The Federalist and V. Ostrom on Concurrent Taxation and Federalism

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Vincent Ostrom viewed concurrent federal and state taxation as a key element of the theory of the compound republic. Alexander Hamilton viewed his theory of concurrent tax jurisdiction elaborated in *The Federalist* as an important intellectual achievement and device for convincing readers that the new federal government needed, and could be entrusted with, an unhampered tax power because citizens would be able to control that power through their House of Representatives, federal taxes would ordinarily be moderate, and the states would retain their sovereign tax powers. Furthermore, the dual federalism arising from this concurrent jurisdiction would be cooperative in two important respects: the federal and state governments would practice mutual forbearance in tax policy making, and the federal government would employ state officers for tax collection.

James Madison rightly wears the mantle of "father of the Constitution" and preeminent American political theorist. *Federalist* papers 10, 39, and 51 are perhaps the most often assigned to students, and Madison receives superb scholarly treatment (e.g., Ketcham 1990; Banning 1995; Rakove 2002; Thomas 2008; Sheehan 2009; Brookhiser 2011). Alexander Hamilton fares less well (but see McDonald 1979; Flaumenhaft 1992; Brookhiser 1999; Chernow 2004), except for a recent study of his political thought (Federici 2012). Hamilton was less given to abstract theorizing than Madison, and was more apt to rely on historical experience (McNamara 1998). Hamilton, however, may deserve the title of "father of the effectual Constitution," or "father of the American government" (Chernow 2004, 481; Rossiter 1964), because he was the framer most attentive to revenue, the lifeblood of a body politic (*Federalist* 30, 188),[1] and he served as the first treasury secretary (1789–95). A viable revenue system was a necessary if not sufficient condition for the new constitution's success, and Hamilton's fiscal acumen was crucial in launching the new government.

No government can function without revenue, warned Hamilton (*Federalist* 12, 79). A fatal flaw of historical "federal precedents," argued Madison, was the failure to give "the federal authority" a general tax power (*Federalist* 20, 128). For want of

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revenue, the confederation government has ''dwindled into a state of decay, approaching nearly annihilation'' (*Federalist* 30, 188). Robert H. Brown argued that central to the Constitution's creation was the framers' horrified reaction to ''the states' inability to collect taxes'' (1993, 3). Vincent Ostrom contended that Hamilton's *Federalis*t essays on taxation (*Federalist* 12, 21, and 30–36) ''deserve careful study for what they have to say about federalism as a theory of overlapping governmental jurisdictions'' (1987, 123) and how federalism can be financed.

Although some observers argue that Hamilton's *Federalist* essays on dual sovereignty and taxation are ''rather disingenuous'' (Rodden 2006, xiii) given Hamilton's policies as treasury secretary, his theory has continuing relevance in such contemporary fiscal federalism concepts as a stable equilibrium ''where the provincial governments finance themselves primarily through general-purpose taxation, and it is common knowledge to creditors and voters that provinces are responsible for their own debts'' (Rodden 2006, xiii). Many elements of Hamilton's theory cohere with contemporary theories of fiscal federalism (e.g., Olson 1969; Oates 1972; Shah 2007), except that Hamilton rejected rules of revenue and expenditure assignment commonly found in today's theories, perhaps partly because progressive redistributive taxes did not exist in 1787–88. Hamilton, of course, did not discuss concepts that emerged later in federalism practice, such as subsidiarity—a Catholic principle revived by the European Union—and fiscal equalization—practiced by virtually all federal countries except the United States (Kenyon and Kincaid 1996).

This article, like V. Ostrom's analysis, examines Hamilton's *Federalist* theory, not his other writings or policies as treasury secretary, although those writings and policies would be essential to understanding Hamilton's overall role in founding the federal republic. V. Ostrom's analysis of Hamilton's *Federalist* tax theory occupies only 7 of 240 pages of *The Political Theory of the Compound Republic* (1987), even though V. Ostrom regarded taxation as key for the compound republic, namely, the concurrent existence of a limited national government with limited and independent state governments. V. Ostrom drew four general conclusions from Hamilton's *Federalist* treatment of taxation.

- Concurrent jurisdiction is important because it ensures independent tax authority for the national and state governments.
- Providing ample tax sources to each order of government rather than allocating only particular tax sources to the federal government produces a more equitable and efficient tax regime and allows both orders of government to meet exigencies unforeseen in 1787.
- *The Federalist* emphasizes cooperative tax federalism, including federal–state transfers, that anticipates twentieth-century cooperative federalism.

- The concurrent system "takes advantage of overlapping jurisdictions to generate competitive pressures toward increasing efficiency and responsiveness in" service delivery (V. Ostrom 1987, 130).

This article explicates Hamilton's theory in more detail than V. Ostrom and in the order Hamilton presented it in *The Federalist* because that order reflects Hamilton's view of how best to unfold his argument in order to persuade his readers. The article closes with an assessment of V. Ostrom's conclusions and brief historical reflections.

Why Taxation Is Prominent in *The Federalist*

Taxation was hotly contested during the founding era (Edling and Kaplanoff 2004). A striking feature of *The Federalist* is that taxation receives more attention than any other constitutional power or policy subject (Kincaid 2012). Sustained treatment of taxation is found in papers 30–36 as well as 12 and 21, all penned by Hamilton. These essays were written early—a sequence important to Hamilton (*Federalist* 36, 230)—within the first 42 percent of the eighty-five papers and first 34 percent of the 214 days of their serialization. Tax words appear often: taxation (used fifty-eight times), taxes (fifty-one), tax (twenty-two), taxed (three), taxations (one), taxing (one), and tax gatherer (one). Total use is 137. Madison uses tax words twenty-eight times (0.9 use per Madison essay) and John Jay not at all, compared to Hamilton's 109 uses (80 percent of the usage and 2.1 per Hamilton essay). The related words revenue (sixty-one) and revenues (thirteen) are used fourteen times by Madison and sixty times by Hamilton, while commerce (seventy-seven) and commercial (thirty-two) are used five times by Jay, twenty-seven times by Madison, and seventy-seven times by Hamilton (computed from Engeman, Erler, and Hofeller 1988). Yet, the treatment of taxation has received much less attention than other facets of *The Federalist*.

