

## “Federalisms” and Union: The Interbellum Constitution

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### INTRODUCTION

In her latest book, *The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms*,<sup>1</sup> Professor Alison LaCroix suggests that the period between 1815 and 1861 in the United States has too often been treated as “the flyover country of constitutional history.”<sup>2</sup> What was happening on the constitutional front during those years, sandwiched between what is often seen as the true end of the American Revolutionary era—the War of 1812, when the United States fought its last battles with its former colonial overseer, Great Britain<sup>3</sup>—and the transformative days of the U.S. Civil War when the U.S. Constitution was remade, is what LaCroix means by the phrase “The Interbellum Constitution.”<sup>4</sup> She asserts that this time should be the subject of greater consideration because this “period . . . witnessed a transformation in American constitutional law and politics.”<sup>5</sup> Contrary to “the conventional story,” it was a “foundational era of both constitutional crisis and self-conscious creativity.”<sup>6</sup>

To make her case, LaCroix offers “five central claims about the nature of the Interbellum Constitution,”<sup>7</sup> and the book considers each in detail. The first claim carves out the years of 1815 to 1861 as a “distinct period” that was not, as she asserts it is too

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<sup>1</sup> ALISON L. LACROIX, *THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY IN THE AGE OF FEDERALISMS* (forthcoming 2024).

<sup>2</sup> *Id.* at 10.

<sup>3</sup> See generally ALAN TAYLOR, *THE CIVIL WAR OF 1812: AMERICAN CITIZENS, BRITISH SUBJECTS, IRISH REBELS, & INDIAN ALLIES* (2011).

<sup>4</sup> See LACROIX, *supra* note 1, at 10.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 10.

often treated, merely a “gap between the constitutional landmarks of the founding era and the Civil War.”<sup>8</sup> In her second claim she identifies the “two conventional stories about constitutional debates in the period between 1815 and 1861” and says that they are both essentially wrong.<sup>9</sup> One story depicts a “binary federalism” that “frames all disputes about the structure of the American union as contests about the power of the general government versus the states.”<sup>10</sup> The second story associates the assertion of federal power with liberty, as the federal government was seen as an enemy, or a potential enemy, of slavery.<sup>11</sup> At the same time, “[s]tate power [ ] in its many incarnations (states’ rights, state sovereignty, localism) is seen as tending toward—perhaps even necessarily tied to—protections for slavery and limits on freedom, in particular the freedom of Black people.”<sup>12</sup>

There is little wonder that historians and other observers of this period, writing in the latter half of the twentieth century, would characterize the difference between the federal and state governments in this fashion. Historians are always writing in a particular social context and are almost inevitably influenced by the events taking place around them. It is important, therefore, that the twentieth century was the era of the modern Civil Rights Movement. Many of the people of the Southern states—politicians and ordinary citizens—were recalcitrant in the face of federal laws and court decisions mandating the end of de jure segregation in the South and other measures taken to ensure that African Americans had equal rights before the law in the United States.<sup>13</sup> They made arguments based upon a version of federalism that tracked many of the arguments made during the period of which LaCroix writes. It is significant that the point of controversy often centered on the question of race: What was to be done with the African Americans who, in the early nineteenth century and the twentieth century, were outside the polity if they were enslaved, and treated as mere denizens rather than true citizens of the Republic if they were free?

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<sup>8</sup> *Id.*

<sup>9</sup> See LACROIX, *supra* note 1, at 10.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *Id.*

<sup>13</sup> See generally MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION (Clive Webb ed., 2005).

LaCroix's third claim is that the era of the Interbellum Constitution was one in which the idea of "concurrent power" flourished, and indeed it was "uniquely central to" the constitutional discourse of the time.<sup>14</sup> This separates this period from both "the founding era" and "the post-Civil War regime."<sup>15</sup> Her fourth claim expands upon her take on concurrent power, saying that the concept was very much a part of the discourse on the federal commerce power during this period of the nineteenth century.<sup>16</sup> Indeed, commerce was "[t]he primary terrain on which interbellum struggles over federalism unfolded."<sup>17</sup>

LaCroix's final claim is about the nature of the American Union during this moment in history. Americans today may see the Union as an entity that existed in a recognizable form from the very start. But it should not surprise that the specific contours of the concept of union were not set in stone in the immediate decades after the Union was formed. There were, LaCroix notes, "many and varied meanings of the concept of 'union' in this period."<sup>18</sup> For this reason, it is a mistake to base historical understandings on a single definition of the term. "The emotional, moral, and constitutional heft of the phrase 'the Union' was, like so much else in this period, contested and fragile. For many interbellum observers, the Union was simply inadequate."<sup>19</sup>

### I. THE "STRANGE PARADOX"

It may come as a shock to those who attended law school in the United States, and to those in the general public who have made books about the founding of the country and the early American Republic such a popular genre, that the time period in which the Supreme Court of the United States amassed a great amount of power for itself under the leadership of Chief Justice John

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<sup>14</sup> See LACROIX, *supra* note 1, at 11.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 12.

