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United/States: A Revolutionary History of American Statehood

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UNITED/STATES: A REVOLUTIONARY HISTORY OF AMERICAN STATEHOOD

*Craig Green**

Where did states come from? Almost everyone thinks that states descended immediately, originally, and directly from British colonies, while only afterward joining together as the United States. As a matter of legal history, that is incorrect. States and the United States were created by revolutionary independence, and they developed simultaneously in that context as improvised entities that were profoundly interdependent and mutually constitutive, rather than separate or sequential.

“States-first” histories have provided foundational support for past and present arguments favoring states’ rights and state sovereignty. This Article gathers preconstitutional evidence about state constitutions, American independence, and territorial boundaries to challenge that historical premise. The Article also chronicles how states-first histories became a dominant cultural narrative, emerging from factually misleading political debates during the Constitution’s ratification.

Accurate history matters. Dispelling myths about American statehood can change how modern lawyers think about federalism and constitutional law. This Article’s research weakens current support for “New Federalism” jurisprudence, associates states-rights arguments with periods of conspicuous racism, and exposes statehood’s functionality as an issue for political actors instead of constitutional adjudication. Flawed histories of statehood have been used for many doctrinal, political, and institutional purposes in the past. This Article hopes that modern readers might find their own use for accurate histories of statehood in the future.

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INTRODUCTION

“Nations reel and stagger on their way; . . . they commit frightful wrongs; they do great and beautiful things. And shall we not best guide humanity by telling the truth about all this, so far as the truth is ascertainable?”

—W.E.B. Du Bois¹

This Article starts with a fundamental question in legal history: where did states originally come from?² Two responses have been widely circulated,

1. W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 714 (1935). Du Bois rejected historical theories from his era that simplified and distorted the recreation of American statehood and government after the Civil War. The political stakes of truth telling with respect to eighteenth-century statehood might be less urgent, yet Du Bois’s willingness to challenge intellectual orthodoxy has inspired many kinds of history, including this Article. See also JILL LEPORE, *THIS AMERICA: THE CASE FOR THE NATION* 10 (2019).

2. Two related questions will also need attention: What does the word “state” mean, and what time period should be used in describing where states “came from”? See *infra* Parts I, II.

and even though one of them is very popular, both are dramatically flawed. The popular “states-first” answer is that states historically preceded all forms of interstate government. Thirteen British colonies reopened as thirteen American states under “New Management” signs, and those entities fit together like colored pieces of a map-shaped puzzle.³ Historians, lawyers, and schoolchildren rely on states-first histories whenever they say that “states came together” to form the United States.⁴ According to standard historical narratives, states emerged first—as the essential and primary entities of American law and territory—while the United States arrived later as a derivative project.

The unpopular “union-first” answer is that statehood was secondary because the legal category itself was conceived and implemented through interstate government.⁵ Abraham Lincoln proclaimed that “[t]he Union is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union threw off their old dependence . . . and made them States, such as they are.”⁶ A generation earlier, Andrew Jackson roared that “[t]he unity of our political character . . . commenced with its very existence.”⁷ The United States predated its compo-

3. Eighteenth-century maps looked very different from modern puzzles. See, e.g., CARINGTON BOWLES, *BOWLES'S NEW POCKET MAP OF THE UNITED STATES OF AMERICA; THE BRITISH POSSESSIONS OF CANADA, NOVA SCOTIA, AND NEWFOUNDLAND, WITH FRENCH AND SPANISH TERRITORIES OF LOUISIANA AND FLORIDA, AS SETTLED BY THE PRELIMINARY ARTICLES OF PEACE SIGNED AT VERSAILLES THE 20TH. OF JANU. 1783* (1784), <https://www.loc.gov/resource/g3700.ar074500/> [<https://perma.cc/C568-EF2B>]. See also DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 7–12, 74–75, 221–23, 343–44 (2019). For efforts to trivialize the eighteenth-century transition from colonies to states, see Thomas Jefferson, *The Article on the United States in the Encyclopédie Méthodique* (Jan. 24, 1786), reprinted in 10 *THE PAPERS OF THOMAS JEFFERSON* 3, 11–12 (Julian P. Boyd et al. eds., 1954), and ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 1 (1924).

4. Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. CHI. L. REV. 705, 724 (2011) (book review) (stating that, under the Articles of Confederation, “[t]hirteen independent and sovereign states came together to form a treaty”); see also, e.g., DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (Wilson Carey McWilliams & Lance Banning eds., 2003); MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 14 (2016); PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 17 (2010); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 163 (1996); Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1124.

5. An even less popular alternative was once sketched by WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (Rita Kimber & Robert Kimber trans., 1980). For criticism of Adams, see Jack N. Rakove, Book Review, 38 WM. & MARY Q. 297, 297–301 (1981).

6. Abraham Lincoln, Special Session Address (July 4, 1861), reprinted in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 433–35 (Roy P. Basler ed., 1953).

7. Proclamation No. 26, Respecting the Nullifying Laws of South Carolina (Dec. 10, 1832), reprinted in 11 Stat. 771, 777 (1859).

ment parts because “[u]nder the royal government we had no separate character; our opposition to its oppressions began as *United Colonies*. We were the *United States* under the confederation, and the name was perpetuated . . . In none of these stages did we consider ourselves in any other light than as forming one nation.”⁸

One eighteenth-century eyewitness, James Wilson, ridiculed any historical argument that states were independent of interstate government: “It is objected . . . that under [the Constitution] there is no sovereignty left in the state governments. . . . but I should be very glad to know *at what period* the state governments became possessed of the supreme power.”⁹ Wilson presciently warned that, when Americans do not understand the true history of statehood, discussions collapse into “a mere illusion of names. *We talk of states, till we forget what they are composed of.*”¹⁰ Even though prominent historical figures like Lincoln, Jackson, and Wilson all argued that the United States came first—with states emerging afterward as legal subordinates—almost no one believes that today.¹¹

This Article rejects both theories, which have been endlessly repeated in American politics and law. Advocates have used states-first and union-first histories to debate the Alien and Sedition Act in the eighteenth century, state nullification of nineteenth-century tariffs, secession during the Civil War, and twentieth-century resistance to racial desegregation.¹² Supreme Court

8. *Id.*

9. Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787, in 1 COLLECTED WORKS OF JAMES WILSON 258 (Dec. 11, 1787) (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis added); see *id.* at 201 (Dec. 1, 1787); Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 1, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 443 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. reprint 2d ed. 1937) (1836) [hereinafter STATE CONVENTIONS (1836)].

10. Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (June 30, 1787), in 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787; WITH A DIARY OF THE DEBATES OF THE CONGRESS OF THE CONFEDERATION 261, 262 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 1845) [hereinafter STATE CONVENTIONS (1845)] (emphasis added).

11. See Amar, *supra* note 4, at 1124 (rejecting Lincoln’s approach). *But see* Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056, 1056, 1089 (1974) (arguing incorrectly that states were “a creation of the Continental Congress, which preceded them in time and brought them into being”); GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE*, at ix (1978) (adopting Morris’s thesis after once having denied it).

12. For states-first arguments against the Alien and Sedition Act, see Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 STATE CONVENTIONS (1836), *supra* note 9, at 540–44. For states-first arguments that favor tariff nullification, see South Carolina, Ordinance to Nullify an Act of the Congress of the United States, entitled “An Act Further to Provide for the Collection of Duties on Imports,” Commonly Called the Force Bill (Mar. 18, 1833), *reprinted in* JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA 129–30 (Columbia, S.C., R.W. Gibbes 1833), and 9 REG. DEB. 364 (1833).

cases have cited states-first history to support slavery under *Dred Scott*, modern doctrines of “freestanding federalism,” and many other legal results.¹³ In 2019, the Supreme Court declared that “[a]fter independence, the States considered themselves fully sovereign nations,” and it concluded that

For secession and the Civil War, see DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860), reprinted in JOHN AMASA MAY & JOAN REYNOLDS FAUNT, SOUTH CAROLINA SECEDES 76, 76–81 (1960), and 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 370 (Philadelphia, Nat’l Publ’g Co. 1868).

For twentieth-century racial segregation, see JAMES JACKSON KILPATRICK, THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA 258–63 (1957). Other prominent applications of states-first history include Franklin Pierce, Veto Message on Legislation Funding Public Works (Aug. 4, 1854), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2789, 2789–90 (James D. Richardson ed., New York, Bureau of Nat’l Literature 1897), and Letter from Sec’y of State Thomas Jefferson to President George Washington (Mar. 18, 1792), http://jeffersonswest.unl.edu/archive/view_doc.php?id=jef.00105 [<https://perma.cc/S4WN-U86M>].

As we have seen, Lincoln and Jackson advanced union-first histories in their opposition to nullification and secession. See *supra* notes 6–7 and accompanying text. Lincoln further claimed that “[o]ur States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution—no one of them ever having been a State out of the Union.” LINCOLN, *supra* note 6, at 433. If Lincoln’s theory were deemed legally acceptable, then all originalist analysis of statehood should focus exclusively on the late 1780s, regardless of earlier historical evidence about independence and confederation. See Part III (describing unresolved debates over statehood during the 1780s). For an exaggerated vision of preconstitutional unity after Lincoln’s death, see Charles Sumner, Address Before the New York Men’s Republican Union: Are We a Nation? 11 (Nov. 19, 1867) (transcript on file with the *Michigan Law Review*).

13. For academic discussion of “freestanding federalism,” see *infra* Section IV.A; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009); Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98 (2009); see also Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661 (2008); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010).

For sixteen examples when the Supreme Court has invoked states-first history, see *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 752 (2002); *Printz v. United States*, 521 U.S. 898, 918–19 (1997); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–03 (1995) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964)); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Hans v. Louisiana*, 134 U.S. 1, 16, 18 (1890); *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), overruled in part by *Morgan v. United States*, 113 U.S. 476 (1885); *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 323 (1857) (Campbell, J., dissenting); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 434 (1857); *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 587 (1847), overruled in part by *Leisy v. Hardin*, 135 U.S. 100 (1890); *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 693 (1838); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 192–93 (1819); and *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796) (Chase, J.). See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 295–96 (1936). The Supreme Court has issued very few examples of “union-first” history. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1936). Only one Supreme Court opinion points toward a third possibility that has the benefit of being, perhaps inadvertently, historically accurate. See *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (“Both the States and the United States existed before the Constitution.”).

therefore “the States retain their sovereign immunity” up to the present.¹⁴ Using states-first history to overturn a forty-year-old precedent, the Court confirmed that the legal status of eighteenth-century statehood remains important today—at least in some contexts and for some audiences.¹⁵

Despite widespread disputes, no one has written an adequate history of legal statehood.¹⁶ The American public has ignored basic questions about how and when statehood developed, perhaps assuming that states arrived along with sailors’ luggage or developed through some kind of natural evolution. Most scholars have likewise presumed that the status of American states was essentially constant from 1776 to 1788, thereby drawing artificially straight lines from colonial status to constitutional statehood.¹⁷ Civics-class mythology has obscured the historical meaning of eighteenth-century statehood, and it has also distorted efforts to understand how states became what they are today.

To begin with obvious errors, it was impossible for thirteen British colonies to become thirteen American states because only twelve colonies joined the Revolution. The thirteenth state, called by its new name “Delaware,” spent nearly a century as the “Lower Counties” of Pennsylvania, and colonists in that region claimed independence from William Penn and Britain at precisely the same time. Some readers will be shocked to hear that there never was a British colony “Delaware.”¹⁸ But the analytical point runs much deeper than any simple factual correction. Every popular history of statehood appears more supportable if one assumes that there were thirteen colonies, and so do conventional histories of Delaware and triumphal myths

14. See *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493, 1498 (2019). An earlier opinion from Justice Breyer contradicted the approach in *Hyatt*, despite Breyer’s own casualness about underlying historical facts. “The original 13 States, once dependents of Britain, became independent entities perhaps at the time of the Declaration of Independence [1776], perhaps at the signing of the Treaty of Paris [1783], perhaps with the creation of the Articles of Confederation [1781]. (I need not be precise.)” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting).

