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## Empire States: The Coming of Dual Federalism

**ABSTRACT.** This Article offers an alternate account of federalism's late eighteenth-century origins. In place of scholarly and doctrinal accounts that portray federalism as a repudiation of models of unitary sovereignty, it emphasizes the federalist ideology of dual sovereignty as a form of centralization—a shift from a world of diffuse sovereignty to one where authority was increasingly imagined as concentrated in the hands of only two legitimate sovereigns.

In making this claim, the Article focuses on two sequential late eighteenth-century transformations. The first concerned sovereignty. Pre-Revolutionary ideas about sovereignty reflected early modern corporatist understandings of authority as well as imperial realities of uneven jurisdiction. But the Revolution elevated a new understanding of sovereignty in which power derived from the consent of a uniform people. This conception empowered state legislatures, which, throughout the 1780s, sought to use their status under new state constitutions as the sole repositories of popular authority to subordinate competing claims to authority made by corporations, local institutions, Native nations, and separatist movements.

The second shift came with the drafting and ratification of the U.S. Constitution, which bolstered federal authority partly in order to protect state authority against internal competitors—an aim reflected in the Guarantee and New State Clauses. Ultimately, the Constitution both limited and enhanced state authority; it entrenched a framework of dual sovereignty. After ratification, competitors to state sovereignty were increasingly constrained to appeal to some federal right or power. What had previously been contests among supposedly coequal sovereigns—what modern scholars would call horizontal federalism—became questions of vertical federalism, issues of whether federal authority would vindicate states or their opponents.

Although the Article concludes with some implications of this history for present-day federalism doctrine and theory, its primary contribution is descriptive. Judges and lawyers routinely and almost unthinkingly invoke localism and power diffusion as the historical values of federalism. Yet the history explored here challenges whether these near-universal assumptions about federalism's aims actually reflect what federalism was designed to accomplish.

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The soil and the people within these limits [of the United States] are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two.

— *United States v. Kagama*<sup>1</sup>

## INTRODUCTION

“Federalism was our Nation’s own discovery,” Justice Kennedy observed before proceeding to craft one of the most influential metaphors in modern American law.<sup>2</sup> “The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”<sup>3</sup>

Justice Kennedy’s metaphor has proved so durable partly because it tidily captures the dominant scholarly and judicial account about federalism and the creation of the United States. Eighteenth-century British thought, this account stresses, envisioned sovereignty as unitary and indivisible; it denounced the prospect of multiple sovereigns within a single polity as a logical impossibility, a so-called *imperium in imperio*.<sup>4</sup> But Anglo-American revolutionaries rebelled against

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1. 118 U.S. 375, 379 (1886).
  2. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Justices have quoted Kennedy’s language in six subsequent decisions. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 643 n.26 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *District of Columbia v. Heller*, 554 U.S. 570, 652 & n.15 (2008) (Stevens, J., dissenting); *Bush v. Gore*, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 751 (1999); *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 150 (1996) (Souter, J., dissenting). According to Westlaw, Justice Kennedy’s phrase has been cited by law review articles 235 times.
  3. *Thornton*, 514 U.S. at 838.
  4. The literature on this history is extensive. For an overview of the longstanding historiographical debates, see Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976). For works discussing British conceptions of sovereignty in the era and the colonial American response, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198-229 (1967); JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 165-81 (2011); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 21-25 (abridged ed. 1995); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 344-54 (1998); CRAIG YIRUSH, *SETTLERS, LIBERTY, AND EMPIRE: THE ROOTS OF EARLY AMERICAN POLITICAL THEORY, 1675-1775*, at 183-270 (2011); and Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 867-69 (1978). For a judicial statement relying on many of these works to summarize this view, see *Seminole Tribe*, 517 U.S. at 150-53 (Souter, J., dissenting).

this conception of authority, and out of the Revolution's ferment emerged a new ideology that valorized sovereignty's division.<sup>5</sup> The Constitution institutionalized this vision by acknowledging both the states and the federal government as sovereigns that derived independent authority from the people.<sup>6</sup> The resulting federalist system of dual sovereignty protected individual liberties by diffusing governmental power among multiple sovereigns.<sup>7</sup>

This standard account underpins most judicial decisions concerning federalism, even those that ultimately embrace national authority.<sup>8</sup> It also provides the starting point for most scholarly discussions of federalism, even when they reject dual sovereignty as archaic—too constraining, too impoverished by its overreliance on the concept of sovereignty to encompass an increasingly interdependent nation and world.<sup>9</sup> Yet this origin story, this Article argues, is a partial and incomplete account of federalism and the constitutional moment known as the Founding.

This Article offers an alternate version of federalism's origins in the late eighteenth-century United States—one that, to modify Justice Kennedy's metaphor, tells a story of federalism as fusion, not fission. The advent of "Our Federalism," I argue, served to centralize as much as to divide authority, as newly empowered states sought to assert claims to sovereignty over and against older conceptions of fragmented, localized quasi-sovereigns. And, I suggest, the states

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5. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 6 (2010) ("The core of this new federal ideology was a belief that multiple independent levels of government could legitimately exist within a single polity, and that such an arrangement was not a defect to be lamented but a virtue to be celebrated."); see also BAILYN, *supra* note 4, at 198-229; WOOD, *supra* note 4, at 344-54.
  6. See WOOD, *supra* note 4, at 344-54.
  7. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."); see also Clarence Thomas, *Why Federalism Matters*, 48 *DRAKE L. REV.* 231, 236-38 (2000) (arguing that the purpose of dual sovereignty is to protect individual rights).
  8. See, e.g., *Arizona v. United States*, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."); *Gregory*, 501 U.S. at 457 ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.");
  9. For an overview of current federalism scholarship and its rejection of sovereignty, see Heather K. Gerken, *Our Federalism(s)*, 53 *WM. & MARY L. REV.* 1549, 1552-61 (2012); and Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 11-20 (2010) [hereinafter Gerken, *Federalism All the Way Down*]. Yet even Gerken notes, "I use the term 'sovereignty' as a stand-in for a particular understanding of federal-state relations because it makes sense in terms of federalism's intellectual history." Gerken, *Federalism All the Way Down*, *supra*, at 13.

frequently succeeded, often with the assistance of the newly created federal government that was as much state authority's ally as its enemy. In short, the Article reimagines the coming of dual federalism not as a shift from unipolarity to bipolarity, but as a move from a world in which sovereignty was diffuse toward one where authority was increasingly understood as concentrated in the hands of only two legitimate sovereigns.

In making this claim, the Article focuses on two sequential late eighteenth-century transformations. The first, involving ideas of sovereignty, occurred during the American Revolution and its immediate aftermath. In British North America, William Blackstone's caricatured accounts of unitary sovereignty bore little resemblance to reality; power rested with a complex patchwork of local institutions with independent authority. The prevalent conception of sovereignty reflected its origins in an early modern worldview rooted both in the corporatist representation of particular communities and in imperial realities of uneven jurisdiction. But the Revolution elevated a different understanding of sovereignty, one in which authority derived from an imagined and homogenous "people." This conception empowered state legislatures, which claimed to be the authoritative repository of the popular will under newly adopted state constitutions. Throughout the 1780s, these legislatures sought to wield this newfound sovereignty against the competing claimants to authority within state borders—corporations, local institutions, Native nations, separatist movements—and to subordinate them to state legislative supremacy.

The second shift came with the drafting and ratification of the U.S. Constitution, a document that, as many have traced, sought to curb the perceived excesses of state legislatures by expanding federal power while also maintaining autonomous and sovereign states outside federal control.<sup>10</sup> But these aims coexisted with another goal: to bolster federal authority in order to *protect* state authority, especially against internal competitors—a purpose reflected in the debates surrounding the Guarantee and New State Clauses and partially in the resulting text. Ultimately, the Constitution, rather than reestablishing older ideas about sovereignty, was interpreted both to limit and to enhance state authority. This outcome firmly established a framework of dual sovereignty, as a brief tour of poststratification history suggests. Competitors to state sovereignty continued to resist state authority, but they were now increasingly forced to appeal not to their own inherent sovereignty, but to some *federal* right or power. In other words, what had previously been considered a contest among supposedly coequal sovereigns—something akin to what modern scholars would label horizontal federalism—increasingly became a question of *vertical* federalism, an issue of whether federal authority would vindicate states or their opponents.

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10. See *infra* notes 236-243 and accompanying text.

Examining federalism and sovereignty in the early United States offers distinct challenges. Like present-day scholars who lament sovereignty as hopelessly imprecise and malleable,<sup>11</sup> early Americans found the concept baffling. “Who, or what, is a sovereignty? What is his or its sovereignty?” Justice Wilson asked in 1793.<sup>12</sup> “On this subject, the errors and the mazes are endless and inexplicable.”<sup>13</sup> But, notwithstanding these misgivings, Wilson and other Anglo-Americans could not seem to escape the term, which they used constantly. Historian Gordon Wood has labeled “sovereignty” the “single most important abstraction of politics of the entire Revolutionary era.”<sup>14</sup>

In this Article, I am less interested in defining sovereignty than in tracing how the inhabitants of the early United States deployed the term in concrete contests over power. Their discussions suggest that this amorphous term proved unavoidable because it did important work. Sovereignty encapsulated the problem of who could legitimately exercise the power to create and adjudicate binding law – and why. The term implicated two closely entangled questions: where this political power came from – its *source* – and whether that power was unitary or could be divided – its *nature*. Because these unsettled issues were foundational, they constantly recurred: even the most quotidian contest over jurisdiction could, and often did, become a struggle over the meaning and legitimacy of authority.

This frame also challenges Justice Kennedy’s account of American exceptionalism. Although institutions in the United States were distinct, the history I recount here fits a global story. The late eighteenth and early nineteenth centuries were, historians have traced, a transnational moment of hardening conceptions of sovereignty.<sup>15</sup> Linked to the rise of nation-states, sovereignty became increas-

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11. See, e.g., Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 2D 51, 59 (1999) (“Sovereignty is too vague and anachronistic a term to allow us to reason about anything more than our propensity to keep using it.”); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346 (“The rhetoric of state sovereignty is responsible for much of the intellectual poverty of our federalism-related jurisprudence . . . . [S]overeignty’ does not have any clear, undisputed meaning.”).

12. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793).

13. *Id.*

14. WOOD, *supra* note 4, at 345; see also BAILYN, *supra* note 4, at 198 (stressing the “pivotal question of sovereignty” and arguing that “in the last analysis it was over this issue that the Revolution was fought”).

15. See, e.g., LAUREN A. BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900*, at 208 (2002) (“Over the span of a handful of decades in the [early] nineteenth century . . . formal plural legal orders were transformed into state-dominated legal orders.”); LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN*

ingly envisioned as uniform authority exercised over space imagined as “territory,”<sup>16</sup> an understanding that displaced older logics of localism and pluralism.<sup>17</sup> The United States did not transcend this transformation: arguably, it was central to it.<sup>18</sup> The newly created states, I argue here, proved particularly eager adopters of this new model of power.<sup>19</sup>

Federalism offers its own conceptual and methodological questions, the subject of a vast and thoughtful existing scholarship.<sup>20</sup> Yet this literature principally focuses on early federalism as abstract political theory and doctrine, reconstructing its contours from conventional sources and texts. This Article, I hope, offers

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AMERICA AND AUSTRALIA, 1788-1836, at 208 (2010) (suggesting that in the early nineteenth century “all the world—metropolis and periphery—engaged in the legal and practical redefinition of sovereignty, fixing its relations to territorial boundaries and to jurisdiction”).

16. On the rise of ideas of territorial sovereignty in this period, see CHARLES S. MAIER, *ONCE WITHIN BORDERS: TERRITORIES OF POWER, WEALTH, AND BELONGING SINCE 1500* (2016); Richard T. Ford, *Law's Territory (a History of Jurisdiction)*, 97 MICH. L. REV. 843, 872-87 (1999); and Daniel-Erasmus Khan, *Territory and Boundaries*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 787, 787-809 (Bardo Fassbender et al. eds., 2012).
17. See, e.g., TAMAR HERZOG, *A SHORT HISTORY OF EUROPEAN LAW: THE LAST TWO AND A HALF MILLENNIA 187* (2018) (arguing that, in revolutionary France, “legislation, guided only by the will of the people, was now the only legitimate normative source. No longer could individuals and communities appeal to customs, doctrine, religious and moral duties, or even jurisprudence.”).
18. See, e.g., FORD, *supra* note 15, at 24-25 (suggesting that Georgia “was the first settler polity to recognize the need to recraft itself explicitly as a defined, territorial space emptied of indigenous people and their laws”); DEBORAH A. ROSEN, *BORDER LAW: THE FIRST SEMINOLE WAR AND AMERICAN NATIONHOOD 147-57* (2015) (tracing how the United States exported its legal interpretations through international-law treatises).
19. They were not the only ones. Elsewhere I have explored how Native nations and the federal government also took up models of authority based on territorial sovereignty. See Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1059-82 (2015) [hereinafter Ablavsky, *Indian Commerce Clause*]; Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783-1795*, 107 J. AM. HIST. (forthcoming 2020).
20. The literature around federalism is enormous. For a sampling of recent works that focus particularly on the concept's early history, see LACROIX, *supra* note 5; FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876* (2000); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202* (1996); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451 (2010) [hereinafter LaCroix, *Authority for Federalism*]; Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015) [hereinafter LaCroix, *Interbellum Constitution*]; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); and Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (book review).

new contexts by thinking about federalism in the frame of less well-known legal and political controversies that unfolded within individual states and along the frontier, alongside these more familiar debates. To recount this history, I draw partly on primary-source research, but also on dozens of localized studies by scholars in fields as diverse as corporate law, local government law, federal Indian law, early state and federal constitutional law, and the history of popular and territorial sovereignty – few of which have defined themselves as explorations of federalism’s history.<sup>21</sup>

My aim in adopting this more expansive scope is not to offer the latest salvo in long-running debates over the influence of ideas, interests, and institutions in shaping history,<sup>22</sup> but rather to suggest – even for legal scholars focused on formal doctrine – the value of the capacious perspectives embraced by current intellectual and political history.<sup>23</sup> Legal history, in the words of James Kloppenberg, is the place “where ideas and power collide head-on.”<sup>24</sup> This Article is about that collision and the complicated mixture of theorizing, high-minded rhetoric, political expediency, legal maneuvering, and material interests that it spawned.

One helpful way to think about this interaction is to rethink federalism as an *ideology*. Existing literature on the late eighteenth-century United States often uses ideology to describe an assemblage of concepts,<sup>25</sup> but the term’s original,

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21. One exception is Dan Hulsebosch, who, in a brief paragraph in his magisterial volume on constitutionalism in early New York, partly anticipated the narrative offered here, observing, “Centripetal, not centrifugal, forces characterized the constitutional settlement that followed the American Revolution. Soon legitimate constitutional authority operated at only two levels: the federal government and the states, with local authority subsumed beneath the latter.” DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 8-9 (2005). Yet this point was one small strand in a large and complex book, and Hulsebosch did not explicitly return to this argument later in the work.
  22. See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 15-18* (2018) (observing, while critiquing, the “false dichotomy . . . that ideas and interests stand in fundamental opposition”); LACROIX, *supra* note 5, at 3-7 (distinguishing between “institutional” and “ideological” approaches to federalism’s history).
  23. Cf. JEFFREY L. PASLEY ET AL., *BEYOND THE FOUNDERS: NEW APPROACHES TO THE POLITICAL HISTORY OF THE EARLY AMERICAN REPUBLIC* (2004) (containing essays applying modern approaches to political history); James T. Kloppenberg, *Thinking Historically: A Manifesto of Pragmatic Hermeneutics*, 9 *MOD. INTELL. HIST.* 201, 201-16 (2012) (describing current methodological techniques in intellectual history).
  24. Kloppenberg, *supra* note 23, at 207.
  25. See BAILYN, *supra* note 4; LACROIX, *supra* note 5; Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 *WM. & MARY Q.* 628 (1987); cf. Caroline Winterer, *The Importance of Being Ideological*, 50 *EIGHTEENTH-CENTURY STUD.* 308 (2017) (describing Bernard Bailyn’s understanding of ideology).

Marxist-tinged meaning depicted ideas as embedded and contested within a particular political and institutional context that advanced certain interests. This perspective draws attention both to federalism's *construction* at a particular historical moment—how it reflected the struggles that created it—and to the political work it performed. As an ideology, federalism, in purporting to describe the world, also sought to remake it: it altered and circumscribed the terms of legitimate debate, sometimes in ways that neither its proponents nor its challengers anticipated or intended.

The success of this recrafting is the central theme of this Article. Although there may be important implications for present-day federalism doctrine and theory, which I explore very briefly at its end, the Article's most important contribution, in my view, is descriptive. In arguing that dual sovereignty served a centralizing function, I am not claiming that it was better or worse than what preceded it.<sup>26</sup> Nor do I argue that federalism does not in fact serve its purported ends<sup>27</sup> or that some other method would better achieve those ends.<sup>28</sup> This Article's principal claims are empirical, not normative. First, it suggests that, rather than serving as an open-ended synonym for multilayered or decentralized governance, federalism had a historical meaning as *dual* federalism, the division of authority between the states and the federal government. Second, it contends that what we routinely assume to have been federalism's values at its moment of creation were in significant part *not* the values that actually underlay the construction of dual sovereignty. We cannot simply appeal, I argue, to a singular intent underlying federalism—particularly a presumed purpose to diffuse authority—to justify a particular outcome.

The argument proceeds in four Parts. In Part I, I seek to reconstruct how authority functioned in Britain's North American colonies. I emphasize how some current scholarship, although it nicely captures the divide between Blackstonian theory and reality, arguably distorts matters by depicting the colonies as profederalist when they in fact embraced a model of plural rather than dual

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26. I do emphasize federalism's complicity in what I regard as the unambiguous harm of U.S. colonialism, especially as directed against Native peoples. But federalism was not unique in this regard: as a quick glance at indigenous history suggests, settler colonial governments, however decentralized or centralized, often proved adept at dispossessing and inflicting violence on Native peoples. See Gregory Evans Dowd, *Indigenous Peoples Without the Republic*, 104 J. AM. HIST. 19 (2017).

27. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (assessing whether federalism serves the ends invoked on its behalf); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005) (arguing that federalism advances localism).

28. See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-27 (1994) (arguing that multiple methods of decentralization would accomplish many of the goals claimed for federalism).

sovereignty. In Part II, I explore how states after the Revolution used new conceptions of popular sovereignty embodied in their constitutions to claim supremacy against older institutions that could also claim to speak for distinct communities. In Part III, I consider the effort to create a stronger federal government to protect states' existing governments. And in Part IV, I explore the aftermath of ratification both in the antebellum Supreme Court and in the fight over Indian Removal, tracing how in both instances dual sovereignty's entrenchment transformed claims against state authority. I conclude with some brief thoughts on this history's meaning for today.

## I. THE OLD ORDER: EMPIRE AND SOVEREIGNTY

Justice Kennedy's atom-splitting metaphor is appealing partly because it so aptly summarizes a century's worth of scholarship on the intellectual history of the American Revolution. Even as historians have debated fiercely the question of the Revolution's origins—one of the oldest questions in American history—they have largely agreed about the fundamental role of contentions over sovereignty.<sup>29</sup> “The idea of sovereignty,” Gordon Wood has observed, “was at the heart of the Anglo-American argument that led to the Revolution.”<sup>30</sup>

This Part surveys accounts of sovereignty's history in the thirteen British colonies that ultimately became the United States. It first explores the rise of Blackstonian conceptions of unitary sovereignty but then notes how poorly those ideas fit the distribution of authority in the British Isles, never mind Britain's colonies, where power was plural and divided and derived from localist conceptions of community representation. Historians have argued that federalism emerged out of this gap, although they have disagreed about how much federalism merely rationalized existing arrangements or represented a new intellectual development. The Part concludes by surveying this debate, noting that the scholars who have argued for continuity have oddly conflated the diffuse power arrangements of colonial America with the ideology of federalism.

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29. For an overview of these longstanding debates, see Edward G. Gray & Jane Kamensky, *Introduction: American Revolutions*, in *THE OXFORD HANDBOOK OF THE AMERICAN REVOLUTION* 1, 1-13 (Jane Kamensky & Edward G. Gray eds., 2013).

30. WOOD, *supra* note 4, at 345. For additional scholars' discussion of this point, see sources cited *supra* note 4.

A. *Blackstonian Sovereignty and Its Discontents*

The modern concept of sovereignty was relatively new in eighteenth-century Britain, having developed, historians suggest, in the sixteenth and seventeenth centuries.<sup>31</sup> Yet nearly two centuries of confrontations between the King and Parliament had made sovereignty central to British legal thought, and William Blackstone's canonical 1765 *Commentaries on the Laws of England* codified the political ideology of the victorious Whigs.<sup>32</sup> Within each state, Blackstone insisted, "there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."<sup>33</sup> In Britain, Blackstone concluded, this final authority, "the sovereignty of the British constitution," was "lodged" in the collective institution of the King-in-Parliament.<sup>34</sup>

Blackstone's views were highly influential among Britain's legal and political elite.<sup>35</sup> But it did not take much digging to reveal that Blackstone's conception of sovereignty was a slapdash veneer concealing a more complicated reality. All that was required was to turn the page: no sooner had Blackstone announced Parliament's irresistible unitary sovereignty than he plunged into the endless ways that British law actually subdivided authority. The clergy, the military, households, and employers all enjoyed extensive and often irrevocable privileges.<sup>36</sup> As for the "law," Blackstone revealed it to be a hodgepodge of doctrines and customs administered by an intricate tangle of common-law, equitable, ecclesiastical, military, manorial, and maritime courts, not to mention a bizarre array of highly specialized courts.<sup>37</sup>

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31. There are numerous histories of sovereignty. For a classic overview, see F.H. HINSLEY, *SOVEREIGNTY* (2d ed. 1986). For more recent works, see ROBERT JACKSON, *SOVEREIGNTY: EVOLUTION OF AN IDEA* (2007); and RAIA PROKHOVNIK, *SOVEREIGNTY: HISTORY AND THEORY* (2008).

32. DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 1-55* (2002); David Lieberman, *The Mixed Constitution and the Common Law*, in *THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY POLITICAL THOUGHT* 317, 321-24 (Mark Goldie & Robert Wokler eds., 2006).

33. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*49.

34. *Id.* at \*51.

35. See LIEBERMAN, *supra* note 32, at 31-32.

36. 1 BLACKSTONE, *supra* note 33, at \*364-454.

37. 3 *id.* at \*22-85. Among the courts of special jurisdiction Blackstone recorded were courts of forests, of sewers, of policies of assurance, of Marshalsea, of the duchy chamber of Lancaster, and also the stannary courts of Devonshire and Cornwall, which administered justice among the tin miners. *Id.* at \*71-85.

And that was just within England. Out in the empire, territorial unevenness exacerbated these jurisdictional complexities: Blackstone traced a confusing welter of incorporated kingdoms (Wales and Scotland), dependent subordinate kingdoms (Ireland), and anomalous municipalities and territories (Berwick-upon-Tweed, the Isle of Man, and the Channel Islands).<sup>38</sup> Based on localized settlements, these places all enjoyed slightly distinct relationships to Parliament and English law – whether through restrictions on Parliament’s power to alter private rights,<sup>39</sup> through restraints on courts’ jurisdiction,<sup>40</sup> or through the principle enunciated in *Calvin’s Case* that the common law did not of its own force extend into conquered countries.<sup>41</sup>

In theory, if all this power radiated outward from Parliament, this profusion of laws and institutions was consistent with Blackstone’s account. Yet in practice, this unevenness and diversity reflected a different vision of sovereignty, one rooted in the thought of the medieval and early modern world that had created these institutions. Arguably epitomized by the common law thought of men like Matthew Hale and Edward Coke, this account differed from Blackstone’s attempted rationalization in explaining both the *source* and the *nature* of power. Under this conception of an “Ancient Constitution,” law derived its authority not from the sovereign’s command but from its historical pedigree, particularly its role as the organic expression of the centuries-old customs of a particular people.<sup>42</sup> As for sovereignty’s nature, this common law order imagined law’s lack of uniformity as a virtue, not a vice: multiple legal orders represented the distinct places, estates, and groups within society.<sup>43</sup>

This understanding of sovereignty – as plural, corporate, and communitarian – resembled what modern scholars dub localism, although it tied authority as much to particular *people* as to place.<sup>44</sup> While in its own way as much a legal

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38. 1 *id.* at \*93-115.

39. *Id.* at \*96.

40. *Id.* at \*98, \*104.

41. *Id.* at \*105. On *Calvin’s Case*, see Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 *LAW & HIST. REV.* 439 (2003); and Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 *YALE J.L. & HUMAN.* 73 (1997).

42. For an overview of this jurisprudential world, see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (2d ed. 1987). See also Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (1993).

43. Pocock, *supra* note 42, at 30-55.

44. For one account of localism, see Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1 (1990).

fiction as Blackstone's account, this approach was arguably closer to the experience of most eighteenth-century Britons, who encountered power not emanating from an all-powerful Parliament but through a complex and uneven patchwork of customary institutions inherited from a medieval and early modern past.

### B. American Sovereignties

In certain respects, Britain's North American colonies more closely resembled the Blackstonian ideal than the British Isles did. Colonization had simplified and purged many vestigial institutions: most colonies had but a single, two-tier court system, and only New York created separate equity courts.<sup>45</sup> Moreover, colonial law became increasingly similar across the diverse colonies as they aped metropolitan legal discourse.<sup>46</sup>

Yet in other ways, the distribution of legal authority in the colonies diverged even more sharply from Blackstone's vision than it did in Britain. Parliament, after all, was far away and rarely legislated for the colonies.<sup>47</sup> In practice, the colonies — many of which were created as corporations or proprietorships and so held explicit right-conferring charters — governed themselves with minimal British oversight.<sup>48</sup> And even then, authority did not radiate from each provincial capital outward. Rather, governance in British North America was arguably even more localized than in early modern Britain. In New England, towns played the central role in regulating daily life, with control literally in the hands of the people in the form of the town meeting.<sup>49</sup> To the south, where counties were the key administrative units, political life centered on the county courts, which not only

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45. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 25-46 (1992); Mary Sarah Bilder, *English Settlement and Local Governance*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 63, 91-96 (Michael Grossberg & Christopher Tomlins eds. 2008).

46. The historian John Murrin famously called this process "Anglicization." See John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 540, 540 (Stanley N. Katz & John M. Murrin eds., 3d ed. 1983).

47. See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788*, at 56-74 (1986).

48. On the colonial charters, see CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865*, at 133-90 (2010); and Bilder, *supra* note 45, at 66-82.

49. See, e.g., GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 68-84 (1960); KENNETH A. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS* (1970); MICHAEL ZUCKERMAN, *PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY* (1970).

adjudicated cases but also governed, setting tax rates, building roads, and enacting ordinances.<sup>50</sup> Court days were also the foundation for local social life.<sup>51</sup> Throughout colonial America, as scholars have traced, the concept of the community was the font of moral and political authority, invoked to justify both criminal and civil regulation.<sup>52</sup> Early America, in fact, was full of official and quasi-official organizations whose authority and legitimacy rested in their role as the institutional embodiment of the community: juries, municipal corporations, militias, churches, and even mobs, which, as in early modern England, claimed a legitimate role in defending the community's interests.<sup>53</sup>

If early America was arguably more localized than Britain, it was also, paradoxically, more expansive and cosmopolitan as well. British settlements in North America were diverse and polyglot; many communities—the Dutch in New York, the Germans in Pennsylvania, the Scots-Irish in the so-called backcountry—maintained their own legal identity and customs.<sup>54</sup> There was also a vast

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50. A.G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA'S LEGAL CULTURE, 1680-1810*, at 34-69 (1981).
51. RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790*, at 88-94 (1982).
52. See WILLIAM EDWARD NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 36-63 (1975) (tracing how Massachusetts law was rooted in community norms); Jack P. Greene, *Law and the Origins of the American Revolution*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 45, at 447, 470 (“[L]aw in the 1760s and 1770s was still as much thought of as custom and community consensus as sovereign command.”); Hendrik Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW: A COLLECTION OF REVIEW ESSAYS ON AMERICAN LEGAL HISTORY* 229, 241 (Hendrik Hartog ed., 1981) (“Colonists defined law not as an instrument of state policy but as a bulwark against centralized authority, as a reflection and a defender of community, customary authority.”); cf. BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987) (observing a shift from the community-based legal norms of the seventeenth century toward a more formalist system in eighteenth-century Connecticut).
53. See, e.g., 4 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735-1776*, at 23-45 (2018) (describing the role of law-finding juries and other institutions in colonial America’s “localist constitutionalism”); Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 *WM. & MARY Q.* 3 (1970) (discussing the role of mobs in early America, when mobs were “an integral and even respected element of the political order”).
54. See, e.g., PATRICK GRIFFIN, *THE PEOPLE WITH NO NAME: IRELAND'S ULSTER SCOTS, AMERICA'S SCOTS IRISH, AND THE CREATION OF A BRITISH ATLANTIC WORLD, 1689-1764* (2001) (describing Scots-Irish legal culture); A.G. ROEBER, *PALATINES, LIBERTY, AND PROPERTY: GERMAN LUTHERANS IN COLONIAL BRITISH AMERICA* (1993) (discussing the persistence of German legal norms); David Thomas Konig, *Regionalism in Early American Law*, in 1 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 45, at 145, 163 (recounting Dutch common law in the Middle Colonies).

space beyond the narrow strip of British settlements huddled along the coast. Ostensibly, this enormous swath of continent also fell under British control, as many colonies' charters grandiosely extended their boundaries all the way to the Pacific Ocean. Yet reality in these contested regions differed sharply from the mapmakers' visions of neatly bounded territories.

Key to understanding how sovereignty functioned in the early American West is the concept of empire. As important recent scholarship has stressed, and as Blackstone's litany of purported English possessions underscores, imperial sovereignty, rather than emanating from a single definitive source, was geographically uneven, expressed through what historian Lauren Benton calls "corridors and enclaves" and frequently attached to individuals rather than territories.<sup>55</sup> As a result, legal pluralism—in which multiple sources of law coexisted within a single society—was particularly pronounced in colonial spaces.<sup>56</sup> Recent studies of colonial American constitutional thought have stressed pluralism as its touchstone and organizing concept.<sup>57</sup>

Unevenness and pluralism offer a much more accurate description of British sovereignty beyond the Appalachians, both as a matter of fact and of imperial law, than unitary authority does. The Native peoples who owned, inhabited, and governed most of the supposed territory of Britain's North American colonies, for one, would have found British claims to sovereignty laughable. British officials struggled to make sense of Native status, often describing allied Native nations as the empire's "subjects."<sup>58</sup> This was a dubious claim—as one French observer wrote, any Englishman who told Native peoples "that they are the

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55. LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900*, at xii-xiv (2010).

56. The literature on legal pluralism is enormous. For an overview of the concept, see Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869 (1988). For works surveying legal pluralism in imperial contexts, see BENTON, *supra* note 15; and *LEGAL PLURALISM AND EMPIRES, 1500-1850* (Lauren Benton & Richard J. Ross eds., 2013).

57. See, e.g., VICKI HSUEH, *HYBRID CONSTITUTIONS: CHALLENGING LEGACIES OF LAW, PRIVILEGE, AND CULTURE IN COLONIAL AMERICA* 1-24 (2010) (stressing the hybridity and pluralism of the colonial American constitutional order).

58. See, e.g., JENNY HALE PULSIPHER, *SUBJECTS UNTO THE SAME KING: INDIANS, ENGLISH, AND THE CONTEST FOR AUTHORITY IN COLONIAL NEW ENGLAND* 27-31 (2005) (recounting English colonial descriptions of Native peoples as "subjects"); cf. GREGORY EVANS DOWD, *WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS & THE BRITISH EMPIRE 178-85* (2002) (recounting British debates over Native status in the wake of the Seven Years' War). For background on debates on the meaning of subjecthood in the late eighteenth-century British Empire, see HANNAH WEISS MULLER, *SUBJECTS AND SOVEREIGN: BONDS OF BELONGING IN THE EIGHTEENTH-CENTURY BRITISH EMPIRE* (2017).

Subjects of *England*” “[ran] the Risk of being massacred.”<sup>59</sup> Yet, however grandiose, claims of Native subjecthood were still weak assertions of British authority. Subject status implied only that the King had taken Native nations under his protection; it did not “subject a People residing in a foreign Country, to the Dominion or Laws of the crown of *Great-Britain*,” as South Carolina’s legislature concluded in the early eighteenth century.<sup>60</sup> Even Native communities in places like New England and Virginia, engulfed by the British, successfully invoked their autonomous status under British law to thwart surrounding colonies’ efforts to assert jurisdiction over them.<sup>61</sup> Native peoples, in short, remained foreign nations, albeit in some ambiguous relationship with British authority.

Native peoples were not the only ones asserting independent authority in the continent’s vast interior. Multiple groups of Anglo-Americans embraced a vision of sovereignty that promised that, just as in the past, new polities could be created in the supposedly empty spaces of the early American West notwithstanding the jurisdictional claims of both Native nations and existing colonial governments. One such group was colonial elites who established a host of land companies – among them the Indiana, Vandalia, Illinois and Wabash, and Ohio Companies – to create new western settlements.<sup>62</sup> More than simple land speculations, these efforts seized on what one historian has called “corporate sovereignty” within British law, which empowered joint-stock companies in imperial domains to establish their own courts, legislatures, laws, and even armies.<sup>63</sup>

Other, less well-heeled Anglo-Americans shared this vision of sovereignty. Before and during the American Revolution, Anglo-American settlers traveled beyond the Appalachian Mountains and began to establish new communities:

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59. JACOB NICOLAS MOREAU, A MEMORIAL CONTAINING A SUMMARY VIEW OF FACTS, WITH THEIR AUTHORITIES, IN ANSWER TO THE OBSERVATIONS SENT BY THE ENGLISH MINISTRY TO THE COURTS OF EUROPE 175 (N.Y.C., H. Gaine 1757).
  60. REPORT OF THE COMMITTEE APPOINTED TO EXAMINE INTO THE PROCEEDINGS OF THE PEOPLE OF GEORGIA, WITH RESPECT TO THE PROVINCE OF SOUTH-CAROLINA, AND THE DISPUTES SUBSISTING BETWEEN THE TWO COLONIES 28 (Charles-Town, S.C., Lewis Timothy 1736).
  61. The Mohegans and Narragansetts, for instance, both surrounded by New Englanders, successfully pursued appeals in which the Crown, although still equivocal about their precise status, nonetheless endorsed their independence from colonial governance. See MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 136 (2004) (exploring an appeal by the Narragansetts to the Assembly); YIRUSH, *supra* note 4, at 113-41 (tracing the Mohegans’ successful appeal to the British Crown in the 1740s).
  62. On the history of these land companies, see SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT 74-132 (1939); and ALAN TAYLOR, AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750-1804, at 77-83 (2016).
  63. See PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011).

the Watauga Association and Cumberland Settlement in western North Carolina; Westsylvania and Transylvania in western Virginia.<sup>64</sup> Lacking any formal authorization other than dubious Indian land deeds, these settlers implicitly assumed the right to create new settlements under conceptions of popular sovereignty.<sup>65</sup> Under their own authority, they created court systems and local governments and sometimes even drafted their own constitutions.<sup>66</sup>

In the vast spaces beyond the Anglo-American coastal settlements, then, sovereignty seemed up for grabs. Existing colonies might point to charters and maps to establish their authority, but there were other, more persuasive claims. Native nations had the strongest rights, even under British law, but longstanding practices of colonization encouraged ordinary and elite Anglo-Americans alike to envision the West as a place where new sovereigns could be created. As Blackstone himself suggested, the British Empire created a capacious and adaptable structure that facilitated all sorts of claims to autonomy under the broad and loose tie of subjecthood and common allegiance. Given this history, established colonies could hardly be surprised to find a wealth of competitors who sought to claim the same rights to authority that they had.

### C. Sovereignty, Localism, and Federalism

The gap between Blackstone's vision of unitary sovereignty and North American realities, historians have long noted, provided a major impetus for the Revolution.<sup>67</sup> Seeking to defend local prerogative against parliamentary incursion, Britain's North American colonists crafted diverse theories that rejected Blackstonian conceptions of sovereignty.<sup>68</sup> They distinguished between internal and external subject matters of legislation, or between taxation and regulation,

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64. On Watauga, see J.G.M. RAMSEY, *THE ANNALS OF TENNESSEE TO THE END OF THE EIGHTEENTH CENTURY* 92-174 (1853); on Cumberland, see KRISTOFER RAY, *MIDDLE TENNESSEE, 1775-1825: PROGRESS AND POPULAR DEMOCRACY ON THE SOUTHWESTERN FRONTIER*, at xxv, 7 (2007); on Transylvania and Westsylvania, see PATRICK GRIFFIN, *AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER* 125-50 (2007); and CLAUDIO SAUNT, *WEST OF THE REVOLUTION: AN UNCOMMON HISTORY OF 1776*, at 19-26 (2014).

65. See GRIFFIN, *supra* note 64, at 150 (describing these efforts as an expression of "self-sovereignty").

66. Both Watauga and Cumberland, for instance, adopted fundamental laws (known as the Articles of Association and the Cumberland Compact, respectively) and established their own court systems. JOHN R. FINGER, *TENNESSEE FRONTIERS: THREE REGIONS IN TRANSITION* 46-47, 82-83 (2001).

67. On this point, see works cited *supra* note 4.

68. *Id.*

or between royal and parliamentary authority.<sup>69</sup> But at every turn, Americans confronted the same counterargument – the supposedly fatal charge of *imperium in imperio* that was, in the parlance of the time, a “solecism,” a contradiction in terms.<sup>70</sup> If sovereignty was the ultimate authority, this argument ran, it had to be unitary; there could not be multiple sovereigns within a single polity.<sup>71</sup>

It was from this intellectual ferment, historians emphasize, that federalism as both ideology and institution emerged in the Revolution’s wake. One increasingly common Anglo-American rebuttal to the supposed inconsistency of multiple sovereigns relied on thinking about the *source* of sovereignty, particularly the concept of popular sovereignty.<sup>72</sup> There was, early American political thinkers came to insist after the War, a single ultimate sovereign in their new polity – the people at large, who delegated their authority to both the federal government and the state governments.<sup>73</sup> But there was another response to British arguments hashed out during the Revolution, one that concerned not just sovereignty’s source but also its *nature*. Rejecting the premise that sovereigns could not coexist, Anglo-Americans came to accept, and even valorize, the possibility of divided authority.<sup>74</sup> This embrace of multiple sovereigns provided what Alison LaCroix has described as federalism’s ideological origins.<sup>75</sup>

Within this broadly shared narrative, however, scholars have disagreed, particularly over the relationship between federalism and its colonial antecedents. Gordon Wood, for instance, has forcefully argued that federalism, far from a

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69. WOOD, *supra* note 4, at 350–54. Eric Nelson has recently argued that some Anglo-Americans adopted the Stuart “dominion” theory, which denied parliamentary supremacy by defending royal prerogative. See ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* (2014). But Nelson acknowledges that his work is only “incidentally” about “sovereignty,” *id.* at 9, and Gordon Wood forcefully critiqued an earlier version of Nelson’s argument for ignoring Blackstonian conceptions of sovereignty, Gordon S. Wood, *The Problem of Sovereignty*, 68 WM. & MARY Q. 573 (2011). Perhaps most notably, one of the most important impetuses behind such dominionist thinking was the desire to avoid the problem of overlapping legislative authority by invoking royal prerogative as a justification for power under colonial charters. Daniel J. Hulsebosch, *The Plural Prerogative*, 68 WM. & MARY Q. 583 (2011).

70. See WOOD, *supra* note 4, at 352.

71. *Id.*

72. *Id.* at 363–72.

73. *Id.* at 543–47.

74. See LACROIX, *supra* note 5, at 221 (“Between the middle decades of the eighteenth century and the early years of the nineteenth century, federal thought was transformed from a heterodox willingness to tolerate messy, multilayered government into an affirmative belief that such multiplicity – untidy though it might be – could form the basis for a new species of union.”).

75. *Id.* at 6.

novelty, merely codified the existing realities of dispersed authority within the colonies.<sup>76</sup> LaCroix responded by insisting that the acceptance of divided sovereignty in the late eighteenth century, although rooted in earlier practices, nonetheless represented a “significant innovation,” positing more diverse intellectual origins of federalist ideology.<sup>77</sup>

The unspoken core of this debate concerned the fundamental nature of federalism. “Americans’ acute sense of localism and their long familiarity with parceled and apportioned political power from below,” Wood claimed, “were the real sources of their idea of federalism.”<sup>78</sup> Yet this neat conflation between localism and federalism is untenable. Federalism was not simply the institutionalization of the myriad, localized ways in which early Americans dispersed authority; its historical meaning was inseparable from the division of sovereignty solely between the states and the federal government.<sup>79</sup>

In this more historically precise sense, federalism *was* novel: sovereignty was not neatly vertically arrayed in colonial America. There were, to be sure, imperial institutions resembling federalism that Anglo-Americans later drew upon when crafting the Constitution,<sup>80</sup> but they formed only one of many ways that sovereignty and authority were divided within colonial America. To privilege the practices that prefigured federalism is to read the history teleologically, as a search for origins.<sup>81</sup>

Similarly, colonies were not straightforward proto-states with authority emanating from provincial capitals. Although some colonial institutions—legislatures, governors, judiciaries—resembled later state institutions, they were merely one set among many, and not necessarily thought to be supreme: local courts sometimes disregarded colonial legislatures’ dictates as ill-suited for local

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76. See Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 710-11 (2011) (reviewing LACROIX, *supra* note 5).

77. Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 733 (2011); see also *id.* at 757 (“Federalism was not just the result of Americans finally internalizing the fear of *imperium in imperio* and finding the language to describe their homegrown remedy for it.”).

78. Wood, *supra* note 76, at 728; see also *id.* at 713 (arguing that because “authority was created by the pooling together of local power from below,” early New England colonists “were experiencing federalism”).

79. I develop this line of argument more fully below. See *infra* text accompanying notes 410-412.

80. See, e.g., BILDER, *supra* note 61, at 9-11 (recounting, in a thorough study of colonial appeals, the vertical divide between colonial governments and the imperial government that resembled federalism and helps explain its development).

81. David Hackett Fischer influentially labeled this approach “the *fallacy of presentism*,” in which “the antecedent” is “defined or interpreted in terms of the consequent.” DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 135-40 (1970).

conditions.<sup>82</sup> What happened in colonial administrative centers was often a vituperative, faction-ridden elite struggle that pitted institutions against each other.<sup>83</sup> Large swathes of each colony, often derisively called the “backcountry” or “marchland,” were excluded from this elite game, a marginalization these regions’ inhabitants resented as acutely as many colonial legislators disliked parliamentary supremacy.<sup>84</sup> Populist revolts that invoked the people to justify resistance against *provincial* governments were far more common in colonial America than were attacks on parliamentary supremacy.<sup>85</sup>

These dynamics carried into Anglo-Americans’ opposition to British authority during the imperial crisis. Resistance manifested throughout the multiple institutions that claimed legitimate authority in colonial society: county conventions, church gatherings, town meetings, militias, mobs, and associations and committees of all sorts organized alongside colonial legislatures to resist British rule, all claiming to speak on the people’s behalf.<sup>86</sup> Moreover, the tax revolt against distant British authority inspired similar popular resistance to provincial legislatures themselves. The most notable instance occurred in North Carolina, where western farmers, angered by the taxes imposed by their colonial legislature, organized.<sup>87</sup> Calling themselves the Regulators — a name drawn from a seventeenth-century English practice that allowed inspection of the actions of the

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82. Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 314-15 (1976) (noting instances when a Massachusetts county court disregarded provincial statutory law).

83. See James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA, *supra* note 45, at 555, 584 (“During the colonial era, many Americans believed that their representative assemblies existed primarily to prevent misrule by power-hungry governors and not to devise new legislation.”); see also BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* (1968) (emphasizing the factionalized nature of colonial politics); ALAN TULLY, *FORMING AMERICAN POLITICS: IDEALS, INTERESTS, AND INSTITUTIONS IN COLONIAL NEW YORK AND PENNSYLVANIA* 418-21 (1994) (recounting New York and Pennsylvania’s oligarchic and faction-driven politics); cf. RICHARD R. BEEMAN, *THE VARIETIES OF POLITICAL EXPERIENCE IN EIGHTEENTH-CENTURY AMERICA* (2004) (stressing the diversity of politics within each colony).

