ALEXANDER HAMILTON, THE NONDELEGATION DOCTRINE, AND THE CREATION OF THE UNITED STATES

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In the period immediately preceding the Constitution's adoption, New Yorkers engaged in a spirited debate over whether a proposed delegation from the State to the federal government authorizing collection of an impost would violate the clause of the New York Constitution that vested "supreme legislative power" in the State Assembly and Senate. Some, like Alexander Hamilton, believed that the clause did not bear on delegations to the federal government, but rather governed the relationship between the branches of the New York government. Others believed that a grant of impost authority impermissibly transferred legislative power away from the state legislature. This Article addresses the debate over delegation that occurred during this controversy—which, in the words of Alexander Hamilton, "begat" the Convention that wrote the U.S. Constitution. The Article also addresses the equally significant debates over delegation that occurred during the consideration of the Constitution itself. As this Article shows, the debates that led to and surrounded the Constitution's adoption were in no small part debates about the legality of delegating sovereign legislative authority.

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INTRODUCTION

One of the most significant criticisms lodged against the Articles of Confederation in the years before the ratification of the Constitution was that the Continental Congress could not directly raise funding for the national government. In 1781, during the American Revolution, the Continental Congress had formally requested that each state "vest a power in Congress, to levy" a tariff of five percent on many foreign imports.[1] In 1787, after years of twists and turns, New York's rejection of Congress's authority to implement an impost effectively sounded the death knell for the proposal.[2] Between those years, the United States won a war and formed a government under the Articles of Confederation.[3] During this period, the impost controversy was central to political debates[4]—so central that, when James Madison spelled out the flaws of the Articles of Confederation in 1787, he placed the inability of the Continental Congress to raise revenue at the very top of the list.[5] New York's rejection was not just the death knell of the impost proposal, but effectively the death knell for the Articles of Confederation and the government

1. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 112 (Gaillard Hunt ed., 1912).

2. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 12–15 (2009) (claiming that New York "put so many qualifications on its approval" of a federal impost that it "was effectively killed").

3. *See generally* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979).

4. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1112–13 (2013) ("Given the horrendous condition of government finances, the impost controversy became a defining issue in American politics."); Letter from Henry Knox to Benjamin Lincoln (June 13, 1788) ("The insurrections of Massachusetts, and the opposition to the impost by New York, have been the corrosive means of rousing america to an attention to her liberties."), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 176, 177 (John P. Kaminski et al. eds., 1995).

5. James Madison, Vices of the Political System of the United States (Apr. 1787) (remarking that such failure "may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System"), *in* 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975).

they had created. To borrow Alexander Hamilton's words, "impost begat [the Constitutional] Convention."[6]

The impost controversy was the occasion for a lengthy and substantial debate over the nondelegation doctrine. That is because, in the crucial State of New York,[7] critics of the proposals for federal impost authority invoked the Legislative Vesting Clause of the New York Constitution of 1777 and contended that it prohibited such a conferral of authority. That clause of the New York Constitution declared, in relevant part, that "the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York."[8]

The critics of the impost proposal argued that delegating impost-collection authority to Congress violated this legislative vesting provision. To take an example, as early as 1783, Abraham Yates—later a prominent antifederalist opponent of the Constitution—claimed that the New York legislature lacked the power "of *delegating* the authority constitutionally vested in them to the federal government."[9] He contended that if the legislature could do so "in this

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6. Alexander Hamilton, Notes for a Speech to the New York Convention (July 17, 1788), *in* 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2197, 2197 (John P. Kaminski et al. eds., 2009); *see also* Calvin Johnson, *"Impost Begat Convention": Albany and New York Confront the Ratification of the Constitution*, 80 ALB. L. REV. 1489, 1500 (2017) ("The New York veto of the national impost was the nearest cause of the abandonment of the confederation mode at the national level and the adoption of the Constitution in its stead . . . .").

7. I describe New York as "crucial" because of its role in the ratification of the Constitution. In the words of the historian Linda De Pauw: "New York was the last state to ratify the federal Constitution before the new government went into operation, and in no state was ratification carried by a narrower margin." LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK AND THE FEDERAL CONSTITUTION ix (1966).

8. N.Y. CONST. of 1777, art. II. In full, the Clause declared as follows: "This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch [sic] of business." *Id.*

9. Rough Hewer, No. III, THE NEW-YORK GAZETTEER, Oct. 20, 1783, at 2.

instance, they might in another, and at last surrender *the whole legislative power*."[10] Three years later, in 1786, the Habsburg Monarchy's agent in the United States, Baron de Beelen-Bertholf, reported that critics of the impost claimed that the New York legislature could not give away "an authority that inheres necessarily in the respective legislatures of each state" and that delegating such authority would depart from the "fundamental principles of the American constitutions."[11] And in the crucial debates over the impost in February 1787, a pseudonymous author, "Candidus," claimed that the New York Constitution did "not authorize the legislature to transfer the power of legislation to Congress, in this instance."[12]

Almost six years of debate over the nondelegation doctrine culminated in a speech before the New York Assembly by Alexander Hamilton in February 1787.[13] In his speech, Hamilton directly addressed the nondelegation doctrine at length, noting that some had charged the impost bill with violating a constitutional prohibition on "delegat[ing] legislative power" from the New York legislature "to Congress" and characterizing this objection as the one "supposed to have the greatest force."[14] He acknowledged the critics' premise that the New York Constitution incorporated a nondelegation principle. He said that "[i]n the distribution of the different parts of the sovereignty in the *particular* government of this state the legislative authority shall reside in a senate and assembly, or in other words, the legislative authority of the particular government

10. *Id.*

11. GEORGE BANCROFT, 1 HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 264 (1882) (citing the Report of the Austrian Agent Baron de Beelen-Bertholf (Apr. 1, 1786)). The quoted language is from Bancroft's description of de Beelen-Bertholf's report.

12. Candidus, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 6, 1787, at 2.

13. Alexander Hamilton, Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON: 1787–MAY 1788, at 71 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter Hamilton Remarks].

14. *Id.* at 73.

of the state of New-York shall be vested in a senate and assembly."[15] But relying on other parts of the New York Constitution, Hamilton contended that the New York Constitution's Legislative Vesting Clause did not go beyond "delineat[ing] the different departments of power in our own state government."[16] Hamilton thus claimed that a delegation *to the federal government* did not violate the prohibition against delegations within "the different departments" of the New York government.[17]

Despite its relevance, the impost debate has received effectively no attention in the voluminous scholarship on the nondelegation doctrine.[18] In this Article, I have uncovered essays and papers written about the legislative vesting provision of the New York Constitution in the critical years and months preceding the Constitution's adoption. There are three basic reasons to care about these new documents.

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15. *Id.* at 74 (internal quotation marks omitted).

16. *Id.*

17. *Id.*

18. I am aware of a few articles that discuss the impost controversy in related, but distinct contexts. First, Professor Jud Campbell discusses the implementation of the impost in the context of the question of commandeering and federalism. *See* Campbell, *supra* note 4; *see, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the Constitution incorporates an "anticommandeering" doctrine that prohibits the federal government from requiring state executive officers to enforce federal law). In doing so, Professor Campbell alludes in passing to the nondelegation question that was raised at the same time. *See* Campbell, *supra* note 4, at 1122 n.72 (observing that Abraham Yates, writing as "Rough Hewer," perceived a "state constitutional bar against 'delegat[ing]' or transfer[ring]' legislative power to Congress"); *see infra* notes 68–71 and accompanying text (discussing Yates and the "Rough Hewer" essays). Separately, Professor David Golove has addressed the impost in the context of delegations to supranational entities. *See* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1715–17 & nn. 62–63 (2003). And third, Professor Calvin Johnson sets forth the outlines of the impost crisis generally. *See* Johnson, *supra* note 6. These sources demonstrate the link between delegation—especially to parties outside the government, such as private parties or supranational entities—and the concepts of appointment, removal, and control. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1349 & n.310, 1356–57 (2019) (addressing the question of delegation to the Bank of the United States).

First, the impost controversy precipitated a crisis that led to the Convention that wrote the Constitution of the United States. It is not much exaggeration to say that this was the legal debate that led to the creation of the United States—with the nondelegation doctrine under the New York Constitution playing a starring doctrinal role. The backdrop of Hamilton's speech was the significant financial difficulties (and potential dissolution) of the federal union prompted by the national government's inability to raise national revenue.[19] Thus, "conferring on congress the power of levying a *national impost*, was the great dividing question on which the two parties that existed in America were arrayed."[20] In the words of Alexander Hamilton's son, the historian John Church Hamilton, "[t]he vote of the New-York legislature on the impost decided the fate of the confederation."[21]

Second, the debate over the Constitution prompted a debate over delegation in a second sense: whether state legislatures had the power to transfer their authority to the federal government, either directly or through agents like the delegates to the Constitutional Convention. During the debate over the Constitution, this question came to the fore, with John Jay addressing the topic of delegation in letters and others addressing whether the participants at the Convention had exceeded their delegated authority.[22]

Third, the question whether the U.S. Constitution's vesting of "legislative powers" in Congress implies a nondelegation principle is a matter of significant current debate.[23] The New York debates

19. *See* Johnson, *supra* note 6, at 1490; *infra* Part I.

20. JOHN CHURCH HAMILTON, 3 HISTORY OF THE REPUBLIC OF THE UNITED STATES OF AMERICA 168 (3d ed. 1868).

21. *Id.* at 236.

22. *See infra* Part III.

23. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the federal Constitution does not incorporate a nondelegation doctrine), *and* Eric A. Posner & Adrian Vermeule, *Interring the*

over the impost provide interesting and potentially significant new and previously overlooked evidence on this question.[24] In a nutshell, they demonstrate that, in one of the highest-profile and consequential debates during the years preceding the Constitution's adoption, editorial writers and legislators within New York repeatedly made arguments based on the premise that the New York Constitution contained a nondelegation doctrine.[25] And in seeking to

Nondelegation Doctrine, 69 U. CHI. L. REV. 1721 (2002) (same), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that the Constitution does incorporate a nondelegation doctrine), *and* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (same).

24. *See, e.g.*, Mortenson & Bagley, *supra* note 23, at 305 (noting that the authors "found only two preratification hints of nondelegation skepticism expressed in a *legal* register"). The new and previously undiscussed sources cited in this Article add to the store of preratification evidence about the nondelegation doctrine.

25. *See infra* Parts I and II. To be sure, I do not claim that the evidence from the impost controversy bears on the question of the scope of the nondelegation doctrine. The Court has used the "intelligible principle" test as the touchstone for implementing the nondelegation doctrine, but several Justices in recent Supreme Court cases have advocated a change to the test. *See* Gundy v. United States, 139 S. Ct. 2116, 2138–42 (2019) (Gorsuch, J., dissenting); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari). Several academics have made important scholarly contributions in recent years on how history might inform the scope of the nondelegation doctrine. *See, e.g.*, Mortenson & Bagley, *supra* note 23; Wurman, *supra* note 23; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239 (2021); Eli Nachmany, Note, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 17 U. ILL. L. REV. ONLINE 17 (2022). The relevance of historical analysis to the proper scope of the nondelegation doctrine is an important question, but it is one that I cannot answer with the materials surfaced in this Article. Instead, I will address whether the generation of lawyers who adopted the Constitution would have understood the vesting of "legislative power" in a body to prohibit the delegation of such power to other bodies. To my mind, the very fact that the participants in the New York debates—ranging from antifederalists like Abraham Yates to staunch nationalists like Alexander Hamilton—presupposed the existence of such a doctrine under the New York Constitution is strong (albeit rebuttable) evidence that constitution-drafters understood that such vesting incorporated a nondelegation doctrine. For an attempt to sketch an approach to the scope of the nondelegation doctrine, see Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019).

rebut that argument, Alexander Hamilton, along with his allies, accepted the existence of a nondelegation doctrine under the New York Constitution's Legislative Vesting Clause, but disputed the doctrine's application to a delegation to the federal government.[26]

This Article proceeds in four parts. Part I spells out the history of the impost crisis in the 1780s, starting with its genesis during the American Revolution in 1781 and addressing developments until the critical year of 1787. Part II discusses the New York Assembly's 1787 session, which addressed the impost proposal for a final time in a debate culminating in Alexander Hamilton's speech analyzing the nondelegation doctrine. It includes an extended discussion of that speech, which acknowledged that the New York Constitution's Legislative Vesting Clause incorporated a nondelegation doctrine, but argued that the conferral of revenue-raising authority on the Continental Congress did not violate that doctrine. Part III discusses the aftermath of the speech, which ended in the failure of the impost proposal and the movement toward the Convention that produced the U.S. Constitution. Even there, nondelegation concerns were raised, because critics of the Constitution argued that the delegates to the Convention had violated their mandates by exceeding the authority vested in them by the New York legislature. All of these concerns were specifically raised during the events leading up to the epic Poughkeepsie Convention that ratified the Constitution in New York.[27] Part IV concludes with implications for our understanding of the Constitution's drafting and ratification, the nondelegation doctrine, and the separation of powers more generally.

In broad strokes, the debate in New York over the delegation of an impost to the federal government—which occurred just a few months before the writing of the Constitution—provides new evidence on how Article I's authors might have understood the federal

26. *See infra* Parts II.C and III.

27. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 327 (2010).

Legislative Vesting Clause. While perhaps not conclusive, it is certainly relevant that, to my knowledge, the principal participants to the New York debate accepted the existence of a nondelegation doctrine under the New York Constitution. The debate over the impost, which "begat"[28] the Constitution, and the debate over the Constitution itself, were in no small part debates over the contours of delegation.

I. THE IMPOST CRISIS OF THE 1780S

The impost crisis was one of the most significant political issues of the period between the end of the American Revolution and the writing of the Constitution. In this Part, I provide a brief timeline of the issue, beginning first with the legal backdrop for the crisis and a description of those who participated in the debate within New York. I then turn to the several impost proposals between 1781 and 1787, highlighting the legal, nondelegation arguments made against such proposals.[29]

A. The Nature of—and Participants in—the Debate

After their ratification in 1781, the Articles of Confederation governed the relationship between the various States. The Articles retained a robust conception of state sovereignty, declaring that "[e]ach State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[30] With respect to taxes, in particular, the Articles declared that they "shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States, in Congress assembled."[31]

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28. Hamilton, *supra* note 6, at 2197.

29. In this Section, I have been greatly aided by the discussion in the following sources: CLARENCE E. MINER, THE RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1921); Campbell, *supra* note 4, at 1112–26.

30. ARTICLES OF CONFEDERATION of 1781, art. II.

31. ARTICLES OF CONFEDERATION of 1781, art. VIII.

New York's Constitution predated the Articles by four years. Drafted in part by John Jay, the Constitution contained a clause vesting "the supreme legislative power within this State" in an Assembly and Senate.[32] New York had early addressed the question whether this "Legislative Vesting Clause," by conferring "supreme legislative authority" on one body, implicitly forbade its exercise by another. In September of 1780, Egbert Benson reported, and the State Assembly passed, a bill "for the Appointment of a Council to assist in the Administration of Government, during the Recess of the Legislature."[33] On October 9, 1780, the state Council of Revision concluded that the bill was "inconsistent with the spirit of the Constitution," because, pursuant to it, "the person administering the government, with the Council therein provided, must exercise the powers of legislation; which by the Constitution is vested in the Senate and Assembly, and cannot by them be delegated to others."[34] The State Assembly did not enact the bill.[35]

The 1780 episode gave a preview of the constitutional arguments made in the much larger dispute within New York in the decade to

32. N.Y. CONST. of 1777, art. II; *see* WILLIAM JAY, 1 THE LIFE OF JOHN JAY 69 (1833). Another one of the drafters of the New York Constitution of 1777, Gouverneur Morris, would go on to play an important role in the drafting of the U.S. Constitution. *See* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 11 (2021).

33. *See* THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR FIRST MEETING OF THE FOURTH SESSION 39, 43 (1780).

34. ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 234 (1859). The New York Constitution had created the Council of Revision as a power to check the New York legislature, with authority to "revise" or effectively veto legislation. *See id.* at 5–7; N.Y. CONST. of 1777, art. III (providing "that the Governor for the time being, the Chancellor and Judges of the Supreme Court, or any two of them, together with the Governor, shall be and hereby are consisted a Council to revise all bills about to be passed into laws by the Legislature" and "that all bills which have passed the Senate and Assembly shall, before they become laws, be presented to the said Council for their revisal and consideration"). For more on this episode, see CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 42 (1922); Wurman, *supra* note 23, at 1539–40 & n.261.

35. *See* THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR FIRST MEETING OF THE FOURTH SESSION, *supra* note 33, at 56.

follow. Over the course of that decade, States lapsed on their obligatory payments to Congress, which, in turn, rendered it impossible for the national government to service many of its foreign debts.[36] Within the State of New York, several factions coalesced around different approaches to this problem.[37] Though only 32 at the time of his speech in 1787, Hamilton was one of the leaders of the New York faction that championed federal authority and the need for federal revenues.[38] Hamilton, along with his allies such as the then-Secretary of Foreign Affairs John Jay and Egbert Benson,[39] sought to authorize a delegation by New York to the federal government to administer the impost.[40]

On the other hand, a separate faction led by Governor George Clinton sought to retain the State's taxing authority, arguing against a delegation to the federal government on both policy and legal grounds.[41] At the time 47 years old, Clinton had been repeatedly elected as Governor of New York.[42] Among his allies was Melancton Smith, a prominent businessman, who would author some of the leading Anti-Federalist tracts in the summer of 1787.[43]

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36. E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 224–28, 234–35 (1961); Letter from James Madison to Thomas Jefferson (Mar. 18, 1786) ("The payments from the States under the calls of Congress have in no year borne any proportion to the public wants."), *in* 8 THE PAPERS OF JAMES MADISON 500, 502 (Robert A. Rutland et al. eds., 1973).

37. *See* Johnson, *supra* note 6, at 1489 ("Ratification was debated in New York with partisan vigor; indeed, participants on either side of the divide were said to detest each other.").

38. RON CHERNOW, ALEXANDER HAMILTON 226–27 (2004).

39. Yes, the same Egbert Benson who would, along with James Madison, convince other members of the House of Representatives to embrace the position that the Constitution conferred on the President a power to remove executive branch subordinates in the "Decision of 1789." *See, e.g.*, Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. ___ (forthcoming 2023).

40. *See infra* Parts I.B, II.

41. JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789, at 219 (1888) (claiming that New York "had her little system of duties all nicely arranged for what seemed to be her own interests, and she would not surrender this system to Congress").

42. *See generally* JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC (1993).

43. *See generally* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE (Michael P. Zuckert & Derek A. Webb eds., 2009).

Also allied with Clinton and Smith were Abraham Yates, a member of the New York Senate; his nephew Robert Yates, a justice of the New York Supreme Court; and John Lansing, the Mayor of Albany and a future member of Congress.[44]

B. From 1781 to 1787

1. The 1781 Impost Proposal

In February of 1781, Congress requested from the States a grant of a five per cent continental tax on imports, characterizing such a tax as an "indispensable necessity."[45] On March 19, 1781, New York granted the federal government an impost to be "collected in such manner and form and under such pains, penalties and regulations, and by such officers as congress shall . . . direct and appoint."[46]

Commenting on the events across the Nation in May of 1781, James Madison remarked in a letter to Edmund Pendleton that Congress's request would prompt a conflict between those members of state legislatures who were naturally jealous and suspicious of national authority and those who saw the necessity of federal revenue-raising capabilities.[47] Madison also noted in his letter that the method of collection would raise its own challenges and that, for this reason, Congress had requested solely the duty, leaving the method to the States.[48]

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44. *See* DE PAUW, *supra* note 7, at 19–31; Campbell, *supra* note 4, at 1128.

