5, 1788), in 11 THE PAPERS OF JAMES MADISON 334, 334 (Robert A. Rutland & Charles F. Hobson eds., 1977).

212. [Alexander Hamilton], *H. G. Letter No. XII* (Mar. 8, 1789), reprinted in 5 THE PAPERS OF ALEXANDER HAMILTON 293, 293 (Harold C. Syrett ed., 1962).

to destroy the new government,” wrote George Nicholas in a letter to Madison.<sup>213</sup> Lambasting the Disqualifying Act in a New York newspaper, Hamilton exclaimed that it “would *oblige* the United States to have a complete set of officers for every branch of the national business, judges, justices of the peace, sheriffs, jail-keepers, constables, [etc].”<sup>214</sup> Of course, that had been Hamilton’s design all along, but the Disqualifying Act provided an opportunity to achieve that result at no political cost—and even at the expense of his political opponents. Another Federalist echoed this reasoning in a widely distributed pamphlet: “If the federal government shall therefore be under the necessity of multiplying officers . . . your good sense will teach you where to place the odium of such measures.”<sup>215</sup>

Indeed, several Federalists in the Virginia legislature apparently had voted for the disqualification bill precisely because of its potential advantages for the Federalist agenda. In a fascinating letter to Madison, Edward Carrington acknowledged that the Act would likely hinder the administration at the outset, but he was more sanguine about its long-term prospects:

The disqualifying Act[’s] . . . design is doubtless to create discontents against the Federal Govt. from the numbers of additional Officers which must be employed amongst the People, indeed to embarrass the U. S.; it will, in the first instance, have this effect, but the scheme must at length, should the first difficulties be got over, have a direct contrary tendency—it will ultimately, in my opinion, greatly abridge the importance of the State, for the U. S, being debarred from conferring their powers upon State Officers, will induce the most able of these into their service, particularly in the judiciary . . . .<sup>216</sup>

Several Federalists in the Virginia legislature, he added, “have rather connived at this project, conceiving the consequences which I have mentioned as desirable.”<sup>217</sup>

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213. Letter from George Nicholas to James Madison (Jan. 2, 1789), in 11 THE PAPERS OF JAMES MADISON 406, 407 (Robert A. Rutland & Charles F. Hobson eds., 1977).

214. Hamilton, *supra* note 212, at 294.

215. A True Federalist, *supra* note 211, at 390.

216. Letter from Edward Carrington to James Madison (Nov. 9, 1788), in 11 THE PAPERS OF JAMES MADISON 336, 337 (Robert A. Rutland & Charles F. Hobson eds., 1977).

217. *Id.* Carrington continued: “I however differ from them in opinion—at least I think it will be necessary to be able to shew the people, when the odious circumstances appear, to whom they are to attribute them.” *Id.* Governor Randolph—a crucial convert to the Federalist cause who had previously refused to sign the Constitution as a convention delegate in Philadelphia—apparently voted against the bill on the basis of unknown objections to “one

Disentangling Federalists' motives from their politically driven rhetoric is tricky, but judging from private correspondence, the Disqualifying Act seems to have influenced legislation in the First Congress. In April 1789, for example, Madison reported to Edmond Pendleton that the Virginia Act threatened to delay the impost bill because potential disqualifications "may require some special provision of a Judiciary nature for cases of seizure &c; until the Judiciary department can be systematically arranged; and may even then oblige the fed[eral] Legislature to extend its provisions farther than might otherwise be necessary."<sup>218</sup> The following month, Massachusetts Congressman Caleb Strong observed privately that the Disqualifying Act had "prohibited [Virginia's] Officers from holding Offices under the United States, and [Virginia's] Courts from having Jurisdiction of Causes arising under the Laws of the Union."<sup>219</sup> Worried about the efficacy of federal law, he expressed concern that "by such Laws every State would be able to defeat the Provisions of Congress if the Judiciary powers of the Genl. Government were directed to be exercised by the State Courts."<sup>220</sup> Strong was mistaken about the scope of the Disqualifying Act, which did not prohibit conferral of jurisdiction—even mandatory jurisdiction—on state courts. Instead, the Act prohibited state officers from holding federal offices or receiving federal salaries, and it even specified that "magistrates of county courts" were exempted entirely.<sup>221</sup> But

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or two inferior clauses." Letter from Edward Carrington to James Madison (Nov. 18, 1788), *supra* note 202, at 351, 352 (Robert A. Rutland & Charles F. Hobson eds., 1977).

218. Letter from James Madison to Edmond Pendleton (Apr. 19, 1789), *in* 12 THE PAPERS OF JAMES MADISON 89, 89 (Charles F. Hobson & Robert A. Rutland eds., 1979).
219. Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *in* 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 623, 623 (Charlene Bangs Bickford et al. eds., 2004).
220. *Id.*; *see also* Pierce Butler, Notes on the Debate of the Judiciary Act (June 22, 1789) (quoting Senator Caleb Strong describing Virginia's Disqualifying Act as "[o]ne State saying that their officers shall not take Cognisance of the Cause of the Federal Governmt"), *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 454, 454 (Charlene Bangs Bickford et al. eds. 1992). Madison may have been confused about the statute's scope, or he may have simply been imprecise with his description. *See* Letter from James Madison to Edmond Pendleton (Apr. 19, 1789), *supra* note 218, at 89 (describing the bill as "disqualifying State officers, Judiciary as well as others, from executing federal functions").
221. For the text of the Act, *see supra* note 202. As the General Court of Virginia explained several decades later, "[I]f any Judge of this State were to accept of either commission, or compensation, from the General Government, he would by that act vacate his office." *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 40 (1815); *see also* Letter from Edward Carrington to James Madison (Aug. 3, 1789) ("State Courts, where they are well established might be adopted as the inferior Federal Courts, except as to Maritime business. . . . I do not apprehend that the extraordinary Act of Virga. will interfere with the operation of a plan

perceptions were what mattered, especially with the Federalists predisposed to create a self-sufficient federal bureaucracy.

For some who realized that the federal government could still have placed duties on state officers, commandeering remained a viable option. Edward Carrington, for instance, thought that the federal government could easily avoid the most pernicious consequences of the Act because of “the clause which binds all state Officers to observe the laws of the Gen[eral] Govt. & to execute them.”<sup>222</sup> Carrington was of course referring to Article VI, which contains the Supremacy Clause and Oath Clause. Most Federalists apparently did not share Carrington’s optimistic attitude about the efficacy of relying on oaths without any accompanying federal incentives.<sup>223</sup> Hamilton, for example, was well aware of “how essential it must be to the execution of the law” to pay officeholders “competent, though moderate rewards.”<sup>224</sup> But Carrington’s comments show that, while many Federalists were quick to use the Disqualifying Act to achieve the political position they already wanted, the Act may have influenced the Federalist agenda. By heightening Federalists’ fears that dependence on state agents would leave enforcement of federal law vulnerable to state interference, the Act likely reduced any disunity that might have otherwise arisen between the more nationalist Federalists and their moderate allies, such as Madison and Carrington, who initially seemed inclined to follow through on their ratification promises. At a minimum, the Act placed the Anti-Federalists at a strategic disadvantage politically, with little argument other than the Oath

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thus founded. If the duties vest as I suggest, no act of the State, which does not annihilate its judiciary establishment, can affect them; the Act alluded to however only prohibits the acceptance of individual appointments, which are not necessary for the adoption of the State Courts into the federal system.”), *reprinted in* 12 THE PAPERS OF JAMES MADISON 322, 323 (Charles F. Hobson & Robert A. Rutland eds., 1979). In 1789, for example, Cyrus Griffin lost his state office after receiving a federal commission to negotiate with the Southern Indians. *See* Letter from Joseph Jones to James Madison (Nov. 2, 1789), *in* 12 THE PAPERS OF JAMES MADISON 441, 441-42 n.3 (Charles F. Hobson & Robert A. Rutland eds., 1979). For an additional instance where the Disqualifying Act may have had an effect, see Letter from Edward Carrington to James Madison (Mar. 2, 1790), *in* 13 THE PAPERS OF JAMES MADISON 77, 79 (Charles F. Hobson & Robert A. Rutland eds., 1981), where Carrington noted that “our Comrs. of the Taxes could have done this business [of taking the federal census] better than any others from their acquaintance with the families in the course of their other duty – a Law of this State however prohibits their being set about it.”

