REVIEW

Federalism from the Bottom Up

Gordon S. Wood†

The Ideological Origins of American Federalism
Alison L. LaCroix. Harvard, 2010. Pp 1, 312.

In 1989 I gave a lecture at the Library of Congress commemorating the 200th anniversary of the founding of the Congress. Although my lecture was solely about the First Congress, during the question period a very angry woman asked: "Why don't you historians of the Founders give proper credit to the Iroquois in the creation of the Constitution?" I was surprised by the question, because I had never heard of the Iroquois's involvement in the making of the Constitution. I suppose I should have known about it, because, as I later discovered, the House of Representatives and the Senate in October 1988 had passed resolutions thanking the Iroquois for their contribution to the framing of the United States Constitution.[1] The angry woman was Laura Nader, the sister of Ralph Nader and a professor of anthropology at Berkeley. She was so infuriated that she wrote a letter to the Librarian of Congress, James Billington, enclosing an article by another anthropologist and suggesting that Billington "send this to Wood and educate him in the origins of the Constitution." So Billington sent it on to me.

This is roughly how the anthropologist's argument went: Benjamin Franklin was at the Albany Congress in 1754, where he, suave diplomat that he was, congratulated the Iroquois on their ability to bring five tribes together to form the Confederacy of the Iroquois Nation. Three decades later, at the Constitutional Convention in 1787,

† Alva O. Way University Professor and Professor of History Emeritus, Brown University.

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1 Iroquois Confederacy Indian Nations—Recognizing Contributions to the United States, HR Cong Res 331, 100th Cong, 2d Sess (Oct 21, 1988), in 102 Stat 4932; Contributions of the Iroquois Confederacy of Nations, S Cong Res 76, 100th Cong, 2d Sess (Sept 16, 1987), in 134 Cong Rec S 29528 (Oct 7, 1988).

Franklin presumably passed this idea of federalism on to his fellow delegates at Philadelphia, and in this manner the Iroquois influenced the creation of our present federal system.[2]

Alison LaCroix, Professor of Law at The University of Chicago Law School, does not buy this bizarre notion of causality. In her book, *The Ideological Origins of American Federalism*, she relegates this notion to an endnote; yet in her endnote she does grant some credibility to this idea that the Iroquois Confederacy contributed to America's conception of union before concluding that "on balance . . . the case for causation has not been made" (p 229 n 40). This seems to me to be much too generous: this strange case for causation ought to have been dismissed out of hand. LaCroix thinks of herself as a historian, and no historian would conceive of causation or influence in this simple-minded manner. The Iroquois and other Indians certainly contributed a great deal to early American culture, but ideas about federalism were not among their contributions.

Yet in her ambitious book, LaCroix has built a case for the causal origins of American federalism that is almost as fanciful as that of the Iroquois-minded anthropologists. Her case for the ideological origins of federalism is not simple-minded by any means; indeed, it is very complicated and highly imaginative, but it is based on often odd readings of an extensive body of primary and secondary sources. The result is a strange and disembodied account that is very different from all of the existing explanations of the origins of American federalism.

LaCroix posits three approaches that previous scholars have used to account for the origins of American federalism. The first and most conventional, which she calls "the constitutional law approach," assumes that federalism simply emerged from the debates of the Philadelphia Convention and the state ratifying conventions in 1787 and 1788 (pp 2–3, 5). It assumes "that American federalism was novel, and that the creation of the Republic constituted a fundamental break with the past" (p 5).[3]

The second and third approaches offer much broader and more expansive time frames. They tend to view the making and ratifying of the Constitution as an end point in developments that go back decades, if not centuries. LaCroix labels the second approach to the origins of federalism "the institutional approach" (p 4). Those scholars who

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2 For an example of an argument along these lines, see Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 Am Indian L Rev 323, 327 (1989).

3 See, for example, *U.S. Term Limits, Inc v Thornton*, 514 US 779, 838 (1995) (Kennedy concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

have explicitly discussed the question of federalism's origins have focused on the structures and institutions of the British Empire as the source of the concept of divided authority. Most prominent of these scholars, she quite rightly contends, is Jack P. Greene.[4] "In Greene's view, because colonists were subject to multiple ascending layers of political authority (colonial legislature, royal governor, Parliament, Privy Council), only a minor conceptual adjustment was needed following independence to establish the Constitution's two-level federal structure of state and national authority" (p 3). Greene's story, she concludes, is one of institutions operating between the peripheries and center of the British Empire. It is based on "the day-to-day political experience of British North Americans whose ideas about government followed from their interactions with what Greene terms the 'negotiated authorities' that operated as a practical matter within the British Empire" (p 3).

More recent scholars, LaCroix suggests, have followed a similar institutional approach, an approach that focuses "on the outward manifestations of authority rather than on political beliefs or theories of government" (p 4). They have tended to treat institutions and experience as more important than arguments or ideology.[5]

LaCroix believes that ideology, namely the republican synthesis popular among scholars in the 1970s and 1980s,[6] characterizes the third approach to explaining federalism (p 4). This approach has not been very satisfying, because it focused too much on the "broader moments of ideological transformation in late-eighteenth-century American politics" at the expense of the issue of federalism itself (p 5). LaCroix suggests that the republican ideological approach has lost whatever strength it once had and that, consequently, the constitutional and institutional approaches have come to dominate our understanding of the origins of federalism (pp 4–5).

LaCroix wants to do something different from these three approaches in explaining the origins of federalism. She wants to bring ideology back into the story, not as the ideology of republicanism but as the ideology of federalism. "[T]he central claim of this book," she says, "is that the emergence of American federalism in the second half

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4 See, for example, Jack P. Greene, *Civil Society and the American Foundings*, 72 Ind L J 375, 381 (1997).

5 See, for example, Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* 7 (North Carolina 2005) (focusing on "the way people experienced constitutions rather than on constitutional theory").

6 See, for example, Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 48 (North Carolina 1998); Bernard Bailyn, *The Ideological Origins of the American Revolution* 351–68 (Harvard 1992); Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 Wm & Mary Q 167, 172 (1974).

of the eighteenth century should be understood as primarily an ideological development—indeed, as one of the most important ideological developments of the period" (p 6). She concedes that institutions were an important part of the story, but more important were "the ideas surrounding those institutions—the words and concepts that contemporary actors used as they explained to themselves what the institutions meant" (p 5). These ideas "played a crucial role in defining the contours first of colonial and then of early national government" (p 5).

Unfortunately, she never makes clear why ideas were more important than institutions and the day-to-day political experience of the colonists. In fact, it is hard to imagine ideas having any effectiveness unless they are related to people's experience. But as a historian, LaCroix at least realizes that federalism is not some transcendent idea standing outside of time and place but a historically created conception that changed through time as circumstances changed. And as a historian, she is also well aware of the danger of grafting what we now know or believe onto the thinking of the past participants (p 6).

"Federalism was a concept created in time," LaCroix says, and "[t]he time of creation was between 1764 and 1802" (p 11). Yet, like all intellectual history, the idea of federalism, she says, had a background. Its core conception of divided governmental authority "drew from several strands of political, legal, and constitutional thought," some of which went back to the sixteenth and seventeenth centuries (p 11). None of them necessarily led to federalism; but "taken together, they offered a conceptual framework through which observers in the latter half of the eighteenth century organized their thoughts about government, as well as a body of lived experience that shaped the vocabulary those observers had at hand" (p 11). Describing these strands of thought that formed the background of the creation of federalism between 1764 and 1802 takes up the first of LaCroix's six chapters.

