

☆ PART ONE ☆

THE NECESSITY OF THE
CONSTITUTION

CHAPTER ONE

The Rise of the Righteous Anger

A. THE FAILURE OF REQUISITIONS

Under the Articles of Confederation, the national-level government could raise funds for the national needs only by requisitions on the states. Each state was required to pay its quota of the total requisition into the federal treasury by raising revenue under its own tax system and collecting it with its own tax officials.¹ Requisitions were mandatory in theory under the Articles – “sacred & obligatory,” as James Madison put it.² With the end of the war, however, the state legislatures began treating requisitions as “mere recommendations,”³ even as “pompous petitions for charity”⁴ and they did not pay. In the requisition of 1786 – the last before the Constitution – Congress mandated that states pay \$3,800,000,⁵ but it collected only \$663.⁶

¹ ARTICLES OF CONFEDERATION, art. VIII, 9 JCC 217 (March 1, 1781).

² Madison, Continental Congress (Feb. 21, 1783), *in* 25 JCC 908: *See also* ARTICLES OF CONFEDERATION, art. XIII, 9 JCC at 221 (providing that every State shall abide by the determination of the United States Congress and that the Articles “shall be inviolably observed by every State”); Robert Morris to President of the Congress (Mar. 8, 1783), *in* 6 RDCUS 278 (“The Right of Congress is perfect and the Duty to pay is absolute[.]”); Madison, Continental Congress (Jan. 28, 1783), *in* 25 JCC 875 (saying that a “requisition of Congress on the states . . . is as much a law to them as their revenue acts when passed are laws to their respective citizens”).

³ *Federalist* No. 15, at 93 (Dec. 1, 1787). (Hamilton) (arguing that the states treated requisitions as mere recommendations although requisitions were mandatory in theory).

⁴ Robert Livingston, New York Convention (June 27, 1788), *in* 2 ELLIOT 342. *See also* Randolph, Virginia Convention (June 7, 1788), *in* 9 DHRC 1017 (saying that the states treated requisitions as earnest entreaties, humble supplications, and solicitations).

⁵ Report of the Board of Treasury (Aug. 2, 1786), *in* 31 JCC 462.

⁶ *See* BROWN 26. The Board of Treasury reported zero receipts from the Requisition of 1786 just after the close of the Constitutional Convention. (Sept 29, 1787), *in* 33 JCC 572. Brown relies on Treasury Reports ending earlier, March 31, 1787, and the difference is

Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking.⁷ New Jersey said it had paid enough tax by paying the tariffs or "imposts" on goods imported through New York or Philadelphia and it repudiated the requisition in full.⁸ Congress's Board of Treasury had concluded in June 1786 that there was "no reasonable hope" that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt.⁹ George Washington reported,

Requisitions are a perfect nihility, where thirteen sovereign independent disunited States are in the habit of discussion and refusing compliance with them at their option. Requisitions are actually little better than a jest and a bye word throughout the land.¹⁰

Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of \$1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid \$1.6 million for interest

apparently a judgment about credit given for prior state expenditures. The bridge between \$663 and zero, in any event, can be comfortably spanned by rounding.

⁷ See, e.g. Madison to Pendleton (Feb. 24, 1787), in 9 JM 295 ("No money is paid into the public Treasury; no respect is paid to the federal authority. Not a single state complies with the requisitions, several pass them over in silence, and some positively reject them").

⁸ Votes and Proceeding of the General Assembly of the State of New Jersey, 10th Sess. 2d sitting, at 12 (1786). See RUTH BOGIN, ABRAHAM CLARK AND THE QUEST FOR EQUALITY IN THE REVOLUTIONARY ERA, 1774-1794, at 127-131 (1982).

⁹ Report of the Board of Treasury (June 3, 1786), in 30 JCC 354-64. The report cataloged the state shortfalls: Connecticut, New Jersey, Delaware, and North Carolina had not passed any act for the 1785 Requisition. Virginia had relied on a tax that was expected to yield only about half of its quota. New York had just agreed to accept payment of its taxes in state paper money and so it could not expect to collect any specie for its quota. Pennsylvania gave \$86,000 of its quota for specie in indents (Treasury notes paid out in lieu of interest) instead of specie. The New Hampshire tax had not been efficacious for the 1785 requisition, so would probably not be dependable for the 1786 requisition. Massachusetts committed its taxes first for state programs and state debt, so any shortfall in revenue would come from the federal requisition. South Carolina claimed credits offsetting her full quota. Rhode Island claimed that its aid to invalids and an unpaid bill for an oxen team offset her quota in full. The Board did not have a copy of Georgia's Revenue Act so it could not ascertain how much, if anything, it would pay.

¹⁰ Washington to Jay, (Secretary of Foreign Affairs) (Aug. 1, 1786), in 28 WRITINGS OF GW 503. See also Charles Pinckney, South Carolina House of Representatives (Jan. 16, 1788), in 4 ELLIOT 255 (saying that for the last six or eight years, not one state had completely complied; but a few had even paid up their specie proportions; others very partially; and some, he had every reason to believe, had not to this day contributed a shilling to the common treasury since the Union was formed).

only.¹¹ Express advocacy of repudiation of the federal debt was rare,¹² but with the failure of requisitions, payment was not possible. Virginia postponed its taxes for 1787 and Madison wrote to his father, “We will [cut] a sharp figure, after our declarations [supporting the] Continental debt if we wholly omit the means of fulfilling them.”¹³

Beyond the repayment of the war debts, the federal goals were quite modest. The operating budget was only about \$450,000 and half of that was for the small military detachments posted on the frontiers to protect against the Indians.¹⁴ The requisitions had to pay for the clerks and other expenses of the Congress itself, and the federal government maintained a small office for surveying and mapping.¹⁵ Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress’ offices shut. “The payments . . . of late fall short even of the pittance necessary for the civil list of the Confederacy,” wrote Madison.¹⁶ Congress had to declare their “utter inability to make [a] pitiful advance” of \$1,000 to transport ammunition to American posts along the Ohio River.¹⁷ In the wording of the time, the federal government was “imbecilic” and “impotent.”¹⁸

¹¹ Proceedings of the Continental Congress (Aug. 2, 1786), in 31 JCC 462. In the Treasury’s 1789 inventory of the debt, the U.S. owed \$12 million to France and to Dutch investors and \$40 million to domestic creditors. Hamilton, Report on Public Debt to the House of Representatives, in 6 PAH 86.

¹² *But see* PELATIAH WEBSTER, POLITICAL ESSAYS ON THE NATURE AND OPERATION OF MONEY, PUBLIC FINANCES, AND OTHER SUBJECTS 362–363, 372 (1791) (suggesting that federal revenue system was so delicate, young, and tender that the fiscal crises needed to be solved by reducing the federal debt by docking it).

¹³ Madison to James Madison, Sr. (June 15, 1784), in 8 JM 80.

¹⁴ Consideration of the Requisition of 1786, in 31 JCC 462.

¹⁵ *Id.* (allocating \$4000 of the failed 1786 requisition to geographer). The “present reduced state of our finances,” meant that the Congress could not pay for a “much desired” map of the middle states. Report of a Committee (Oct. 23, 1783), in 25 JCC 711.

¹⁶ Madison to Pendleton (Feb. 24, 1787), in 9 JM 295

¹⁷ Letter of Rufus King to Washington (June 18, 1786) in 8 LMCC 393.

¹⁸ Hamilton, The Defence of the Funding System (July 1795), in 19 PAH 22, 27 (arguing that requisition from the states was a system of “imbecility” and “impoten[ce]”). *See also, e.g.*, Randolph, Federal Convention (May 29, 1787) 1 FARRAND 25 (McHenry notes) (“Imbecility of the Confederation”); Randolph, Federal Convention (June 16, 1787), in 1 FARRAND 255 (painting “in strong colours, the imbecility of the existing Confederacy”); Madison, Federal Convention, July 7, 1787, 1 FARRAND 551 (“impotent . . . as the old” government); Madison, House of Representatives (April 8, 1789), in 12 JM 65 (calling for a retaliatory tariff on British shipping because the union has recovered from the “state of imbecility, that . . . prevented a performance of its duty”); Christopher Gore to Rufus King (June 28, 1787), quoted in BROWN at 261 (saying our government is “weak, languid, and inefficient to support the great objects of civil institutions,” and that one “must invent some plan to increase the circulation at the heart”); ARCHIBALD MACLAINE, PUBLICOLA: ADDRESS TO THE FREEMEN OF NORTH CAROLINA, STATE GAZETTE OF NORTH CAROLINA (Mar. 20, 1788),