<sup>17</sup> *Id.* at 87. In addressing this matter, LaCroix is returning to a subject matter she discussed in her much-heralded first book, *The Ideological Origins of American Federalism*, which traced Americans' thoughts about federalism from the colonial period up through the early American Republic. See generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

<sup>18</sup> LACROIX, *supra* note 1, at 14.

<sup>19</sup> *Id.*

Marshall<sup>20</sup> would be considered neglected territory. Law students learn how the Virginian politician-turned-jurist solidified the power of a Supreme Court that had begun life as the least powerful, least glamorous of the branches of government.<sup>21</sup> Beginning with *Marbury v. Madison*,<sup>22</sup> in which the Marshall Court established, among other things, the Court's power to declare laws passed by the Congress unconstitutional, students follow the progression of cases from 1803 to 1835, the year of Chief Justice Marshall's death,<sup>23</sup> that firmly established the Court as a coequal branch within the government of the United States. *Fletcher v. Peck*,<sup>24</sup> *McCulloch v. Maryland*,<sup>25</sup> *Gibbons v. Ogden*,<sup>26</sup> and *Trustees of Dartmouth College v. Woodward*<sup>27</sup> are presented as paving the way for the development of law and society in the United States. There is also reason to think that many Americans who have not gone to law school at least have some familiarity with what took place during Chief Justice Marshall's tenure. Though Chief Justice Marshall is not as popular as other members of the founding generation, a number of well-received books have told the story of how he used case law to promote a nationalist jurisprudence that

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<sup>20</sup> William H. Rehnquist, Remarks of the Chief Justice William H. Rehnquist, Federal Judges Association at the Ritz Carlton Hotel (May 8, 2001) (available at <https://perma.cc/3LKS-TKQT>) ("The Court's present-day status—and indeed, the present day status of the federal judiciary—is due in large part to John Marshall, who served as Chief Justice for thirty-four years—from 1801 until 1835.")

<sup>21</sup> See generally JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES (2018).

<sup>22</sup> 5 U.S. (1 Cranch) 137 (1803). Another scholar makes the case that the pre-Marshall era on the Court has been neglected and was also a time in which important ideas about the workings of the Constitution were put in place. Professor David Currie describes Chief Justice Marshall's influence as

so great that the modest record of his predecessors tends to be overlooked. The relative paucity of early federal legislation, the absence of a general grant of original federal jurisdiction over cases arising under federal law, and the fact that the Court's jurisdiction was largely appellate contributed to a low starting caseload. Yet for all this the twelve years before Marshall's appointment proved to be a significant formative period during which the Justices established traditions of constitutional interpretation that were to influence the entire future course of decision.

DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 3 (1985).

<sup>23</sup> PAUL, *supra* note 21, at 433.

<sup>24</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>25</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>26</sup> 22 U.S. (9 Wheat.) 1 (1824).

<sup>27</sup> 17 U.S. (4 Wheat.) 518 (1819).

helped build the power of the Court.<sup>28</sup> Indeed, LaCroix references these works in footnotes, acknowledging the substantial literature on the development of the Court in the early American Republic through the so-called Age of Jackson, up until the start of the Civil War.<sup>29</sup>

But LaCroix sees "a strange paradox":

[T]he fact that John Marshall was the Great Chief Justice is a casebook commonplace. The fact that the Marshall Court issued a host of foundational decisions has been established through numerous important works of scholarship. Yet, somehow, the period is held to have been bereft of constitutional creativity or intellectual development. How can this be?<sup>30</sup>

This raises the question: Who exactly has designated the era "bereft of constitutional creativity or intellectual development,"<sup>31</sup> and would such a pronouncement negate the influence of the copious literature discussing the development of constitutional interpretation during this period?

In the Introduction to *The Interbellum Constitution*, LaCroix identifies the works of legal scholars Bruce Ackerman and Akhil Reed Amar as having downplayed the richness of constitutional interpretation during the interbellum period, and it appears that their writings on the Constitution during this era served as a major provocation to writing this book. She writes:

Ackerman calls the years after 1815 "qualitatively different from the previous decade," consigning them to the category of "a period of 'normal politics.'" In contrast to Ackerman's canonical "constitutional moments" of the founding, Reconstruction, and the New Deal, the interbellum period did not witness "great ideological struggles between competing parties."<sup>32</sup>

She says of Amar: "Employing a similar chronology, Akhil Reed Amar's story of constitutional development focuses on four key moments: the founding, Reconstruction, the New Deal, and

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<sup>28</sup> See generally, e.g., R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* (1988); PAUL, *supra* note 21.

