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More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism

Martin S. Flaherty*

A full constitutional account of sovereignty and federalism calls for . . . [understanding] the momentous constitutional issues at the heart of the American Revolution . . .

I. INTRODUCTION

The legal community has rightly appreciated the influence of the American Revolution on the creation of the Constitution. In particular, legal scholars, judges, and lawyers have noted that the nation's revolutionary experience played an important role in shaping its commitment to federalism. Akhil Amar, for example, notes that "the problem of allocating power vertically between central and local officials," as faced by the Founders, "had cracked open the British Empire." Steven Calabresi observes that "[t]he American Revolution obviously also had interlinked democracy and nationalism, but its final Federalist outcome muted the connection." Whether tied to the American Revolution or not, federalism embraces a bundle of concepts which are not always unpacked. Most broadly, the term refers to authority—whether overlapping or not—exercised by two or more tiers of government. A more powerful version, recently brought back from the grave in United States v. Lopez, rejects the idea that such divided authority may always overlap, and instead views certain allocations between state and national power as exclusive. This Paper will explore a still more vigorous conception. In this view, federalism entails legally enforceable barriers or immunities that protect constituent states from direct regulation by the national government. This brand of the doctrine, which frequently posits some notion of state sovereignty, can lay claim to substantial force in part because of the extensive protection it affords state government. It is powerful in larger part

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2. Id. at 1444.
because it has been successful in a series of recent Supreme Court cases, including *Gregory v. Ashcroft*, *New York v. United States*, and *Seminole Tribe v. Florida*. This type of sovereignty federalism, perhaps better labeled as autonomy or barrier federalism, in turn draws special strength from its apparent historical pedigree.

With certain variations, the conventional theme holds that the American Revolution produced a keen appreciation of vertically divided governmental authority, including federalism in the strong form under consideration. Americans, the argument runs, wisely embraced this approach in large part because they had defended their liberties by rallying around their thirteen political communities to oppose a tyrannical central government. The most extreme version of the account posits the Founding as a "We the States" phenomenon: so committed were Americans to strong local authority that the states ceded only so much authority to the federal government as was necessary to cure the weaknesses of the Articles of Confederation. A more modest, and undoubtedly more common, version simply points to federalism's revolutionary pedigree generally. Either way, the importance of the American Revolution in the development of our federal system has obvious relevance for originalists. Yet, it is also relevant for those who simply desire to derive lessons about how American government should function from how it has functioned. Whether the point is original intent or historical background, the conventional wisdom bolsters the claim that "federalism actually might be by far the most important and beneficial feature of our constitutional scheme.

Recent historical scholarship confirms the American Revolution's impact. In particular, historians have done much to show that a model of divided authority was at the core of the patriots' case against Great Britain. On this account, Americans resisted parliamentary measures in

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8. These two terms are more accurate insofar as this type of federalism predated the notion that states are sovereign.
10. This notion is also implicit in Justice O'Connor's approving quotation of Justice Chase's statement that, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *New York*, 505 U.S. at 162 (quoting Texas v. White, 7 Wall. 700, 725 (1869)).
11. *See supra* note 3.
the belief that the "Constitution of Empire"\textsuperscript{14} established a federated British Empire to which the colonists owed allegiance through the Crown, which allowed them to govern their own affairs through their own local assemblies and courts. The American commitment to constitutional federalism, in other words, predated the Federal Constitution. This rediscovery provides fresh opportunities for those seeking to reconstruct the Constitution's original understanding as well as for those who merely seek to derive lessons from the Founders' experience. In the words of another noted historian, Gordon Wood, one can "make little or no sense of the various institutional or other devices written into the constitutions" or the era until one understands "the assumptions from which the constitution-makers acted."\textsuperscript{15}

So far those opportunities are mostly unrealized. For all its scavenging tendencies,\textsuperscript{16} the legal community has yet to consider this body of scholarship and relate it to modern federalism controversies. Even worse, legal professionals generally have failed to make any credible historical assertions about federalism, whether about the American Revolution or the Founding itself. Assuming that the point of invoking the past is to confront it on its own terms rather than to bolster preordained conclusions, it follows that a credible historical assertion must comport with at least the minimum standards commonly employed by professional historians themselves. As it happens, one of the chief methods is to master the scholarship of professionals in the first place.\textsuperscript{17}

Once this is done, a very different picture emerges, one suggesting that federalism is far from the "most important and beneficial"\textsuperscript{18} aspect of American constitutionalism. To the contrary, this Paper argues that a study of the American Revolution indicates that even at its height, federalism proved to be a secondary device for protecting liberty. Moreover, federalism's importance was progressively overshadowed by more novel constitutional devices as the Declaration of Independence receded in importance while the Constitution ascended. Part II contends that the patriots' commitment to a federated empire, while central to their constitutional thinking, became relevant only \textit{after} the failure of separation of powers in Great Britain and the impossibility of direct

\begin{itemize}
  \item[18.] Calabresi, \textit{supra} note 3, at 754.
\end{itemize}
representation by the colonials. Part III considers the lessons that this Revolutionary experience had for the Founders and whether those lessons remain valid for us, their successors, today. This Paper concludes by suggesting that, for the Founding generation, federalism represented an increasingly outmoded doctrine most strongly championed by the losers in the struggle over the Constitution, and that, for our generation, what relevance federalism might have had has only diminished in the ensuing two centuries.