The failure to pay the war debts was dangerous because when war came again the country would need to borrow again.¹⁹ It will be necessary in emergencies to borrow, Hamilton told the New York Convention, and “it is impossible to borrow, unless you have funds to pledge for the payment of your debts.”²⁰ “In the modern system of war,” Hamilton argued, “even the wealthiest nations are obliged to have recourse to large loans.”²¹ “A nation without credit,” Hamilton said, “would be in great danger of falling a victim in the first war with a power possessing a vigorous and flourishing credit.”²² Borrowing when the next war came meant that the government would need to raise only enough to pay the current interest and could avoid having to raise the whole funds of war immediately. Raising the entire funds of war without borrowing, would be “distressing to the people, [and to] our country perhaps overrun by the enemy.”²³ “Our credit as a nation is sinking,” wrote Roger Sherman, and “the resources of the country [can] not be drawn out to defend against a foreign invasion”²⁴

The proponents of the Constitution thought war was inevitable. The United States was a coastal nation spread out along the Atlantic and vulnerable to attack by sea by any of three rapacious empires: France, Spain, or England. “It would be strange,” said a proponent in Connecticut, if England or Spain did not force us into war within 15–20 years.²⁵ “We are circumscribed with enemies from Maine to Georgia”²⁶ The prospect of war, James Wilson told Pennsylvania, was “highly probable.”²⁷

The insolvency of the federal government would make it hard to defend the nation. This “wretched confederation,” Edward Rutledge told South Carolina, is “unable to discharge of any part of our debts . . . Without a

reprinted in 16 DHRC 436 (saying Continental Congress without the power to “raise a single shilling” had been reduced to the “present state of imbecility”); James Wilson, Public Meeting in Philadelphia (Oct. 6, 1787), *in* 13 DHRC 343 (arguing that the imbecility of the Confederation left the states with great debt).

¹⁹ EDLING at 47, 207–208, 220, 228–29 (2003) argues that the Constitution was formed to create a military-fiscal state capable of defense, much as the European states were formed to pay for defense.

²⁰ Hamilton, New York Convention (June 27, 1788), *in* 2 ELLIOT 352.

²¹ *Federalist* No. 30, at 192 (Hamilton) (Dec. 28, 1787).

²² Hamilton, Defense of the Funding System (July 1795), 19 PAH 57.

²³ James Iredell, North Carolina Convention, July 30, 1788, 4 ELLIOT 220–221.

²⁴ Letter of Roger Sherman to William Floyd, *in* 3 DHRC 353. See also Randolph, Virginia Convention (June 7, 1788), *in* 9 DHRC 1021 (saying that every nation must borrow during war); Madison, (June 6, 1788), *in* 9 DHRC 996–997 (“For all nations, debts come from war”).

²⁵ Republican VI, CONN. COURANT (MARCH 19, 1787) *in* DHRC MICROFICHE SUPPL. CONN.

²⁶ Christopher Gore, Massachusetts Convention (Jan. 22, 1788), *in* 2 ELLIOT 67.

²⁷ Wilson, Pennsylvania Assembly (Sept. 17, 1787), *in* 2 DHRC 58.

ship – without a soldier – without a shilling in the federal treasury, without a . . . government to obtain one,” he said, “we hold the property that we now hold at the courtesy of other powers.”²⁸ “If a war breaks out, and our situation invites our enemies to make war,” Oliver Ellsworth argued, “how are we to defend ourselves? Has government the means to enlist a man or buy an ox?”²⁹ “What is there to prevent an Algerine Pirate from landing on your coast, and carrying your citizens into slavery?” Hugh Williamson asked North Carolina. “You have not a single sloop of war.”³⁰ The Congress was empowered to make war, John Jay told New York, “but [they] are not empowered to raise men or money to carry it on.”³¹ An imbecilic and impotent government could not defend the country.

In the *Federalist* the most important subject was war and the financing of it. The essays of the *Federalist* were written by Alexander Hamilton, James Madison, and John Jay, all under the single pseudonym of *Publius*, in order to convince the people to ratify the newly proposed Constitution. *Publius* said that “nations in general will make war whenever they have a prospect of getting any thing by it,”³² and that therefore “to model our political systems upon speculations of lasting tranquillity, is to calculate on the weaker springs of the human character.”³³ The Union under an efficient national government, *Publius* argued, affords “the best security that can be devised.”³⁴ The national government could best defend the nation because it could apply “the resources and power of the whole to the defence of any particular part.”³⁵ The national government would need to be able to call on the full resources of the continent. The power of providing for defense can “know no other bounds,” *Publius* wrote, “than the exigencies of the nation and the resources of the community.”³⁶ “The circumstances that endanger the safety of nations are infinite,” *Publius* said, “and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”³⁷

²⁸ Edward Rutledge, South Carolina Legislature (Jan. 16, 1788), in 2 DEBATE 23.

²⁹ Oliver Ellsworth, Connecticut Convention (Jan. 4, 1788), in 2 ELLIOT 189.

³⁰ Hugh Williamson, Speech at Edenton, N.C., N.Y. DAILY ADVERTISER, (Feb. 26, 1788), in 25 DHRC 206.

³¹ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 109.

³² *Federalist* No. 4, at 18–19 (Jay) (Nov. 7, 1787).

³³ *Federalist* No. 34, at 212 (Hamilton) (Jan. 5, 1787).

³⁴ *Federalist* No. 3, at 14 (John Jay) (Nov. 3, 1787).

³⁵ *Federalist* No. 4, at 21 (John Jay) (Nov. 7, 1787).

³⁶ *Federalist* No. 31, at 196 (Hamilton) (Jan. 1, 1787).

³⁷ *Federalist* No. 23, at 147 (Hamilton) (Dec. 18, 1787). See also *Federalist* No. 23, at 149 (Hamilton) (Dec. 18, 1787) (arguing that the Union must be empowered to pass all laws as guardian of the common safety); *Federalist* No. 26, at 164 (Hamilton) (Dec. 22, 1787)

The language the Framers used to describe the failure of requisitions was intensely moral, even religious. The requisitions were mandatory under the Articles, and “were as *sacred & obligatory* as the constitutions of the several States.”³⁸ The failure of requisitions caused “repeated breaches of the public *faith*.”³⁹ “American *faith*” was said to have become a bitter proverb in Europe by reason of American failure to pay its debts.⁴⁰ “The failure of the requisitions was a *vice* of the system⁴¹ and not just an omission or error. “The deficiency by the states most capable of yielding their quotas was *shameful*.”⁴² The default on Revolutionary War debts was a “*humiliation*”⁴³ and “our *infamy*.”⁴⁴ The fact that the government had to borrow money even to pay interest on its existing debt was “the most *humiliating* and *disgraceful* measure that a nation could take,”⁴⁵ the Federalists said, and “should strike us with *shame*.”⁴⁶ All of Congress’ efforts to keep the national vessel from sinking, Madison wrote Jefferson, “have been frustrated by the *selfishness* or *perverseness* of some part or other of [Congress’] constituents.”⁴⁷

(arguing that the idea of restraining the legislative authority over the means of providing for the national defense is “more ardent than enlightened”); *Federalist* No. 30, at 188 (Hamilton) (Dec. 28, 1787) (arguing that a regular and adequate supply of tax money is an “indispensable ingredient in every constitution”); Randolph, Virginia Convention (June 7, 1788), in 3 ELLIOT 115 (saying “[w]ars cannot be carried on without a full and uncontrolled discretionary power to raise money in an eligible manner”).

³⁸ Madison, Notes on Debates in the Congress (Feb. 21, 1783), in 6 JM 270, 271 (emphasis added).

³⁹ James Bowdoin, Massachusetts Convention (Jan. 23, 1788), in 2 ELLIOT 82 (saying non-compliance with congressional requisitions caused “breaches of public faith”) (emphasis added).

⁴⁰ Aristedes, *Remarks on the Proposed Plan of a Federal Government* (Jan. 31, 1788), in 15 DHRC 538 (emphasis added).

⁴¹ Madison, Vices of the Political System of the United States (April 1787), in 9 JM 348 (emphasis added); Madison, Notes on Ancient and Modern Confederacy (1786 or 1787), in 9 JM 6, 8, 11, 16, 22.

⁴² Madison (member of Congress representing Virginia) to Jefferson (Governor of Virginia) (April 16, 1781), in 3 JM 71 (emphasis added).

⁴³ *Federalist* No. 15, at 91 (Hamilton) (Dec. 1, 1787) (identifying national humiliation from failure to pay Revolutionary War debts as part of the situation forcing the need for change of the weak Confederation) (emphasis added).

⁴⁴ The North American No. 1, PENNSYLVANIA JOURNAL AND WEEKLY ADVERTISER (Sept. 17, 1783), reprinted in 3 WM. & MARY Q. 569, 580 (1946) (attributed to Richard Peters of Philadelphia by *Editorial Note*, in 7 JM 319–363) (saying that Dutch and French seizure of American shipping to pay debts will record our *infamy* as well as our *impotence*) (emphasis added).

⁴⁵ William Davie, North Carolina Convention (July 24, 1788), in 4 ELLIOT 19 (emphasis added).

⁴⁶ Hamilton, New York Convention (June 28, 1788), in 2 ELLIOT 366.