In contrast to sparse references to public finance in the U.S. Constitution, taxation looms large in *The Federalist* because the tax power was the most important authority delegated to the union (*Federalist* 33, 205 and 45, 314). It is the first power listed in Article I, Section 8. This power was intended to remedy what Hamilton termed "the great and radical vice" of the confederation, namely, "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist" (*Federalist* 15, 93, capitals in original). The Constitution's most singular federalism innovation was to give the federal government authority to legislate for individuals and, thus, levy taxes, conscript for military service, regulate commerce, enforce treaties, enact criminal laws, and the like. The confederation had "an indefinite discretion to make requisitions for men

and money'' but ''no authority to raise either by regulations extending to the individual citizen'' (*Federalist* 15, 93). The states treated the requisitions as merely recommendations to accept or reject.

Taxation was most fearsome because it was the only proposed power that would immediately and permanently affect every American. Only four years after rejecting ''taxation without representation'' and freeing themselves from a distant, foreign tax regime, Americans were being asked to establish another distant, foreign tax regime, presumably with representation. Hence, opponents of the proposed constitution made their ''most zealous effort against'' the proposed tax power (*Federalist* 31, 196). Furthermore, the scope of the proposed tax power was not clear even to the Constitution's advocates, as reflected in Hamilton's broad view and Madison's narrow view of the power. The meaning of ''direct taxes,'' moreover, which is the first mention of taxes in the Constitution (Art. I, Sec. 2), was unclear. At the Constitutional Convention, Madison wrote that Rufus ''King asked what was the precise meaning of *direct* taxation? No one answered'' (Farrand 1966, II: 350), although taxes on imports and articles of consumption were then usually called ''indirect'' taxes, while poll (i.e., capitation) taxes and taxes on land and property were usually termed ''direct'' taxes.

Many anti-federalists supported a simple, nonthreatening solution requiring no restructured union: a 5 percent import duty to be levied by Congress, which, they argued, would finance the union's military and debt needs (Brown 1993).

Anti-federalist Luther Martin expressed common fears when he declared that the new Congress would ''impose *duties* on every *article* of *use* or *consumption*, on the *food* that we *eat*, on the *liquors* we *drink*, on the *clothes* that we *wear*, the *glass* which *enlighten* our *houses*, or the *hearths* necessary for our *warmth* and *comfort*.'' Congress would ''*sluice* [the people] at *every vein* as long as they have a *drop* of blood, without any control, limitation, or restraint; while *all the officers* for *collecting* these taxes . . . are to be appointed by the *general government*, under its directions, not accountable to the *States*; nor is there *even* a security that they shall be *citizens* of the *respective States*, in which they are to exercise their offices'' (Storing 1981, V. 2: 55, italics in original).

If, as Daniel Webster and John Marshall later contended, ''the power to tax involves the power to destroy'' (*McCulloch* 1819, 17 and 431), citizens had reason to worry whether a distant national government would employ taxes to reward and punish various livelihoods or state instrumentalities. Hamilton acknowledged the anti-federalist fear that the federal tax power might subject the states ''entirely to the mercy of'' Congress (*Federalist* 31, 197). The doctrine of intergovernmental tax immunity was not advanced until *McCulloch* (1819, 426). Madison, too, in discussing the dangers of majoritarian tyranny, warned that the tax power offers the greatest ''opportunity and temptation'' for ''a predominant party to trample on the rules of justice'' (*Federalist* 10, 60).

It was crucial for *Publius* to portray the new tax regime as limited, moderate, cooperative, republican, and well administered enough to be a benefit, not a threat. Human affections, believed Hamilton, ''are commonly weak in proportion to the distance or diffusiveness of the object''; citizens will have stronger loyalties to their states unless the union government can attract those loyalties by demonstrating a better administration of government (*Federalist* 17, 107). The importance of allaying fears about the federal tax power also is attested to by the fact that the first substantive discussions of the ''necessary and proper'' and ''supremacy'' clauses occur in the course of justifying the tax power (*Federalist* 33). The former clause is defended again by Madison in *Federalist* 44, while the supremacy clause is treated only briefly there. The first sustained discussion of the House of Representatives also occurs in the tax essays (35–36) because the House is elected by the people, who are the subjects of taxation, and the House has sole authority to originate revenue bills (Art. I, Sec. 7).

The Proposed Union's Revenue Benefits for the States and Citizens

Federalist 12 opens the tax justification. Consistent with V. Ostrom's view that the compound republic consists not only of national and federal principles (e.g., *Federalist* 39) but also of individuals and communities of individuals, *Publius* illustrates how the proposed union will benefit, and also ease tax burdens for, both states and individuals, especially anti-federalist farmers.

Similar to the argument made in many *Federalist* essays, Hamilton contends that the new union will generate much more commercial prosperity and national wealth, especially by fostering manufacturing. Appealing to fearful ''manorial lords of the Hudson valley'' (Beard 1913, 28) and other farmers in upstate New York who preferred taxes on imports than on soil, Hamilton asserts that agriculture and manufacturing ''are intimately blended and interwoven'' (*Federalist* 12, 74) because manufacturing increases prosperity, thus increasing land values and demand for agricultural produce.