II. THE REVOLUTIONARY LEGACY

A. Revolutionary Federalism

For a modern advocate of states rights, recent scholarship on the American Revolution takes away, gives back, yet in the end takes away again. The American Revolution's legacy first simply undermines the hoary notion that the Constitution owes its existence to "We the Sovereign States." That legacy nonetheless indicates that Americans argued a powerful brief for constitutional federalism well before the colonies had even achieved independence. The American Revolution ultimately highlighted then and illustrates now the inadequacies of federalism as a practical safeguard of liberty.

Whatever else it does, recent American Revolution scholarship should prevent the assertion that independence established thirteen sovereign nation-states, resulting in a confederation that was "not much more than the 'United Nations.'" This assertion is as old as Maryland's arguments in *M'Culloch v. Maryland* and as recent as the dissent in *U.S. Term Limits, Inc. v. Thornton.* Often the issue is posed as a chicken-or-egg inquiry—which came first, the states or the nation—with advocates of decentralized power generally assuming the former. Not that awarding the states first place necessarily leads to a strong states' rights reading of the Constitution. Analytically, the American Revolution is at least twice removed from the Founding. It could be that independence indeed yielded thirteen sovereigns, yet that the Articles of Confederation eroded state sovereignty. It could also be that the Articles themselves established no more than a league of sovereigns, yet that the Constitution itself extinguished genuine state autonomy. That said, the debate may not be dispositive, but it does remain probative. The existence of thirteen state sovereigns in an original state of nature would at least create a presumption that the eradication of such sovereignty would be more difficult or

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20. 17 U.S. (4 Wheat.) 415 (1819) (argument for the defendant-in-error, the state of Maryland).
less likely. At the very least, the idea of indestructible states present at the creation retains considerable rhetorical power.

That image, however, assumes a clearly wrong answer to a question that may have no resolution that is clearly right. Richard B. Morris, a dean of early American historians, summed up a generation’s worth of scholarly work in arguing that a “review of the evidence makes it clear that a national government was in operation before the formation of the states.”22 Before independence, delegates to the First and Second Continental Congresses were selected by extralegal means by the people of each colony outside the duly constituted colonial governments.23 At independence, in effect, the Second Continental Congress ushered the state governments into being by recommending to “the respective assemblies and conventions of the United Colonies . . . to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”24 After the formal declaration of independence three weeks later, Congress assumed the powers of war and peace.25 It entered into treaties with foreign nations that were established as the supreme law of the land.26 It asserted admiralty jurisdiction.27 It even compelled national allegiance through treason laws; compulsory oaths, and national passports.28 For all these reasons, Morris concludes “that the United States was created by the people in collectivity, not by the individual states.”29 He may, however, overargue.30 John Adams and Thomas Jefferson, for example, famously disagreed as to whether the Confederation Congress was a “diplomatic assembly.”31 If the historian does err, though, he errs on the side with the substantial preponderance of the evidence.

Yet federalism did matter. This federalism, however, was older, more sophisticated, and more powerful than any notion that the original thirteen

23. See id. at 56-58.
25. See MORRIS, supra note 22, at 64.
27. See id. at 67-71.
28. See id. at 72-76.
29. Id. at 76.
30. R.B. Bernstein, for example, disagrees with the certitude, if not the substance, of Morris’s nationalistic account. See Richard B. Bernstein, Charting the Bicentennial, 87 COLUM. L. REV. 1565, 1580 (1987).
states were originally independent sovereigns. This approach, which in many ways was the first American version of the doctrine, became the centerpiece of the patriot case against Parliamentary encroachment upon the local affairs of the colonies. Moreover, that case was not merely rhetorical or pragmatic, but self-consciously constitutional. Not more than twenty years ago, the idea that the American patriots marched toward rebellion under the flag of constitutional federalism would have been dismissed almost out of hand. That no one dismisses this idea today is the singular achievement of a generation of ideological, legal, and constitutional historians whose number includes Edmund S. Morgan, Bernard Bailyn, Barbara Black, Jack P. Greene, and John Phillip Reid. Their achievement is central to any understanding of the American Revolution, much less any account that focuses on government.32

Their account holds that the federalist case, not to mention the American Revolution itself, grew out of two competing conceptions of the English Constitution and, more specifically, two mutually exclusive ideas of how that constitution applied to the Empire. Broadly speaking, the divergence began with the Glorious Revolution of 1688 and the Hanoverian Succession of 1714, which together established Parliament’s victory in its centuries-old battle for constitutional supremacy over the Crown. For the colonies, Parliamentary supremacy could have led to one of two basic results. Either Parliament would follow the dictates of power and assert unconstrained authority throughout the Empire, or it would observe the very constitutional principles it had used against the monarch and respect the claims of colonial representatives to manage their own affairs. As Reid observes, “the eighteenth century can be termed the epoch of two constitutions in both Great Britain and the American colonies, with the mother country eventually succumbing to the obvious convenience of one constitution and the independent American states consciously selecting the other.”33