⁴⁷ Madison (serving in Virginia Assembly) to Jefferson (Ambassador in Paris) (Oct. 3, 1786), in 8 JM 373 (emphasis added).

“[R]equisitions were rendered nugatory,” John Jay told New York, “not by their want of propriety, but by their want of power.”⁴⁸ Partial performance of requisitions reversed “the first principle of all Government,” Madison wrote to Jefferson, because “the requisition system punishes not the *evildoers*, but those that do well.”⁴⁹

The failure of requisitions was also inconsistent with the highest ideals for which the Revolutionary War had been fought. The debts had been “fairly contracted” to fight the war and “justice and good faith demand that [they] should be fully discharged.”⁵⁰ The “public debt rendered so sacred by [the] cause in which it had been incurred remained without any provision for its payment.”⁵¹ The war debt was “the price of liberty” for which “the faith of America has been repeatedly pledged.”⁵² The failure to pay public debt was “horrid,” Madison said, “the erecting of our independence on the ruins of public faith and national honor.”⁵³ The defaults exposed “the friends and patrons of the Republic . . . to insult by . . . the votaries of tyranny.”⁵⁴ The prospective break up of the Union would lead “the minds of men every where [to] become alienated from republican forms.”⁵⁵ The defaults prevented the nation from securing “the fruits of the Revolution” despite “the blood, the toils, the cares and the calamities” of the War.⁵⁶ The defaults dishonored the “great cause,” he said, “the last and fairest experiment in favor of the right of human nature.”⁵⁷

The Congress pleaded pathetically with the states to pay their quotas:

The Crisis is arrived when the People of these United States, by whose Will and for whose Benefit the Federal Government was instituted,

⁴⁸ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 107.

⁴⁹ Madison to Jefferson (Oct. 3, 1785), in 3 JM 72 (emphasis added).

⁵⁰ Madison, Address to the States, by the United States in Congress Assembled (April 26, 1783), in 24 JCC 277, 282.

⁵¹ Madison, “Preface to the Constitution” (circa 1820s), in 3 FARRAND 547. See also James Wilson, Pennsylvania Convention (Nov. 24, 1787), in 2 DHRC 360 (saying that “the commencement of peace was the commencement of every disgrace and distress” and that “devoid of national credit, . . . our public securities melt in the hands of holders”).

⁵² Hamilton, Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), in 6 PAH 51, 69.

⁵³ Madison, Notes on Debates in Congress (Jan. 28, 1783), in 6 JM 142–149.

⁵⁴ *Id.*

⁵⁵ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 120. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 185 (1985) collects additional expressions on the vulnerability of the democratic form of government because of the fiscal crisis.

⁵⁶ Madison, Address to the Nation (April 26, 1783), in 24 JCC 281.

⁵⁷ *Id.*

must decide whether they will support their Rank as a Nation by maintaining the Public Faith, at home and abroad; or whether for want of a timely exertion in Establishing a General Revenue and giving Strength to the Confederacy, they will hazard, not only the existence of the Union, but of those great and invaluable privileges, for which they have so arduously and honorably contended.

(February 8, 1786)⁵⁸

Whilst the United States in Congress, are denied the means of satisfying those Engagements which they have constitutionally entered into for the common Benefit of the Union; they cannot be responsible for those fatal Evils which will inevitably flow from a breach of Public faith, pledged by solemn contract, and a violation of those principles of Justice, which are the only solid Basis of the honor and prosperity of Nations.

(February 13, 1786)⁵⁹

“[Failure of the states to pay their requisitions denied Congress] the Means of satisfying these Engagements, which they had constitutionally entered into for the Common Benefit of the Union, it was their duty to warn their Constituents, that the most fatal Evils would inevitably flow from a breach of Public Faith, pledged by solemn Contract, and a violation of those principles of Justice which are the only solid Basis of Honor and Prosperity of Nations.”

(August 13, 1786)⁶⁰

It is with the most painful anxiety that [the Congress] are compelled to declare, that, having been denied the means of satisfying the engagements which they have constitutionally made for the common benefit of the Union it is now their duty solemnly to warn their constituents that the most fatal evils will speedily and inevitably flow from a breach of public faith and a violation of the principles of justice, which are the solid basis of the honor and prosperity of Nations.

(October 6, 1786)⁶¹

Reminding the states of the consequences of delay in taxes, Robert Morris said in 1782, “was like preaching to the dead.”⁶²

⁵⁸ Report of the Board of Treasury (Feb 8, 1786), *in* 30 JCC 57.

⁵⁹ Report of the Committee, consisting of Rufus King, Charles Pinckney, et al. (Feb. 13, 1786), *in* 30 JCC 67–68. The Virginia Assembly cited this language as the first reason to appoint delegates to the Philadelphia Convention. Resolution of the Virginia Assembly, Nov. 23, 1786, 8 DHRC 540.

⁶⁰ An Address from the United States in Congress Assembled to the Legislatures of the several States (Aug. 31, 1786), *in* 31 JCC 613, 614.

⁶¹ An Address from the United States in Congress Assembled to the Legislatures of the several States (Oct. 6, 1786), *in* 31 JCC 747–748.

⁶² Erna Risch, “Supplying Washington’s Army” 257 (U.S. Army Center of Military History 1981), <<http://www.army.mil/cmh-pg/books/RevWar/risch/chpt-8.htm>>

The nationalists attempted to persuade the states of their duty by reminding them to whom they owed the duty: The money was owed to France, Madison said, who “to the exertion of his arms . . . [were] added the succours of his treasure,”⁶³ and to the Dutch who were “first to give so precious a token of their confidence in our justice . . .”⁶⁴ It was owed to individual creditors “in commercial States, attached to the American cause,” who “obeyed the public call” and trusted the new Republican government with their loans.⁶⁵ “[T]he individuals who lent us money in the hour of our distress are now reduced to indigents.”⁶⁶ Money was owed to the soldiers of the Revolution, “whose blood and whose bravery have defended the liberties of their country.”⁶⁷

The failure to pay the soldiers had been especially shameful. “[The soldiers] ask for no more than such a portion of their dues as will enable them to retire from the field of victory and glory, into the bosom of peace and private citizenship.”⁶⁸ “The war-worn veteran whose reward for toils and wounds existed in written promises,” said John Jay to New York, “found Congress without the means, and too many States without the disposition to do him justice.”⁶⁹

⁶³ Madison, Address to the States, by the United States in Congress Assembled (April 26, 1783), in 24 JCC 277, 282. The identified author of the Address is a committee consisting of Madison, Hamilton, and Oliver Ellsworth, but the manuscript was in Madison’s handwriting (24 JCC 283) and Madison claimed to have written it. *Editorial Note*, in 6 JM 498. *See also* Madison, Virginia Convention, June 6, 1788, 3 ELLIOT 136:

How have we dealt with that benevolent ally? Have we complied with our most sacred obligations to that nation? Have we paid the interest punctually from year to year? Is not the interest accumulating, while not a shilling is discharged of the principal? The magnanimity and forbearance of that ally are so great that she has not called upon us for her claims, even in her own distress and necessity.

⁶⁴ Madison, Address to the States, by the United States in Congress Assembled (April 26, 1783), in 24 JCC 282.

⁶⁵ THE NORTH AMERICAN NO. 1, PENNSYLVANIA JOURNAL AND WEEKLY ADVERTISER (Sept. 17, 1783), reprinted in 3 WM. & MARY Q. 569, 574–75 (1946) (attributed to Richard Peters of Philadelphia by *Editorial Note*, in 7 JM 319–363). *See also* Madison, Address to the States, by the United States in Congress Assembled (April 26, 1783), in 24 JCC 277, 282–283 (“The remaining class of public creditors is composed partly of such of our fellow-citizens as originally lent to the public the use of their funds, or have since manifested most confidence in their country, by receiving transfers from the lenders; and partly of those whose property has been either advanced or assumed for the public service”).

⁶⁶ William Davie, North Carolina Convention (July 24, 1788), in 4 ELLIOT 19.

⁶⁷ Madison, Address to the States (April 26, 1783), in 24 JCC 277, 282.

⁶⁸ *Id.*

⁶⁹ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF NEW YORK (April 15, 1788), in 17 DHRC 107.