The colonists living in the British Empire necessarily experienced multiple lawmaking bodies, ranging from the activities of their towns and their provincial assemblies to the actions of Parliament and Crown, including the operation of the Privy Council as the final court of appeal in the Empire, three thousand miles away (p 12). Yet this experience with governmental multiplicity had to contend with the growing English preoccupation with the idea of sovereignty—that is, the doctrine that in every state there must be one final, supreme, indivisible lawmaking authority, or else the state would be divided against itself. Any attempt at multiple authorities, it was said, would

result in an *imperium in imperio*, or a state within a state, which was widely condemned as a solecism in politics (pp 14–15).

This idea of sovereignty went back to the writings of Jean Bodin in the sixteenth century,[7] was reinforced by Thomas Hobbes in the seventeenth century,[8] and for an increasing number of Englishmen in the aftermath of the Glorious Revolution of 1689, was applied to the King-in-Parliament (pp 13–14). "The power and jurisdiction of parliament," wrote the eighteenth-century jurist William Blackstone in his celebrated *Commentaries on the Laws of England*,

> is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal . . . . In short, it can do every thing that is not naturally impossible.[9]

Although many mainstream Englishmen by the mid-eighteenth century accepted this doctrine of sovereignty, some, such as William Pitt and Lord Camden, did not,[10] and the idea remained contested among many Anglo-Americans (p 15). Drawing on the classical past, European thinkers, beginning with Hugo Grotius and Samuel von Pufendorf in the seventeenth century, offered various leagues, compacts, and confederations as examples of divided governmental authority (pp 18–20). There were, in other words, alternatives to the English unitary vision of sovereignty present in mid-eighteenth-century Anglo-American culture.

In addition to these theorists, British North Americans, says LaCroix, had their own experience with colonial union in the British Empire to draw upon. She mentions the New England Confederation of 1643 and the failed Albany Plan of Union of 1754 (pp 20–23). Both schemes were designed to work within the existing imperial structure and assumed a multiplicity of authorities (p 24).

The final examples of divided governmental authority that LaCroix invokes are those of Scotland and Ireland (pp 24–29). Until

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7 See generally Jean Bodin, *Six Books of the Commonwealth* (Basil Blackwell 1955) (M.J. Tooley, trans) (originally published 1576).

8 See generally Thomas Hobbes, *Leviathan* (Penguin 1982) (C.B. Macpherson, ed) (originally published 1651).

9 William Blackstone, 1 *Commentaries on the Laws of England* 156 (Chicago 1979).

10 See Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan L Rev 843, 858 (1978) (describing Pitt and Camden as adherents of the view "that a fixed constitution and fundamental law limited even Parliament").

the Act of Union of 1707, which created Great Britain, both the English and Scottish Parliaments had existed independently and had been connected only by a common monarch (p 25). In addition to Scotland, Ireland offered another historical example of an alternative approach to union. Although LaCroix presents a rather more negative view of Ireland's relationship to Great Britain than that suggested by recent scholarship,[11] she is correct in stressing the ambiguous position of Ireland in the eighteenth-century empire. Although Parliament in 1720 claimed that it had jurisdiction over Ireland in all cases whatsoever,[12] it had tended to be cautious in its interventions into Irish affairs. Like the North American colonial legislatures, the Irish Parliament, according to Jack P. Greene and other scholars, developed a considerable degree of independence during the first half of the eighteenth century.[13] Because both North America and Ireland were occasionally touched by the British Parliament's ultimate authority, people in the empire became used to double legislatures.

"Taken together," LaCroix concludes, "these antecedents formed the background against which American thinking about legislative power, sovereignty, authority, union, and jurisdiction fundamentally changed between the 1760s and the 1800s" (p 29).

LaCroix seems to believe that she has fully described the colonists' "lived experience" with federalism in this brief opening chapter (p 11), but in fact she has barely scratched the surface. She never acknowledges that the American colonists from the very beginning of their settlements in the seventeenth century were thoroughly familiar with the dividing and apportioning of political power. Indeed, this early experience with divided authority was far more significant in preparing Americans for federalism than the writings of Grotius or Pufendorf, or even their dealings with the distant multiple layers of empire. In fact, Americans from the outset were conditioned to think of political authority as very different from the top-down hierarchical structures of England and Europe. The early colonists did not need the Indians or anyone else to tell them how to dole out and divide up political power and construct

11 See, for example, Jack P. Greene, *The Constitutional Origins of the American Revolution* 47–52, 93–94 (Cambridge 2011).

12 See Dependency of Ireland Act, 1719, 6 Geo I, ch 5 (1720) ("Parliament assembled, had, hath, and of Right ought to have full Power and Authority to make Laws and Statutes of sufficient Force and Validity, to bind the Kingdom and People of Ireland.").

13 See, for example, Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788* 63 (Georgia 1986).

confederations. They learned at the beginning that political authority was divisible and created from the bottom up.[14]

The migrants who settled Jamestown and the Chesapeake, and later New England, came already primed with a long English heritage of local autonomy. As the populations in both the Chesapeake area and in New England quickly dispersed, this acute English sense of local authority was reinforced and intensified. No one had quite expected such rapid dispersion of settlement. The Virginia Company, for example, hoped to set up boroughs in the Chesapeake and, indeed, created four towns on paper—Jamestown, Charles City, Henrico, and Kiccowtan.[15] The settlers' desire to grow tobacco, a very soil-exhausting crop, undid the plan of having boroughs with burgesses as citizens.[16] Although only one of the four towns, Jamestown, actually arose, the colony's legislature was initially called the House of Burgesses, and the name stuck.

Instead of congregating in towns, the settlers dispersed and created private plantations throughout the Chesapeake area. By the 1630s, the scattering of settlements had become so great in the Chesapeake area that some sort of local organization became necessary, and, in imitation of England's county structure, the colony was divided into eight counties, each with its own court.[17] But, unlike England, where power flowed from the Crown downward to the localities, these county courts became the loci of power.

Within less than a generation of settlement, these county courts became not only the basic unit of local government in Virginia but the source of representation in the central government, with each county sending two burgesses to the central government.[18] Although the

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14 See Bailyn, *Ideological Origins* at 160 (cited in note 6). For more detailed discussions of the local development of political structures in the colonies, see Michael Kammen, *Deputyes & Libertyes: The Origins of Representative Government in Colonial America* 13–51 (Knopf 1969) (giving a colony-by-colony account of legislative development in the American as well as Caribbean colonies, focusing in particular on the development of local governments with substantial independence); Paul Lucas, *American Odyssey, 1607–1789* 30–49 (Prentice-Hall 1984) (attributing the development of bottom-up political authority to the fact that the colonies lacked several important institutions, including "the Crown, the Anglican Church, and the aristocracy").

15 *Instructions to Governor George Yeardley, November 18, 1618*, reprinted in Jon L. Wakelyn, ed, 1 *America's Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance* 49, 49–51 (Greenwood 2006).

16 Consider Warren M. Billings, *The Growth of Political Institutions in Virginia, 1634 to 1676*, 31 Wm & Mary Q 225, 226 (1974) (attributing the growth of local institutions in colonial Virginia to economic and social patterns that were unique to Virginia).