By mid-century, Great Britain’s surrender to convenience was already well along. According to British imperialist thinkers, Parliament was manifestly supreme and arguably sovereign over any territory that the United Kingdom controlled. Supremacy meant that the imperial legislature had the authority to make laws, in Lord Mansfield’s words, over “every part and every subject without the least distinction” across the Empire.34 Parliament itself asserted this claim in two “Declaratory

32. See generally History “Lite,” supra note 17, at 542-45.
Acts,"—one for Ireland in 1720 and the other for America in 1766—proclaiming its power to bind the subjects of these dependencies "in all cases whatsoever." The idea of parliamentary sovereignty went even further. This doctrine held that the final arbiter of constitutional limits on Parliament, including traditional limits on its power over the Empire’s constituent members, was Parliament itself. Though not uncontested until the nineteenth century, parliamentary sovereignty received constitutional endorsement from no less a figure than Blackstone in no less a treatise than his enormously influential Commentaries on the Laws of England.

These and other jurists defended these novel imperial conceptions on several grounds. These included the familiar adage against an imperium in imperio, or the impossibility of two sovereigns in a single system, as well as the more shaky assertion that the colonies were "virtually" represented in Parliament anyway. Regardless of their bases, it was out of these constitutional assumptions that Parliament undertook its doomed program of asserting its authority, starting with the Sugar and Stamp Acts, continuing through the Townshend Duties and the New York Legislature Suspension Act, and culminating in the Intolerable Acts, Lexington, and Concord.

The Americans followed a more venerable conception. Until the shooting began, even the most fervent patriot accepted Parliament’s authority to regulate trade and imperial affairs generally. Yet they also consistently asserted that the principles of the English Constitution simply restricted Parliamentary power to tax, legislate, or assert general jurisdiction with respect to the domestic affairs of the colonies. As the Virginia House of Burgesses resolved in 1765:

[H]is Majesty’s liege People of this his most ancient and loyal Colony, have, without Interruption, enjoyed the inestimable Rights of being governed by such Laws, respecting their internal Polity and Taxation, as are derived from their own Consent, with the Approbation of their Sovereign, or his Substitute; which Right hath never been Forfeited, or Yielded up; but hath been constantly recognized by the Kings and People of Great Britain.

This is not to say that the colonists believed that America had no direct tie to the Empire. As the House of Burgesses indicated, however, that tie was through the Crown. Citing Lord Coke’s opinion in Calvin’s Case, American constitutionalists argued that precedent, custom, consent, and colonial charters established the doctrine that once the monarch recog-

35. 6 Geo. 1, ch. 5 (1720) (Eng.) ; 6 Geo. 3, ch. 5 (1766) (Eng.).
36. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *93-110.
37. The Resolutions as Printed by the Maryland Gazette, July 4, 1765, in PROLOGUE TO REVOLUTION 50 (Edmund S. Morgan ed., 1973).
nized the common law in any of the dependencies settled under his authority, no law could be altered except by the King (directly or through a royal governor) and a dependency's own assembly. As Franklin put it in 1770, there was no subordination among the several parts of the empire, but "only a Connection, of which the King is the common link." Like their English opponents, Franklin and his fellow patriots invoked an array of sources to support their position; only theirs were familiar, old-fashioned, and backward looking. The federal model that they advanced in substance if not in name stemmed, they claimed, from precedent, custom, consent, colonial charters, and the necessity of actual representation. When Parliament ignored these constitutional limits time after time, the only logical course was to resist and, finally, to rebel.

John Witherspoon later summed up the American position in describing the British Empire as "a federal" rather than "an incorporating Union." Moreover, the barriers that resulted were not simply venerable but extensive—far more extensive than even the staunchest advocate of states' rights would hope for today. The path to the American Revolution in large measure consisted of patriot efforts to defend particular federalism limits against imperial encroachment. Without exception, each effort illustrates the near absolute nature of American claims. Patriots early on denied Parliament any authority to enact revenue measures. Parliament's opponents later adopted a similar position with regard to legislation in general.

One especially illustrative limit is among the least appreciated today. As far as the Americans were concerned, the Imperial Constitution not only denied direct authority over the dependencies to the British Parliament, but to the British judiciary as well. On the American view, the sources of English constitutional law established the principle that only provincial courts enjoyed jurisdiction over provincial matters. It followed, therefore, that no appeals could proceed to the realm other than to the Privy Council. This exception, however, was entirely in keeping with older constitutional precepts. Unlike the House of Lords, the final, and Parliamentary, court of appeal for British cases, the Privy Council, was not really a court at all but a royal body. Since the Imperial Constitution established the Crown as the sole direct tie of the colonies.