<sup>29</sup> See LACROIX, *supra* note 1, at 15 nn.31–32.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (quoting BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 242–43 (2005)).

the civil rights revolution of the 1960s.”<sup>33</sup> However, both men “acknowledge the significance of some of the [interbellum] era’s major Supreme Court decisions, principally *McCulloch v. Maryland* (1819).”<sup>34</sup>

Still, even with these two scholars’ assessments of the period of which LaCroix writes—and Amar only by inference because she does not cite any specific statement of his that suggests that nothing was going on during this period—there is still the question why LaCroix sees all of the writings on the development of constitutional jurisprudence during this era as basically ignoring the significance of constitutional interpretation during that time. Do Ackerman’s and Amar’s opinions carry the day given the amount of writing that has been done on constitutional cases between 1815 and 1861?

As voluminous as they may be, LaCroix identifies deficiencies in the substance of the writings on this period: “[T]hese accounts overlook the profound interconnection between law, politics, and history in this period. Our governing narratives of the early nineteenth century are incomplete and in need of updating using new techniques that meld constitutional law with legal and intellectual history.”<sup>35</sup>

It is LaCroix’s intention with *The Interbellum Constitution* to go beyond the most common presentations to reveal the “profound interconnection between law, politics, and history in this period.”<sup>36</sup> She wishes to broaden what can be considered constitutional theorizing, removing the question from the chambers of the Supreme Court and the intense focus on the outcomes of particular famous decisions. It makes sense, in a legal system based upon precedent, for legal scholars to zero in on the holdings of cases and the reasoning that makes up the jurisprudence of a certain time. There is a practical concern—how should contemporary cases be decided?—that does not apply to traditional historical writing, which seeks to explicate a particular moment in time without necessarily connecting it to any specific current issue.

What is needed for telling the intellectual, social, political, and legal history of a given moment, however, is not simply how specific cases were decided. The lens has to be broadened to bring

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<sup>33</sup> *Id.* (citing AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 5 (2012)).

<sup>34</sup> See LACROIX, *supra* note 1, at 15.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

in as much of the context of the time period as can be adduced. That involves recovering the substance of the debates that ranged in the era—considering the points of view that could have been widely held at the time but did not triumph in the end. The range of acceptable arguments can tell us a great deal about a given society. Why did some positions succeed while others failed? LaCroix seeks to survey the arguments in a way that shows the intellectual flexibility of early Americans' conceptions of their system of federalism.

## II. LAWYERS: ARCHITECTS OF THE INTERBELLUM ERA OF CONSTITUTIONALISM

And what of the most prominent members of the founding generation and those who came after, for example, Presidents Thomas Jefferson, James Madison, and Andrew Jackson? Their stories have been parsed endlessly during their lifetimes and since, and have carried much information about the period of constitutional struggle and interpretation of which LaCroix writes. As powerful as these presidents were, however, they didn't make the era all by themselves. LaCroix sets the stage for her attempt to tell a broader story of this era by focusing on the life of a man who is largely unknown to the general public today, but who was one of the most famous and influential leaders of his time: William Wirt.<sup>37</sup>

In much-quoted passages in his classic work *Democracy in America*, political theorist Alexis de Tocqueville famously noted the outsized role that lawyers have always played in American life:

The Aristocracy of America is on the Bench and at the Bar. . . . In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause, which it is useful to investigate, as it may be reproduced elsewhere.<sup>38</sup>

Tocqueville appeared in the United States in 1831 toward the middle of the interbellum period.<sup>39</sup> His observations of American society during that time fit perfectly with the world that LaCroix

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<sup>37</sup> *Id.* at 5.

<sup>38</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 348 (Henry Reeve & Francis Bowen trans., The Century Co. 1898).

<sup>39</sup> *Id.* at xvii.

describes, a world in which lawyers shaped everyday understandings about law and the Constitution.<sup>40</sup> If any lawyer was a member of the country's aristocracy, it was William Wirt. Born four years before the signing of the American Declaration of Independence, and living until the Age of Jackson, Wirt connected the founding generation to the generation that succeeded it.<sup>41</sup> President Thomas Jefferson was a friend and mentor, having come into Wirt's life when the young man married the daughter of President Jefferson's doctor and close friend, George Gilmer.<sup>42</sup> Wirt served informally as President Jefferson's personal lawyer.<sup>43</sup> President Jefferson recommended him for a series of positions.<sup>44</sup> He came into national prominence with his unsuccessful prosecution of former Vice President Aaron Burr for treason in 1807 and remained in the public eye for the rest of his life.<sup>45</sup> According to LaCroix, "[e]verywhere one looks in the world of early-nineteenth-century American law and politics, Wirt [was] there."<sup>46</sup>