45. BANCROFT, *supra* note 11, at 34.

46. An Act Authorizing the United States, in Congress Assembled, to Levy a Duty on Foreign Merchandise Imported into this State (Mar. 19, 1781), *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 347–48 (1886).

47. Letter from James Madison to Edmund Pendleton (May 29, 1781) (noting that (1) Congress had requested that "the duration of the impost was limited" to mollify sentiment within the States, though "limited in so indefinite a manner as not to defeat the object" of the impost, and (2) "if the States will not enable their Representatives to fulfill their engagements, it is not to be expected that individuals either in Europe or America will confide in them"), *in* 1 THE PAPERS OF JAMES MADISON 94–95 (Henry D. Gilpin ed., 1840).

48. *Id.* ("On one side it was contended that the powers incident to the collection of a duty on trade were in their nature so municipal, and in their operation so irritative, that it was improbable that the States could be prevailed on to part with them.").

As Madison predicted, the State of Rhode Island unanimously rejected Congress's recommendation.[49] In a letter to Congress, the Speaker of the Rhode Island House of Representatives, William Bradford, gave three reasons for the rejection. Two of them sounded in policy: Bradford claimed that the impost would work unequally, "bearing hardest on the most commercial states," and that it would be "repugnant to the liberty of the United States."[50] But the other reason Bradford proffered was legal: he claimed that Congress's proposal "introduce[d] into this and the other states, officers unknown and unaccountable to them, and so is against the constitution of this State."[51]

Just four days after Rhode Island's rejection of the 1781 impost, Hamilton—along with fellow Delegates James Madison and Thomas Fitzsimons—produced a report responding to Bradford's letter.[52] The Report set the Continental Congress on a path to a second unsuccessful attempt—an attempt modified to accommodate the objections to the previous proposal—to obtain authorization for a federal impost.

The Report responded to Bradford's constitutional argument[53] by claiming that the various state constitutions did not "define and fix

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49. *See* Letter from William Bradford (Nov. 30, 1782), *in* 23 JOURNALS OF THE CONTINENTAL CONGRESS 788–89 (1914).

50. *Id.* at 788.

51. *Id.* Rhode Island did not have a post-Revolution Constitution at the time, but rather was operating under its Royal Charter. *See* IRWIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774–1795 (1969).

52. *See Continental Congress Report on a Letter from the Speaker of the Rhode Island Assembly* (Dec. 16, 1782), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON: 1782–1786, at 213 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

53. The Report also responded to Bradford's policy arguments that the impost unfairly targeted commercial States and was repugnant to the liberty of Americans. As to the former, the Report claimed that merchants would pass on the duty to consumers in the price of the commodity, resulting in each State feeling the "burthen" of the import solely "in a ratio to its consumption, and this will be in a ratio to its population and wealth." *Id.* at 215. As to the latter, the Report sought to play down the implications of the impost grant and to play up the responsiveness of Congress to the citizenry. *See id.* at 219 ("The truth is the security intended to the general liberty in the confederation consists in the frequent election and in the rotation of the members of Congress, by which there is a constant and an effectual check upon them.").

the precise numbers and descriptions of all officers to be permitted in the state," but rather that the "Legislature must always have a discretionary power of appointing officers, not expressly known to the constitution."[54] This discretionary power, the Report continued, "include[d] that of authorising the Fœderal government to make the appointments in cases where the general welfare may require it."[55] In the absence of such a power, the Report argued, the conferral of appointment authority on the federal government for officers within the post office would be unconstitutional.[56] And Rhode Island's argument would "prove also that the Fœderal government ought to have the appointment of no internal officers whatever, a position that would defeat all the provisions of the Confederation and all the purposes of the union."[57] But the Report pointed out that the Articles expressly contemplated that Congress had authority to appoint all such "civil officers as may be necessary for managing the general affairs of The United States under their direction."[58]

Although not couched in nondelegation terms, Rhode Island's objection to the impost opened a constitutional debate over the federal government's power to use its own officers to collect a tax within a State and, in turn, opened a debate on the States' authority to confer such powers on the federal government.

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54. *Id.* at 216.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; *see generally* 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 206–08 (1854). Other supporters of a stronger central government urged that Congress be vested with greater power to pay off the public debt. For example, on February 17, 1783, James Duane wrote Hamilton, urging a "better Establishment of our General Government on a Basis that will secure the permanent Union of the States, and a punctual Payment of the publick Debts." Letter from James Duane to Alexander Hamilton (Feb. 17, 1783), *in* 3 HAMILTON PAPERS, *supra* note 52, at 257.

2. The 1783 Compromise

On March 6, 1783, a report in the Continental Congress commented on the financial situation by declaring that the national government had tried to ascertain and liquidate the public debt and to ensure adequate and regular payment for paying the interest.[59] In doing so, the report renewed the attempt to secure a grant of the proposed impost. But the renewed attempt might have had the opposite effect. On March 15, 1783, New York repealed the grant that the State had made in 1781 and substituted in its place a grant that authorized the collection of the impost by state officials.[60]

The following month, on April 18, 1783, Congress officially reproposed a federal impost.[61] This time around, the proposal was a duty of five percent on "all . . . goods" other than those specified,[62] accompanied with two key accommodations to the objections. First, Congress proposed that the impost expire after twenty-five years.[63] Second, Congress authorized States to appoint tax collectors, though it retained federal authority to remove them.[64] Referring to this proposal in a letter to George Washington, Hamilton described members of Congress as having "been dragged into the measures

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59. Report on Restoring Public Credit (Mar. 6, 1783), *reprinted in* 6 THE PAPERS OF JAMES MADISON 311, 311–16 (William T. Hutchinson & William M.E. Rachal eds., 1969); *see id.* at 311 (recommending that the States vest in Congress "a power to levy for the use of the U.S., a duty of 5 [percent] . . .").

60. An Act to Repeal an Act Entitled "An Act Authorizing the United States, in Congress Assembled, to Levy a Duty on Foreign Merchandise Imported into this State" (Mar. 15, 1783), *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 544 (1886) (providing that duties shall be "collected by such officers, under the authority of this State").

61. *See, e.g.*, RICHARD HILDRETH, 3 THE HISTORY OF THE UNITED STATES OF AMERICA 435 (1863); BANCROFT, *supra* note 11, at 104.

62. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 257 (Apr. 18, 1783) (Gaillard Hunt ed., 1922). For the other, listed goods, the proposal levied a specified duty. *See id.* For the committee report on the same subject, see *id.* at 188.

63. *Id.* at 258 (providing that the duties shall not "be continued for a longer term than twenty-five years").

64. *Id.* (providing that "the collectors of the said duties shall be appointed by the states, within which their offices are to be respectively exercised, but when so appointed, shall be amenable to, and removable by, the United States in Congress assembled, alone"). Congress also provided that, if a State did not make such an appointment within a specified time, then Congress could make the appointment. *See id.*

which are now near being adopted by the clamours of the army and other public creditors."[65]

Joined by Madison and Oliver Ellsworth, Hamilton authored a report to defend the proposal that was circulated in the New York press.[66] Hamilton wrote Governor Clinton on May 14, 1783, to advocate for the proposal on the basis of "the obligations of national faith, honor, and reputation."[67]

Others, however, claimed that the proposal violated the New York Constitution of 1777 because the State could not delegate away its sovereignty. Writing as "Rough Hewer," Abraham Yates published a series of elaborate editorials in the New York papers contending that the "Impost, *in the Mode required*, cannot be granted, consistent with the Confederation or [New York] Constitution."[68] Yates argued that, although the New York Constitution conferred on the legislature the authority to appoint the State's officers,[69] it did not by implication grant the legislature the power "of *delegating* the authority constitutionally vested in them to the federal government."[70] If the legislature could do so "in this instance,"

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65. Letter from Alexander Hamilton to George Washington (Apr. 8, 1783), *in* 3 HAMILTON PAPERS, *supra* note 52, at 318.

66. ADDRESS AND RECOMMENDATIONS TO THE STATES, BY THE UNITED STATES IN CONGRESS ASSEMBLED (Apr. 24, 1783); *see* MINER, *supra* note 29, at 19–20.

67. Letter from Alexander Hamilton to George Clinton, *in* 3 HAMILTON PAPERS, *supra* note 52, at 355.

68. Rough Hewer, No. III, *supra* note 9, at 1. For earlier suggestions of the same point, see Rough Hewer, *To Mr. Balentine*, THE NEW-YORK GAZETTEER, Aug. 4, 1783, at 2 (suggesting that the "requisition of Congress" was "against the constitution of the State of New-York"); Rough Hewer, No. II, THE NEW-YORK GAZETTEER, Oct. 6, 1783, at 2–3.

69. *See* N.Y. CONST. of 1777, art. XXIII (specifying how officers would be appointed). In the course of his argument, Yates cited several other provisions of the New York Constitution. *See* Rough Hewer, No. III, *supra* note 9, at 1 (citing N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them."); *id.* art. XXVIII (providing that, where "the duration of any office shall not be ascertained, such office shall be construed to be held during the pleasure of the council of appointment"); *id.* art. XXXIII (vesting the Assembly with the power to impeach officers)).