15. *Hyatt*, 139 S. Ct. at 1493, 1499 (overturning *Nevada v. Hall*, 440 U.S. 410 (1979)).

16. Peter Onuf’s attention to the historical construction of statehood is a partial counterexample, but his conclusions remain deeply affected by states-first assumptions. See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787* (1983); Peter S. Onuf, *State-Making in Revolutionary America: Independent Vermont as a Case Study*, 67 J. AM. HIST. 797 (1981); see also PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* (1987); PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* (2000). By contrast, analysis by German scholar Willi Paul Adams offers a useful complement or corrective to existing historical narratives. See ADAMS, *supra* note 5.

17. See, e.g., NEVINS, *supra* note 3, at 1.

18. One could collect thousands of inaccurate references to “thirteen” rebellious British colonies. Every generation of citizens, lawyers, and scholars has accepted that number as the unquestioned truth. E.g., ROBERT J. ALLISON, *THE AMERICAN REVOLUTION: A VERY SHORT INTRODUCTION* 4, 19 (2015).

about the Constitution.¹⁹ This Article suggests that dominant narratives about statehood have repeatedly ignored awkward details. Correcting historical narratives is one step toward fixing constitutional law. With respect to American statehood, inattention to Delaware dramatically illustrates how far there is to go.

Twelve other revolutionary states used prerevolutionary colonial names, which verbally announced new entities' existence and the old regime's annihilation.²⁰ The act of claiming those names was politically important, yet the new states "Virginia" and "New York" were legally different from the colonies that came before. The Revolution altered legal definitions of state citizenries, officials, and institutions, while also transforming boundaries that defined the states themselves.²¹ For centuries, British imperial law created and sustained colonies as territorial entities. The renunciation of British law produced a new category of "statehood" that reflected an aspirationally emerging legal order.

Prerevolutionary colonies were supposed to be formally subservient, malleable, and derivative creations of the British Empire.²² American states had different objectives—a major impetus for the Revolution—and no state acted alone in creating or pursuing its augmented legal status. States did not rise onto naturally independent feet. Nor did interstate negotiations resem-

19. *E.g.*, AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 247 (2005) (claiming that Delaware was omitted from a 1776 version of Benjamin Franklin's snake cartoon "Join, or Die" because Franklin came from Pennsylvania). In fact, Benjamin Franklin was quite familiar with the Lower Counties' status as a semiautonomous entity inside Pennsylvania, having published the first copy of the *Laws of the Government of New Castle, Kent, and Sussex [Counties] upon Delaware* in 1741, and having also printed currency for the Lower Counties' government. See *THE EARLIEST PRINTED LAWS OF DELAWARE 1704–1741*, at 12 (John D. Cushing ed., 1978); BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 125 (Leonard W. Labaree et al. eds., 2d ed. 1964). For orthodox Delawarean history, see JOHN A. MUNROE, *HISTORY OF DELAWARE* 63 (5th ed. 2006) [hereinafter MUNROE, *HISTORY OF DELAWARE*], and JOHN A. MUNROE, *COLONIAL DELAWARE: A HISTORY* 217–34 (Delaware Heritage Press 2003) (1978) [hereinafter MUNROE, *COLONIAL DELAWARE*]. Perhaps Amar deserves credit as one of the only law professors to notice anything at all odd about Delaware during the revolutionary period.

20. Similar tactics about governmental names appear among modern postrevolutionary governments as well. See 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, at xv–xvi (Neil J. Kritz ed., 1995).

21. See Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 *SUFFOLK L. REV.* 759, 776 (2014) ("[E]ach state prosecuted native-born or long-domiciled residents who remained loyal to the Empire as traitors. Treason prosecutions, by judicial verdict and statutory attainder, also became an important source of revenue for the states."); Alan Taylor, *Expand or Die: The Revolution's New Empire*, 74 *WM. & MARY Q.* 619, 630 (2017) ("We often overlook the enhancement of state power because of our preoccupation with a national story focused on the federal Union.").

22. Colonial experience did not always follow such a rigid hierarchy in practice. See JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689–1776*, at 3–4 (1963).

ble international diplomacy where background norms about negotiators' legal status and territorial existence were taken for granted.²³

On the contrary, legal characteristics of American states and statehood were created and negotiated in the same historical moments as the United States' central government, often through the same legal documents. States and the United States repeatedly leaned on one another for support and recognition, operating and functioning together, of necessity and also by design. Both layers of government jointly manufactured structures to organize populations and territory even as they struggled with one another over particular substantive points. American law borrowed heavily from British experience in other regards,²⁴ but establishing the status of states and their relationship to central government would require substantial innovation and improvisation.

American statehood was never determined by abstract theory, nor was it produced by facile imitation. To ask which came first as a historical matter—the states or the United States—yields a paradox of chickens and eggs that is widely overlooked. Exploring that paradox raises deeper questions about

23. Dan Hulsebosch and David Golove have shown that diplomacy and the law of nations were essential components of eighteenth-century statehood, as they also were essential to the United States' emergent nationhood. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935, 980 (2010) (describing "The International Constitution"); Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239, 1242–46 (2018) (adding international commerce and credit to analysis of governmental structures); Hulsebosch, *supra* note 21, at 769 ("[R]evolutionary institution-building was performed on an international stage."); see also ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012) (describing the United States' emphasis on international reputation). Although such works have sometimes analogized early statehood to an international treaty among sovereign European governments, they also acknowledge that "the political relationships among the states and between each state and the Congress were left unmapped," Golove & Hulsebosch, *supra* at 951, which illustrates a fundamental difference between American statehood and most examples from European history. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 189 (2005) ("Throughout the war, the relationship between the state and the Continental Congress, and then Confederation government, was unclear."); Hulsebosch, *supra* note 21, at 774 ("There was . . . no internationally prescribed mode for gaining recognition as an independent state."); cf. HULSEBOSCH, *supra* at 170 ("We have a government, you know, to form; and God only knows what it will resemble." (quoting a letter from John Jay on July 6, 1776)).

Other research has shown that negotiations with and violence against Native Americans are frequently overlooked aspects of revolutionary and constitutional statehood. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 999 (2014); Craig Green, *Creating American Boundaries: Federalism and Dispossession* (unpublished manuscript) (on file with author). Even though this Article will focus on the development of legal materials by white North Americans, no one should assume that such episodes were ever fully isolated from European and Native American forms of power, law, or influence.

24. See 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660* (2008); 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730* (2013).

what statehood originally meant and how states developed in the centuries that followed. This Article analyzes in detail the former issue of origins, while highlighting later historical developments as an important topic for future research.²⁵

American states were not easily derived from British colonies, just as the United States did not simply recreate the British Empire. Hundreds of books have analyzed how the national United States displaced British North America, yet almost no scholarship has considered how states displaced colonies.²⁶ To understand statehood as a legal category requires new interpretations of the Revolution and the Constitution. It also raises questions about history's practical significance when modern courts interpret and apply constitutional law.

This Article proceeds in four steps. Part I explains what it means to study states and statehood as objects of legal history. Comparable to "cities," "colonies," "corporations," and "nations," states and statehood are technical legal entities that only sometimes overlap with nonlegal experience.²⁷ A few scholars have analyzed states as economic, social, intellectual, or cultural entities, and their research has focused on economic, social, intellectual, and

25. See ALISON L. LACROIX, *THE INTERBELLUM CONSTITUTION: UNION, COMMERCE, AND SLAVERY FROM THE LONG FOUNDING MOMENT TO THE CIVIL WAR* (forthcoming 2020); Maeve Glass, *Founding Properties* (unpublished manuscript) (on file with author).

26. E.g., JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011). This Article's history of statehood is distinct from abundant histories of federalism, though it obviously borrows from that literature. Histories of federalism typically cover different subjects and use different source materials that bypass the origins of states, while shifting attention toward the integration, separation, and interrelationship of such entities relative to the United States. Compare ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2011), and DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* (2d ed. 2018), with *infra* Part I.

27. For example, one could define a "city" based on particular standards for high-density residence, aggregations of urban infrastructure, or cultural features like television channels and sports teams. See JEAN GOTTMANN, *MEGALOPOLIS: THE URBANIZED NORTHEASTERN SEABOARD OF THE UNITED STATES* 24 (1961) (defining a New York-centered urban area based on sociological concentrations of population, "banking, insurance, wholesale, entertainment and transportation activities"). From a strictly legal perspective, however, cities are formal entities that possess technically prescribed borders, governments, origins, powers, and responsibilities. HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 2 (Cornell Univ. Press 1989) (1983). One could similarly use the word "corporation" to describe almost any powerful aggregation of wealth or personnel—as in "corporate America"—or the term could be reserved for a specific kind of legally chartered entity with prescribed legal powers and a technical residence. Cf. James Wilson, *Address to the People of Philadelphia, Speech Delivered at the Pennsylvania Ratifying Convention* (Oct. 6, 1787), <https://oll.libertyfund.org/pages/1787-wilson-address-to-the-people-of-philadelphia-speech> [<https://perma.cc/98YU-3SSV>] ("In common parlance, indeed, [the word 'corporation'] is generally applied to petty associations for the ease and convenience of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even [the proposed Constitution] . . .").

cultural materials.²⁸ By contrast, this Article offers an “unapologetically” legal history of statehood, which is tightly focused on legal documents and negotiations without addressing broader relationships to economic practice, social reality, intellectual theory, or cultural characterization.²⁹ Such legally oriented analysis cannot be the last word on the history of states and statehood, but perhaps it will provide a useful step forward.

Part II presents three kinds of evidence from 1775 to 1788 about the origins and nature of statehood. One category involves the first American constitutions, which effectively inaugurated provincial government outside of British authority. From their earliest existence, breakaway colonies-and-states were not manufacturing constitutions in their capacity as self-authorized sovereignties, standing alone and boldly announcing their existence. On the contrary, provincial constitutional systems were requested by, coordinated with, and validated through the Continental Congress as an aspirationally central government.

A second category of evidence surrounds declarations of independence that rejected British authority to formally produce anticolonial statehood. Revolutionary colonies and states asserted legal independence from Britain through highly interdependent mechanisms, analogous to state and central cooperation in the contemporaneous war that they were trying to survive. There was never any historical moment when states could have preceded the United States because both layers of government were interrelated in their joint and codependent legal struggles for existence. From the beginning, states and the United States had to function together, and their developing legal status reflected that interlocking set of needs.

The third category involves states as territorial entities with geographically specific borders, authorities, and responsibilities. Renouncing British imperial government implied that states and central governments had to decide for themselves—and alongside one another—how territorial claims could be asserted and challenged. Legal borders defined where states were located, and those decisions determined states’ economic and demographic future, while also establishing a framework for states to exist and coexist.

All of these eighteenth-century materials indicate that states were very different from colonies. They were also different from international countries like France, as well as existing confederacies like the Netherlands or the Iroquois (Haudenosaunee). Revolutionary states were never independent from one another, much less were they autonomous from the interstate governments that they helped to inaugurate. American “States” were always

28. Some of the best scholarship in this group has described economic, social, intellectual, and cultural forces that transcend or challenge the limits of statehood and nationhood. See *CONTESTED SPACES OF EARLY AMERICA* (Juliana Barr & Edward Countryman eds., 2014); *MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004); *CHARLES S. MAIER, ONCE WITHIN BORDERS: TERRITORIES OF POWER, WEALTH, AND BELONGING SINCE 1500* (2016).

29. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY 2* (2000) (describing the potential importance of focused legal history, despite its clear imperfections).

“United,” and those words were repeatedly contested and constructed in the same historical episodes.