Wirt was, as LaCroix describes him, the "[i]nterbellum [c]onstitutionalist,"<sup>47</sup> and she uses his life and career as a template for the constitutional moment that she seeks to illuminate. Examining his progress through life, and the arguments he made in legal cases, in his letters, and in his nonlegal writings—Wirt was something of a literary figure—illuminates the great constitutional issues and matters of interpretation of the day. Of this she writes, "[c]ommerence, mobility, and concurrent power were the defining elements of Wirt's life. They were also the defining elements of American constitutional thought and debate in the early nineteenth century, between approximately 1815 and 1835."<sup>48</sup>

Debates about these issues were taking place in a state of confusion about how federalism was to work in a world "in which federal and state power overlapped, intermixed with a thicket of

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<sup>40</sup> See LACROIX, *supra* note 1, at 25–29 (explaining the influence of the lawyer William Wirt).

<sup>41</sup> *Id.* at 25.

<sup>42</sup> *See id.* at 30.

<sup>43</sup> *See id.* at 46.

<sup>44</sup> *See id.* at 42–43 (noting Wirt's selection for the prosecution of former Vice President Aaron Burr, a prosecution closely managed by President Jefferson); *see also* LACROIX, *supra* note 1, at 45 (describing President Jefferson's request that Wirt run for Congress); *id.* at 24 (noting President Jefferson's request for Wirt to become the University of Virginia's first president and first professor of law).

<sup>45</sup> *See id.* at 22–24.

<sup>46</sup> *Id.* at 22.

<sup>47</sup> *Id.* at 25.

<sup>48</sup> LACROIX, *supra* note 1, at 26.



local power, and overlaid by the tendrils of foreign affairs.”<sup>49</sup> In other words, how did (could) *imperium in imperio* (a state within a state) actually work? It had been a commonplace idea before the revolutionary period that such a thing could not work—there could only be one sovereign.<sup>50</sup> The Framers of the U.S. Constitution believed they had overcome this problem with the federalized structure of their government. But it was one thing to have created a federal system on paper in 1787 and another thing for the formerly separate entities to try to operate together under the umbrella of a new national government created by that piece of paper.<sup>51</sup> LaCroix notes that, unlike today, people of the time period actually believed it was possible to have a government that ran with power disbursed in this fashion.<sup>52</sup>

We see Wirt acting in various capacities as a lawyer, a public figure, and Attorney General during President James Monroe’s administration, addressing pressing and never-before-seen questions that the existence of concurrent powers raised.<sup>53</sup> His status as an adopted Virginian and a slave owner influenced how he saw these matters, leading him to favor national power in some instances—including in instances where this stance “[ran] contrary to slave-owning interests—and states’ rights in other cases.<sup>54</sup> It was always a difficult balancing act that he and others operating within the system accepted as a normal part of their lives in the new republic.

Under the circumstances of the years between the wars, Wirt, his cohort of lawyers, and many other Americans had to grapple with two major questions:

First . . . [W]hat was the Union? Was it synonymous with the Constitution? Was it embodied in the general government? Or was the Union something distinct from the general government, a balanced and aspirational entity to be guarded from the power-grabbing tendencies of the temporary occupants of the executive and legislative branches? . . . Second,

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<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.* at 250.

<sup>51</sup> *See generally* JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018). Historian Jonathan Gienapp argued that the meanings of the Constitution were not really set until after the bruising political battles of the 1790s, and he argued that it is thus a mistake to think meanings can be discerned just by the text created in 1787.

<sup>52</sup> *See* LACROIX, *supra* note 1, at 17–19.

<sup>53</sup> *See id.* at 22.

<sup>54</sup> *See id.* at 26–27.

did the constitutional system provide an arbiter, an umpire, to oversee this balance? Or was the constant struggle in fact the goal? Was the Supreme Court the arbiter, or was it merely another branch of the general government, jostling and grasping for power?<sup>55</sup>

There is little reason to doubt the centrality of these questions. To the extent that they seemed especially confounding to those living during the interbellum years, it was almost certainly a function of the fact that the questions were new. It is only natural that there would be some level of confusion and uncertainty at the start of any new enterprise, especially one so large and complex as a new government—a republic after having been part of monarchy. People who were subjects were told they were now the “sovereign” in some capacity. They had to figure out just what that meant and how their power would be expressed in a republican form of government with federalism as the means of ordering the various governments that existed at different levels of society. It must be noted, however, that the struggle to find the proper balance between federal, state, and local power is not unique to the interbellum constitutional period. There, probably, has never been a time when there have not been disputes about how to set the balance. Debates about these questions continue to this day.

