

## Book Review

### Recovering “From the State of Imbecility”<sup>1</sup>

RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION. By Calvin H. Johnson.<sup>†</sup> New York: Cambridge University Press, 2005. Pp. xiv, 289. \$75.00.

Reviewed by Keith E. Whittington<sup>\*</sup>

At the end of 1936, just after President Franklin Roosevelt’s first triumphant reelection and just as he was advising the administration on what would become the Court-packing plan, constitutional historian Edward Corwin published an important lecture on the concept of a constitution. There he distinguished two ways of thinking about what a constitution is and does within a political system. A constitution can be understood to be “an instrument of popular power—sovereignty, if you will—for the achievement of progress.”<sup>2</sup> As such, the modern constitution is a conscious device designed to create and organize a government, making man a “master of his fate” and providing for “things needing to be done in the future.”<sup>3</sup> Alternatively, a constitution can be understood as a symbol, one that stands as a “bulwark of a previously achieved order of human rights”<sup>4</sup> and therefore tries “to protect and tranquilize *private interest or advantage as against public power*, which is envisaged as inherently suspect.”<sup>5</sup> Corwin left no doubt that he favored viewing the U.S. Constitution as an energizing instrument of popular government rather than as a symbolic “fetish” of private rights.<sup>6</sup> This was the Constitution of the New Deal of 1936. Reconstructing a “symbolic” constitution capable of recognizing preferred

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1. 1 ANNALS OF CONG. 107 (Joseph Gales ed., 1834) (statement of James Madison).
2. Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1072 (1936).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* Corwin was not alone in making the case for a Constitution of public power in the 1930s. See Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640, 644–49 (1972) (noting several academics whose views of the Constitution were similar to Corwin’s); Herman Belz, *The Realist Critique of Constitutionalism in the Age of Reform*, 15 AM. J. LEGAL HIST. 288, 300–06 (1971) (same).

freedoms was a task that Corwin and others took up only after the “revolution.”<sup>7</sup>

Since the 1930s and the battles of the New Deal, the instrumental Constitution that Corwin championed has been on the decline. New Dealers such as Corwin contributed to the eclipse of the instrumental Constitution by the symbolic Constitution by identifying how the Court could make itself useful advancing and defending a new set of rights that could be made consistent with the goals of the New Deal coalition.<sup>8</sup> No sooner had political progressives in the United States fought and won the battle for expanded government power than the specter of totalitarian regimes in Europe made the emphasis on the rights-protecting dimension of modern constitutionalism newly salient.<sup>9</sup> One year after the Court switched on the constitutionality of the New Deal and two years after Corwin identified these two competing conceptions of constitutionalism, his former colleague and historian of the British Constitution Charles Howard McIlwain delivered a series of lectures that tried to reconcile those two dimensions of modern constitutionalism but insisted that the Constitution’s “one essential quality” was the “legal limitation on government.”<sup>10</sup> McIlwain’s lectures were published on the eve of American entry into the Second World War. After the war against fascism and in the midst of the Cold War, this “essential quality” increasingly swallowed the whole. For McIlwain, the “true safeguards of liberty against arbitrary government,” which he took to be the heart of constitutionalism, “are the ancient legal limitation and the modern political responsibility,” (i.e., democratic elections).<sup>11</sup> Constitutional theorists, of course, would soon point out and obsess over the tension between these two safeguards—Bickel’s countermajoritarian difficulty.<sup>12</sup> “All constitutional government is by

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7. Corwin coined the name for the “constitutional revolution” of 1937, in which the Court backed off from its struggle with the New Deal. EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION*, LTD. 64–65 (1941).

8. See, e.g., *id.* at 110–12 (discussing the Court’s judicial activism and deference to the legislative branch); Alpheus Thomas Mason, *The Core of Free Government, 1938-40: Mr. Justice Stone and ‘Preferred Freedoms,’* 65 *YALE L.J.* 597 (1956) (chronicling the rise of post-1937 preferred freedoms); Alpheus Thomas Mason, *Judicial Activism, Old and New*, 55 *VA. L. REV.* 385 (1969) (distinguishing the activism of the post-1937 Court from that of the pre-1937 Court); Keith E. Whittington, “*To Support This Constitution*”: *Judicial Supremacy in the Twentieth Century*, in *MARBURY V. MADISON* 101, 101–28 (Mark Graber & Michael Perhac eds., 2002) (discussing the political acceptance of judicial review). For an insightful analysis of other aspects of this transition from progressive statism to post-New Deal liberalism, see generally KEN KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004).

9. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–78 (1999) (discussing rights changed after World War II).

10. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 24 (1940).

11. *Id.* at 145. By December of 1937, McIlwain was warning, “[t]here is a tidal wave of despotism sweeping over the world,” and that the great issue of the day was “between constitutionalism and arbitrary government.” C.H. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 257, 266 (1939).

12. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962) (discussing the countermajoritarian difficulty). See generally Barry Friedman, *The Birth of an Academic*

definition limited government,” McIlwain posited, and others soon agreed.<sup>13</sup> But the very “government of will” that the U.S. Constitution was hedging in was the will of the people.<sup>14</sup> For a generation of postwar theorists, constitutionalism was counterpoised not only to dictatorship but also to democracy (and certainly to popular power). The function that the Constitution, or any constitution, played in the political system was to limit power. To talk about constitutions was to talk about how that process of limitation worked.

Historians have likewise generally portrayed the U.S. Constitution as a system of constraints. The progressive school of constitutional historians, led by Charles Beard, interpreted the Philadelphia constitutional convention as a counterrevolutionary putsch by economic elites concerned with tying down the new republican governments and interpreted the Constitution as flawed from the beginning.<sup>15</sup> The progressive school was particularly critical of these constraints, but historians in the twentieth century found them hard to ignore. Writing during World War II, Benjamin Wright argued that judicial review should not be seen as the “product of a group or groups opposed to the growth of a democratic polity,”<sup>16</sup> but rather constitutionalism and its constraints on government was “one of the most persistent and pervasive characteristics of American democracy.”<sup>17</sup> American constitutionalism was all about constraints, but those constraints were self-imposed.<sup>18</sup> Postwar historians could argue that the Founders need not be

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*Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (placing in historical context Bickel’s framing of the issue as constitutionalism’s conflict with democracy); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973) (placing the retreat from prewar Legal Realism in historical context).

13. MCILWAIN, *supra* note 10, at 23; *see also* Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 860 (1962) (arguing that a true constitution is defined by its aims of limiting government).