39. See Black, supra note 14, at 1174-1200.
41. See Reid, supra note 33, at 3-26.
42. See id.
43. GREENE, supra note 34, at 172.
to the Empire, America never opposed this infrequently employed appellate body for colonial cases.45

Yet on just these grounds, patriot constitutionalists vehemently opposed Parliament’s attempt in 1767 to revive “the Act of 35 of Henry VIII,” a disused Tudor statute that provided that any alleged act of treason committed outside the realm of England could be tried there. As Reid observes, “Parliament was asserting the strongest claim to supremacy it would make between passage of the Declaratory Act and passage of the coercive acts.”46 Not surprisingly, “[s]ome of the most extreme claims of the right of the colonists to be legislatively autonomous of Parliament were drafted to protest the Act of 35 Henry VIII.”47 Nor were these claims novel or even uniquely American. Nearly fifty years earlier, the Irish House of Lords waged a dramatic battle to resist attempts by the British House of Lords to assert exclusive and final appellate jurisdiction over Irish cases. The Irish Lords lost, with the British Parliament sealing its victory with the Irish Declaratory Act, the model for the American Declaratory Act and centerpiece of Westminster’s competing vision of the Empire as a consolidating Union.48

In the end, imperial federalism was a seeming success, so much so that Americans would have every reason to hold the general concept dear long after the American Revolution. So it seems, at any rate, if an end to any constitutional doctrine is the preservation of liberty. Imperial federalism gave Americans a rich legal vocabulary that enabled them to resist measures that deprived them of such fundamental rights as property, trial by jury, and security. Moreover, the existing set of institutions that the doctrine posited—local assemblies, courts, juries, and militias—afforded the patriots practical means of defending their rights. When George III, perhaps prudently, decided to side with Parliament’s conception of Empire, these means played a role in ensuring that the final step the patriots would take would end in victory.

B. Revolutionary Alternatives

But the odes to “our federalism” should not commence just yet. More fundamentally, patriot federalism counts as an obvious failure. This conclusion at least follows if the goal of a constitutional doctrine is not simply liberty, but contributing to a working system of government that protects liberty. From this viewpoint, the model of a federated empire

45. See 1 JULIUS GOEBEL, HOLMES DEVISE HISTORY OF THE SUPREME COURT (1971).
46. REID, supra note 33, at 70.
47. See id. at 69-70.
functioned only so long as the imperial government permitted. Worse, when encroachments came, this model served to hasten rather than avert a high-stakes conflict in which the results were far from certain. Matters came so close to pass in large part because other constitutional mechanisms had either failed first or were simply non-starters given contemporary circumstances. Of these, the two that stand out above all others are separation of powers and representation. The American Revolution, in other words, was not just, or even primarily, about federalism. Rather, the conflict occurred because other devices that might have insured a free and functioning imperial system never came into play. In this way, the American Revolution speaks to the limits of federalism as much, or more, than its advantages.

Consider first separation of powers. Recall that the British imperialists who opposed American protestations argued for Parliament’s plenary authority throughout the Empire. This imperial claim rested on a domestic predicate. At least in its capacity as a representative legislature, Parliament did not seek to establish its supremacy, then sovereignty, outside the realm until it undertook the same mission within it. The timing is often striking. No sooner had Parliament rendered the Crown subordinate in the Glorious Revolution than it generated one of the first imperial crises by attempting to legislate for Ireland in 1698. A generation later, Parliamentary Whigs made the Crown’s subordination permanent by once and for all displacing the tyrannical Stuarts with the compliant Hanovers. On the heels of this domestic triumph, Parliament first articulated its imperial hegemony in the Irish Declaratory Act. When Americans resisted an even stronger Parliament just over fifty years later, the immediate response was the American Declaratory Act of 1766.49 In this light, it is especially ironic that Montesquieu attributed the success of the English Constitution to the doctrine of separation of powers just as the English were discarding it. Put in his framework, the eighteenth century witnessed the legislative department drawing all power into its vortex at the expense of the executive in particular. This concentration of power not surprisingly led to threats on liberty, especially where it was most vulnerable. Attacks on substantive rights in America, Ireland, and elsewhere in the Empire, in other words, in the first instance resulted from a breakdown in separation of powers.

The analytic correlation is even more striking than the temporal one. American constitutional thinkers stressed the imperial link to the Crown for good reason. When the colonies were settled, English constitutional authority tended to hold that only the monarch had authority outside the realm, particularly with regard to lands conquered from other peoples.

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49. See id. at 612-13, 620-22.
That did not mean that the Constitution did not impose an array of constraints on royal powers, not the least of which was the requirement of local assemblies and courts. In this light, Parliament's attack on what had been effectively a partial system of separation of powers did not just mean that power had become concentrated in a dangerous manner. It also meant that Parliament set about to displace the one domestic institution that, in theory, had an institutional incentive for protecting the interests of its possessions outside Great Britain.

At the time, few would have engaged in this type of analysis on either side of the Atlantic, in part because it was still ahead of its time. This was one reason that the doctrine never played a significant role in opposing Parliamentary power. J.G.A. Pocock may have overstated when he argued that one needs a vocabulary for a practice, but having the vocabulary does not hurt. Montesquieu notwithstanding, contemporaries instead analyzed the balance of power within the English Constitution in terms of mixed government. According to this doctrine, Great Britain's framework successfully balanced power and liberty by mixing the forms of government associated with social class. Thus, the Crown embodied monarchy; the House of Lords served the aristocracy, and the House of Commons reflected the democracy—each one checking the other to prevent, in turn, either tyranny, oligarchy, or anarchy.