“Hard necessity,” Jay said, compelled the veterans “to sell their honest claims on the public for a little bread.”⁷⁰

An unpaid army, moreover, was dangerous. In 1783, unpaid soldiers drove the Congress out of Philadelphia and the Congress fled to Princeton, New Jersey, where it held a session in exile.⁷¹ When Virginia repudiated a proposal to give Congress power to impose taxes on imports, Madison wrote home that

Virginia could never have cut off this source of public relief at a more unlucky crisis. . . . The deputies of the Army are still here. . . . But what can a Virginia Delegate say to them, whose constituents declare that they are unable to make the necessary contribution to establish the funds for the obtaining of their pay?⁷²

The failure of the requisition left the founders “despondent as to the present System.”⁷³ “Payments to the federal Treasury. are ceasing every where,” Madison wrote his father, “and the mind of people losing all confidence in our political System.”⁷⁴ Rufus King of Massachusetts was “more agitated for Country than he could express,” and he “conceived that [the Constitutional Convention] to be the last opportunity of providing for [the Country’s] liberty & happiness.”⁷⁵

“[S]omething must be done, or the fabrick must fall,” Washington wrote in 1786, “for it certainly is tottering . . . From the high ground we stood upon, from the plain path which invited our footsteps, to be so fallen! so lost! it is really mortifying. . . .”⁷⁶ “In a word, it is at an end,” Washington declared in 1787, “and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue.”⁷⁷ “General Government is now suspended by a Thread,”

⁷⁰ *Id.*

⁷¹ RAKOVE, BEGINNINGS at 334–335.

⁷² Madison to Randolph (Jan. 22, 1783), in 6 JM 55–56. See discussion in KETCHAM 171–173.

⁷³ Madison to Pendleton (Feb. 24, 1787), in 9 JM 294.

⁷⁴ Madison to Madison, Sr. (Feb. 25, 1787), in 9 JM 297. See also Letter of Madison to Ambrose Madison (Aug. 5, 1786), in 9 JM 89 (saying that “[n]o money comes into the public treasury, . . . and the States are running mad after paper money, which among other evils disables them from all contributions of specie for paying the public debts, particularly foreign ones”).

⁷⁵ Rufus King (Massachusetts), Federal Convention (June 30, 1787), in 1 FARRAND 490.

⁷⁶ Washington to Secretary of Foreign Affairs (John Jay) (May 18, 1786), in 28 WRITINGS OF GW 430, 431–2. Accord, Letter of Madison to Randolph (Feb. 25, 1787) in 9 JM 299 (saying that lacking money and respect for its authority, the Confederation was tottering on its foundation).

⁷⁷ Washington to Jefferson (May 30, 1787), in 3 FARRAND 31.

he wrote in a 1788 letter, “I might go further . . . *it is really at an End.*”⁷⁸ “We may indeed with propriety be said to have reached almost the last stage of national humiliation,” *Publius* said. “We have neither troops nor treasury nor government.”⁷⁹ Things had fallen apart; the center could not hold.

For the Framers of the Constitution, the failure of requisitions was a matter of state willfulness and not of incapacity. “[W]e labour under one sad Evil,” John Jay wrote, “the Treasury is empty tho’ the Country abounds in Resources, and our people are far more unwilling than unable to pay Taxes.”⁸⁰ The times were prosperous, the founders believed.⁸¹ “Population is encreasing,” John Jay reported, “new houses building, new lands clearing, new settlements forming and new manufacturing establishing with a rapidity beyond conception.”⁸² The country, Franklin said, was on the whole so

⁷⁸ Extract of a Letter, of a late Date, from the illustrious President of the late Federal Convention [Washington], to his Friend in Fredericksburg, Virginia – extracted from Mr. Green’s Virginia Herald, Maryland Journal (Jan. 1, 1788), in 15 DHRC 136 (emphasis in original).

⁷⁹ *Federalist* No. 15, at 91 (Hamilton) (Dec. 1, 1787).

⁸⁰ Jay to John Adams (Feb. 27, 1787), quoted in BROWN, at 157–167 for other descriptions of the Federalists’ view that failure of requisitions was the result of “an unvirtuous people.” Brown himself is a dissenter from that view, considering the failure of requisitions to be an unavoidable result of lack of specie in the rural communities and economic depression, but given the prosperity and commodity exports of the nation, the failure to tap any of the considerable wealth of the nation or to create viable mechanisms for collection has to be understood as a failure of will and institutions, and not an act of God or force of nature. See, e.g., Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. OF ECON. HISTORY 47, 60 (1988).

⁸¹ It is quite surprisingly still unclear as to whether the economy should be considered overall as booming or in depression in 1787. Proponents of prosperity include RISJORD at 156 (finding economic prosperity in Virginia, with state tax receipts increasing by 15% between 1785–1786 and 1786–1787); JENSEN, *NEW NATION* 214–18, 245–57 (describing booming trade and economy); McDONALD, HAMILTON at 89 (saying that New York revenues burgeoned from \$95,000 in 1784 to \$450,000 in 1785, mainly thanks to import duties, but also good 1785 harvest and recovery from the ravages of the war); 167–168 (Pennsylvania prosperous as computed from import and export data); 186 (“boom” in Mass). Arguing for depression, John P. Kaminski, *New York: The Reluctant Pillar*, in *RELUCTANT PILLAR* 48, 54; JOHN J. McCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607–1789* at 373–77 (1985) (arguing that something truly disastrous happened to American economy from 1775 to 1790). MORRIS at 130–148 (1987) has an excellent discussion arguing in favor of depression on the grounds of drop in prices and increasing trade deficits.

A great deal does not ride on whether the country was prosperous or not, but I come down on the side of prosperity. Price drops that Morris points to were a monetary phenomenon attributable to the withdrawal of state paper money. Trade deficit figures also show steadily increasing exports and also a trend to increasing imports, although not steadily. Morris gives credence to mercantilists who decry increasing imports, but increasing imports are in fact not a sign of bad economic health. In the end, it is the perceptions of the Framers that count, and their letters are filled with optimism.

⁸² Charles Thomson to Jefferson (April 6, 1786), in 9 PTJ 380.

prosperous that there was every reason for profound thanksgiving.⁸³ “Our country is fertile, abounding in productions in demand and bearing a good price,” wrote John Jay to Jefferson.⁸⁴ The harvests were good ones and the states were recovering from the ravages of war and then deflation.⁸⁵

The states were using their increasing revenues to purchase debt held by citizens of their own state, rather than paying the requisition that would extinguish the debt for the benefit of the whole union.⁸⁶ The purchases benefited local voters, at least to the extent of the depreciated value of the debts, without reducing the federal burden. New York bought the federal debt held by supporters of Governor George Clinton as part of a program to garner political support for the governor. New York also acquired enough securities that interest due to New York on the federal debt was more than New York’s quota under a requisition, so that the State could afford to ignore requisitions, as it did.⁸⁷ Clinton was supposed to come in as co-debtor helping to extinguish the debts. Instead he came in as a creditor pushing to the head of the line. The debts held by New York would have priority even over the Dutch creditors because New York payments under requisitions and its collections as creditor would cancel each other out. Virginia did not pay her quota of requisition, but she did purchase federal debt at their depreciated value in 1787, speculating that a new Constitution would allow payments on the federal debt that would enrich Virginia.⁸⁸ Virginia and New Jersey paid off their state debts, without paying the requisition quotas that would have allowed the federal government to pay off the general debts.⁸⁹ Those same payments should have gone to extinguish the federal debt under the mandatory provisions of the Articles of Confederation.

B. VETO OF THE IMPOST

In 1781 Congress had proposed that it be granted its own tax, a 5% tax on imports called the “impost” so that it did not have to rely entirely on

⁸³ Quoted in BEARD 49.

⁸⁴ Letter of Jay to Jefferson (Dec. 14, 1786) in 3 PJJ 224.

⁸⁵ On deflation, see discussion Chapter 6, pp. 218–219.

⁸⁶ FERGUSON at 228–234 (saying that Pennsylvania, Massachusetts and New York began buying federal debt from their own citizens at a fraction of the face value, replacing the federal debt with state paper money and state debts).

⁸⁷ McDONALD, HAMILTON at 88–89; EDMUND BURNETT, CONTINENTAL CONGRESS 540–46 (1941); FERGUSON at 189, 230, 233. Cf. KAMINSKI, CLINTON 102 (1993) (saying that Clinton bought 28% of the federal securities owned by New Yorkers but not those of the wealthy New York City residents, who had little sympathy for Clinton).

⁸⁸ JENSEN, NEW NATION at 397.

⁸⁹ *Id.*, at 34, (Virginia), at 392–393 (New Jersey).

requisitions. The impost proposal required an amendment of the Articles of Confederation, however, and, under the Articles themselves, amendment required the endorsement by all thirteen states.⁹⁰ Rhode Island vetoed the impost of 1781, saying that a federal tax was inconsistent with the sovereignty and independence of the State.⁹¹

When Rhode Island vetoed the impost, the rest of America was unforgiving. Because of its veto of the impost, Rhode Island was “an evil genius” whose veto “injured the United States more than the worth of that whole state.”⁹² Rhode Island was “shameful” and a “perverse sister.”⁹³ “Cursed State ought to be erased out of Confederation, and . . . out of the earth, if any worse place could be found for them.”⁹⁴ A poem of 1782 showed Mother Columbia, the symbol of all America, protecting all her thirteen children, when the Devil comes to her and says he must take one state. Fair Columbia protests, but then she remembers Rhode Island’s veto of the 1781 impost. She smiles, consents, and lets the devil have Rhode Island.⁹⁵

As the states came together for the Constitutional Convention, the newspapers were filled with attacks on Rhode Island. Selfish “Rogue Island” was said to be responsible for the poverty of the Revolutionary soldiers, for the high taxes on land, and for the embarrassment of public finances.⁹⁶ Rhode Island was the “Quintessence of Villainy.”⁹⁷ It was governed by “miscreants void of even the appearance of Honor or Justice.”⁹⁸ “The small district of Rhode Island put a negative upon the collected wisdom of the continent.”⁹⁹ Even to a talented, moderate Anti-Federalist, Melancton Smith, Rhode Island was an

⁹⁰ ARTICLES OF CONFEDERATION, art. XIII, para. 1, 9 JCC 221 (March 1, 1781).