As an ancillary project, Part III examines the origins of inaccurate myths about preconstitutional states and statehood. States-first and union-first arguments have served diverse political purposes throughout United States history, including the Constitution’s framing and ratification. This Article’s thesis is that such theories were always developed and contested, rather than timeless, original, or conventional. During eighteenth-century ratification debates, for example, Federalists and Anti-Federalists disagreed about the Constitution’s substantive merit. Yet both sides circulated broken histories of the Articles of Confederation, characterizing states as primary, essential, and sovereign in contrast to the weak and derivative central government. After ratification, similarly distorted images of preconstitutional state-centrism were even more prominent. Modern intellectuals and lawyers cannot hope to escape this flawed consensus unless they look beyond Federalist and Anti-Federalist pamphlets. Reliance on that deeply political literature explains many Americans’ orthodox misimpression that somehow—in the beginning—there were states.

Part IV briefly considers possible normative implications. Supreme Court decisions espousing “freestanding federalism” have relied on abstract intuitions about eighteenth-century history without attention to factual details. Although this Article will not address specific doctrinal questions, it rejects any assumption that constitutional statehood was a primordial fact or an eighteenth-century consensus. States did not enter the union fully formed of their own volition. Under such circumstances, states could not legally rely on implicit assumptions about their new constitutional status—they had to depend on postratification politics. In the late eighteenth century, statehood was not a background convention that simply went without saying. It was a contested legal category that changed several times, with some aspects explicitly resolved, and many questions persistently unanswered.

As with the Declaration of Independence and the Articles of Confederation, the Constitution did not simply diminish states by making them *compromise* preexisting status and authority; it also established state powers that were previously lacking. Contrary to popular myths, states did not give up one fraction of their natural sovereignty to silently preserve the rest. Instead, the Constitution composed and reformed statehood itself as a legal category, revising and borrowing from earlier models, clarifying some issues while leaving others undecided. Most modern doctrines that affirm and establish states’ rights cannot be credibly planted in the shifting sands of eighteenth-century statehood. Right or wrong, today’s states-rights advocates must seek constitutional support from other historical periods and materials.

Historical mistakes have allowed modern conventions about states’ rights to slip backward in time, from the nineteenth and twentieth centuries toward an undifferentiated period of 1776 to 1788. There were plenty of states-rights arguments during ratification, and those positions gained more power as the United States’ economic and legal systems developed. The problem is that rewritten timelines can help states-rights advocates to insu-

late arguments about constitutional statehood from the politics of later periods, including massive plantation slavery and Jim Crow racism. This Article challenges a phenomenon that could be called “Founders-Chic Federalism” in order to clarify the specific history of states-rights doctrines, while also inviting closer attention to the use of historical arguments elsewhere in constitutional law.³⁰

Enthusiasm for historical accuracy depends on a broad legal audience more than any particular author.³¹ This Article may convince some readers that constitutional law demands more careful and accurate historical analysis. Other readers might think that constitutional law should make fewer substantive claims based on casual historical characterizations. Insofar as modern federalism doctrine is serious about eighteenth-century history, the consequences of this Article’s revisionism are substantial and obvious. By contrast, if modern uses of eighteenth-century history are simply ornamental, lawyers must acknowledge that constitutional statehood has changed over the years, despite prevalent rhetoric about timeless consistency. Under either scenario—historical instability in the eighteenth century or doctrinal instability afterward—this Article proposes that most issues concerning statehood should be presumptively decided by modern political instruments instead of constitutional adjudication. The latter institutional mechanisms rely too often on unfortunate mixtures of flawed eighteenth-century history and misplaced twenty-first-century functionalism. Some aspects of statehood were constitutionally specified, including the Electoral College, allocation of Senate seats, and territorial boundaries. Yet most details remain open for political debate and disposition, as was also true in the beginning.

I. ANALYZING STATES AS LEGAL ENTITIES

The time period between the Revolution and the Constitution is one of the most widely studied in United States history, yet almost no one has analyzed eighteenth-century states as legal entities. This Part briefly explains this Article’s relationship to two general categories of existing scholarship. The first category tends to highlight national development of the United States and constitutional federalism without analyzing the revolutionary origins, contours, and composition of statehood.³² Such nationalist scholarship of

30. See Francis D. Cogliano, *Founders Chic*, 90 HISTORY 411, 412 n.2 (2005) (book review); David Waldstreicher, *Founders Chic as Culture War*, 84 RADICAL HIST. REV. 185 (2002). For one especially sophisticated example of “Founders Chic” scholarship, see JOSEPH J. ELLIS, *AMERICAN DIALOGUE: THE FOUNDERS AND US* 7–9 (2018) (“Given our current condition as a deeply divided people, my hope is that the founding era can become a safe space to gather together, not so much to find answers to . . . questions as to argue about them.”); *id.* at 223–24 (“Soon after their departure, a thick cloud of incense formed around the founders . . . The founders desperately wanted to be remembered. But they must not be canonized.”).

31. See *supra* note 1 and accompanying text (quoting W.E.B. Du Bois concerning the “Propaganda of History”).

32. See AMAR, *supra* note 19, at 122; KLARMAN, *supra* note 4, at 5; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 355–56 (1969).

federalism centers on the allocation of powers to central governments as though states already existed as fully formed elements of the constitutional system.³³ Many political theorists have produced blueprints about American nationhood and federalism that portray states as mostly inert or unexamined entities until the ratification debates.³⁴ There are many histories that involve states without providing histories of statehood. Even as the legal shift from Britain to America has received extraordinary attention, the legal shift from colony to state has not had nearly enough.

A second set of research has considered individual states in isolation, typically beginning with European ships and colonial charters long before states or statehood were even imagined.³⁵ Law is rarely central to these provincial histories, and the law of statehood never is.³⁶ On the contrary, the point is to describe an imaginary or essential entity whose history transcends formal categories of colonies or statehood. Provincial histories often describe cultural, religious, economic, and social dynamics in order to understand how particular groups of people gathered and organized themselves in places called “Virginia” or “Massachusetts.”³⁷ Less attention is paid to a state’s peers in different locations, and very little is given to the legal category that defined the peership itself. Provincial histories often culminate in stories about the United States, thus resembling the first category of nationalist scholarship.³⁸ In other respects, however, most research about particular states could just as easily describe British Quebec, New Spain, and East or West Florida, which never became individual states at all.³⁹ For current purposes, such

33. See GEORGE WILLIAM VAN CLEVE, *WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION* 3–7 (2017).

34. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 25–32, 324–37 (enlarged ed. 1992); MAIER, *supra* note 4, at 126.

35. See, e.g., JERE R. DANIELL, *COLONIAL NEW HAMPSHIRE: A HISTORY* 14–22 (Univ. Press of New Eng. 2015) (1981); MUNROE, *COLONIAL DELAWARE*, *supra* note 19, at 15; PETER WALLENSTEIN, *CRADLE OF AMERICA: A HISTORY OF VIRGINIA* 1–5 (2d rev. ed. 2014).

36. Cf. HOWARD PASHMAN, *BUILDING A REVOLUTIONARY STATE: THE LEGAL TRANSFORMATION OF NEW YORK, 1776–1783*, at 20–21 (2018) (discussing the transformation of private law alongside revolutionary politics, without directly analyzing statehood as a legal category).

37. See, e.g., MARSHA L. HAMILTON, *SOCIAL AND ECONOMIC NETWORKS IN EARLY MASSACHUSETTS: ATLANTIC CONNECTIONS* 8–15 (2009).

38. See *supra* notes 32–34 and accompanying text.

39. Similar historical treatment is common for territorial governments outside the United States. For example, James Kennedy’s analysis of the Netherlands explicitly considers “historical developments within the *territory* that *at present* constitutes the Kingdom of the Netherlands.” JAMES C. KENNEDY, *A CONCISE HISTORY OF THE NETHERLANDS* 3 (2017). The first chapter starts 15,000 years ago with groups whose lived experiences had no connection to modern ideas about “the Netherlands” as such. See *id.* at 10–11. The point is not to criticize Kennedy’s approach—much less provincial scholarship concerning individual states—but rather to identify potentially variable starting points for any history of the Netherlands, Virginia, or the United States. With the land or first residents, with any self-identified polity, or with the first government to use the modern name? This Article will focus exclusively on legal history,

provincial histories often include descriptions of particular states without exploring the category of statehood.

This Article highlights states and statehood by identifying when and how states came into being, separate and apart from colonial entities that—aside from Delaware—operated for a long time under the same names. Such close attention to preconstitutional statehood sets an important baseline for identifying what states originally meant and how they developed in the revolutionary period. Unlike most scholarship, this Article’s source materials are not especially ideological—focused on ageless philosophers or theorists—nor are they especially materialist—focused on allocations of human bodies and property. Instead, the ambition is to implement a mezzanine-level history of legal statehood that focuses on how aspirationally legal ideas were expressed in operative documents and negotiations.⁴⁰

This Article’s methodology assumes that groups of disgruntled colonists were tied to one another by something more than unvarnished economics, religion, and social factors. They were also bound together by law, and those legal documents were not identical to political propaganda or European intellectualism. This Article emphasizes revolutionary Americans who started to produce, manage, and serve collective entities that were self-consciously legal, including a peculiar mixture of American “states” that were “united” from the start.

Legal statehood deserves attention. Alongside familiar concepts of eighteenth-century liberty, equality, republicanism, and nationhood, the revolutionary period was also essentially concerned about “states.” None of the concepts on that list was a simple legacy from Britain, nor did any of them acquire singular meanings at specific moments thereafter.⁴¹ Just like other revolutionary ideas, statehood exists dynamically among the fundamental

but certainly that is just one way—with benefits and costs—to analyze such complicated questions.

40. Attempts to define “law” and “legal” can be especially complex in discussions that involve historical materials. See 1 G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* 1–15 (2012); see also Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC’Y REV.* 719, 719–20 (1973); Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 *LAW & HIST. REV.* 370, 377–78 (1994). Instead of offering analytical theories of what law is today, much less what it was for these historical actors, this Article will narrowly focus on groups of legal materials that should be easily recognizable as such in the modern era and would be similarly recognizable to Anglo-Americans in the eighteenth century. Erudite arguments that all Eurocentric law conceptually derived from Roman history presents a cautionary tale against trying to elaborate similar themes in this Article. See ALDO SCHIAVONE, *THE INVENTION OF LAW IN THE WEST* (Jeremy Carden & Antony Shugar trans., 2012).

41. See ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804*, at 1–9 (2016); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. AM. HIST.* 11, 11–38 (1992).

“keywords, the metaphors, the self-evident truths” of American politics that matter “too deeply for us to use them in any but contested ways.”⁴²

Statehood is already an implicitly fundamental feature of revolutionary history. Patriots did not fight simply to lower taxes, and military struggle is often a counterproductive way to reduce fiscal burdens.⁴³ At one level, colonists were essentially disputing what kinds of legal entities should tax and govern.⁴⁴ Eighteenth-century revolutionaries argued that lawmakers and tax assessments should mostly derive from individual colonies or states, and sometimes from the United States.⁴⁵ Even though the British Empire made substantive governmental errors that the United States hoped to avoid, the Revolution’s most immediate and lasting guarantees concerned basic structures of leadership, government, and authority.⁴⁶ The operative legal entities after the war were declared to be states instead of colonies, and the United States instead of Britain. What any of those words meant in practice was up for grabs, and to understand what happened requires examining precisely when and how states emerged as legal entities.

II. RIDDLING ABOUT CHICKENS AND EGGS

To explore the historical origins of legal statehood, this Part examines three sets of preconstitutional materials. First are efforts to create provincial governments through documents that were eventually called “state constitutions.” These represent the earliest efforts to announce new governmental structures that sought to establish—perhaps temporarily—states’ existence beyond British authority. Modern observers have viewed state constitutions as archetypically local episodes, and that characterization has made such documents especially important for states-first historians.⁴⁷ However, every state constitution—including the first examples in New Hampshire and South Carolina—emerged through the intimate cooperation and coordination of local authorities and the aspirationally Continental Congress. Revolutionary Americans established different levels of provincial and central governments improvisationally, in mutual reliance, and all at once. Neither states nor the United States could have plausibly claimed historical antecede-

42. DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 16 (1998).

43. See JUSTIN DU RIVAGE, *REVOLUTION AGAINST EMPIRE: TAXES, POLITICS, AND THE ORIGINS OF AMERICAN INDEPENDENCE* 5–23 (2017).