222. Letter from Edward Carrington to James Madison (Nov. 18, 1788), *supra* note 202, at 352; *see also* Letter from Edward Carrington to James Madison (Aug. 3, 1789), *supra* note 221.

223. This is not to say that oaths were unimportant in the eighteenth century. *See* Mashaw, *supra* note 98, at 1309-10.

224. Alexander Hamilton, Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits, *in* 11 THE PAPERS OF ALEXANDER HAMILTON 77, 105-06 (Harold C. Syrett ed., 1966).

Clause for why the federal government should trust state officers to execute federal law.

The Disqualifying Act also helps explain why Congress crafted legislation that—when viewed in isolation—might otherwise suggest a lack of commandeering power. Just after passing the Judiciary Act of 1789, for example, Congress “recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States.”<sup>225</sup> In states that complied, the federal government would give jailers fifty cents per prisoner. The *Printz* majority speculated that the resolution might provide “some indication” of an original understanding against commandeering.<sup>226</sup> The relevant congressional debates, however, do not reveal any hostility to commandeering.<sup>227</sup> Instead, the Virginia

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225. Resolution of Sept. 23, 1789, ch. 27, 1 Stat. 96, 96. When Georgia refused, Congress passed a law requiring the federal marshal to rent jail space to house federal prisoners within that state. See Resolution of Mar. 3, 1791, 1 Stat. 225. Most states, however, seem to have accepted Congress’s proposal. See, e.g., Act of Dec. 5, 1789, ch. 521, 1789 Pa. Laws 405-06 (providing for the custody of prisoners committed under the authority of the United States) (Dec. 5, 1789); Act of Nov. 12, ch. 41, 1789 Va. Acts 43 (providing for the safekeeping of prisoners committed under the authority of the United States into any of the jails of the commonwealth); Act of Oct. 24, 1789 (requiring all public jailers to receive and keep prisoners committed under U.S. authority), reprinted in LAWS OF THE STATE OF DELAWARE 446-47 (Wilmington, R. Porter & Son 1829).

226. 521 U.S. 898, 909 (1997).

227. For the limited drafting history of the resolution, see *Resolution on Safekeeping of Prisoners*, reprinted in 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 2113 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). A few Congressmen made comments about jails during debates over the 1789 Judiciary Act, but these are inconclusive. See, e.g., H.R. Debate (Aug. 31, 1789), *supra* note 185, at 1384 (remarks of Rep. Michael Stone) (reciting logistical difficulties of state administration of federal prisoners and questioning whether “it [is] a proper return by the marshal [if] the prisoner is kept by the state sheriff”); *id.* at 1387 (remarks of Rep. Elbridge Gerry) (noting that logistical difficulties could be overcome by passing laws pursuant to the Necessary and Proper Clause); H.R. Debate (Aug. 29, 1789), *supra* note 172, at 1352 (remarks of Rep. William Loughton Smith) (“I am not persuaded that there will be a necessity for having separate court-houses and gaols: Those already provided in the several states will be made use of by the district court.”); H.R. Debate (Aug. 24, 1789) (remarks of Rep. Samuel Livermore) (“I hope the [federal] government will not adopt this last mode [regarding use of state jails], or escapes may be made in great number. I apprehend we shall find the execution offer no inconsiderable obstacle to our system.”), reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1324, 1332 (Charlene Bangs Bickford et al. eds., 1992). Livermore’s comment about a heightened number of escapes may refer to the frequent problem of inmates bribing jailkeepers. See Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, 19 AM. J. LEGAL HIST. 173, 179 (1975). As explained earlier,

Disqualifying Act provides a more persuasive explanation of the congressional decision to request rather than compel state cooperation. The Disqualifying Act prohibited the federal government from paying jailers directly, and Federalists were understandably reluctant to force jailers to assume these expenses themselves—a guaranteed way to evoke hostility toward the federal government. Thus, the jail resolutions tell us little, if anything, about the Founders’ understandings of federal powers.

Yet again, the Disqualifying Act raises important questions about enforcement mechanisms. How far could Congress go to ensure state-officer compliance with federal demands? Some Federalists thought that the Disqualifying Act was unconstitutional because it might inhibit the enforcement of federal law.<sup>228</sup> But no opportunity arose to test the boundaries of state power because Federalists, eager to create federal offices, had no interest in forcing state officers to accept federal payments or titles.

*C. Federal Use of State Officers*

A persistent challenge for originalists is figuring out how to weigh conflicting Founding-era evidence. In the case of commandeering, for example, should originalists credit Fisher Ames’s and William Maclay’s view that the federal government cannot commandeer state officers, or should they instead credit the many individuals who seem to have supported that power? Obviously, we have no way of knowing for certain what a majority of the public thought (or would have thought had the topic crossed their minds) about the meaning of any constitutional provision. Early congressional

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Livermore and Stone had endorsed the Anti-Federalist plan to commandeer state judges. Their arguments here with respect to jails related to the difficulties that would arise if the federal government created its own courts.

**228.** In his earliest comments about the Disqualifying Act, Carrington seems to have thought that it was unconstitutional because it attempted to ban any state-level execution of federal law. In one early letter, for example, Carrington wrote that the law “can have no effect in fact, for the New Constitution binds every State officer to observe & Execute the Federal Laws.” Letter from Edward Carrington to Henry Knox (Dec. 30, 1788), *supra* note 210, at 385. He continued by observing that “the State courts must decide all causes of a Federal Nature according to the Laws which the Federal Govt shall pass concerning them.” *Id.* Moreover, he stated, even if it could be “in the power of a State to prevent their officers from Executing the Federal Laws, & a Multiplication of Officers amongst the people should be the consequence, I apprehend the odium of such a circumstance would naturally turn upon the authors of the necessity.” *Id.* But the following year, Carrington clearly understood that the Act prevented only the acceptance of federal commissions and payments. *See supra* note 221. Hamilton also seems to have doubted the Disqualifying Act’s constitutionality. *See supra* note 214 and accompanying text.

decisions, however, provide strong evidence that most congressmen accepted federal power to commandeer state officers.

Several early statutes imposed administrative burdens on state courts. For example, Congress required that the common law courts in every state “shall record” citizenship applications,<sup>229</sup> and that it “shall be the duty” of the clerk to transmit abstracts of those applications to the Secretary of State<sup>230</sup> and maintain a registry of foreign citizens.<sup>231</sup> Another federal law “authorized and required” state justices of the peace—who traditionally had both judicial and executive responsibilities—to direct “three persons in the neighbourhood, the most skilful in maritime affairs that can be procured” to examine vessels that were allegedly leaking or otherwise unsafe for travel.<sup>232</sup> And a 1799 statute mandated that state courts “shall take cognizance” over cases arising under the federal postal bill.<sup>233</sup> Importantly, none of these statutes conflicted with the Virginia Disqualifying Act (or similar acts passed later in other states) by granting federal commissions or emoluments.<sup>234</sup>

The *Printz* majority dismissed these statutes as irrelevant because they were directed at judicial rather than executive officers.<sup>235</sup> Congressional power to

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229. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (establishing a uniform rule of naturalization). Some states had separate courts that heard equity cases, and therefore it was necessary to specify *common law* courts.