⁹¹ Congressman David Howell to Gov. Wm. Greene (July 30, 1782), in 18 LDCC 678. *See also* Congressman David Howell to Gov. Wm. Greene (Feb. 5, 1784), in 21 LDCC 340 (saying that if the “States give up to Congress the power of raising money . . . , their sovereignty will in fact be absorbed into one mighty sovereignty”). *See* IRVIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774–1795, at 82 (1969) (collecting arguments that impost violated state sovereignty). *See id.* at 53–88 for a description of Rhode Island’s decision to veto the impost.

⁹² STATE GAZETTE OF SOUTH-CAROLINA (CHARLESTON) (June 1, 1786) and “A FABLE,” EXCHANGE ADVISER (BOSTON) (Feb. 11, 1786), quoted in IRVIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774–1795, at 96 (1969).

⁹³ Madison to Randolph (Nov. 19, 1783), in 5 JM 289.

⁹⁴ John Montgomery to Edward Hand (July 26, 1784), in 6 LMCC 575.

⁹⁵ PHILADELPHIA COLUMBIAN MAGAZINE (1782), described in JOHN K. ALEXANDER, THE SELLING OF THE CONSTITUTIONAL CONVENTION at 24 (1990).

⁹⁶ *Id.* at 23 (1990) (quoting SALEM (MASSACHUSETTS) MERCURY, 1787).

⁹⁷ *Id.* at 23. For additional expressions of anti-Rhode Island sentiments in the press, see *id.* at 23–24, 71–74, 158–169.

⁹⁸ Francis Hopkinson to Jefferson (July 8, 1787), in 11 PTJ 561.

⁹⁹ D. Thatcher, Massachusetts Convention (Feb. 4, 1788), in 2 ELLIOT 142 (complaining that Rhode Island had prevented repaying Massachusetts for her disproportionate contribution to the war).

illustration of “political depravity,” “genuine infamy,” and “a wicked administration.”¹⁰⁰ Rhode Island, according to the scholarly Noah Webster, was that “little detestable corner of the Continent.”¹⁰¹

Rhode Island was not, however, alone in its veto of the impost. Once Rhode Island vetoed the 1781 impost proposal, Virginia revoked its prior ratification, saying that giving any body other than the Virginia General Assembly power over taxation was “injurious to [Virginia’s] Sovereignty.”¹⁰² Nathaniel Gorham of Massachusetts reacted that Virginia not only refused to contribute the necessary requisitioned funds, but at the same moment repealed her concurrence in the only scheme that promised to make up the deficiency of contributions.¹⁰³ “How all these sovereign People will agree in the Establishment of National Security,” Oliver Wolcott reacted, “is difficult to say.”¹⁰⁴

In 1783 Congress proposed again that it be given a 5% impost, this time limiting the impost to 25 years and to the payment only of past debts.¹⁰⁵ New York vetoed the 1783 impost.¹⁰⁶ By 1783, New York State had a state impost, exploiting New York harbor to pay for New York government, in part by taxing imports destined for neighboring states.¹⁰⁷ The state was reluctant to give up the advantage of its impost in favor of the nation.¹⁰⁸ New York, like Rhode Island and Virginia, also claimed that federal tax would swallow up

¹⁰⁰ Melancton Smith, New York Convention (June 27, 1788), in 2 ELLIOT 335.

¹⁰¹ “AMERICA” (NOAH WEBSTER), NEW YORK DAILY ADVERTISER (Dec. 31, 1787), reprinted in 15 DHRC 201.

¹⁰² XI Statutes of Virginia 171 (William Waller Henning, ed., Oct. 1782).

¹⁰³ Nathaniel Gorham, Continental Congress (Jan. 27, 1783), 25 JCC 868.

¹⁰⁴ Oliver Wolcott to Oliver Wolcott, Jr. (Feb. 19, 1783), in 19 LDCC 715.

¹⁰⁵ 24 JCC 258 (April 18, 1783).

¹⁰⁶ In form, the New York resolution on the 1783 impost merely required that the federal impost be collected in New York paper money and by New York officers, but those conditions prevented the Congressional resolution from becoming effective. See Report of a Committee of William Johnson, Rufus King, Charles Pinckney, James Monroe, and William Grayson (Aug. 22, 1786), in 31 JCC 532, 535; Letter of Rufus King to Elbridge Gerry (May 14, 1786) reprinted in 23 LDCC 284 (saying that New York’s grant of impost to pay in paper money to be collected by officers amendable and removable by New York will have the consequence of Congress not having the power to put the impost into operation and no money will come into the federal Treasury). The federal government needed not more paper money but specie to pay its foreign debts. According to Hamilton, New York’s Governor Clinton argued to defeat the impost that “Congress might misapply it” and that Clinton did not care how the impost was collected so long as Congress did not get it. H.G.VIII, NEW YORK DAILY ADVERTISER (Feb. 28, 1789), reprinted in 5 PAH 277–278.

¹⁰⁷ John P. Kaminski, *New York: The Reluctant Pillar*, in RELUCTANT PILLAR at 48, 52–53, 56–58; MAIN at 76 (1961).

¹⁰⁸ See, e.g., KAMINSKI, CLINTON at 91 (discussing the attitude that the New York harbor was a “privilege Providence has endowed us with” that should not be surrendered to Congress).

entirely “the sovereignty of the particular states.”¹⁰⁹ When New York vetoed the impost, it was said, every “liberal good man [wished] New York [should rest] in Hell.”¹¹⁰

The Congress had also used up its credit. Toward the end of the Revolutionary War, Congress had borrowed from France and on Dutch financial markets with French guarantees. With the end of the war, however, France had stopped both the loans and the guarantees.¹¹¹ By 1787, Congress was in default on interest and principal, and the foreign debt had depreciated to about a sixth of its face value.¹¹² In 1783, Rhode Island gave Congress the useless advice that it should keep requisitions low and borrow the rest of any funds that were needed in Europe.¹¹³ By vetoing the impost, Rhode Island simultaneously denied to Congress “the only fund that would be satisfactory to lenders.”¹¹⁴ Late in 1786, Congress attempted to float a loan for \$500,000, but attracted not a single subscriber.¹¹⁵ Congress had no revenue nor prospects that could justify further lending.¹¹⁶ “Our own experience will shew,” the Superintendent of Finance Robert Morris had told Congress, that the nation’s “want of honesty is severely punished by the want of credit.”¹¹⁷

C. FRAGMENTATION?

Professor E. James Ferguson has argued that the states might have paid off the Revolutionary War debts without a national government, with each state assuming part of the total debt.¹¹⁸ *Publius* did not find that plan viable.

¹⁰⁹ A ROUGH HEWER, *NEW YORK JOURNAL* (Mar. 17, 1785), *quoted in* KAMINSKI, CLINTON at 90 (1993).

¹¹⁰ Henry Jackson to Henry Knox (April 23, 1786), *quoted in* Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 *NEW ENG. Q.* 388, 398 (1969).

¹¹¹ *See, e.g.*, Robert Morris to the President of the Congress (Mar. 17, 1783), *in* 6 *RDCUS* 309 (saying that there is no hope of any further pecuniary help from French court; even if she was inclined to assist us, “it is not in her power”).

¹¹² JENSEN, *NEW NATION* at 38 (giving evidence that debt was worth 1/6th of face value – \$67 million borrowed, specie value of \$11.5 million – by 1780).

¹¹³ Madison to Randolph (Nov. 19, 1783), *in* 5 *JM* 289.

¹¹⁴ *Id.*

¹¹⁵ Report of the Board of Treasury (Feb. 7, 1787), 32 *JCC* 33.

¹¹⁶ BROWN at 17–21 (1993).

¹¹⁷ Robert Morris, Report of the Office of Finance (July 29, 1782), *in* 22 *JCC* 429, 435 (Aug. 5, 1782).