44. See James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), reprinted in 1 *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776*, at 408 (Bernard Bailyn ed., 1965).

45. ARTICLES OF CONFEDERATION of 1781, art. XIII (“[T]axes . . . shall be laid and levied by the authority and direction of the legislatures of the several States.”).

46. See RIVAGE, *supra* note 43, at 22.

47. See 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 22 (1888) (calling state constitutions “the oldest things in the political history of America”); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1437–49 (1987).

ence based on their legal actions, much less could either have claimed normative priority. Revolutionary politicians who were bracing for war did not have time to debate the theoretical chronology of chickens and eggs.

A second category of evidence involves efforts to identify “states” using that particular noun. Much like colonial status under the British Empire, the category of legal statehood was not something that happened through unexamined accidents. On the contrary, American statehood was claimed and contested at identifiable moments, including the Declaration of Independence’s description of the “United States” as “Free and Independent States.”⁴⁸ The Declaration of Independence itself was a formally collective document that recognized and created states as legally individual entities. A different declaration of statehood occurred in the same period, as a small revolutionary entity, the Lower Counties (modern Delaware), repudiated legal authority from Britain and Pennsylvania alike.⁴⁹ Both the interstate Declaration of Independence and the Lower Counties’ provincial resolution emerged from complex legal relationships that represented indissoluble mixtures of state and interstate authority. Under every circumstance, declarations of legal independence from Britain created opportunities for debating what American states were supposed to be, and simultaneously how states were supposed to be organized inside the United States. Those two dynamics happened at the same time, with mutual interreliance and functional togetherness among various levels of government.

A third category of evidence involves states’ scope and existence as territorial entities. Many observers trivialize such issues under the misleading label “western lands,” but territorial law was more important than that.⁵⁰ One of a state’s earliest characteristics was its purported geographic location. Pre-revolutionary and postrevolutionary states were legally identified by their connections to land, placing “Virginia” over here and “New York” over there.⁵¹ Before the Revolution, some colonial borders were vague, and their location seemed purely theoretical with respect to areas that Europeans seldom visited.⁵²

48. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

49. John A. Munroe, *Revolution and Confederation*, in 1 DELAWARE: A HISTORY OF THE FIRST STATE 95, 106–07 (H. Clay Reed ed., 1947).

50. See Peter Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. 353, 353–56 (1977).

51. *But cf.* JOHN MITCHELL, THOMAS KITCHIN & ANDREW MILLAR, A MAP OF THE BRITISH AND FRENCH DOMINIONS IN NORTH AMERICA, WITH THE ROADS, DISTANCES, LIMITS, AND EXTENT OF THE SETTLEMENTS, HUMBL Y INSCRIBED TO THE RIGHT HONOURABLE THE EARL OF HALIFAX, AND THE OTHER RIGHT HONOURABLE THE LORDS COMMISSIONERS FOR TRADE & PLANTATIONS (1755), <https://www.loc.gov/resource/g3300.np000009/> [<https://perma.cc/NRP3-E4TK>] (depicting Virginia and New York with the same color and thus inseparably blending each into one another).

52. See RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815, at xxv–xxxii (20th anniversary ed. 2011) (indicating how territorial and other intercultural disputes were changed by more solid legal institutions and more aggressive European migration).

As a matter of legal status, Britain always possessed formal authority to create new colonies, create or merge existing ones, or relocate boundaries.⁵³ It was much less clear how postrevolutionary institutions and substantive law would identify borders or resolve disputes among states. Territorial decisions were vital to determining states' tax policies and migration patterns, their political relationship to other states, and even their survival as social and economic units. During this period, questions about the location of "Virginia" and "New York" were also connected to territorial construction of the United States under the Articles and the Constitution. Even as splotches or lines on a map, the definition of statehood and the formulation of interstate nationhood were inextricably linked.

No single element of this eighteenth-century evidence stands alone in defining American states, and this Article's explicit goal is to consider different ways of identifying statehood's legal origins. In the aggregate, however, such evidence suggests that efforts to sequentially order the histories of states and the United States are flawed. There was no primordial moment when states came together, nor was there a moment when the United States conceived states out of nothing. As a matter of legal rhetoric and action, different categories of revolutionary government claimed and recognized each other's authority in exactly the same time period. The states and United States leaned against one another as co-constitutive entities, and all of this might seem perfectly obvious, if it were not so widely forgotten and ignored.

A. *Constitutions for Colonies, and for States*

The earliest state constitutions were not called "state constitutions," and establishing "states" is not what they tried to do. During these particular moments, it was unclear whether statehood, war, or independence would ever come to pass. Nevertheless, such prerevolutionary efforts to organize at the colonial level helped start the process of statehood, much as the Continental Congress started the process of interstate government.

The first of these provincial documents came from New Hampshire, during a period when prerevolutionary strife was affecting colonies in different ways.⁵⁴ Massachusetts residents had thrown tea in Boston Harbor, leading Parliament to suspend the provincial assembly, increase the royal governor's power, and impose harsh legal restrictions.⁵⁵ By contrast, New Hampshire's Governor John Wentworth urged London to "restore the powers of [royal] Government," while predicting that his own colony had fortu-

53. See Eliga H. Gould, *Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, Circa 1772*, 60 WM. & MARY Q. 471, 475 (2003).

54. LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION*, at xvii (2d ed. 2015).

55. GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 37–38 (2002).

nately “passed the crisis without much mischief.”⁵⁶ Wentworth spoke too soon. In late 1774, rioters sacked New Hampshire’s munitions depot, and the governor was powerless to chastise the thieves.⁵⁷ Crowds pointed a stolen cannon at Wentworth’s front door, and the “frantic rage and fury of the people” made him retreat to the colonial armory that now lacked “men or ammunition.”⁵⁸ By the end of 1775, Wentworth left New Hampshire forever.⁵⁹

Terrorizing the royal governor destabilized New Hampshire’s status as a British colony, and questions emerged about who should decide what happened next. New Hampshire residents mustered a “provincial congress” and militias to resist imperial troops.⁶⁰ Yet as a legal matter, colonists did not act alone in composing a new government. They urgently sought instructions from the Second Continental Congress:

We would have you immediately use your utmost endeavours to obtain the advice and direction of the Congress, with respect to a method for our administering Justice, and regulating our civil police. We press you not to delay this matter, as, its being done speedily . . . will probably prevent the greatest confusion among us.⁶¹

The Continental Congress itself was an improvised entity with uncertain authority. One historian called Philadelphia’s motley group of politicians “no doubt the strangest government we have ever had.”⁶² Nevertheless, Congress answered New Hampshire’s request with formal legal recommendations. Local patriots should “call a full and free representation of the people” and, “if they think it necessary, establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province.”⁶³

Did the Continental Congress have valid authority to promote anti-imperial policies?⁶⁴ Could New Hampshire have created a government with-

56. John Wentworth, *Seizure of Arms and Powder at Fort William and Mary. The Finale of the Provincial Government in New-Hampshire.*, 23 NEW ENG. HIST. & GENEALOGICAL REG. 274, 274–78 (1869) (letters of Governor Wentworth, Nov. 9, 1774).

57. *Id.* at 277.

58. *Id.* at 278.

59. See FRIEDMAN, *supra* note 54, at 5.

60. *Id.* at 5, 7; LYNN WARREN TURNER, *THE NINTH STATE: NEW HAMPSHIRE’S FORMATIVE YEARS 10* (1983).

61. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 298 (Worthington Chauncey Ford ed., 1905) [hereinafter J.C.C. (1905)].

62. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE*, at xxi (1997).

63. J.C.C. (1905), *supra* note 61, at 319.

64. The Continental Congress had already taken similar actions concerning Massachusetts—at the latter’s request—but Massachusetts did not produce a formal document establishing anti-imperial government. Hulsebosch, *supra* note 21, at 770–71. Most colonies simply followed the Continental Congress’s instructions directly, as though the latter were sufficient authorization in themselves. See *id.* at 778; 2 J.C.C. (1905), *supra* note 61, at 77, 83–84.

out anyone's approval?⁶⁵ The best answers to those questions of legal theory involve actions that the respective governments took in practice. Cooperation and coordination among colonial and intercolonial leaders made it unnecessary to resolve abstract and potentially delicate issues about who was sovereign over whom—or what sovereign superiority even meant in this context. New Hampshire's effort to recompose its government deliberately exhibited profound interdependence. According to Congress, New Hampshire's government was supposed to continue only "during . . . the present dispute between G[reat] Britain and the colonies."⁶⁶ No one knew how long that dispute would last.

On January 5, 1776, New Hampshire's arguably treasonous provincial politicians implemented Congress's arguably treasonous recommendations, creating a new government that was operationally detached from homeland British law but intimately connected to intercolonial authority.⁶⁷ New Hampshire explained that the "Sudden & Abrupt Departure of his Excellency *John Wentworth* . . . and Several of the Council" left the colony "Destitute of Legislation, and no Executive Courts being open to Punish Criminal Offenders; whereby the Lives and Propertys of the Honest People of this Colony, are Liable to the Machinations & Evil Designs of wicked men."⁶⁸

Such complaints about Wentworth's departure were crocodile tears, and New Hampshire residents were not pining for new royal courts "to Punish Criminal Offenders."⁶⁹ New Hampshire residents were not trying to restore British officialdom. They were announcing new legal authority to "Pursue Such Measures as we Should Judge best for the Public Good."⁷⁰ Most important, New Hampshireites did not act entirely on their own initiative, which is why they did not invoke foundational or organic localism as a source of legal authority. On the contrary, New Hampshire's radical charter expressed colonists' wish "to establish Some Form of Government, *Provided that Measures should be recommended by the Continental Congress*."⁷¹

Modern observers might not expect colonial dissidents in a revolutionary context to worry so much about legal technicalities. But it was only after "a Recommendation to that Purpose [was] Transmitted to us From the Said Congress" that the New Hampshire assembly sought to "Take up CIVIL GOVERNMENT for this Colony . . . During the Present Unhappy and Un-

65. For eighteenth-century arguments that New Hampshire's constitution was invalid notwithstanding the Continental Congress's support, see Bezaleel Woodward, Clerk, Address at Hanover (July 31, 1776), *reprinted in* 10 NEW HAMPSHIRE STATE PAPERS 229, 229–35 (Concord, N.H., Edward A. Jenks 1877), <https://sos.nh.gov/archives-vital-records-records-management/archives/publications-collections/new-hampshire-state-papers/> (follow link to "Volume 10" to view full volume).

66. J.C.C. (1905), *supra* note 61, at 319.

67. FRIEDMAN, *supra* note 54, at 5–6.

68. N.H. CONST. of 1776.

69. *Id.*

70. *Id.*

71. *Id.* (emphasis added).

natural Contest with Great Britain.”⁷² Through their explicit language and legal actions, New Hampshire politicians relied on the Continental Congress for authorization because they did not wish to act alone. The result was to produce a hybrid and mutually reliant legal entity from top to bottom.

New Hampshire’s leaders did not call their document a “constitution,” much less did anyone seek to identify a “state.”⁷³ Nonetheless, the event marked a new beginning. The governmental plan created exclusively North American institutions to regulate a self-identified “Colony of New-Hampshire” outside homeland British authority.⁷⁴ The document also included medium-term electoral rules and bureaucratic responsibilities, just in case “the Present unhappy Dispute with Great Britain Should Continue longer than this present year.”⁷⁵

New Hampshire did not declare sovereign autonomy, emphasizing that “we Never Sought to throw off our Dependence upon Great Britain.”⁷⁶ And whatever this new kind of “New Hampshire” was supposed to be, it absolutely *was not independent* from intercolonial authority. On the contrary, “we Shall Rejoice if Such a reconciliation between us and our Parent State can be Effected as shall be Approved by the CONTINENTAL CONGRESS in whose Prudence and Wisdom we confide.”⁷⁷ The new provincial legislature was an explicitly tentative and subordinate entity, whose governmental institutions were authorized to function only insofar as “the Continental Congress Give no Instruction or Direction to the Contrary.”⁷⁸ Constitutive legal actions were taken at both levels of government, interdependently, and at the same time.