70. Rough Hewer, No. III, *supra* note 9, at 2.

Yates claimed, "they might in another, and at last surrender *the whole legislative power*."[71]

3. The Road to 1787

In 1786, Congress tried again. It began the process on February 8, 1786 by recommending the resolutions of April 18, 1783 "to the serious consideration of the Legislatures of those States which have not fully complied with [them]."[72] A few days later, Congress adopted a resolution as part of a special financial report that noted that New York had yet to comply with the 1783 impost request and that urged immediate action on the matter.[73]

In early 1786, Alexander Hamilton drafted a petition on behalf of the "inhabitants of the City of New York" to the state legislature to support the adoption of the 1783 impost proposal and contended that such a scheme was constitutional.[74] According to the report of Baron de Beelen-Bertholf, the Habsburg Monarchy's agent in the United States, objectors to the impost responded that neither the Congress nor state legislatures possessed the authority to alter state constitutions (or the Articles of Confederation), but rather were required to build on them.[75] Specifically, they argued that surrendering the impost power gave away "an authority that inheres necessarily in the respective legislatures of each state" and that delegating such authority would depart from the "fundamental principles of the American constitutions."[76]

Again, the state legislature adopted the position of the anti-federal-authority faction. On May 4, 1786, the state legislature enacted an impost law that granted Congress certain duties on imports, but

71. *Id.* For a similar point, see Rough Hewer, No. IV, THE NEW-YORK GAZETTEER, Nov. 3, 1783, at 2–3.

72. 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 58 (1934).

73. *See id.* at 67.

74. Inhabitants of the City of New York to the Legislature of New York State (Jan.–Mar. 1786), *reprinted in* 3 HAMILTON PAPERS, *supra* note 52, at 647; 1 BANCROFT, *supra* note 11, at 263; 2 HAMILTON, *supra* note 20, at 318.

75. 1 BANCROFT, *supra* note 11, at 264 (citing the Report of the Austrian Agent Baron de Beelen-Bertholf (Apr. 1, 1786)).

76. *Id.*

vested in state officers the power to levy and collect those duties.[77] By implication, the tax collectors were responsible to the State.

Congress recognized this measure as effectively a rejection of its own request and in resolutions issued on August 11 and August 23, 1786, recommended to Clinton that he convene a special session of the legislature to reconsider the bill.[78] Fresh off his election as New York Governor, Clinton had another, albeit by now somewhat-familiar, decision to make.

The stage was set for the final scenes of the drama, for Alexander Hamilton's famous speech on the impost's connection to the New York Constitution, and—precipitated by the entire chain of events—for the Convention that drafted the United States Constitution.

II. HAMILTON'S SPEECH AND THE NONDELEGATION DOCTRINE

In this Part, I will discuss the actions that the New York legislature took during its 1787 session, the nondelegation arguments that were made in the New York press at this time, and Hamilton's speech responding to those arguments.

A. The New York Legislature's January 1787 Session

When the New York legislature met in January 1787, it received a message from Governor Clinton that addressed the congressional

77. An Act for Giving and Granting to the United States in Congress Assembled, Certain Imposts and Duties on Foreign Goods Imported into this State, for the Special Purpose of Paying the Principal and Interest of the Debt Contracted in the Prosecution of the Late War with Great Britain (May 4, 1786), *reprinted in* 2 LAWS OF THE STATE OF NEW YORK 320–22 (1886). The statute provided that "the said duties and imposts shall be levied and collected in the manner directed in and by" state law. *Id.* at 321. For the state law, see An Act Imposing Duties on Certain Goods, Wares, and Merchandize Imported into this State (Nov. 18, 1784), *reprinted in id.* at 11–19.

78. *See* 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 513 (1934) (recommending "the Executive of the State of New York, immediately to convene the legislature of the said state, to take into consideration the recommendation of the 18 of April, 1783, for the purpose of granting the System of impost to the United States, in such conformity with the Acts and grants of the other states . . ."); *id.* at 555–61.

resolutions of the previous August concerning the impost.[79] In his message, Clinton justified his decision not to convene the legislature, in the wake of the congressional resolutions, while it was not in session. He claimed that the impost question had "been so repeatedly submitted to the consideration of the Legislature, and must be well understood," and that he had acted with "regard to our excellent Constitution, and an anxiety to preserve unimpaired the right of free deliberation on matters not stipulated by the Confederation."[80] Clinton's oblique reference to the "excellent Constitution" alluded to the New York Constitution's provision granting the governor "power to convene the assembly and senate on *extraordinary* occasions,"[81] which Clinton interpreted as limiting his discretion in this instance. The State Assembly tasked a committee (which included Hamilton as a member) to prepare an answer to Clinton's address.[82] The initial draft of the answer did not mention the Governor's failure to convene the legislature, but a Clinton ally managed to add a clause in which the assembly "express[ed] our approbation of your Excellency's conduct in not convening the Legislature at an earlier period."[83] In two lengthy speeches, Hamilton unsuccessfully objected that this clause wrongly embraced Clinton's suggestion that the New York Constitution had barred the Governor from calling the legislature in response to the congressional resolutions.[84] Like the Assembly, the Senate responded to the

79. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION 6 (1787).

80. *Id.*; *see* 1 J.B. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 370 (1886).

81. N.Y. CONST. of 1777, art. XVIII (emphasis added).

82. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 7.

83. *Id.* at 15, 17. The assembly rejected a proposal by a Hamilton ally, William Malcolm, that would have explained that Clinton's actions were warranted in light of the "short space of time between the passing of the [congressional] Resolution, and the period appointed by law for the meeting of the Legislature." *Id.* at 15. Malcolm's proposal notably omitted any suggestion of approval of Clinton's constitutional argument.

84. Alexander Hamilton, First Speech on the Address of the Legislature to Governor George Clinton's Message (Jan. 19, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 3, 6

Governor's message (in an answer drafted in part by Abraham Yates) by approving Clinton's "conduct in not convening the Legislature, to re-consider a subject which had so lately been decided."[85]

The brief skirmish over the assembly's answer to the Governor's message was a prelude to a larger conflict over the constitutionality of the delegation itself. The assembly ordered a committee led by Hamilton's ally William Malcolm to report on the congressional resolutions,[86] and (a few weeks later) to prepare a bill granting Congress the impost.[87] The bill that the committee ultimately reported contained three notable provisions. The first provision would have given "to the United States in Congress assembled" a set of specified and listed "duties, upon goods imported into [New York] . . . for the special purpose of discharging the debts contracted by the United States, during the late war with Great-Britain."[88] The second provision authorized New York's Council of Appointment to appoint the "Collectors of the said duties," but made those collectors "accountable to, and removable by the United States in Congress

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(arguing that the New York Constitution left Clinton "at liberty to exercise the discretion vested in him" and "[t]here is at least no *constitutional bar* in the way"); Alexander Hamilton, Second Speech on the Address of the Legislature to Governor George Clinton's Message (Jan. 19, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 13, 14 (arguing that, if the legislature gave its "approbation on [Clinton's] conduct, we do clearly decide that the governor was barr'd, that he lay under a constitutional impediment, which prevented him from complying with a request of Congress").

85. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION 8 (1787); *id.* at 6 (noting that Yates was a member of the committee to prepare an answer to the Governor's message). The Senate's answer made specific reference to the Governor's "regard to the Constitution, and the right of free deliberation." *Id.*

86. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 20 (entry of Jan. 23, 1787).

87. *See id.* at 36 (entry of Feb. 6, 1787); *see also id.* at 41, 43, 46 (noting that Malcolm brought a bill entitled "An act for granting to the United States in Congress assembled, certain Imposts and Duties upon foreign Goods imported into this State for the purpose of discharging the Debts contracted by the United States, during the late war with Great-Britain").

88. *Id.* at 51.

assembled."[89] The third provision authorized Congress "to levy and collect within [New York], the Duties and Imposts hereby given and granted" and "to make such Ordinances and Regulations, and to prescribe such Penalties and Forfeitures, as they may judge necessary . . . ."[90] The bill thus set up a potential conflict among those who wished to grant Congress the impost, as well as the authority to control its collectors; those who wished to deny Congress the impost and any control over officers within the State; and those who staked out an uneasy middle ground by seeking to grant Congress the duties, while requiring such collection occur through officers accountable to the State.

B. The Impost War in the Press: "Cimon" and "Candidus"

At the same time, the dispute over the constitutionality of delegating authority to Congress to collect the impost continued in the press. On January 31, 1787, an author using the pseudonym "Cimon" wrote in favor of the impost, albeit without addressing the constitutional issue. He downplayed the policy risks of delegating authority over an impost to the federal government. After all, Cimon claimed, the members of the Continental Congress were "removeable at pleasure, and of short continuance at most," and thus were unlikely to "enter into a combination to destroy the fair fabric of liberty which *themselves* have had so great a share in rearing and establishing."[91] He implored his readers to follow the counsel of Hamilton and Malcolm and to resist the "secret influence of a certain great officer [*i.e.*, Yates] with all his Rough Hewing Myrmidons."[92]

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89. *Id.* at 52.

90. *Id.* The provision further stated that Congress must act with the purpose "to prevent frauds, and to secure the payment and collection thereof as well as to enforce obedience to their ordinances and regulations, respecting the duty of the officers to be employed for that purpose." *Id.* And it provided that "all such penalties and forfeitures may be recovered in the name of Congress, in the same mode as is established by law, for the recovery of fines and forfeitures for the breach of any of the laws of this State, in similar cases." *Id.*

91. Cimon, *To the Honorable Legislature of the State of New-York*, N.Y. DAILY ADVERTISER, Jan. 31, 1787, at 2.

92. *Id.* (capitalization altered).