17 Id at 227.

18 See *Two Burgesses for Each County* (1669), reprinted in William Waller Henning, 2 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619* 272, 272–73 (Pleasants 1810).

parish originally had been the organization for local government, the county soon supplanted it and became the sole authority relating to the central authority in Jamestown. The county courts became powerful, self-perpetuating bodies that combined within themselves various civil, criminal, ecclesiastical, admiralty, and administrative jurisdictions that in England were exercised by different institutions. They assumed the power to deal with orphans, probate wills, collect taxes, regulate morals, supervise the militia, maintain prices, relieve the poor, issue land titles, license taverns, control the parish vestries—in fact, the men sitting on the vestries tended to be the same men sitting on the county court—and enact bylaws for their counties.[19] Central authority remained weak and dependent on power flowing upward from the counties.[20]

The same dispersion of people and localization of authority took place in New England. Within months of landing in 1630, the Puritans had created seven towns surrounding Boston.[21] These New England towns became the sole unit of local government. Like the Chesapeake county courts, the town united within itself a host of powers that had been widely shared by different local institutions in England.[22] The parish, the borough, the village, the manor court, the county—all were collapsed into the New England town.

During the first generation of settlement in the New World, the Crown, which in England was considered the source of all local authority, for all intents and purposes simply did not exist. This meant that the local units of government in both the Chesapeake and New England attained extraordinary degrees of autonomy and power without being beholden to the Crown at all.[23] Indeed, so strong and autonomous did the local authorities become that even the central governments in each of the early colonies in the Chesapeake and New England had difficulty dealing with them.[24]

It soon became evident that these central authorities not only often existed at the behest or at the sufferance of the local units but were sometimes also the creatures of the local units. The colony of Connecticut, for example, was created in 1639 when three

19 See Billings, 31 Wm & Mary Q at 225–32 (cited in note 16).

20 See id at 232.

21 See Mark A. Peterson, *The Plymouth Church and the Evolution of Puritan Religious Culture*, 66 New Eng Q 570, 579 (1993).

22 See Lucas, *American Odyssey* at 94–96 (cited in note 14) (noting that the typical town in Massachusetts Bay Colony had the authority to distribute land, monitor economic progress, elect officials, and maintain public spaces).

23 See id at 69 (noting that English officials were "appalled by the degree of independence shown by colonies like Massachusetts").

24 See Billings, 31 Wm & Mary Q at 242 (cited in note 16).

independent towns—Hartford, Windsor, and Wethersfield—came together and agreed in a written Fundamental Orders to form a superintending central government.[25] (This is why Connecticut today calls itself the "Constitution State" on its automobile registration plates.[26]) These Connecticut colonists had a clear sense that they were putting together a central government from the bottom up. A similar development took place in New Haven in 1643, when a half-dozen or so towns joined together to form a separate colony.[27] In the 1660s, these towns revolted and joined Connecticut.[28] All of this reinforced the view that authority was created by the pooling together of local power from below. In other words, these early settlers were experiencing federalism without any ideological justification whatsoever.

Some towns in New England sometimes belonged to no colony at all. Springfield, for example, existed independently for a decade or so until 1649, when it was finally incorporated into the colony of Massachusetts Bay. Although ostensibly a colony, seventeenth-century Rhode Island was in reality four more or less independent towns: Providence, founded by Roger Williams; Portsmouth, founded by Anne Hutchinson, in flight from the Puritans in Boston; Newport, founded by William Coddington; and Warwick (or Shawomut, as it was called then) founded by a real radical, Samuel Gorton, who was as cantankerous a character as ever existed in American history. Williams was constantly trying to bring these cranky Puritans together, but they were at each other's throats through most of the seventeenth century. Williams finally got a patent from the Puritan Parliament in 1644,[29] and unified the towns temporarily in 1647,[30] but that central authority remained very weak. The towns could not agree where the colony's government should meet, so they rotated from one town to another.[31] In the 1650s, the confederation of towns, such as it

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25 See *Fundamental Orders of Connecticut, 1639*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 125, 125 (cited in note 15).

26 See Jon O. Newman, *"The Old Federalism": Protection of Individual Rights by State Constitutions in an Era of Federal Court Passivity*, 15 Conn L Rev 21, 21 (1982) (describing the motto as "a designation reflecting our justified pride in having begun the process of civil governance pursuant to a written statement of fundamental law").

27 Lucas, *American Odyssey* at 42 (cited in note 14) (noting that the town of New Haven united with Fairfield, Guilford, Milford, and Stratford to form the colony of New Haven).

28 See id.

29 *Patent for Providence Plantation, March 14, 1643*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 146, 146–48 (cited in note 15).

30 See *Acts and Orders Made at the General Court of Election, May 19–21, 1647*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 148, 148–49 (cited in note 15).

31 See Kammen, *Deputyes & Libertyes* at 29 (cited in note 14) (noting that a strong sense of localism delayed the actual implementation of a central government by seven years).

was, fell apart.[32] Rhode Island now had two general assemblies, two sets of officials.[33] In the end, the colony was rescued by a man named John Clarke, who, unlike Roger Williams, is virtually unknown today. Although he was a Puritan, Clarke nonetheless succeeded in securing a royal charter from Charles II's government in London in 1663, three years after the ousting of the Puritans and the restoration of the Stuarts.[34] To this day, no one knows quite how he did it, but he saved the colony of Rhode Island. Despite the royal charter, however, near town anarchy continued to exist throughout the seventeenth century. The towns disregarded many laws—from collecting taxes to recording land titles—and scarcely existed as a united colony.[35]

This intense localization of authority that took place in both New England and the Chesapeake was not matched by any corresponding clarification of the relationship between the central and local governments, whether towns or counties. Plymouth Colony is a good example. It was founded in 1620 by Pilgrims who had a patent from the Virginia Company.[36] But they landed in New England—outside of the Virginia Company's claim. They realized this immediately, which is why the Pilgrims drew up the Mayflower Compact, granting them some legal authority to govern themselves.[37] In 1621, they obtained a new patent from the New England Council, which soon went out of business and was superseded by the Massachusetts Bay Charter of 1629.[38] So the Pilgrims found themselves in Plymouth with no legal authority whatsoever except from a patent from a company that no longer existed. William Bradford, the great diarist, controlled the patent, such as it was, and ruled rather autocratically.[39] But there were protests from the towns, which by 1640 numbered ten. As the towns scattered westward, the central authority's control over them was steadily weakened. By the 1680s, the towns were in open revolt, refusing to pay taxes to the central government in Plymouth.[40] When

32 See id.

33 See George Washington Greene, *A Short History of Rhode Island* 34 (Reid 1877).

34 See *Charter of Rhode Island and Providence Plantation, July 8, 1663*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 151, 151–52 (cited in note 15).

35 See Theodore Dwight Bozeman, *Religious Liberty and the Problem of Order in Early Rhode Island*, 45 New Eng Q 44, 44 (1972).

36 See Lucas, *American Odyssey* at 36–37 (cited in note 14).

37 See id at 37.

38 See generally *Charter of Massachusetts Bay, 1629*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 82 (cited in note 15).

39 See Roland Greene Usher, *The Pilgrims and Their History* 204 (Macmillan 1918).

40 See George D. Langdon Jr, *Pilgrim Colony: A History of New Plymouth, 1620–1691* 233, 244 (Yale 1966).

Massachusetts Bay acquired a new royal charter in 1691, it inevitably swallowed up the disintegrating Plymouth Colony.[41]

Given this experience of creating government from the bottom up, it was not all that novel for the colonies of New England—Massachusetts Bay, Plymouth, New Haven, and Connecticut—to come together in 1643 to form the New England Confederation (Rhode Island was too insignificant or objectionable to be included).[42] Because this was more than a century before the Albany Conference, these New Englanders created their confederation without the help of the Iroquois. Although LaCroix mentions the New England Confederation (p 21), she never explains its background. Indeed, she never acknowledges that the idea of parceling out authority from the bottom up—creating different levels of government—was very much a part of American experience from the beginning.