The second colony to act was South Carolina, and its history paralleled that of New Hampshire. After South Carolina’s governor was physically threatened in the fall of 1775, he fled in January 1776.⁷⁹ As with New Hampshire, South Carolina’s politicians sought approval from the Continental Congress before they attempted any governmental reorganization.⁸⁰ On November 4, 1775, Congress recommended that a “full and free representation of the people” should establish a new form of government.⁸¹ And on March

72. *Id.*

73. *See id.* (using the word “state” exclusively to describe Great Britain as New Hampshire’s “parent state”); Hulsebosch, *supra* note 21, at 777 (describing New Hampshire’s “act of civil government”).

74. N.H. CONST. of 1776 (emphasis omitted).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Robert A. Olwell, “Domestick Enemies”: *Slavery and Political Independence in South Carolina, May 1775–March 1776*, 55 J.S. HIST. 21, 45–46 (1989).

80. ADAMS, *supra* note 5, at 57; Terry W. Lipscomb, *The South Carolina Constitution of 1776*, 77 S.C. HIST. MAG. 138 (1976). *See also* J.C.C. (1905), *supra* note 61, at 326–27; S.C. CONST. of 1776.

81. J.C.C. (1905), *supra* note 61, at 320, 326.

26, 1776, South Carolina became the first colony in British North America to produce a “constitution” under that name.⁸² South Carolinians insisted that they wanted to accommodate “the unhappy differences between Great Britain and America,” despite being “treated as rebels” by homeland British officials.⁸³ South Carolina’s document was not optimistic about transatlantic reconciliation, however, and collective resistance to British imperialism throughout the colonies made their provincial constitution seem every day more permanent.

As an exercise of interdependent governance, South Carolinians asserted their new constitution’s legitimacy by repeating exact language from Congress’s authorization, promising “a full and free representation of the people of this colony.”⁸⁴ Provincial actors did not act as though they were locally independent sovereigns. They were constructing a legal system that was intentionally mixed together with intercolonial authority. South Carolina’s constitution said that “the resolutions of the Continental Congress, now of force in this colony, shall so continue *until altered or revoked by them*.”⁸⁵ The opposite of announcing absolute local sovereignty and self-governance, South Carolina’s constitution disclaimed authority for provincial legislators to contradict intercolonial resolutions—thereby granting the Continental Congress power that intercolonial officials could not have claimed on their own. South Carolina’s constitution vested power in the Continental Congress at the same time that the province was claiming power for itself.

The South Carolina Constitution did assert slightly more self-sufficiency than New Hampshire, perhaps reflecting the southern document’s emergence later in time. New colonial officeholders promised to “support, maintain and defend the Constitution of South Carolina” until disputes with Great Britain could be amicably resolved.⁸⁶ But South Carolina’s Constitution also provided that the new colonial legislature must choose “delegates of this Colony in the Continental Congress.”⁸⁷ As a matter of legal rhetoric and action, the establishment of provincial government was linked with authority to obtain representation and participation in the intercolonial Congress. Systems of local and intercolonial authority appeared together as comparably elemental parts of South Carolina’s “constitution.” This again was a legal expression of interrelationship, not autonomy.

Modern observers often call documents from New Hampshire and South Carolina “the first state constitutions,” but that shifts them anachronistically forward in time, while also neglecting the creation of statehood as a

82. S.C. CONST. of 1776.

83. *Id.*

84. *Id.* art. I.

85. *Id.* art. XXVIII (emphasis added).

86. *Id.* art. XXXIII.

87. *Id.* art. XV.

legal category.⁸⁸ In the spring of 1776, there certainly were not any legal “states” called New Hampshire or South Carolina. None of North America’s colonial governments claimed that status, nor were they asserting independence from Britain, and the latter was a necessary predicate for any legal form of anticolonial statehood.

Cultural, social, and political continuities throughout the revolutionary era cannot erase the constitutive difference between colonies and states as legal entities. Properly understood, early efforts of New Hampshire and South Carolina to challenge British authority reveal the creation of mutually reinforcing legal entities that tried to mimic other colonies while urgently pursuing intercolonial authorization and support. Such legal language and documents were always seeking to achieve the “constitution” of something bigger than a merely isolated, autonomous locality. The precarious circumstances and political ambitions of revolutionary war would require state and interstate governments all at once.

The next step in the history of statehood was May 10, 1776. Citing the British Empire’s declining functionality, the Continental Congress recommended that all assemblies and conventions in “the United Colonies” should “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.”⁸⁹ Much like earlier documents from New Hampshire and South Carolina, the colonial and state constitutions that executed those instructions were never purebred expressions of organic localism.⁹⁰ They were the direct result of intercolonial prompts from Congress.

The congressional recommendation of May 10 transcended any particular colony’s circumstances or requests. The intercolonial government relied on its own initiative and judgment in suggesting that each colony should overthrow officials and create new governmental forms.⁹¹ To be sure, Congress did not prescribe a substantive template for colonies to follow, and provincial documents were drafted in particular locations by diverse “Repre-

88. *E.g.*, William Clarence Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 64 (1897).

89. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 341–42 (Worthington Chauncey Ford ed., 1906) [hereinafter J.C.C. (1906)].

90. Listed in chronological order, state constitutions after the May 10 resolution were issued by Virginia (June 29, 1776), New Jersey (July 3, 1776), Delaware (September 21, 1776), Pennsylvania (September 28, 1776), Maryland (November 11, 1776), and North Carolina (December 18, 1776). 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812 (Francis Newton Thorpe ed., 1909); 3 *id.* at 2594; 1 *id.* at 562; 5 *id.* at 3081; 3 *id.* at 1686; 5 *id.* at 2787. Constitutions from Georgia and New York followed in 1777, and Massachusetts produced a constitution in 1780. 1 *id.* at v, vii, x. Connecticut and Rhode Island continued to govern under their colonial charters throughout various fractions of the nineteenth century. *Id.* at iv, xii.

91. ADAMS, *supra* note 5, at 51.

sentatives of the People.”⁹² For present purposes, however, the point is to show that layers of government were interdependent, not to measure their relative importance against one another. The Continental Congress directed that reforms should be considered throughout “the United Colonies,” with an eye toward the benefit of “their constituents in particular” as well as the collective benefit of “America in general.”⁹³

Functional togetherness was a pervasive characteristic of the legal institutions that gradually emerged. The legal existence of provincial governments was repeatedly braided together with the similarly new Congress, as they both represented efforts to reform or replace British imperial government. In that wartime context, so-called “state constitutions” could never be isolated acts of local self-recognition. From the start, colonial and intercolonial governments aimed to serve harmonious objectives and perform overlapping functions.

One reason that the Continental Congress endorsed new provincial governments was to boost political support for independence, intercolonial opposition, and revolution that were increasingly probable and imminent.⁹⁴ On May 15, the Continental Congress wrote a preamble elaborating its motive for authorizing provincial governments. The King and Parliament had mistreated the “United Colonies,” ignored their petitions for redress, and mustered armies for war. Under such circumstances, “it appears absolutely irreconcilable . . . for the people of these colonies now to take the oaths and affirmations necessary for the support of any government under the crown of Great Britain.”⁹⁵ Therefore, Congress claimed “it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted, under the authority of the people of the colonies.”⁹⁶ Creating new provincial governments allowed colonies to resist “hostile invasions and cruel depredations of their enemies,” including British officials from the colonists’ ostensible legal homeland.⁹⁷

The intercolonial resolution and preamble did not use precise legal terminology about independence, states, or nationhood. Nevertheless, they characterized imperial mistreatment of any single colony—especially Massachusetts—as a terrible sin against all of them.⁹⁸ This legal justification for

92. See *id.* at 63. Richard Lee asked John Adams whether perhaps the Continental Congress should draft uniform charters for state governments to adopt. As a modern scholar explained, “Lee’s premise that the states were building new governments primarily so that they could work together . . . was obvious at the time, but is now largely forgotten.” Hulsebosch, *supra* note 21, at 783.

93. J.C.C. (1906), *supra* note 89, at 342.

94. See WOOD, *supra* note 32, at 132.

95. J.C.C. (1906), *supra* note 89, at 357–58.

96. *Id.*

97. *Id.*

98. *Id.* at 342, 357–58; see Don Higginbotham, *War and State Formation in Revolutionary America*, in *EMPIRE AND NATION: THE AMERICAN REVOLUTION IN THE ATLANTIC WORLD* 54, 58–59 (Eliga H. Gould & Peter S. Onuf eds., 2005).

new provincial governments tactically aggregated and amalgamated colonial wrongs, so that each individual colony—whatever its practical circumstances—could be equally aggrieved as a matter of law. Congress linked the ostensibly individuated response of creating local constitutions together with coordinated and collective preparation for intercolonial resistance, which eventually included war.⁹⁹ In May 1776, protorevolutionary colonists at all levels of government hoped that new provincial institutions and new intercolonial institutions might emerge and continue as legally interdependent and co-constitutive entities. Separate statehood would obviously have been a recipe for political failure and military defeat.

Congress's use of the words "colonies" and "United Colonies" did not refer to legal entities that were controlled by Britain, and neither the resolution nor the preamble sought to invoke British imperial authority. On the contrary, the Continental Congress used its own questionably legitimate powers to manufacture provincial governments of equally questionable legitimacy, in order that "every kind of authority under the [British] crown should be totally suppressed."¹⁰⁰ The resolution and preamble implied that disgruntled colonists could choose to unseat governors, displace judges, and disobey their King with an authorizing citation to the Continental Congress. But of course, no one except protorevolutionary Americans would accept Congress's authority in the first place. Despite such inevitable risks of circularity, the lean-to architecture of American law was effective. In 1776, multiple layers of interdependent government seemed indispensable, and every North American colony that created a new governmental charter did so with some kind of encouragement from Congress.¹⁰¹

Revolutionary Virginia—the largest and strongest insurgent colony—offers one more example of interdependent provincial charters. On the same day that Congress issued its preamble in May 1776, a convention of Virginian dissidents unanimously resolved that their delegates in the Continental Congress should "propose to that respectable body to declare the United Colonies free and independent States, absolved from all allegiance to, or dependence upon, the Crown or Parliament of *Great Britain*."¹⁰² Virginian colonists understood that their provincial government should be secondary in both of those legal projects. Virginians authorized intercolonial representatives to make whatever "declaration" and take "whatever measures may be

99. See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 17, 61–62 (1979); Higginbotham, *supra* note 98, at 61–62.

100. J.C.C. (1906), *supra* note 89, at 357–58; see RAKOVE, *supra* note 98, at 65–66.

101. ADAMS, *supra* note 5, at 60–93.

102. Preamble and Resolution of the Virginia Convention, May 15, 1776, Instructing the Virginia Delegates in the Continental Congress to "Propose to That Respectable Body to Declare the United Colonies Free and Independent States" (1776), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 19, 20 (Charles C. Tansill ed., 1927) [hereinafter *Virginia Resolution*] (emphasis omitted); JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION* 4 (2d ed. 2014).

thought proper and necessary *by the Congress* for forming foreign alliances, and a Confederation of the Colonies, at such time and in the manner as to them shall seem best.”¹⁰³

Virginia’s own state convention prescribed that the Continental Congress was the best institution for declaring independence, organizing a confederation, and transforming “Colonies” into “States.”¹⁰⁴ Even powerful Vir-Virginia did not claim statehood alone, much less did Virginians explain what statehood or interstatehood should mean. All of those were matters for Congress to debate and resolve as a collective matter, uniformly, and across the board. The legal category of statehood itself did not belong to—and was not defined by—any state on its own.