A week later, another pseudonymous author, "Candidus," responded to Cimon's arguments. He criticized Cimon's rhetoric and, more significantly, his failure to refute the claim that the New York Constitution did "not authorise the legislature to transfer the power of legislation to Congress, in this instance."[93] He challenged Cimon to answer a series of questions.[94] Among those questions was the following: whether the New York legislature had "authority under the constitution, to transfer to Congress such legislative powers, as by their operation will materially abridge the powers committed to the legislature, and change the nature of our government."[95] By its terms, Candidus's question presupposed that the New York Constitution incorporated a principle prohibiting the transfer of "legislative powers" from the state legislature to Congress.

Cimon responded two days later by accepting Candidus's contention that the impost bill would "change the nature of our government."[96] But he said that he welcomed such a change. As he put it, "if *some* of the powers of the [New York] legislature were abridged—and *some* change in the nature of our government was effected (provided no violence was necessary to produce it) it would be a happy circumstance indeed, and devoutly to be wished."[97] Cimon's response thus did not answer, but rather seemed to acknowledge, Candidus's charge that the impost law

93. Candidus, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 6, 1787, at 2.

94. In addition to the question highlighted in the text, Candidus posed a set of policy-based questions. He asked whether Cimon agreed that New York had authorized an impost, but merely chosen not to grant Congress the power to make laws to collect it; whether money raised by the States would "go as far in discharging the national debt, as if it were raised under laws made by Congress"; whether it was "absolutely necessary to invest Congress with the power to pass laws to collect the impost"; and whether the grant of collection power to Congress would "affect an essential change both in the federal and state governments." *Id.* These questions indicate that Candidus distinguished between policy-based objections to the impost and the legal nondelegation argument highlighted in the text.

95. *Id.*

96. Cimon, *A Word to Candidus*, N.Y. DAILY ADVERTISER, Feb. 8, 1787, at 2.

97. *Id.*

would violate the New York Constitution's prohibition on transferring "legislative powers."

When he replied to Cimon a few days later, Candidus pointed out just that. He declared that Cimon had failed to address whether the state legislature had the right to confer on Congress the requested power.[98] On February 21, 1787, Cimon answered Candidus by claiming that the New York legislature had the authority to interpret the State Constitution, which it had previously employed to sanction measures that were "not only opposed to the *spirit*, but to the very *letter* of the constitution."[99] Although far from clear, Cimon's response seemed to acknowledge the charge that the impost law might violate the New York Constitution, but justified this violation on the basis of supposed legislative precedents that had also been "opposed to . . . the constitution."

At the same time, illustrating the high stakes of the question, an article advocating a separate New England confederacy was reprinted in the New York press.[100] The author argued that it was

> now time to form a new and stronger union. The five states of New-England, closely confederated, can have nothing to fear. Let then our general assembly immediately recall their delegates from the shadowy meeting which still bears the name of Congress, as being a useless and expensive establishment. Send proposals for

98. *See* Candidus, *Mr. Printer*, N.Y. DAILY ADVERTISER, Feb. 10, 1787, at 2 (reasoning that the state legislature could not "transfer the power of legislating").

99. Cimon, *For the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 21, 1787, at 2 (claiming that the "legislature has on *certain occasions* affirmed discretionary power to *explain the constitution*"). Along with Cimon and Candidus, various other pseudonymous authors weighed in on the impost controversy during this time period. *See* Zenobius, *For the Daily Advertiser*, N.Y. DAILY ADVERTISER, Jan. 22, 1787, at 2; Patrioticus, *Candid Remarks Upon the Republican*, N.Y. DAILY ADVERTISER, Feb. 13, 1787, at 2; Thersites, *To Cimon*, N.Y. DAILY ADVERTISER, Feb. 14, 1787, at 2; An Admirer of Cimon, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 17, 1787, at 2; Rough Carver, *Some Considerations on the Impost, Offered to the Citizens of the State of New-York*, N.Y. DAILY ADVERTISER, Feb. 19, 20, & 22, 1787, at 2. For an interesting and nearly contemporaneous treatment of the separation of powers (albeit not in the context of the impost controversy), see Sydney, *Considerations upon the Seven Articles Reported, and Now Lying on the Table of Congress*, THE INDEPENDENT GAZETTEER, Feb. 6, 1787, at 2–3.

100. *See A Serious Paragraph*, N.Y. DAILY ADVERTISER, Feb. 23, 1787, at 2 (reprinting an article "[f]rom a Boston paper of February 15," 1787).

> instituting a new Congress, as the representative of the nation of New-England, . . .[101]

C. Hamilton's Speech on Imposts and Duties

1. Hamilton's Speech

Into this mix stepped Hamilton. Delivered over the course of an hour and twenty minutes, his speech before the New York Assembly responding to the criticisms of the impost has long been viewed as a landmark in American rhetoric.[102]

The order of the day on February 15, 1787, was the bill—drafted in part by Hamilton's ally, William Malcolm—to grant Congress impost authority. The first provision to come to a vote would have authorized Congress to collect "duties, upon goods imported into [New York] . . . for the special purpose of discharging the debts contracted by the United States, during the late war with Great-Britain."[103] By the very slimmest of margins, the Assembly agreed to the inclusion of this language in the bill in a 29–28 vote.[104] But the second relevant provision of the bill—which rendered the collectors of the duties "accountable to, and removable by the United States in Congress assembled"[105]—faced stormier waters. The Assembly voted against that language by a count of 38–19.[106]

That left the third relevant provision of the proposed bill, which would have authorized Congress "to levy and collect within [New

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101. *Id.*

102. Hamilton Remarks, *supra* note 13, at 71 n.1. For contemporaneous sources praising the speech, see CHERNOW, *supra* note 38, at 226 (reporting that Margaret Livingston told her son Chancellor Robert R. Livingston that "after his famous speech in the House in favor of the impost," Hamilton "was called the great man" and "[s]ome say he is talked of for G[overnor]"); Letter from Robert R. Livingston to Alexander Hamilton (Mar. 3, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 103 ("While I condole with you on the loss of the impost I congratulate you on the lawrels [sic] you acquired in fighting *its battles*.").

103. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 51.

104. *Id.*

105. *Id.* at 52.

106. *Id.*

York], the Duties and Imposts hereby given and granted" and to make relevant "Ordinances and Regulations."[107] Before the vote on this provision, Hamilton made his speech.[108]

Hamilton noted that someone or some group of individuals had lodged a nondelegation challenge to the impost bill by contending that "it would be unconstitutional to delegate legislative power" from the New York legislature "to Congress."[109] Hamilton characterized this objection as the one "supposed to have the greatest force" among those who objected to the delegation of impost authority to Congress.[110] Precisely who Hamilton was responding to is unclear, but it seems likely that the views of the pseudonymous polemicist Candidus or the similar views of a member of the Assembly were the target of Hamilton's speech.

Hamilton did not dismiss the nondelegation argument out of hand, but rather parsed the provisions of the New York Constitution of 1777 and acknowledged the viability of a nondelegation challenge in appropriate circumstances. To begin with, Hamilton rejected the objectors' reliance on the provision in the New York Constitution that declared "no power shall be exercised over the people of this state, but such as is granted by or derived from them."[111] Hamilton countered that this provision was merely a "declaration of that fundamental maxim of republican government, that all power, mediately, or immediately, is derived from the consent of the people."[112] Any power, in Hamilton's view, that was

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107. *Id.*

108. *See Colonel Hamilton's Speech in the Assembly, on the 15th. inst when the impost was under consideration*, N.Y. DAILY ADVERTISER, Feb. 26, 1787, at 3 (observing that "Mr. Hamilton addressed the house" with respect to the clause "for granting power to Congress *to levy* the proposed duties").

109. Hamilton Remarks, *supra* note 13, at 71, 73. This version of Hamilton's speech was reproduced from the *N.Y. Daily Advertiser*. *See id.* at 1 n.1, 71.

110. *Id.* at 73.

111. *Id.* (quoting, albeit imprecisely, Article I of the New York Constitution of 1777); *see* N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.").

112. Hamilton Remarks, *supra* note 13, at 73.

"conferred by the representatives of the people . . . is a power derived from the people."[113] The clause permitted both "an indirect derivation of power" (*i.e.*, to the U.S. government through the New York legislature) as well as an "immediate grant of it" (*i.e.*, to the New York legislature).[114]

Thus, with respect to this particular clause of the New York Constitution, Hamilton contended that nothing limited the New York legislature from conferring authority on any other entity.[115] Because the power of the New York legislature derived from the people, any power conferred by them on anyone else also derived from the people, albeit "mediately" or "indirect[ly]."[116]

Hamilton's response was different, however, with respect to the New York Constitution's Legislative Vesting Clause. That provision declared that "the supreme legislative power within this State shall be vested in . . . the assembly . . .[and] the senate."[117] Objectors to the impost proposals argued that the clause "exclude[d] the idea of any other legislative power operating within the state."[118] Hamilton did not dispute that the clause incorporated a nondelegation principle. In his view, the clause meant this:

> In the distribution of the different parts of the sovereignty in the *particular* government of this state the legislative authority shall reside in a senate and assembly, or in other words, the legislative authority of the particular government of the state of New-York shall be vested in a senate and assembly.[119]

But that was the extent of the clause's nondelegation implications. The authors of the New York Constitution, Hamilton argued,

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113. *Id.* at 73–74.

114. *Id.* at 74.

115. *Id.*

116. *Id.* at 73–74; *see also id.* at 74 ("The words 'derived from' are added to the words 'granted by,' as if with design to distinguish an indirect derivation of power from an immediate grant of it.").

117. N.Y. CONST. of 1777, art. II.

118. Hamilton Remarks, *supra* note 13, at 74.

119. *Id.* (emphasis in original and quotation marks omitted).