Even the legislatures of the separate colonies were in a sense the products of the bringing together of local authorities. Both the counties in the Chesapeake and the towns in New England demanded voices in the central governments, which, at the outset, were simply the governors and their councils, usually a dozen men or so.[43] Of course, the governors and their councils needed to reach out to the local units, and these mutual interests of the central and local authorities led to the creation of legislatures—composed in the case of Virginia of two burgesses from each county and, in the case of the New England colonies, of two deputies from each town.[44]

In those colonies where strong central and local forces pulled in opposite directions, the legislatures split apart and created bicameral assemblies. This did not happen in Plymouth or until much later in Connecticut because the central governments in those colonies were too weak.[45] But the central government in Massachusetts Bay was especially strong, and it resisted the centrifugal pull of the town authorities. In 1644, a series of disputes between the magistrates and the town deputies came to a head over a case involving Goody Sherman's sow.[46] Up to then, the magistrates, standing for the central authority, and the deputies, representing local interests, had met

41 See *New Charter of Massachusetts Bay, 1691*, reprinted in Wakelyn, ed, 2 *America's Founding Charters* 323, 330 (cited in note 15); Lucas, *American Odyssey* at 37 (cited in note 14).

42 See *Articles of Confederation of the United Colonies of New England, August 29, 1643*, reprinted in Wakelyn, ed, 1 *America's Founding Charters* 273, 273 (cited in note 15).

43 See Kammen, *Deputyes & Libertyes* at 14, 20–21 (cited in note 14).

44 Id at 13, 21–22.

45 See id at 20–25.

46 See *John Winthrop's Summary of the Case between Richard Sherman and Robert Keayne*, 4 *Winthrop Papers* 349 (Massachusetts Historical Society 1944).

together as the General Court.[47] In this case, the court voted seventeen to fifteen in favor of Sherman, with two magistrates and fifteen deputies for Sherman, and seven magistrates and eight deputies for her opponent, a merchant named Robert Keayne.[48] The magistrates protested, contending that a majority of magistrates should have a negative, or veto, over all decisions. The magistrates eventually won, and the General Court was divided into two houses, with the magistrates in one and the deputies in the other.[49] Virginia had a similar struggle in the 1660s that also led to a bicameral legislature.[50]

Although by the eighteenth century this bicameralism was often considered to be an imitation of the English Parliament, with its House of Commons and its House of Lords, its seventeenth-century origins lay in these struggles between local and central authorities.

Yet even as eighteenth-century Americans began regarding their governments as miniature copies of the English Parliament, they continued to think of their legislative representatives in seventeenth-century terms, as, in effect, ambassadors from their local districts. Not only did the counties and towns require their agents to be residents of the localities they represented and seek to bind them with instructions, they sometimes even refused to pay taxes if their representatives were not present at the time the taxes were voted.[51] They never accepted the idea that their so-called representatives embodied the full authority and power of the people who elected them.

This was what the Americans came to call "actual representation," which by the eighteenth century was very different from the English conception of representation.[52] Although the House of Commons had begun in the thirteenth century as a collection of delegates from particular towns and counties, by the eighteenth century it had come to be thought of as representing the whole commons of England—the entire estate of the people—not particular local units.[53] Indeed, by the eighteenth century some local English places that continued to send representatives to Parliament had no populations at all; the town of Dunwich, for example, had long since fallen into the North Sea but

47 See Mark DeWolfe Howe and Louis F. Eaton Jr, *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 New Eng Q 291, 294 (1947).

48 Id at 292.

49 Id at 294 (claiming that, as a result of this achievement, Sherman's sow has achieved immortality as "the mother of Senates").

50 See Kammen, *Deputyes & Libertyes* at 16 (cited in note 14).

51 See Wood, *Creation of the American Republic* at 173–76, 183 (cited in note 6).

52 See id at 181–82.

53 See id at 184.

continued to send two members to the House of Commons.[54] During the imperial debate of the 1760s and 1770s, the English called their hodgepodge of representation "virtual representation."[55]

Those contrasting ideas of representation, which LaCroix ignores even though they were an important part of the imperial debate, were actually aspects of a larger difference of opinion over the nature of state power. Because Americans tended to think of government as a pooling together of power from below, they never really developed, as the English did, a modern sense of state power. Because the state bureaucracy of the English Crown never reached deeply into the colonial localities, for the colonists state authority had generally remained an extraneous and alien force; when it did touch them, as it did with trade regulations, it was usually hostile and susceptible to corruption. Consequently, Americans came to think of state power as something distant and dangerous.

LaCroix believes that "the story of federalism[] . . . begins with the constitutional crisis of the 1760s, in which the background fact of multiplicity, of institutional overlap, that characterized the British Empire began to give way to a new normative vision in which multiplicity itself was a potential source of governmental authority" (p 34). She means that the Americans' experience with multiple layers of authority in the empire, their colonial legislative dealings with the Crown and Parliament, not their local experience within the colonies themselves, which she takes no notice of, was the source of their eventual ideological endorsement of federalism. The ideology of federalism, says LaCroix, was "a radical conviction that legislative power could be split into multiple heads, each associated with a set of particular substantive activities" (p 36).

Although LaCroix spends some time analyzing previous constitutional studies of the imperial debate, especially those dealing with the external–internal distinction, much of her account of the imperial debate in the 1760s follows conventional lines. The British government's enactment of the Stamp Act[56] in 1765 aroused a firestorm of opposition in America. The colonists argued that the stamp tax, levied on a variety of paper products, was an unconstitutional violation of their rights as Englishmen—that they could not be taxed without their consent, and that consent could be given only by their representatives in their respective colonial legislatures, not by Parliament. The problem was that the colonists

54 See John Cannon, *Parliamentary Reform, 1640–1832* 30 (Cambridge 1972).

55 See Wood, *Creation of the American Republic* at 173–76 (cited in note 6) ("Men did not actually have to vote for members of Parliament to be represented there.").

56 5 Geo III, ch 12 (1765).

had earlier agreed implicitly to duties levied by Parliament for the regulation of their trade, namely the Molasses Act of 1733.[57] To explain this distinction, some colonists suggested that taxes that were internal, such as a stamp tax, could be levied only by their colonial assemblies, but other taxes that were external, such as the molasses duty, could be levied by Parliament.[58] In order to justify her case for the ideological origins of federalism, LaCroix highlights the colonists' various struggles in 1765 to define separate spheres of authority and to separate internal matters from those that were external (pp 44–51, 59–64). By distinguishing between their internal jurisdiction and their external relation to Britain, some colonists, she writes, "moved toward a conception of government in which lawmaking authority was not only divided but was divided along lines that parceled out certain substantive, nondiscretionary heads of legislation to each level of government" (p 59).

Parliament repealed the Stamp Act in 1766,[59] but at the same time it passed the Declaratory Act, which stated that Parliament had the right to legislate for the colonies "in all Cases whatsoever."[60] This expression of Parliament's sovereignty was an attempt to cover its embarrassment in having to repeal the Stamp Act.