The Virginia Resolution contained one provincially oriented caveat, which echoed earlier provisions from New Hampshire and South Carolina: “That the power of forming Government for, and the regulations of the internal concerns of each Colony, be left to the respective Colonial Legislatures.”¹⁰⁵ Subsequent territorial disputes make it especially hard to say where Virginia’s “internal concerns” were located as a geographic matter, much less as an analytical one.¹⁰⁶ For present purposes, the crucial detail is that Virginians and congressional politicians reached the same legal conclusion on the very same day: both levels of government agreed that protorevolutionary colonists must use *intercolonial mechanisms* to announce independence and their own statehood as well.

Virginia’s colonial convention used its own legal authority—whatever that might have been at the time—“to prepare . . . such a plan of Government as will be most likely to maintain peace and order in this Colony, and secure substantial and equal liberty to the people,” but only if the Continental Congress endorsed such an enterprise.¹⁰⁷ On the other side, Congress was ignorant of Virginia’s actions but endorsed the same conclusion—invoking equally questionable intercolonial authority to license a new governmental plan drafted by and for Virginians.¹⁰⁸ Multiple revolutionary entities expressed mutually resonant ideas about the complex legal environment that they were occupying and helping to create. As colonists inaugurated formal authorities that were outside of and contrary to British imperialism, perhaps it seemed important for everyone to pile on at once.

103. Virginia Resolution, *supra* note 102 (emphasis added).

104. *Id.*

105. *Id.*

106. See *infra* Section II.C (describing eighteenth-century territorial disputes); Section III.C (suggesting that political institutions should define what qualifies as “internal”).

107. Virginia Resolution, *supra* note 102. For the historical status and genealogy of “conventions” in Anglo-American legal practice, see HULSEBOSCH, *supra* note 23, at 171, and WOOD, *supra* note 32, at 310–43.

108. Compare Virginia Resolution, *supra* note 102, with J.C.C. (1906), *supra* note 89, at 342.

Joining New Hampshire, South Carolina, and Virginia, seven other states ratified constitutions in the months surrounding the Declaration of Independence.¹⁰⁹ Most of those legal innovations cited Congress's resolution and preamble from 1776 as an undefined mixture of political and legal support, without considering whether any state hypothetically could have acted alone.¹¹⁰ Many states were likewise affected by the actions of New Hampshire and South Carolina, which Congress had authorized and requested. As a matter of legal language and action, interstate cooperation occurred self-consciously and deliberately in multiple venues, channels, and institutions.¹¹¹

Eighteenth-century legal evidence shows that state constitutions were never isolated or organically local phenomena, nor did those provincial documents represent simple applications of European philosophy or international law.¹¹² Regardless of whether one considers purpose and function, formal legal authority, or bare chronology, revolutionary Americans pursued state and interstate governments all together. Even documents that are assumed to be state-centric, from a supposedly state-centric historical period, do not reveal state authority as something antecedent or normatively superior to interstate authority. States and the United States were bound together from the start.

B. *Whose Independence?*

This Article's second group of materials concerns formal independence from Britain. Many observers have debated which American entities were first to claim independence as a matter of anti-imperialist pride.¹¹³ By contrast, this Section examines early declarations to describe the mutual interdependence of legal entities that emerged. Neither the Declaration of Independence, nor similar actions undertaken by individual provinces, are sufficient to support states-first histories of American law.

1. Intercolonial Independence

Three colonial legislatures—North Carolina, Massachusetts, and Rhode Island—took small and early steps toward independence. However, those actions did not establish legal autonomy from intercolonial government, much less did they establish local provinces as normatively superior to the Continental Congress. On April 12, 1776, North Carolina's Halifax Resolves

109. MAIER, *supra* note 62, at 163–64.

110. *See id.*

111. *See* ADAMS, *supra* note 5, at 56–62.

112. For complex and nuanced intersections concerning statehood and the law of nations, see sources cited *supra* note 23.

113. *See* Richard N. Current, *That Other Declaration: May 20, 1775-May 20, 1975*, 54 N.C. HIST. REV. 169, 170 (1977).

charted a path that other colonies hopefully would follow.¹¹⁴ North Carolina authorized its delegates in the Continental Congress “to concur with the delegates of the other Colonies in declaring Independency, and forming foreign alliances.”¹¹⁵ Like Virginia’s resolution one month later, the Halifax Resolves purported to “reserv[e] to this Colony the sole and exclusive right of forming a Constitution and laws for this Colony.”¹¹⁶ And they also “reserv[ed]” to North Carolina the power of “appointing delegates from time to time . . . to meet the delegates of the other Colonies for such purposes as shall be hereafter pointed out.”¹¹⁷

If this was legal independence, it was an interdependent way to claim it. North Carolina did not assert inherent or foundational sovereignty that guaranteed authority to decide its legal fate. Instead, North Carolina repeatedly acknowledged its status as a “Colony,” while expressing its hope that other colonies’ congressional delegates might concur in a collective legal decision to secede and begin their uncharted future together. North Carolina asserted a “sole and exclusive right” to regulate itself alongside an equally “sole and exclusive right” to participate in intercolonial government.¹¹⁸ In starting to construct a post-British legal system, North Carolina’s representation in collective decisionmaking was comparably vital to its authority over provincial matters. Both categories would matter a lot during wartime conflict and international diplomacy, and any formal legal status for North Carolina clearly required intercolonial independence from Britain. The “colony” of North Carolina explicitly vested authority concerning all of the latter issues in the Continental Congress.¹¹⁹

By comparison, Massachusetts was an immediate target for British imperial power, and on May 1, 1776, it replied with legislation that modern readers might characterize as fussy.¹²⁰ The colonial assembly required “the Third King of Great Brittain” to be terminologically replaced in certain legal documents with “the Government & People of the Massachusetts Bay in New England.” The assembly also ordered that documents “in this Colony”

114. See David T. Morgan & William J. Schmidt, *From Economic Sanctions to Political Separation: The North Carolina Delegation to the Continental Congress, 1774-1776*, 52 N.C. HIST. REV. 215, 230–31 (1975).

115. 10 THE COLONIAL RECORDS OF NORTH CAROLINA 512 (William L. Saunders ed., AMS Press, Inc. 1968) (1890).

116. *Id.*

117. *Id.*

118. *Id.*

119. See *supra* notes 102–108 and accompanying text (discussing similar actions by Virginia one month later).

120. An Act for Establishing the Stile of Commissions Which Shall Hereafter be Issued and for Altering the Stile of Writs Processes, and all Law Proceedings Within this Colony and for Directing how Recognizances to the Use of this Government Shall for the Future be Taken and Prosecuted (May 1, 1776), *reprinted in* N.Y. HIST. SOC’Y, DECLARATION OF INDEPENDENCE BY THE COLONY OF MASSACHUSETTS BAY, MAY 1, 1776, at 8, 8–11 (n.p. 1862) [hereinafter MASSACHUSETTS BAY DECLARATION].

should no longer calculate dates using the tenure of British regents.¹²¹ Such details about legal names and dates might seem quite remote from independence. Yet Massachusetts justified its decision by listing King George's "Great and manifest Greivances," including an "unjust war" of "Inhumane and Barbarous treatment" that was "wasting spoiling and destroying the Country burning Houses and defenceless Towns and Exposing the helpless Inhabitants to every misery."¹²² Those abuses, along with the colony's military deployments and deaths, meant that "the absurdity of Issuing [legal documents] . . . in the name and stile of the King of Great Brittain is very apparent."¹²³ For Massachusetts, legal symbolism felt much more visceral after soldiers killed and died in military conflicts at Lexington and Concord.¹²⁴

Rhode Island's legislature behaved similarly on May 4, 1776, theorizing that "protection and allegiance are reciprocal; the latter being only due in consequence of the former."¹²⁵ The King's alleged misconduct caused Rhode Island to revoke colonial legislation requiring allegiance to homeland British law.¹²⁶ Like Massachusetts, Rhode Island prescribed that legal documents should invoke authority "of the English Colony of Rhode Island" instead of using royal nomenclature and should calculate dates without "year of the . . . reign" benchmarks.¹²⁷ Rhode Island likewise drafted oaths for local officers, judges, soldiers, and jurors to uphold colonial law instead of imperial British authority.¹²⁸

Legislative actions by North Carolina, Massachusetts, and Rhode Island illustrate the extremely modest forms of independence that provincial governments asserted as separate legal entities. The Revolution did not spark grand declarations that asserted the autonomy and sovereignty of individual colonies-or-states. The independence that everyone was waiting for did not come from particular colonies, but from the Continental Congress as a whole. Intercolonial independence represented a correspondingly important event in the legal history of states and statehood.

121. *Id.* at 9. Similar antiregnal changes to the calendar occurred briefly, and much earlier, during the English Commonwealth. See Robert Poole, "Give Us Our Eleven Days!": Calendar Reform in Eighteenth-Century England, 149 PAST & PRESENT 95, 107-08 (1995).

122. MASSACHUSETTS BAY DECLARATION, *supra* note 120, at 8-9.

123. *Id.*

124. See Robert G. Parkinson, *War and the Imperative of Union*, 68 WM. & MARY Q. 631, 632 (2011).

125. An Act Repealing an Act, Entitled "An Act for More Effectually Securing to His Majesty, the Allegiance of his Subjects, in his Colony and Dominion of Rhode Island and Providence Plantation;" and Altering the Forms of Commissions, of All Writs and Processes in the Courts, and of the Oaths Prescribed by Law (1776), *reprinted in* 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 522, 522 (John Russell Bartlett ed., Providence, A. Crawford Greene 1861) [hereinafter RECORDS OF RHODE ISLAND].

126. *Id.*

127. *Id.* at 522-23.

128. *Id.* at 523-26.

2. Interstate Independence

In June 1776, a congressional delegate proposed that “these United Colonies are, and of right ought to be, free and independent States, . . . and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.”¹²⁹ This statement was unequivocal, and it explicitly swapped colonial legal status for statehood. The resolution urged colonies-or-states to affirm Congress’s proposals through collective intercolonial procedures in Philadelphia, not as freestanding entities acting alone. If any delegates felt that they needed provincial authorization before taking such intercolonial action, they were urged to act quickly and return to Congress for the decisive vote.¹³⁰

The Declaration of Independence eventually popularized the term “United States of America,” and the document was typically identified as a “unanimous declaration of the thirteen United States of America.”¹³¹ American states were once again being legally produced by the same collective United States that they were also trying to create. The “States” that announced themselves to the world as “Free and Independent” from Britain were “thirteen” in number, but they were also “unanimous” and fundamentally “united.” The interrelationship between plurality and singularity was less analytically complex than the Christian Trinity, yet the legal nature of thirteen-in-one remained deeply challenging and somewhat mysterious.¹³²

3. The New United States

Responses to the Declaration of Independence were different in various states. For Rhode Island, becoming a “free and independent State[]” only required statutory changes, such as renouncing royal allegiance and altering legal documents.¹³³ That is because the new state government retained its colonial charter—there was no state constitution. Rhode Islanders simply discarded requirements that colonial laws must not be “contrary and repugnant [] to . . . the laws of this our realm of England.”¹³⁴ Before and after independence, Rhode Island’s governor was a publicly elected official. Indeed, the ex-

129. 5 J.C.C. (1906), *supra* note 89, at 425.

130. *Id.*

131. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 21–22 (2007); 5 J.C.C. (1906), *supra* note 89, at 591; WILLIAM SAFIRE, *SAFIRE’S POLITICAL DICTIONARY* 768 (Oxford Univ. Press 2008) (1968); Edmund C. Burnett, Notes and Suggestions, *The Name “United States of America,”* 31 AM. HIST. REV. 79, 79–81 (1925).