230. Act of June 18, 1798, ch. 54, §§ 2-3, 1 Stat. 566, 566-67 (repealing and replacing the prior legislation establishing a uniform rule of naturalization). This bill was the first installment of the infamous Alien and Sedition Acts, though the commandeering aspect of the bill was routine.

231. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154-55 (repealing and replacing prior legislation establishing a uniform rule of naturalization).

232. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 131, 132 (providing for the regulation of seamen in the merchant service).

233. Act of Mar. 2, 1799, ch. 43, § 28, 1 Stat. 733, 741 (establishing certain rules regarding the Post Office of the United States); cf. Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 270 (2011) (“The Theft of the Mails Act of 1799 . . . is obviously some evidence that Congress supposed state courts could handle genuinely criminal prosecutions for genuinely federal crimes. But the statute appears to be singular, and examples of attempted state-court enforcement are difficult to find.”).

234. Under these statutes, payments to state officials were made in the form of negotiated fees paid by applicants directly to the officials. For more information on fee-based payments in the Founding era, see NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (forthcoming 2013). The Virginia General Court later refused to enforce the Theft of Mails Act, but not because of the Disqualifying Act. See *Commonwealth v. Feely*, 1 Va. Cas. 321, 323 (1813) (“[A]s the offense described in the indictment in this case, is created by an act of congress, the said superior court, being a state court, hath not jurisdiction thereof . . .”).

235. 521 U.S. 898, 905-07 (1997).

commandeer state judges, the majority argued, is “explicit” in the text of the Supremacy Clause, which provides that the Constitution, federal laws, and treaties, “shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*”<sup>236</sup> This expansive reading of the Supremacy Clause has no merit. The directive to the “judges in every State” at the end of the Supremacy Clause “neither confers nor obliges state court jurisdiction; it simply requires that if and when state courts take jurisdiction over a case, they follow the supreme law of the land.”<sup>237</sup> The purpose of the additional language, which today may seem superfluous, was to establish that state judges must review whether state law conflicts with the Federal Constitution, federal laws, or treaties.<sup>238</sup> Judicial review—as that practice is now known—was extremely

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236. *Id.* at 907 (emphasis added) (quoting U.S. CONST. art. VI, cl. 2); *see also* *New York v. United States*, 505 U.S. 144, 178–79 (1992) (noting that federal statutes are enforceable in state courts pursuant to the Supremacy Clause).

237. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 256 n.165 (1985); *see also* *Haywood v. Drown*, 556 U.S. 729, 752 (2009) (Thomas, J., dissenting) (“[T]he Supremacy Clause’s exclusive function is to disable state laws that are substantively inconsistent with federal law—not to require state courts to hear federal claims over which the courts lack jurisdiction.”); *Printz*, 521 U.S. at 968 (Stevens, J., dissenting) (noting that the Judges Clause “commands state judges to ‘apply federal law’ in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore”); Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 103 (2003) (“The Supremacy Clause . . . establishes a rule of decision to be applied by courts . . . after jurisdiction attaches.”); Martin H. Redish & Steven G. Sklaver, *Federal Power To Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 72 (1998) (“Both by its individual terms and its broader textual context, the State Judges Clause concerns solely the implementation of an independently authorized congressional power to commandeer. It does not itself provide a constitutional source of congressional power to engage in such commandeering.”). As Redish and Sklaver also correctly point out, the *Printz* majority’s alternative rationale for distinguishing the constitutionality of commandeering state judges—namely, that the Constitution withheld the creation of lower federal courts—would apply equally to commandeering state executive officers, because the Constitution similarly withheld the creation of federal executive offices such as tax collector positions. *See* Redish & Sklaver, *supra*, at 80.

238. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 175 (1996) (“[T]he supremacy clause marked an attempt to incorporate a principle of judicial review into all the state governments by the unilateral fiat of the Constitution.”); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1833 (1833) (The Judges Clause “was but an expression of the necessary meaning of the former clause, introduced from abundant caution, to make its obligation more strongly felt by the state judges. The very circumstance, that any objection was made, demonstrated the utility, nay the necessity of the clause, since it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution.”).

controversial in 1787, and most state judges who had exercised this novel power had been swiftly repudiated, sometimes through impeachment. As Larry Kramer observes, the explicit language about the duty of state judges “answered the leading objection to judicial review, which was that judges had not been authorized by the people to make such decisions.”<sup>239</sup> In short, the Supremacy Clause requires state courts to exercise judicial review vis-à-vis federal law; it does not create or even suggest federal power to commandeer state courts.

Moreover, even if commandeering of judicial officers were somehow constitutionally distinguishable from commandeering of executive officers, these early statutes remain significant because they undermine the best historical evidence against commandeering. During the Judiciary Act debates in 1789, Fisher Ames and William Maclay had directly questioned federal power to commandeer state officers.<sup>240</sup> These statements, of course, were far outnumbered by endorsements of federal commandeering power.<sup>241</sup> Yet the decision not to commandeer state judges as part of the Judiciary Act left open the possibility that a silent majority in Congress agreed with Ames and Maclay. Early statutes placing duties on state judicial officers settle these doubts. Majorities in both the House and Senate in the First Congress and in subsequent Congresses repeatedly rejected Ames’s and Maclay’s proposition that the federal government could not commandeer state officials.<sup>242</sup>

This conclusion is bolstered by a bill passed during the Second Congress that imposed a federal duty on state governors. The bill, which regulated presidential elections, provided “[t]hat the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors” before the election.<sup>243</sup> Nathaniel Niles, an Anti-Federalist congressman from the recently admitted state of Vermont, moved to eliminate that provision based on his objection to commandeering. “[N]o person could be called upon to discharge any duty on

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239. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 75 (2004).

240. For Fisher Ames’s views, see *supra* notes 180-183 and accompanying text. For William Maclay’s views, see *supra* notes 195-198 and accompanying text.

241. See, e.g., *supra* notes 130 (James Winthrop; Samuel Spencer), 133-135 (Alexander Hamilton), 158 (Patrick Henry), 184 (Michael Stone), 185-186 (Samuel Livermore), 188 (Elbridge Gerry), 222 (Edward Carrington), and accompanying text.

242. See *supra* notes 229-234 and accompanying text.

243. Act of Mar. 1, 1792, ch. 8, § 3, 1 Stat. 239, 240. David Currie also argues that another early congressional bill regarding crimes against Indians “arguably suggested” a “co-opt[ation] [of] state officers to enforce federal law.” CURRIE, *supra* note 186, at 86-87.

behalf of the United States,” Niles asserted, “who had not accepted of an appointment under their authority.”<sup>244</sup> Theodore Sedgwick, a leading Federalist from Massachusetts, disagreed. “[I]f Congress were not authorized to call on the Executives of the several States,” Sedgwick stated, he “could not conceive what description of persons they were empowered to call upon.”<sup>245</sup> Niles replied that he “considered this section as degrading to the Executive of the several States.”<sup>246</sup> Federalist James Hillhouse of Connecticut agreed that Congress should amend the bill, but he offered a different reason. According to Hillhouse, the proposed bill “imposed a duty on the Supreme Executives of the several States, which they might, or might not execute; and thus the necessary certificates may not be made.”<sup>247</sup> In other words, Hillhouse questioned the bill’s practicability because it entrusted federal responsibilities to unaccountable state officers. Samuel Livermore of New Hampshire—an opponent of the Judiciary Act of 1789 who later voted mostly with the Federalists—supported the clause and “did not consider it either as an undue assumption of power, or degrading to the Executives of the respective States.”<sup>248</sup> The House then voted down Niles’s motion, thus retaining the federal duty placed on state executives.<sup>249</sup> Having directly debated commandeering’s constitutionality, the Second Congress enacted a law that explicitly commandeered state governors.