### III. FEDERAL POWER, COMMERCE, AND CONCURRENT POWER

If people know anything about the Marshall Court, they know that the Chief Justice, and to a great degree his protégé and eventual Justice, Joseph Story, used the decisions of the Court to exert federal power over the commerce of the nation.<sup>56</sup> In the great battles of the 1790s, Chief Justice Marshall had been a prominent member of what would become the Federalist Party, with an affinity for extending the power of the national government.<sup>57</sup> With the election of President Jefferson in 1801, at the head of the Democratic-Republican Party, the Federalists never achieved real power again in either the executive or the legislative branch.<sup>58</sup> The judiciary was the last Federalist stronghold. That,

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<sup>55</sup> *Id.* at 48–49 (emphasis omitted).

<sup>56</sup> *See id.* at 341.

<sup>57</sup> *See LACROIX, supra* note 1, at 33.

<sup>58</sup> In an 1802 letter by President Jefferson to his Attorney General, Levi Lincoln, President Jefferson vowed “to sink federalism into an abyss from which there shall be no

in many ways, is how the Court made itself into a powerful entity in the face of Democratic-Republican domination. What the Federalists could not achieve by electing representatives and presidents was achieved through the Court, and perhaps in no other area did the Court assert itself more strategically and fatefully than in the area of commerce.

LaCroix's discussion of the way the Court shaped the laws regarding commerce notes the particular problem that decision-makers and members of the public had in looking to overlapping centers of power to answer questions about how commerce would proceed in the new republic.<sup>59</sup> Much has been written about *Gibbons v. Ogden*, in which the Supreme Court ruled that the federal government had exclusive power over interstate commerce.<sup>60</sup> The opinion is, to a great degree, well-trod scholarly ground, but LaCroix offers a different perspective on this case and others decided during this time period. Instead of focusing primarily on the reasoning and holdings of the opinions, LaCroix went to the archives to find the arguments of the lawyers involved in the cases.<sup>61</sup> She also searched newspapers and the correspondence of interested parties.<sup>62</sup> These sources allow her to show the range of acceptable arguments that were advanced about the nature of federalism and to show that there were "several credible versions" of federalism at play.<sup>63</sup> And because "federalism meant multilayered government, it guaranteed some degree of friction among the levels of law-producing authorities."<sup>64</sup> Portraying this as a contrast with present-day beliefs, LaCroix insists that unlike modern-day analysts of federalism, "[i]nterbellum producers of constitutional discourse understood the federalist project to be one of constant

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resurrection for it." Letter from Thomas Jefferson, President, to Levi Lincoln, Attorney General, LIBR. OF CONG. (Oct. 25, 1802) (available at <https://perma.cc/SK8Y-3HKS>). He and his party were ultimately successful, which led to a period of domination by the Democratic-Republicans. This period came to be known as the "Era of Good Feelings" largely because of the lack of intense partisanship and because of American confidence after the end of the War of 1812. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 93 (2007).

<sup>59</sup> LACROIX, *supra* note 1, at 84.

<sup>60</sup> See *generally* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>61</sup> See LACROIX, *supra* note 1, at 137.

<sup>62</sup> See *id.*

<sup>63</sup> *Id.* at 88.

<sup>64</sup> *Id.* at 87.

negotiation among competing, and sometimes overlapping, powers. They believed that multiple sources of authority could extend over a given activity.”<sup>65</sup>

What are we to make of this, however? Was the more flexible understanding of federalism a matter of greater political openness and intellectual sophistication, or was it, to a degree, a result of the country’s relative youth? It should not surprise that in a society applying a brand-new system of government there would be multiple views about how that new government was supposed to operate. They had no basis for knowing what would work and what would not work. Certainly, all interested parties who had the power to do so would try to press their particular viewpoints; some would be accepted, and others rejected. In his 2018 book, *The Second Creation: Fixing the American Constitution in the Founding Era*, which should be read in conjunction with LaCroix’s work, historian Jonathan Gienapp examined the 1790s in the United States and argued that the meaning of the U.S. Constitution was not really “fixed” until after the bruising political battles of the 1790s.<sup>66</sup> Gienapp also drew attention to the range of arguments about the proper operation of the recently formed government. It was only through the debates, discussions, and attempts to apply the language of the Constitution to problems that arose during the 1790s—things that could not have been anticipated and things that, perhaps, should have been—that a version of a fixed Constitution came into being.<sup>67</sup> LaCroix’s argument is much like Gienapp’s in its focus on the importance of debate and discourse in fashioning constitutional interpretations, except Gienapp focused on an earlier period in the Republic. There is every reason to believe that this process has applied throughout the history of constitutional interpretation in the United States.

Could the more “binary”<sup>68</sup> attitude toward federalism that LaCroix discerns be a function of two centuries’ worth of experience, of people deciding based upon trial and error that a particular way of operating works—or does not work? Of course, we know something that the subjects of this book did not know—that the document LaCroix is writing about actually failed its experiment in federalism and failed to keep together the Union it created. A

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<sup>65</sup> *Id.* at 17.