14. MCILWAIN, *supra* note 10, at 24.

15. In contrast to such radical progressives as Beard, Corwin, and eventually the New Dealers, thought there was nothing wrong with the Constitution that could not be fixed through a few judicial appointments. On the Beardian vision of the Constitution, *see generally* John Patrick Diggins, *Power and Authority in American History: The Case of Charles A. Beard and His Critics*, 86 AM. HIST. REV. 701 (1981); Richard Hofstadter, *Beard and the Constitution: The History of an Idea*, 2 AM. Q. 195 (1950). *But see* Pope McCorkle, *The Historian as Intellectual: Charles Beard and the Constitution Reconsidered*, 28 AM. J. LEGAL HIST. 314, 321–41 (1984) (discussing Beard’s praise of the Federalists).

16. BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 5 (1942).

17. *Id.* at 8. Soon thereafter, in his suitably titled history of American constitutionalism, Carl Swisher complained that so “great at times has been the emphasis on the purely negative characteristics of a constitution, on prohibitions of the exercise of power rather than on the giving of power, as to create the false impression that the primary function of a constitution is negative rather than positive.” CARL BRENT SWISHER, *THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES* 6 (2d ed. 1963).

18. On this Cold War era historiographical reconciliation, *see* Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640, 653–59 (1972) (noting how the influence of the European dictators of the time helped to push

understood as “anti-democrats”; they had just “solved the *problem* of popular government,”<sup>19</sup> and in doing so, were able to ““make *démocratie* safe for the world.””<sup>20</sup> In recent decades, the Constitution has been seen as the product of a “Madisonian moment,”<sup>21</sup> centrally concerned with addressing the fact “that no other rule exists . . . but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.”<sup>22</sup>

Calvin Johnson’s *Righteous Anger at the Wicked States*<sup>23</sup> joins a set of recent works that have begun to reemphasize the instrumental side of the U.S. Constitution—what the Founders hoped to achieve with it and not just what they hoped to prevent.<sup>24</sup> The particular emphasis of *Righteous Anger* is on the desire of proponents of constitutional reform to place the government of the United States on firmer financial footing than seemed possible under the Articles of Confederation. Part I of this Review provides a summary of the central arguments of the book. Part II indicates the value of this reminder of the role of the Constitution in building a stronger national state while questioning aspects of Johnson’s particular arguments. Part III suggests that Johnson’s historical account is less decisive a response to federalism-oriented originalists than he believes. The Founders sought to build a new American state on firmer foundations, but the theme of their being driven by righteous anger at the wicked behavior of the post-revolutionary states obscures as well as illuminates.

## I. The Constitution and the Tax State

*Righteous Anger* provides a thesis-driven account of the founding of the U.S. Constitution. Johnson is admirably clear about what his argument is, and he marshals copious historical evidence in support of his argument. Some chapters can be read simply as a brief account of the Federalist movement to draft a new constitution for the United States, but most are

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the ideas of diverging constitutional theorists closer together); James H. Hutson, *The Creation of the Constitution: Scholarship at a Standstill*, 12 REV. AM. HIST. 463, 469–74 (1984) (tracing the contentious debate among historians over the correct manner in which to interpret the motivations behind the creation of the Constitution).

19. Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers’ Intent*, 53 AM. POL. SCI. REV. 52, 53–54 (1959).

20. MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* 65 (1981) (quoting GEORGE WILSON PIERSON, *TOCQUEVILLE IN AMERICA* 112 (1959)).

21. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 35–36 (1997).

22. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 8 *THE PAPERS OF JAMES MADISON* 295, 299 (Robert A. Rutland et al. eds, 1973).

23. CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005).

24. For other works in this mode, see, for example, AKHIL REED AMAR, *AMERICA’S CONSTITUTION* (2005); ROGER H. BROWN, *REDEEMING THE REPUBLIC* (1993); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* (2003); DAVID C. HENDRICKSON, *PEACE PACT* (2003); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL* (1973); JAMES H. READ, *POWER VERSUS LIBERTY* (2000); KARL-FRIEDRICH WALLING, *REPUBLICAN EMPIRE* (1999).

closely argued explanations for what Johnson takes to be the central purpose of the Constitution and critiques of alternative explanations that might be suggested. The book engages the secondary literature, but it is chiefly concerned with sifting through the primary documents of the constitutional founding—the letters, speeches, and writings of the Federalist proponents of constitutional reform. Johnson moves briskly through his argument, with ample footnotes marking the way.

The central claim of the book is that “the Constitution was a radically nationalizing vector compellingly explained by the righteous anger of the Founders at the misdeeds of the states.”<sup>25</sup> The central purpose of the Constitution and the core of its meaning were to give the general government the power to tax in order to repay the debts from the Revolutionary War and restore the creditworthiness of the nation. The anger at the states fueled the Federalists’ drive to overthrow the Confederation system and erect a powerful national government in its stead. The “shameful acts by the states” that sparked this anger were their failure to make their requisitioned payments into the federal treasury in the 1780s and their unwillingness to give Congress the power to raise its own taxes within the rules of the Articles of Confederation.<sup>26</sup> Those who would read the Constitution as imposing limits on the power of the federal government are suffering under the sway of “Anti-Federalist principles” that had no bearing on “the historical Constitution” and its “original meaning.”<sup>27</sup>

The first few chapters lay out the case for the “necessity of the Constitution” as a cure to the fiscal crisis of the mid-1780s.<sup>28</sup> The Articles of Confederation did not give Congress the power to raise taxes. Although it provided that “expenses that shall be incurred for the common defence or general welfare . . . shall be defrayed out of a common treasury,” the taxes that were to fill that treasury “shall be laid and levied by the authority and direction of the Legislatures of the several States.”<sup>29</sup> The system was not a success. George Washington concluded by 1786, “requisitions are a perfect

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25. JOHNSON, *supra* note 23, at 2–3.

26. *Id.* at 3.

27. *Id.* at 8. Here Johnson sets up strawmen. He writes, for example, “It is common to see the Constitution described as written to limit the federal government and to protect states’ rights,” attributing this view to the conservative Justices of the Rehnquist Court in particular. *Id.* at 7. Although it is certainly common to see the Constitution described as imposing limits on the federal government (and it is such descriptions that Johnson marshals as evidence), but this is quite different than claiming that the purpose for meeting in Philadelphia and replacing the Articles of Confederation was to limit the federal government. Johnson conflates the two views, and then dismisses the former (the Constitution limits the federal government) by arguing against the latter (the purpose of writing the Constitution was to limit the federal government). Since no one holds the latter view, the argument often falls wide of the mark.