132. See A.P. Martinich, *Identity and Trinity*, 58 J. RELIGION 169 (1978).

133. See RECORDS OF RHODE ISLAND, *supra* note 125, at 522–25.

134. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 68 (1849); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705 (2012); Amar, *supra* note 47, at 1433 n.33.

act same person was elected in 1776 and 1777, after a loyalist governor was removed in 1775.¹³⁵

When the United States declared its (or their) collective independence, Rhode Island institutions were already somewhat sheltered from British oversight.¹³⁶ In this sense, Rhode Island was definitely a “colony,” but it was an unusual example of the genre.¹³⁷ Likewise, Rhode Island’s postindependence statehood certainly created a new legal status, but there were notable continuities of provincial government before and after the fact. The most immediate transformation as Rhode Island became a state was not any revision of local government but rather its stance on intercolonial independence. Even as legal statehood and colonialism looked more operationally similar in Rhode Island than elsewhere, the shift from one to the other certainly felt dramatic for Rhode Island residents, the interstate Congress, and London’s public officials.

In stark contrast to Rhode Island’s relative continuity, Delaware never existed at all as a British colony. American histories have included countless references to “thirteen original colonies.” But that only illustrates widespread inattention to legal differences between a colony and a state. The state of Delaware and even the name “Delaware” were created by the assertion of intercolonial independence, thus illustrating statehood’s novelty and uncertainty in the revolutionary period.¹³⁸ Delaware eventually invoked and applied statehood like every other state, and most modern observers have assumed that it must have previously been a British colony. How could any revolutionary state exist without first enjoying or suffering colonial status? Telling the truth about Delaware sheds important light on the source and origins of statehood as a whole.

Long before the American Revolution, Europeans had called parts of the region “Zwaanendael,” “New Sweden,” “New Netherland,” “Maryland,” and “New York.”¹³⁹ In the late 1700s, however, the area was widely known as the “Lower Counties of New Castle, Kent, and Sussex on the Delaware.” That is exactly how delegates introduced themselves to the Continental Congress in 1774.¹⁴⁰

The word “lower” reflected the counties’ position on the river, but by the late 1700s, there was no doubt that they were Pennsylvania’s “counties,” and

135. See 3 THOMAS WILLIAMS BICKNELL, *THE HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1097–99* (1920).

136. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA 30–31* (rev. ed. 1998).

137. See *id.*

138. See *New Jersey v. Delaware*, 291 U.S. 361, 370 (1934).

139. ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES 62–70* (2nd ed. 2006); DANIEL DENTON, *BRIEF DESCRIPTION OF NEW YORK, FORMERLY CALLED NEW NETHERLANDS WITH THE PLACES THEREUNTO ADJOINING* (2d ed., New York, William Gowans 1845).

140. 1 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 21–22 (Worthington Chauncey Ford ed., 1904) [hereinafter J.C.C. (1904)].

even Maryland begrudgingly accepted the fact.¹⁴¹ The Lower Counties never had their own colonial charter or governor, and they were not recognized as a separate colony by Britain, Pennsylvania, or any other British entity. The Lower Counties could not be a British colony by accident, and no prerevolutionary politician claimed that they were.

The Lower Counties were a semiautonomous region whose mixture of self-determination and subordination was created and sustained by oversight from the Pennsylvanian government.¹⁴² For example, the Lower Counties' legislature and local governments were designed and authorized by William Penn, and Penn was their colonial leader precisely because he was the proprietor of Pennsylvania.¹⁴³

To understand the full importance of Delaware's statehood, consider the Lower Counties' status before independence. In 1754, British officials did not invite the Lower Counties to an intercolonial conference at Albany, nor did North American colonists solicit the Lower Counties' approval for Benjamin Franklin's Albany Plan of Union.¹⁴⁴ For every formal purpose of imperial law, the Lower Counties were similar to Philadelphia's city government.¹⁴⁵ Neither of those social entities possessed colonial status under the British legal system.

By contrast, when the Massachusetts Assembly gathered opposition to the Stamp Act in 1765, it addressed all "committees from the Houses of Representatives or Burgesses" that were located "in the several colonies on this continent."¹⁴⁶ The Stamp Act Congress was an episode of practical politics

141. The river's name has an older history, and so does the name that Europeans often used for native Lenapes. See BETSY MCCULLY, *CITY AT THE WATER'S EDGE: A NATURAL HISTORY OF NEW YORK* 52 (2007); J. Frederick Fausz, *An "Abundance of Blood Shed on Both Sides": England's First Indian War, 1609-1614*, 98 VA. MAG. HIST. & BIOGRAPHY 3, 43 (1990); Alison Olson, *The Lobbying of London Quakers for Pennsylvania Friends*, 117 PA. MAG. HIST. & BIOGRAPHY 131, 144-45 (1993); Nicholas B. Wainwright, *Tale of a Runaway Cape: The Penn-Baltimore Agreement of 1732*, 87 PA. MAG. HIST. & BIOGRAPHY 251, 252-60 (1963); see also PHILIP S. KLEIN & ARI HOOGENBOOM, *A HISTORY OF PENNSYLVANIA* 187-88 (2d enlarged ed., Pa. State Univ. Press 1980) (1973).

142. MUNROE, *HISTORY OF DELAWARE*, *supra* note 19, at 48-49.

143. The Lower Counties were overseen by the Penn family's governor, who had unfettered power to veto local legislation. The governor of Pennsylvania could choose the Lower Counties' Sheriff, and he could also appoint or remove their justices of the peace and supreme court. Pennsylvania's Land Office distributed titles to property in the Lower Counties, and Pennsylvanian officials handled border negotiations with New York, Maryland, and Native American groups. *Id.* at 36-37, 47-49, 52-53. Although certain aspects of the Lower Counties' extralegal politics, culture, religion, and history were different from other regions of Pennsylvania, the Lower Counties' legal status as part of Pennsylvania was absolutely clear. See *id.* at 51-52.

144. ROBERT C. NEWBOLD, *THE ALBANY CONGRESS AND PLAN OF UNION OF 1754*, at 185-86 (1955).

145. See *id.* at 121, 170.

146. Proceedings of the House of Representatives, Respecting Sending a Committee to New York, to Consult with Committees from Other Colonies, on the State of the Country, June 6, 1765, in *SPEECHES OF THE GOVERNORS OF MASSACHUSETTS FROM 1765 TO 1775*, at 35,

instead of legal status, and any governmental entity that could influence public opinion was better than none.¹⁴⁷ For the improvised Stamp Act Congress, political coordination was vastly more important than formal authority.

The Lower Counties' importance increased as British imperial power became vulnerable.¹⁴⁸ In 1774, the First Continental Congress focused on economic and political practicalities, and representatives from the Lower Counties were accepted as voting members just like Pennsylvania or Massachusetts.¹⁴⁹ The Lower Counties joined the resolves that Congress produced in 1774, confirming that colonial status was not necessary to participate in boycotts and protests.¹⁵⁰ The Lower Counties continued as voting members of the Continental Congress throughout the Revolution, thereby risking British punishment for treason and making it impossible to question their equal status after the war had finished.

On June 15, 1776, Wilmington's provincial legislature suspended royal authority and continued operations in the Lower Counties' own name. That decision mirrored other colonial efforts to reject and replace British authority, yet one difference was that the Lower Counties renounced Britain and Pennsylvania simultaneously.¹⁵¹ It was British imperial law that established formal connections between the Lower Counties and the rest of Pennsylvania—including Penn's formal charters and territorial purchases, as well as the Lower Counties' semiautonomous institutions.¹⁵² The Lower Counties' act of double independence annihilated both sets of imperial bonds at once.

This was a new beginning for the Lower Counties, and they soon had a new name as well. On September 10, a constitutional convention declared that "[t]he Government of the Counties . . . shall hereafter in all Public and other Writings be called THE DELAWARE STATE."¹⁵³ That name change helped to erase memories of prior subordination to Pennsylvania. These were no longer merely counties, and they were not a colony either.¹⁵⁴ The region quickly became "The State of Delaware," equivalent to other states

35–36 (Alden Bradford ed., Boston, Russell & Gardner 1818). The Lower Counties technically had their own Speaker of the House, and the provincial legislature—created by William Penn and supervised by Pennsylvania's governor—was located "in" the North American colony of Pennsylvania. MUNROE, HISTORY OF DELAWARE, *supra* note 19, at 43–44.

147. C.A. WESLAGER, THE STAMP ACT CONGRESS 120–25 (1976). Reactions to the Stamp Act included public rioting, and the Stamp Act Congress itself was a meeting where two or three delegations (including the Lower Counties) arrived without proper authorization from their legislative assemblies. *Id.*

148. See MUNROE, HISTORY OF DELAWARE, *supra* note 19, at 65.

149. J.C.C. (1904), *supra* note 140, at 21–22.

150. *Id.* at 75–81.

151. Munroe, *supra* note 49, at 106–07.

152. See MUNROE, HISTORY OF DELAWARE, *supra* note 19, at 37–38.

153. DEL. CONST. of 1776, art. 1.

154. MUNROE, HISTORY OF DELAWARE, *supra* note 19, at 69.

that had chosen to retain their prerevolutionary labels.¹⁵⁵ Thirteen states were creating all together the uniform category of statehood that was seamlessly transferred to Delaware despite its unique prerevolutionary history. The Lower Counties' subordination made no difference for Delaware because legal recognition under the new interstate regime was all that mattered. Delaware's experience once more reveals statehood as an invented and uniform legal status, created by revolutionary politicians at different levels of government, rather than a category directly inherited from colonial and sub-colonial experiences in British North America.¹⁵⁶

4. "We Are One"

Many legal steps toward independence illustrate that states and the United States emerged in the same time period through mutual reliance on one another. None of the states was recreating itself as merely a "colony" of the new American empire.¹⁵⁷ Yet states also did not claim the international, cultural, political, or legal independence that would have attached to a newly created nation or country. Whatever the word "states" meant after independence, statehood was never an easy transplant from other models, whether European colonies, unitary European nations, Dutch or Swiss Republics, or the Iroquois Confederacy.¹⁵⁸ Despite highly abstract similarities among those collective organizations, legal statehood was also new and different. Agreements and actions among states—including the Declaration itself—were never straight lines drawn between preexisting governmental dots. On the contrary, interstate agreements marked legal opportunities to establish what American states were supposed to be, and also how they were organized within the United States.¹⁵⁹

In 1776, Benjamin Franklin sketched a nearly perfect image of statehood in the revolutionary era, which contradicts the map-shaped puzzle-piece image that is dominant today.¹⁶⁰ The Continental Congress printed money that artistically described the United States' legal identity, while financially un-

155. *Id.*

156. Governments that did not obtain interstate recognition are mostly forgotten, including Franklin in modern Tennessee, Transylvania in modern Kentucky, and Westsylvania in modern Pennsylvania. Even Vermont's admission to the United States was delayed until 1791.

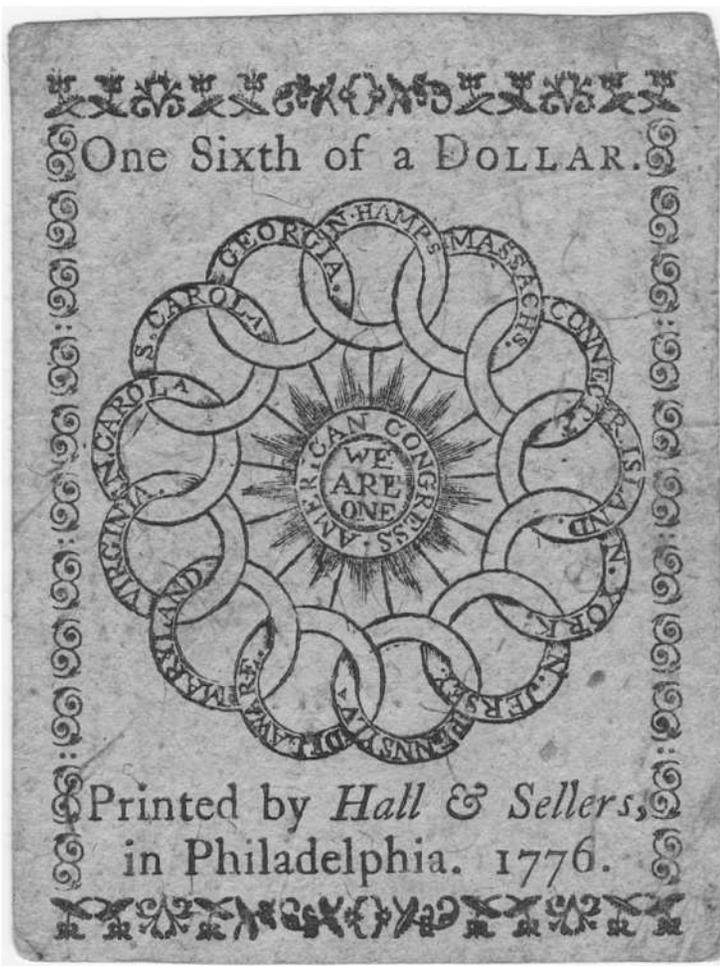
157. See Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, *PUBLIUS*, Winter 1990, at 55, 58.