Thinking that the colonists would be willing accept external taxes (largely because of Benjamin Franklin's testimony before the House of Commons), Chancellor of the Exchequer Charles Townshend in 1767 had Parliament levy duties on a list of colonial imports.[61] The colonists reacted strongly to these Townshend duties, and in a series of writings, the most important being John Dickinson's *Letters from a Farmer in Pennsylvania* of 1767–1768,[62] vigorously denied Parliament's authority to levy any taxes whatsoever on the colonists (pp 60–63). The Americans, however, continued to accept the authority of Parliament to regulate their trade, the difference being determined by the purpose behind the parliamentary act—whether it was for the raising of revenue or for the controlling of imperial trade (p 62).

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57 6 Geo II, ch 13. See also John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* 166–70 (Wisconsin 1987) (recounting arguments by Edmund Burke that the colonies had accepted taxation in the form of the Molasses Act as part of a universal compromise).

58 See Reid, *Constitutional History of the American Revolution* at 35–39 (cited in note 57).

59 An Act Repealing the Stamp Act, 6 Geo III, ch 11 (1766).

60 6 Geo III, ch 12 (1766).

61 See Revenue Act of 1767, 7 Geo III, ch 46. See also Eliga H. Gould, *Liberty and Modernity: The American Revolution and the Making of Parliament's Imperial History*, in Jack P. Greene, ed, *Exclusionary Empire: English Liberty Overseas, 1600–1900* 112, 123–24 (Cambridge 2010).

62 John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* (Scholarly 1969) (originally published 1768).

From this point, LaCroix's account begins to get muddy. She quite rightly emphasizes the colonists' confusion as they groped to make sense of their previous experience in the British Empire. From the seventeenth century on they had accepted Parliament's right to pass navigation acts regulating their trade; but they knew instinctively that they could never allow Parliament to tax them. As the Stamp Act Congress declared in 1765, the colonists knew "[t]hat it is inseparably essential to the Freedom of a People, and the Undoubted Right of Englishmen, that no Taxes be imposed on them, but with their own Consent, given personally or by their Representatives."[63] And since "the People of these Colonies are not and from their local Circumstances cannot be Represented in the House of Commons in Great Britain," they concluded that the only representatives who could speak for them in their colonies were "persons chosen therein, by themselves"; and, therefore, it was crystal clear to them that "no Taxes ever have been or can be constitutionally imposed on them but by their respective Legislatures."[64] This was the American position staked out at the very outset of the imperial debate, and despite all of the colonists' subsequent stumbling and fumbling, this position was never shaken.

Because every Englishman in the mother country agreed with the premise that no one could be taxed without his consent, the problem was initially one of representation. English officials argued that even though the colonists could not vote for members of Parliament they were virtually represented in the House of Commons in the same manner as other Englishmen who did not elect members of Parliament, such as the residents of the burgeoning cities of Birmingham and Manchester.[65] As far as most Englishmen were concerned, election was not the criterion of representation. Once in the House of Commons, the representative was not supposed to speak for any particular constituency but for the commons as a whole; in fact, the members of Parliament did not even have to reside in the districts that they nominally represented.[66]

Because the Americans' experience with representation was very different, believing as they did in the explicitness of consent and in the closest possible ties between themselves and their elected agents, they could never accept the British argument. Instead, they invoked their long experience with actual representation to explain what they meant

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63 *Journal of the Stamp Act Congress* (1765), reprinted in C.A. Weslager, *The Stamp Act Congress* 181, 201 (Delaware 1976).

64 Id.

65 See Wood, *Creation of the American Republic* at 174–76 (cited in note 6).

66 See Cannon, *Parliamentary Reform* at 4 (cited in note 54).

when they said that "their local circumstances" prevented them from being virtually represented in the British House of Commons.[67] Since LaCroix does not deal with these contrasting conceptions of representation, she skips right by this important stage of the imperial debate.

As the colonists struggled to explain the distinction they were trying to draw between taxation and trade regulation, they eventually ran up against the English doctrine of sovereignty—that is, the mainstream British idea that there must be in every state one final, supreme, indivisible lawmaking authority. Although the Declaratory Act had been a robust assertion of the doctrine of parliamentary sovereignty, LaCroix apparently believes that "the idea of sovereignty in this period can be seen as an ill-defined concept relating to the legitimate source of 'right,' as opposed to mere 'power,' within a given polity" (p 83). Maybe most colonists had a hazy view of the concept, as their struggles to draw distinctions and create separate spheres of authority demonstrated, but certainly most British imperial officials did not. LaCroix scarcely acknowledges the existence of William Knox's ministerial pamphlet of 1769, *The Controversy between Great Britain and Her Colonies Reviewed*, even though it was the most important statement of the official British position in the entire period.

In his pamphlet, Knox mocked the colonists' efforts to draw distinctions between taxes for revenue and those for trade regulations and laid out the logic of the doctrine of sovereignty. Sovereignty could not be divided, Knox contended. If the colonists conceded even "in one instance" that Parliament had authority over them, then, said Knox, they had to admit that they were members "of the same community with the people of England" and thus under the sovereign authority of Parliament.[68] But if Parliament's authority over the colonists were denied "in any particular," then it must be denied in "all instances" and the union dissolved.[69] "There is no alternative: either the Colonies are part of the community of Great-Britain, or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British parliament."[70]

The colonists did not want to be faced with such stark alternatives, and in numerous writings they kept trying to create

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67 See Wood, *Creation of the American Republic* at 176 (cited in note 6).

68 William Knox, *The Controversy between Great Britain and Her Colonies Reviewed* 21–22 (Mein and Fleeming 1769).

69 Id at 22.

70 Id.

separate spheres of power and to distinguish between taxation and trade regulation.[71] But to no avail. The British officials kept throwing the logic of sovereignty in their faces, raising over and over again the specter of *imperium in imperio*, a power within a power.

The climax came in January 1773 with Governor Thomas Hutchinson's speeches to the Massachusetts General Court. LaCroix spends a good deal of time on this clash between Governor Hutchinson and the Massachusetts legislature (pp 72–100), but she does not seem to have fully grasped its consequences. Hutchinson in his arrogance and innocence believed that the colonists had no real choice in the matter, and he thus confronted the General Court with the logic of sovereignty that Knox had laid out earlier. "I know of no Line," he told the Massachusetts legislature,

> that can be drawn between the supreme Authority of Parliament and the total Independence of the Colonies. It is impossible there should be two independent Legislatures in one and the same State, for although there may be but one Head, the King, yet the two Legislative Bodies will make two Governments as distinct as the Kingdom of England and Scotland before the Union.[72]

Traditional Whigs like Hutchinson could not imagine any liberty-loving Englishmen choosing to be outside the authority of that bulwark of English liberty, Parliament.

The Massachusetts Council, or upper house, sought to evade the logic of sovereignty and the dangerous choice and, like many of the earlier respondents to Knox's pamphlet, denied that the alternatives were as stark and narrow as Hutchinson contended. Parliament had to be limited in some way, the Council said; the problem was how to determine those limitations.[73] Even though the Council's position garnered little or no support in Massachusetts or elsewhere, LaCroix believes that it "had taken a crucial step toward articulating a new vision of sovereignty" (p 95).

For its part, the House of Representatives took a much stronger line, and one that was popular and supported elsewhere in the colonies. In the end, the House did not try to articulate a new vision of sovereignty but instead accepted the logic of the Blackstonian idea

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71 See, for example, Dickinson, *Letters from a Farmer* at 66 (cited in note 62).