Commerce, in turn, will increase wealth and thereby expand the tax base and provide more federal revenue without onerous tax rates (*Federalist* 12, 74). The emperor of Germany, he observes, presides over a fertile, populous territory but has only ''slender revenues'' for want of commerce. Likewise, lacking the prosperity that can flow from a stronger union, the states have anemic revenues (*Federalist* 12, 75). Public penury is a cost of confederation. Prosperity will ease state revenue collection, especially the difficulty of raising ''considerable sums by direct taxation'' (*Federalist* 12, 75 and Brown 1993). By making it easier to levy imposts and excises, commercial prosperity will reduce the need to pester citizens with numerous direct taxes on their lands, houses, and personal property. Hamilton highlights

government's tendency to oppress farmers by imposing high taxes on their lands (*Federalist* 12, 79).

Union also will simplify tax collection and make it more effective (*Federalist* 12, 76). Absent a stronger union able to regulate interstate commerce, illicit trade will multiply contraband movements among the states. States will collect less revenue, engage in race-to-the-bottom duty reductions, and probably launch armies of oppressive patrols, which number "upwards of twenty thousand" in France. This would "be intolerable in a free country" (*Federalist* 12, 77). Union will obviate the need for such patrols, requiring only patrols of the Atlantic coast by a "few armed vessels." Madison reinforces this point by asserting that disunion will mean that liberty everywhere will be "crushed between standing armies and perpetual taxes" (*Federalist* 41, 272).

Federal patrol vessels will, moreover, foster federal–state cooperation (*The Federalist*'s first mention of cooperative federalism) because states will surely assist federal authorities so as to prevent smugglers from playing the states against each other. Hamilton estimates that the federal government could increase duties from the average 3 percent then levied by states to 9 percent (compared to 15 percent in France) and could collect £200,000 per year from a one-shilling-per-gallon tax on imported "ardent spirits."

This tax regime also will deliver a social benefit to the states by reducing alcohol consumption, which will "be equally favorable to the agriculture, to the economy, to the morals and to the health of the society" (*Federalist* 12, 78). As such, Hamilton endorsed federal sin taxes and, thus, the use of taxation to regulate human behavior as well as raise revenue. He was perhaps responding to a prevalent problem in what one historian termed "the alcoholic republic" (Rorabaugh 1979). Drinking, complained George Washington, is "the ruin of half the workmen in this Country" (Quoted in Risen 2013, 20).

Hamilton appeals again to farmers in *Federalist* 21, arguing that land taxes are unjust and inequitable because it is impossible to obtain accurate valuations of land in any country, let alone one as "imperfectly settled and progressive in improvement" as the United States (*Federalist* 21, 135). Instead, taxes on articles of consumption "must always constitute the chief part of the revenue raised in this country" (*Federalist* 21, 134), a point reiterated by Madison in *Federalist* 56. Consumption taxes are more just because each citizen's tax payments "will in a degree be at his own option . . . The rich can be extravagant, the poor can be frugal." Inequalities arising from duties on particular goods in some states will "be counterbalanced by proportional inequalities in other States" so that, over time, "an equilibrium" will be established everywhere (*Federalist* 21, 134).[2]

This discussion, as well as Hamilton's repeated claims that taxes must be moderate and least burdensome so as to maximize justice, economic growth, and government revenue, echoes supply-side economics (Chernow 2004). Like Arthur

Laffer (2004), Hamilton wrote: ''If duties are too high they lessen the consumption—the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds'' (*Federalist* 21, 134).

Hamilton links this discussion to a plea to end federal requisitions of revenue from the stingy states, ''another fundamental error in the confederation'' (*Federalist* 21, 132). Lacking guaranteed revenue, the federal government cannot repel ''domestic dangers, which may sometimes threaten the existence of the State constitutions,'' such as the ''tempestuous situation'' (i.e., Shays's Rebellion) that rocked Massachusetts in 1786–87. What ''if the mal-contents had been headed by a Caesar or by a Cromwell?'' (*Federalist* 21, 131). Furthermore, requesting revenue from the states in proportion to their supposed ability to pay will produce ''glaring inequality and extreme oppression'' because it is impossible to calculate accurately the tax capacity of each state in order to determine equitable requisitions (*Federalist* 21, 133).[3]

Essentially, Hamilton holds that the federal tax power will stimulate economic growth, thereby generating more federal and state revenue at lower tax rates. Taxes will be less oppressive; no patrols will harass citizens; and tax burdens will be more equitable, especially because prosperity will allow taxes to fall mostly on consumption. There is no Keynesianism in Hamilton's *Federalist* analysis. While many aspects of Hamilton's theory remain plausible, and greater consumption taxation has many advocates today (Andrews 1974; Hall and Rabushka 2007; Rivlin 2012), Hamilton, perhaps deliberately, skimmed over the regressive side of consumption taxes.

A General Tax Power for the General Government

The sequential tax essays address general matters (*Federalist* 30), state concerns (*Federalist* 31–34), and citizen concerns (*Federalist* 35–36).

Hamilton reminds readers that money is ''an indispensable ingredient in every constitution,'' and ''the happiness of the people'' can be promoted only if government has enough revenue to address the people's necessities (*Federalist* 30, 188). The confederation's system of state requisitions is worthless.

The general government, argues Hamilton, needs general authority to levy all types of taxes on all objects of taxation except as prohibited by the Constitution (i.e., no federal taxes on exports from any state) so as to be able to meet all future necessities. As such, Hamilton advocates what is today called revenue diversification. Revenue will be needed to finance defenses against external aggression and internal disorder, facilitate borrowing, service debt, support civil administration, fund all other federal functions, and undertake ''liberal or enlarged plans of public good'' (*Federalist* 30, 191).

A ''fundamental maxim of good sense and sound policy,'' contends Hamilton, ''dictates that every POWER ought to be proportionate to its OBJECT'' (*Federalist* 30, 190). As a general rule, as V. Ostrom noted, a constitution should not be framed with tunnel vision on current necessities but with recognition that future necessities cannot be predicted or calculated accurately (*Federalist* 30, 190). Given the federal government's defense responsibilities especially, it must have unhindered access to all revenues needed to meet ''the probable exigencies of ages'' (*Federalist* 34, 210).