"could have had nothing more in view than to delineate the different departments of power in our own state government."[120] Those authors, Hamilton claimed, "never could have intended to interfere with the formation of such a constitution for the union as the safety of the whole might require."[121]

To put the matter somewhat differently, Hamilton effectively acknowledged that the New York Constitution prohibited delegating legislative authority from the legislature to another body "*within this state*."[122] But he derived from the particular phrasing of the New York Constitution's Legislative Vesting Clause the principle that the legislature could delegate authority *outside of the State* to a federal Congress.

Hamilton rested this conclusion on inferences from several other provisions of the New York Constitution. He noted that the Constitution provided that "the supreme executive authority *of the state* shall be vested in a governor."[123] Hamilton explained that, if the Legislative Vesting Clause "exclude[d] the grant of legislative power," then the Executive Vesting Clause would "equally exclude the grant of executive power," which would necessarily mean that "there would be no federal government at all."[124] "[I]f the constitution prohibits the delegation of legislative power to the union," Hamilton argued, "it equally prohibits the delegation of executive power—and the confederacy must then be at an end: for without legislative or executive power it becomes a nullity."[125]

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120. *Id.*

121. *Id.*

122. *Id.* (emphasis in original).

123. *Id.* (quoting, albeit imprecisely, N.Y. CONST. of 1777, art. XVII) (emphasis in original)). The original text reads "the supreme executive power and authority of this State shall be vested in a governor." N.Y. CONST. of 1777, art. XVII.

124. Hamilton Remarks, *supra* note 13, at 74. Hamilton considered, but rejected, the argument that the clauses were relevantly different because the Legislative Vesting Clause spoke of vesting power "within this State" and the Executive Vesting Clause spoke of such power "of this State." *Id.* at 74–75. He claimed that "[i]n grammar, or good sense the difference in the phrases constitutes no substantial difference in the meaning . . . . In my opinion the legislative power '*within this state*,' or the legislative power 'of this state' amount in substance to the same thing." *Id.*

125. *Id.* at 75.

Contrary to this perspective, however, Hamilton pointed out that various provisions in the Articles of Confederation and in the New York Constitution presupposed the existence of the confederation and the propriety of delegations of "legislative power" to it. For one thing, the federal government "already possessed . . . *legislative* as well as *executive* authority," the latter of which Hamilton defined as "of three kinds, to make treaties with foreign nations, to make war and peace, [and] to execute and interpret the laws."[126] Hamilton defined the "legislative" power, by contrast, as "the power of prescribing rules for the community."[127] He listed a number of the federal government's authorities that he described as "powers of the legislative kind," including the authority "to require [money] from the several states," "to call for such a number of troops as they deem requisite for the common defence in time of war," "to establish rules in all cases of capture," "to regulate the alloy and value of coin; the standard of weights and measures, and to make all laws for the government of the army and navy of the union."[128] Thus, "the [nondelegation] objection, if it prove[d] any thing it prove[d] too much"—by implying "that the powers of the union in their present form are an usurpation on the constitution of this state."[129] But "[t]he degree or nature of the powers of legislation which it might be proper to confer *upon the federal government*" was "a mere question of prudence and expediency—to be determined by general considerations of utility and safety."[130]

For another, Hamilton observed that various provisions of the New York Constitution presupposed the existence of a federal union. For example, the Constitution required the governor "to correspond with the continental Congress,"[131] established "that the judges and chancellor shall hold no other office than delegate to the

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Or as Hamilton put it elsewhere, "if Congress were to have neither executive nor legislative authority, to what purpose were they to exist?" *Id.* at 76.

130. *Id.* (emphasis added).

131. *Id.* (quoting N.Y. CONST. of 1777, art. XIX).

general Congress,"[132] and directed that "delegates *to represent* this state in the general Congress of the United States of America shall be annually appointed."[133]

These provisions, Hamilton argued, had to be understood by "resort to the co-existing [*i.e.*, contemporaneous] circumstances" to "collect from thence the intention of the framers of the law."[134] He thus traced the historical backdrop of delegations from the states to the federal government. For example, early delegates had been sent to meet in Congress with "full power 'to take care of the republic'" and an understanding that the "whole of this transaction [was] the idea of an *union* of the colonies."[135] Moreover, the Declaration of Independence had been written on behalf of "the representatives of the United States of America in general Congress assembled," which implied "full power of sovereignty" in the federal union.[136]

Turning from the legal argument,[137] Hamilton also confronted the question whether it was sufficient for New York "to grant the *money*

132. *Id.* (citing N.Y. CONST. of 1777, art. XXV).

133. *Id.* (citing N.Y. CONST. of 1777, art. XXX).

134. *Id.* at 77.

135. *Id.*

136. *Id.*; *see also id.* at 78 (reasoning that, taken together, these provisions "in substance amount[ed] to a constitutional recognition of the union with complete sovereignty").

137. Hamilton supplemented the points I have highlighted in the text with rhetorical and policy arguments. For example, he accused his opponents of hypocrisy, contending that they had in the past "by other instances of conduct contradicted their own hypothesis on the constitution which professedly forms the main prop of their opposition." *Id.* at 80 (pointing specifically to a prior bill granting to the United States the power to regulate trade). In addition, he argued that a delegation to Congress posed no threat to the "liberty of the people" because "members of Congress are annually chosen by the several legislatures—they are removable at any moment at the pleasure of those legislatures," *id.* at 81, and because the States themselves would protect the liberties of their citizens, *id.* at 82. The bill, moreover, would "merely . . . grant certain duties on imposts to the United States for the short period of twenty-five years" and the legislature would, under appropriate circumstances, have a "right of repealing its grant." *Id.* at 83. And Hamilton concluded his speech on a theme that he would later repeat in a more famous setting by arguing that, if the States were "not united under a federal government, they will infalliably [sic] have wars with each other; and their divisions will subject them to all the mischiefs of foreign influence and intrigue." *Id.* at 91; *see* FEDERALIST NOS. 6 & 7 (Alexander Hamilton), *in* THE FEDERALIST PAPERS 53–66 (Clinton Rossiter ed., 1961).

but not the *power* required from us"[138]—in other words, to grant the duties to Congress, but not the power to control the collectors. He believed that such a limited grant was insufficient, because other States had accompanied their grants of authority "with a condition, that similar grants be made by the other states."[139] By preserving the ability to collect the duty itself, Hamilton contended, New York's act was "essentially different from" those of the other States.[140] Moreover, unlike the other States, New York had made the duty "receivable in paper money."[141] As a result, "[t]he immediate consequence of accepting [New York's] grant would be a relinquishment of the grants of the other states," who would have to "take the matter up anew, and do the work over again, to accommodate it to [New York's] standard."[142] While some argued that it would be easy to convince other States to enact new delegations that followed New York's model,[143] Hamilton pointed out that it was unclear that "Massachusetts and Virginia, which have no paper money of their own, [would] accede to a plan that permitted other states to pay in paper while they paid in *specie*," especially in light of the depreciated nature of the paper money of most States.[144] This issue would, Hamilton argued, condemn the plan and ensure that "the states which are averse to emitting a paper currency, or have it in their power to support one [against depreciation] when emitted, would never come into it."[145]

2. An Assessment

What should we make of the legal debate and Hamilton's argument in particular? As an initial matter, it seems readily apparent

138. Hamilton Remarks, *supra* note 13, at 86.

139. *Id.* at 87.

140. *Id.*

141. *Id.*

142. *Id.*

143. As Hamilton characterized it, they argued that "the states which have granted *more* [*i.e.*, money with the delegation of authority to collect it] would certainly be willing to grant *less* [*i.e.*, money without the authority to collect it]." *Id.*

144. *Id.*

145. *Id.*

that some group of legislators in New York believed that the New York Constitution's vesting of "the supreme legislative power within this State"[146] implicitly prohibited the delegation or transfer of such power (however defined) to another body—for example, Congress. These legislators also believed that aspects of the proposals conferring impost authority on Congress for twenty-five years violated that prohibition. Hamilton himself characterized this argument as the one "supposed to have the greatest force" with his political opponents.[147]

As for Hamilton himself, it appears he agreed that the New York Constitution of 1777 incorporated some version of a nondelegation doctrine. He could have dismissed the Legislative Vesting Clause argument with a wave of the hand. Indeed, he dismissed the objectors' reliance on the provision in the New York Constitution declaring that only such "authority" may "be exercised over the people or members of this State . . . as shall be derived from and granted by them."[148] With respect to *that* clause, he argued that authority delegated by the legislature to another was still "derived from the consent of the people."[149] Had Hamilton believed that reliance on the Legislative Vesting Clause of the New York Constitution was similarly out of bounds, he had occasion and incentive to say so. But he did not.[150] Instead, he responded that the clause did not mediate between the New York legislature and the federal government, but rather governed "the distribution of the different parts of the sovereignty in the *particular* government of this state."[151] That

146. N.Y. CONST. of 1777, art. II.

147. Hamilton Remarks, *supra* note 13, at 73.

148. N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.").

149. Hamilton Remarks, *supra* note 13, at 73.

150. *Cf.* ARTHUR CONAN DOYLE, THE ADVENTURE OF SILVER BLAZE (1892) (deploying the idea of the dog that didn't bark).

151. Hamilton Remarks, *supra* note 13, at 74. Hamilton's allies, moreover, did not find fault in the thrust of his argument, but rather showered him with praise for the speech. *See supra* note 102. In any event, even assuming that Hamilton's argument was made to placate powerful adversaries (rather than sincerely made), it would suggest that Hamilton did not feel that he could dismiss the nondelegation argument altogether.

response converted the argument based on the Legislative Vesting Clause from one that addressed the relationship between state and federal power to one that addressed the relationship between the different branches of state government.

At any rate, no attempt was made to answer Hamilton's speech.[152] Instead, the Assembly immediately voted on the third provision in the bill. That vote resulted in a rejection of Hamilton's position by a tally of 36–21.[153] Hamilton and his allies were defeated. The fight over the impost was over, to be replaced by an equally, if not more, momentous fight over a new legal document—the Constitution.