<sup>66</sup> GIENAPP, *supra* note 51, at 4.

<sup>67</sup> *See id.* at 9–12.

<sup>68</sup> LACROIX, *supra* note 1, at 2.

new version had to be created. We also know from our own perspective today that the Constitution does not answer many of the very salient questions that have arisen in our present-day context.<sup>69</sup> But as LaCroix’s book makes plain, the intimations of that ultimate failure, as well as the problems that have carried over, can be discerned in some issues addressed in the period that is the subject of her work. The Constitution left so many important questions unanswered that it is no wonder that people had to fill in the blanks, and judges have been doing it in one way or another ever since. LaCroix actually refers to this process of change over time in her discussion of the way the landscape of constitutional interpretation of the laws of commerce shifted during the nineteenth century.<sup>70</sup> For example, the Court’s pronouncement about Congress’s power to regulate commerce brought a reaction:

The debates surrounding the steamboat monopoly in *Gibbons v. Ogden* had offered a hopeful vision in which the Commerce of the Union staved off destruction and decline. . . . In the late 1830s, however, the idea of the Commerce of the Union appeared to have lost its luster. This shift occurred because contemporaries no longer wished to search for a shared substantive vision of national commerce. Perhaps they had ceased to believe that such a vision was even possible. Instead of asking whether a given activity extended out from the local realm to meld with commerce among the states, with foreign nations, or with the Indian tribes, they began asking a different question: Did the activity come into the state, and in so doing become part of the state’s autonomous ambit? Contemporaries thus turned to concurrent power. They embraced the idea that the states claimed coequal spheres of governmental authority with those covered by the general government.<sup>71</sup>

And while scholars who write in the area of constitutional interpretation may tend to see federalism in binary terms, and express skepticism about the capacity of a government to run with concurrent powers, certainly the experiences of lawyers and

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<sup>69</sup> Some, such as constitutional scholar Sanford Levinson, have argued that the document should be scrapped totally and substituted with a document that better suits the exigencies of modern times. See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

<sup>70</sup> See LACROIX, *supra* note 1, at 336–37.

<sup>71</sup> *Id.*

judges—as during the time of William Wirt—show that there are differing understandings about the meaning of union, federalism, and the possibility of existing within a regime of concurrent powers. Would it be possible to replicate in present times the story of divergent constitutional interpretations by the same means used to uncover the varied experiences and opinions that existed during Wirt’s career? In other words, could one look at today’s newspapers, emails, law review articles, legal briefs, and social media posts and discover a wide range of views about federalism, union, and the possibilities of exercising concurrent power?

#### IV. RACE, UNION, AND FEDERALISM IN THE NEW REPUBLIC

One recurring theme in *The Interbellum Constitution* is that the questions of how people of African descent, free and enslaved, fit into the new Republic and how Indigenous Peoples were to be treated once the Republic was established were present from the very beginning. The United States has always been a multiracial, multicultural society. The creation of a republic based upon the will of “the people” raised questions about just who counted in that designation. At the time of the Revolution, slavery existed in all thirteen American colonies, though the institution was far more entrenched in the Southern colonies.<sup>72</sup> A racially based system of slavery, in which only people of color (mostly people of African descent) could be enslaved, made all Black people suspect on the question of who could be part of “the people.”<sup>73</sup> The Naturalization Act of 1790<sup>74</sup> put a punctuation mark on the importance of race in the new republic by providing that only free white people could immigrate to the United States.<sup>75</sup> Indigenous Peoples, seen as fundamentally different from Europeans, were generally treated as members of separate nations outside of the new American polity.<sup>76</sup>

With the demographics described above, understandings about racial differences and the conflicts over slavery shaped how law and the early American system of government operated. For example, one of the cases LaCroix discusses, *The Brig Wilson*,<sup>77</sup>

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<sup>72</sup> See Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 81–82 (1999).

<sup>73</sup> See *id.* at 78 (“As early as 1806, Virginia’s highest court had asserted that blackness created a presumption of slavery.”).

<sup>74</sup> Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

<sup>75</sup> See *id.*

<sup>76</sup> LACROIX, *supra* note 1, at 305.

<sup>77</sup> 30 F. Cas. 239 (C.C.D. Va. 1820).

demonstrates the ways in which the issues of race and slavery figured in the earliest disputes about federalism.<sup>78</sup> The Court and Congress had to deal with the fact that there was a

collision among several distinct international legal regimes governing slavery. It was also a moment in which the legal categories of “free person of color” and “slave” gained increased salience because those categories had different meanings in different jurisdictions. Yet those jurisdictions were now to be joined into a single *union*.<sup>79</sup>

As historians say, nothing is inevitable. But the cases LaCroix describes make it clear that the seeds for possible disunion—over the question of slavery in particular—were present early on.