84. ERIC HINDERAKER & PETER C. MANCALL, *AT THE EDGE OF EMPIRE: THE BACKCOUNTRY IN BRITISH NORTH AMERICA* 133-60 (2003); HULSEBOSCH, *supra* note 21, at 98-104.

85. For background on some of these rebellions, see ALAN TAYLOR, *AMERICAN COLONIES* 139-40, 148-50 (2001) (Bacon’s Rebellion); *id.* at 280-85 (Leisler’s Rebellion); and *id.* at 436 (Paxton Boys). On similar uprisings in the Hudson Valley, see THOMAS J. HUMPHREY, *LAND AND LIBERTY: HUDSON VALLEY RIOTS IN THE AGE OF REVOLUTION* (2004).

86. HOWARD PASHMAN, *BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776-1783*, at 5-11 (2018); TAYLOR, *supra* note 62, at 126-28.

87. See generally MARJOLEINE KARS, *BREAKING LOOSE TOGETHER: THE REGULATOR REBELLION IN PRE-REVOLUTIONARY NORTH CAROLINA* (2002) (recounting the rebellion).

government<sup>88</sup>—they gathered at county meetings of representatives selected in each neighborhood and ultimately marched on and attacked proceedings at the provincial court.<sup>89</sup> North Carolina’s governor ultimately suppressed the rebellion, but only after a pitched battle involving a force of over one thousand eastern militia.<sup>90</sup>

Such actions reveal a more complex pre-Revolutionary reality than the simple depiction of protofederalist colonies waiting to throw off British rule. Provincial legislatures could, and did, claim the mantle of local authority. But they had competition from many other institutions, widely regarded as closer and more representative of “the people” than were the distant legislatures; these institutions, could, and did, readily repurpose arguments against imperial rule from Britain to reject rule from provincial capitals. Britain’s thirteen rebellious colonies, in short, were certainly localist, but they were not federalist in the sense that sovereignty was located in each colony. Creating that kind of federalism—a federalism founded on sovereign states—would require significant work and considerable struggle in the following years.

## II. THE NEW ORDER: STATE ATTACKS ON COMPETING SOVEREIGNS

With the Declaration of Independence, the United States rejected any pretense of parliamentary or royal sovereignty. The Declaration proclaimed thirteen “Free and Independent States,” an international-law term of art for sovereign nations.<sup>91</sup> Even before the Declaration, the Continental Congress had urged states to form new governments grounded in the “authority of the people,” and states had assumed the mantle of sovereignty by adopting new written constitutions.<sup>92</sup>

These constitutions codified two central strands of Revolutionary thought. First, they reflected the growing dominance of an ideology of popular sovereignty that rooted all legitimate authority in the people.<sup>93</sup> “[A]ll political power

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88. *Id.* at 2.

89. *Id.* at 133-47, 182-84.

90. *Id.* at 197.

91. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776); *see also* DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 29-56 (2007).

92. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 342, 357-58 (Worthington Chauncey Ford ed., 1906); *see also* MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA (1997) (describing the creation of early state constitutions).

93. The topic of popular sovereignty in the era of the American Revolution is vast. For important treatments, *see* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM

is vested in and derived from the people only,” read one provision with close analogs in multiple state constitutions.<sup>94</sup> “That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof” often followed close behind.<sup>95</sup> This vision of authority was importantly different from the concept of power rooted in particular local communities: it envisioned the sovereign people as a homogenous whole. During the 1780 drafting of Massachusetts’s constitution, some in western Massachusetts sought to preserve the towns’ “rights, Liberties, and Priviledges” by arguing that the state was the sum of its parts, “several Bodies Corporate of which the great whole is formed.”<sup>96</sup> But a majority of the convention rejected that vision. The new constitution’s preamble described a *single* “body politic” that formed a compact by the “whole people.”<sup>97</sup> The processes of creating most of the new state constitutions reflected this understanding; they relied on special conventions representing the entire people to draft the texts that were then ratified through popular vote.<sup>98</sup>

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AND JUDICIAL REVIEW 10-33 (2004); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 244-87 (1988); RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 183-97* (2016); WOOD, *supra* note 4, at 344-89; and David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 *YALE L.J.* 664 (2017) (reviewing TUCK, *supra*).

94. N.C. CONST. of 1776, A Declaration of Rights, &c, art. I; *see also, e.g.*, GA. CONST. of 1777, pmbl. (“We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended.”); MD. CONST. of 1776, A Declaration of Rights, &c, art. I (“[A]ll government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”); MASS. CONST. pt. 1, art. V (“All power residing originally in the people, and being derived from them.”); N.J. CONST. of 1776, pmbl. (“[A]ll the constitutional authority ever possessed by the kings of Great Britain over these colonies, or their other dominions, was, by compact, derived from the people.”); 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.”); PA. CONST. of 1776, art. IV (“[A]ll power being originally inherent in, and consequently derived from, the people.”); VT. CONST. of 1777, ch. 1, art. V (“[A]ll power being originally inherent in, and consequently, derived from, the people.”); VA. DECLARATION OF RIGHTS of 1776, art. II (“[A]ll power is vested in, and consequently derived from, the people.”).
95. *See, e.g.*, MD. CONST. of 1776, A Declaration of Rights, &c, art. II; N.C. CONST. of 1776, A Declaration of Rights, &c, art. II; PA. CONST. of 1776, art. III; VT. CONST. of 1777, ch. 1, art. IV.
96. JOHANN N. NEEM, *CREATING A NATION OF JOINERS: DEMOCRACY AND CIVIL SOCIETY IN EARLY NATIONAL MASSACHUSETTS* 14 (2008).
97. MASS. CONST. pmbl.
98. *See* TUCK, *supra* note 93, at 183-212; WOOD, *supra* note 4, at 306-43.

Second, although many at the time sought to distinguish between the sovereign people and the government,<sup>99</sup> in practice the new state constitutions privileged popularly elected legislatures, granting them “supreme legislative power” on behalf of the people.<sup>100</sup> Newly created state executives, by contrast, tended to be weak and were often selected by legislatures.<sup>101</sup> The result was that, after the Revolution, state legislatures, not magistrates or judges, “stood at the apex of the American legal system,” in the words of one historian.<sup>102</sup>

Taken together, the new state constitutions suggested an understanding of sovereignty that, notwithstanding Revolutionary tumult, resembled Blackstone’s. In this conception, the people empowered state legislatures, as their most direct representative, to act as the *de facto* supreme authority within the state. But just as in the case of Blackstone, this vision of governance was an ideology rather than a description of reality. The new constitutions did not sweep away longstanding inherited practices that had splintered authority and legitimacy among diverse institutions. If anything, the realities of war making devolved power further, as the old order’s collapse emboldened institutions all to claim supremacy in the midst of the War’s uncertainty and upheaval.

The result was an intense struggle over the nature and meaning of sovereignty that persisted after the War’s end and dominated what historian John Fiske long ago dubbed the “critical period”: the decade of the 1780s.<sup>103</sup> Parts of this history are well known, captured in the standard narrative of the drive toward the Constitution. For example, many scholars have noted how nationalists, especially James Madison, recoiled from the perceived excesses of unfettered state legislatures, which often came at the expense of minority rights.<sup>104</sup> Madison and others accordingly created institutions, particularly a strengthened federal

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99. See generally TUCK, *supra* note 93, at 252-80 (discussing the sovereign/government distinction); WOOD, *supra* note 4, at 363-89 (noting the growing distinction between legislatures and the people at large).

100. See, e.g., N.Y. CONST. of 1777, art. II; PA. CONST. of 1776, § 2.

101. See WOOD, *supra* note 4, at 135-57.

102. Henretta, *supra* note 83, at 592; see also *id.* (“Thanks to the new state constitutions, the legislators and their constituents became the prime shapers of the legal system, largely unimpeded by governors and only partially restrained by an emergent judiciary.”).

103. JOHN FISKE, *THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789* (Cambridge, Mass., Riverside Press 1892).

104. WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* 5-16 (2007); LACROIX, *supra* note 5, at 145-58; RAKOVE, *supra* note 20, at 39-56; WOOD, *supra* note 4, at 404-24.

government, that were designed to check such abuses and forestall the frequent clashes *between* states that marked the era.<sup>105</sup>

Yet alongside these well-documented debates was another, largely ignored contest for authority, as state legislatures sought to make their paper power real by establishing their supremacy against competitors for sovereignty. Their target in this campaign was what modern scholars might deem group rights: the authority rooted in an enduring early modern worldview of corporatist institutions that claimed organic legitimacy from the people or from a subset of them. There were plenty of such potential competitors in the pluralist early United States, including churches,<sup>106</sup> immigrant communities,<sup>107</sup> and voluntary associations.<sup>108</sup> But in this Part, I focus on four particularly significant early American sites of governance: corporate “bodies politic”; localist institutions such as towns, courts, and juries; Native nations; and movements for would-be new states. Against each of these competitors, states wielded their potent new ideological weapon: a uniform sovereign “people” who had, in the fundamental and supreme law of the new state constitutions, sanctioned state legislatures as their primary agents. The Part concludes by looking at one of the era’s most substantial challenges to state authority, Shays’s Rebellion – an event that wove together

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105. HOLTON, *supra* note 104, at 180-200; LaCroix, *Authority for Federalism*, *supra* note 20, at 461-64.

106. See Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 314 (2014) (explaining that in the late 1700s and early 1800s careful attention was given to “carefully limiting the powers of religious organizations and empowering their individual members”).

107. See DOUGLAS BRADBURN, *THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774-1804*, at 206-34 (2009).

108. The history of voluntary associations resembles that of corporations discussed below – the two were, in fact, largely indistinguishable well into the nineteenth century. See William J. Novak, *The American Law of Association: The Legal-Political Construction of Civil Society*, 15 STUD. AM. POL. DEV. 163 (2001). Historians have uncovered a robust culture of voluntary associations in colonial America, many of which exercised governmental functions. See JESSICA CHOPPIN RONEY, *GOVERNED BY A SPIRIT OF OPPOSITION: THE ORIGINS OF AMERICAN POLITICAL PRACTICE IN COLONIAL PHILADELPHIA* (2014). After the Revolution, there was widespread suspicion of such associations: Jefferson, for instance, feared that they would “take the government out of its constitutional hands” and “jeopardize the march of regular government.” NEEM, *supra* note 96, at 5; see also RONEY, *supra*, at 184-85 (describing suspicions of voluntary associations in post-Revolution Pennsylvania). Ultimately, like business corporations and others, see *infra* notes 109-115, voluntary associations became less threatening as they proliferated and explicitly subordinated themselves to state law. See generally KEVIN BUTTERFIELD, *THE MAKING OF TOCQUEVILLE’S AMERICA: LAW AND ASSOCIATION IN THE EARLY UNITED STATES* (2015) (describing concepts of membership, characterized by law and procedural fairness, which underpinned the early proliferation of voluntary associations).

many of these claims to sovereignty, profoundly unsettling many of the nation's political elite in the process.

### A. Corporations

Corporations – “artificial persons,” Blackstone wrote, “constitute[d]” by the government<sup>109</sup> – flourished in the era following the American Revolution, as the new state legislatures issued hundreds of corporate charters.<sup>110</sup> In part, this push manifested a postwar profusion of civic engagement and republicanism. But many of these newly incorporated institutions were not actually new: they were the diverse “bodies politic” – municipalities, churches, colleges, civic organizations, and for-profit companies devoted to infrastructure and public works – that had long characterized early America.<sup>111</sup> They incorporated now in part because, as legislatures supplanted the King, the legislative charter replaced the more onerous requirement of royal assent to create a corporation.<sup>112</sup>

In theory, these new corporations were the states' servants. Incorporation required an express charter from the state legislature, making corporations' existence and authority entirely dependent on state approval.<sup>113</sup> Moreover, the requirement that corporations serve a public purpose led early Americans to regard them as “agencies of government,” in that the state authorized their creation to serve the public interest.<sup>114</sup> These understandings explain the anxiety state advocates frequently expressed at the constitutional convention that states would be reduced to “mere corporations” – institutions stripped of sovereignty.<sup>115</sup>

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109. 1 BLACKSTONE, *supra* note 33, at \*455.

110. *E.g.*, JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 1-19 (1970); Eric Hilt, *Early American Corporations and the State*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 37, 47 (Naomi R. Lamoreaux & William J. Novak eds., 2017); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & MARY Q.* 51, 51-52 (1993).

111. Maier, *supra* note 110, at 53-54.

112. *See id.* at 56 (reporting how Massachusetts was hesitant to charter corporations until the 1750s in part because of anxieties over royal approval).

113. *See* E. MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860: WITH SPECIAL REFERENCE TO MASSACHUSETTS* 196 (1954) (“There was almost universal assent to the proposition that the power to form corporations, which had in England belonged to both King and Parliament, was in post-Revolutionary America possessed by the legislatures alone.”).

114. Maier, *supra* note 110, at 55.

115. *See, e.g.*, 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 263 (Max Farrand ed., 1911) [hereinafter *FARRAND'S RECORDS*] (expressing fears that the Constitution would “absorb the State sovereignties & leave them mere Corporations”).

Yet early American law afforded corporations many of the attributes of sovereignty. Authorized to craft and enforce their own legal orders, corporations looked and acted a lot like states. Pennsylvanian James Wilson collapsed the distinction, insisting, “[s]tates are corporations or bodies politic of the most important and dignified kind.”<sup>116</sup> Historians have picked up on Wilson’s analogy, noting the close parallels between corporate charters and the advent of state constitutions: both documents represented fundamental written law that simultaneously empowered and restrained.<sup>117</sup> Many states, in fact, had sprung from incorporated chartered colonies.<sup>118</sup> And Anglo-Americans knew, too, of the great “company-states” of the late eighteenth-century British world that claimed sovereignty over enormous imperial territories.<sup>119</sup> The British East India Company, which ruled much of the Indian subcontinent, was a particular bugbear that demonstrated the evils of unchecked corporate authority.<sup>120</sup>

Moreover, it was not clear that corporate authority was in fact subject to state legislative control. Many at the time believed that, because corporate charters were a form of property right, legislatures lacked the power to alter them once given.<sup>121</sup> This conclusion reflected the longstanding common law vision of corporate charters as a check on governmental authority, a view grounded in earlier English struggles over charter rights.<sup>122</sup>

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116. JAMES WILSON, *CONSIDERATIONS ON THE BANK OF NORTH AMERICA* (1785), reprinted in 1 COLLECTED WORKS OF JAMES WILSON 60, 67 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2007).

117. ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 25 (2018); Maier, *supra* note 110, at 79; see also Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502, 541-45 (2006) (comparing post-Revolution “delegated legislative power” to the “delegated bylaw authority of corporations”).

118. Rhode Island and Connecticut in fact retained their colonial charters in place of drafting new constitutions. MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM: 1833-1849*, at 3-5 (1973).

119. STERN, *supra* note 63, at 207-14.

120. See Rosemarie Zagari, *The Significance of the “Global Turn” for the Early American Republic: Globalization in the Age of Nation-Building*, 31 *J. EARLY REPUBLIC* 1, 27-29 (2011).

121. See JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650-1825*, at 79 (1975) (reporting comments from the 1780s that “charters once given cannot be revoked” and that they were “irrevocable, unalterable”); see also Gordon S. Wood, Lecture, *The Origins of Vested Rights in the Early Republic*, 85 *VA. L. REV.* 1421, 1441-43 (1999) (describing the debate over whether “[chartered] corporations were actually contracts immune from state tampering”).

122. On perhaps the most noteworthy contest, see JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660-1688, AND ITS CONSEQUENCES* (1969).

To many in the early United States, then, corporations looked less like creatures of the states than rivals for their power. For this reason, chartering corporations proved to be among the most controversial legislative acts of the post-Revolutionary period. Opponents of these decisions—a group the historian Louis Hartz labeled the “anti-charter” movement—offered diverse critiques of corporations, but among the most frequent was that corporations arrogated to themselves the rights of sovereignty properly placed in the representatives of the people.<sup>123</sup> They threatened to become, in the words of a pamphlet challenging Wilson’s analogy between corporations and states, “that solecism in politics, *imperium in imperio*.”<sup>124</sup>

The fear that corporate power would trample state authority appeared throughout the new states from the 1780s into the 1790s. In Baltimore, opponents of a proposal to transform the town into a municipal corporation consisting mostly of appointed officials bemoaned the “sovereign power[s] vested in the Corporation” outside any control of the “*acts of Assembly* and the *Constitution of the State*.”<sup>125</sup> In New York, the Council of Revision—which had the power to veto legislation—rejected efforts to charter a workingman’s association and to expand the powers of the city of New York.<sup>126</sup> Corporations, the council warned, were “to most purposes independent republics” endowed with “all the powers of legislation”; if the rage for incorporating continued, “the State, instead of being a community of free citizens pursuing the public interest, may become a community of corporations . . . composing an aristocracy destructive to the Constitution and independence of the State.”<sup>127</sup> In Massachusetts, the state legislature censured the controversial Order of the Cincinnati, an association of officers who had served in the Continental Army, for usurping the authority to determine public policy, “for which purpose the people of these United States have constituted and established their legislatures and Congress.”<sup>128</sup> The Cincinnati, the legislature warned, threatened to become a “select society . . . independent

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123. LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, at 69-79 (1948).

124. *REMARKS ON A PAMPHLET, ENTITLED, “CONSIDERATIONS ON THE BANK OF NORTH-AMERICA”* 5 (Phila., John Steele 1785).

125. *To the Inhabitants of Baltimore-Town, Fellow-Citizens*, MD. J. (Balt.), Mar. 7, 1786, at 1. Baltimore ultimately incorporated in 1797.

126. ALFRED B. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK; ITS HISTORY, A HISTORY OF THE COURTS WITH WHICH ITS MEMBERS WERE CONNECTED; BIOGRAPHICAL SKETCHES OF ITS MEMBERS; AND ITS VETOES* 261-64, 276-77 (Albany, William Gould 1859).

127. *Id.* at 262, 264, 276.

128. *Considerations on the Order of Cincinnati*, BOS. GAZETTE & COUNTRY J., May 26, 1788, at 1.

of lawful and constitutional authority; tending, if unrestrained, to *imperium in imperio*.”<sup>129</sup>

But the fiercest confrontations concerned banks. The prospect that an unelected, self-governing elite might wield substantial power by controlling money and credit prompted deep anxieties over the creation of “government[s] within a government” that would challenge the supremacy of popular authority.<sup>130</sup> The most intense struggle occurred in Pennsylvania, where state representatives waged a lengthy and protracted battle over the charter of the Bank of North America.<sup>131</sup> Critics feared the Bank’s seeming independence from government, anxious that the corporation would soon “dictate to the legislature” which laws to enact.<sup>132</sup> William Findley, the Bank’s primary opponent, attacked arguments that the Bank’s charter could not be altered once granted. The “supreme legislative power of every community,” he insisted, “necessarily possesses a power of repealing every law inimical to the public safety.”<sup>133</sup>

These contests over corporate charters in the 1780s and 1790s resolved little. They augured similar struggles that would persist well into the nineteenth century.<sup>134</sup> But this period set the frame for those later conflicts, which would also be cast as fights over sovereignty, where corporations’ assertions of autonomy were read as a challenge and an affront to state legislative control. Both corporations and states possessed written documents that conferred powers and rights, but increasingly only state legislatures could claim the mantle and authority of popular sovereignty, while corporate claims became an antidemocratic form of privilege.

### B. Localism

Revolutionary resistance to parliamentary authority rested in part on an ideology of localism. “Whig theory of law,” historian Hendrik Hartog has observed, “was grounded . . . in a perception of the autonomy of local legal institutions as

129. *Id.*

130. Maier, *supra* note 110, at 65-69 (emphasis omitted); see also BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 54-56 (1957).

131. For background on this debate, see ANDREW SHANKMAN, *CRUCIBLE OF AMERICAN DEMOCRACY: THE STRUGGLE TO FUSE EGALITARIANISM & CAPITALISM IN JEFFERSONIAN PENNSYLVANIA* 2-5 (2004).

132. *DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, ON THE MEMORIALS PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULLING THE CHARTER OF THE BANK* 58 (Mathew Carey ed., Phila., Carey & Co. Seddon & Pritchard 1786).

133. *Id.* at 65.

134. See *infra* Section IV.A.

independent recipients of constitutional power and authority . . . .<sup>135</sup> The Revolution's exigencies encouraged this devolution; as centralized institutions collapsed, localities increasingly took on the responsibilities of war making, leading them to be viewed as "sovereign entities."<sup>136</sup> But in the post-Revolutionary period, as states remade inherited institutions of governance, localism came under attack. Often, these changes came through reforms that sought to make local institutions more democratic by making them more responsive to the will of the people.<sup>137</sup> Yet, because of the supposed congruence between the "people" and their self-proclaimed representatives—the state legislatures—these transformations often asserted state legislative supremacy over and against older competing claims of local authority. This struggle between conceptions of state and local sovereignty occurred across multiple institutions of local governance: courts, municipalities, juries, and mobs.

At the time of the Revolution, local county courts—long the heart of colonial legal systems—retained considerable authority in nearly every American colony.<sup>138</sup> These courts, staffed by justices of the peace (JPs) who were often unelected local notables with no formal legal training, combined adjudication with responsibilities of administrative governance.<sup>139</sup> The justice they administered was what historian Laura Edwards refers to as the "peace," rooted in customary community norms rather than formal statutes or conceptions of individualized rights.<sup>140</sup>

Yet precisely because of their power in a common law system, these judges, particularly when unelected, posed a threat to conceptions of popular sovereignty centered in the legislature.<sup>141</sup> As a result, throughout the late eighteenth and into the early nineteenth century, new state governments waged a sustained

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135. Hendrik Hartog, *Losing the World of the Massachusetts Whig*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW*, *supra* note 52, at 143, 152.

136. OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861*, at 2 (1947).

137. See Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 *LAW & SOC. INQ.* 788, 810 (2011) ("[M]uch of the impetus for reform that came from state lawyers, at least in the years immediately after independence, was itself about making state and local institutions *more* consonant with democracy and popular sovereignty . . .").

138. On the history and significance of the county courts, see HOFFER, *supra* note 45, at 26-27; Bilder, *supra* note 45, at 91; and Henretta, *supra* note 83, at 556-61, 579.

139. HOFFER, *supra* note 45, at 26-27.

140. LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 3-10, 102-132 (2009).

141. See Theodore W. Ruger, "A Question Which Convulses a Nation": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 *HARV. L. REV.* 826 (2004).

campaign to remake or even abolish these older institutions. This process began in Virginia, where petitioners assailed county courts as “far from being the Representatives of the People.”<sup>142</sup> In 1788, the state legislature, urged by staunch republicans like Thomas Jefferson, established a new separate system of district courts overseen by legislatively appointed judges.<sup>143</sup> The aim was to displace the local courts that these republicans saw as the purview of unlettered gentry unfamiliar with legal technicalities. They succeeded; according to historians, the act destroyed the political influence of JPs and empowered the district courts, especially because litigants could remove any dispute involving more than thirty dollars to the new courts.<sup>144</sup> A similar process unfolded in 1780s Massachusetts, where the state legislature for the first time intervened in the county court system, assuming “most all of the discretionary and rule-making authority of local courts.”<sup>145</sup> In 1804, the state legislature stripped the courts of general sessions of their judicial role altogether and transformed them into what Hartog described as “mere administrative agencies” exercising delegated legislative power.<sup>146</sup> “[T]here was no place for a discretionary problem solver that was not tied to the sovereign people of the whole Commonwealth,” Hartog concluded.<sup>147</sup> “The ‘public’ for the actions of the court [of general sessions] had become, in effect, the General Court” – the Massachusetts state legislature.<sup>148</sup>

The timeline in North and South Carolina was slower according to Laura Edwards’s careful study of those states’ local court records.<sup>149</sup> Nonetheless, a coterie of post-Revolutionary elite lawyers sought to “centralize the operation of government to regularize the creation and dissemination” of state-created law.<sup>150</sup>

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142. Henretta, *supra* note 83, at 588 (quoting a petition by George Mason).

143. Act of Dec. 22, 1788, ch. 67, 1788 Va. Acts 29.

144. See ROEBER, *supra* note 50, at 201-22; Christopher Doyle, *Judge St. George Tucker and the Case of Tom v. Roberts: Blunting the Revolution’s Radicalism from Virginia’s District Courts*, 106 VA. MAG. HIST. & BIOGRAPHY 419 (1998). Challenging A.G. Roeber, Jessica Lowe has recently argued that the creation of the district courts served to make “state justice more local,” and she observes that many of the new state officials were the same county officials wearing new hats. JESSICA K. LOWE, *MURDER IN THE SHENANDOAH: MAKING LAW SOVEREIGN IN REVOLUTIONARY VIRGINIA* 97-102, 183-85 (2019). But this narrative arguably highlights the significance of the shift traced here: in Lowe’s telling, the key difference between the new and old court system is that the former were explicitly *state* institutions that tied local elites to the state.

145. Hartog, *supra* note 135, at 163; *see also* Hartog, *supra* note 82, at 314, 324-29 (discussing the shift from empowered local courts to administrative county government).

146. Hartog, *supra* note 135, at 163-64.

147. Hartog, *supra* note 82, at 324.

148. *Id.*

149. EDWARDS, *supra* note 140, at 5-10.

150. *Id.* at 8.

By the end of Edwards's period of study, these lawyers had increasingly succeeded in displacing the world of customary legal ordering in favor of "state law," a set of statutory rules based on individual-rights-bearing citizens that "competed with localized processes" for authority.<sup>151</sup>

Similar dynamics marked the contest between legislatures and municipalities in the post-Revolutionary era. The question of municipal authority closely paralleled the issues surrounding corporations more generally, of which cities were an important subset. But the drive to make municipalities more responsive to the people—and increasingly subordinate to the state legislature—was arguably even stronger in the context of municipalities because of their direct role in governance. Although this contest would involve a long and gradual transformation, the ideology that undergirded the argument for state legislative supremacy emerged very soon after the Revolution.

In 1792, for instance, a writer styled as "A Town-Born Child" assailed a recent critic who had argued that a plan to reform Boston's government would "be the destruction of the Sovereignty of the town."<sup>152</sup> The Town-Born Child found this puzzling:

We wish to learn what is meant by the *Sovereignty of a town*—Sovereignty is an *uncontroulable absolute power*: But a town is a mere creature of legislative authority, and this authority is again a mere creature of the Sovereignty of the people's in a whole State or Commonwealth; and so a town can have nothing about it like Sovereign power; it is a corporation holding certain privileges, regulated by law, and granted by the authority of the supreme power and Sovereignty of the State.<sup>153</sup>

In the coming years, this argument would gain ascendancy throughout the United States. By 1802, New Yorkers were proclaiming their municipal government a "child and creature of the state" and thus subject to state legislative interference at will.<sup>154</sup> Increasingly, the premise that municipal authority was delegated state power—rather than grounded in "[c]ustom, tradition, and local authority," as one historian put it—became a staple of the law of the United States.<sup>155</sup>

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151. *Id.* at 282.

152. *Miscellany for the Centinel*, COLUMBIAN CENTINEL (Bos.), Feb. 4, 1792, at 165.

153. *Id.*

154. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 97 (1983).

155. *Id.* at 142.

Finally, the post-Revolutionary push against community institutions came to target juries and mobs, two traditional bodies of local power. This move was ironic because both had been central to colonial resistance to British authority during the imperial crisis. Juries were, in the words of one historian, an “adjunct of local communities which articulated into positive law the ethical standards of those communities,” and so were often free to decide both law and fact.<sup>156</sup> Their prominent role in Revolutionary resistance helps explain their protection within the Bill of Rights.<sup>157</sup> Mobs, although not protected within formal law, nonetheless enjoyed a quasi-legal status similarly based on their role in acting in “defense of the community.”<sup>158</sup>

Yet to many early Americans, both institutions were increasingly seen as opposed to state legislative supremacy. For juries, this shift meant diminishing their role to that of factfinder alone, while providing for a variety of alternate procedural mechanisms—special verdicts, jury instructions, and particularly judgments according to law and motions for new trials—that stripped them of control.<sup>159</sup> Mobs were now cast as undemocratic assaults on duly established popular government.<sup>160</sup> “[M]obs will never do—to govern states or command

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156. NELSON, *supra* note 52, at 169; *see also* John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, in *SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY* 152, 154 (David D. Hall et al. eds., 1984) (describing the colonists’ shift from “initial ambiguity to reverential acceptance” in their perspective on juries).

157. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81-118 (1998).

158. Maier, *supra* note 53, at 24; *see also* PAUL A. GILJE, *THE ROAD TO MOBOCRACY: POPULAR DISORDER IN NEW YORK CITY, 1763-1834*, at 5 (1987) (“For many Anglo-Americans in the mid-eighteenth century, then, popular disorder assumed a quasi legitimacy.”); *id.* at 10 (“The sense of solidarity implied in corporatism supplied the theoretical framework that allowed the mob to believe that it acted for the benefit of the community.”).

159. NELSON, *supra* note 52, at 165-74; Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 *NOTRE DAME L. REV.* 505, 515-31, 542-47 (1996); *cf.* MANN, *supra* note 52, at 69-81 (tracing a similar transformation in Connecticut but several decades earlier).

160. *See, e.g.*, Maier, *supra* note 53, at 35 (“[O]perative sovereignty, including the right finally to decide what was and was not in the community’s interest, and which laws were and were not constitutional, [was to] be entrusted to established governmental institutions. The result was to minimize the role of the people at large, who had been the ultimate arbiters of those questions in English and American Revolutionary thought.”); *see also* PAUL A. GILJE, *RIOTING IN AMERICA* 59 (1996) (“[By the end of the 1790s,] [t]hose in government now claimed that they represented the people and that politics out of doors was no longer necessary. The logic of democracy was pushing Americans to a new and different world.”); GILJE, *supra* note 158, at 92 (“With the roots of government newly anchored in the popular will, the guardians of social order possessed a new weapon to wield against violators of the community’s peace.”).

armies,” John Adams observed in early 1787, condemning “Riots, Routs & unlawful assemblies.”<sup>161</sup>

All these assaults on localist institutions did not mean that local governments became irrelevant; on the contrary, historians have demonstrated that they continued to exercise considerable police powers well into the nineteenth century.<sup>162</sup> The key issue in the clash between states and localities was not the *extent* of government authority but its legitimacy and source—the question, in short, of sovereignty. Pre-Revolutionary thought emphasized localism because it rested on an older, early modern logic of uneven and customary law rooted in a particular place and community of people. The ascendant post-Revolutionary thought invoked the “people,” too, but the people as an abstract, homogeneous collective, stripped of particularities, who had empowered state legislatures as the institutional expression of their will. This vision of state legislative supremacy did not displace preexisting ideas immediately; it would require a longer struggle to overcome older localist logics.<sup>163</sup> Nonetheless, the ideology of unitary state sovereignty gained currency as a potent tool to argue that localist institutions—local courts, municipalities, juries, mobs—previously seen as closely tied to the people were, in fact, undemocratic. Paradoxically, a vision of authority as bottom up had helped build an ideology in which power flowed from the top down, as states claimed supremacy by virtue of their purported monopoly on democratic representation.

### C. *Native Nations*

Even though their nation was born of an anti-imperial revolt, Anglo-Americans freely spoke of the new United States as an empire.<sup>164</sup> The term captured their sense of the new nation’s immense scale, which extended to the Mississippi River. But the term’s present-day meaning was also apt, since the United States from the beginning sought to assert authority over Native peoples who never consented to their incorporation in the nation’s territory and who were excluded from Anglo-American institutions of governance.

States early on became the principal proponents and actors in the new nation’s colonial project of dispossessing Native peoples. All of the country’s vast

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161. Letter from John Adams to Benjamin Hichborn (Jan. 27, 1787), in 18 PAPERS OF JOHN ADAMS 563, 564 (Gregg L. Lint et al. eds., 2016).

162. This is the central argument of WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

163. See, e.g., *supra* notes 149–151 and accompanying text.

164. See JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* (2002) (surveying this rhetoric and exploring its meaning).

expanse ostensibly fell within the borders of existing states, many of which asserted dubious charter rights extending all the way to the Pacific. Such claims were laughable: at the time of the Revolution, state sovereignty in the enormous regions west of the Appalachians, where mere handfuls of Anglo-Americans lived, was purely notional. Native nations unquestionably remained this territory's most consequential sovereigns.

Yet this reality did little to halt states' assertions of sweeping territorial sovereignty. Two of the largest states, Virginia and North Carolina, included provisions in their new constitutions that codified their charter boundaries.<sup>165</sup> Their only acknowledgments that their supposed territory was already inhabited were constitutional provisions prohibiting private purchases of Indian lands—restrictions that further empowered state governments and demonstrated their intent to claim broad authority to regulate their entire territories.<sup>166</sup>

Such provisions prefigured what would become an aggressive effort by state legislatures to deploy the new ideology of popular sovereignty to assert authority over the Native nations within their borders.<sup>167</sup> The first rumblings over this question came during the drafting of the Articles of Confederation, when several states objected to proposals that would have granted the national government sole authority over Indian affairs.<sup>168</sup> The final document instead codified ambiguous language that barred the national government's authority in Indian affairs from "infring[ing]" on each state's "legislative right . . . within its own limits" and from regulating Indians who were "members of any of the states."<sup>169</sup>

States quickly seized on this provision as authorizing expansive control over the Native nations within their borders. Their principal aim was to divest tribes of as much land as possible in order to placate their property-hungry citizens. But the states' vision also swept much more broadly: it proposed nothing less

165. See N.C. CONST. of 1776, A Declaration of Rights, &c, art. XXV ("[A]ll the territories, seas, waters, and harbours, with their appurtenances . . . agreeable to the said Charter of King Charles, are the right and property of the people of this State, to be held by them in sovereignty . . ."); VA. CONST. of 1776, para. 42 ("The western and northern extent of Virginia shall, in all other respects, stand as fixed by the Charter of King James I.").

166. See N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. XLII; VA. CONST. of 1776, para. 42.

167. States seemed untroubled by the disparity, obvious to present-day readers, between the assertion of territorial authority in fundamental documents that invoked the name of the "people" and the exclusion of Native peoples from any meaningful participation as part of that "people." See generally AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 99-175 (2010) (noting the coexistence of republicanism and claims to imperial authority in the early republic).

168. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1012-13 (2014).

169. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

than eliminating the rights to sovereignty and self-governance that Native peoples had enjoyed under the British Empire.<sup>170</sup> States would instead assume firm control over Natives within their borders, in large part by transforming them from members of sovereign nations into detribalized subjects. New York should abandon holding treaties and cease referring to the Haudenosaunee (Iroquois) tribes as nations, one New York congressman advocated.<sup>171</sup> Native peoples, he urged, should be regarded simply as state “[m]embers,” and he would negotiate with them “as if I was actually transacting Business with the Citizens.”<sup>172</sup>

Similar arguments appeared to the south, as states sought to use their new constitutions as weapons to dispossess Natives. In Georgia, state officials badgered a small delegation of Creeks into signing a treaty, the first article of which stated that “the said Indians . . . within the limits of the State of Georgia, have been and now are members of the same (since the day and date of the Constitution of the said State of Georgia).”<sup>173</sup> The state legislature also established new counties in unpurchased Indian territory without any acknowledgment of existing Native sovereignty.<sup>174</sup> In North Carolina, the state legislature dispensed with treaties altogether: it enacted a statute that set aside a small portion of land for the Cherokees and then opened the rest for settlement by the state’s citizens.<sup>175</sup> The logic, according to one observer, was that the state “claim[s] all the Land westward according to their bill of rights and . . . the Indians are only tenants at will.”<sup>176</sup>

In the short term, these state claims were self-defeating: states’ reckless disregard of Native sovereignty badly misread the balance of power and threatened

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170. James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, in *THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS* 197, 199-200 (Jack P. Greene ed., 1987).

171. James Duane’s *Views on Indian Negotiations* (July/Aug. 1784), in 18 *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES & LAWS, 1607-1789: REVOLUTION AND CONFEDERATION* 299, 299-300 (Alden T. Vaughan & Colin G. Calloway eds., 1994).

172. *Id.*

173. Articles of a Treaty Concluded at Galphinton, Nov. 12, 1785, reprinted in *S. MISC. DOC. NO. 25*, at 6, 6 (1855); see also Letter from Benjamin Hawkins to Thomas Jefferson (June 14, 1786), in 9 *THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES* 640, 641 (Julian P. Boyd ed., 1954) (recounting that Georgia “will not allow that the Indians can be viewed in any other light than as members thereof”).

174. CHARLES F. HOBSON, *THE GREAT YAZOO LANDS SALE: THE CASE OF FLETCHER V. PECK* 26 (2016).

175. Act of Nov. 15, 1777, ch. 1, reprinted in *THE ACTS OF ASSEMBLY OF THE STATE OF NORTH CAROLINA* 3-7 (New Bern, N.C., James Davis 1778).

176. Letter from Benjamin Hawkins to Thomas Jefferson, *supra* note 173, at 641.

wars that neither the states nor the federal government could afford to fight.<sup>177</sup> The outcome, as I have explored elsewhere, was the adoption of a Constitution that codified exclusive federal authority over Indian affairs.<sup>178</sup> But even after ratification, states like New York and Georgia continued to insist on their sovereign rights to govern their entire territories, including the Native peoples within them.<sup>179</sup> The question of Native status within a federalist system, in short, persisted and would later reemerge with even greater force.

Although little discussed among present-day public law scholars, these early fights over Native authority reveal much about federalism's nature during its early, tentative development. In theory, federalism as an ideology of divisible sovereignty might have proved a boon for Native nations: if sovereignty did not have to be unitary, then it was possible for the United States to acknowledge Native sovereignty while also defending its paramount sovereignty. In fact, the legal status that the Washington Administration envisioned for Native nations bore some similarity to the position of states in the new constitutional order.<sup>180</sup> But early American federalism as actually practiced created little conceptual space for Native sovereignty. If anything, it foreclosed it, as states invoked the legitimacy supposedly conferred by their new constitutions to claim supremacy throughout their vast territories, even over peoples who had no hand in these documents' creations. Once again, federalism facilitated new and more aggressive claims of sovereignty against states' competitors.

#### D. Secessionists

Natives were not the only people in the states' western territories. After the Revolution, the westward trickle of Anglo-American settlers across the Appalachians became a torrent. The "Spirit of Emigration rages to an immense degree," reported one observer.<sup>181</sup> "[T]he old States must certainly be drained of their

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177. See Ablavsky, *supra* note 168, at 1019-33.

178. Ablavsky, *Indian Commerce Clause*, *supra* note 19, at 1039-45.

179. *Id.* at 1045-50.

180. See *id.* at 1076-77.

181. Letter from Josiah Harmar to Henry Knox (May 8, 1789) (on file with the University of Michigan Clements Library, 29 Josiah Harmar Papers, Letterbook F).

inhabitants.”<sup>182</sup> By the late 1780s, the so-called “western waters,” previously nearly devoid of white residents, contained tens of thousands of U.S. citizens.<sup>183</sup>

The future of these regions was one of the most important constitutional questions in the early United States. Nearly all Anglo-Americans believed that, at some point, new states would be carved from the existing ones.<sup>184</sup> Both North Carolina and Virginia’s constitutions provided that new states could be created in the West with the consent of the existing state’s legislature.<sup>185</sup> In 1784, Congress, having earlier urged states to cede their western lands to the federal government, created its first plan to divide transferred lands into future states.<sup>186</sup> But while many states gave up their lands, others—including North Carolina, Georgia, and Virginia—retained jurisdiction and ownership over large western territories.<sup>187</sup>

The Anglo-Americans living in these regions rarely welcomed the continued authority of distant state governments. In their view, states provided few services—failing to establish courts or provide protection against Native nations angered by state land grabs—even as state legislatures happily pillaged these regions through sale or grant to repay Revolutionary War debts.<sup>188</sup> The result was widespread discontent with state rule.

This anger found institutional form in widespread invocations of popular sovereignty and the right to self-determination. In particular, the broad language of the Declaration of Independence provided a powerful intellectual tool for those who argued that inadequate protection justified separation. But, notwithstanding occasional flirtation with a British or Spanish alliance, these disgruntled western settlers did not seek secession from the United States.<sup>189</sup> Rather, they sought to fulfill a promise that was also widespread in Revolutionary

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182. *Id.*

183. See, e.g., RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, ACCORDING TO “AN ACT PROVIDING FOR THE ENUMERATION OF THE INHABITANTS OF THE UNITED STATES;” PASSED MARCH THE FIRST, ONE THOUSAND SEVEN HUNDRED AND NINETY-ONE 51, 56 (Phila., J. Phillips 1793) (recording 35,691 non-Native inhabitants in present-day Tennessee and 73,677 in Kentucky).

184. See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787, at 149-72 (1983).

185. N.C. CONST. of 1776, A Declaration of Rights, &c, art. XXV; VA. CONST. of 1776, para. 42.

186. 26 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 92, at 274-79.

187. See ONUF, *supra* note 184, at 17-20.

188. See, e.g., KEVIN T. BARKSDALE, THE LOST STATE OF FRANKLIN: AMERICA’S FIRST SECESSION (2009).

189. On secessionism in the early trans-Appalachian West, see François Furstenberg, *The Significance of the Trans-Appalachian Frontier in Atlantic History*, 113 AM. HIST. REV. 647, 663-65

thought. “[A]ll men have a natural inherent right,” read the 1776 Pennsylvania Bill of Rights, “to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.”<sup>190</sup> Western settlers interpreted the term “state” in such promises in the domestic sense – as meaning that they possessed the right to become a new state *within* the United States.

For settlers angered by state governments’ perceived neglect, the prospect of separate statehood *within* the union was irresistible. These would-be state builders were, after all, merely hastening a process that everyone conceded must take place eventually. During and after the Revolution, then, existing states confronted a rash of secessionist movements within their territories. As one congressman reported in 1782, “[T]he Spirit of making new States is become epidemic.”<sup>191</sup>

The process began with Vermont, ostensibly part of New York. Seeking to protect land titles derived from New Hampshire, Vermont’s residents quickly grasped the emancipatory potential of Revolutionary ideals and, in 1777, gathered to draft a constitution.<sup>192</sup> The resulting document was explicit about its intellectual foundations: it began with a near-verbatim copy of the Declaration of Independence, although it reworked the litany of complaints to attack abuses by the “legislature of *New-York*” rather than the King.<sup>193</sup> The proclamation ended by insisting that any new government in Vermont must be “derived from, and founded on, the authority of the people only” – but, lest this be understood as a claim to complete independence, the sentence finished, “agreeable to the direction of the honorable American Congress.”<sup>194</sup>

Vermont’s status remained uncertain well into the 1780s, as New York strenuously maintained its claim and Congress dithered.<sup>195</sup> Yet what Thomas Jeffer-

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(2008). See also Sylvia L. Hilton, *Loyalty and Patriotism on North American Frontiers: Being and Becoming Spanish in the Mississippi Valley, 1776-1803*, in *NEXUS OF EMPIRE: NEGOTIATING LOYALTY AND IDENTITY IN THE REVOLUTIONARY BORDERLANDS, 1760S-1820S*, at 8, 8-38 (Gene Allen Smith & Sylvia L. Hilton eds., 2010) (discussing the creation of a spirit of Spanish loyalty and patriotism in the West Florida and “Luisiana” colonies).

190. PA. CONST. of 1776, art. XV.

191. Letter from Hugh Williamson to Alexander Martin (Nov. 18, 1782), in 19 *LETTERS OF DELEGATES TO CONGRESS, 1774-1789*, at 397, 397 (Paul H. Smith et al. eds., 1992).

192. MICHAEL A. BELLESILES, *REVOLUTIONARY OUTLAWS: ETHAN ALLEN AND THE STRUGGLE FOR INDEPENDENCE ON THE EARLY AMERICAN FRONTIER* (1993); ONUF, *supra* note 184, at 129-44.