28. *Id.* at 13.

29. ARTICLES OF CONFEDERATION art. VIII.

nullity . . . . [They are] actually little better than a jest.”<sup>30</sup> In that year, Congress had called for states to pay \$3,800,000, but the states only delivered \$663.<sup>31</sup> Payments due to foreign and domestic creditors for federal war debts would have absorbed nearly the entire requisition.<sup>32</sup>

This was not a good situation to be in. As the Federalists would point out to the delegates to the state ratifying conventions, “we are circumscribed with enemies from Maine to Georgia,”<sup>33</sup> and yet “[w]ithout a ship, without a soldier, without a shilling in the federal treasury, and without a nervous government to obtain one, we hold the property that we now enjoy at the courtesy of other powers.”<sup>34</sup> In particular, it was well understood by Federalist leaders that modern wars were to be fought on credit, which made the ability of the United States government to borrow large sums of money from foreign lenders a matter of utmost importance to national security. If the government showed itself unable to pay Revolutionary War debts or could not demonstrate the wherewithal to extract the resources necessary to repay future war debts, then the United States would be in a very vulnerable position.

Despite such concerns, Congress had not been able to escape the requisition system. The unanimous consent of the states was required to amend the Articles of Confederation,<sup>35</sup> and the states with the busiest ports were unwilling to allow the federal government (and the other states) to share in the taxes that could be collected in those ports.<sup>36</sup> The most obvious solution, Federalists such as James Madison and Alexander Hamilton soon concluded, was to give the federal government an independent power to tax. Experience had shown that creating such a power would first require altering the procedures for constitutional amendments to allow constitutional changes without the consent of each state. At the same time, at least according to Madison (because, Johnson suggests, he was particularly “angry” at the states and perhaps in particular his home-state rival, Patrick Henry), an independent authority to tax required other accoutrements of government power and sovereignty, including an executive and judiciary capable of enforcing the tax and a legislative representative structure capable of fairly

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30. Letter from George Washington to John Jay (Aug. 1, 1786), in 9 THE WRITINGS OF GEORGE WASHINGTON 187, 188 (Jared Sparks ed., 1835).

31. JOHNSON, *supra* note 23, at 15. The receipts reported later that year are zero, with the difference being “apparently a judgment about credit given for prior state expenditures.” *Id.* at 15–16 n.6.

32. *Id.* at 16.

33. Christopher Gore, Speech in Massachusetts Convention (Jan. 22, 1788), in 2 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 64, 67 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT’S DEBATES].

34. Edward Rutledge, Speech in South Carolina Convention (Jan. 16, 1788), in 4 ELLIOT’S DEBATES, *supra* note 33, at 274, 275.

35. ARTICLES OF CONFEDERATION art. XIII.

36. JOHNSON, *supra* note 23, at 26–29.

and effectively assessing the tax. The only way to achieve these fundamental constitutional changes was to circumvent the state governments and seek this new national authority directly from the people. Step by step, the need for taxes led to a constitutional revolution.<sup>37</sup>

Having accounted for what went into the Constitution, Johnson then turns to potential alternative influences on the Constitution in order to show why these were in fact unimportant. His general starting point in developing these negative arguments is a chapter on the Anti-Federalists, who are to be dismissed as irrelevant to the founding. The central lesson of the ratification process, Johnson concludes, was that “all regions supported the Constitution at nearly landslide levels” and the Anti-Federalists were quickly driven from politics.<sup>38</sup> This complete victory suggests to Johnson that the Federalists “oversold their document, making claims that were more compromising . . . than was necessary,”<sup>39</sup> but those claims can be ignored in any case because the meaning of the Constitution was fixed in Philadelphia not in the states, and because no one was persuaded by those claims in any case but instead voted to ratify simply to stay in the Union.<sup>40</sup>

With that background established, Johnson takes up various alternatives to taxes and righteous anger as explanations for the purpose and meaning of the Constitution. These are first framed, somewhat awkwardly, as whether something other than nationalism and taxes were “critical issues of the ratification debate” and “implicated in the disagreements between Federalists and the Anti-Federalists.”<sup>41</sup> The chief goal here is to further dismiss the Anti-Federalists, and through them opponents of unrestrained nationalism, as unattractive and best forgotten. On individual rights, democracy, and slavery, Johnson argues, the Anti-Federalists were worse or no better than the Federalists.<sup>42</sup> From these “false issues,” Johnson moves on to “less convincing factors” that might have influenced the Federalists.<sup>43</sup> Far from being an important element of the constitutional scheme, the power to regulate commerce is dismissed as “trivial,”<sup>44</sup> except as “a synonym for

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37. *See id.* at 40–99 (laying out the Madisonian logic for a “step-by-step revolution”). This story is fairly conventional, though Johnson tells it with near exclusive emphasis on taxes and with the distinctly unconventional assertion that the powers listed in Article I, Section 8 are “illustrative” and “not exhaustive” rather than a fixed enumeration. *Id.* at 122.

38. *Id.* at 130.

39. *Id.* at 131.

40. *Id.* at 137–38.

41. *Id.* at 163. Whether issues were central to the ratification debate does not necessarily indicate whether they were central to the Constitution. On the centrality of democracy and slavery to the Constitution, see generally, AMAR, *supra* note 24, at 15, 20 (noting how the Constitution “infused some form of democracy into each of its seven main Articles” at the same time as it “specially accommodated or actually strengthened slavery”).

42. JOHNSON, *supra* note 23, at 163–86.

43. *Id.* at 163.

44. *Id.* at 187.

nationalizing state imposts.”<sup>45</sup> He makes short work of other potential concerns of the Federalists. Securing private contracts and ending the scourge of paper money? Insignificant, and not something that distinguished Federalists from Anti-Federalists.<sup>46</sup> Territorial disputes among the states? Already solved by the Articles of Confederation.<sup>47</sup> Shay’s Rebellion? Only reaffirmed prior beliefs.<sup>48</sup>

The remaining chapters attend to the aftermath of the constitutional movement. First, Alexander Hamilton as Secretary of the Treasury completed the Constitution’s mission by solving the Confederation’s fiscal crisis “with quite modest federal taxes.”<sup>49</sup> The ease by which “Hamilton’s Constitution” restored the public credit further suggests to Johnson that the “revolution” embodied in Madison’s Constitution must have been motivated by something else—righteous anger.<sup>50</sup> Second, Madison abandoned the Federalists to join with Thomas Jefferson, who had not been tested in the fires of the constitutional debates given his diplomatic service in Paris and was, in effect, a closet Anti-Federalist who was guided by the repudiated principles of the Confederation.<sup>51</sup> Finally, the Eleventh Amendment turned its back on the “ideals that lead to the Constitution” and once again facilitated the “wickedness of the states.”<sup>52</sup> The Constitution remained, but the constitutional movement had reached its end and could no longer control politics.