Hamilton therefore attacks the anti-federalists' distinction between internal taxes (e.g., taxes on land and real property), which they want to reserve to the states, and external taxes (i.e., duties on imports), which they are ''willing to concede to the Foederal Head'' (*Federalist* 30, 190). Import taxes alone, Hamilton declares, will not meet the ''exigencies of ages.'' If such revenues are insufficient, countered anti-federalists, Congress could requisition the states. For Hamilton, this would return the union to ''a kind of tutelage to the State governments'' (*Federalist* 30, 190) and generate federal–state and inter-state conflict. During wars, moreover, says Hamilton, too little revenue will render borrowing difficult and compel the federal government to divert revenue from nondefense to defense purposes. Absent the tax power to ensure debt service, creditors will withhold credit or demand usurious rates. The ability to borrow more easily will also benefit the states and citizens. Governments normally borrow during war, says Hamilton. The ''unrestrained power of taxation'' (*Federalist* 30, 192) will enable the federal government to rely more on loans than on high taxes or requisitions in wartime because creditors will have confidence in the federal government's post-war ability to levy sufficient taxes to repay loans.

Madison adds to Hamilton's attack on the anti-federalists' import-duty limitation by arguing that reliance on one tax would be insensitive to the states' diverse import–export mixes (*Federalist* 38) and that rising domestic manufacturing will reduce import-duty revenues. In the future, moreover, domestic manufacturing will require raw-material imports, which will likely require ''bounties'' rather than ''discouraging duties'' (*Federalist* 41, 276). ''A system of Government, meant for duration, ought to contemplate these revolutions, and be able to accommodate itself to them'' (*Federalist* 41, 276–77).

Nonetheless, Hamilton maintains that the Constitution does not prohibit the federal government from requisitioning money from the states. In fact, the proposed tax power will make such requisitions more effective: ''When the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part'' (*Federalist* 36, 227). Hamilton does not explain why the new government would resort to such requisitions in lieu of taxation, although match requirements in the federal government's 1,041 grants-in-aid

(Dilger 2013) today are requisition-like in that the federal tax power is used to entice states to voluntarily co-fund national programs.

Hamilton and Madison repeatedly emphasize that federal taxes will mostly fund defense and foreign affairs. Both acknowledge that federal taxes will finance domestic functions too, but they do not accentuate domestic policy because they want to assure readers that the state governments will be the most important peacetime domestic actors (*Federalist* 45, 313). Madison, however, goes farther than Hamilton in assuring the states. One of his most famous assurances to the states is tied to taxation: "The powers delegated . . . to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected" (*Federalist* 45, 313). Madison also assures readers that the federal tax power cannot reach into states to destroy freedom of the press or trial by jury or "even to regulate the course of descents, or the forms of conveyances" (*Federalist* 41, 277). Federal taxation, he avers, will consist mostly of import duties (*Federalist* 56, 379). Hence, contrary to V. Ostrom, *The Federalist* does not envision a competitive intergovernmental policy environment, although the potential is present due to the existence of federal domestic powers.

Madison also advances a narrower view of the federal tax power, deeming it absurd to believe that the federal tax power can be used for purposes not specified in Article 1, Section 8. This enumeration of powers immediately follows the general tax-and-welfare clause, "and is not even separated by a longer pause than a semicolon. . . . Nothing is more natural or common than first to use a general phrase, and then to explain and qualify it by a recital of particulars" (*Federalist* 41, 277). By contrast, while assuring states that the federal tax power will not be used intrusively, Hamilton declines to confine the scope of federal taxing and spending to the enumerated powers. "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care . . . free from every other control, but a regard to the public good and to the sense of the people" (*Federalist* 31, 195). Consequently, 150 years later, the U.S. Supreme Court proclaimed, in upholding the Social Security Act of 1935: "The conception of the spending power advocated by Hamilton . . . has prevailed over that of Madison" (*Helvering* 1937, 640).

Hamilton, an opponent of slavery, disapproves of poll taxes, a common direct tax in 1787–88, and does not want poll taxes to be levied by the federal government (*Federalist* 36, 229), although he defends this federal power because "certain emergencies" might necessitate a federal poll tax. Hamilton leaves it to Madison to defend the tainted three-fifths representation-and-taxation clause (Art. I, Sec. 2), even though the clause was critical to the Constitution's success and salved northern consciences by appearing to make southerners pay for their slaves'

representation (Ackerman 1999). Madison is the only author who uses the words "slave" and "slaves," although in defending the three-fifths rule, he speaks through "one of our southern brethren" but then pronounces himself "fully" reconciled with the view that the "Foederal Constitution . . . decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character" (*Federalist* 54, 368). Counting slaves as three-fifths persons for representation and taxation, says Madison, also will motivate state officials to cooperate with federal officials to ensure accurate decennial census counts.

Concurrent Taxation with Big Union-Needs and Small State-Needs

Hamilton counters anti-federalist fears that Congress will use its tax power to subjugate the states, abolish state taxes, or erect a "foederal monopoly." However, compared to the credible logic in his other essays, Hamilton descends into *ad hominem*. Aside from a glancing mention of "the composition and structure of the government" (*Federalist* 31, 197) as a barrier to federal usurpation of state powers, Hamilton asserts that anti-federalists have put themselves "out of the reach of all reasoning" by imagining "an endless train of possible dangers," thereby becoming "bewildered amidst the labyrinths of an enchanted castle" (*Federalist* 31, 197). More plausible, he claims, is that the states will encroach on the union. But the "safest course" is to set aside such speculations and leave it "to the prudence and fairness of the people" to "preserve the constitutional equilibrium between the General and the State Governments" (*Federalist* 31, 198), mainly through the House of Representatives.