¹¹⁸ E. James Ferguson, *The Nationalists of 1781–1783 and the Economic Interpretation of the Constitution*, 56 *J. OF AM. HIST.* 241, 246, 252 (1969) argues that there was good chance that the states could come to hold all the federal debt. *See also* E. James Ferguson, *Book Review of Forest McDonald, E Pluribus Unum*, 23 *WM. & MARY Q.* 149 (3rd Series, 1966) (arguing that federal taxation to pay the debt was merely a “gambit” of those who wanted to strengthen

Some states, *Publius* argued, would feel an indifference, even repugnance to paying the debt, because they were less impressed with the importance of national credit, or because their citizens held little, if any, of the debt. Other states, however, would be “strenuous for some equitable and effective” distribution of the burden. The “procrastinations of the former would excite the resentments of the latter” and the states would collide.¹¹⁹ In the period before the Constitution, the states were not buying the debt held by the crucial foreign creditors in the Netherlands. They were buying only the domestic debt held by their own citizens. Even for the domestic debt, they were buying only some of it.¹²⁰ The states were also not extinguishing the federal domestic debt upon purchase of it, but demanding payment of it, or at least offsets for their payments under a requisition.

The suggestion that each state would voluntarily pay off a portion of the war debt is, indeed, not very credible in the terms of modern analysis. Paying off the war debt was what is now called a “collective action” problem.¹²¹ No state could be excluded from the benefits of a healthy national credit when war came again, even if they had not helped restore the public credit. Defense for one state would generally be tantamount to defense for all. A states paying just its fractional quota of the debts, when other states defaulted, would not have done any good. Thus each state had no separate advantage to paying and every motive to default and free ride on other states. In any event, the states did not pay the war debt, even when it was mandatory that they make contributions to do so via requisitions. Why should anyone think that the states would pay more if the mandate disappeared?

The Framers treated the prospect of a breakup of the Union into fragments as frightening.¹²² Separate states or coalitions would inevitably have “frequent and violent contests with each other,” Hamilton argued.¹²³ Disunited

the Union and that “[a]s the states began to assume the federal debt during the 1780’s this bond of union decayed, bringing on a crisis, not of the country, which was in pretty good shape, but of the nation’s political future”).

¹¹⁹ *Federalist* No. 7, at 41 (Hamilton) (Nov. 17, 1787).

¹²⁰ New York, for instance, was acquiring only the debt held by supporters of Governor George Clinton. McDONALD, HAMILTON at 88–89; KAMINSKI, CLINTON at 102.

¹²¹ See, e.g., TODD SANDLER, *COLLECTIVE ACTION: THEORY AND APPLICATIONS* 5–6 (1992); KEITH DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* 8–10 (2001).

¹²² See, e.g., *Federalist* No. 13, at 80 (Hamilton) (Nov. 28, 1787) (discussing how states might clump into separate confederacies in lieu of one union). Cf. *Federalist* No. 1, at 7 (Hamilton) (Oct. 27, 1787) (saying that opponents whisper of the necessity to “resort to separate confederacies of distinct portions of the whole”).

¹²³ *Federalist* No. 6, at 28 (Hamilton) (Nov. 14, 1787); generally, *Federalist* No. 8 (Hamilton) (Nov. 20, 1787).

states of America, Hamilton wrote, would have the same inducements that all nations in the world have shown to deluge themselves in blood.¹²⁴ Disunion in America would require a state of constant preparation and standing armies, he said, just as disunion did in Europe.¹²⁵ Great Britain, when once separated into three countries, Jay said, was constantly embroiled in quarrels and wars among the three countries.¹²⁶

The proponents of the Constitution also thought that solutions to the crisis required loyalty to the united cause. The governing maxim for the Revolutionary War had been, “United we stand, divided we fall.”¹²⁷ The union represented the ideals of independence and the republican form of government. The prospect of fragmentation, Madison thought, should rouse all “real friends of the Revolution to exert themselves . . . to perpetuate the Union and Redeem the Honor of the Republican name.”¹²⁸ America, according to John Jay, was

one connected, fertile, wide spreading country, . . . one united people, descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who by their joint counsels, arms and efforts, fighting side by side throughout a long and bloody war, have nobly established their general Liberty and Independence.¹²⁹

America was a single nation: “[T]he kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defence of their sacred rights, consecrate their union, and excite horror at the idea of their becoming aliens, rivals, enemies.”¹³⁰

¹²⁴ *Federalist* No. 7, at 36 (Hamilton) (Nov. 17, 1787).

¹²⁵ *Federalist* No. 8, at 49 (Hamilton) (Nov. 20, 1787).

¹²⁶ *Federalist* No. 5, at 24 (Jay) (Nov. 10, 1787).

¹²⁷ John Adams to Henry Murchant (June 1, 1790), in 4 DHFFE 402 (saying “United we stand but divided we fall. Join or die. Those were our Maxims twenty-five or thirty years ago, and they are neither less true or less important now than they were then”); Courtland Canby, *Robert Munford’s “The Patriots,”* 6 WM. & MARY Q. 437, 459 (3rd. Ser. 1949) (character in Virginia play of 1775 or 1776 describes “United We Stand, Divided We Fall” as the American motto).

¹²⁸ Madison to Pendleton, (Feb. 24, 1787), in 9 JM 294–295. See also A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 120 (saying that fragmentation would lead “the minds of men every where [to] become alienated from republican forms”).

¹²⁹ *Federalist* No. 2, at 9 (Jay) (Oct. 31, 1787). See also *Federalist* No. 14, at 88 (Madison) (Nov. 30, 1787).

¹³⁰ *Federalist* No. 14, at 88 (Madison) (Nov. 30, 1787).

D. TO STARVE THE ARMY AT THEIR PLEASURE

The Founders' anger at the states for the states' failure to pay requisitions and for the veto of the impost stood on top of a swelling anger at the states carried over from the Revolutionary War. The states had repeatedly betrayed the army and the cause of independence by their failure to provide financial support. Washington was a committed Federalist because he had seen first hand the effect of the state's starvation of the army¹³¹ and Hamilton became a nationalist at the start of his career as George Washington's smart young aide. The officers of the Continental Army were disproportionately supporters of the Constitution.¹³²

The national Congress, to whom requisitions were due, embodied the cause of the Revolutionary War. As resistance to British policies intensified into war, the cause held on to its moderates, who preferred a settlement with Britain, as well as its radicals, who wanted quick independence, under the principle that everyone should defer to the Continental Congress. If the sides could not agree to what steps of resistance to undertake, they could nonetheless unite under the principle of supporting whatever steps the Congress would agree on. "Allegiance to Congress became the primary test of the right to participate in the emerging Revolutionary polity."¹³³ A united stand by all the colonies was at the core of the Revolution: Virginia and the other colonies would support Boston's resistance to Great Britain¹³⁴ and a Virginia general would command New England troops at Bunker Hill to make it a Continental Army, embodying the common mission of resistance and independence.¹³⁵ The Union was then worshipped with "as much fervor

¹³¹ See, e.g., Letter of Washington to Hamilton, <[http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw260324\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw260324)))> (March 31, 1783) (saying that no man in the United States had felt the bad effects of the want of powers in the Congress more than himself). See GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 47–53 (1993) for a more extended discussion of Washington's bitterness at the failure of the states to support the war effort.

¹³² See HUGH GRIGSBY, *THE HISTORY OF THE VIRGINIA FEDERAL CONVENTION OF 1788*, 160 (1890, 1969 reprint) (attributing ratification in Virginia to ex-military officers); McDONALD, *WE THE PEOPLE* 261–262 (finding ex-officers of the continental line to be heavily but not exclusively pro-ratification in Virginia). Cf. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 187* (1985) (saying the Framers at the Philadelphia convention were "court-party" nationalists who shared a complex of experiences including service for a considerable time as officers in the Continental Army).

¹³³ RAKOVE, *BEGINNINGS* at 66.

¹³⁴ See John W. Blassingame, *American Nationalism and Other Loyalties in the Southern Colonies 1763–1775*, 34 *J. OF S. HIST.* 50, 63 (1968) (describing Southern support for united stand against the British).

¹³⁵ JAMES THOMAS FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 60 (1969).

as pagans . . . implored the protection of titular deities.”¹³⁶ Loyalty to the Union defined the Revolutionary cause.

In 1776, Congress had instructed the revolutionary assemblies and conventions of the Colonies to take the powers of government as representatives of the people away from the Crown and to adopt a government that was most conducive to the happiness and safety of America.¹³⁷ Congress supervised the revolutionary committees spread across the full nation in the resistance and then the war. The provincial authorities were, in many ways, subordinate officials of Congress who were expected to implement its directives and policies.¹³⁸ The Articles of Confederation contained no provision empowering Congress to use coercive authority against the states because, quite simply, in 1776–1777 when they were drafted, “it was difficult to believe they would willfully defy its decisions.”¹³⁹ The authors of the existing Confederation, John Jay told New York in 1787, “were led to flatter themselves that the people of America only required to know what ought to be done, to do it.”¹⁴⁰

Congress throughout the Revolutionary War had tried every tool and trick at its disposal to fund the army. In the early years, the war was financed just by issuing paper money, the Continental dollar. By the time the emissions of the Continental dollar ended, in 1780, Congress had issued \$220 million. The states were required, in theory, to redeem their share of the Continental dollars with tax revenue.¹⁴¹ The states, however, did not set up any mechanism for redemption and the paper depreciated. Continental dollars would have held their value if the states had imposed taxes to absorb the excess

¹³⁶ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 107.