## II. Constitutional State-Building

The recent body of work that has emphasized the positive dimension of the Constitution and the intention of its proponents that it serve as Corwin’s “instrument of popular power” has usefully reminded us of a side of the U.S. Constitution that is easily forgotten.<sup>53</sup> Most directly, it helps correct the historical record. For those concerned with the politics of the early republic, how bad the “critical period” of the 1780s, between the Revolution and ratification, actually was and whether the Constitution was really necessary have long been open questions.<sup>54</sup> The proponents of constitutional reform in

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45. *Id.* at 189.

46. *Id.* at 202–10.

47. *Id.* at 210–13.

48. *Id.* at 213–22.

49. *Id.* at 223.

50. *Id.* at 245.

51. *Id.* at 252–53.

52. *Id.* at 271.

53. Corwin, *supra* note 2, at 1072 (emphasis omitted).

54. For classic accounts, see JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789*, at 98 (1888) (arguing that the 1780s were a critical period in which the country was “drift[ing] toward anarchy”); MERRILL JENSEN, *THE NEW NATION* 347–421 (1950) (arguing that the difficulties of the 1780s have been overstated and that the Confederation government was largely successful).



the 1780s certainly believed that the Confederation was failing to live up to the promise of the Revolution, however; it is an equally interesting question as to what they perceived the constitutional and the political problems of the period to be and, consequently, what kind of solution was needed. Influenced in part by the progressive narrative of the Philadelphia convention as a revolt of the creditors, twentieth-century historians have frequently emphasized various threats to property rights, including paper money and debtor-relief laws, as a force that propelled the Federalists.<sup>55</sup> James Madison’s historically influential diagnosis of the root cause of the “[v]ices of the political system of the United States” pointed in that direction and defined the negative dimension of constitutionalism in a republic: “[W]hat is to restrain [the majority] from unjust violations of the rights and interests of the minority, or of individuals?”<sup>56</sup> Recent work<sup>57</sup> has helped balance our understanding of the Federalists by taking its cues more from Madison’s list of the failures of the Confederation system and less from his identification of “to what causes is this evil to be ascribed?”<sup>58</sup> Madison may have thought the root cause of the evils could be found in the logic of unfettered democracy, but the “[i]njustice of the laws of the states” came only at the end of his long list of vices.<sup>59</sup> Leading the way were rather different complaints, such as the “[f]ailure of the states to comply with constitutional requisitions” and “want of concert in matters where common interest requires it.”<sup>60</sup> More power for the national government was the cure for those ills, and the Constitution was the means for getting it. The passage of the Constitution was a “revolution in favor of government”<sup>61</sup> and an important step in the development of the American state.

Less directly, works such as *Righteous Anger* help deepen our understanding of constitutionalism. Ironically, it is the very limited character of the government established by the U.S. Constitution that calls our attention to the constitutive work of such founding documents. The American states were closer to the primordial model of the Old World nations. They were the relatively natural political unit that emerged from the Revolution. They were the governments of general jurisdiction with all the accoutrements of sovereignty. They admittedly could not claim to have existed since time immemorial; they were too new for that. But their foundings had occurred long before the Revolution. They did not need to be

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55. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 393–424 (1969) (explaining that laws threatening property rights were a major grievance of Federalists, such as James Madison, in the 1780s).

56. James Madison, Vices of the Political System of the United States, in 9 *THE PAPERS OF JAMES MADISON*, *supra* note 22, at 348, 355.

57. See sources cited *supra* note 24.

58. Madison, *supra* note 56, at 354.

59. *Id.* at 354–57.

60. *Id.* at 348, 350.

61. EDLING, *supra* note 24, at 3–10.

constituted; they needed only to declare their independence from the British Empire. State governments naturally filled the vacuum left by the retreating colonial governors. The Americans were nonetheless sufficiently Lockean to initiate the phase of “self-conscious” constitutionalism by which the new governments were consecrated with the drafting of written constitutions,<sup>62</sup> but the process was somewhat haphazard and for some, such as Connecticut, entirely expendable.<sup>63</sup> The most obvious constitutional task in the states was one of tying these new sovereigns down with instruments such as George Mason’s Virginia Declaration of Rights.

The task facing the Federalists was rather different. They needed to wrest *some* governmental power away from the states and invest it in a new national government. This transfer of political authority required more than a declaration of independence by a more-or-less preexisting government, the displacing of one authority by another. It required the formation of a new government and a reorganization and reallocation of the political authority already held and being exercised by officials in the United States.<sup>64</sup> The Federalists needed to claim and delegate a specified quantum of government power, and no more. At this moment of founding, the positive, constitutive function of a constitution—of the Constitution—was more obvious. They were not just throwing off the old. They were building something new.

The perspective on constitutionalism offered by these historical works exposes not only the positive concern with creating an instrument of political power but also the more specific concern with the effectiveness of that instrument. The positive dimension of constitutionalism is often taken to be merely descriptive of how political power is organized and, therefore, basic and not very interesting. “In the light of this conception every state has a constitution.”<sup>65</sup> “True” constitutionalism might then be able to ignore this “commonplace” feature of politics and focus on its distinctive normative concern of limiting state power.<sup>66</sup> The experience of the Confederation period, not to mention episodes in other countries around the world, suggests the difficulty of this approach to thinking about constitutionalism. On a cautionary note, Madison recognized that constitutional limits could not

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62. MCILWAIN, *supra* note 10, at 23; *see also* Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 470–72 (1900) (remarking on the influence of Lockean social contract theories in the early republic).

63. ELIAS B. SANFORD, *A HISTORY OF CONNECTICUT* 247 (1922) (recounting how Connecticut, rather than adopting a written constitution during the Revolution, conducted its government under a 1662 charter until the early nineteenth century).