Yet, even within this framework, Americans in particular diagnosed Parliament's pretensions in a way that anticipated a more familiar separation of powers analysis. As Bernard Bailyn long ago pointed out, patriot commentators made sense of Westminster's policies in terms of corruption. Time and again, Parliament's opponents explained events in terms of a small cabal of ministers who used the promise of government posts, safe parliamentary seats, and even outright bribes to buy and control majorities that would do their power-hungry bidding. Yet this theme—preventing the concentration of governmental authority in the same set of hands through the misuse of government powers—would comport far more with a self-conscious separation of powers approach than a mixed government analysis. Twenty years later, exactly this concern would appear in the Federal Constitution's prohibitions on persons holding "any Office under the United States" from being members of Congress, or on members of Congress, during their terms, being "appointed to any civil Office under the Authority of the United


52. See id. at 84-93.
States, which shall have been created, or the Emoluments whereof shall have been encreased, during such time." Together the prohibitions are rightly seen as classic expressions of the Founders' separation of powers concerns.

Once again, the role of the courts highlights the general point—here, that the consolidation of power at the center of the Empire led to an assault on rights in the peripheries. The English judiciary had never been a truly distinct and independent department of government. During the era of colonial settlement, the courts failed to establish the power of judicial review of statutes while the judges themselves were royally appointed and sat *quod bene placent*, at the Crown's pleasure. The Glorious Revolution kept the judiciary subordinate but shifted control away from the monarch, in part by rendering judicial tenure *que bene gerrisent*, upon good behavior. Significantly, the English House of Lords—long considered the kingdom's court of last resort—mounted its first assault on the appellate jurisdiction, an imperial dependency, not long after the Glorious Revolution concluded. This initial assault, on the Irish House of Lords, failed. No less significantly, however, a second assault twenty years later succeeded when Parliament extended its power still further by installing the present dynasty on the throne. While the British Lords never asserted the same jurisdiction over the colonies, an even stronger Parliament did encroach upon the jurisdiction of American trial courts starting in the 1760s. The Stamp Act, for example, sought to extend admiralty jurisdiction at the expense of both local common law trial courts and the juries that went with them. As noted, the revival of 35 Henry VIII attempted to deprive colonial courts of treason jurisdiction altogether.

While separation of powers may only have been indirectly invoked at best, representation was debated and discarded by each side. Paradoxically, each side also agreed that the colonial representation at Westminster would all but solve the constitutional conflict. By the mid-eighteenth century, few principles of English constitutionalism seem more firmly established than the tenet that representation in a lawmaking assembly was both a right in itself and the best means of protecting other rights. It was in part on the strength of this doctrine that Parliament was able to wrest more authority from the Crown during the previous hundred years. Were the colonists to send representatives to Westminster, it followed that

53. U.S. CONST. art. 1, § 6, cl. 2.
54. See Flaherty, supra note 48, at 603-22.
55. See MORGAN & MORGAN, supra note 44, at 24.
one of their principal rights would have been realized, and with it a way of safeguarding all others.

The trouble was that one side thought that the problem had already been solved and the other thought that it never could be. British imperialists famously countered American federal claims with the argument that the colonists were already virtually represented in Parliament. During the Stamp Act crisis, Soame Jenyns set forth the ministry's position in asking: "If the towns of Manchester and Birmingham, sending no representatives to Parliament, are notwithstanding there represented, why are not the cities of Albany and Boston equally represented in that Assembly?" 57 The colonists themselves of course never accepted this fiction. Responding directly to Jenyns, Daniel Dulany argued that "the notion of a virtual representation of the colonies . . . is a mere cob-web, spread to snatch the unwary, and entangle the weak." 58 Nor, the patriots further argued, was sending actual representatives to Parliament an option.

Americans denied Parliament's capacity to represent them for several reasons. Their own experience of actual representation in government, which was far more representative than Britain's own experience, rendered the claim of virtual representation simply untenable. The three-week voyage across the Atlantic, moreover, would have made it nearly impossible for any American MPs to conduct their business with their constituents even were Parliament to accept the idea. Finally, some patriots admitted that they themselves would not necessarily accept American representation in Parliament on the ground that colonial MPs would be nothing more than a consistently outvoted regional minority given Great Britain's still significantly greater population. 59

Only at the eleventh hour did anyone seriously propose representation as a way out of the imperial impasse. Late in 1774, Joseph Galloway of Pennsylvania placed before the Continental Congress a Plan of Union, that would establish a Grand Council—essentially a colonial parliament—that would regulate American affairs in conjunction with the British Parliament. Under the plan, the colonial assemblies would choose members of the Grand Council on a proportional basis. Galloway's proposed constitutional revision compromised the American position by


59. See MORGAN & MORGAN, supra note 44, at 80-86, 262-64.
admitting Parliament's authority, yet likewise compromised British claims requiring the assent of a representative American assembly before exercising jurisdiction over "the affairs of the colonies, in which Great Britain and the colonies, or any of them, the colonies in general, or more than one colony, are in any manner concerned." Perhaps not surprisingly, the Plan further tied representation to regulation of courts, adding that the Grand Council's jurisdiction would also extend to "criminal and civil" matters. In this way, too, Galloway's Plan relaxed American federalism limits in consideration of a representative stake in imperial policymaking.

The Plan of Union came too late in the course of affairs for actual representation on an imperial basis to gain acceptance by either side. With this constitutional option rejected, and separation of powers only dimly perceived, the patriot's constitutional commitment to federalism remained central. That commitment, however, hastened rather than averted a war in which the fate of American rights would be left to military circumstance. This experience would suggest that the Revolution's legacy undermines the view that "federalism actually might be by far the most important and beneficial feature of our constitutional scheme."