Any federal usurpation would be "a violent assumption of power unwarranted by any" provision of the Constitution. The states will "retain . . . the most absolute and unqualified" and "independent and uncontrollable authority to raise their own revenues for" their own purposes (*Federalist* 32, 199). The Constitution prohibits states from taxing imports and exports, but they can tax everything else (*Federalist* 32, 202). Hence, the states will "clearly retain all the rights of sovereignty which they before had and which were not . . . exclusively delegated to the United States" (*Federalist* 32, 200).

Here, Hamilton introduces the ideas of "concurrent jurisdiction" and "coequal authority" of the federal and state governments to tax the same bases—the key point for V. Ostrom. Hamilton later elaborates that this concept is grounded not in "abstract principles," which hold that such "co-ordinate authority cannot exist" (*Federalist* 34, 209), but in the pragmatic reality that "CONCURRENT JURISDICTION" over taxation is the only alternative to a complete subordination of the union to the states or the states to the union (*Federalist* 33, 208). Hamilton is proud of this idea. "I flatter myself," he writes, for forging this idea of

concurrent tax jurisdiction against purveyors of misguided abstract reasoning (*Federalist* 34, 209). He ends his seven-paper taxation analysis proclaiming: "Happy will it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough, to set so glorious an example to mankind!" (*Federalist* 36, 230).

In the cases of exclusive federal powers and prohibitions of state powers (e.g., no state taxation of imports and exports), there will be no conflict or contradiction between federal and state legislation; however, the vast remaining field of tax concurrency is vulnerable to mutual interference, competition, and double taxation. Hamilton's solutions for the "inconveniences" to be sometimes occasioned by concurrency are initially "prudence" and "reciprocal forebearances" (*Federalist* 32, 202). Hamilton suggests, however, that if the federal and state governments pile taxes upon the same object, they will induce taxpayer discontent and find it difficult to collect those taxes. Because such double taxation will be an inconvenience to each government, mutual self-interest will motivate cooperation between the federal and state governments to mitigate double taxation (*Federalist* 33, 208).

Hamilton next defends the necessary and proper clause against "virulent invective" that portrays it as the exterminator of local liberties and "hideous monster whose devouring jaws" will swallow up state powers (*Federalist* 33, 204). However, Hamilton presents a circular argument whereby the legislative power to levy taxes renders the necessary and proper clause "only declaratory" because the power to lay and collect taxes must already "be a power to pass all laws *necessary* and *proper*" to execute that power (*Federalist* 33, 205). Operation of the federal government "would be precisely the same" if this clause, as well as the supremacy clause, were not in the Constitution (*Federalist* 33, 204). Hence, the necessary and proper clause is "perfectly harmless" (*Federalist* 33, 205). If so, why was it placed in the Constitution? It was included "to guard against all cavilling refinements" by people who might try to curtail or diminish the union's legitimate powers (*Federalist* 33, 205).

The argument is not persuasive, but Hamilton admits that the federal government will be the final judge of whether its laws are necessary and proper. However, if the federal government should "make a tyrannical use of its powers; the people whose creature it is must . . . redress the injury done to the constitution" (*Federalist* 33, 206). For example, any federal law "to vary the law of descent in any state" or abrogate a state land tax (*Federalist* 33, 206) would clearly exceed Congress's jurisdiction. Hamilton does not mention, at this point, the Supreme Court as a check on congressional use of the clause, nor does he suggest here any nullification or interposition role for the states. Instead, like Daniel Webster's 1830 second reply to Robert Hayne, Hamilton grounds the Constitution in the supreme power of the people. Only later, in *Federalist* 46, does Madison outline various ways in which states might, in reality, resist "unwarrantable" federal measures.

Hamilton similarly contends that the supremacy clause "only declares a truth." When individuals establish a body politic, its laws are their supreme regulator. When political societies create a larger body politic, its constitutionally valid laws "must necessarily be supreme over those societies" and the individuals composing them. Otherwise, it would "be a mere treaty, dependent on the good faith of the parties, and not a government" (*Federalist* 33, 207). The supremacy clause does not, however, make an unconstitutional law, such as abrogation of a state tax, supreme. This, too, is presumably a matter to be settled by the people.

Hamilton then turns to another important issue: the federal government's needs versus the states' needs. Hamilton contends that "there must always be an immense disproportion between the objects of Federal and State expenditures" (*Federalist* 34, 213) because "wars and rebellions" are the chief causes of expense for every national government (*Federalist* 34, 213). "Fourteen fifteenths" of Great Britain's annual revenue, claims Hamilton, goes to pay interest on wartime debts. Hamilton also had a morbid fear of domestic disorder. He later led troops against the Whiskey Rebellion (1791–94) and objected strongly to Fries's Rebellion (1799–1800) so as to substantiate the federal government's tax-enforcement power. It is Hamilton who fastened the derogatory label "whiskey insurrection" onto the farmer's revolt in western Pennsylvania (Hogeland 2006, 239) even though the 25 percent federal "excise was undeniably regressive" (Elkins and McKitrick 1993, 473). Thus, the federal government needs a general tax "CAPACITY" (*Federalist* 34, 211) mainly to meet periodically enormous expenses occasioned by usually unpredictable wars and rebellions.