193. VT. CONST. of 1777, pmbl.

194. *Id.*

195. ONUF, *supra* note 184, at 129-44.

son labeled the “Vermont doctrine” — “that any portion of what had been an integral state had . . . a right to assume a separate existence, and to govern themselves” — spread to other regions.<sup>196</sup> One congressman complained that the would-be state “furnish[ed] a fatal example to the Union,” such that “the desire of dismembering States prevails in so great a degree among the citizens of the Union.”<sup>197</sup> There were soon rumblings of secession in the so-called Kentucky district of Virginia and in the eastern townships of Massachusetts, which would, much later, become the state of Maine.<sup>198</sup>

But the most determined push for secession appeared in western North Carolina, beyond the Smoky Mountains, a region that the white settlers now proclaimed as the new state of Franklin.<sup>199</sup> Like Vermont, Franklin drew explicit support from Revolutionary principles of self-determination. During the debate over separation, one delegate literally drew a copy of the Declaration of Independence from his pocket to invoke its authority; the convention delegates then immediately voted in favor of independence.<sup>200</sup> These justifications soon appeared in the would-be state’s new constitution, which, like Vermont’s, was modeled on the Declaration and contained a paean to popular sovereignty.<sup>201</sup> Franklin’s leaders also penned petitions to Congress and to North Carolina vindicating their project, appealing to the “world . . . to judge whither we ask more than free people ought to claim agreeable to Republican principles, the grand foundation whereon our American fabric now stands.”<sup>202</sup> Outside of formal documents, some Franklinites put their claim to self-governance more boldly. “[T]hey Had Knowledge Enough to Judge for themselves,” one Franklin booster

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196. Letter from Thomas Jefferson to Edmund Randolph (Feb. 15, 1783), in 6 PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 173, at 246, 247-48.

197. Letter from William Grayson to Beverley Randolph (June 12, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 191, at 327, 327.

198. See STEPHEN ARON, HOW THE WEST WAS LOST: THE TRANSFORMATION OF KENTUCKY FROM DANIEL BOONE TO HENRY CLAY 102-123 (1996) (recounting Kentucky’s secessionist efforts); ALAN TAYLOR, LIBERTY MEN AND GREAT PROPRIETORS: THE REVOLUTIONARY SETTLEMENT ON THE MAINE FRONTIER, 1760-1820, at 109-14 (1990) (describing conflicts over Maine).

199. For a detailed history of Franklin, see BARKSDALE, *supra* note 188.

200. *Id.* at 54; SAMUEL COLE WILLIAMS, HISTORY OF THE LOST STATE OF FRANKLIN 30 (1933).

201. The Constitution of the State of Franklin, in 22 THE STATE RECORDS OF NORTH CAROLINA 661, 661-670 (Walter Clark ed., 1907).

202. Petition of the Inhabitants of the Western Country, in 22 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 201, at 705, 707.

announced, “that they should not ask North Carolina Nor no other person how they ware to B. Governrd.”<sup>203</sup>

Outside observers feared the decentralizing consequences of such a broad and radical concept of self-determination. North Carolina’s governor denounced the Franklinites’ “rash and irregular conduct,” which, he warned, established “a precedent . . . for every District and even every County of the State to claim the right of separation and Independency for any supposed grievance of the Inhabitants, as caprice, pride and ambition shall dictate at pleasure.”<sup>204</sup> Neighbors in the enormous, unwieldy state of Virginia were equally concerned. “[I]f a doctrine of this sort is allowed,” warned Virginia Congressman William Grayson, “it will go directly to the destruction of all government for if the right exists in the first instance it may be carried so far as to reduce a State to the size of a county or a parish.”<sup>205</sup> Even the arch-republican Jefferson, frankly admitting his anxieties for Virginia, feared that “our several states will crumble to atoms by the spirit of establishing every little canton into a separate state.”<sup>206</sup>

Yet fears about the fragmentation of political authority could not justify why state governments alone possessed the legitimate right to govern. Secessionists’ opponents offered what they thought to be a compelling answer: the legitimate authority of the state constitutions. North Carolina’s governor described Franklin as a “self-created power and authority unknown to the Constitution of the State, and not sanctified by the Legislature.”<sup>207</sup> Virginia’s legislature enacted a law making it an act of “high treason” to attempt to establish “any government separate from or independent of the government [sic] of Virginia.”<sup>208</sup> The statute’s preamble justified the law by insisting that the state’s “constitution, sovereignty, and independence . . . should at all times be maintained and supported.”<sup>209</sup> At their core, these arguments rested on the premise that the state constitutions had made the state legislatures the sole repositories of popular sovereignty.

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203. Letter from Joseph Martin to Edmund Randolph, Governor of Va. (Mar. 25, 1787) (on file with the Tennessee State Library and Archives, Cherokee Collection).

204. Alexander Martin, A Manifesto, in 22 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 201, at 642, 645.

205. Letter from William Grayson to Beverley Randolph, *supra* note 197, at 327.

206. Letter from Thomas Jefferson to Richard Henry Lee (July 12, 1785), in 8 THE PAPERS OF THOMAS JEFFERSON: MAIN SERIES, *supra* note 173, at 286, 286-87.

207. Martin, *supra* note 204, at 645.

208. Act of Oct. 17, 1785, ch. X, reprinted in 12 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 9, 41 (William Waller Hening ed., Richmond, Va., George Cochran 1823).

209. *Id.* The statute also criminalized advocating for such a state in writing or speech. *Id.*

This claim, however, was difficult to sustain against the secessionists, who questioned why *their* constitutions and legislatures did not enjoy equal right to speak on the people's behalf. With neither side willing to concede the other's legitimate authority, these contests over sovereignty threatened to devolve into violence. Virginia's statute authorized use of the militia to suppress would-be secessionists,<sup>210</sup> while Vermonters spoke openly about using force to repel any effort by New York to assert jurisdiction.<sup>211</sup> In North Carolina, the prospect of a "civil war" was not merely hypothetical.<sup>212</sup> In the 1788 Battle of Franklin, armed pro- and antistatehood parties clashed, leaving three dead.<sup>213</sup>

These conflicts over secession, coming in the midst of the debates over the drafting and ratification of the Federal Constitution, demonstrated deep tensions in how popular sovereignty would function. Nearly everyone, including the leaders of existing states, acknowledged that the vast western expanses must eventually become separate states. Moreover, proponents of Vermont, Kentucky, and Franklin considered themselves, with some justification, the heirs of the Revolution's principle of self-determination: they, too, could point to constitutive written acts of popular sovereignty that granted them legitimate authority. Yet, despite these compelling arguments, New York, Virginia, and especially North Carolina fought fiercely to suppress any suggestion that separation could occur without their approval and consent. Their persistence arguably had little to do with any deep desire to govern these territories – which, in the 1790s, they would readily relinquish. At stake, rather, was the question of sovereignty. State charters and constitutions, state leaders insisted, elevated their legislatures to the position of ultimate authority over the state's territory, however broadly and hazily defined. Any separation could take place only on the legislature's terms.

### *E. Shays's Rebellion*

On August 22, 1786, a convention of delegates elected in town meetings across Hampshire County met in Hatfield, Massachusetts.<sup>214</sup> In its first act of business, the convention "voted that this meeting is constitutional."<sup>215</sup> The delegates then drafted a list of seventeen different grievances, most focused on an

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210. *Id.* at 42.

211. ONUF, *supra* note 184, at 129-44.

212. Letter from Richard Dobbs Spaight to James Iredell, Sr. (July 3, 1787), in 3 THE PAPERS OF JAMES IREDELL 283, 285 (Donna Kelly & Lang Baradell eds., 2003).

213. BARKSDALE, *supra* note 188, at 133-35.

214. *Convention*, HAMPSHIRE HERALD (Springfield, Mass.), Sept. 5, 1786, at 4.

215. *Id.*

unresponsive, undemocratic, and distant state legislature, as well as a legal system they regarded as hostile to their interests.<sup>216</sup>

Although similar county conventions were held across Massachusetts in the summer of 1786, the Hampshire meeting yielded the most immediate results.<sup>217</sup> One week after the convention, hundreds of men, many armed, gathered in the town of Northampton. Conducting themselves with “sobriety and good order”<sup>218</sup> and marching to fife and drum, they successfully demanded that court business cease until their grievances were redressed.<sup>219</sup> Soon, similar assemblies were closing courts across the state.

This movement ultimately became known as Shays’s Rebellion – the label affixed to it by its opponents, who used the name of one of its reluctant leaders. But the movement’s participants used different terms, referring to themselves as the Regulators or sometimes “a body of the people.”<sup>220</sup> As these names suggest, the protestors’ critique of state authority drew on multiple understandings of sovereignty in the era’s thought. In their use of town meetings and organized county conventions to legitimate their grievances, the Regulators invoked the longstanding link between localism and popular sovereignty.<sup>221</sup> In their armed yet somber mass mobilization, the protestors harked back to the established role of mobs and militia in expressing community opinion.<sup>222</sup> And in their attack on the failure of distant elites in Boston to represent their interests, the insurgents echoed the lines of criticism that, in Franklin, Vermont, and Kentucky, culminated in full-blown demands for independent statehood.<sup>223</sup>

The movement’s opponents, however, did not recognize any of these sources as a basis for legitimate authority. To their minds, there was a single source of sovereignty in Massachusetts, the state constitution, which vested authority and

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216. *Id.*

217. Shays’s Rebellion has spawned a large historical literature. For key recent contributions, see generally SEAN CONDON, *SHAYS’S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA* (2015); IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (Robert A. Gross ed., 1993); LEONARD L. RICHARDS, *SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE* (2002); and DAVID P. SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980).

218. *Springfield, Sept. 5*, HAMPSHIRE HERALD (Springfield, Mass.), Sept. 5, 1786, at 3.

219. RICHARDS, *supra* note 217, at 9–10.

220. CONDON, *supra* note 217, at 57. As in North Carolina, the term “Regulators” harked back to seventeenth-century English precedents. See *supra* note 88 and accompanying text.

221. See *supra* text accompanying notes 135–155.

222. See *supra* text accompanying notes 158–162.

223. See *supra* Section II.D.

the right to speak on behalf of the people in a single institution, the state legislature. “County Conventions are a body unknown to the constitution of this commonwealth,” wrote one author outraged by the Hampshire Convention.<sup>224</sup> “[W]hen they assume to give law or direction to the people, or to any branch of government, they usurp the lawful powers of the legislature and are guilty of injuring the majesty of the people.”<sup>225</sup> The conventions’ actions similarly incensed a rising young lawyer named Fisher Ames. “[T]he supreme power is really held by the legal representatives of the people,” Ames insisted.<sup>226</sup> “[C]ounty conventions and riotous assemblies of armed men shall no longer be allowed to legislate, and to form an *imperium in imperio* . . . .”<sup>227</sup>

Ultimately, these critics’ views prevailed, although only after much difficulty. The national government sought to raise troops to suppress the protests, but it lacked the funds to do so.<sup>228</sup> Unable to rely on the militia, Massachusetts’s governor was reduced to depending on wealthy Bostonians to fund a force of eastern militia, which eventually suppressed the insurgents.<sup>229</sup> Although most participants were pardoned, several leaders were sentenced to death, with two eventually hanged for their role in the insurgency.<sup>230</sup>

Shays’s purported rebellion encapsulated the confrontations over sovereignty that marked the critical period of the 1780s. The legal principles the Regulators invoked were not new: they rested on understandings of authority as local, plural, and institutionally grounded that were commonplace, even banal, in early America—ideas that had helped justify Revolutionary resistance.<sup>231</sup> But these concepts were at odds with a growing ideology of legislative supremacy grounded in popular sovereignty. The possibility that other institutions might legitimately speak for the people panicked state leaders. Such principles would act “in Subversion of all order and government,” opined the Massachusetts legislature, the General Court, eagerly defending its status as the source and arbiter of both.<sup>232</sup>

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224. An Old Republican, *Number 1*, HAMPSHIRE HERALD (Springfield, Mass.), Sept. 5, 1786, at 1.

225. *Id.*

226. FISHER AMES, LUCIUS JUNIUS BRUTUS (1786), reprinted in 2 WORKS OF FISHER AMES: WITH A SELECTION FROM HIS SPEECHES AND CORRESPONDENCE 91, 94 (Seth Ames ed., Bos., Little, Brown & Co. 1854) [hereinafter WORKS OF FISHER AMES].

227. *Id.*

228. RICHARDS, *supra* note 217, at 15-16.

229. *Id.* at 23-26, 31-32.

230. *Id.* at 36-42.

231. See *supra* Part I.

232. Declaration of the General Court That a Rebellion Exists (1787).

Anxiety over events in Massachusetts extended well beyond the state. As has been well documented, the insurgency strengthened calls for a stronger national government to replace the ineffectual Continental Congress and helped draw George Washington from retirement to preside over the Constitutional Convention.<sup>233</sup> The specter of Daniel Shays came to haunt both the Constitution's drafting and the ensuing debates over ratification.

But the lessons early Americans drew from events in Massachusetts were more complicated than a simple story about the shortcomings of a weak national government. The county conventions, after all, said almost nothing about national power; they focused their ire on the *state* legislature and the state constitution. The argument for a stronger federal government in response to Shays's Rebellion rested on the assumption that such a government would bolster and protect *states* from the competing sources of authority invoked by the insurgency. "It is time to render the federal head supreme in the United States," Fisher Ames opined in one of his attacks on the insurgents.<sup>234</sup> "It is also time to render the general court supreme in Massachusetts."<sup>235</sup> This linkage persisted in the ensuing Constitutional Convention, producing a document that arguably sought to accomplish *both* of Ames's goals.

### III. CONSTITUTIONALIZING DUAL SOVEREIGNTY

Two accounts dominate interpretations of federalism and the Constitution's creation. One is nationalist: it emphasizes how the document's drafters sought to repair the perversities of the Articles of Confederation by empowering the national government and, just as significantly, to place firm limits on state legislatures, which had seemingly run roughshod over minority rights, especially economic rights, in the years following the Revolution.<sup>236</sup> This account finds support most explicitly in the Supremacy Clause,<sup>237</sup> but also in Article I, Section

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233. See RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 18-19 (2009); HOLTON, *supra* note 104, at 148-61, 219-20; RAKOVE, *supra* note 20, at 33-34.

234. FISHER AMES, *CAMILLUS* NO. III (1787), *reprinted in* 2 *WORKS OF FISHER AMES*, *supra* note 226, at 106, 107.

235. *Id.*

236. For standard versions of this account, see BEEMAN, *supra* note 233, at 14-21; CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005); RAKOVE, *supra* note 20, at 39-56; and WOOD, *supra* note 4, at 404-29. For versions that portray this nationalist push as an effort to remove power further from popular control, see HOLTON, *supra* note 104; and MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016).

237. U.S. CONST. art. VI, cl. 2.

10 of the Constitution, which placed explicit limits on state power.<sup>238</sup> The other narrative stresses what would become known as states' rights. It emphasizes how the document ensured that the states retained sovereignty as a shield against possible federal overreach.<sup>239</sup> Here, the key provisions are primarily structural—the creation of a federal government with only “limited and enumerated powers,”<sup>240</sup> the role of the states in the makeup and selection of the Senate,<sup>241</sup> the intricacies of the amendment process,<sup>242</sup> and the Tenth Amendment, which was adopted to allay Antifederalist fears of “consolidation.”<sup>243</sup>

This Part offers a third way to interpret the relationship between the Constitution and federalism: that the document's drafters expanded federal authority in part to *protect* state sovereignty.<sup>244</sup> By 1787, the states' status as sovereigns was both well established by a decade of precedent and yet arguably still precarious. Although most delegates to the Convention assumed that sovereign states would remain the foundation for the new union, the most nationalist delegates argued for the abolition of the states altogether.<sup>245</sup> While these proposals gained little traction, they suggest that state sovereignty was not the unquestioned principle of constitutional thought it would later become. For most delegates, however, there was a more immediate threat to state authority: the risk, borne out by the

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238. *Id.* art. I, § 10.

239. For works in this vein, see KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009); THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, *POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* (2006); Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 *STAN. L. REV.* 969 (2008); and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *COLUM. L. REV.* 1 (1988).

240. See Richard Primus, *The Limits of Enumeration*, 124 *YALE L.J.* 576, 578 (2014) (noting this foundational principle while challenging the conclusion that it meaningfully limits federal power).

241. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

242. *Id.* art. V.

243. *Id.* amend. X.

244. This interpretation has appeared briefly in other works on the Constitution. See, e.g., RAKOVE, *supra* note 20, at 165 (“Far from sapping the vitality of the states, the formation of a more perfect Union capable of checking separatist movements, guaranteeing boundaries, and adjudicating territorial disputes could work to protect their authority against pressing threats.”). However, this perspective seems to have had little acknowledgment in legal scholarship.

245. See, e.g., 1 FARRAND'S RECORDS, *supra* note 115, at 24 (reporting remarks by Edmund Randolph proposing that the “idea of states should be nearly annihilated”); *id.* at 136 (recording remarks by George Read “agst. patching up the old federal System” and anticipating that the new government would “swallow all of [the states] up”); *id.* at 297 (recording Alexander Hamilton's argument that “we must establish a general and national government, completely sovereign, and annihilate the state distinctions and state operations”).

preceding decade, that internal dissensions might overthrow state power altogether.<sup>246</sup> Many delegates accordingly sought to create a federal government that would protect state power against these potential challengers.

Discussion of this aim did not supplant, but coexisted alongside, concerns about state and federal overreach, with all three issues swirling together during the debates at the Convention and during ratification. Like these other, better-known concerns, the desire for expanded federal authority to protect states arguably resulted in concrete constitutional provisions that manifested this purpose. Here, I focus on two in particular—what have come to be known as the Guarantee Clause<sup>247</sup> and the New State Clause.<sup>248</sup> Both were understood at the time to pledge federal support to states against their would-be competitors.

#### A. *Protecting State Power at the Constitutional Convention*

In April 1787, James Madison penned some notes on what he labeled the “Vices of the Political System of the United States.”<sup>249</sup> The document, which has become a touchstone for understanding the Constitutional Convention, made clear Madison’s hostility to the excesses of the state legislatures, cataloging at length the “multiplicity,” “mutability,” and “injustice” of state laws.<sup>250</sup> Yet tucked in among the list of vices was also his lament over the “want of Guaranty to the States of their Constitutions & laws against internal violence” in the Articles of Confederation.<sup>251</sup> Madison’s fear was that an armed and determined minority could “overmatch” the majority and place itself in authority.<sup>252</sup>

The immediate context for Madison’s remarks was likely Shays’s Rebellion, but others had used similar language in the context of other challenges to state authority. Writing even as the Convention sat, Virginia Congressman William Grayson insisted, “There can be no doubt but that the United States are bound to guaranty the limits of every State.”<sup>253</sup> His concern was the bevy of secessionist movements challenging state authority, but he, too, relied on the term “guarantee” to capture what he sought from a federal government—a promise noticeably lacking in the Articles of Confederation.

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246. See *infra* Sections III.A.1, .2.

247. U.S. CONST. art. IV, § 4.

248. *Id.* art. IV, § 3, cl. 1.

249. James Madison, Vices of the Political System of the United States, in 9 THE PAPERS OF JAMES MADISON 345, 348-57 (Robert A. Rutland & William M.E. Rachal eds., 1975).

250. *Id.* at 353-54.

251. *Id.* at 350.

252. *Id.*

253. Letter from William Grayson to Beverley Randolph, *supra* note 197.

Grayson and Madison's concern that the federal government should protect state authority and territory carried into the drafting of the Constitution. Ultimately, these anxieties produced two provisions – the Guarantee and New State Clauses – that the drafters believed enlisted federal authority to aid states against potential challenges to their authority.

### 1. *The Guarantee Clause*

At the time of the Constitution's drafting, the word "guarantee" carried some of the same connotations as it does now, but it was more firmly rooted in a legal context. It was ubiquitous in the era's documents of high diplomacy, as nations routinely guaranteed each other's lands and sovereignty in treaty provisions.<sup>254</sup> Noah Webster defined this sense of the word as "to secure to another, at all events, as claims, rights, or possessions."<sup>255</sup>

Proposals to codify some sort of "guaranty" by the federal government of the states in the constitutional text came on the first day of substantive discussion at the Convention. The Virginia Plan included a provision that the "Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State."<sup>256</sup> But the proposal's language slowly evolved. On June 11, one delegate objected to "guarantying territory" as a "perpetual source of discord," while James Madison sought to expand voluntary junction to include voluntary *partition*.<sup>257</sup> In response, the Convention unanimously agreed to alter the guarantee to encompass only "a Republican Constitution & its existing laws," eliminating all references to territory.<sup>258</sup>

As the delegates debated this new language, they read it principally as a *protection* for states, interpreting it in light of the earlier, more explicit proposals to codify state constitutions and territories.<sup>259</sup> The provision's "object," observed

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254. For a thorough discussion of this usage of the term, see Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602 (2018).

255. 1 NOAH WEBSTER, *Guaranty*, in AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (N.Y.C., S. Converse 1828).

256. 1 FARRAND'S RECORDS, *supra* note 115, at 22; *see also id.* at 28 (recording that the Virginia Plan included a "Guary. by the United States to each State of its Territory, etc.").

257. *Id.* at 202.

258. *Id.* at 194.

259. For fuller consideration of the debate over the Guarantee Clause, see WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 51-77 (1972); and Williams, *supra* note 254, at 641-46.

James Wilson, “is merely to secure the States agst. dangerous commotions, insurrections and rebellions.”<sup>260</sup> Haunting the entire debate was the specter of Shays’s Rebellion, to which one delegate explicitly referred.<sup>261</sup>

Yet not all the delegates embraced the idea that the federal government should intervene on behalf of the status quo. Some, expressing strong dislike for existing state laws and constitutions, objected to their inclusion in the clause.<sup>262</sup> Others, including Luther Martin of Maryland, disagreed about when and how the federal government should employ force to protect state authority. One delegate feared that the national government would be forced “to decide between contending parties each of which claim the sanction of the Constitution.”<sup>263</sup> Despite these objections, the delegates ultimately agreed to a provision promising that the federal government “shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.”<sup>264</sup>

## 2. *The New State Clause*

As the debates over the Guarantee Clause suggested, the question of state authority was closely tied up with the issue of territory. Delegates from states that retained expansive western lands, particularly North Carolina and Georgia, were especially eager to protect their claimed territory from potential encroachment. One provision, adopted after substantial back and forth, stipulated that nothing in the Constitution undermined states’ claims to western lands, thus beating back an attempt by small-state advocates to establish federal ownership.<sup>265</sup> But delegates from states with western land claims sought more than federal noninterference; they wanted a constitutional bar that would forestall secessionist movements. They accordingly made a controversial proposal that Congress’s power to admit new states—which already existed under the Articles—be amended so that new states “within the limits of any of the present

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<sup>260.</sup> 2 FARRAND’S RECORDS, *supra* note 115, at 47. *But see id.* at 48 (recording a proposal by Randolph “that no State be at liberty to form any other than a Republican Govt.”).