64. On the reallocation of political authority within a crowded landscape as being at the heart of political development, *see generally* KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

65. SWISHER, *supra* note 17, at 3.

66. *See id.* at 3 (noting that the “commonplace” conception in any constitution is that it stipulates or explains the basic application of governmental power); Sartori, *supra* note 13, at 859 (arguing that a true constitution establishes a fundamental law that restricts arbitrary government power).

stand if they seemed to create intolerable results: “It is in vain to oppose constitutional barriers to the impulse of self-preservation.”<sup>67</sup> The negative dimension of constitutionalism had to be reconciled with its positive dimension. More affirmatively, constitutions are organized so as to achieve valued ends.<sup>68</sup> As Federalist Oliver Ellsworth argued in the ratification debates, “[i]f we mean to have our natural rights and properties protected, we must first create a power which is able to do it, and in our case there is no want of resources, but only of a civil constitution which may draw them out and point their force.”<sup>69</sup> More broadly, the preamble to the Constitution itself points to a range of goals that the instrument is intended to advance, and something is lost if they are all reduced simply to securing the blessings of liberty. Constitutions can fail if they cannot, for example, provide the means for peacefully resolving social problems, coordinating collective decisions, adequately representing key interests in society, or effectively implementing political decisions once they are made.<sup>70</sup> For the Federalists proposing the U.S. Constitution, this pushed to the fore questions not only about which powers should be given to a new national government, but also about how that government ought to be organized and how representation ought to be structured so as to best take advantage of those powers.

The central constitutional project in 1787 was one of state-building. The particular argument of *Righteous Anger* is that the movement to draft a new federal constitution was driven by the “desperate but short-term needs” of restoring the federal credit.<sup>71</sup> One need not be persuaded that this was the singular aim of those who organized the Philadelphia convention to recognize its importance to the Federalist movement. Simply put, the fiscal crisis threatened the future and independence of the country, and its roots were structural and embedded in the design of the Articles of Confederation.

67. THE FEDERALIST NO. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961).

68. For a theoretical reconciliation of the positive and negative dimensions of the Constitution in the context of valued ends, see Mariah Zeisberg, *The Constitution of Conflict* (2005) (unpublished Ph.D. dissertation) (on file with author).

69. Oliver Ellsworth, *A Landholder III*, CONN. COURANT, Nov. 19, 1787, reprinted in 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 140, 140 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

70. See, e.g., MARK E. BRANDON, *FREE IN THE WORLD* 18, 202–07 (1998) (noting that the American constitutional order had failed to represent society’s key interests when it ceased to hold the “political world together” both before and after the Civil War); JOHN E. FINN, *CONSTITUTIONS IN CRISIS* 144–45 (1991) (stating that the Weimar Constitution played a significant part in the German Republic’s inability to collectively and peacefully resolve social predicaments in the late 1920s and early 1930s because its provisions allowed the president to evade legislative control, which in turn passed “the power to issue emergency decrees . . . to a president uncontrolled and unaccountable to the cabinet or the Reichstag”); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2099 (2002) (explaining that, although a constitution’s specific purposes can be described in a variety of ways, constitutions are mainly concerned with instituting a government and protecting “foundational political values,” and “constitutional crises arise out of the failure, or strong risk of failure, of a constitution to perform [these] central functions”).

71. JOHNSON, *supra* note 23, at 9.

The apparent inability of the central government to collect revenue threatened the creditworthiness of the new nation, and consequently threatened its ability to make a plausible military showing that could deter foreign aggression or repel a serious invasion if deterrence failed. Despite the American success in winning independence, many Federalists quite plausibly feared that the Confederation was not capable of fighting and winning another war given its constitutional defects. The United States needed to build a better war machine, and the U.S. Constitution was it.

Granting that the movement to draft the Constitution was one directed to building a more powerful national state, the question is how well the “righteous anger” motif explains this movement and the contours of the Constitution that was ultimately adopted. The emphasis on the Federalists’ anger at the “evil and shameful acts by the states”<sup>72</sup> may obscure more than it illuminates. To explain the constitutional change in regard to taxation powers, anger seems superfluous. To explain the rest of the Constitution, anger seems unhelpful. *Righteous Anger* downplays the multifaceted character of the constitutional state-building project, and it ignores the complexity of the text that was drafted in Philadelphia and sold to the various states in the debates over ratification.

It had become clear to most observers well before 1787 that the Confederation’s system of national requisitions was broken. There was no effective means for the central government to coerce the states when they essentially stopped paying their quotas, and the alternative sources of federal revenue (primarily selling federal land and additional borrowing) were an inadequate foundation on which to construct a government bearing primary responsibility for defending the nation. The obvious solution of giving the central government the authority to tax imported goods had, in 1781 and again in 1783, been unable to pass through Congress given the Confederation’s requirement that such measures receive the unanimous support of the states.<sup>73</sup> The states that already enjoyed their own imposts had no interest in seeing that revenue stream diverted to the central government, and no state had an interest in sending money from its own coffers to Congress as long as other states were neglecting to pay their own share of the national expense.<sup>74</sup> Solving the fiscal problem facing the Confederation Congress required either an act of charity on the part of key states or an altered constitutional amendment process that would take away the veto of any one state (or a very small number of states) and facilitate the adoption of tax reform. Given that such was the expected agenda of the Philadelphia convention, it is perhaps no surprise that Rhode Island (the obstruction to

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72. *Id.* at 3.

73. *Id.* at 27–29.

74. *See* KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 13–15 (2001) (arguing that states only paid requisitions when doing so advanced local interests).

federal imposts in 1781) did not send delegates and New York (the primary culprit in 1783) sent hostile delegates who quickly abandoned the convention. The delegates from the remaining states had no difficulty agreeing to strip Rhode Island and New York of their vetoes and put the question of federal taxes on a more majoritarian footing.<sup>75</sup>

Johnson writes, “[i]f the Articles of Confederation had not required unanimity or the Framers had not been so angry, the Framers might well have tried to find a solution to the fiscal crisis within the confederate mode in a way that preserved state sovereignty.”<sup>76</sup> The first condition alone seems to have been sufficient. If the United States was to be an effective instrument for providing for the common defense, the states had to give up at least two important features of sovereignty—individual control over taxes and over constitutional changes. From the modern perspective, NATO would seem to indicate that an alternative collective security arrangement that did not require sacrificing elements of state sovereignty could have been viable. Fear more than anger may indicate why a NATO-type arrangement could not endure in the United States.<sup>77</sup> A belief that “united we stand” managed to carry the colonies through the Revolution, but it was soon easy enough to imagine New England failing to come to the aid of Georgia if the latter came under military threat, and vice versa.<sup>78</sup> Worse yet, it was also easy to imagine neighbor setting upon neighbor over economic or territorial disagreements. The Confederation structure not only seemed to invite the great powers of Europe to test American resolve to hang together,<sup>79</sup> but also to provide inadequate guarantees that the newly independent states would not themselves come to blows.<sup>80</sup>

The theme of righteous anger at state depravity is consistent with the goal of the Federalists to find the means to repay the Revolutionary War debts. It tends to imply the wrong purpose for setting that goal, however—suggesting a moral principle of honoring contracts rather than the instrumental calculation of maintaining creditworthiness so as to borrow in future wars. It completely obscures other elements of the state-building

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75. The constitutional reform itself required only supermajority support among the states, but not consensus. U.S. CONST. art. VII. Legislative discretion over taxes required only simple majorities under the new Constitution. U.S. CONST. art. I, § 7.