72 *The Speeches of His Excellency Governor Hutchinson to the General Assembly of the Massachusetts-Bay. At a Session Begun and Held on the Sixth of January, 1773. With the Answers of His Majesty's Council and the House of Representatives Respectively* 11 (Edes and Gill 1773) (Gov Hutchinson).

73 See id at 18–19 (Rep Brattle, et al); id at 86–87 (Rep Gray, et al).

of sovereignty, which is what all the colonial leaders eventually did.[74] "Your Excellency tells us, 'you know of no Line that can be drawn between the Supreme Authority of Parliament and the total Independence of the Colonies.'" The House declared:

> If there be no such Line, the Consequence is, either that the Colonies are the Vassals of the Parliament, or, that they are totally independent. As it cannot be supposed to have been the Intention of the Parties in the Compact, that we should be reduced to a State of Vassalage, the Conclusion is, that it was their Sense, that we were thus Independent.[75]

The House then went on to more or less accept Hutchinson's logic that Parliament and the General Court were in fact two independent legislative bodies tied together in the empire with a common head in the king.[76]

LaCroix analyzes this debate over sovereignty in the strangest manner. "The essence of the General Court's break with imperial constitutional theory," she writes, "was its members' insistence that the ultimate source of political authority could be divided, rather than that it could be shifted wholesale to reside, still unitary, in a different location within the political community" (p 96). She assumes that the colonists somehow were able to evade Knox's and Hutchinson's logic; they could get away with denying Parliament's authority to tax them but at the same time acknowledge its right to regulate their trade. By contemplating a system in which they "lived under two layers of legislative authority," the colonists, she concludes, "had begun to abandon existing understandings of supremacy as requiring a single dominant power" (p 84). They had also begun "to reject the Blackstonian concept of indivisible sovereignty" (p 84). They were, of course, doing nothing of the sort.

No scholar has described the imperial debate in quite the way LaCroix has. Every historian of the period has seen the leading colonial writers as more or less accepting the logic of sovereignty; but instead of locating it in Parliament, the American leaders, like the Massachusetts House of Representatives in 1773, placed it in each of their separate colonial legislatures. This was an intellectual adjustment, not a substantive one, as Americans had usually acted as if their separate colonial legislatures were miniature parliaments.

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74 See Wood, *Creation of the American Republic* at 350–52 (cited in note 6). See also text accompanying note 9.

75 *The Speeches of His Excellency* at 56 (cited in note 72) (Rep Adams, et al).

76 See Wood, *Creation of the American Republic* at 350 (cited in note 6).

Thus, by 1774, the colonial spokesmen reached a position that has been called a "commonwealth" theory of the empire,[77] referring to the British theory of the Commonwealth that was eventually codified in the Statute of Westminster of 1931.[78] As James Wilson put it in a pamphlet published in 1774, "[A]ll the different members of the British empire are distinct states, independent of each other, but connected together under the same sovereign in right of the same crown."[79] LaCroix describes Wilson's argument as a challenge to "Blackstone's unitary view of sovereignty," when in fact it was a concession to it (p 125).

One by one, all of the leading Revolutionaries—John Adams, Thomas Jefferson, Benjamin Franklin, and Alexander Hamilton—accepted the logic of sovereignty but relocated it in their separate legislatures. Two legislatures in the same state, wrote Hamilton in 1775, "cannot be supposed, without falling into that solecism in politics, of *imperium in imperio*."[80] John Adams agreed. Two supreme authorities could not exist in the same state, he said, "any more than two supreme beings in one universe."[81] Therefore it was clear, concluded Adams, "that our provincial legislatures are the only supreme authorities in our colonies."[82] They were held together in the empire by their common tie to the Crown. Because such a colonial view greatly enhanced the role of the monarch at the expense of Parliament, it was viewed with alarm by Whig politicians in Britain; it seemed to suggest a resurgence of prerogative power and thus smacked of Toryism.

Somehow LaCroix has convinced herself that these patriot leaders had not really accepted the logic of sovereignty—that there must be in every state one final, indivisible, supreme lawmaking power—but instead had "sought to adapt what had originally been an ad hoc structure of royal charter and local assembly into a newly conceived vision of divisible legislative sovereignty" (p 90). In place of the Blackstonian vision of indivisible and unitary sovereignty, the

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77 See Randolph G. Adams, *Political Ideas of the American Revolution: Brittanic-American Contributions to the Problem of Imperial Organization, 1765 to 1775* 65–85 (Barnes & Noble 1958) (originally published 1922).

78 22 & 23 Geo V, ch 4 (1931).

79 James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774*, in Kermit L. Hall and Mark David Hall, eds, 1 *Collected Works of James Wilson* 3, 30 n r (Liberty Fund 2007).

80 Alexander Hamilton, *The Farmer Refuted* (Feb 5, 1775), in Henry Cabot Lodge, ed, 1 *The Works of Alexander Hamilton* 53, 176 (G.P. Putnam's Sons 1904).

81 John Adams, *Novanglus 7* (Mar 6, 1775), in John Adams and Jonathan Sewall, *Novanglus and Massachusettensis* 78, 83 (Hews & Goss 1819).

82 Id.

colonists, she contends, were in the process of creating a "federal vision in which divided authority was neither a solecism nor an ad hoc practice, but a foundational principle" (p 101).

LaCroix seems to believe that this commonwealth theory of empire worked out by 1774—that the colonists were not under Parliament's authority at all and that each colonial legislature was sovereign and tied to Britain only through the king—constituted a new federal vision, when in fact it was largely a belated and pragmatic acknowledgment of the logic of sovereignty. If it were in truth a vision, it was not a very clear one, for it did not explain in any satisfactory way the colonists' previous experience in the empire, because Parliament had continually regulated their trade. This is why the First Continental Congress in 1774 rather awkwardly had to "cheerfully consent" to future parliamentary regulation of colonial trade "from the necessity of the case, and a regard to the mutual interest of both countries."[83]

LaCroix does not mention this embarrassing concession by the Congress, which scarcely seems to constitute any sort of "foundational principle" (p 101). The colonists did stick to their commonwealth theory of the empire to the end. This is why the colonists, many of them being good lawyers, scrupulously avoided any reference to Parliament in the Declaration of Independence, even though most of their oppression had come from acts of Parliament. If they were tied solely to the Crown and not under Parliament's authority, they needed to cut only that tie to be independent.

Given the Americans' long experience with parceling power from the bottom up and their deeply rooted sense of each colony's autonomy, forming the Articles of Confederation posed no great theoretical problems. Thirteen independent and sovereign states came together to form a treaty that created a "firm league of friendship,"[84] a collectivity not all that different from the present-day European Union. Although LaCroix believes that the Articles "embodied the governmental multiplicity for which American Whigs had argued since the Stamp Act debates of the 1760s," she acknowledges that the Articles involved "little in the way of explicit constitutional theory" (pp 128–29). She does not seem to realize that the Confederation Congress was merely a replacement for the Crown. It possessed the Crown's former prerogative powers, but it could not tax or regulate

83 *Resolution and Declaration of Rights in Continental Congress, October 1774*, reprinted in Wakelyn, ed, 2 *America's Founding Charters* 646, 648 (cited in note 15).

84 Articles of Confederation Art III.

commerce, as the Crown had not had the authority to do these things either.[85]

Seeing little or nothing contributing to the ideological origins of federalism in the debates over the Articles, LaCroix moves quickly to the creation of the Constitution of 1787. "The drafting and ratification of the Constitution," she writes, "served to crystallize a novel, distinctively British North American theory of government that had been developing since at least the mid-1760s" (p 133). One can scarcely quarrel with that statement; it is the way she works it out and attempts to substantiate it that seems questionable.