III. FOUNDING LESSONS

A. Original Understandings

Perhaps the first question that arises concerning this legacy is what lessons did the Founders themselves draw? We today might come to different conclusions about our Revolutionary experience because two hundred years of subsequent experience may or may not confirm any lessons that the Founders drew. But for an originalist, the Founders' understanding of Revolutionary federalism is obviously critical. Even for non-originalists, the Founders' unparalleled experience in applied constitutional thought, along with their not inconsiderable acumen, gives their views a certain persuasive, perhaps even presumptive, authority.

The short answer is that more research needs to be done before any account can be put forward with confidence. The longer answer is that


61. See id. at 118.


63. See supra text accompanying note 13.

there is every reason to expect that the Founders looked back at the American Revolution as evidence that federalism at best made for an ancillary and, to use Reid’s phrase, increasingly backward-looking solution to the problem of an extended polity when weighed against the more forward-looking doctrines of separation of powers and national representation. For one, independence permitted separation of powers to come out from under the shadow of “mixed-government” analysis. During the Critical Period, between 1776 and 1787, separation of powers became one of the chief analytical tools employed by critics of the early state constitutions. It follows that this same, newly-created popular device would serve a similar function when the founding generation considered its recent experience under the English Constitution. For another, the Antifederalists made sure that this experience remained under consideration throughout the Ratification debates. Patrick Henry, for example, struck one of the most frequent Antifederalist chords in equating the proposed Constitution with Parliament, at one point going so far as to say, “I would rather infinitely . . . have a King, Lords and Commons, than a government so replete with such insupportable evils [as those under the Federal Constitution].” Perhaps the most compelling reason, however, is simply that more skeptical understanding of Revolutionary federalism, at least on the part of the Federalists (who after all carried the day), is what the constitutional history of the American Revolution itself suggests. The early returns indicate as much. Such leading Federalists as Tench Coxe, Noah Webster, and Charles Cotesworth Pinckney contrasted America’s former experience under the English Constitution with its prospective experience under the proposed Constitution by emphasizing the document’s innovative approach to separation of powers and continental representation while downplaying federalism or ignoring it altogether. It cannot be stressed sufficiently, however, that these passages are merely suggestive. As the legal community is perhaps coming to acknowledge, credible historical assertions should not rest on isolated

65. Reid used these terms respectively to contrast the American—and, significantly, the federalist—conception of the English Constitution with the British interpretation. See Reid, supra note 33, at 5.
66. See The Most Dangerous Branch, supra note 17, at 1763-71.
69. Giles Hickory, in 1 The Debate on the Constitution, supra note 68, at 669-772.
excerpts, but instead should rely on some effort to examine whether those quotations are representative, and still further should rely on some effort to reconstruct the general context in which the statements quoted were made. Yet, in part this task has already been completed. As noted, these kinds of statements comport with the general structure and direction of constitutional thought leading up to the Federal Convention. The insights of Wilson and Madison, moreover, correspond with the work of the Convention itself—in particular, its vigorous embrace of just the mechanisms and insights lacking in the patriot case.

Consider, again, separation of powers. As noted, provisions such as the Emoluments Clause reflected an ongoing concern about corruption, a traditional patriot concern that anticipated a separation of powers analysis. Yet what had been at best a peripheral doctrine in patriot constitutionalism became a centerpiece of American constitutional thinking by the time of the Founding. Where the early state frameworks—much like the evolving English Constitution itself—pointed toward legislative supremacy, the Federal Constitution famously enhanced executive and judicial authority to prevent the tyrannical accretion of power to the same set of hands. So thoroughgoing was the commitment to the general principal that the Federalists and Antifederalists disagreed only on how well the document furthered the doctrine, rather than on their enthusiasm for the doctrine itself.

In similar fashion, actual representation, which had been considered and discarded in the imperial setting, served as another cornerstone in the national context. Soon-to-be Federalists insisted on this innovation from the start. The Virginia Plan immediately recast the debate on reforming the Articles of Confederation not just by providing for a government that would act on individuals rather than just the states, but by assuming direct representation of those individuals. Much like the patriots, the Antifederalists never questioned the desirability of representation so much as its feasibility. Patrick Henry once more sounded a common opposition theme in stating that the new government would “oppress and ruin the people” in no small part because the Congress would not be representative enough. Nor was this type of objection trivial. No less a figure than Henry’s fellow Virginian, George Washington, famously broke his silence at the end of the Federal Convention by supporting a last-minute proposal that the ceiling for House districts be lowered from 40,000 to

71. See History “Lite,” supra note 17, at 554; see also LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 208-29 (1996).
72. See The Most Dangerous Branch, supra note 17, at 1755-1810.
COMMITMENT TO FEDERALISM

30,000 to make national representation more credible. In addition, as Larry Kramer has convincingly argued, it would take the invention of national political parties to make the system meaningful as a conduit for local concerns to receive consideration in national corridors of power.