As shown thus far, federal commandeering power was acknowledged and employed by majorities in the early Congresses. Not everyone, though, accepted this federal power. In 1792, while considering a militia bill that would have required local justices of the peace to issue warnings to rebellious assemblies, two Federalists openly questioned commandeering power. Representative Abraham Clark of New Jersey, a supporter of the Washington Administration, “inquired whether the United States have a right to call on the

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244. 3 ANNALS OF CONG. 279 (1791) (remarks of Rep. Nathaniel Niles). Niles’s comment flew directly in the face of the ratification debates regarding the *posse comitatus*, because neither the state sheriffs nor the local citizens who comprised the *posse* were federally appointed officers.

245. *Id.* (remarks of Rep. Theodore Sedgwick).

246. *Id.* (remarks of Rep. Nathaniel Niles).

247. *Id.* (remarks of Rep. James Hillhouse). The phrase “might, or might not execute” raises, but does little to answer, interesting questions about the extent to which the federal government had prophylactic remedies to compel state-officer compliance with federal demands. *See infra* p. 1178.

248. 3 ANNALS OF CONG. 279 (1791) (remarks of Rep. Samuel Livermore). Livermore had endorsed commandeering power in the 1789 debates over the Judiciary Act. *See supra* note 186.

249. 3 ANNALS OF CONG. 280 (1791); *see* Act of Mar. 1, 1792, ch. 8, § 3, 1 Stat. 239, 240 (1792).

justices of the peace to execute the laws of Congress? [I]f they have no such right, the amendment, so far as it respects those officers, is nugatory.”<sup>250</sup> Alexander White of Virginia, also a Federalist, echoed Clark’s skepticism, stating that he “was in favor of the clause generally, but said he had no idea that the General Government had any right to call on the officers of the particular States to execute the laws of the Union.”<sup>251</sup> Elbridge Gerry responded with an unequivocal affirmation of federal commandeering power. After “adverting to several parts of the Constitution,” Gerry observed that “nothing could be plainer than this – that the General Government had a right to require the assistance of the officers of the several State Governments; for they have severally taken an oath to support the Constitution of the United States.”<sup>252</sup> Unsurprisingly, Gerry did not invoke the Supremacy Clause’s language about state judges being bound to apply federal law, nor did he defend the proposal based on a justice of the peace’s status as a local judge. Rather, like many before him, Gerry cited the Oath Clause, which does not distinguish between executive and judicial officers. The next speaker, Federalist John Kittera of Pennsylvania, ignored the constitutional issue and instead argued that requiring justices of the peace to read official warnings would merely exacerbate insurrections.<sup>253</sup> Congress then voted down the idea without recording the vote and without further comment.

#### *D. A Judicial Response*

Based largely on Federalist policy preferences and Virginia’s Disqualifying Act, a burgeoning federal administration evolved in place of what could have been a blended federal and state bureaucracy. With only the few exceptions mentioned above, early Congresses did not require state officers to enforce federal law. Instead, Congress created federal judges, federal tax collectors, federal customs houses, and a federal marshal service. The paucity of commandeering statutes limited the opportunities for judicial consideration of whether Congress may commandeer state executive officers. There was, however, one exception.

In the early 1790s, Congress passed a series of excise taxes on distilled

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250. 3 ANNALS OF CONG. 579 (1792) (remarks of Rep. Abraham Clark).

251. *Id.* (remarks of Rep. Alexander White).

252. *Id.* (remarks of Rep. Elbridge Gerry). Gerry had also recognized federal commandeering power during the debate over the Judiciary Act of 1789. *See supra* note 187 and accompanying text.

253. 3 ANNALS OF CONG. 579 (1792) (stating that the provision, “far from operating to suppress insurrections, would produce them in a much greater degree”).

spirits. These deeply divisive laws were generally ignored west of the Appalachians, where necessarily long delays in transporting produce to outside markets meant that easily preservable and transportable alcoholic beverages were the region's economic mainstay. In these parts, occasional attempts to enforce the excise laws often met with violent opposition. Although the Washington Administration orchestrated a successful publicity stunt in 1794 by demonstrating its fortitude in the face of the so-called Whiskey Rebellion in western Pennsylvania, noncompliance with the excise laws remained rampant, especially in Kentucky.

The refusal of one Kentuckian to pay the excise tax on his whiskey distillery gave rise to the only known Founding-era judicial test of commandeering's constitutionality. The controversy began in 1797, when John Mannen failed to pay his federal tax. When a state tax collector and the local constable arrived to enforce the debt on behalf of the federal marshal, Mannen brandished two pistols and drove them away. In 1800, a federal grand jury indicted Mannen for violating a federal law against obstructing federal officers during the course of their official duties.<sup>254</sup> Mannen was convicted, but he argued on appeal that the state officials he had threatened were not "officers of the United States," and therefore his assault of those officers was not punishable as a federal crime.<sup>255</sup>

Harry Innes, a longtime federal judge who was then sitting on the newly reorganized Sixth Circuit, delivered the opinion in *United States v. Mannen* in 1802.<sup>256</sup> Judge Innes observed that the defense had raised "an important

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254. Act of Apr. 30, 1790, ch. 9, § 22, 1 Stat. 112, 117 ("[I]f any person or persons shall knowingly and wilfully obstruct, resist or oppose any officer of the United States, in serving or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer, or other person duly authorized, in serving or executing any writ, rule, order, process or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall, on conviction thereof, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars."). It is unknown why Mannen was not charged under the clause applying to assaults against "any officer or other person, duly authorized, in serving" federal process, but the "bumbling efforts" of prosecutor William Clarke may have been the reason. See MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, at 73 (1978) (describing Clarke's "bumbling efforts" as prosecutor, though not with respect to *Mannen* in particular).

255. *United States v. Mannen* (6th Cir. 1802) [hereinafter *Mannen*], in INNESS' REPORTS: FEDERAL COURT, DISTRICT OF KENTUCKY 1795-1806, at 172, 177-78 (original bound manuscript of Innes's opinions belonging to the Filson Historical Society).

256. Judge Innes's opinion has never been published. Therefore, with permission I have transcribed below the relevant portions from the bound opinion book in the Filson Historical Society, in Louisville, Kentucky. A draft of the opinion is in the Harry Innes Papers, at the Library of Congress. All punctuation and spelling have been preserved.

[\*177] The second point made in this Motion is that the Collector or Constable were not officers of the U. States and in the execution of that kind of process which is described in the 22<sup>d</sup> sec<sup>t</sup>. of the Act of Congress [\*178] for the punishment of certain crimes against the U. States which Act was permitted to be given in evidence to the Jury.

This question involves an important consideration because the power of Congress to require any service to be performed by a State Officer in his official capacity is denied.

That such a power rests in Congress is evident from the Constitution & Laws of the U. States which are the Supreme Law of the Land.

In article 1<sup>st</sup> & Sec<sup>t</sup>. 8<sup>th</sup> of the Constitution of the U. States it is declared the Congress shall have power – to lay and collect taxes, duties imposts & excises

To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the U.S. or in any department or office thereof

By Art. 3<sup>d</sup> Sec<sup>t</sup>. 2, the Judicial power of the U.S. shall extend to all cases in Law and equity arising under this Constitution, the Laws of the U.S. & Treaties made or [\*179] or which shall be made under their Authority

By Article 4<sup>th</sup> Section 2 a person charged with Felony Treason or other Crime who shall flee from Justice and be found in another State shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the Crime

By the 6<sup>th</sup> Article this Constitution and the Laws of the U.S. which shall be made in pursuance thereof and all treaties &c shall be the supreme Law of the Land & the Judges in every State shall be bound thereby any thing in the Laws & Constitution of any State to the Contrary notwithstanding

The first step taken by Congress at their first session under the Constitution is the Act to regulate [\*180] the time and manner of administering certain Oaths. The first Oath described in that Act is to support the Constitution of the U.S. This Law not only requires all the executive and Judicial officers of the several States who were then in office to take this Oath but all such who thereafter shall be appointed – From this view of the subject it is evident that the officers of the State Governments are to certain intents compelled to act officially in order to carry into effect particular Laws of the U.S. and when doing so must be considered as acting under their authority to prove which I will state three examples which occur. 1 By the Law establishing the Judicial Courts of the U.S. Criminals against the U.S. may be arrested by any Justice of the peace or other Magistrate of any of the U.S. 2 By the Law respecting Fugitives from justice it is made the Duty of the executive magistrate of any state upon a legal demand of the Governor of another state or of either of the Territories to cause such Fugitive to be arrested & secured.