III. DELEGATION AND THE CONSTITUTIONAL CONVENTION

The impost debate was immediately followed by a significant movement to hold a national convention to revise the Articles of

152. *See* CHERNOW, *supra* note 38, at 226 ("Hamilton's masterly exposition met with stony stares from the Clintonians, who responded in insulting fashion. They demanded a vote on the issue without bothering to rebut Hamilton's speech.").

153. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 52; Hamilton Remarks, *supra* note 13, at 92 n.7; Leo, *To the Victorious Thirty-Six*, N.Y. DAILY ADVERTISER, Feb. 27, 1787, at 2 (criticizing the majority's vote). Two days later, Hamilton gave a speech in the Assembly touching on, but not embracing, a nondelegation doctrine under the New York Constitution of 1777. *See* Remarks on an Act for Raising Certain Yearly Taxes Within This State (Feb. 17, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 94. Hamilton observed that the then-existing system of taxation in New York was "*arbitrary*," because it left "the amount of the tax to be paid by each person, to the discretion of the officers employed in the management of the revenue." *Id.* Hamilton commented that "*[h]e* would not say that the practice was contrary to the provisions of our constitution; but it was certainly repugnant to the genius of our government." *Id.* at 95 (emphasis added). After all, he asked, "[i]s it proper to transfer so important a trust from the hands of the legislature to the [tax] officers of the particular districts?" *Id.* It is a little unclear whether the "he" in these last two sentences refers to Hamilton's views, or rather to Hamilton's summary of the views of Jacques Necker, a Swiss banker and the French Minister of Finances. *See id.* at 96 n.5. To my mind, it seems more likely that these sentences refer to opinions that Hamilton himself held. At any rate, the point remains the same: Hamilton alluded to the connection between arbitrary government, the transference of authority from the legislature to tax officers, and constitutional law.

Confederation.[154] During this movement, questions about the propriety of delegations from state legislatures to federal authorities were raised once again—both in the form of concerns over state legislatures violating the allocation of powers within state constitutions and in the form of concerns over the mandate granted convention delegates.

A. Doubts About Delegations

In early 1787, almost simultaneously with the impost debate in the New York legislature, John Jay, then the Secretary of Foreign Affairs, exchanged a set of letters expressing delegation concerns that bore a striking resemblance to those articulated in the context of the impost. Jay's concerns, however, arose in the context of a proposed convention to rework the national charter. In this context, too, there emerged a question whether the New York legislature possessed the authority to confer power on a national entity (in this instance, the Convention) when doing so might be understood to depart from the state constitution's vesting of power in the state government itself. In a letter to George Washington dated January 7, 1787, Jay outlined a series of wholesale—rather than retail—changes to the Confederation that he believed were necessary for the federal government's proper functioning.[155] Chief among those changes was a proposal to "divide the sovereignty into its proper

154. To be sure, the first steps in such a direction had begun earlier. *See, e.g.*, Letter from George Washington to John Jay (May 18, 1786), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, at 195 (Henry P. Johnson ed., 1891) (remarking that Washington entertained "*no* doubt" that "it is necessary to revise and amend the articles of confederation," but that he "scarcely kn[e]w what opinion to entertain of a general Convention"); Letter from John Jay to George Washington (Mar. 16, 1786), *in id.* at 186 ("An opinion begins to prevail that a general Convention for revising the Articles of Confederation would be expedient.").

155. *See* Letter from John Jay to George Washington (Jan. 7, 1787), *in id.* at 226–29.

departments."[156] Jay put it this way: "Let Congress legislate—let others execute—let others judge."[157]

Jay, however, highlighted that it was unclear that state legislatures could delegate *binding* authority to the members of a convention in contravention of state constitutions. He doubted, in other words, that a convention composed of delegates with "authority . . . to be derived from acts of the State legislatures" would be able to make the wholesale changes he had recommended.[158] As he asked: "Are the State legislatures authorized, either by themselves or others, to alter constitutions?"[159] He believed they could not, because those "who hold commissions can by virtue of them neither retrench nor extend the powers conveyed to them."[160]

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156. *Id.* at 227 ("The executive business of sovereignty depending on so many wills [in the Continental Congress], and those wills moved by such a variety of contradictory motives and inducements, will in general be but feebly done."). Jay returned to this theme repeatedly in other letters written at the same time. *See* Letter from John Jay to Thomas Jefferson (Feb. 9, 1787), *in id.* at 231–32 (proposing a modification of the national government so "that the legislative, judicial, and executive business of government may be consigned to three proper and distinct departments"); Letter from John Jay to John Adams (Feb. 21, 1787), *in id.* at 233–34 (proposing that the Convention "distribute the federal sovereignty into its three proper departments of executive, legislative, and judicial" and lamenting the fact that "Congress should act in these different capacities" as "a great mistake in our policy" under the Articles of Confederation).

157. *See* Letter from Jay to Washington (Jan. 7, 1787), *supra* note 155, at 227. Some of Jay's suggestions to Washington appear similar to those ultimately adopted at the Constitutional Convention later that very year. *See id.* ("Might we not have a governor-general limited in his prerogatives and duration? Might not Congress be divided into an upper and lower house—the former appointed for life, the latter annually,—and let the governor-general (to preserve the balance), with the advice of a council, formed for that only purpose, of the great judicial officers, have a negative on their acts?"). Other suggestions—perhaps motivated by the then-current impost debate—differed quite dramatically from the approach ultimately adopted in the Constitution. *See id.* at 228 (proposing that "all [the States'] principal officers, civil and military, be[] commissioned and removable by the national government").

158. *Id.* at 248.

159. *Id.*

160. *Id.* When Washington responded to Jay some months later (after the proposal for a Convention had already gathered steam), he remarked that "[i]n strict propriety, a Convention so holden may not be legal." Letter from George Washington to John Jay (Mar. 10, 1787), *in id.* at 238, 239.

Although Jay did not elaborate on his rationale for this conclusion, we can make sense of it in light of the various legal theories articulated during the impost debate. State constitutions—such as the New York Constitution of 1777, which Jay coauthored—had already vested legislative and executive authority in state officials. A new national charter that distributed additional legislative and executive powers among national officials would seemingly seek to vest preexisting state powers elsewhere. Jay's worry that the state legislature's actions would "alter" the state constitution or "retrench . . . the powers conveyed to" state legislators appeared to be based on the premise that the vesting clauses of the New York Constitution implicitly barred such a delegation to a national authority. Much like the earlier concerns of the Rough Hewer and the nearly contemporaneous concerns of Candidus, Jay's letter spoke to the connection between delegation and sovereignty—who or what had the power to govern the people of New York?

While expressing doubts about the authority of a national convention composed of members elected by state legislatures to *bind*, Jay acknowledged that it could *recommend*.[161] But in his view such a recommendation might prompt "endless discussion, perhaps jealousies and party heats."[162] He sought to bypass the state legislatures altogether by proposing that "the people of the States without delay . . . appoint State conventions (in the way they choose their general assemblies)."[163] In turn, those conventions would send delegates to a general convention tasked with revising the Articles of Confederation in a manner that "should appear necessary and proper, and which being by them ordained and published should have the same force and obligation which all or any of the present articles now have."[164] "No alterations in the government," Jay concluded,

161. *See* Letter from Jay to Washington (Jan. 7, 1787), *in id.* at 228 ("Perhaps it is intended that this convention shall not ordain, but only recommend.").

162. *Id.*

163. *Id.*

164. *Id.* at 229.

should "be made, nor if attempted will easily take place, unless deducible from the only source of just authority—*the People*."[165]

Jay's solution to the problem of state legislatures potentially exceeding their constitutional powers, in other words, was to bypass the state legislature in favor of state conventions. But that approach necessarily raised the question whether state conventions themselves abrogated the state constitutions' lodging of legislative and executive powers. To ensure that they did not, Jay needed a theory of state conventions that was absent in his letter to Washington.

B. Delegation and the Convention's Mandate

At any rate, the idea of a constitutional convention to *recommend* revisions to the Articles of Confederation took hold almost immediately after Hamilton's speech on the impost. The controversy that arose in this context was conceptually related to the one that Jay had highlighted in his letter: It concerned the limits that state legislatures placed on the mandate of the Convention delegates and whether those delegates exceeded the mandate in proposing a new national charter. Although only indirectly connected to the proper interpretation of the vesting clauses of the New York Constitution, the debate demonstrated how questions of sovereignty and delegation continued to play a central role in this final stage of the drama.

Two days after Hamilton's speech on the impost, on February 17, 1787, the New York Assembly adopted a resolution to instruct the State's delegates in Congress to recommend the holding of a Convention to revise the Articles "as the representatives met in such Convention, shall judge proper and necessary, to render them adequate to the preservation and support of the Union."[166] By a single

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165. *Id.*

166. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 55; *see* HAMILTON, *supra* note 20, at 239–40 (reporting on amendments to the initial language of the resolution). For a suggestion that Hamilton authored this resolution, see Resolution on the Call of a Convention of the States (Feb. 17, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 93 n.1.

vote, and "after considerable debate," the Senate passed the resolution and transmitted it to Congress,[167] which on February 21, 1787, sanctioned the idea of a Convention "for the sole and express purpose of revising the Articles of Confederation."[168]

After Clinton conveyed Congress's actions to the New York Assembly two days later,[169] Hamilton offered (and the Assembly adopted) a resolution calling for the appointment of five delegates to the proposed Convention.[170] The resolution, however, faced objections in the Senate.[171] Abraham Yates sought to insert a proviso in the mandate for the Convention delegates prohibiting changes to the Articles that were "repugnant to or inconsistent with the constitution of this State."[172] Although the Senate Journal does not reflect Yates' reasons for seeking the proviso, the language seems consistent with his earlier concerns that it would be inconsistent for the New York legislature to delegate away its authority to the federal government. At any rate, after a debate and by the decisive vote of the president of the Senate, the motion to insert the proviso was

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167. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 34–35; HAMILTON, *supra* note 20, at 240 (reporting a debate in the Senate). Remarking on this development, on February 21, 1787, Jay wrote to John Adams that "[t]he convention gains ground" with New York's instruction of "her delegates to move in Congress for a recommendation to the States to form a convention; for this State dislikes the idea of a convention unless countenanced by Congress." Letter from Jay to Adams (Feb. 21, 1787), *supra* note 156, at 233–34.

168. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 74 (1936); *see also id.* at 71–73; HAMILTON, *supra* note 20, at 241.

169. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 63.

170. *See id.* at 68 (providing, like the congressional resolution, that the Convention occur "for the sole and express purpose of revising the Articles of Confederation"). For Hamilton's introduction of the resolution, see Resolution on the Appointment of Delegates to the Constitutional Convention (Feb. 26, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 101 n.1.

171. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 42–43.

172. *Id.* at 45.

defeated.[173] But the Senate succeeded in reducing New York's delegates to the Convention from five to three.[174]

Fatefully, on March 6, the New York legislature elected Hamilton, Robert Yates, and John Lansing, Jr. as New York's delegates to the Convention,[175] with the instruction that they attended the Convention

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several Legislatures, such alterations and provisions therein, as shall when agreed to in Congress, and confirmed by the several States, render the federal Constitution adequate to the exigencies of government, and the preservation of the Union.[176]

This limitation on the mandate of the Convention delegates played a significant role in the controversies that followed. As an initial matter, in the middle of the Constitutional Convention, two of the three New York delegates—Yates and Lansing—departed.[177] In a letter to Governor Clinton, they claimed that the Convention was violating the delegates' instructions by going beyond a simple

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173. *Id.*

174. *See id.* at 44–45; JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 70–71; BANCROFT, *supra* note 11, at 274.

175. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 82–84.

176. *Id.* at 84. Hamilton made one, last-ditch effort to tilt New York's representation at the Convention in favor of his faction, proposing on April 16, 1787, that two additional delegates be named in addition to those already appointed. *See* Motion That Five Delegates Be Appointed to the Constitutional Convention (Apr. 16, 1787) (reporting that the Assembly agreed to Hamilton's resolution), *in* 4 HAMILTON PAPERS, *supra* note 13, at 147. Hamilton suggested as possible names his allies John Jay, Robert R. Livingston, Egbert Benson, or James Duane. *See* Remarks on a Motion That Five Delegates Be Appointed to the Constitutional Convention (Apr. 16, 1787), *in id.* at 148. The New York Senate blocked the proposal. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 93, 95.

177. JONATHAN ELLIOT, 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 479 (1836) (noting that Lansing and Yates left the Convention on July 5, 1787).

revision to the Articles of Confederation.[178] As they put it, "[t]he limited and well-defined powers" conferred on them by the New York legislature "could not, on any possible construction, embrace an idea of such magnitude as to assent to a general Constitution, in subversion of that of the state."[179] The measures contemplated by the Convention, they believed, "tended to deprive the state government of its most essential rights of sovereignty."[180] Yet, they concluded, their mandate could not have included "the subversion of [the New York] Constitution which, being immediately derived from the people, could only be abolished by their express consent, and not by a legislature possessing authority vested in them for its preservation."[181]

The letter penned by Yates and Lansing, thus, echoed the themes of delegation and sovereignty that dominated the impost debate. If the New York Constitution had already vested certain powers in the state government, they reasoned, then neither the state legislature nor they, its agents, could confer that authority on another body.

In addition, just as the Convention concluded and Congress transmitted the proposed Constitution to the States,[182] the *New York Journal* began to publish a series of articles—perhaps written by Governor Clinton—by the pseudonymous author "Cato."[183] Although the first "Cato" essay simply asked the citizens of New York

178. Letter from the Hon. Robert Yates and the Hon. John Lansing, Jun., Esquires, to the Governor of New York, Containing Their Reasons for Not Subscribing to the Federal Constitution, *in* ELLIOT, 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 177, at 480 ("Our powers were explicit, and confined to the sole and express purpose of revising the Articles of Confederation . . . .").

179. *Id.*

180. *Id.*

181. *Id.* at 480–81.

182. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 549 (Sept. 28, 1787) (1936).

183. On the identification of Cato with Clinton, see ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 245 (Paul Leicester Ford ed., 1892) [hereinafter ESSAYS ON THE CONSTITUTION]. For speculation that Cato was another individual (either Abraham Yates or

to "[d]eliberate . . . on this new national government with coolness,"[184] the second Cato contended that the Convention had exceeded its mandate, such that the new government would be "founded in usurpation" with its origins in "power not heretofore delegated."[185] Cato was not alone. Critics of the new Constitution repeatedly objected that the delegates to the Convention had exceeded their instructions.[186]

The most consequential rebuttal to the arguments that the delegates to the Convention exceeded their mandates was James Madison's in Federalist 40.[187] There, Madison conceded that "[t]he powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents."[188] But he interpreted the delegates' mandates broadly to authorize the framing of "a *national government*, adequate to the *exigencies of government* and *of the Union*."[189]

The last serious gasp of this delegation-style argument occurred when the New York legislature met in February 1788 to decide whether to ratify the Constitution. Members of the Assembly sought to introduce into the resolution calling for a state convention a preface providing that the delegates to the Constitutional Convention, "instead of revising and reporting alterations and provi-

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John Williams), see Joel A. Johnson, *'Brutus' and 'Cato' Unmasked: General John Williams' Role in the New York Ratification Debate, 1787–88*, 118 AM. ANTIQUARIAN SOC. 297 (2009).

184. Cato I, NEW YORK JOURNAL, Sept. 27, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 247, 249.

185. Cato II, NEW YORK JOURNAL, Oct. 11, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 250, 254. The Cato essays prompted a set of responses from Alexander Hamilton writing as "Caesar." *See* Cæsar I, N.Y. DAILY ADVERTISER, Oct. 1, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 283–85.

186. *See* DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION 48–57 (1910) (collecting sources arguing that the Convention lacked power).

187. James Madison, FEDERALIST NO. 40, *in* THE FEDERALIST PAPERS 247 (Clinton Rossiter ed., 1961).

188. *Id.*

189. *Id.* at 248.

sions in the Articles of Confederation," had proposed "a new Constitution for the United States" that would "materially alter" New York's Constitution and "greatly affect" the State's rights and privileges.[190] The assembly rejected the proposal, albeit by a close vote of 27–25.[191] Against all odds, at the New York Convention in Poughkeepsie in June and July of 1788, the Federalists led by Hamilton and Jay prevailed in persuading their fellow New Yorkers to ratify the Constitution.[192]

IV. DELEGATION, SOVEREIGNTY, AND THE SEPARATION OF POWERS

What is the source and nature of sovereignty? Both the debate over the Constitution and the impost debate that preceded it turned on the answer to this question. In the case of the impost, the objectors argued that, once vested with sovereign authority through the Constitution, the New York legislature could not delegate that authority to the national government or anywhere else. In the case of the Constitutional Convention, John Jay's concerns were the same—what right did state legislators have to task agents to transfer away their own powers? Although mediated through the issue of the delegates' mandates, the momentous disputes about the propriety of the Constitutional Convention leading up to the ratifying conventions asked the same basic question.

The solution to the question of sovereignty, for better or worse, was the one proposed by Jay in his letter to Washington: an appeal to "the People" through state conventions. Precisely why the state

190. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR ELEVENTH SESSION 47–48 (1788); *see* MAIER, *supra* note 27, at 327.

191. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR ELEVENTH SESSION, *supra* note 190, at 48.

192. *See* MAIER, *supra* note 27, at 327–42. In the words of Professor De Pauw, "[a] substantial majority of the state's voters were Antifederalists, and the delegates that New Yorkers sent to the ratifying convention at Poughkeepsie opposed ratification without previous amendments by a majority of better than two to one." DE PAUW, *supra* note 7, at ix. Hence, "[t]he final vote in favor of ratification at the Poughkeepsie Convention is the most conspicuous example of the Federalists' astonishing ability to succeed even when success appeared impossible." *Id.*

legislature could authorize elections for state conventions that might strip away the vested powers of the state government was never fully explained. Years later, Americans still struggled to explain fully the relationship between ratifying convention and sovereign lawmaking authority.[193]

All of these were, in a sense, questions regarding the delineation of the authority between the sovereign States and the then-quasi-sovereign federal government. Hamilton's response, which echoed the germinal theory expressed in the 1780 Council of Revision opinion, was that the New York Constitution's vesting of "supreme legislative power" within the State created the boundaries between the entities within the State. In his impost speech, he embraced a conception of the nondelegation doctrine that distinguished between the legislature and the Governor. That is the notion of nondelegation that echoes through the centuries down to the present day.

CONCLUSION

During the period immediately before the Constitution's adoption, members of the New York legal community—including Alexander Hamilton—debated whether the New York Constitution's Legislative Vesting Clause prohibited the delegation of impost authority to the federal government. The participants in the debate accepted that New York's Constitution incorporated a nondelegation principle, though they disagreed over the doctrine's scope. The debate over the impost led, almost directly, to a debate over a new federal charter, the Constitution, in which the legality of delegation was again at issue. These debates provide compelling evidence that key members of the generation that wrote the U.S. Constitution believed that the vesting of "legislative power" in one entity implicitly barred delegation of such power to another. The very debates that led to the adoption of the federal Constitution were, in part, debates about nondelegation.

193. *See generally* JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (4th ed. 1887).