76. JOHNSON, *supra* note 23, at 3.

77. On fear as the dominant motif of the constitutional movement, see MARKS, *supra* note 24, at 96 (“The combination of fear and hope . . . heightened the impact of each individual problem on the demand for constitutional reform.”).

78. On revolutionary unity, see JOHNSON, *supra* note 23, at 32 and accompanying notes (describing the “common mission of resistance and independence”).

79. See HENDRICKSON, *supra* note 24, at 259 (noting that the Constitution was a response to internal and external security concerns).

80. See Daniel H. Deudney, *The Philadelphia System: Sovereignty, Arms Control, and Balancing of Power in the American States-Union, Circa 1787–1861*, 49 INT’L ORG. 191, 201 (1995) (explaining that violent conflicts between the states were possible and that the state militias were seen as potential instruments in such conflicts).

project, details of the constitutional reform that were also calculated to enhance the fighting strength of the union (or accomplish other purposes) in complement with the taxing power. Johnson's approach of identifying the meaning and significance of the Constitution with the immediate policy program of its advocates leads him to emphasize the modesty of the tax package proposed by Alexander Hamilton in 1790. If, as it turned out, there could be "a cure with a pittance" to the Confederation's fiscal crisis, then emotion becomes a more compelling and necessary explanation for what all the shouting was about in 1787.<sup>81</sup> After the Philadelphia convention had effectively trumped the single-state veto on imposts, however, it was the Federalists' insistence that the national government must also have a power over internal, "direct" taxes that was the deal breaker for many Anti-Federalists. But here it is the Federalists' vision of the future that is crucial. The impost power was sufficient by itself to repay the existing debts and restore the creditworthiness of the nation in 1787. The next war, however, might require a power of unlimited taxation. Revenue from tariffs tended to dry up during wartime, and at that critical juncture the central government would find itself back in the position of having to ask the states for additional resources. The nation's rivals, Oliver Ellsworth warned,

may look into our Constitution, see what resources are in the power of government, and calculate to go a little beyond us; thus they may obtain a decided superiority over us, and reduce us to the utmost distress. A government which can command but half its resources is like a man with but one arm to defend himself.<sup>82</sup>

The Federalists did not merely want to recover from the last war; they wanted to prepare for and prevent the next one. And the next one might be more difficult than even the war for independence had been. The national consensus that constitutional reform was needed to overcome the immediate fiscal crisis became the opportunity to upgrade the entire system, and there were apparent crises aplenty elsewhere. Without a national judicial system that could enforce national commitments over state obstructions, treaties intended to secure the peace with Britain and various Indian tribes were collapsing. Without a national power to regulate external commerce, the independent United States found itself locked out of the lucrative trading opportunities that the colonies had enjoyed within the British Empire and without the means to negotiate freer trade with the European powers or their colonies.<sup>83</sup> Without an adequate national army and navy, shipping lanes and

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81. JOHNSON, *supra* note 23, at 245.

82. Oliver Ellsworth, Speech in Connecticut Convention (Jan. 7, 1788), in 2 ELLIOT'S DEBATES, *supra* note 33, at 185, 191.

83. Johnson dismisses the significance of trade issues as motivating the Constitution because the proposed policies were misbegotten remnants of mercantilism and because most were ultimately not adopted after ratification. JOHNSON, *supra* note 23, at 193-98. There is little question, however, that many Federalists in the 1780s thought that the only route to free trade was through negotiated treaties. That more ambitious policies on trade were not adopted after ratification,

the frontiers to the north, south, and west could not be kept clear of hostile forces. Settlers on the territorial periphery soon informed Congress that without more support from the center “our allegiance will be thrown off and some other power applied to. . . . You are as ignorant of this country as Great Britain was of America.”<sup>84</sup> The stripped-down organization of the Confederation government reflected both the ad hoc quality of the federation that fought the Revolution and the strong revolutionary distrust of executives, and many Federalists had long been frustrated with the limits this constitutional design imposed on the Confederation’s administrative capacity.<sup>85</sup> The immediate needs of the fiscal and related crises created the opportunity for the Federalists to nationalize the constitutional lessons that had been learned in the states over the previous decade, such as the possibility of a republican chief executive who could manage the government’s finances and marshal its military resources.<sup>86</sup>

### III. Meaning and Motive in Making the Constitution

*Righteous Anger* is subtitled, “The Meaning of the Founders’ Constitution.” It is intended, in part, as a repost to those who would give originalist support to the Rehnquist Court’s federalism decisions.<sup>87</sup> The central point of the book is that “the Constitution is a nationalizing vector, written by ardent nationalists.”<sup>88</sup> Those who wished to place limits on central power were irrelevant to the Constitution’s design and meaning. The Anti-Federalists were no more a part of the founding than Pope Urban VIII was a contributor to Galileo’s scientific revolution.<sup>89</sup> The Bill of Rights was

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however, was mostly a function of changing events. The outbreak of new European wars gave France and Britain independent reasons to deal with American merchants and shippers in the 1790s. EDLING, *supra* note 24, at 86–88.

84. Letter from a Gentleman at the Falls of the Ohio to His Friend in New England (Dec. 4, 1786), in 3 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, SEPTEMBER 10, 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789, at 246, 248 (Blair & Rives 1837).

85. Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 117–22 (1971).

86. Keith E. Whittington, *The Separation of Powers at the Founding*, in SEPARATION OF POWERS 1, 7–8 (Katy J. Harriger ed., 2003).

87. *See, e.g.*, JOHNSON, *supra* note 23, at 7–8 (referring to the Rehnquist Court’s proclivity for a restriction on the power of the federal government in favor of state power based upon a “jurisprudence of original intention”); *id.* at 262–75 (citing an expanded notion of the Eleventh Amendment and state sovereign immunity adopted by the Court).

88. *Id.* at 278. Others have taken a similar approach to Reconstruction. *See, e.g.*, Evan Caminker, *State Sovereignty and Subordinacy*, 95 COLUM. L. REV. 1001, 1043 n.164 (1995) (“I am personally disinclined to give much weight to the Framers’ intent on issues of federalism in particular, as I believe the Reconstruction Amendments significantly changed the proper constitutional perspective on federal–state relations.”); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1149 (2001) (“The Court is mistaken if it believes that the constitutional consequences of the Civil War can be cabined in the Civil War Amendments.”).