Thirdly the Case in the present Context whereby the Law respecting the excise a Justice [\*181] of peace is authorized by special warrant to authorize any of the Officers of inspection to search for spirits fraudulently hid or concealed in the presence of a Constable or other officer of the peace.

To oppose obstruct or resist the authority of a State Officer when acting in conformity to the Constitution & Laws of the U.S. is as much a violation of the Laws as opposing obstructing and resisting an Officer immediately acting by

consideration because the power of Congress to require any service to be performed by a state officer in his official capacity is denied.”<sup>257</sup> Judge Innes then flatly rejected the defendant’s argument. “That such a power rests in Congress,” he declared, “is evident from the Constitution & Laws of the U. States which are the Supreme Law of the Land.”<sup>258</sup> According to Judge Innes, the Necessary and Proper Clause gives Congress authority to pass laws to effectuate its enumerated powers. The First Congress had exercised its constitutional authority over state officers, he stated, when it passed the Oath Act during its first session. Under this law, he wrote, “all the executive and Judicial officers of the several states . . . are to certain intents compelled to act officially in order to carry into effect particular laws of the U.S. and when doing so must be considered as acting under [federal] authority.”<sup>259</sup> Judge Innes then cited three examples to bolster his conclusion. First, the Judiciary Act of 1789 empowered local justices of the peace and magistrates to arrest federal criminals.<sup>260</sup> Second, the Fugitive Slave Act of 1793 required state officials to apprehend and return fugitive slaves.<sup>261</sup> Third, under the excise tax

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virtue of a Commission issued under the authority of the U.S. and the happiness of Society depends upon supporting this opinion.

There can exist no doubt of the power being vested in the Justice of the peace to issue the warrant to Machir to search the Houses where he suspected spirits were fraudulently concealed – Machir is an Officer of the U.S. – Hamar the Constable is virtually so when called upon by the collector in his official capacity to do a duty which is required of him by a law of the U.S. enacted under the Constitution and which he is sworn to support.

*Mannen*, *supra* note 255, at 177-81. The opinion later provides the first names of Peter Machir and James Hamar. *See id.* at 192.

257. *Id.* at 178.

258. *Id.*

259. *Id.* at 180. For clarity, I have substituted “[federal]” in place of “their.” In the eighteenth century, collective nouns usually took plural pronouns.

260. *Id.* at 180; *see* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

261. *Mannen*, *supra* note 255, at 180; *see* Fugitive Slave Act of 1793, ch. 7, § 1, 1 Stat. 302, 302. The modern view of the Fugitive Slave Act is that it directly implemented the Fugitive Slave Clause in Article IV. *See* *Printz v. United States*, 521 U.S. 898, 908-09 (1997). But although modern courts consider that Clause and the adjacent Extradition Clause “clear and explicit” in placing duties on state executives, *see* *Michigan v. Doran*, 439 U.S. 282, 286 (1978), these provisions are actually worded in the passive voice, stating that fugitives shall “be delivered up,” U.S. CONST. art. IV, § 2. As Justice Story wrote:

The slave is to be delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? . . .

. . . The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them;

law, “a justice of peace is authorized by special warrant to authorize any of the Officers of inspection to search for spirits fraudulently hid or concealed in the presence of a constable or other officer of the peace.”<sup>262</sup>

Having confirmed the power of Congress to compel state officers to enforce federal law, Innes then concluded that resisting a state officer during the exercise of this responsibility was tantamount to resisting a federal officer. “[T]he happiness of society,” he remarked, “depends upon supporting this opinion.”<sup>263</sup> Innes’s decision was resolute: The Necessary and Proper Clause gives Congress authority to commandeer state executive officials in furtherance of enumerated federal powers. Congress had exercised this prerogative by passing the Oath Act and, subsequently, the excise law.

Innes’s opinion underscores that although the Founders were divided politically over whether the federal government should use state officers to enforce federal law, they were not divided about commandeering in ways that we might expect today. In fact, Innes was probably the most antinationalist of any federal judge at the time. “[I]f the Constitution is adopted by us,” he wrote to a close friend in 1788, “we shall be the mere vassals of the Congress and the consequences to me are horrible and dreadful.”<sup>264</sup> Nor did he lose his antipathy toward federal power after becoming a federal judge. According to one scholar, “Innes’s interests were almost strictly parochial: he was first a Kentuckian and only distantly and secondly an American. The strength of his political convictions owed more to his uncompromising antifederalism than to any

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and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.

Prigg v. Pennsylvania, 41 U.S. 539, 615-16 (1842). Though he reached the wrong result, Justice Story was right to recognize the link between commandeering and the meaning of Article IV. If requiring state officials to enforce federal duties were an encroachment on state sovereignty and fundamentally incompatible with federalism, it would be odd for the Framers to have written such a requirement in the passive voice.

262. *Mannen*, *supra* note 255, at 180-81; see Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207.

263. *Mannen*, *supra* note 255, at 181.

264. Letter from Harry Innes to John Brown (Feb. 20, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 385, 387 (John P. Kaminski et al. eds., 1988); see also *id.* at 386 (“[T]he adoption of that Constitution would be the destruction of our young & flourishing country [of Kentucky].”).

positive adoption of Jeffersonian principles.”<sup>265</sup> Innes’s opinion therefore not only reaffirms the Founding generation’s views about the constitutionality of commandeering; it also further debunks the notion that any disputes over that power would have split along modern ideological lines, with Anti-Federalists opposed to “greater” federal power.

#### IV. COMMANDEERING AND CONSTITUTIONAL CHANGE

Though driven by concerns other than commandeering’s constitutionality, early congressional decisions had a tremendous impact on how people thought about the interplay between commandeering and federalism. Despite Federalists’ ratification-era assurances to the contrary, Congress nearly always decided that federal laws should be administered by federal officials and enforced by the federal judiciary. With only rare exceptions, state officers had little role in administering federal laws. Gradually, this effective separation between state and federal officers evolved into a widely acknowledged – though never universally accepted – constitutional norm.

To be sure, flickers of anticommandeering sentiment appeared during the First Congress. But these lone voices were overwhelmed by the chorus of individuals who endorsed federal commandeering power. As the 1790s progressed, however, doubts about commandeering grew more frequent, especially among Federalists, whose opposition to state-based enforcement of federal law grew even more resolute<sup>266</sup> and who gradually developed a constitutional critique supporting that goal. In the late 1790s, for example, Congress debated a bill that would have required Virginian executive officials to license ship pilots from Maryland. Federalist Joshua Coit of Connecticut “objected to the principle, from doubts whether they had a right to direct the affairs of a State Government to do certain acts.”<sup>267</sup> Republican Samuel Smith of Maryland replied that “these [state] officers might be directed to grant licenses to these pilots on the same ground that the Judges and Justices of the States are directed to do the business of the United States.”<sup>268</sup> But Federalist Samuel Sitgreaves of Pennsylvania “did not allow the analogy of the two

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<sup>265</sup>. TACHAU, *supra* note 254, at 38. It is possible that during ratification Judge Innes may have understood the Constitution to permit commandeering. See Political Club of Danville, Kentucky, *supra* note 163, at 414 (remarks of Harry Innes) (noting that federal power to commandeer the *posse comitatus* is “necessary to enforce the Collection of Taxes”).