It is, therefore, not a surprise that South Carolina, which would go on to precipitate the rupture of the Union,<sup>80</sup> would be such an important part of LaCroix’s story. She devotes two chapters to the state as a rich source of debate about the nature of federalism.<sup>81</sup> As LaCroix notes, the issues of race and slavery were always present in constitutional interpretation directly or indirectly. When a Black British sailor challenged South Carolina’s Negro Seamen Act<sup>82</sup> in 1823, all levels of government were involved. It was an international question, as well as a federal, state, and local question.<sup>83</sup> The law provided that any “free negro or person of colour” who came to port in South Carolina would be jailed if they left the ship.<sup>84</sup> LaCroix deftly lays out the issues at hand. There were competing values and loyalties at play in a Southern slave society with officials who were loyal to their state but also loyal to a conception of federal power that was offended by South Carolina legislation, as it usurped the power of the federal government in dealing with foreign nations and their subjects.<sup>85</sup>

<sup>78</sup> See LACROIX, *supra* note 1, at 100.

<sup>79</sup> *Id.* at 97 (emphasis added).

<sup>80</sup> See DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861*, at 491 (Don E. Fehrenbacher ed., 1976) (“There can be little doubt that the speed of South Carolina’s action gave crucial encouragement to secessionists throughout the South and accelerated the tempo of the disunion movement in a decisive way.”).

<sup>81</sup> See LACROIX, *supra* note 1, at 159–240.

<sup>82</sup> Ch. 3, §§ 1, 2, 7, 1822 S.C. 11, 11–13, *invalidated by* *Elkison v. Deliesseline*, 8 F. Cas. 493 (Johnson, Circuit Justice, C.C.D.S.C. 1823) (No. 4,366)

<sup>83</sup> LACROIX, *supra* note 1, at 164.

<sup>84</sup> *Id.* at 174.

<sup>85</sup> *Id.* at 164 (“It was not obvious to [many South Carolinians] that broad federal power necessarily translated into antagonism toward their local or state regulations upholding slavery and racial subordination.”).

The story of South Carolina's role in one of the most serious events of the interbellum period—the Nullification Crisis of 1832–1833—has been told often by political historians, legal historians, and constitutional scholars, among others.<sup>86</sup> The Crisis fits squarely into LaCroix's consideration of this period for it showed the ways in which people of all walks of life had differing understandings of the nature of the Union, federalism, and concurrent power. The central figures and their respective views are well known—President Andrew Jackson, Vice President John Calhoun, Secretary of State Daniel Webster, and Secretary of State Henry Clay.<sup>87</sup>

LaCroix approaches the matter from a different route. Just as she eschews focusing on the ideas and actions of the most famous men of the interbellum period in favor of analyzing the career of William Wirt, she highlights the views of other less well-known figures who contributed to the discussion of federalism and nullification—most interestingly, Maria Henrietta Pinckney, a writer and a member of the famous South Carolinian family.<sup>88</sup> LaCroix's discussions of people who did not wield formal power, but were nevertheless influential, provide an important window into the past, broadening our understanding of the way a given society worked. Because of the gender conventions of the day, the voices of women on political matters were seldom aired in public, and LaCroix's presentation of Pinckney's life and work will be of great interest and use to other scholars. Pinckney, the daughter of the famous statesman Charles Pinckney, was said to have had a "masculine intellect" that was greatly respected in her circle.<sup>89</sup> LaCroix notes that her "political views were well known in Charleston, and she occupied an important, and unique, place in public debates concerning nullification, state sovereignty, and the structure of American federalism."<sup>90</sup> In 1830, she published a tract in support of the Southern position on nullification, titled *The Quintessence of Long Speeches, Arranged as a Political Catechism* (also called the *Political Catechism*).<sup>91</sup>

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<sup>86</sup> See, e.g., PAUL, *supra* note 21, at 424; James Haw, "The Problem of South Carolina" Reexamined: A Review Essay, 107 S.C. HIST. MAG. 9, 17 (2006) ("[I]t was during the nullification crisis that these peculiarities helped shape a divergent path for South Carolina on the national stage.").

<sup>87</sup> See generally PAUL, *supra* note 21.

<sup>88</sup> See LACROIX, *supra* note 1, at 205.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 206.

<sup>91</sup> *Id.* at 219.



Pinckney’s station in life, namely her connections to a powerful family, no doubt made it easier for people to accept a woman’s participation in discourse that was more typically seen as the domain of men. Also, there is no reason to doubt that Pinckney’s views on the balance of power between the federal government and the states were influenced by her status as an enslaver and member of a prominent family that enslaved people. From the battles in 1787 in Philadelphia over slavery, members of the Southern gentry were wary of federal power out of fear that the federal government might one day move against the institution of slavery.<sup>92</sup> This was the fear that shadowed debates about the commerce power, about internal improvements, and about any measures that allowed the federal government to act with strength.