<sup>261.</sup> *Id.* at 317.

<sup>262.</sup> *Id.* at 47-49.

<sup>263.</sup> *Id.* at 48.

<sup>264.</sup> U.S. CONST. art. IV, § 4.

<sup>265.</sup> 2 FARRAND’S RECORDS, *supra* note 115, at 465-66.

States” could be admitted only with the express legislative consent of the concerned states.<sup>266</sup>

This proposal to give existing states a trump over new states’ admission prompted a highly charged debate with explicit references to Vermont, Kentucky, and Franklin.<sup>267</sup> On one side were those who, like state officials, foresaw anarchy from the prospect of endless secessions. If new states were permitted within existing states without their consent, “nothing but confusion would ensue,” warned Pierce Butler of South Carolina.<sup>268</sup> “Whenever taxes should press on the people, demagogues would set up their schemes of new States.”<sup>269</sup> (Butler apparently failed to catch the irony of objecting to secession as the product of a tax revolt.) James Wilson offered the proposal’s most sophisticated defense, grounded in conceptions of popular sovereignty and majoritarian rule. Under the proposal, Wilson observed, if a “majority of the State wish to divide they can do so,” but he was opposed to the suggestion that the “Genl Government should abet the minority.”<sup>270</sup> There was, he insisted, “nothing that would give greater or juster alarm than the doctrine, that a political society is to be torne asunder without its own consent.”<sup>271</sup>

The measure’s opponents were not persuaded. Some, like John Dickinson of Delaware, saw the measure as nothing more than an attempt to force all the states to protect large states’ “extensive claims of territory.”<sup>272</sup> But the most interesting response came from Luther Martin, who pointed out Wilson’s hypocrisy for suddenly discovering a solicitude for states as natural political societies, a concern he had allegedly lacked during the debate over representation.<sup>273</sup> As Martin pointed out, the large states’ capacious and arbitrary boundaries enfolded regions with few geographic or economic ties.<sup>274</sup> The proposal would condemn these regions – Martin specifically mentioned the “Western People” of Virginia, North Carolina, and Georgia as well as those living in Maine – to rule by distant

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266. *Id.* at 454-56.

267. *Id.* at 454-56, 461-69; see also Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 385-90 (2002) (providing a highly detailed account of the debate over the New State Clause).

268. 2 FARRAND’S RECORDS, *supra* note 115, at 455.

269. *Id.*

270. *Id.* at 456.

271. *Id.* at 462.

272. *Id.* at 456.

273. *Id.* at 463-64.

274. *Id.* at 463.

and unresponsive governments that would “keep the injured parts of the States in subjection.”<sup>275</sup>

Martin’s objections to the New State Clause had no more effect than his challenge to the Guarantee Clause. The provision that “no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned” became part of the proposed constitutional text.<sup>276</sup>

### 3. *Intent and Text*

The adoption of the Guarantee and New State Clauses represented an important victory for those who sought to codify protections for state authority. Both Clauses specifically committed the federal government to support existing state authority, and both granted considerable decision-making power to state legislatures. These proposals had proved controversial, provoking some of the most sustained debate during the Convention, as many delegates pointed to what they believed to be the abuses of state authority under the Articles. Yet in the end more delegates had come to Philadelphia partly, as Madison’s *Vices* suggested, to secure support for state authority. The document they created fulfilled some of their aspirations.

But only some, as the debates at the Convention had cabined these advocates’ success. The final version of the Guarantee Clause, for instance, was much less capacious in its protections than the original proposals were: it did not protect states’ “Constitutional authority,”<sup>277</sup> as Madison had at one point proposed, nor did it explicitly guard state territory. The resulting text was so ambiguous that what the delegates primarily intended as a *protection* for state authority could be plausibly read, as many scholars have done, as a *restriction* on states.<sup>278</sup> The New State Clause was at once clearer and narrower: although it resembled the territorial protections that states had sought, it specifically prohibited only secession without state consent.

The proposed Constitution, then, reflected only imperfectly what seemed a rough agreement in the Convention for using federal power to protect state au-

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<sup>275.</sup> *Id.*

<sup>276.</sup> U.S. CONST. art. IV, § 3.

<sup>277.</sup> 2 FARRAND’S RECORDS, *supra* note 115, at 47-48.

<sup>278.</sup> See, e.g., Akhil Reed Amar, *The Central Meaning of a Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994). See generally Williams, *supra* note 254, at 606-07 (surveying this line of scholarly and legal argument).

thority. Opponents were outspoken and influential enough to yield a compromise document that, while it resembled the promise that state advocates had sought, actually committed the federal government to very little. This tension between intent and text played out even more fully during the ratification debates that followed.

### *B. Ratification*

“[C]onsolidation”—the prospect that the new federal government would destroy the “states as independent, autonomous jurisdictions”—was, historian Jack Rakove has argued, “the chief evil that Anti-Federalists ascribed to the Constitution.”<sup>279</sup> Unsurprisingly, then, discussions of federalism dominated the extensive debates over ratification that followed the Constitutional Convention. As the Constitution’s critics vociferously defended state independence and sovereignty, ratification’s Federalist proponents sought to downplay the Constitution’s threat to state autonomy, speaking far more circumspectly about state authority than the delegates to the Convention had.

These dynamics pushed the ratification debates onto seemingly shared argumentative terrain: if only out of expediency, Federalists outwardly agreed with Antifederalists on the need for federal power to preserve state sovereignty against potential competitors. But they disagreed over whether the Constitution actually achieved this supposedly shared goal. This framing had divergent consequences for the Guarantee and New State Clauses during ratification. The Guarantee Clause proved a key point of contention: Federalists routinely invoked it as proof against charges of consolidation, only for Antifederalists to respond that the Clause’s text did not support the Federalists’ broad claims. By contrast, unlike the heated discussions it elicited during the Convention, the New State Clause, with its unambiguous textual support for states, proved largely uncontroversial.

#### *1. The Guarantee Clause*

The Guarantee Clause was much debated during ratification, and for a clear reason. Because it contained the Constitution’s most explicit codification of state authority, the Guarantee Clause gave Federalists a useful tool to rebut Antifederalists’ allegations that the Constitution would destroy the states. Here was

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279. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1049-50 (1997).

proof, Federalists insisted, that the “danger of our state governments being annihilated” was illusory,<sup>280</sup> and that the Constitution would not “infring[e] upon the internal police of the states.”<sup>281</sup>

In making this case, Federalists repeatedly stressed two aspects of the Clause. First, they argued that the Clause afforded greater protection to states than existed under the Articles because it pledged them federal support. Echoing discussions at the Convention, ratification’s proponents noted that states’ rights would be now be “guaranteed by the whole empire”<sup>282</sup> and would receive a “continental confirmation.”<sup>283</sup> Second, the Federalists claimed that the Clause provided states such robust protections as to obviate the bill of rights that the Antifederalists constantly harped on. The Guarantee Clause was a “constitutional security far superior to the fancied advantages of a bill of rights,” Jasper Yeates argued at the Pennsylvania ratifying convention; it clearly “assure[d] us of the intention of the framers of this Constitution, to preserve the individual sovereignty and independence of the states inviolate.”<sup>284</sup> The Maryland writer Aristedes labeled all of Article IV “a declaration of governmental rights” because it contained “[t]he guarantee of a distinct republican government to each state, and a variety of other state rights are expressly provided for.”<sup>285</sup>

In response, Antifederalists pointed out the gap between the Federalists’ rhetoric and the Guarantee Clause’s actual text. The Federalists spoke as though the Clause contained all the language discussed, but ultimately omitted, at the Convention — protections of state sovereignty, independence, and constitutional

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280. *A Jerseyman: To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: DELAWARE, NEW JERSEY, GEORGIA, AND CONNECTICUT 146, 149 (Merrill Jensen ed., 1978) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION].

281. *Uncus*, MD. J. (Balt.), Nov. 9, 1787, reprinted in 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 76, 79 (John P. Kaminski & Gaspare J. Saladino eds., 1983).

282. *A Landholder IV*, CONN. COURANT (Hartford), Nov. 26, 1787, reprinted in 3 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 477, 479 (Merrill Jensen ed., 1978).

283. *The State Soldier I*, VA. INDEP. CHRON. (Richmond), Jan. 16, 1788, reprinted in 8 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 303, 306 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

284. Pennsylvania Convention Debates (Nov. 30, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 425, 434 (Merrill Jensen ed., 1976); see also *A Countryman*, BALT. MD. GAZETTE, Dec. 18, 1787, reprinted in 11 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 115-16 (John P. Kaminski et al. eds., 2015) (“Can you say you have no bill of rights when the new Constitution guarantees to each State a republican form of government, that is to say, warrants and defends the Constitutions of the different States[?]”).

285. *Aristedes*, MD. J. (Balt.), Mar. 4, 1788, reprinted in 11 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 351, 356 (John Kaminski et al. eds., 2015).

authority. Yet these words, while part of the Articles, appeared nowhere in the new Constitution, including in the Guarantee Clause. “The sovereignty of the states is not expressly reserved,” one critic noted of the Clause. “[T]he form only, and not the SUBSTANCE of their government, is guaranteed to them by express words.”<sup>286</sup> Perhaps if the Constitution had codified the Convention’s original proposal to guarantee states’ constitutions and existing laws, Abraham Yates, Jr., writing as Sydney, observed, this provision “would have been substantial.”<sup>287</sup>

Ultimately, the Antifederalists were united in their view that the Guarantee Clause was inadequate: the promise of a republican “form,” they insisted, was a weaselly word that offered little actual protection.<sup>288</sup> What they sought was not elimination but expansion of the Clause – the creation of a more substantive federal promise that would specifically use the words they thought necessary to guard states’ rights. When Rhode Islanders insisted on a series of changes, the first proposed amendment was a much-expanded version of the Clause: “The United States shall guarantee to each State its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Constitution expressly delegated to the United States.”<sup>289</sup>

## 2. *The New State Clause*

In contrast to the Guarantee Clause, the New State Clause elicited relatively little attention during ratification. Most commentators who discussed the Clause argued, like James Madison in *The Federalist*, that it simply clarified Congress’s power under the Articles.<sup>290</sup> As for the prohibition on secession, it merely, in Madison’s words, “quiets the jealousy of the larger States.”<sup>291</sup> Federalists at

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286. *An Officer of the Late Continental Army*, INDEP. GAZETTEER (Phila.), Nov. 6, 1787, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 210, 211 (Merrill Jensen ed., 1976).

287. Sydney, *To the Citizens of the State of New York*, N.Y. J., June 13-14, 1788, reprinted in 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 1153, 1160 (John P. Kaminski et al. eds., 2004).

288. *Centinel III*, INDEP. GAZETTEER (Phila.), Nov. 8, 1787, reprinted in 14 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 55, 58 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (“[B]ut of what avail will be the form, without the reality of freedom?”).

289. Rhode Island Convention: Bill of Rights and Proposed Amendments, Mar. 6, 1790, reprinted in 26 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 976, 979 (John P. Kaminski et al. eds., 2004).

290. THE FEDERALIST NO. 43, at 270 (James Madison) (Clinton Rossiter ed., 1961).

291. *Id.*

times exploited that jealousy in pressing their case for the Constitution. “How has it happened . . . that Vermont is at this moment an independent State?” Robert Livingston queried at the New York Convention when illustrating the shortcomings of the Articles.<sup>292</sup> “How has it happened that new States have arisen in the West, & in the heart of other States[?]”<sup>293</sup> One Massachusetts author argued that the Clause secured “the peace and happiness of the states”: it “entirely defeated” those “who wish to effect the disunion of the states, in order to get themselves established in posts of honour and profit,” he wrote, broadly hinting about Maine.<sup>294</sup>

Even as Federalists embraced the New State Clause, comparatively few Antifederalists opposed it. Yet there was one vocal opponent: Luther Martin. In a widely reprinted speech to Maryland’s legislature, Martin reprised and expanded his critiques from the Convention, describing the continued subjugation of western settlers to grossly oversized states as an “ignominious . . . yoke” that might justify armed resistance.<sup>295</sup> But, should these frustrated citizens challenge state jurisdiction, the Guarantee Clause had “pledged” states “the whole force of the United States” to protect “even in the extremest part of their territory” from uprising.<sup>296</sup> “[T]he State of Maryland may, and probably will be called upon to assist with her wealth and her blood in subduing the inhabitants of Franklin, Kentucky, Vermont, and the provinces of Main and Sagadahock,” Martin foresaw, “and in compelling them to continue in subjection to the States which respectively claim jurisdiction over them.”<sup>297</sup>

Martin’s plea was a lonely one. A handful of other critics voiced similar concerns that the New State Clause, coupled with the promise of federal aid, would encourage states to maintain extravagant territorial claims.<sup>298</sup> And one group of

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292. New York Convention Debates (June 19, 1788), in 22 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 1681, 1685 (John P. Kaminski et al. eds., 2008).

293. *Id.* at 1685–86.

294. *Cassius VI*, MASS. GAZETTE (Bos.), Dec. 21, 1787, reprinted in 5 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 500, 503 (John P. Kaminski et al. eds., 1998) (emphasis omitted).

295. Luther Martin, *Genuine Information XI*, BALT. MD. GAZETTE, Feb. 5, 1788, reprinted in 11 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 281, 281 (John P. Kaminski et al. eds., 2015).

296. *Id.* at 283 (emphasis omitted).

297. *Id.*

298. See, e.g., Letter from William Tilghman to Tench Coxe (Nov. 25, 1787), in 11 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 62, 63 (John P. Kaminski et al. eds., 2015) (“What I dislike most, is the power given to each state to put a negative on the erection of any new State within its Lines – this matter had better have been referred to the foederal Legislature entirely – for the State which thinks itself injured by a loss of territory, finding itself

westerners published a revised version of the Constitution that would have stripped Congress's power to admit states altogether in favor of automatic admission once would-be states (including, presumably, those within existing states) reached a requisite population.<sup>299</sup> But few others seemed to share Martin's anxiety that the Constitution condemned western settlers to the continued unwelcome rule of states they rejected.

### 3. *State Sovereignty and the Ratification Debates*

The ratification debates were as significant for demonstrating agreement as for highlighting contention. In contrast with the Convention, there seemed to be widespread consensus that using federal power to shield state sovereignty was a laudable goal. This understanding helps explain why the New State Clause received so little attention while, paradoxically, the Guarantee Clause received so much, with both sides contesting whether it in fact served to protect state authority.

This framing reflected politics as much as principle. To succeed, Federalists had to win over state ratification conventions, many dominated by the same state political elites who had long sought to bolster their own authority. By contrast, those who challenged or denied state authority – Natives, leaders of Franklin and Vermont, Daniel Shays – were excluded. The result was that, although Federalists and Antifederalists sharply disagreed about where to draw the line between federal and state authority, both came to emphasize the role of federal power in guarding states.

This dynamic shaped the meaning of the document being debated. In part, the change was textual: the enactment of the Bill of Rights and particularly the Tenth Amendment seemed to address some of the anxieties over consolidation, even though the Amendment's text was arguably even more ambiguous than the Guarantee Clause. But even when the text remained unchanged, ratification shaped perceptions of the Constitution's purpose. As their critics pointed out, Federalists, in selling the Constitution, figuratively rewrote its text, speaking as though it contained the more robust protections of state sovereignty that the Convention had rejected. The consequence was the belated vindication of advocates of federal power in the service of state authority, as the ratification debates

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supported by the force of the whole Union, will be apt to indulge the passions of interest & resentment, & prefer a civil war to the common good . . .”).

299. The Soc'y of W. Gentlemen, *The Federal Constitution Amended: Or, an Essay to Make It More Comfortable to the Sense of a Majority of the Citizens of the United States*, VA. INDEP. CHRON. (Richmond), Apr. 30 & May 7, 1788, reprinted in 9 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 280, at 772, 778 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

helped entrench a frame of dual sovereignty that advocates had only partially succeeded in writing into the constitutional text.

#### IV. AFTERMATH: THE ARRIVAL OF DUAL FEDERALISM

Ratification did not freeze federalism. If anything, the doctrine was in its infancy: its meaning and contours would be heavily shaped by frequent and intense fights over sovereignty in the early United States. Most scholarship has focused on the era's bitter struggles between federal and state authority,<sup>300</sup> yet the earlier conflicts between states and their would-be competitors persisted after ratification, too. Although tracing the full history of these confrontations lies outside the scope of this Article, this Part selectively explores three important contests over nonstate sovereignty in the antebellum United States, involving corporate rights, populist challenges to state authority, and Indian Removal. My goal in this brief glimpse of ratification's aftermath is to highlight both continuity and change, suggesting some of the ways that dual sovereignty altered the jurisprudential landscape.

One significant change concerned the viable methods of contesting state authority, in particular the decline of armed resistance and the rise of judicial review. The threat of violence persisted after ratification, but now it was directed principally *against* Native peoples, secessionists, and populist rebels, who recognized that they could not easily prevail against states backed by a newly strengthened federal military.<sup>301</sup> Petitioning, another common method of political engagement in the early United States, required supplicating the very legislatures whose authority was being challenged.<sup>302</sup> By contrast, the developing idea of courts as an independent check on legislative supremacy<sup>303</sup> – and perhaps, as Al-

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300. On the era's significance for crafting vertical federalism, see LaCroix, *Interbellum Constitution*, *supra* note 20, at 403 ("I contend that political and legal actors in the early nineteenth century believed themselves to be living in what I refer to as a 'long Founding moment,' in which the fundamental terms of the federal-state relationship were still open to debate.").

301. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* 49 (2003) (describing the creation of the federal government as an effort to craft a fiscal-military state along the European model).

302. On the significance of petitioning in the early United States, see Maggie McKinley, *Lobbying and the Petition Clause*, 68 *STAN. L. REV.* 1131 (2016); and Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1552-66 (2018).

303. See, e.g., KRAMER, *supra* note 93, at 93-127; Rakove, *supra* note 279; William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455 (2005).

ison LaCroix has suggested, as the institutions the Constitution intended to police sovereignty disputes<sup>304</sup> – seemed to offer a viable way to contest state authority without bloodshed.

The result was that many antebellum disputes between states and their competitors began as political struggles but ended as judicial decisions. These were rarely *state* court decisions: opponents of state authority were, with justification, skeptical of state courts, which often rubber-stamped legislatures' actions. Instead, many turned to the supposedly more neutral forum of the federal courts, and often, ultimately, to the U.S. Supreme Court. As I explore, some of the Court's most significant antebellum rulings sought to arbitrate between states and their competitors.

Yet relying on federal courts to resist state authority had important consequences. In particular, it reinforced the frame of dual sovereignty. To prevail, states and their competitors had to ground their claims in the multivalent language of the Constitution, which enlisted federal power *both* as a guarantee of states' authority and as a bulwark against state overreach. The result transformed these struggles into legal contests over which entity had the best claim to federal support. Sometimes, states' competitors won. But these victories did not rest on a pre-Revolution logic of separate autonomy grounded in an independent source of popular authority; they relied, of necessity, on the vindication of *federal* rights that could be asserted against states. The ratification of the Constitution, in short, helped cement a structure in which claims to authority were increasingly interpreted as *derivative* of either federal or state sovereignty.

#### A. *Public and Private Corporations*

After ratification, fights over corporate rights continued unabated. Anti-charter advocates continued to emphasize the supremacy of state legislatures to alter corporations at will, while corporations stressed the sanctity of their charters as a form of "vested right" that, once granted, could not be modified.<sup>305</sup> Early on, this contest raged most fiercely in cities like New York and Philadelphia, where state legislatures repeatedly intervened in municipal governance.<sup>306</sup> But as

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304. LACROIX, *supra* note 5, at 169-73. *But see* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084 (2010) (reviewing *id.*) (challenging LaCroix's claim that the courts were the intended venue to resolve sovereignty disputes).

305. On the doctrine of "vested rights" in this era, see GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 185-204 (1997); and HOBSON, *supra* note 174, at 128-34.

306. TEAFORD, *supra* note 121, at 82-89.

legislatures expanded their reach to nonprofit and business corporations, struggles over charter rights quickly came to encompass such organizations as well.<sup>307</sup>

While these conflicts between states and corporations resembled preratification contests, the Constitution significantly altered the terms of the debate. In particular, the Contracts Clause, which forbade state laws “impairing the obligation of contracts,” seemed to codify the vested-rights doctrine.<sup>308</sup> Soon, corporations of all sorts were arguing that their charters were contracts that state legislatures could not modify.

The mixed success of these Contracts Clause arguments reflected a growing legal dichotomy between two kinds of corporations: “public,” primarily municipal corporations, and “private” nonprofit and business corporations. This distinction had significant consequences. As Gerald Frug showed long ago, this shift diminished the idea of corporations as intermediate institutions between the people and the government: municipalities were now seen as part of the state while the new private corporations were analogized to rights-bearing individuals.<sup>309</sup>

Rendering municipal corporations “public” doomed their Contracts Clause claims, as courts reasoned that states had to be able to control institutions that judges regarded as state subdivisions. Even Justice Story, a robust defender of vested rights, excluded municipal charters from the Clause’s scope: “In respect . . . to *public* corporations which exist only for public purposes, such as counties, towns, cities, &c.,” Story reasoned in 1815, “the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them . . . .”<sup>310</sup> Four years later, the Court reiterated and reinforced this conclusion in *Trustees of Dartmouth College v. Woodward*.<sup>311</sup> Although primarily about excluding municipal corporations from federal rights, these rulings reflected the growing ascendancy of state legislative supremacy: they undercut longstanding claims about charter rights’ inviolability, and they depicted authority as flowing from state legislatures to localities. Long before the mid-nineteenth-century codification of state supremacy in the doctrine known as Dillon’s Rule, then,

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307. HURST, *supra* note 110, at 17-30.