<sup>266</sup>. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 209 (2010).

<sup>267</sup>. 6 ANNALS OF CONG. 1983 (1797).

<sup>268</sup>. *Id.*

cases.”<sup>269</sup> The better comparison, he argued, was Congress’s decision in 1789 to *request* that each state “provide for the safe-keeping of the prisoners of the United States.”<sup>270</sup> The House then tabled the bill.<sup>271</sup> Federalists also expressed anticommandeering sentiments during debates over the Judiciary Act of 1801.<sup>272</sup> And by 1802, Hamilton observed that “the right to employ the agency of the State Courts for executing the laws of the Union, is liable to question, and has, in fact, been seriously questioned.”<sup>273</sup> One can only assume that a different political course in the First Congress would have laid the foundation for a very different understanding of federalism.<sup>274</sup>

One factor further opening the door to an emerging anticommandeering doctrine was the decline of the Oath Clause as plausible textual evidence of commandeering’s constitutionality. During and immediately after ratification, Americans had not yet settled on the meaning of many constitutional provisions, including the Oath Clause.<sup>275</sup> Anti-Federalists in particular argued that the Oath Clause obliged state officers to enforce federal law, at least when called upon by Congress to do so. The strong form of the argument quickly proved too much. Richard Henry Lee, for example, had asserted that the Oath Clause itself required state judges to hear federal cases, but that position became untenable after Congress decided to vest jurisdiction exclusively in federal courts for most federal causes of action.<sup>276</sup> Proponents of a smaller federal government were left with the more limited argument that the federal oath *implied* that state officers would have federal duties. But given the political rejection of a blended federal administration and the gradual decline in the

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269. *Id.*

270. *Id.*; see also *supra* note 225 and accompanying text (discussing the jail resolutions).

271. 6 ANNALS OF CONG. 1983 (1797).

272. See, e.g., 10 ANNALS OF CONG. 892 (1801) (remarks of Rep. Robert Goodloe Harper) (“It is true that we cannot enforce on the State courts, as a matter of duty, a performance of the acts we confide to them . . .”).

273. Hamilton, *supra* note 16, at 488.

274. Cf. 10 ANNALS OF CONG. 892 (1801) (remarks of Rep. John Bird) (noting that “our own practice destroys” the idea that “as soon as Congress pass a law, there exists a right and a duty in the State courts to execute it”).

275. For a thorough summary of early congressional debates on various constitutional controversies, see 1 CURRIE, *supra* note 186.

276. David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 522 (1989) (pointing out that the 1789 Judiciary Act “distributed virtually all of the subject matter jurisdiction contemplated by article III” in the various federal courts).

salience of oaths, this argument too became increasingly strained.<sup>277</sup> In a state of disuse, the Oath Clause argument faded away.<sup>278</sup>

Shifts in the Anti-Federalists' political priorities also help account for the erosion in support for the federal commandeering power. During ratification, Anti-Federalists accurately predicted the emergence of a federal bureaucracy, but their dire forecasts about that bureaucracy turned out to be grossly overblown. For instance, rather than bearing down on the people "like a Macedonian phalanx,"<sup>279</sup> the federal government gathered most of its tax revenue through relatively noninvasive import duties.<sup>280</sup> In fact, combined with the federal assumption of state debts, federal customs duties caused overall direct taxation to plummet, thus further reducing the concern that states would be left unable to meet their own revenue needs. To be sure, federal excise taxes on distilled spirits prompted a political firestorm, most famously in the so-called Whiskey Rebellion. But the primary opposition to the excise taxes stemmed from their basic unfairness, not abuses relating to their collection.<sup>281</sup> Moreover, excise taxes went uncollected in many parts of the country and were formally repealed in 1802. Thus, by the early nineteenth century, Americans had little reason to fear that federal executive officers would either act tyrannically or displace state officials.

Debates about the federal judiciary, of course, remained virulent for many years after ratification. It would be an overstatement to say that states' rights proponents in the early republic no longer cared about state judicial enforcement of federal law. But it was apparent by the early nineteenth century that federal courts were neither displacing their state counterparts nor actively

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277. Judge Innes's opinion in *United States v. Mannen* shows that the Oath Clause argument had not faded entirely. But Judge Innes also seems to have thought about these questions during ratification. See *supra* note 265. On the assumption that people rarely change their already formed opinions, perhaps *Mannen* is better seen as reflecting a prior era.

278. The decline of the Oath Clause argument, however, does not undermine my thesis, which is simply that original federalism principles did not bar commandeering, and that the anticommandeering doctrine has been contested ever since.

279. 2 ANNALS OF CONG. 1844 (1790) (remarks of Rep. Josiah Parker).

280. Max M. Edling & Mark D. Kaplanoff, *Alexander Hamilton's Fiscal Reform: Transforming the Structure of Taxation in the Early Republic*, 61 WM. & MARY Q. 713, 722 (2004).

281. See, e.g., 2 ANNALS OF CONG. 1896 (1791) (remarks of Rep. John Steele) ("He then adverted to the operation of an excise, especially in the State of North Carolina, and said that the consumption of ardent spirits in that State was so great that the duty would amount perhaps to ten times as much as in the State of Connecticut."); *id.* at 1908 (remarks of Rep. Josiah Parker) ("He then adverted to the unequal operation of an excise, especially on the Southern States, which, he said, rendered it entirely contrary to the spirit of the Constitution.").

oppressing the citizenry. And contrary to Anti-Federalist fears, the new federal government did not create many courthouses, nor did it employ a large cohort of marshals, bailiffs, and jailers. “In the general constitutional order of the early republic,” Gautham Rao observes, “the lower federal courts played but a peripheral role in an era dominated by the ascendancy of the common law and state judiciaries.”<sup>282</sup> In sum, the primary justifications for commandeering lost their luster once the federal government came into existence.

The emergence of the anticommandeering principle during the 1790s was mostly due to Federalist opposition to state enforcement of federal law. After the turn of the century, however, states’ rights supporters increasingly joined in the attack. State judges, for instance, began articulating theories of a strict separation between federal and state responsibilities, largely in an effort to insulate their decisions from federal review.<sup>283</sup> In one of the most famous examples, the Virginia Supreme Court refused to acknowledge the Supreme Court’s appellate jurisdiction over state courts, holding that in the unique American system of dual sovereignty, “each government must act by *its own* organs: from no other can it expect, command, or enforce obedience, even as to objects coming within the range of its powers.”<sup>284</sup> As the scope of federal lawmaking grew, states also cited an interest in not being overwhelmed with federal responsibilities unless Congress could show the necessity of using state officers.<sup>285</sup>

Eventually the anticommandeering doctrine also gained traction in the

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282. Rao, *supra* note 144, at 17.

283. See, e.g., *United States v. Campbell*, Tapp. Rep. 61, 64 (Ohio Ct. Com. Pl. 1816); *Jackson v. Rose*, 2 Va. Cas. 34 (1815).

284. *Hunter v. Martin*, 18 Va. 1, 8 (1815) (opinion of Cabell, J.), *rev’d sub nom.* *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

285. In 1816, for example, one state court rejected its own jurisdiction to hear a federal criminal case, saying that if Congress had judged state court jurisdiction “to be *necessary*, I think they have been mistaken—*convenience* is not *necessity*. Their own tribunals are sufficient to enforce their own laws.” *Campbell*, Tapp. Rep. at 64; see also *Worthington v. Masters*, 1 J. Jurisprudence 196, 203 (Ohio Ct. Com. Pl. 1803) (Defense counsel: “[C]ongress, in attempting to impose duties upon the state courts, have assumed a power which they are not warranted in exercising, unless it can be made [to] appear that this power is necessary to the exercise of some power specially granted. This I believe cannot be done. For every judicial purpose the union has a judicial power of its own. The aid of the state courts can in no case be absolutely necessary.”). The defense counsel in *Worthington* also noted that imposing federally mandated state court duties without paying state judges for their services “would embarrass them, throw them into difficulties, [and] compel them to neglect their duties or resign their offices,” while payments from the federal government “would have a tendency to consolidate the state governments, and destroy insensibly the power and independence of the states.” 1 J. Jurisprudence at 201-02.