LaCroix believes that American ideas of legislative multiplicity, ideas of multilayered authorities that went back to the internal–external distinction of the 1760s, were the principal source of American federalism (pp 64–67). The delegates to the Philadelphia Convention, she says, had to work through the meaning of these ideas of multiplicity during the debate surrounding James Madison's proposal in the Virginia Plan to give Congress the power to negative, or veto, state laws (pp 154–58). Ultimately the "delegates rejected the established legislative solution embodied in Madison's negative and turned instead to another institution, the judiciary, to mediate between state and general governments" (p 135). The delegates thus "gave their institutional choice of a judicial approach a normative edge" (p 135). From this moment on, American thinkers "put aside the legislative focus of their political heritage and beg[a]n experimenting with the judicial power as a key component of the federal arrangement" (p 178). By "coupling multiplicity as an idea with courts as a mode of mediating among multiple levels of government," they "created a new ideology: federalism" (p 172).

It is hard to know what to make of this extraordinarily novel argument. Since there is little or no evidence in the Convention debates for this curious contention that the judiciary became the principal source of federalism, she has to imagine much of it. But not all of it. Her discussion of the Virginia Plan and Madison's bizarre proposal for a congressional negative over all state laws (pp 132–74) is especially illuminating; indeed, no historian has offered such a full analysis of Madison's veto. She recognizes very clearly that Madison wanted the new general Congress to play the same role with the states as the king ideally was supposed to have played with the colonies in the empire (p 145). She tends, however, to see Madison's proposal as "an opportunity for one lawmaking body to oversee the activities of another" (p 151), when in fact Madison saw the Congress becoming

85 See Wood, *Creation of the American Republic* at 352–57 (cited in note 6).

"a disinterested & dispassionate umpire in disputes between different passions & interests"[86] in the various states (p 147).

Ultimately Madison's negative failed to garner enough votes. It was replaced, LaCroix says, by a judicial remedy for controlling the legislative abuses of the states. Her proof for this is the fact that the Supremacy Clause emerged at more or less the same time in mid-July as the demise of Madison's veto (pp 163–64).

This is where LaCroix's argument goes seriously awry. Not only does she base her case simply on coincidence, but she assumes that the delegates had ideas of judicial developments that were not really anticipated by anyone and that occurred decades later. She contends that "the delegates intended the Supremacy Clause to do what Madison had intended the negative to do" (p 164). Never mind that the Supremacy Clause was introduced by Luther Martin, who vigorously opposed the creation of a federal court system;[87] it is enough for LaCroix that the judicial remedy for federalism inherent in the Supremacy Clause occurred simultaneously with the defeat of Madison's negative. By replacing Madison's negative with the Supremacy Clause, the delegates "signaled a transformation in American constitutional thought" (p 172). Using the Supremacy Clause, courts and judges would become "the mediating agents between the national and state governments" (p 171). To make her case, LaCroix has to believe that judicial review of a sort that arose only much later was already in the minds of many delegates, and that they "viewed it as an explicit tool to mediate among levels of government" (p 165).

This is a strained argument, to say the least, with nothing but correlations, a vague convention speech, and an anachronistic reading of history to back it up. Nearly all of the delegates saw Article I, § 10, and not the Supremacy Clause, as the replacement for Madison's veto.[88] That section prohibited the states from taking certain actions, including passing ex post facto laws, issuing paper money, and interfering with the obligation of contracts—the very things that Madison and other Federalists had most complained about in the 1780s. LaCroix never mentions this section of the Constitution.

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86 Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* 32 (Oxford 2009), quoting Letter from James Madison to George Washington (Apr 16, 1787).

87 See Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 27–29 (Yale 1911). See also Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 75 (Oxford 2004) (explaining that Martin may have viewed the Supremacy Clause as a political maneuver to stave off further discussions of the judicial veto).

88 See Gordon S. Wood, *"Motives at Philadelphia": A Comment on Slonim*, 16 L & Hist Rev 553, 558 (1998).

In her final chapter on competing jurisdictions, LaCroix continues to exaggerate the role of the judiciary in creating federalism. No doubt jurisdiction was an important means by which a federal division of power was worked out during the early decades of the new Republic. But LaCroix is not happy with mere importance; she has to see "the rise of jurisdiction as the defining element of American federalism" (p 179). But the fierce struggles of these years over the judiciary, including competing claims of jurisdiction between federal and state courts, were bigger than issues of federalism; they in fact involved fundamental issues of democracy. Many Americans thought that all appointed judges, especially those with life tenure, were aristocrats who had no place in a democratic government.[89] Others, however, believed that the courts, especially the federal courts, were the only thing preventing America from sliding into licentiousness and anarchy.[90] Yet all that LaCroix can conclude is that "[b]y 1801, jurisdiction had replaced sovereignty as the lodestar of American constitutional debate" (p 203).

It really had not. Sovereignty was still very much part of American thinking, only now it was popular sovereignty, not legislative sovereignty. Had LaCroix paid any attention whatsoever to the extraordinary ratification debates of 1787–1788, she might have found some more persuasive solutions to the origins of federalism. For those debates, more than anything else, ultimately clarified the Americans' ideas of federalism.

During the debates, the old issue of sovereignty, or *imperium in imperio*, once again raised its ugly head. The Anti-Federalists, the opponents of the Constitution, claimed that the powers of the federal government would eventually become consolidated because of the logic of sovereignty—that in every state there had to be one final, supreme, indivisible power—and the Supremacy Clause would ensure that the national government would possess that sovereignty.[91] The Federalists, as the supporters of the Constitution, at first vainly tried, as John Dickinson and other colonists in the 1760s had tried, to argue that power could be divided and shared.[92] But the Anti-Federalists,

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89 See, for example, *Essays of Brutus XV* (Mar 20, 1788), in Herbert J. Storing, ed, *The Anti-Federalist: Writings by the Opponents of the Constitution* 182, 183 (Chicago 1985) ("[T]hey are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.").

90 See, for example, Arthur E. Wilmarth Jr, *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 Geo Wash L Rev 113, 146 (2003).

91 See Wood, *Creation of the American Republic* at 526–28 (cited in note 6).

92 See id at 529.

just as William Knox and the British imperial officials in the 1760s and 1770s had, kept throwing the logic of sovereignty back in their faces.[93]

Finally, James Wilson, the much-neglected Framer who in many respects was as intellectually gifted as Madison, hit upon the solution. Like the colonists in 1774, Wilson did not deny the doctrine of sovereignty. "In all governments, whatever is their form, however they may be constituted, there must be," he admitted, "a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable. The only question," he said in the Pennsylvania ratifying convention, "is where that power is lodged."[94] Blackstone had placed it in the omnipotence of the British Parliament. Some Americans, said Wilson, had tried to deposit this supreme power in their state governments.[95] This was closer to the truth, he continued, but not accurate; "for in truth, it remains and flourishes with the people."[96] Instead of trying to deny or divide sovereignty, Wilson, like the colonists in 1774, simply relocated this final, supreme lawmaking authority—in Wilson's case, in the people themselves.

Once the other Federalists grasped this idea of sovereignty located in the people, they ran with it, and most of their intellectual problems were solved.[97] "The people of the United States are now in the possession and exercise of their original rights," said Wilson, "and while this doctrine is known and operates, we shall have a cure for every disease."[98] Wilson did not pull this brilliant solution to the problem of sovereignty out of thin air. Indeed, he drew upon a century or more of American experience with the practices of actual representation, practices that had never granted the people's elected agents the people's full authority. The Americans' acute sense of localism and their long familiarity with parceled and apportioned political power from below were the real sources of their idea of federalism.