Yet, in the end, the analogy to the unrepresentative Imperial Parliament was untenable. Direct, biennial election of every member of the House of Representatives alone belied the parallel. So, too, did the mediate election of the Senate and the President, who in turn selected the judiciary. In this way, the Constitution's supporters could make the claim that the framework went much further and gave the entire government a representative pedigree. As Gordon Wood points out, the Federalist argument held that "all government officials, including even the executive and judicial parts of the government, were agents of the people, not fundamentally different from the people's nominal representatives in the lower houses of the legislatures." Federalists, in fact, expressly contrasted the Constitution's superior commitment to representation with domestic British practice. Nothing would have prevented them from making the point even more strongly about Great Britain's imperial claims.

All this said, the American Revolution furnished far from the only recent experience that suggested federalism's inadequacies. Though beyond the scope of this Paper, subsequent experience diminished the doctrine's place in received constitutional thinking even more dramatically. No theme is more central to the last generation of historical scholarship than the Founders' disillusionment with state government and the constitutional insights that resulted. During the Critical Period, innumerable observers came to the reluctant conclusion that the state governments had proven themselves to be sinkholes of demagoguery, faction, and localism that infringed individual rights precisely because they were close to the people. The idea that self-government and rights did not always go hand in hand shattered previous constitutional assumptions. As Jefferson put it, "an elective despotism is not the government we fought for." The result was a profound suspicion of state government, disenchantment that was further enhanced by the country's inability to present a unified front on the international stage.

75. See Kramer, supra note 12, at 1522-35.
76. WOOD, supra note 15, at 598.
77. Id. at 596.
78. See History "Lite," supra note 17, at 539, 547-48. The centerpiece of this understanding is Wood's Creation of the American Republic.
This post-Revolutionary experience further enhanced the appeal of separation of powers and direct representation.80

But it also generated even more forward-looking, post-Revolutionary alternatives to the federalist model that the patriots advanced. Of these, perhaps the most celebrated—today if not at the time—was the argument that Madison made in *Federalist No. 10* that large polities are actually less likely to result in assaults on liberty than are local polities.81 Also critical was the novel doctrine that the new central government would only exercise specified powers, however elastic. Perhaps more important, the Federalists refined relocated sovereignty from either the new Federal or state governments or deemed it a power of the people who constituted both.82

The judiciary again provides a case on point. Whether the conscious result of the American Revolution or the Critical Period, the Constitution dealt with courts in a way that would have made patriot federalists blanch. Where American—and Irish—constitutionalists denied the appellate jurisdiction of the Empire’s highest court, the Constitution, by analogy, commanded it. Such, in any case, was the expectation with regard to Article III, an expectation immediately realized by the First Congress in the First Judiciary Act and confirmed by the Supreme Court in *Martin v. Hunter’s Lessee*.83 Previously, Americans had held the barrier against appellate jurisdiction as a *sina quo non* of the federal system that they defended and under which they had lived. With reliance on separation of powers and direct representation, among others, this critical barrier no longer seemed so important.

None of this is to say that the brand of federalism that the patriots put forward has disappeared. As has been suggested, however, the keepers of the flame were not the Founding Federalists, but their Antifederalist opponents. Continuing to view the American Revolution almost exclusively in terms of federalism, Antifederalists discounted the Constitution’s reliance on alternative mechanisms and consequently saw the proposed central government as little more than Parliament’s illegitimate American stepchild. Nor did this view die with the Constitution’s opponents. With varying degrees of intensity, it has echoed through the rhetoric of the Jeffersonians, Confederates, the states rights opponents of the civil rights movement, and the opinions of Justices Powell and O’Connor. Yet, in the short term, it was the Federalists who carried the day. The victors obviously were not about to

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80. See generally WOOD, supra note 15, passim.
82. See WOOD, supra note 15, at 532-36.
abandon the states as important units of government. The American Revolution’s legacy, however, suggested that retaining such units did not mean retaining the rigid barriers claimed by the colonists.84

B. Modern Conclusions

Whatever lessons the Founding generation took away from the American Revolution, we of course are free to take our own. The Founders, no greenhorns at implementing a workable government, themselves did this all the time. Publius, after all, considered the record of Amphictyonic Confederacy and the Holy Roman Empire not so much for the original understandings of the ancient Greeks or medieval Germans, but for the examples themselves.85 This does not mean, however, that current views need clash with original ones. Nor do they here. Our modern perspective does nothing to undermine the meaning of the American Revolution’s legacy that was suggested at the time, while subsequent experience only tends to confirm it. On the one hand, it seems clear that the type of backward-looking federalism that the patriots put forward proved to be an ineffective and precarious strategy for safeguarding liberty. On the other hand, it seems equally evident that whatever utility may lie in this conception of divided government appears greatly diminished given the forward-looking alternatives that, for various reasons, were not implemented at the time.

If the American Revolution is any guide, the type of federalism that imposes absolute barriers for the protection of constituent polities was already backward-looking by the time the United States declared independence. Not only did it look to the past in Reid’s sense of resting on an older constitutional idea, it also looked to a time in which it had been workable, but which had already receded. So long as circumstances inhibited Parliament from asserting imperial authority, the model of a federated Empire appeared to succeed. When, after 1764, those circumstances no longer existed, the patriot’s constitutional case probably did more to invite catastrophe than inhibit it.