Supreme Court. In the famous fugitive-slave case of *Prigg v. Pennsylvania*, Justice Story wrote that “it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government.”<sup>286</sup> While ostensibly favoring states’ rights, Story actually may have been trying—much like the early Federalists—to strengthen federal power. “By removing state judges from the process,” Paul Finkelman writes, “[Justice] Story in effect forced Congress to assume a more aggressive role in the return of fugitive slaves.”<sup>287</sup> This illicit motive, of course, did not stop the advancement of anticommandeering. Several years after *Prigg*, Chief Justice Taney announced in *Kentucky v. Dennison* that “the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.”<sup>288</sup>

*Dennison* was unequivocal, but it wasn’t the last word. In 1987, the Supreme Court reversed course in *Puerto Rico v. Branstad*, finding that “*Kentucky v. Dennison* is the product of another time” and that its rigid conception of state sovereignty is “fundamentally incompatible” with modern doctrine.<sup>289</sup> The Court further explained that “[t]he fundamental premise of the holding in *Dennison*—‘that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.’”<sup>290</sup> What is representative of modern law, however, can quickly change. Just ten years after *Branstad*, the *Printz* majority remarked that commandeering is “fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>291</sup> Anticommandeering, it seems, has always been a doctrine in flux.

Oscillating views toward commandeering are not surprising. The constitutional text has little to say about the issue, and we are long removed from the mostly forgotten concerns that motivated the Founders. The anticommandeering doctrine’s history also reflects its shifting political valence. When support for a federal program is overwhelming but the means of

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286. 41 U.S. 539, 616 (1842).

287. Paul Finkelman, *The Roots of Printz: Proslavery Constitutionalism, National Law Enforcement, Federalism, and Local Cooperation*, 69 BROOK. L. REV. 1399, 1411 (2004). Indeed, Finkelman shows that Justice Story was lobbying to relocate the enforcement of the Fugitive Slave Act away from state officers and into the hands of newly appointed federal commissioners. *Id.* at 1412.

288. 65 U.S. (24 How.) 66, 107 (1861).

289. *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987).

290. *Id.* at 228 (quoting *FERC v. Mississippi*, 456 U.S. 742, 761 (1982)).

291. 521 U.S. 898, 935 (1997).

implementation are contested, the commandeering power may serve state interests by offering a viable alternative to purely federal administration. Everyone in the First Congress, for instance, knew that federal taxes had to be collected and federal crimes judicially enforced, so an anticommandeering doctrine would have done little to limit the scope of federal law. Conversely, anticommandeering served Justice Story's nationalist objectives by cutting off a less effective method of apprehending fugitive slaves when he knew the national government would step in to enforce federal law. When a policy is highly contested, though, the anticommandeering doctrine shifts fiscal and political costs to the federal government in a way that may defeat the federal program entirely.

How then should self-proclaimed "originalists" use the Founding-era history presented in this Article? Originalism comes in many varieties, which means no single answer will suffice. Recent originalist scholarship and jurisprudence tend to focus on the "original public meaning" of the Constitution's words and phrases. According to this view, "[c]onstitutional meaning is fixed by the understandings of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers."<sup>292</sup> The original meaning of the word "proper" may—as several originalists have argued, and as the Supreme Court has held—prevent the government from unduly infringing upon state sovereignty.<sup>293</sup>

From the Founding generation's perspective, however, the Constitution does not categorically prevent the federal government from commandeering state executive and judicial officers. The Founders simply didn't think that commandeering always violates federalism principles. In fact, many thought just the opposite. Anti-Federalists were among the strongest supporters of commandeering, and the few dissenters were mostly Federalists wanting to retain complete federal control over the administration of federal law. As Elbridge Gerry declared, "nothing could be plainer than this—that the General Government had a right to require the assistance of the officers of the several

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292. Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

293. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (opinion of Roberts, C.J.); *Printz*, 521 U.S. at 923-24 (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-326, 330-33 (1993)); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 217 (2003) (noting that the propriety of certain means may be judged in part "according to principles of federalism"). See generally GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010).

State Governments.”<sup>294</sup> At a minimum, then, originalists committed to a belief that true constitutional meaning cannot change should recognize that commandeering is not—at least not in an unconstructed sense—*categorically* unconstitutional.

Ironically, the brand of originalism encouraged by *Printz*’s author, Justice Scalia, is also the version most likely to favor the constitutionality of commandeering. Justice Scalia generally gives priority to the Founders’ original expectations about constitutional meaning.<sup>295</sup> “[T]he *very acts* that were perfectly constitutional” at the Founding, he has suggested, cannot “be unconstitutional today.”<sup>296</sup> For instance, Justice Scalia argues that the Eighth Amendment’s bar against cruel and unusual punishment should be “rooted in the moral perceptions of the” Founding era and thus proscribe not “whatever may be considered cruel from one generation to the next,” but what the Founders considered cruel in 1791.<sup>297</sup> The same could be said for commandeering: the Founders accepted the practice, and whatever we think today about its impact on federalism values is beside the point. “The Constitution,” Justice Scalia has written, “is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.”<sup>298</sup>

This is not to suggest that originalists in the mold of Justice Scalia should think that commandeering is *always* constitutional. To offer an outrageous example, it is a safe bet that the Founders would not have agreed to the constitutionality of a federal mandate that state governors *personally* ride around their states on horseback to count and enumerate each state resident

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294. See *supra* note 252 and accompanying text.

295. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (“In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”); Antonin Scalia, *Response* (noting that he interprets a constitutional provision “on the basis of the ‘time-dated’ meaning”), in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 148-49 (Amy Gutmann ed., 1997) [hereinafter *Scalia, Response*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-62 (1989) (discussing original-applications originalism). *But see* Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1199-1204 (2012) (providing examples where Justice Scalia has deviated from original-applications originalism).

296. Scalia, *Response*, *supra* note 295, at 141.

297. *Id.* at 145.

298. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010) (Scalia, J., dissenting).

once every ten years. As early congressional debates suggest,<sup>299</sup> the object, type, and degree of burdens placed on state officers are relevant to the constitutionality of particular federal mandates.

Limitations might also exist on how far Congress can go in *enforcing* its mandates. Many Founders thought that the oath helped guarantee state-officer compliance with federal responsibilities, and perhaps some individuals viewed the oath as the only tool for enforcing federal demands.<sup>300</sup> But in other instances when state officers had to perform federal functions, the federal government could use additional prophylactic measures to compel obedience.<sup>301</sup> Although most Anti-Federalists likely would not have endorsed *unlimited* federal power to compel state-officer compliance, they would not necessarily have rejected coercive means entirely. After all, tailored measures to

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299. See 3 ANNALS OF CONG. 279 (remarks of Rep. Samuel Livermore) (stating that he “did not consider [a simple imposition on state governors] either as an undue assumption of power, or degrading to the executives of the respective states”).

300. In a related context, for instance, Virginia Supreme Court Judge Spencer Roane thought that the Constitution’s only “antidote” for ensuring that state courts obey federal law “exists in the oath imposed on them . . . to support the constitution of the United States. This is . . . the agreed remedy for the evil; and, after this, it does not lie in the mouth of any, to raise the objection.” *Hunter v. Martin*, 18 Va. 1, 42 (1815) (opinion of Roane, J.), *rev’d sub nom.* *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816). Judge Roane also explicitly denounced federal commandeering. See *id.* at 33-36.