¹³⁷ Preamble (May 15, 1776), in 4 JCC 357–358; Resolution (May 10, 1776), in 4 JCC 342. See MORRIS at 76 (1987) (concluding that the states may rightly be considered a creation of the Continental Congress, which preceded them and brought them into being); RAKOVE, BEGINNINGS at 173n (endorsing Morris’ analysis on “one of the oldest and most contentious issues of Constitutional history”).

¹³⁸ RAKOVE, BEGINNINGS at 197.

¹³⁹ *Id.*, at 172–173. See also *id.*, at 145 (saying the extent of Congressional authority was *not* a subject of major political concern, because Congress already had authority over the conduct of the war and diplomacy).

¹⁴⁰ A CITIZEN OF NEW YORK (JOHN JAY), ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK (April 15, 1788), in 17 DHRC 101, 108.

¹⁴¹ Jefferson, Notes on Debates on the Continental Congress (July 29, 1775), in 2 JCC 221 (resolving that “each colony provide ways and means to sink its proportion of the bills ordered to be emitted by this Congress, in such manner as may be most effectual and best adapted to the condition and circumstances, and usual mode of levying taxes in such colony”). See EDMOND BURNET, THE CONTINENTAL CONGRESS 215–20 (1941); RAKOVE, BEGINNINGS at 205–15.

of dollars beyond the amount needed for trades,¹⁴² but the states were not willing to tax. There was wealth to tax, but states did not try to protect the dollar.¹⁴³ By September 1779, Congress had issued \$160 million of Continental dollars, whereas the states had contributed a trivial \$3 million from taxes for redemption.¹⁴⁴ The Congress itself concluded that too much paper had been issued: “Where the quantity of money of any quality or denomination exceeds what is useful as a medium of commerce,” Congress said, “its comparative value must be proportionately reduced [by tax].”¹⁴⁵ In 1779, John Jay, the president of the Continental Congress, wrote a circular to the states telling them that their failure to redeem the Continental dollars would “appear among reputable nations like a common prostitute among chaste and respectable matrons.”¹⁴⁶ Fail, however, they did.

In 1780, Congress devalued the Continental dollar to 1/40th, renouncing any attempt to redeem anything but 2-1/2% of its value. Even then the dollar could not hold its new value, in absence of any creditable commitment from the states.¹⁴⁷ By 1780 when Congress stopped printing the Continental dollar, it had dropped in value to about a penny of specie and had ceased to circulate as acceptable currency.¹⁴⁸ The Congress’s Office of Finance concluded that the government, by issuing the dollar but failing to redeem, had “committed injustice.”¹⁴⁹ The depreciation of the Continental dollar stole from all who touched it, with the amount of the loss depending on how long the currency was held. The soldiers and domestic suppliers who had accepted the Continental dollar as currency, either absorbed the loss or passed the loss off to someone else.

¹⁴² Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. OF ECON. HISTORY 47, 59 (1988) (states refused to accept Continental dollars at par but only at depreciated value, thus providing no backing).

¹⁴³ *Id.* at 59–60 (arguing that failure to support the Continental dollar was institutional failure or failure of will). *Accord*, FERGUSON at 29 (1961) (saying that the states could have been taxing to withdraw Continental dollars from circulation, but they were compounding the problem by issuing too much of their own paper).

¹⁴⁴ Draft of Circular Letter from President of the Congress (Sept. 13, 1779), in 15 JCC 1052–1053. Overall, only about 6% of the war cost was raised by taxes during the war. Confiscation of Tory property, for example, raised almost three times as much. Calomiris, *supra* note 142 at 58. *See also* Robert A. Becker, *Evolution and Reform: An Interpretation of Southern Taxation, 1763 to 1783*, 32 WM. & MARY Q. 417, 433–439 (3d Series 1975) (describing taxes in the Southern states, which fell very far short even of the paper dollars the states issued).

¹⁴⁵ Nov. 22, 1777, in 9 JCC 954.

¹⁴⁶ John Jay, Draft of a Circular from the Congress to the States (Sept 13, 1779), in 15 JCC 1060.

¹⁴⁷ 16 JCC 262–267 (March 18, 1780). *See also* FERGUSON at 51–53.

¹⁴⁸ JENSEN, *NEW NATION* at 37–41.

¹⁴⁹ Robert Morris, Report of the Office of Finance in 22 JCC 435 (Aug. 5, 1782).

When Continental paper failed, Congress called on the states to deliver specific supplies to specific sites. The results of the specific requisition system were at no time satisfactory and were at times disastrous.¹⁵⁰ The requisition of specific supplies, Washington concluded, was “pernicious beyond description,”¹⁵¹ and “the most uncertain, expensive, and injurious that could be devised.”¹⁵² “One state will comply with a requisition of Congress,” General Washington complained, “another neglects to do it, a third executes it by halves, and all differ either in the manner, the matter, or so much in point of time, that we are always working up hill, and ever shall be.”¹⁵³ Even the Continental dollar had been far better, while it lasted: “Whilst [Congress] exercised the indefinite power of emitting money on the credit of their constituents,” James Madison wrote,

[Congress] had the whole wealth and resources of the continent within their command, and could go on with the affairs independently and as they pleased. Since the resolution passed for shutting the press the power has been given up and they are always dependent on the states. They can neither enlist pay nor feed a single soldier; nor execute any other purpose but as the means are first put into their hands.¹⁵⁴

The winter camp of 1779–1780 at Morristown was miserable for the Continental Army. Hard snow and cold came early. Quartermaster-General Nathaniel Greene wrote bitterly in March 1780, “Perhaps this campaign is to be the Marvelous kind. We are to . . . exist without support.”¹⁵⁵

State laws to fund the specific requisitions gave the farmers the right to trial by jury, and lots of rights to delay the procedures.¹⁵⁶ Local magistrates were reluctant to impress supplies from their friends and neighbors.¹⁵⁷ The state legislatures deliberated on every measure and by their slowness “the Army has been fed only from day to day & at some times [was] almost entirely

¹⁵⁰ See Erna Risch, *supra* note 62, at 231–258 ; E. WAYNE CARP at 171–187 (1984); JENSEN, *NEW NATION* at 34.

¹⁵¹ Washington to the President of Congress (April 3, 1780), in 18 WRITINGS OF GW 207, 209.

¹⁵² Washington to the President of Congress (Aug. 20, 1780), in 19 WRITINGS OF GW 402, 403; See also Committee at Headquarters (May 15, 1780), in 5 LMCC 142 (saying that to “Depend on the States for *effectual* Supplies . . . would be hazarding too much”).

¹⁵³ Washington to Joseph Jones (Delegate to the Continental Congress from Virginia) (May 31, 1780), in 18 WRITINGS OF GW 453.

¹⁵⁴ Madison (member of Congress representing Virginia) to Jefferson (Governor of Virginia) (May 6, 1780), in 2 JMI 9.

¹⁵⁵ Nathaniel Greene to Jeremiah Wadsworth (Mar. 2, 1780), *quoted in* E. WAYNE CARP at 180.

¹⁵⁶ E. WAYNE CARP at 85–86.

¹⁵⁷ *Id.*, at 185–186.

destitute of any provision at all.”¹⁵⁸ The Army officers, including Washington and Hamilton, “witnessed and daily felt the effect of the states’ inability or unwillingness to provide for the army.”¹⁵⁹ The system of specific requisitions allowed the states, as one Major J. Burnett put it, “to starve the army at pleasure.”¹⁶⁰

The Army was nearly always at the point, Washington wrote, where without immediate provisions it must “[s]tarve, dissolve, or disperse.”¹⁶¹ “The army must dissolve,” Hamilton wrote in September 1780. “It is now a mob, rather than an army, without cloathing, without pay, without provision, without morals, without discipline. We begin to hate the country for its neglect of us, the country begins to hate us for our oppressions of them.”¹⁶² The Continental army, wrote Robert Morris in 1782, was “an army unfed, unpaid, unclothed, which would subsist of itself or disband itself.”¹⁶³

There was no serious lack of available provisions had Congress been able to pay for them. The French had no difficulty in obtaining flour with gold and when the Continental army had funds to pay specie, the supplies were available. What was lacking “was the means to draw out the resources – that is, the cash in hand to pay for the wheat, flour, cattle and other subsistence which farmers were otherwise reluctant to release.”¹⁶⁴ Indeed, American farmers were willing to sell their produce to the British, who had hard currency with which to pay.¹⁶⁵

The states sometimes appropriated for their own militias goods meant for the Continental Army.¹⁶⁶ In January 1777, for example, the New York militia had seized Washington’s only supply of clothing in transit from New

¹⁵⁸ James Bowdoin to President of the Congress Samuel Huntington (Sept. 1780), *quoted in* RAKOVE, *BEGINNINGS* at 277.