#### V. “FRACTAL FEDERALISM”

The new republic had been carved out of land that had previously belonged to others. The question of what to do with the inhabitants of that land who did not wish to become a part of the new country and whom many Europeans looked down upon was, and to a great degree today remains, a central question for the American Republic. The United States was made up of entities—states—in which Indigenous Peoples lived. With every expectation that there would be more states and more encroachments on the lands of Native Peoples, it was likely inevitable that there would be conflicts between the federal government and individual states that believed they had the right to control what went on in their borders. LaCroix takes up the so-called “Indian cases” in two chapters focusing on Georgia, which presented the problem of multiple tiers of government starkly.<sup>93</sup> William Wirt even makes an appearance.<sup>94</sup> Again, this is one area that has, in fact, been exhaustively covered by historians, law professors, and constitutional scholars. As have other scholars,<sup>95</sup> LaCroix attempts to see these matters through the perspective of Indigenous Peoples like

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<sup>92</sup> *Id.* at 17–18.

<sup>93</sup> LACROIX, *supra* note 1, at 241–335.

<sup>94</sup> *Id.* at 252.

<sup>95</sup> See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 557 (2021) (“Tribal law is American law, and as such it ought to occupy an equally prominent place alongside federal, state, and local law.”). See generally Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999 (2014).

Elias Boudinot, a man of mixed Cherokee and European heritage.<sup>96</sup> The Cherokee, as did other Indigenous Peoples, had their own theories about government, and their negotiations with whites reveal their attempts to incorporate their perspectives on how these matters should be resolved. LaCroix uses the phrase “[f]ractal [f]ederalism” to describe the Cherokee’s understanding of the relationship that existed between them, the federal government, and the states.<sup>97</sup> They were a nation within a state that was also in a larger nation with whom they had to negotiate.<sup>98</sup> They forged treaties with the federal government, and those treaties determined their fate.<sup>99</sup> But they had to be aware that the federal and state governments often had conflicting views about how, and whether, Indigenous Peoples would fit in the entities called the states. This was, of course, a delicate business, as it is even today.<sup>100</sup>

According to LaCroix,

the struggle of the Cherokee Nation [was] at the center of the interbellum American constitutional narrative. The story is not simply one of binary conflict between the federal government and the states. It is not a case study in the familiar federalism dynamic brought about by the Civil War and entrenched in the twentieth century. Nor is it a tale of inevitability, in which an Indigenous society was destined to be compelled to give way in the face of American imperialism, Manifest Destiny, racism, or any of the other forces that are correctly associated with, but not entirely constitutive of, the interbellum United States.<sup>101</sup>

This was a battle over the place of “nonconforming polities that lay within the boundaries of the American federal union.”<sup>102</sup> One might also refer to the “American Empire,” for these battles over

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<sup>96</sup> LACROIX, *supra* note 1, at 266.

<sup>97</sup> *Id.* at 247.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at 255 (“The only lawful means by which Indian lands could be acquired was through the mechanism of a treaty.”).

<sup>100</sup> *See, e.g.,* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress cannot abrogate state sovereign immunity under the Indian Commerce Clause); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (holding that approximately half of Oklahoma is “Indian country” for the purposes of the Major Crimes Act, 18 U.S.C. § 1153); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022) (holding that both the states and the federal government may prosecute crimes committed by non-Indians against Indians in Indian country).

<sup>101</sup> LACROIX, *supra* note 1, at 249–50.

<sup>102</sup> *Id.* at 250.

which non-Indigenous groups would have the power to exert influence over the destinies of Native Peoples resemble the tenor of the conflicts that existed between the American colonists and the officials in the government of Great Britain in the prerevolutionary days. A central point of contention between the colonists and the mother country was the willingness of the latter to make deals with Native Peoples that prevented, or at least slowed, western expansion. The United States in the coming decades would expand its empire west, creating new states and new occasions of conflict with Native Peoples, until the country reached the Pacific Ocean.

#### CONCLUSION

*The Interbellum Constitution* reminds us of the important insights that have helped transform the historiography of the early American Republic, of slavery, and of relations between European settlers and Indigenous Peoples. Historians and other scholars during the latter half of the twentieth century discovered the importance of moving beyond "great man" history to tell a richer and more truthful story about the past. The story LaCroix tells is not entirely unknown, but her signal contribution is to look beyond the "great man," "great case" perspective on the years after the War of 1812 and before the Civil War. By mining the archive for information, she expands our understanding of the range of ideas about union, federalism, and sovereignty. As we live in a time, when all of these concepts, in a different context, in a much different world, are still very much at issue, her intervention is timely.