308. U.S. CONST. art. I, § 10, cl. 1.

309. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1099-1102 (1980).

310. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815).

311. 17 U.S. (4 Wheat.) 518, 638 (1819) (“The right to change [public corporations] is not founded on their being incorporated, but on their being the instruments of government, created for its purposes.”); *see also id.* at 669 (Story, J., concurring); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 260-61 (1833) (citing *Dartmouth College* for the proposition that, in cases of public corporations, “the legislative power over such charter is not restrained by the constitution, but remains unlimited”).

federal courts had rendered local governments the creatures of state governments.<sup>312</sup>

“Private” corporations had better success advancing Contracts Clause claims to curb legislative power, especially under the Marshall Court, where they won several important victories.<sup>313</sup> But this legal strategy of pitting corporations as rights-bearing artificial persons against state legislatures had limits. For one, success under the Contracts Clause required a contract: as Chief Justice Marshall observed, “The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract.”<sup>314</sup> State legislatures quickly learned that they could avoid the Contracts Clause question by enacting corporate charters that reserved the legislature’s right to alter the charter, a practice courts subsequently upheld.<sup>315</sup>

Envisioning corporations as “private” institutions also cast the struggle between charters and legislatures as a contest between private corporate interests and the public good—an approach that increasingly advantaged states, especially in the new Taney Court. In *Charles River Bridge v. Warren Bridge*, for instance, Chief Justice Taney refused to protect a Massachusetts company that invoked its eighteenth-century charter to try to halt the state legislature’s authorization of a competing bridge.<sup>316</sup> “While the rights of private property are sacredly guarded,” Taney observed, “we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.”<sup>317</sup> Taney’s conflation of community rights with the actions of the legislature, and his relegation of the company’s interests to private property, suggest how much the jurisprudential landscape had changed since the time of the Revolution.

Legislative actions, too, furthered this fundamental shift in understanding. Antebellum legislatures ultimately established control over private corporations

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312. Numerous scholars have recounted this narrative in detail. For a sample, see HARTOG, *supra* note 154, at 101-219; TEAFORD, *supra* note 121, at 79-90; and Frug, *supra* note 309, at 1105-09. But see David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 497-503 (1999) (distinguishing *Dartmouth College’s* ruling on municipalities from Dillon’s Rule while conceding the force of the Contracts Clause implications).

313. See, e.g., *Dartmouth College*, 17 U.S. (4 Wheat.) 518; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). On the Marshall Court’s Contracts Clause jurisprudence, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE: 1815-35*, at 595-673 (1988).

314. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830).

315. See, e.g., *Crease v. Babcock*, 40 Mass. (23 Pick.) 334 (1839).

316. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

317. *Id.* at 548.

by making many more of them: as one historian has observed, “proponents of anticharter doctrine became advocates of general incorporation laws.”<sup>318</sup> The enactment of these laws – which began in the 1780s and accelerated throughout the antebellum period – abandoned the older conception of the corporate charter as a special privilege of quasi-state authority rooted in public service.<sup>319</sup> Instead, the corporate form became a ubiquitous, and banal, method to pursue profit rather than the public good.

By the mid-nineteenth century, then, legal changes had helped to defang the threat that ideas of corporate sovereignty posed to state legislative supremacy. Making municipalities “public” had made them creatures of state law, while “private” corporations came to depend on federal vindication of their Contracts Clause rights to defend their charters – a limitation that state legislatures readily learned to circumvent. This shift did not mean the end of corporate power, particularly for increasingly wealthy and influential business corporations. But these corporations ceased to be legally *corporate* in the early modern sense: they no longer seemed to be miniature governments whose legitimate grounding in the people pitted them against state legislative supremacy.

#### B. Secessionist and Populist Movements

As with struggles over corporate charters, ratification did not quell populist challenges to governmental authority. But the Constitution altered the dynamics of these contests for authority, both by federalizing many state responsibilities and by inserting federal authority into contests *within* states.

Populist discontent persisted, for instance, in much of the early American West, but the Constitution, coupled with state cessions and the Northwest Ordinance, transformed the region into federally controlled territories outside existing states.<sup>320</sup> This change did little to resolve western settlers’ grievances, which remained rife. Franklinites, for instance, still griped about the distant and out-of-touch government even after North Carolina’s ceded western lands became the Federal Southwest Territory.<sup>321</sup> Yet such complaints were now directed

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318. Maier, *supra* note 110, at 76; see also Hilt, *supra* note 110, at 38 (“Ultimately, Jeffersonian and Jacksonian reformers concluded that the best way to eliminate the corrupting influence of corporations was to liberalize access to incorporation.”).

319. HURST, *supra* note 110, at 15-16, 21-22.

320. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 121-38 (2004); PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 44-66 (1987).

321. FINGER, *supra* note 66, at 125-51.

toward Washington, D.C., and settlers' claims to statehood now depended on the approval of Congress, not of state legislatures.<sup>322</sup>

Similarly, the 1790s witnessed two populist movements labelled as “rebellions” – the 1794 Whiskey Rebellion and the 1798 Fries's Rebellion.<sup>323</sup> Like the earlier Massachusetts insurgency, both were antitax revolts that claimed the mantle of popular sovereignty. Yet because the federal government had taken on debts and burdens of taxation previously borne by the states, these two Pennsylvania movements targeted federal rather than state authority and were suppressed by federal troops. Such conflicts set a pattern: the advent of dual federalism increasingly channeled some of the most intense constitutional struggles of the early republic into contests *between* states and the federal government, a dynamic that culminated in Southern states' efforts to secede from the union over slavery.<sup>324</sup>

Conflicts over sovereignty *within* states persisted alongside the flashy battles of vertical federalism, but their character changed, too. The New State Clause, for instance, effectively foreclosed secession from *within* a state. In the early 1830s, residents in a disputed region between Canada and New Hampshire sought to create a new jurisdiction called “Indian Stream.”<sup>325</sup> But, as Robert Tsai observes in his account of this effort, the residents “never considered [statehood] a serious option,” likely because it would have required New Hampshire's consent.<sup>326</sup> After all, when the region's residents appealed to the federal government for aid, they were instructed to turn to New Hampshire for relief.<sup>327</sup> Unsurprisingly, then, apart from the exceptional case of West Virginia, the only successful

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322. ONUF, *supra* note 320, at 67-87. For the example of Tennessee's admission to the Union, see FINGER, *supra* note 66, at 148-51.

323. See, e.g., RONALD P. FORMISANO, FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850S, at 47-51, 57-59 (2008); CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 153-89 (2008); THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986).

324. See generally STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 (1995) (describing political and legal debates in the era of the early American republic); McDONALD, *supra* note 20 (examining the issue of states' rights between 1776 and 1876).

325. ROBERT L. TSAI, AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY 18-48 (2014).

326. *Id.* at 46.

327. *Id.* at 37.

proposals to divide states after ratification traced to preratification separatist movements.<sup>328</sup>

Secession, though, was not the only opportunity to appeal to popular sovereignty in order to resist state authority. As Christian Fritz has shown, the possibility that the people could, on their own initiative, alter and supplant a state constitution persisted in antebellum constitutional thought, producing a series of state constitutional conventions questionably authorized by state legislatures.<sup>329</sup> This invocation of popular sovereignty to overturn constituted state authorities reached its zenith in what one newspaper editor labelled a “Second Shays’s Rebellion”<sup>330</sup> – Rhode Island’s Dorr Rebellion of 1841-1842, similarly named for its purported leader, Thomas Dorr.<sup>331</sup>

The Dorr Rebellion sought to eliminate the restrictive voting requirements codified in Rhode Island’s fundamental governing document, its unaltered seventeenth-century charter.<sup>332</sup> To overturn these limits, the Dorrites set about creating their own government. They left little doubt as to their actions’ source of authority: they convened a “People’s Convention” that produced a “People’s Constitution,” purportedly ratified through a popular election. This constitution became the foundation for a new government, with Dorr as the “People’s Governor.”<sup>333</sup> The Dorrites rejected their opponents’ claims that these actions, unsanctioned by the legislature, illegally flouted fundamental law. “We contend for [the people’s] absolute sovereignty over all Constitutions,” Dorr wrote, “Constitutions and plans of government not being barriers against Popular Sovereignty . . . but forms of expressing, protecting & securing the Rights of the People, intended to remain in use until the People shall otherwise indicate and direct.”<sup>334</sup>

Both the Dorrites and the preexisting Rhode Island legislature appealed to the federal government for aid, the latter specifically invoking the terms of the

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328. Vermont’s, Kentucky’s, and Maine’s successful claims to statehood all preceded ratification. See *supra* Section II.D.

329. FRITZ, *supra* note 323, at 235-45.

330. ERIK J. CHAPUT, *THE PEOPLE’S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* 2 (2013).

331. Histories of the Dorr Rebellion include *id.*; GEORGE M. DENNISON, *THE DORR WAR: REPUBLICANISM ON TRIAL, 1831-1861* (1976); and GETTLEMAN, *supra* note 118. See also FRITZ, *supra* note 323, at 246-76; WIECEK, *supra* note 259, at 85-110.

332. GETTLEMAN, *supra* note 118, at 6-12.

333. *Id.* at 43-56, 84-87.

334. WIECEK, *supra* note 259, at 94-95.

Guarantee Clause.<sup>335</sup> President Tyler made his views on the merits of the two cases clear, though he avoided intervening on the grounds that there was no actual violence. The federal government, he promised, could only support “that government which has been recognized as the existing government of the State through all time past”; otherwise, the United States would become “the armed arbitrator between the people of the different States and their constituted authorities,” which, he feared, would prove “dangerous” to “the stability of the State governments.”<sup>336</sup> Ultimately, the Dorr Rebellion fizzled without direct federal invention.<sup>337</sup>

The Dorrites then turned to the federal courts for vindication, concocting an elaborate trespass suit to assert their government’s legitimacy under principles of popular sovereignty. The resulting case—which the Supreme Court decided as *Luther v. Borden*<sup>338</sup> in 1849—has usually been interpreted as standing for the proposition that whether a state possesses a “republican” government under the Guarantee Clause is a political question.<sup>339</sup> Yet this reading distorts the case’s valence. Luther’s attorney, challenging Rhode Island’s government, barely mentioned the Clause, or even the Constitution: his case for the “People’s Constitution” derived largely from the claim that “the sovereignty of the people is supreme, and may act in forming government without the assent of the government.”<sup>340</sup> It was the defendant’s attorney, Daniel Webster, who relied extensively on the Constitution, which, he urged, “recognizes the existence of States . . . [and] protect[s] them against domestic violence.”<sup>341</sup> Webster continued: “The thing which is to be protected is the existing State government . . . . The Constitution . . . does not contemplate these extraneous and irregular alterations of existing governments.”<sup>342</sup>

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335. GETTLEMAN, *supra* note 118, at 107-15.

336. Letter from President Tyler to Governor of Rhode Island (Apr. 11, 1842), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2143, 2144-45 (James D. Richardson ed., 1917).

337. GETTLEMAN, *supra* note 118, at 131-38.

338. 48 U.S. (7 How.) 1 (1849).

339. See Williams, *supra* note 254, at 2 (“*Luther v. Borden* . . . has long been construed as requiring that all constitutional challenges based on the Clause be treated as involving a non-justiciable political question.”).

340. *Luther*, 48 U.S. (7 How.) at 20; see also BENJAMIN FRANKLIN HALLETT, THE RIGHT OF THE PEOPLE TO ESTABLISH FORMS OF GOVERNMENT (Bos., Beals & Greene 1848) (recording Hallett’s argument before the Court).

341. *Luther*, 48 U.S. (7 How.) at 32 (recording Webster’s argument).

342. *Id.*; see also DANIEL WEBSTER, THE RHODE ISLAND QUESTION (D.C., J. & G.S. Gideon 1848) (recording Webster’s argument before the Court).

In a hand-wringing opinion focused on the limits of the federal courts, Chief Justice Taney sided with the defendants.<sup>343</sup> He discussed the Guarantee Clause only to note that, to the extent the Clause conferred authority on the federal government to assess state governments, it empowered Congress and the President, not the courts.<sup>344</sup> But the Chief Justice did offer brief thoughts on popular sovereignty. “No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State,” he began. Yet whether the people had exercised that power to alter that government, Taney insisted, was “a question to be settled by the political power.”<sup>345</sup>

Taney’s decision, then, rendered not just the Guarantee Clause but popular sovereignty itself a political question. But even this nonanswer was an answer of a sort. At each step in the Dorr conflict, every federal institution – Congress, the President, and the Supreme Court – deferred to Rhode Island’s existing government. The Constitution, as interpreted by President Tyler and Chief Justice Taney, had a profound bias toward the status quo: it committed the federal government to protect only constituted state governments and provided no viable federal relief to those who sought to challenge that authority.

This outcome was unsurprising: the alternate view, as one Justice observed, would make judges the definitive arbiters of when popular sovereignty had been exercised.<sup>346</sup> More surprising, perhaps, was the Dorrites’ expectation that the federal courts would vindicate their claims, especially given their earlier suspicion of the judiciary. Whether motivated by principle or pragmatism,<sup>347</sup> the Dorrites’ decision to turn to the federal government for support carried the same implication: dual federalism had created a legal and political situation in which federal sovereignty increasingly offered the only viable check on state power.

### C. Native Nations

Of all these diverse contentions, however, arguably the most significant confrontation between state sovereignty and its challengers in the antebellum

343. *Luther*, 48 U.S. (7 How.) at 34-35.

344. *Id.* at 41-44.

345. *Id.* at 47.

346. *See id.* at 53 (Woodbury, J., dissenting) (expressing the concern that judicial intervention would render the judiciary “a new sovereign power in the republic,” coequal with the “people themselves”).

347. Compare GETTLEMAN, *supra* note 118, at 174 n.1 (arguing that Dorrites expediently decided to file in the courts), with George M. Dennison, *Thomas Wilson Dorr: Counsel of Record in Luther v. Borden*, 15 ST. LOUIS U. L.J. 398 (1971) (arguing that Dorr’s view of courts shifted).

United States concerned the status of Native nations. In particular, the question whether Native and state sovereignty could coexist was at the center of the struggle over so-called Indian Removal—the effort to forcibly relocate Native nations from within states to federal territory west of the Mississippi River. Removal, particularly of the Cherokee Nation, produced one of the era’s most intense conflicts between state and federal authority; it convulsed Native and Anglo-American politics alike, involving state courts and legislatures, Congress, the President, and ultimately the Supreme Court.<sup>348</sup> Although these conflicts have received substantial scholarly attention, little work has focused on what, for Anglo-Americans, was arguably the core jurisprudential question: whether the Constitution was best understood to require the federal government to *check* or *protect* state authority.

Contentions over Removal had their roots in the unresolved jurisdictional tensions over Native status in the 1780s. Expansionist states still eagerly sought to engross Native lands, but the federal government embraced a more gradual approach to dispossessing and colonizing Native peoples. By the 1820s, southern states in particular began to panic that the nations within their borders—the Cherokee, Creek, Chickasaw, and Choctaw Nations—had no intention of vanishing, as Anglo-Americans had assumed they would.<sup>349</sup> Instead, with the support of the federal government, they were engaged in nation building in ways highly legible to Anglo-Americans.<sup>350</sup> Native communities even began adopting Anglo-American forms and language to assert their sovereign rights. The 1827 Cherokee Constitution, for instance, closely paralleled state constitutions, affirming, in English as well as in Cherokee, the nation’s “Sovereignty and Jurisdiction” over its territory on behalf of the “representatives of the people of the Cherokee Nation in Convention assembled.”<sup>351</sup>

Native nations’ claim to sovereignty under federal law was straightforward: they had entered treaties with the federal government that guaranteed their

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348. On the political and legal contentions surrounding Removal, see JOHN P. BOWES, *LAND TOO GOOD FOR INDIANS: NORTHERN INDIAN REMOVAL* (2016); DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 345-57, 413-21 (2007); JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* (1996); and Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *STAN. L. REV.* 500 (1969).

349. FORD, *supra* note 15, at 129-57.

350. See DUANE CHAMPAGNE, *SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK* (1992); WILLIAM G. MCLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* (1986).

351. CHEROKEE NATION CONST. of 1827, pmb., reprinted in CHEROKEE PHOENIX (New Echota, Cherokee Nation), Feb. 21, 1828, at 1, <http://neptune3.galib.uga.edu/ssp/News/chrkphnx/18280221a.pdf> [<https://perma.cc/T23T-HM8Z>]; *id.* art. I, § 2.

rights to territory and autonomy, treaties that the Constitution deemed the supreme law of the land.<sup>352</sup> The federal government might not have regarded Native nations as fully independent, but it had long conceded that they retained some sort of sovereign status under the ultimate sovereignty of the United States—a position Chief Justice Marshall ultimately sought to capture with his neologism of “domestic dependent nations.”<sup>353</sup> Moreover, textual and historical evidence overwhelmingly suggested that the Constitution granted the federal government exclusive authority over Indian affairs.<sup>354</sup>

For their part, states, especially state courts, responded with a straightforward legal theory of their own: a conception of unitary and absolute state sovereignty explicitly cribbed from Blackstone. “It is a principle of the common law of England that the parliament is supreme,” the Alabama Supreme Court reasoned in a case challenging the state’s jurisdiction in Indian country.<sup>355</sup> “This principle applies equally to our general assembly, with the exception of the restraints which are imposed upon it by the Constitutions of the United States and of this state.”<sup>356</sup> Application of this principle led the states and their allies to reject any possibility of divided authority within their borders just as clearly as British law had during the imperial crisis. “I know of no half-way doctrine on this subject,” reasoned one New York judge in 1822.<sup>357</sup> “We [the state] either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the *Indians*, or we have no jurisdiction over their lands . . . . It cannot be a divided empire: it must be exclusive, as regards them or us . . . .”<sup>358</sup>

States’ supporters in Congress agreed. “A State either has jurisdiction or it has not,” argued the Committee on Indian Affairs, citing the New York case. “The principle upon which jurisdiction is assumed, does not admit of division.”<sup>359</sup> In making this argument, Removal proponents revived the language

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352. See U.S. CONST. art. VI, cl. 2.

353. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

354. See Ablavsky, *Indian Commerce Clause*, *supra* note 19, at 1039-45.

355. *Caldwell v. State*, 1 Stew. & P. 327, 383 (Ala. 1832) (opinion of Taylor, J.).

356. *Id.* For background on the decisions by the southern supreme courts concerning removal, see TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* (2002); and DEBORAH A. ROSEN, *AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880*, at 38-57 (2007).

357. *Jackson ex dem. Smith v. Goodell*, 20 Johns. 188, 193 (N.Y. Sup. Ct. 1822).

358. *Id.*

359. H.R. REP. NO. 21-227, at 9 (1830); see also *Caldwell*, 1 Stew. & P. at 363-64 (opinion of Saffold, J.) (“This doctrine of partial sovereignty, remaining in the inferior, by the terms of submission, I consider entirely incompatible with the sovereign rights of the states within their chartered limits . . .”).

and terms that British thinkers had deployed against the American colonies. Unless the state could exercise jurisdiction, another Alabama justice reasoned, “the Creek Indians . . . may establish and maintain a separate government forever, and the State of Alabama would have within its borders another and a distinct sovereignty; an *imperium in imperio*.”<sup>360</sup> This portrayal of Native nations as an *imperium in imperio* was a commonplace in state arguments for jurisdiction.<sup>361</sup>

Opponents of Removal were quick to catch the irony of states repurposing the dogma of unitary sovereignty. It was laughable, for instance, to suggest that the Cherokee were “a new nation, an ‘imperium in imperio,’ springing up,” one congressman observed, since the Cherokee, whose government predated Georgia’s, “can urge this objection with more force than we can.”<sup>362</sup> Others caught how bizarre state claims of absolute territorial sovereignty were in a federal system. How could Georgia claim that “within the limits of a State there can be none others . . . that can claim to exercise the functions of Government,” another congressman queried, when the powers vested in the federal government “must be exercised within the States?”<sup>363</sup>

Yet these critiques failed to blunt the states’ jurisdictional demands. Acting on their theories of unitary territorial sovereignty, Georgia, Alabama, and Tennessee all enacted laws that purported to extend state jurisdiction into Indian country.<sup>364</sup> Well aware that neither appeals to the states nor violence would be effective, aggrieved Native peoples had little recourse other than to the federal government, first through unanswered petitions and ultimately through litigation.<sup>365</sup> As with the Dorrites, this expedient decision pushed Native arguments for autonomy into a dual-sovereignty frame, forcing them to ground their claims to authority not on divisible sovereignty and jurisdictional pluralism but on the balance of state-federal authority under the Constitution.

Legally, this reliance on federal power proved a winning strategy. In *Worcester v. Georgia*, Chief Justice Marshall firmly concluded that Georgia’s laws asserting jurisdiction over the Cherokee nation were not only “extra-territorial” – a

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360. *Caldwell*, 1 Stew. & P. at 428 (opinion of Taylor, J.).

361. ROSEN, *supra* note 356, at 26; ROCHELLE RAINERI ZUCK, *DIVIDED SOVEREIGNTIES: RACE, NATIONHOOD, AND CITIZENSHIP IN NINETEENTH-CENTURY AMERICA* 32-68 (2016).

362. 6 REG. DEB. 1030 (1830) (remarks of Rep. Ellsworth).

363. *Id.* at 1011 (remarks of Rep. Storrs).