By contrast, once the states retire their Revolutionary War debts, their needs "will naturally reduce themselves within *a very narrow compass*" (*Federalist* 34, 210) requiring only a small land tax. Hamilton asserts that states' revenue needs "ought not to exceed" £200,000 each (*Federalist* 34, 213), which would be about $28.6 million today (Nye 2012) compared to the actual 2013 own-source average of $33 billion. Hamilton does not explain how he reached this conclusion, other than to say that the proposed constitution will relieve the states of the fiscal burdens of defense, but this tiny revenue estimate is consistent with Hamilton's later idea to amend the Constitution to enable "Congress on the application of any considerable portion of a state, containing not less than a hundred thousand persons, to erect it into a separate state" (Hamilton 1799, 603). Subdividing big states should "be a cardinal point" of federal policy because "empire" states are an existential threat to the federal government. Also, small states are best able to regulate local affairs and preserve the spirit of republican government. Hamilton's reflections here shed light on his 1790 insistence on having the federal government pay off the states' Revolutionary War debts. This allowed state taxes to drop sharply in less than a decade while federal internal taxes remained limited (Edling and Kaplanoff 2004).

This preference for small states might raise doubt about Hamilton's fidelity to federalism (Federici 2012), but in principle, the idea is consistent with the traditional belief in small republics and *The Federalist*'s plans for a co-equal federal–state equilibrium and equitable citizen representation in Congress, which would be more feasible if states had more equal populations. Large states do sometimes threaten federal governments, and size asymmetries among states trouble many federations (Tarlton 1965; Watts 2008). However, following Hamilton's idea today would produce about 3,140 states.

In summary, Hamilton envisions a large field of tax concurrency in which the states occupy one small corner and the federal government occupies another small corner during peacetime, but with the federal government able to occupy the lion's share of the field during security emergencies. He therefore anticipates little, if any, state-federal tax overlaps, collisions, or competition. The concept of concurrent jurisdiction, therefore, allows each order of government—federal and state—to finance all needful obligations falling within its constitutional sphere of authority.

All this casts doubt on modern contentions, as expressed in *Helvering* (1937), that Hamilton would endorse today's federal welfare state. Although Hamilton endorses heavier taxation of the rich, he does not speak of federal wealth redistribution or of helping poor states. Also doubtful is a modern contention that the framers sought to safeguard liberty by creating a fundamentally competitive federalism (Greve 2012). Hamilton held a dualist view of the federal system with respect to concurrent tax legislation, but he advanced a cooperative view of concurrence in which the federal and state governments would avoid competition and usurpations of each other's tax bases.

The House of Representatives: Heart of the Federal System

In *Federalist* 35, Hamilton reiterates that confining the federal government to import duties would oppress some industries, produce unequal tax burdens among individuals and states, and disadvantage New York, an importing state. To finance federal needs, import duties would become excessive, giving rise to smuggling and some manufacturing monopolies, while also oppressing merchants, especially small merchants, when imports exceed domestic demand. But to further assure skeptics that the tax power will not be abused, Hamilton highlights the role of the House of Representatives.

If money is the lifeblood of government, then the House, which most embodies the republican principle, is the beating heart of the federal system because, as Madison emphasizes, only the House can originate revenue bills. It holds the power of the purse—"the most compleat and effective weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary

measure'' (*Federalist* 58, 394). Hamilton fought for the popularly elected House in the Constitutional Convention, partly because of the need to ground taxation in representation. The House is the institution that will propose tax increases during emergencies and tax reductions during peacetime. Furthermore, two-year terms for all House members will give citizens regular opportunities to alter federal taxation by electing advocates of low or high taxes. As a result, the House is the means by which the people will be able to throw their weight into the balance of federal–state power and shift public sentiment toward the federal government or the states, whichever proves administratively superior. In this sense, there is a competitive dynamic, but it is intergovernmental (i.e., federal–state) rather than interjurisdictional (i.e., interstate and interlocal) (Kenyon and Kincaid 1991), which is the most commonly advocated competition today (e.g., Tiebout 1956; Adler 2012).

However, while justifying the House's representative character because it cannot mirror the country's polyglot population perfectly, Hamilton weaves a tale of interclass sympathy in which ''the wealthiest landlord'' and ''poorest tenant'' are ''perfectly united'' (*Federalist* 35, 220) against high land taxes. Although Hamilton stresses that the door of the House ''ought to be equally open to all'' (*Federalist* 36, 223), including men of low birth who rise by merit, free voters will ''naturally'' elect their betters, namely, landholders, merchants, and learned professional men who, like Hamilton, are likely to have the ''thorough knowledge of the principles of political economy'' as well as the awareness of the sentiments of the people (*Federalist* 35, 221–22) needed to fashion moderate, efficient, and equitable taxes. Furthermore, governments ''usually commit the administration of their finances to single men or to boards composed of a few individuals'' to propose tax plans for legislative enactment. ''Inquisitive and enlightened Statesmen are deemed every where best qualified to make a judicious selection of the objects proper for revenue'' (*Federalist* 36, 224). Hamilton had faith in political elites or ''natural aristocrats'' (Federici 2012, 122) to govern on behalf of the common weal.

Cooperative Federalism

Attempting to allay fears that federal internal taxes will double tax citizens, Hamilton and Madison claim that the federal government will cooperatively restrain itself from taxing articles already taxed by the states. Hamilton proposes a first-past-the-post rule by which the federal and state governments should ''mutually abstain from'' taxing objects already taxed by the other government. Otherwise, taxes delegated exclusively to the federal government (i.e., customs duties) and federal taxes on objects not taxed by the states will not create double taxation and ''double sets'' of tax collectors (*Federalist* 36, 227).

The House will be the principal restraining institution because House members will surely protect their states' corner of tax concurrency from federal intrusion and

their constituents from burdensome double taxation. House members, elaborates Madison, will be well enough attuned to the local needs and circumstances of their constituents to design equitable federal taxes that can be "effectually collected" (*Federalist* 53, 363). However, even if House representation is imperfect, contends Madison, there will be no problem because a "skillful individual in his closet . . . without any aid from oral information" can simply read all the states' tax codes and propose federal plans that avoid double taxation (*Federalist* 56, 380)! Thus, it will be easy for the federal government to avoid unnecessary encroachments on state tax bases.