301. See, e.g., *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 15 (1820) (“The President’s orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper; neglect, or refusal to obey orders, is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence and punishment . . .”). But historical references to enforcement mechanisms other than the oath are relatively uncommon. Making matters especially difficult, the Founders often spoke in terms of *practical* authority rather than *constitutional* authority. One congressman, for instance, commented in an editorial: “Is the general government to have a compleat set of officers of their own appointment, or to make use of those appointed by the States? If the former, their number will be immense; if the latter, they will feel no dependence on the union and *cannot be brought to account.*” Jeremiah Wadsworth, *The Observer No. XV* (Jan. 18, 1790) (emphasis added), reprinted in 18 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 248, 250 (Charlene Bangs Bickford et al. eds., 2012). In context, Wadsworth seems to be suggesting that federal coercive remedies exist but should never be relied upon. One limitation on prophylactic measures—and perhaps this was Wadsworth’s point—may be a bar against terminating officers’ state jobs. See H.R. Debate (Aug. 29, 1789), *supra* note 172, at 1369 (remarks of Rep. Theodore Sedgwick) (“Suppose [state judges] . . . might refuse or neglect to attend to the national business; . . . where is our mean of redress? Shall we apply to the state legislatures that patronize them? Can we impeach or have them tried? If we can, how is the trial to be had, before a tribunal established by the state? Can we expect in this way to bring them to justice? Surely no gentleman supposes we can.”). To be sure, the problems here are vexing, especially with respect to disciplining disobedient state judges.

promote compliance with federal duties would have encouraged Congress to rely on state officers in the first place.<sup>302</sup>

For some originalists, however, the Founders' views about commandeering may not be dispositive. If we assume that the original meaning of the Necessary and Proper Clause prevents Congress from violating state sovereignty, some originalists may argue that that original meaning does not freeze in place all the potential *ways* in which sovereignty interests may be violated. In other words, the Constitution may ban Congress from using means that violate federalism values, but the linguistic meaning of the constitutional text may not embalm a particular list of policies that offend these values. In a closely related context, for instance, whether means are “necessary” under the Necessary and Proper Clause does not depend on whether those means were thought necessary at the Founding.<sup>303</sup>

This version of originalism—one that conceptually separates the original linguistic meaning of the constitutional text from the way that the text would have been originally applied—may be capable of vindicating modern anticommandeering doctrine. That is, perhaps federalism values have evolved such that commandeering is now inconsistent with “our constitutional system of dual sovereignty,” thus making it appropriate for judges to “construct” an anticommandeering rule. For instance, perhaps the temptation of placing federal responsibilities on state officers without having to pay the political cost of supporting those officers would lead Congress to abuse such a power.

If the justification for anticommandeering is mostly prudential rather than historical, however, then one wonders why the Supreme Court did not adopt Justice Souter's suggestion that the Court might ban only *unfunded*

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302. The same logic helps explain Anti-Federalist support for commandeering. *See supra* p. 1153. Moreover, we should be careful not to conflate commandeering's constitutionality with the availability of federal prophylactic remedies over disobedient state officers. If the Framers, for example, had adopted Roger Sherman's proposal that federal laws “be carried into execution by the judiciary and executive officers of the respective states, wherein the execution thereof is required,” *supra* note 96, the exact same questions about prophylactic remedies would still have surfaced. And even if Congress lacked any practical means of compelling state-officer obedience, the constitutionality of commandeering as a legal matter would still resolve a host of interesting legal issues.

303. Whether a law is “necessary” to effectuate an enumerated power depends on empirical facts that may change over time, thus leading to developments unanticipated by the Founders. *See United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) (“The Federal Government undertakes activities today that would have been unimaginable to the Framers . . . . Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.” (quoting *New York v. United States*, 505 U.S. 144, 157 (1992))).

mandates.<sup>304</sup> Justice Scalia offered one answer, remarking that a rule requiring reasonable federal payments “would create a constitutional jurisprudence (for determining when the compensation was adequate) that would make takings cases appear clear and simple.”<sup>305</sup> Not surprisingly, the *Printz* majority instead adopted a bright-line rule barring commandeering entirely, which is perhaps the only judicially administrable way to enforce the real (though decidedly not rule-based) constitutional value of state autonomy.

Our modern aversion to unfunded federal mandates, however, is yet another reminder of how distant we are from the concerns of our constitutional forebears. Echoing earlier colonial-era and confederation-era debates, Anti-Federalists worried that federal emoluments would pry away state-officer loyalties and breach the independence of state governments. And the modern aversion to cost shifting is even more discordant with Founding-era views in light of Anti-Federalists’ continued support for requisitions, which allowed the federal government to demand that states turn over tax revenue. As James Ferguson notes, the requisitions scheme “had its drawbacks, but it preserved a degree of local control of the purse strings, and wherever the Antifederalists had any strength they brought it forward.”<sup>306</sup> The cost shifting created by commandeering state officers is a small pittance compared to that imposed by federally mandated revenue transfers.

History may help guide our thinking on these constitutional issues, but it does not resolve how we should account for changing circumstances or how the Court should incorporate prudential considerations into its constitutional analysis. If we carefully examine the Founders’ views about commandeering,

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304. *Printz v. United States*, 521 U.S. 898, 975-76 (1997) (Souter, J., dissenting) (“I do not read any of The Federalist material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it.”).

305. *Id.* at 914 n.7 (majority opinion).

306. FERGUSON, *supra* note 18, at 291; *see also* Ames, *supra* note 191, at 242-43 (discussing early proposed amendments to make requisitions the constitutionally preferred method of raising federal revenue); Jensen & Entin, *supra* note 12 (discussing federal power to commandeer state legislatures). Whether the federal government had any prophylactic remedies for enforcing requisitions is another matter. Some individuals thought that Congress could use force against noncompliant state legislatures. *See, e.g.*, Wadsworth, *supra* note 301, at 250 (“That the general government possesses a coercive power over an individual State, is allowed on all hands . . .”). But those same individuals often thought that Congress should never exercise that authority. *See, e.g., id.* (“If the general government must ever use coercion, let it be to execute their own laws and grants; and let individuals and not States be the subjects of it.”); *see also* Clark, *supra* note 75, at 1839-62 (presenting evidence about federal power to “coerce” state legislative compliance—evidence that, in my view, almost entirely relates to how, if at all, the federal government might obtain compliance with legally binding federal duties).

however, we might also recognize the legitimacy of countervailing federalism concerns that militate in favor of requiring state officers to enforce federal law. As many Anti-Federalists thought, the power to commandeer can facilitate federal use of state officers, thus giving state officers greater control over federal policy and reducing the size of the federal bureaucracy.<sup>307</sup> Going a step further than Anti-Federalists went (at least openly), modern scholars have pointed out that commandeering may also beneficially foster state-based opposition to unwanted federal laws because “the very threat of ‘being pressed into federal service’—of having to enforce federal law—may drive states to contest such law on the merits.”<sup>308</sup> Commandeering, in other words, can harness institutional dissent in a way that more effectively constrains federal power. Whether the anticommandeering doctrine survives future shifts in the Supreme Court’s membership may rest on how the Justices continue to balance these competing federalism concerns.

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307. The *Printz* dissenters made the same point. See 521 U.S. at 945 (Stevens, J., dissenting) (arguing that commandeering “is obviously more deferential to state sovereignty concerns than a national government that uses its own agents to impose its will directly on the citizenry”); *id.* at 976-77 (Breyer, J., dissenting) (making the same point with respect to European practices).

308. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1298 (2009) (footnote omitted) (quoting *Printz*, 521 U.S. at 905).