For one thing, imperial federalism did nothing to curb Parliament’s assertions. The doctrine offered little to prevent the steady accretion of power to the leadership of the House of Commons. It also afforded no mechanism for advancing colonial concerns to that leadership or to anyone else in Parliament—a task that was only sporadically undertaken

84. Except, of course, for the constraint of retaining states as a governmental subdivision to begin with, a barrier assumed by both the Guarantry Clause, U.S. Const. art. IV, § 4, and the provision for equal state suffrage in the Senate, U.S. Const. art. V.

85. THE FEDERALIST Nos. 18 & 19, supra note 81, at 122-29 (James Madison with Alexander Hamilton).
by informal colonial agents such as Benjamin Franklin and Edmund Burke. Instead, the patriot framework served to alienate Britons in general through its robust assertion of the imperial constraints under which Parliament labored, and in this way hastened the conflict.

Moreover, once the conflict came, the federated ideal turned out to be a chancy way of protecting the liberties that the English Constitution guaranteed. With no other mechanisms available, all that was left for either side was to capitulate or gamble on war. Even here, at least late in the crisis, the colonial-cum-state governments probably hindered patriot efforts as much as they helped. As Richard Morris and others point out, both American resistance and rebellion owed their effectiveness more to novel, continental institutions such as committees of correspondence, a professional Continental Army, and Congress itself than to notoriously unreliable militias or often recalcitrant state governments.  

Federalism, finally, appears backward-looking in another sense. The nation’s long experience, because the Founding tends to confirm that the Revolutionary legacy was no aberration. Larry Kramer has aptly suggested that what instead stands out is how rarely and ineffectively the type of federalism under consideration has served its purpose of protecting fundamental freedoms. While examples merit an extended discussion elsewhere, echoes of the Revolutionary approach are few and suggestive. The Virginia and Kentucky Resolutions, the Hartford Convention, Nullification, Secession, and the post-World War II states’ rights movement all, to varying degrees, insisted on constitutional shields to preserve state prerogatives and sought to marshall the states when those shields were ignored. Unlike the American Revolution, however, each effort was not only chancy, but either ineffective on its own terms or simply an outright disaster. Whatever other purposes it has served, the brand of federalism that achieved its height during the American Revolution did not turn out to be the way of the future so far as implementing a working yet free government is concerned.

This task instead would fall largely to the more forward-looking doctrines of separated powers and direct representation. These mechanisms rightly qualify as prospective not just because they were either underdeveloped or untried through 1776. Rather, these devices should today be seen as having eclipsed any commitment to at least rigid federalism because subsequent experience has demonstrated their worth. Whether they would have averted bloodshed and preserved liberty at the


87. See generally Kramer, supra note 12, passim.

88. See id. at 1490.
time can be no more than speculation. Their use since then, however, has not.

Experience since ratification indicates that the Founders' confidence in separation of powers was well-placed. If the analysis to this point is anywhere near the mark, it follows that this doctrine should be seen as preventing the infringement of rights before federalism constraints would or could be invoked. This has occurred with increasing frequency over time. Considered as a subset of separated powers, judicial review furnishes only the most obvious example of one branch of government preventing questionable assertions of power by the others. More dramatically, the mechanism has worked repeatedly in preventing any one branch from concentrating into its hands the powers of the others and so meet the classic Madisonian "very definition of tyranny." Moreover, it has done so under heavy assaults. Andrew Johnson for better or worse prevented the Republican Congress from gutting the presidency. The Supreme Court did much the same in successfully resisting F.D.R.'s court-packing plan. Such successes stand in marked contrast to the failure of the states previously discussed.

Representation provides an even clearer case. At least early in the Republic's history, continued reliance on the backward-looking, together with increasing reliance on forward-looking counterparts, suggested the relative efficacy of each. Perhaps the most dramatic comparison involved the Alien and Sedition Acts. Here figures no less imposing than Madison and Jefferson attempted to preserve liberty through a state-based strategy that echoed the American Revolution. Taking a leaf from Patrick Henry, the two men famously engineered resolutions by the Virginia and Kentucky legislatures condemning Federal tyranny, expressing the doctrine that each state was as fully competent as the Federal government to interpret the Constitution, and calling on the other states to consider nullification of the controversial statutes. No state did, and this strategy generally fizzled. What did not fizzle, however, was the opposition's other, innovative approach. Both Jefferson and Madison redoubled efforts, then already underway, to organize a national movement to unseat President Adams and the Federalist Congress in the next national elections. It was this strategy that worked. The Jeffersonians were swept into power in 1800 and allowed the hated acts to expire.

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89. THE FEDERALIST No. 47, supra note 81, at 301 (James Madison).
91. See Kramer, supra note 12, at 1519-20.
92. See MALONE, supra note 90, at 393-424.
Americans who would achieve similar success in the future tended to go with what worked.93

IV. CONCLUSION

History papers conventionally end with a call for further study. This one is no exception. This Paper in particular requires further research on its own terms, especially with regard to the Founders’ understanding of the American Revolution that many of them had so recently undertaken. More importantly, legal academics interested in "using" the past to gain a better understanding of American federalism have, for the most part, yet to employ an entire generation of historical scholarship toward that end with even minimal credibility. This Paper attempts a start. Yet, while several aspects remain provisional, the central conclusion is not. As a uniquely American contribution to the protection of liberty, federalism has long been more apparent than real.

93. See Kramer, supra note 12, at 1519.