364. See Mary Young, *The Exercise of Sovereignty in Cherokee Georgia*, 10 J. EARLY REPUBLIC 43, 49-54 (1990).

365. THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE NATION AND THE TRAIL OF TEARS* 73-79 (2007).

conclusion that would not empower the Court to invalidate them – but also “repugnant to the constitution, laws, and treaties of the United States.”<sup>366</sup> In reaching this conclusion, Marshall adopted a reading of the Constitution as a nationalist document intended to cabin state authority: its text, he noted, unequivocally granted power over Indian affairs to the federal government, preempting the exercise of state authority.<sup>367</sup>

Although states, for their part, often pitched their arguments as an effort to *restrict* federal involvement, they too appealed for federal support, demanding a Removal bill that would provide federal money and land for tribes’ relocation. States’ opponents caught this irony. “Georgia . . . is sovereign, and will do as she pleases: and they advise us to let her alone,” one congressional opponent observed.<sup>368</sup> “Sir, the difficulty is, she will not let us alone. She says, give us your money; pledge the national treasury to remove the Indians within our borders; and all this she demands of us, by trampling under foot the charters of our plighted faith.”<sup>369</sup>

To vindicate this demand for federal aid, states’ proponents also turned to the Constitution. But they read the document very differently from Chief Justice Marshall. Even as they relied on strained readings of the Commerce and Treaty Clauses to deny federal authority over Indian affairs,<sup>370</sup> state advocates invoked constitutional provisions they believed *mandated* federal support for states against Native sovereignty.

The New State Clause played a particularly prominent, if unlikely, role in the state supporters’ constitutional argument, one that extended it well beyond its textual meaning. President Jackson, for instance, quoted the Clause to advocate for Removal before Congress. “If the General Government is not permitted to tolerate the erection of a confederate State within the territory of one of the members of this Union against her consent,” he argued by analogy, “much less could it allow a foreign and independent government to establish itself there.”<sup>371</sup> Jackson was not alone: removal advocates routinely cited the New State Clause, particularly in a series of southern state supreme court decisions that spurned

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366. 31 U.S. (6 Pet.) 515, 561 (1832).

367. *See id.* (“The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”).

368. 6 REG. DEB. 1026 (remarks of Rep. Ellsworth).

369. *Id.*

370. ROSEN, *supra* note 356, at 57–67.

371. Andrew Jackson, First Annual Message (Dec. 8, 1829), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1005, 1020 (James D. Richardson ed., N.Y.C., Bureau of Nat’l Literature 1897).

*Worcester* and rejected Native claims to jurisdictional autonomy. “[I]f we can not reach [the Indians] by our statutes[,]” one Alabama justice asked, “if they can be encouraged to adopt a regular system of laws, a written code for their government: is not a new state formed within this; are not our limits in truth, contracted, by so much as is included in this ‘new state’?”<sup>372</sup>

Removal advocates’ broad and tenuous reading of the New State Clause was consistent with their understanding of what they regarded as the Constitution’s fundamental purpose. While Marshall and the opponents of Removal interpreted the Constitution as a *limitation* on state power, President Jackson read the Constitution differently. If Native nations’ arguments prevailed, Jackson contended, “the objects of this Government are reversed, and . . . it has become a part of its duty to aid in destroying the States which it was established to protect.”<sup>373</sup> Jackson’s allies in Congress expanded on this claim:

[T]he prime object of the States, in becoming parties to the Union, was to secure their own existence; and besides the express guaranty of each of them, which is to be found in the fourth article of the Constitution, the whole of that instrument may be said to constitute a general guaranty of the States, embracing not only the territory included in the limits of each of them, but also the particular form of government therein established.<sup>374</sup>

As the quotation suggests, this line of interpretation read the entire Constitution through the lens of the Guarantee Clause—as a document whose fundamental purpose was to protect, not cabin, state authority. This understanding of constitutional intent entitled Georgia and Alabama, not the Creek and Cherokee, to federal aid. And, while it failed before the Supreme Court, this argument won the support of the President and a sharply divided Congress. Both endorsed Removal and granted the states the federal aid they sought.<sup>375</sup> In the end, the states successfully secured the jurisdiction they demanded—at great human cost.<sup>376</sup>

Removal represented a coda of sorts to the struggles over the viability of an inherited system of jurisdictional pluralism and multiple sovereigns in a world dominated by an ideology of dual sovereignty. Arguably, that earlier intellectual world did not survive. Even as *Worcester v. Georgia* carved out space for Native

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372. *Caldwell v. State*, 1 Stew. & P. 327, 434 (Ala. 1832) (opinion of Taylor, J.).

373. Jackson, *supra* note 371, at 1021.

374. H.R. REP. NO. 21-227, at 15 (1830).

375. PERDUE & GREEN, *supra* note 365, at 91-115.

376. *Id.* at 116-40 (recounting how one quarter of the Cherokee Nation died during their deportation to Indian Territory).

sovereignty, it altered the logic that had undergirded Native autonomy: instead of emphasizing, as earlier jurisprudence had, the quasi-foreign nature of Native peoples, Chief Justice Marshall guarded Native rights by fitting their claims into the frame of dual sovereignty, aligning them ever more closely with federal authority.<sup>377</sup> This line of reasoning had perverse consequences since, even as it theoretically protected Native nations, it subordinated them ever further to federal power.

While dual sovereignty's triumph empowered the federal government, it was arguably an even greater victory for the states. Although state advocates failed to abolish the concept of tribal sovereignty, they did manage to entrench the idea of dual federalism as natural and inevitable, making it seem as though state and federal sovereignty were all that had ever existed. As Jackson and others' views suggested, and as Removal demonstrated, this conception of dual sovereignty bolstered state power as much as it limited it. Intoxicated by an ideology that made them supreme, confident that the Constitution obligated the federal government to endorse their assertions, states were increasingly unwilling to brook challengers to their claims to sole sovereignty within their territories.

#### D. Text and Ideology

"To the Constitution of the United States the term SOVEREIGN, is totally unknown," Justice Wilson—who had helped draft the document—famously proclaimed in the 1793 Supreme Court decision of *Chisholm v. Georgia*, which rejected the principle of state sovereign immunity and embraced a strong position of popular sovereignty.<sup>378</sup> But, while literally right, Wilson arguably misread the background of sovereignty talk that profoundly shaped how the document was interpreted and deployed—a discrepancy that produced a constitutional amendment overruling *Chisholm* and vindicating the states.<sup>379</sup>

Unlike *Chisholm*, the triumph of dual sovereignty in the early republic rarely required changing the constitutional text, which provided resources for both proponents and critics of state sovereignty. Postratification competitors to state sovereignty themselves helped entrench the dual-sovereign frame when they turned, out of necessity and constraint, to the Constitution and the federal government to defend their autonomy. For their part, advocates of state sovereignty proved adept at grasping the portions of the Constitution that seemed to codify federal support for states.

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377. 31 U.S. (6 Pet.) 515, 558–59 (1832).

378. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.).

379. See U.S. CONST. amend. XI.

Yet *Chisholm* highlights a broader dynamic that helps explain why states won many of these contests for federal support: the gap between constitutional text and ideology in early federalism. When states won, it was less because of the doctrinal merits of their claims than because of the widespread assumption that federal protection for state sovereignty was the law. This assertion's foundation in constitutional text was shaky: the states' interpretations of the provisions that they claimed vindicated their positions, like the Guarantee and New State Clauses, were, viewed from the present, thin, implausible, and highly purposive. States' victories were, in this sense, ideological, as many Anglo-Americans came to believe that protecting states was a fundamental constitutional goal, and they interpreted the Constitution's text in light of this aim.

State success was ideological in another sense, too. Like all ideologies, the vision of perfect state territorial sovereignty never won the universal assent it sought, and dissenting views persisted. Yet the rise of dual sovereignty not only shaped legal doctrine but also channeled and altered the terms and scope of this resistance. Increasingly, even those who struggled against state sovereignty were constrained to do so within the legal frame their opponents had helped define.

## CONCLUSION

Although the Supreme Court began referring to "our dual form of government" in the late nineteenth century,<sup>380</sup> the term "dual federalism" was a coinage of the early twentieth-century constitutional scholar Edward S. Corwin.<sup>381</sup> No sooner had Corwin crafted this phrase, however, than he wrote a now-canonical law article warning of its "passing."<sup>382</sup> Corwin lamented the constitutional changes that the New Deal had wrought, especially the expansion of federal authority at state expense.<sup>383</sup>

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380. *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895); *see also* *Knowlton v. Moore*, 178 U.S. 41, 60 (1900) (describing the "dual system of government which the Constitution established"); *In re Debs*, 158 U.S. 564, 578 (1895) (referring to the "dual system which prevails with us the powers of government"); *Ex parte Virginia*, 100 U.S. 339, 363 (1879) (Field, J., dissenting) (describing the "dual system of governments"); *Tennessee v. Davis*, 100 U.S. 257, 266 (1879) (referencing the "dual character of our government").

381. *See* Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 481 (1933) ("We may term this doctrine 'Dual Federalism.'"); *see also* Charles E. Clark, *Legal Aspects of Legislation Underlying National Recovery Program*, 20 A.B.A. J. 269, 270 (1934) (attributing this "striking and descriptive phrase" to Corwin).

382. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

383. *Id.*

Corwin's piece epitomized the triumph of the frame of dual sovereignty: in his vision, power in the United States was partitioned solely between the federal government and state governments, which existed in zero-sum relation to each other.<sup>384</sup> But around the edges of Corwin's account were hints that it had not always been so—that others might have a claim to something like sovereignty. “American federalism served the great enterprise of appropriating the North American continent to western civilization,” Corwin observed in cataloging federalism's triumphs; it created “a new, a *democratic, imperialism*.”<sup>385</sup> Implicit, but unspoken, in Corwin's assertion were the sovereigns displaced and denigrated in this process of “appropriation”—what we would now label colonialism.

Corwin's formulation of “democratic imperialism” captured, albeit perhaps unwittingly, much about how federalism had functioned in the early United States. Dual federalism often *was* imperialist, a method of forcing nonconsenting groups to submit to unwelcome authority. And, even while it rested on widespread exclusion, this expansion was democratic in its constant invocation of “the people” to justify subordination: popular sovereignty became a club with which states could beat their opponents into submission. Ironically, Corwin failed to recognize this imperialist process as an instance of “cooperative federalism,” a term he objected to because “when two cooperate it is the stronger member of the combination who calls the tunes.”<sup>386</sup> The early history of the United States arguably bore out Corwin's concern, but it suggests a different tune-giver than the federal government Corwin feared.

As in Corwin's account, struggles against *state* sovereignty often get shunted aside in favor of our great national drama of dual sovereignty. Nevertheless, they persist on the margins. As a quick glance at headlines reveals, corporations continue to fight state regulatory authority;<sup>387</sup> municipalities and local governments still battle state legislatures for legislative authority;<sup>388</sup> modern-day secessionists, like their eighteenth-century forbears, devise plans to carve new states from existing ones;<sup>389</sup> and Native nations clash with states over jurisdiction in Indian

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384. *Id.* at 3 (describing “[t]he division of the sum total of legislative powers between a ‘general government’, on the one hand, and the ‘States’, on the other”).

385. *Id.* at 22.

386. *Id.* at 21.

387. This is particularly true in the wake of the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); and *Citizens United v. FEC*, 558 U.S. 310 (2010). See WINKLER, *supra* note 117, at 377-95 (discussing these cases).

388. See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018).

389. Hailey Branson-Potts, *In California's Rural, Conservative North, There Are Big Dreams for Cleaving the State*, L.A. TIMES (Mar. 17, 2018, 5:00 AM), <http://www.latimes.com/local/lanow>

country.<sup>390</sup> Yet these contests take place primarily within a frame of dual sovereignty. Neither corporations nor municipalities are legally sovereign, and so they have prevailed against states largely when they have convinced federal courts that individual federal rights bar state action.<sup>391</sup> Even state secessionists – now seen as crackpots rather than fundamental constitutional threats – have turned to federal courts claiming constitutional rights.<sup>392</sup>

Native nations, by contrast, have retained formal legal recognition of their sovereignty in federal law, the result of their persistent activism in the face of states' recurrent efforts to destroy their autonomy.<sup>393</sup> Yet the survival of this constitutional doctrine, rooted in the early modern logic of plural and divisible sovereignty, continues to befuddle many – including, ironically, the Supreme Court Justices most committed to reconstructing original constitutional meanings.<sup>394</sup> The history presented here helps explain why tribal sovereignty – well-grounded in centuries of law and precedent – can nonetheless strike some observers as incomprehensible within our current jurisprudential frame.

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[/la-me-ln-state-of-jefferson-activists-20180317-htmlstory.html](#) [<https://perma.cc/LKEz-S9EG>].

390. See, e.g., John Eligon, *'This Ruling Gives Us Hope': Supreme Court Sides with Tribe in Salmon Case*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/us/washington-salmon-culverts-supreme-court.html> [<https://perma.cc/D2X6-ZMV6>].
391. See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007) (“The prevailing view of local government identity in federal law is one of . . . localities at the whim of states’ plenary authority. In a lesser-recognized tradition, however, courts have allowed local governments to invoke federal authority to resist assertions of state power.”).
392. *Citizens for Fair Representation v. Padilla*, No. 2:17-cv-00973-KJM-CMK, 2018 WL 684772 (E.D. Cal. Feb. 1, 2018); see also Branson-Potts, *supra* note 389 (quoting a supporter of secession saying, “I just like the whole idea of getting back to the Constitution, getting back to the principles that made this country great in the first place”).
393. On this history, see CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 177-205*, 383-84 (2005).
394. See, e.g., *United States v. Lara*, 541 U.S. 193, 218-19 (2004) (Thomas, J., concurring) (“States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments . . . . The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.”); see also *id.* at 212 (Kennedy, J., concurring) (“[T]he Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State . . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity [a tribe].”).

Although the full normative and doctrinal implications of this history fall outside the scope of this Article, I will conclude by briefly sketching what I think might be a few possible takeaways.

First, and probably most explicitly, this history challenges some of the commonplace narratives of the normative functions that federalism was intended to serve. At its inception, federalism was not solely about dividing power to protect individual rights, nor was it always a method to decentralize authority and empower local communities. To be sure, early Americans sometimes spoke of both these goals as the aims of federalism, particularly when, as in *The Federalist*, they sought to sell the merits of the Constitution to a skeptical public.<sup>395</sup> But by fixating solely on these aspects of early American discourse, we miss the widespread recognition and anticipation of many thinkers—including in *The Federalist* itself<sup>396</sup>—that federalism would also serve the opposite function, that of centralizing and concentrating power. Antebellum history vindicated this expectation, as states eagerly and often successfully conscripted federal authority against internal competitors. The existence of these multiple and conflicting aims of federalism is not only a historiographical revision; it challenges the possibility of judicial enforcement of a single original understanding of federalism, which, this Article suggests, did not exist.<sup>397</sup>

Second, this history might help clarify states' claims to federal support as a matter of positive law. On the one hand, conscripting federal aid on behalf of the states was an important aim of some of the Constitution's drafters—a goal that, as antebellum fights demonstrated, often conflicted with the document's other explicit purposes, particularly the keenly felt need to restrict state authority in order to further national aims. On the other hand, however, the proponents of state sovereignty arguably proved less successful than their opponents at writing their aims into the constitutional text. Jackson and his allies may have read the Guarantee Clause as the Constitution's crux, but, as Antifederalists pointed out, the Clause's narrow text did not actually codify broad claims to state sovereignty. Similarly, although state advocates read the New State Clause as though it were the guarantee of territorial integrity they had sought at the Convention, the Clause's actual text was much more circumscribed. Yet state advocates' failure to secure unambiguous constitutional text did not hurt them, since they arguably won the ideological struggle over interpreting the Constitution's aims. This paradoxical success explains why recent judicial defenses of federalism have relied

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395. See THE FEDERALIST NO. 51 (James Madison).

396. See, e.g., THE FEDERALIST NO. 9 (Alexander Hamilton).

397. See, e.g., Yoo, *supra* note 20, at 1393-95 (emphasizing the "Framers' unified understanding of federalism," particularly the "link between state sovereignty and individual rights").

extensively on “history and structure” rather than on definitive constitutional language, which is often lacking.<sup>398</sup> But such reasoning is in tension with the rise of jurisprudential theories that emphasize that the democratically authorized constitutional text—rather than uncodified intentions or expectations—is alone binding law.<sup>399</sup>

Third, by focusing on the Constitution’s late eighteenth-century drafting, this Article necessarily slights the dramatic changes wrought by the Reconstruction Amendments. Although federalism’s post-Civil War remaking lies beyond the scope of this Article, the history explored here perhaps provides a suggestive frame for the period. As other scholars have traced, the drafters of the Reconstruction Amendments were keenly aware of what they perceived to be the abuses and excesses of state sovereignty in the antebellum United States, and so sought to curtail states’ power by expanding federally granted and enforced rights.<sup>400</sup> The result was a dramatic expansion of the dual-sovereignty frame already present before the Civil War, in which limitations on state sovereign rights against their competitors increasingly depended on invocations of ever-expanding federal authority. In 1886, for instance, the Supreme Court announced the federal government’s complete authority over all aspects of Natives’ lives.<sup>401</sup> It justified this sweeping power by invoking the federal government’s duty to protect “dependent” Native peoples, particularly against their “deadliest enemies”: “the people of the states where they are found.”<sup>402</sup> That same day, the Court also reportedly ruled that corporations were “persons” under the Fourteenth Amendment, granting them a new and powerful federal tool with which to challenge

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398. See, e.g., *Alden v. Maine*, 527 U.S. 706, 724 (1999); see also *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to [whether Congress may compel state officers to execute federal laws], the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”).

399. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009). For an introduction to a vast and complicated literature on original-public-meaning originalism, see Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (“[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.”).

400. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 196 (1990); see also AMAR, *supra* note 157, at 156–59; Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 875–80 (2003). If, as Akhil Amar suggests, the Bill of Rights was intended to protect “intermediate associations” such as the “church, militia, and jury,” AMAR, *supra* note 157, at xii, then making the Bill of Rights enforceable against the states substantially expanded this dynamic.

401. *United States v. Kagama*, 118 U.S. 375, 379–80 (1886).

402. *Id.* at 384 (emphasis omitted).

whole swathes of state legislation.<sup>403</sup> Municipalities, by contrast, were deprived access to federal rights and consigned entirely to state control: “[N]othing in the Federal Constitution . . . protects [cities],” the Court proclaimed when Pittsburgh attempted to invoke the Contracts Clause.<sup>404</sup> “The power is in the state . . . .”<sup>405</sup>

Finally, this Article, with its focus on sovereignty, intersects somewhat orthogonally with current federalism scholarship, which has become disillusioned with dual sovereignty as an intellectual frame. Scholarly discourse, these scholars lament, has echoed broader historical developments: by creating two distinct poles, dual sovereignty has constantly pushed federalism scholarship to rehash debates between nationalists and proponents of states’ rights. One proposed solution has been a call for a new approach to federalism, one drained of sovereignty, which would, in the words of Heather Gerken, extend “all the way down,” beyond debates over federal and state power to encompass cities, juries, school boards, and the myriad institutions of governance in which authority is actually exercised.<sup>406</sup> This move, Gerken argues, would grant minorities the “power of the servant – authority without sovereignty.”<sup>407</sup>

I am of two minds about what the history recounted here offers for this “new nationalist” school of federalism scholarship. In one sense, it offers a usable past. Gerken stresses that her vision of federalism is “not your father’s federalism,”<sup>408</sup> but perhaps it is your many-great-grandmother’s: federalism-all-the-way-down bears a more-than-passing resemblance to pre-Revolution America, where institutions of local governance possessed the kind of voice and autonomy that Gerken seeks. For a scholarly field that, at least to my eye, seems to be searching for alternate models of authority, this history offers an account different from the dominant dual-sovereign frame.

And yet, this Article also suggests the limits of such a reimagining. In part, the objection is terminological. As depicted here, the routine invocation of federalism to describe any division of authority between local and central governments distorts the term’s historical specificity: federalism in the United States

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403. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 394-95 (1886). As scholars have traced, the case’s caption distorted the Court’s actual holding, but this mangled version nonetheless became the basis for corporations to invoke all manner of federal rights. See WINKLER, *supra* note 117, at 113-60.

404. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

405. *Id.*

406. Gerken, *Federalism All the Way Down*, *supra* note 9.

407. *Id.* at 33.

408. *Id.* at 9.

has always implied *dual* federalism, the separation of sovereignty between states and the federal government.<sup>409</sup> The point is not that federalism is determinate, or that it is, or should be, defined by what it meant at the time the Constitution's adoption. It is, rather, that the meaning of terms as capacious, resonant, and central as federalism is accreted through centuries of collective contestation: as a result, as Justice Kennedy's quote suggests, their current valence remains inextricably bound up with their past. Gerken's repurposing arguably attempts to separate the term from its history while still claiming this pedigree, like someone asserting a friend's identity by putting on her coat.

But the challenges go beyond the difficulty of dismantling the master's house with the master's tools. One problem concerns enforcement. Autonomy must be defended against its competitors. Yet if that protection comes from the federal government, which would retain the trump even in Gerken's newly decentralized system,<sup>410</sup> then federalism's history suggests how quickly fights over local independence would collapse into contests between state and federal power.

Still more fundamentally, federalism-all-the-way-down misunderstands the historical function of sovereignty talk. Sovereignty is never as absolute as it asserts; as this Article demonstrates, even in the pre-Civil War era that Corwin nostalgically envisioned as dual federalism's heyday, sovereignty as practiced was always incomplete, plural, and contested.<sup>411</sup> In these struggles for authority, invocations of sovereignty were about more than autonomy or supremacy; they were proclamations of legitimacy, assertions about whose claims should be recognized and whose disregarded.<sup>412</sup> Dual federalism restricted these claims of legitimacy to the states and federal government, a move with meaningful and lasting consequences particularly for the communities excluded from this validation.

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409. Gerken inadvertently underscores this point when she describes states as the "only subnational institutions that possess sovereignty" in the United States, erasing Native nations, which U.S. law defines as both subnational (despite their appellation) and sovereign. *Id.* at 21.

410. *Id.* at 71.

411. Cf. James J. Sheehan, *The Problem of Sovereignty in European History*, 111 AM. HIST. REV. 1, 2 (2006) ("As a doctrine, sovereignty is usually regarded as unified and inseparable; as an activity, however, it is plural and divisible.").

412. Cf. H. Jefferson Powell & Benjamin J. Priestler, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 659, 662 (2000) (noting that a plurality of the Supreme Court's historical invocations of state sovereignty are "rhetoric," in that "all that is meant is that state governments are important institutions whose interests should not be trampled upon lightly by the federal government (as opposed to municipalities or territories, to whom such deference is not due)").