¹⁵⁹ E. WAYNE CARP at 198.

¹⁶⁰ Major J. Burnett to Jeremiah Wadsworth (Mar. 18, 1780), *quoted in* E. WAYNE CARP at 179.

¹⁶¹ Washington to The President of Congress (Dec. 23, 1777), *in* 10 *WRITINGS OF GW* 192; *See also* Madison (then Representative to Congress from Virginia) to Jefferson (then Governor of Virginia) (Mar. 27, 1780), *in* 2 *JM* 5, 6 (saying that the army has the immediate alternatives of disbanding or living on free quarter, since the public credit is exhausted).

¹⁶² Hamilton to James Duane (Sept. 3, 1780), *in* 2 *PAH* 403, 404–408, 409, 417.

¹⁶³ Robert Morris, Draft of Proposed Letter to the Governors of the States (May 16, 1782), *in* 5 *DCAR* 425.

¹⁶⁴ Erna Risch, *supra* note 32, at 419.

¹⁶⁵ Sung Bok Kim, *The Limits of Politicization in the American Revolution: The Experience of Westchester County, New York*, 3 *J. OF AMER. HISTORY* 868, 883–84 (1993). The American troops responded with plunder of the Westchester farmers. *Id.* at 885.

¹⁶⁶ June 17, 1777, *in* 8 *JCC* 472–473 (reporting Clothier-General James Mease’s complaining that the states frequently appropriated clothing and necessities, on its passage through the state, leading to “disorder and confusion” in his department).

England to the Continental Army. Washington wrote that “the troops in the field are now absolutely perishing for want of it.”¹⁶⁷ In August 1780, Governor William Greene of Rhode Island flatly refused to send the food the Congress had ordered to be delivered to the army on the ground that the food was needed for the Rhode Island militia because he expected a British invasion.¹⁶⁸ “The contest among the different States now,” Washington wrote in 1780, “is not which shall do most for the common cause, but which shall do least.”¹⁶⁹

With the end of the Continental dollar, the Army in the field survived primarily on impressments.¹⁷⁰ Impressments were involuntary seizures from civilians with the misfortune of living within reach of the army as it moved or camped.¹⁷¹ The civilians would receive in return for their goods not cash or specie, but rather Quartermasters Certificates or Commissary Certificates or certificates of whatever department had authorized the seizure. Whenever possible the army would ask the regular civilian authorities to seize the goods to soften the confrontation between soldier and farmer. Originally the certificates were in handwriting. Printed certificates came later. Wherever the army passed or camped, the countryside was soon saturated with certificates. Ultimately the amount of certificates approximated the amount of outstanding Continental dollars. As Robert Morris, the Financial Superintendent for the Congress explained the system, “property has been wrested . . . by force to support the war,” with certificates given in return “which are entirely useless.”¹⁷² In 1780 the certificates were restated in terms of the specie value of what was delivered. Interest was promised thereafter at 6%.¹⁷³ The certificates were ultimately settled when the Constitution gave the Congress a source of revenue, although with less interest than had been promised.¹⁷⁴ Still, at the time when they were given, the future payments were not known

¹⁶⁷ Washington to William Duer (Jan. 14, 1777), in 8 PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR 63–64.

¹⁶⁸ E. WAYNE CARP at 184.

¹⁶⁹ Washington to Fielding Lewis (July 6, 1780), in 19 WRITINGS OF GW 129, 132.

¹⁷⁰ See, e.g., Washington to Mason (Oct. 22, 1780), in 2 PGM 677, 678 (saying that “[w]e are without money . . . without provision & forage except what is taken by Impress.”)

¹⁷¹ Impressments are described by E. WAYNE CARP at 77–98 and FERGUSON at 57–70 upon which this paragraph is based.

¹⁷² Robert Morris, Report of the Office of Finance in 22 JCC 435 (Aug. 5, 1782).

¹⁷³ April 14, 1780, in 16 JCC 363 (adopting a new policy of paying interest at 6% on quartermaster and commissary certificates); May 26, 1780, in 17 JCC 463–464 (mandating that the certificates be accepted as state taxes and quota of requisitions if holder affirms that they were received for value given and had not been paid), Aug. 23, 1780, in 17 JCC 782–785 (mandating that the certificates be reduced to their specie value).

¹⁷⁴ See discussion, Chapter 7, pp. 232–238.

and were not very creditable. Impressments and certificates were “legal robbery qualified by a promissory note.”¹⁷⁵

It was the misery of the specific requisition system and of impressment of supplies that lead Congress to propose that the federal level be given the power to tax on its own. In 1781 and again in 1783, Congress proposed that the Congress be allowed to lay the “impost,” which was a tax of 5% on imports.¹⁷⁶ It was that solution that evil Rhode Island and then damnable New York vetoed.

Over the years, many states had taken a turn as the chief assassin of the general welfare. Maryland had single-handedly delayed the ratification of the Articles of Confederation for four years.¹⁷⁷ Delaware had refused to join an embargo on exports to Britain, and her merchants profited from trade, while the other colonies sacrificed.¹⁷⁸ Rhode Island had vetoed the 1781 proposal for a federal-level impost and then Virginia joined and revoked its ratification once Rhode Island had vetoed. New York had vetoed the proposed 1783 federal impost, to keep the high-yield impost for itself¹⁷⁹ and New Jersey had renounced the 1786 requisition, saying it had paid enough taxes already by paying the New York and Philadelphia imposts.¹⁸⁰ For Georgia there was a rule of thumb that “Congress could make any emergency request and confidently expect that about three years later, Georgia would agree to not quite what Congress had asked.”¹⁸¹ No state had paid its quota of the 1786 requisition. The states had stabbed deeply into the federal authority.

Publius was not only the name adopted by the authors of the *Federalist*, but also the name of a virtuous Roman senator who watched as a helpless

¹⁷⁵ ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775–1789*, at 506 (1924).

¹⁷⁶ MAIN at 84–99 (1961) is a fine description of the fate of the impost proposals in the various states; I BRANT, *THE NATIONALIST* at 209–231 describes the disputes from Congress’s side.

¹⁷⁷ JENSEN, *ARTICLES* at 236–238 (describing Maryland’s delay in the ratification of the Articles). The Articles were adopted by Congress on Nov. 15, 1777, after fifteen months debate, (9 JCC 928) but not ratified by Maryland until March 1, 1781 (1 DHRC 135–137).

¹⁷⁸ Madison to Jefferson (April 16, 1781), in 3 JM 71 (saying that at a time when all the other states were submitting to the loss and inconveniency of an embargo on their exports, Delaware absolutely declined the measure, and not only defeated the general object, but enriched herself at the expense of those who did their duty); E. WAYNE CARP at 184 (1984) (saying that Delaware lifted the embargo on British goods in May 1780).

¹⁷⁹ John P. Kaminski, *New York: The Reluctant Pillar*, in *RELUCTANT PILLAR* 48, 52–53, 56–58.

¹⁸⁰ See RUTH BOGIN, *supra* note 83 at 127–131 (1982).

¹⁸¹ FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC*, 1776–1790, at 156.

bystander while Brutus, Cato, Cassius, and the conspirators assassinated Caesar. “Publius,” wrote Shakespeare, was “quite confounded with this mutiny.”¹⁸²

¹⁸² WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 1.

Identifying *Publius*, the author of *Federalist*, with Publius, the bystander who witnessed the assassination of Caesar, is a good fit, but a speculation. The New York newspapers had already published essays from a strident Federalist, *Caesar* (Oct. 1), and two assassins of Caesar, *Cato* (Sept. 27) and *Brutus* (Oct. 18), before *Publius* first appeared on October 27. 13 DHRC 287, 255, 411, 486. *Federalist* No. 1 shows a number of specific reactions to *Brutus*' arguments. There is an apt one-upmanship in taking the name *Publius*, in reaction to the already-published assassin. *Publius* is the fair and public-minded essayist. Douglas Adair speculates that *Publius* of the *Federalist* was the hero, Publius Valerius Poplicola, who helped found the Roman Republic, but the only reason given is that Plutarch, who discussed Poplicola, was familiar to Hamilton. Douglas Adair, *A Note on Certain of Hamilton's Pseudonyms*, 12 WM. & MARY Q. 282, 283–284, n. 4 (3d Series 1955). Identifying *Publius* of the *Federalist* with Publius Valerius Poplicola is possible, but Shakespeare's Publius, the bystander who witnessed the assassination of Caesar, is a better fit. *Publius* identifies himself in *Federalist* 1 as an outside observer, not unfriendly to the Constitution, and not as a Constitution *maker*, as Publius Valerius Poplicola had been.

Hamilton had used the pseudonym *Publius* in October 1778 to attack Congressman Samuel Chase of Maryland for overcharging the union for wheat (PUBLIUS LETTERS I–III (Oct. 1778), reprinted in 1 PAH562, 567, 580), and in that context as well, *Publius* is better understood as a fair observer than as a Constitution maker.