89. JOHNSON, *supra* note 23, at 133–34.

a “sop, with little substantive meaning”;<sup>90</sup> the Eleventh Amendment a “backwash,” best read as a meaningless sop.<sup>91</sup> The electoral victory of the Jeffersonians in 1800 and their belief in a federal government confined to enumerated federal powers marked the reversal of the constitutional enterprise.<sup>92</sup>

“Meaning” is used here in a rather particular sense, and it is not clear that federalism-oriented originalists will feel very chastened by *Righteous Anger*. Reasonably enough, Johnson cites Ludwig Wittgenstein and Quentin Skinner in support of the propositions that “words are deeds”<sup>93</sup> and have to be situated “within such intellectual contexts as enable us to make sense of what their authors were doing in writing them.”<sup>94</sup> Originalists should agree with that starting point.<sup>95</sup> Johnson infers from these propositions, however, that the meaning of the Constitution should be “derived from its goals.”<sup>96</sup> Indeed, it would seem that its meaning can be reduced to its goals, and perhaps even further to the particular legislative “program” of its strongest proponents.<sup>97</sup> Or, in keeping with the righteous anger theme, the Constitution’s “weapon-like characteristics” that bludgeoned the states are “core to its historical meaning.”<sup>98</sup> Here the originalist would have to part ways with Johnson. Although the programmatic aims of the constitutional drafters are certainly useful to understanding the text that they adopted, the motivations that the drafters held and their expectations about the consequences of the constitutional changes that they were making are not equivalent to the meaning of what they wrote.<sup>99</sup>

The historical evidence Johnson assembles speaks more to the motivations for the constitutional revolution than to the meaning of the constitutional text drafted and ratified. The historical narrative that makes up the body of the book is concerned with the explanation for the gathering in

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90. *Id.* at 9.

91. *Id.* at 274.

92. *Id.* at 11, 250–55, 275.

93. *Id.* at 1 (quoting LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 146 (2d ed. 1958)).

94. *Id.* at 1 n.1 (quoting QUENTIN SKINNER, *1 VISIONS OF POLITICS: REGARDING METHOD* 3 (2002)); see also Quentin Skinner, *Meaning and Understanding the History of Ideas*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 29, 56–63 (James Tully ed., 1988) [hereinafter *MEANING AND CONTEXT*] (arguing that if one wants to understand the written expression of another, one needs to understand both the intended meaning of the author and the context within which the words were used).

95. KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 88–109 (1999).

96. JOHNSON, *supra* note 23, at 1.

97. *Id.* at 5.

98. *Id.* at 1.

99. See Whittington, *supra* note 95, at 175–79 (explaining the difference between an author’s intent and the meaning of the text); see also Quentin Skinner, *Motives, Intentions and the Interpretation of Texts*, in *MEANING AND CONTEXT*, *supra* note 94, at 68, 70 (identifying three distinct definitions of meaning in the context of a literary text: the meaning of the words in isolation, the meaning of the words to the reader, and the meaning of the words to the author).



Philadelphia in 1787. The implications for originalism and the jurisprudence of federalism would not be evident from the book if not for its introduction and conclusion and a short section on the Eleventh Amendment. As a counter to federalism-oriented originalists, however, *Righteous Anger* has several difficulties and at least one oddity.

The difficulties from an originalist perspective are several. The first difficulty has already been noted—it melds motives and meaning in a manner that most originalists would reject. That the Constitution was written as part of a nationalizing, state-building project is at best the start of an originalist inquiry into its meaning, but it certainly cannot be its ending. A second difficulty is that *Righteous Anger* largely ignores the constitutional text, which is still the starting point for any originalist analysis. The basic project of *Righteous Anger* is reductionist—to identify the single predominant cause of the shift from the Articles of Confederation to the U.S. Constitution. The big picture, Johnson correctly concludes, is that the Federalists wanted a more nationalist system with the central government capable of imposing its own taxes. To frame that big picture the constitutional text matters less than the letters and notes of the Federalists in the 1780s. For most of the questions of constitutional interpretation with which modern originalists are concerned, however, knowing that is not enough; such questions turn on the particular provisions of the Constitution as adopted and the particular beliefs and understandings within which the Constitution was embedded. A third and related difficulty is that Johnson is committed to the notion that constitutional meaning is defined by its strongest proponents, often as indicated by their concerns going into the Philadelphia convention.<sup>100</sup> The constitutional text that was adopted did not mirror those preferences, however. The nationalizing impulse of proponents such as Madison was significantly blunted in the Philadelphia convention, and Johnson gives little attention to the compromises that had to be made to satisfy those more skeptical of national power.<sup>101</sup> The significance of the pivotal voters in the legislative process in shaping the text and in forcing compromises in principles, which the strongest advocates would not have otherwise preferred, seems particularly apt to Johnson’s approach to 1787.<sup>102</sup> A fourth

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100. JOHNSON, *supra* note 23, at 1.

101. David Brian Robertson, *Madison’s Opponents and Constitutional Design*, 99 AM. POL. SCI. REV. 225, 225 (2005); see CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 201–07 (1988) (summarizing how various tenets of Madison’s strongly nationalistic Virginia Plan eventually yielded to a vision of “moderate federalism” over the course of the Constitutional Convention); RAKOVE, *supra* note 21, at 57–160 (describing the compromises and concessions made by the Federalists that were necessary to achieve ratification of the Constitution). Johnson does discuss Madison’s “partial losses” in the convention but discounts their significance given that “[l]imitation on the federal government was not the problem for which the Philadelphia convention met.” JOHNSON, *supra* note 23, at 120.

102. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711–12 (1992) (arguing that statutory interpretation concerned with legislative intent must focus on the accommodations that were necessary to win support of

difficulty is that *Righteous Anger* largely ignores the ratification debates and the Federalists' representations of what the Constitution means. Whereas originalists generally regard these debates as crucial to identifying the authoritative public meaning of the Constitution and the assurances that had to be made in order to win ratification, Johnson gives them little attention, partly on the theory that "words are deeds" and what was said in the ratification debates was so much rhetoric, and partly on the belief that the Federalists simply rolled the Anti-Federalists and did not need to moderate or compromise in order to achieve what they wanted.<sup>103</sup> Such issues may not affect our judgment of what motivated the Constitution, the primary concern of the book, but they surely affect our assessment of just how strong of a "nationalizing vector" the Constitution was and how an originalist should interpret it.<sup>104</sup>

The oddity of *Righteous Anger* from an originalist perspective is that it tends to render the Constitution irrelevant to modern politics. If the Constitution is primarily "a tax document"<sup>105</sup> intended to solve the "short-term needs" of the union,<sup>106</sup> then its mission was accomplished almost as soon as it was adopted. The Constitution is not a "timeless document"; it had exhausted its purpose by 1791.<sup>107</sup> From that perspective, it is little wonder that the constitutional movement came to a quick end and American politics splintered. Once the first tax bill passed through Congress, on this account there was nothing more for the Constitution and its proponents to do. Having accomplished the goals that they had in common, the Federalists who championed the Constitution splintered into the Federalists in government and the Republicans in opposition as the political agenda shifted to issues about which they did not hold a common view.<sup>108</sup>

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legislative moderates); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1422–23 (2003) (proposing a theory of legislative interpretation that considers the "scope of the bargain struck by the ardent supporters with the coalition of pivotal legislators . . . central to the meaning of the statute"). The pivotal delegate at Philadelphia was closer to the skeptical Roger Sherman than to the enthusiastic James Madison. See Keith L. Dougherty & Jac Heckelman, *A Pivotal Voter from a Pivotal State: Roger Sherman at the Constitutional Convention*, 100 AM. POL. SCI. REV. (forthcoming 2006).

103. JOHNSON, *supra* note 23, at 1–10, 128–38.

104. *Id.* at 278.

105. *Id.* at 276.

106. *Id.* at 9.

107. *Id.* The transformation of texts taken to be timeless documents into something of only antiquarian interest is a recurrent risk of those adopting the Skinnerian approach to history. See JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE*, at x (1982) ("I simply cannot conceive of constructing an analysis of any issue in contemporary political theory around the affirmation or negation of anything which Locke says about political matters."); John G. Gunnell, *Interpretation and the History of Political Theory: Apology and Epistemology*, 76 AM. POL. SCI. REV. 317, 326–27 (1982) (discussing the Skinnerian method of analyzing Machiavelli's works).

108. On the "two Madisons" question, however, Johnson favors the view that Madison converted from nationalism to states' rights, which might be taken to imply instead that the Federalists splintered only because Madison defected to the other side, not because they had

Of course, we expect there to be a gap between constitutional politics and ordinary politics, between the moment of founding and the long period of living within that which was founded. The oddity created by the reduction of the meaning of the Founders’ Constitution to taxes and anger, however, is that it effectively seals the Constitution off from subsequent political developments, and the founding begins to seem trivial. *Righteous Anger* has less to say about the ways in which the Constitution continued to matter in politics than it should. It provides no leverage for understanding how subsequent party politics was grounded in disagreements about the meaning of the Constitution and how the Constitution was integrated into ongoing American politics.<sup>109</sup> For Johnson, there is little to be said about textual meaning and interpretation after the first Congress; “the Constitution as a text had been written and ratified and the ink was dry.”<sup>110</sup>

If the Constitution has little meaning beyond the Hamiltonian tax program for Johnson, he does seem to find relevance for the Constitution to the extent that it is a platform on which subsequent politics must be built. “The structural part of the Constitution endures . . . long after the original anger at the states has dissipated.”<sup>111</sup> Although he may think that this is where the long-term significance of the Constitution is to be found, Johnson’s analysis of the founding leaves the structural part of the Constitution in the shadows. The ways in which the Constitution constituted and channeled subsequent American politics by creating a new instrument of political power, by structuring the representation and power of social interests in the new government, and by creating new dynamics of interbranch and intergovernmental rivalry and cooperation are obscured behind the veil of righteous anger. The “clever combination of New World gears and gadgets”<sup>112</sup> that occupied so much of the framers’ time in the summer of 1787 and that has been of such consequence in the years since is dismissed as a sideshow.

It is perhaps no surprise that those who came after the Founders, in the early republic itself as well as in subsequent generations, have focused less on the fiscal crisis that undoubtedly contributed to the creation of the

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reached the limit of their common goals. JOHNSON, *supra* note 23, at 249–61. For other views on the “two Madisons” question, see also STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 133–61 (1993), which notes Madison’s vacillation between the theories of centralized national government and states’ rights egalitarianism; and John Zvesper, *The Madisonian Systems*, 37 W. POL. Q. 236, 254 (1984), which argues that Madison recognized both Federalism and Republicanism as possible methods of protecting rights but also realized the intrinsic weaknesses of both theories.

109. See DAVID J. SIEMERS, *RATIFYING THE REPUBLIC 193–205* (2002) (analyzing how opponents of the Federalists utilized a strategy of legitimizing and working within the bounds of the newly ratified Constitution in order to both stabilize the government and achieve political successes).

110. JOHNSON, *supra* note 23, at 11.

111. *Id.*

112. AMAR, *supra* note 24, at 87.

Constitution than on the scope and limits of the federal and state governments that operate under that Constitution. The existence of the federal government, armed with the power to tax and to enforce its will directly on the citizens, could be assumed after 1789. The partial qualification of the sovereignty of the states was accomplished fact. The initial constitutive work of the constitutional enterprise was done. The task going forward was one of interpretation and construction of constitutional meaning and practices. Within that context, the constraints that the Constitution imposed on government power become more relevant. The federal government became a machine that would go of itself; it possessed officers, resources, and coercive authority that it would seek to use. The Constitution would then become the ground on which the limits of that coercive authority would be fought. The “constitutional movement” did not come to an end in the 1790s.<sup>113</sup> It merely changed form.

Calvin Johnson’s *Righteous Anger* usefully emphasizes the positive dimension of constitutionalism—the creation of effective and well-directed governmental power to achieve public purposes. It joins a growing body of work that conceives of the Federalist project as one of constituting, reallocating, and expanding government power, not limiting it. As a historical account that explains the movement for constitutional change in the early republic, this is a useful corrective to those who would attend only to Madisonian warnings that, since men are not angels, constitutionalists must oblige the government to control itself.<sup>114</sup> Constitutionalism is about constructing the ship of state and not merely about binding Ulysses to the mast. It *is also* about binding Ulysses, however, and Johnson is not sufficiently attentive to the limits that the Federalists imposed on their creature. The search for a unicausal explanation for the events in Philadelphia can easily obscure the details of the product of that convention, and yet it is in those details that the meaning of the Founders’ Constitution must often be found.

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113. JOHNSON, *supra* note 23, at 10, 262–75.

114. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).