Of course, locating sovereignty in the people did not mean simply that all authority was ultimately derived from the people; deriving all power from the people was conventional wisdom for most English Whigs in the eighteenth century.[99] It meant instead that final, supreme,

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93 See *The Impartial Examiner I* (Feb 20, 1788), in Storing, ed, *The Anti-Federalist* 275, 281 (cited in note 89); Wood, *Creation of the American Republic* at 530 (cited in note 6).

94 John Bach McMaster and Frederick D. Stone, eds, *Pennsylvania and the Federal Constitution, 1787–1788* 229 (Historical Society Pennsylvania 1888).

95 See id.

96 Id at 229–30.

97 See Wood, *Creation of the American Republic* at 531–32 (cited in note 6).

98 McMaster and Stone, eds, *Pennsylvania and the Federal Constitution* at 341 (cited in note 94).

99 See Wood, *Creation of the American Republic* at 292 (cited in note 6).

indivisible lawmaking authority actually rested with the people themselves and not with any institution of government or even with all of the institutions of government put together. The people, said Wilson, have not parted with their sovereignty; "they have only dispensed such portions of power as were conceived necessary for the public welfare."[100] In other words, the people doled out bits and pieces of their sovereign power, but not all of it, to various agents and institutions. Sovereignty, Wilson claimed, always stayed with the people at large; "[t]hey can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper."[101] For this reason, Wilson noted, the people "can distribute one portion of power to the more contracted circle called State governments: they can also furnish another proportion to the government of the United States."[102]

All of America's constitutional creations since independence—the development of written constitutions being superior to statutory law, special conventions different from legislatures for framing constitutions, and ratification of the constitutions by the people themselves—all of these innovations prepared the way for this radical notion of locating Blackstone's lawmaking sovereignty in the people themselves.

Surprisingly, LaCroix does not even mention these developments, which have consequences for our politics even today. The Progressive generation's creation of ballot initiatives and popular referendums, still alive and well, grew out of this notion of the people's being actually sovereign. And American federalism is dependent upon it. The people have various agents at several levels of government—state representatives, state senators, federal representatives, federal senators, and hosts of other officials—doing their bidding. Unless the people are considered vitally and realistically sovereign, concluded Wilson with some exasperation, "we shall never be able to understand the principle on which this system was constructed."[103]

Although Madison at first had some trouble grasping the idea of federalism at the Convention,[104] by the time he came to write Federalist 46 in 1788 he had come to understand fully what Wilson was driving at. "The Federal and State Governments," he wrote, "are in fact but different agents and trustees of the people, instituted with

100 McMaster and Stone, eds, *Pennsylvania and the Federal Constitution* at 302 (cited in note 94).
101 Id at 316.
102 Id at 302.
103 Id at 317.
104 See Wood, *Creation of the American Republic* at 525 (cited in note 6).

different powers, and designated for different purposes."[105] The opponents of the Constitution, said Madison, must now realize that "the ultimate authority, whatever the derivative may be found, resides in the people alone."[106]

Perhaps paying some attention to the idea of sovereignty existing in the people might have allowed LaCroix to explain more fully the development of judicial independence and judicial review in this period and enabled her to build a more solid case for the rising significance of the judiciary in the early Republic than the one she has been able to make.

The judiciary was transformed in a relatively short time from being a minor member of a much mistrusted magistracy during the colonial period to being, in the words of the Massachusetts constitutional convention of 1780, one of "the three capital powers of Government," equal in status to the legislative and executive powers.[107] This transformation occurred, however, not because of the adoption of the Supremacy Clause or because Americans needed the courts to mediate between the national and state governments.

Precisely because sovereignty was located in the people who doled out their power to the various institutions of government, some Americans were now able to view the courts as delegated agents of the people, not all that different from their legislative representatives, and to use that idea to enhance the independent status of the judiciary. Indeed, developing the independence of the judiciary, as John Marshall among others came to appreciate, was a prerequisite to the emergence of any sort of judicial review.

That was the gist of Alexander Hamilton's defense of judicial review in Federalist 78. He began by invoking the idea of popular sovereignty and by belittling the representative character of the elected legislature. Americans, he said, had no intention of allowing "the representatives of the people to substitute their *will* to that of their constituents."[108] In fact, it was "far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the

105 Federalist 46 (Madison), in *The Federalist* 315, 315 (Wesleyan 1961) (Jacob E. Cooke, ed).

106 Id. See also Wood, *Creation of the American Republic* at 531–32 (cited in note 6) (noting that once this idea was presented, the Federalists "were tumbling over each other in their efforts to introduce the people into the federal government").

107 *Address of the Convention, March 1780*, reprinted in Oscar Handlin and Mary Handlin, eds, *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* 434, 437 (Harvard 1966).

108 Federalist 78 (Hamilton), in *The Federalist* 521, 525 (cited in note 105).

latter within the limits assigned to their authority."[109] The authority of the judges to set aside acts of the legislatures, said Hamilton, did not

> by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges . . . ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[110]

In his law lectures of 1790 and 1791, James Wilson made a similar argument for judicial independence. Some individuals, declared Wilson, call the legislature "the *people's representatives*."[111] They seem to imply by that term "that the executive and judicial powers are not connected with the people by a relation so strong, or near, or dear. But it is high time that we should chastise our prejudices," said Wilson,

> and that we should look upon the different parts of government with a just and impartial eye. The executive and judicial powers are now drawn from the same source, are animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as they who make them.[112]

Of course, Wilson, like Hamilton before him, was simply trying to establish and enhance the independence and authority of the judiciary against the mistrusted state legislatures. He scarcely foresaw how his argument could be exploited by others for different ends. Soon, however, some concluded that if judges were indeed agents of the people, then they rightly ought to be elected by the people as other agents were. A demand for elected judges in the states was already being voiced in the first decade of the nineteenth century.[113] By the Jacksonian era, it began to be implemented,[114] and today in at

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109 Id.

110 Id.

111 James Wilson, *Lectures on Law, Delivered in the College of Philadelphia in the Years One Thousand Seven Hundred and Ninety, and One Thousand Seven Hundred and Ninety One*, in Hall and Hall, eds, 1 *Collected Works of James Wilson* 427, 699 (cited in note 79).

112 Id at 699–700.

113 See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U Chi L Rev 689, 714–15 (1995).

114 See id at 716–17.

least thirty-nine states the people elect their judges in one way or another.[115]

American federalism is complicated, and it has many sources, some of which are highlighted in LaCroix's book. It could not have been created de novo by James Wilson or by any of the Framers. It was the product of America's long experience with localism and the parceling out of power from the bottom up, not simply of the fact the colonists had to deal with layers of imperial authority above them. No doubt, too, its creation involved a great deal of intellectual debate, but unfortunately that debate did not take place in the Constitutional Convention, as LaCroix contends. If she had dipped into some of the nearly two dozen modern letterpress volumes of the ratification debates—a rich documentary record of debates over the fundamental issues of power and liberty scarcely equaled in the history of the world—she might have reached some different conclusions. Her book is very original and very ambitious, but ultimately it flies too close to the sun.

115 See Genelle I. Belmas and Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 Drake L Rev 709, 709 (2010), citing American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2010), online at http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_1196092850316.pdf (visited Nov 1, 2010).