The principal field of direct intergovernmental cooperation, though, will be the implementation of federal internal taxes. Congress "can make use of the *system of each State within that State*" (italics in original); that is, each state's methods of collecting particular taxes can "be adopted and employed by the Foederal Government" (*Federalist* 36, 226). Implementation of federal taxes on land or real property "must be devolved upon discreet persons . . . elected by the people or appointed by the government" to assess land and property values and collect the taxes (*Federalist* 36, 225). Hamilton appears to be saying that administration could be devolved to assessors already elected or appointed under state law or given to assessors to be appointed under federal law. The former interpretation is reinforced by Hamilton's recommendation to use state officers and regulations to collect any "additional imposition" arising from a double tax (*Federalist* 36, 227). This also will reduce administrative expenses for federal tax collection and "best avoid" anger and resistance from state governments and the people (*Federalist* 36, 228). Hamilton concludes, virtually in direct response to one of Luther Martin's concerns, that the best way to implement federal taxation will "be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government, instead of making federal influence flow in an opposite and adverse current" (*Federalist* 36, 228). Hamilton's position is consistent with the U.S. Supreme Court's contemporary anti-commandeering doctrine (*New York* 1992; *Printz* 1997), holding that the federal government cannot compel state officials to enforce federal law or administer federal programs but can pay state officials to do so. The doctrine is consistent with the concept of concurrent jurisdiction in which each order of government has recourse to independent tax resources to finance its constitutional duties.

Revisiting V. Ostrom's Interpretation

This analysis confirms many of V. Ostrom's conclusions, though with some caveats and need for elaboration.

Concurrent Jurisdiction

Concurrent tax jurisdiction is, as V. Ostrom suggested, essential to the viability of the design of the American federal system because the federal and state governments possess ample independent power to obtain sufficient revenues to ensure their own sovereign survival. The federal and state governments have co-equal sovereign authority to tax all conceivable bases (except exports and imports), including unforeseen ones created by future economic and technological change (e.g., the Internet). The states surrendered import taxes to the federal government but were ready to cede them anyway. They also relinquished export taxes but prohibited the federal government from levying them too (Art. I, Sec. 9).

As such, concurrent tax jurisdiction, in which neither the union nor the states are fiscally subordinate, is key to V. Ostrom's concept of the compound republic as a regime of coexisting sovereigns rather than constitutionalized decentralization. Daniel J. Elazar (1987) similarly argued that the American federal design entails constitutional noncentralization, not decentralization or a hierarchy of levels of government.

Ample and Equitable Tax Sources

V. Ostrom was surely correct in arguing that the virtually unhampered tax powers of both orders of government allowed each to meet exigencies unforeseen in 1787. This became especially important for the states. For example, concurrent tax authority allowed them to enact income taxes (first in 1911) and sales taxes (first in 1930) without federal permission when reformers pressed revenue diversification as a route to state modernization and citizen equity.

V. Ostrom's view that *The Federalist*'s concurrency produces more equitable and efficient taxation is questionable, though. V. Ostrom identified no logic inherent in concurrency that might produce such results. *The Federalist*, moreover, emphasizes consumption taxes while eliding their regressivity and the costs of tariffs for farmers and workers (which became major political issues at various points during the nineteenth century). V. Ostrom himself (1987, 206) later acknowledged in his lament over what he called the twentieth-century break with the federalist tradition that the federal income tax creates inequities and inefficiencies and diminishes revenue for state and local governments, which rely on less elastic revenue sources. Yet, concurrency endures, and 43 states levy an income tax. Perhaps, V. Ostrom regarded the federal income tax itself as a manifestation of the break from the federalist tradition, but this would contradict his earlier emphasis on the importance of the federal government's virtually unhampered tax power. Hamilton placed no boundaries on the types of federal taxes that might be levied to meet future exigencies. Partly because of Hamilton's view, many later observers believed that the U.S. Supreme Court erred when it voided a federal income tax (*Pollock* 1895).

Intergovernmental Cooperation

V. Ostrom's highlighting of intergovernmental cooperation in *The Federalist* was an important insight, especially in light of the classic and prevailing definition of dual federalism, which holds that the federal government has only limited enumerated powers, the federal and state governments occupy separate spheres of power, and federal–state relations exhibit ''tension rather than collaboration'' (Corwin 1950, 4). V. Ostrom avoided the term ''dual federalism,'' perhaps because Corwin and others employed it to denigrate the compound republic's concurrency so as to justify a more centralized collaborative federalism. V. Ostrom's theory treats the first two elements of Corwin's definition as positive, but, like *The Federalist*, rejects the third element. Dualism does not necessarily mean tension (Elazar 1962).

The Federalist conveys an optimistic expectation of cooperation, especially voluntary federal restraint, in the exercise of government's most important power in a dualist system. V. Ostrom shed light on *The Federalist*'s support for cooperative tax administration (e.g., intergovernmental transfers), but did not highlight the expectation of cooperation in tax policy making; yet this is crucial for maintaining the compound republic. Absent tax-policy cooperation, the compound republic would either disintegrate from federal–state conflict or be undone by domination by one government, most likely the federal government. *The Federalist* expects the federal and state governments to refrain from invading each other's tax bases so as to avoid tension, conflict, or monopolistic domination.

However, *The Federalist*'s means of restraint do not inspire confidence, given the tendency of national governments in federations to usurp concurrent powers (Kincaid and Tarr 2005). Prudence and ''reciprocal forbearances'' are posed as one set of restraints, but restraints dependent on goodwill are inconsistent with the otherwise overwhelming emphasis in *The Federalist* and in V. Ostrom on the need for power to counteract power in order to safeguard federalism and liberty. The idea of ambition counteracting ambition (*Federalist* 51, 349) is not present in the essays on taxation, even though taxation is acknowledged to be the federal government's most dangerous power. The other restraint is federal and state self-interest in not invading each other's tax bases so as not to arouse citizen discontent. Yet *Federalist* 33 acknowledges that this mutual interest is merely to be hoped for and presumed because there is no inherent logic in concurrency that produces comity.

Intergovernmental Competition

The concurrent tax scheme is not as competitive as V. Ostrom suggested because *The Federalist* assumes that the federal government's predominant revenue needs will be for foreign affairs and national security, which are mostly exclusive federal powers, although even here some cooperation is envisioned due to the continuing

security roles of state militias. *The Federalist* also assumes limited federal and state domestic roles, with the federal government focused mostly on economic development in the domestic sphere. Although Hamilton hoped to make "the luxury of the rich tributary to the public treasury" so as "to guard the least wealthy . . . from oppression" (*Federalist* 36, 229), he did not envision the modern federal welfare state. *The Federalist*'s view of concurrency is dualistic; the federal and state governments occupy separate spheres of policy making and avoid bumping into each other. Where both governments overlap a policy field, as in taxation and partly in national security, *The Federalist* envisions cooperation, especially by the federal government toward the states.

Popular Sovereignty: The Neglected Dimension

An important finding of this analysis, not adequately elaborated by V. Ostrom, is *The Federalist*'s view of the House of Representatives as the prime regulator of the federal–state balance of power. The House is seen as playing this role because the federal–state distribution of revenue will substantially drive the federal–state distribution of power, and the House is the principal holder of the power of the purse. *The Federalist* treats the Senate as an important guarantor of federalism, but not the House. Instead, the House—the chamber of the people who are the subjects of taxation—is the regulator of federalism. The House might, therefore, choose to augment the power of the federal government at the expense of the states, especially if the federal government provides better administration. The Senate, of course, might veto such a scheme, but the regulatory role of the House envisioned by *The Federalist* is a problem for the theory of the compound republic because "democracy has the danger of presuming that a majority can do no wrong" (V Ostrom 1987, 175), and the House is particularly susceptible to control by a national majority. Peculiarly absent from *The Federalist* essays on taxation are references to countervailing powers, competition, and other structural and institutional barriers to national aggrandizement found elsewhere in *The Federalist*. Instead, the tax essays emphasize popular sovereignty and national majority rule through the House.

Conclusion

"Follow the money" plausibly summarizes *The Federalist* on federalism. Taxation receives inordinate attention because the independent federal tax power was the most important change introduced by the proposed constitution. The *sine qua non* of a real government for *The Federalist* is authority to tax, and the new federal government was to be a real government, not a sham like the confederation government. Absent the federal tax power, the Constitution would have failed. A 5 percent import duty plus state requisitions would not have sustained a viable

union. However, because the power to tax is the power to destroy, *The Federalist* authors well understood that exercises of the federal tax power would have the most decisive impacts on the actual balance of federal–state power. Therefore, *The Federalist* argued for concurrent tax jurisdiction as the best way to finance the federal government, protect state tax powers, and ensure restraint and cooperation by the federal government. The states would surely have rejected any plenary federal tax power that obliterated or subordinated state tax powers.

Whether Hamilton later exhibited "disdain for dual fiscal sovereignty" when he was treasury secretary (Rodden 2006, xiii) is a matter of debate. Hamilton believed in a strong national government, but he was not a nationalist in the modern progressive sense (Federici 2012). It is worth noting that some of *The Federalist*'s hoped for forbearance did occur, as reflected in the continuing absence of a federal property tax, sales tax, and value-added tax, although the federal government has arguably violated concurrent comity in recent decades by using the Constitution's commerce clause to preempt many types of state taxes (Eads 2012), such as sales taxes on out-of-state mail-order sales (*Quill* 1992), a strategy not envisioned by *The Federalist*.

Furthermore, for more than 140 years, the federal system hewed fairly closely to the fiscal design set forth in *The Federalist*. The federal and state governments mostly occupied separate pieces of concurrency with little competition and few collisions (except for the Civil War, which was not a tax conflict); the federal government never spent more than 4 percent of GDP except during wars; the federal government raised taxes during wars but relied more on borrowing; and there was some federal–state cooperation, though not as much as expected by *The Federalist*. In 1902, state and local property taxes accounted for 42 percent of all federal, state, and local revenues (Wallis 2000). Even by 1932, local governments accounted for more than half of all government revenue. In 1927, federal spending amounted to only 31 percent of all own-source government expenditures, compared to 52 percent for local governments and 17 percent for the states (U.S. Bureau of the Census 1975).

The fiscal order changed, however, when, by 1939, the federal share of spending soared to 51 percent and increased further thereafter, placing the federal government in a permanently dominant fiscal position. This fiscal revolution is one manifestation of what V. Ostrom regarded as the twentieth-century break from the federalist tradition. Concurrent tax jurisdiction endures, but with the states in a weakened sovereign position in which federal funds account for about 31 percent of state spending and Medicaid, a jointly funded federal–state program, is the single largest category of state spending (National Association of State Budget Officers 2013). Consequently, the contemporary U.S. fiscal constitution exhibits a less co-equal federal–state equilibrium than Hamilton's constitution. This historical

development would seem to confirm Vincent Ostrom's call for more contemplation of Hamilton's theory of concurrent taxation.

Notes

1. All *Federalist* page references are to Cooke (1961).
2. Today, Hamilton's notion that the poor can be frugal is an unacceptable cure for consumption-tax regressivity, but his preference for consumption taxes does resonate with contemporary American preferences for sales taxes over property and progressive-income taxes (Kincaid and Cole 2001, 209).
3. Today, the U.S. Department of the Treasury does calculate annually each state's fiscal capacity (i.e., Total Taxable Resources), which is included in the formulas used to distribute federal funds for two block grants: Community Mental Health Service and Substance Abuse Prevention and Treatment.

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