158. See Remarks of James Wilson at the Pennsylvania Ratifying Convention (Nov. 26, 1787), in *STATE CONVENTIONS* (1836), *supra* note 9, at 422; TIMOTHY J. SHANNON, *INDIANS AND COLONISTS AT THE CROSSROADS OF EMPIRE: THE ALBANY CONGRESS OF 1754*, at 7–8 (2002).

159. See Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, *PUBLIUS*, Fall 1994, at 13, 14–15.

160. See *supra* note 3 and accompanying text.

derwriting its material future.¹⁶¹ Thirteen states appeared along the periphery as abstract and interlocked rings, with discourteously shortened names to make the scheme work. States were not only linked with one another; they also had direct linear connections to the middle, interspersed with triangular sunbursts radiating from the center outward. The core image included the words “AMERICAN CONGRESS” encircling a bold declaration: “WE ARE ONE.” Alongside the many legal documents that have been discussed *supra*, this vivid and public image sought to show everyone what statehood and interstate government meant to Franklin and the Continental Congress when the Revolution began.



162

161. See J. A. Leo Lemay, *The American Aesthetic of Franklin's Visual Creations*, 111 PA. MAG. HIST. & BIOGRAPHY 465, 490–91 (1987).

162. Louis Jordan, *Continental Currency*, COLONIAL CURRENCY, <https://coins.nd.edu/ColCurrency/CurrencyText/CC-02-17-76.html> [<https://perma.cc/QL8Q-XW52>]; see also Carla J.

Just like other documents from this era, Franklin's printed picture was almost entirely imaginary and aspirational. In the years that followed, historical truths about states and statehood were fought on battlefields, litigated in courtrooms, and paid for in cash. This Article's distinctive legal history seeks to uncover ideas about statehood in the moments they were first imagined and constructed without minimizing other historical evidence and methods. Much like other declarations of independence, Franklin's currency in 1776 expressed improvisational and intermingled ideas about statehood that do not fit comfortably with states-first historical accounts.

C. *Where Was Virginia?*

A third category of evidence about statehood involves territory. Just as states were supposed to rule their population and compose interstate entities, they were also supposed to govern land.¹⁶³ Throughout British North America, borders among colonies were established, changed, and contested, including the creation of new colonies and the elimination of old ones.¹⁶⁴ British authority to create and manage legal borders literally defined a colony's existence, and although intercolonial rivals often resolved disputes among themselves, British law and decisionmakers retained ultimate power to govern any colony's territorial scope and status.¹⁶⁵ The Revolution began a new phase of territorial law. Old institutions were set aside, and so were rules that identified provincial governments—just ask Delaware.¹⁶⁶ This transformation of territorial law paralleled states' emergence as a new kind of entity, and here again, the construction of statehood was vital to creating the United States as a whole.

The Continental Congress borrowed a few ideas from earlier efforts to reform the old British Empire, but many debates about territorial states and statehood raised entirely new legal issues.¹⁶⁷ For example, delegates fought about whether the United States could possess its own legal territory, or whether all land must instead belong to one of the individually component

Mulford, *Benjamin Franklin Says "WE ARE ONE,"* OUPBLOG (June 28, 2006), <https://blog.oup.com/2016/06/benjamin-franklin-printing-currency-congress/> [<https://perma.cc/U3XG-23N5>].

163. See PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 1–31 (2017).

164. See JOHN P. SNYDER, *THE STORY OF NEW JERSEY'S CIVIL BOUNDARIES 1606-1968*, at 13–15 (2004); Marc Harris, *Pennsylvania's Border at Lake Champlain: Borders and Contexts in Colonial North America*, 32 *HIST. REFLECTIONS* 493, 498–99 (2006); Walter B. Scaife, *The Boundary Dispute Between Maryland and Pennsylvania*, 9 *PA. MAG. HIST. & BIOGRAPHY* 241 (1885).

165. See KLEIN & HOOGENBOOM, *supra* note 141; Harris, *supra* note 164, at 498.

166. See *supra* Section II.B.3.

167. See Lutz, *supra* note 157, at 58–61.

states.¹⁶⁸ Other debates concerned procedures for limiting or extending states' territory, creating new states, and transferring land from states to the United States.

The most remarkable conflict involved Maryland and Virginia from 1777 to 1781. This dispute emphasized territory's significance for statehood and the interstate confederacy as well.¹⁶⁹ The shortest version of the story is that Maryland refused to approve the Articles of Confederation because Virginia was too big.¹⁷⁰ Virginia's seventeenth-century colonial charter encompassed territory "from sea to sea," stretching from a particular section of Atlantic coastline to the Pacific Ocean.¹⁷¹ Those claims not only included today's "West Virginia," but also a northwest line that extended "[e]ndless[ly]" into the Great Lakes.¹⁷²

One of Thomas Paine's least famous pamphlets contained a drawing of Virginia's territorial claims.¹⁷³ The northwest diagonal absorbed all of modern Ohio, Indiana, Illinois, and Michigan, as well as parts of Maryland, Pennsylvania, New Jersey, and New York.¹⁷⁴ John Locke once wrote that "in the beginning all the world was *America*,"¹⁷⁵ yet under the law of colonial charters, a surprising amount was Virginia. After the Revolutionary War, international treaties limited Virginian claims along the Mississippi River's border with Spain and at British Quebec in the north.¹⁷⁶ From Maryland's perspective, however, even Virginia's remaining claims—which had been

168. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 843 (Worthington Chauncey Ford ed., 1907) [hereinafter J.C.C. (1907)] (Oct. 27, 1777); David H. Flaherty, *Virginia and the Marginal Sea: An Example of History in the Law*, 58 VA. L. REV. 694, 711–12 (1972).

169. See MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 150–51 (1940).

170. HERBERT B. ADAMS, *MARYLAND'S INFLUENCE UPON LAND CESSIONS TO THE UNITED STATES* *passim* (Baltimore, Johns Hopkins Univ. 1885); 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 631–32 (Worthington Chauncey Ford ed., 1908).

171. Harris, *supra* note 164, at 495; *A Third Charter of K. James I. to the Treasurer and Company for Virginia* (March 12, 1611), reprinted in 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 98 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823).

172. See JOHN ALEXANDER WILLIAMS, *WEST VIRGINIA: A HISTORY* 3 n.1, 10–15 (2d ed. 2001); THOMAS PAINE, *PUBLIC GOOD, BEING AN EXAMINATION INTO THE CLAIM OF VIRGINIA TO THE VACANT WESTERN TERRITORY, AND OF THE RIGHT OF THE UNITED STATES TO THE SAME* 8–11 (London, R. Carlile 1819).

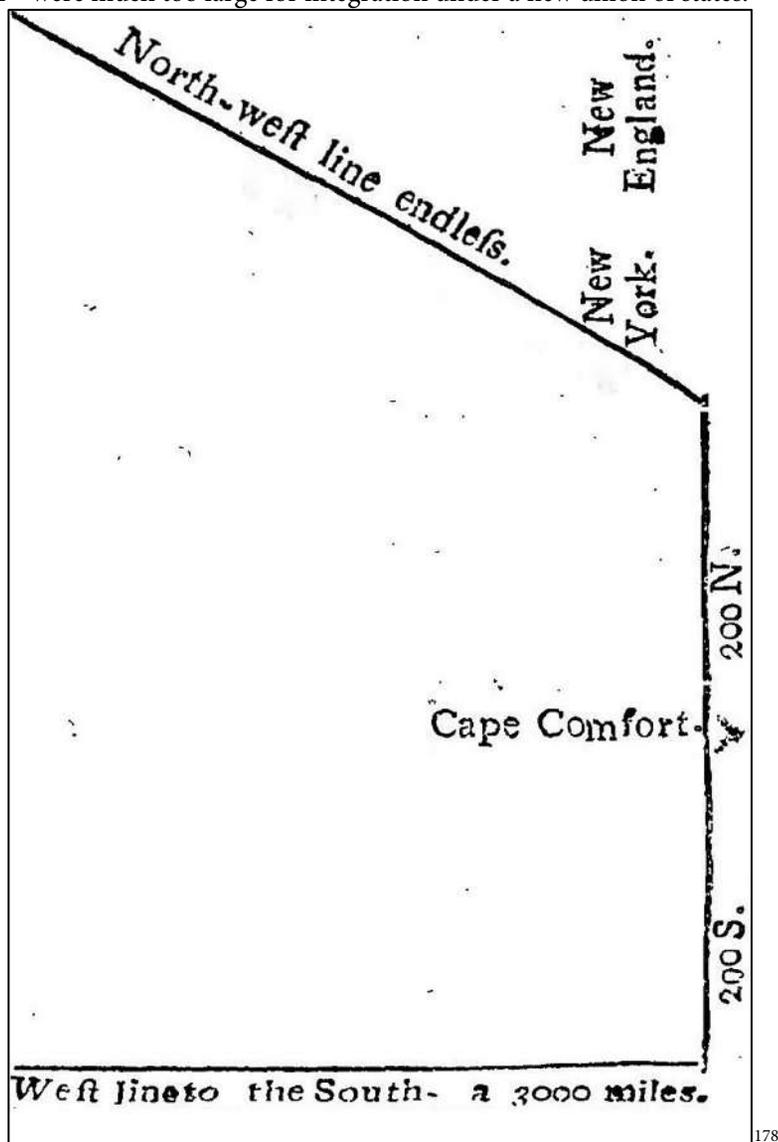
173. PAINE, *supra* note 172, at 9. The original map was strangely turned sideways, such that the top of Paine's drawing extended westward toward the unknown Rocky Mountains.

174. See *id.*

175. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 29 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

176. See *Definitive Treaty of Peace, Gr. Brit.–US*, art. II, Sept. 3, 1783, 8 Stat. 80.

unquestionably acceptable and valid for a century under the colonial system—were much too large for integration under a new union of states.¹⁷⁷



Territorial claims under the royal charters of Georgia, North and South Carolina, Massachusetts, and Connecticut also stretched west to the Pacific

177. See JENSEN, *supra* note 169, at 150-51; 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 619-22 (Worthington Chauncey Ford ed., 1909) [hereinafter J.C.C. (1909)].

178. PAINE, *supra* note 172, at 11 (reoriented so that north is upward).

Ocean or “South Seas.”¹⁷⁹ New York’s claims were comparably large, and even more complex.¹⁸⁰ The Ohio Valley included conflicting territorial claims from several different states, and Connecticut argued that almost half of modern Pennsylvania was in fact Connecticut.¹⁸¹

Colonial borders were relatively narrow in Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and the Lower Counties because none of those entities had “South Sea” claims under British law.¹⁸² After the Revolution, the latter group argued that “South Sea” states must surrender western lands to the United States, perhaps compelled by collective interstate law if necessary.¹⁸³ Such territorial reductions would create important national assets for public sale and revenue, while also reducing territorial disparities among the thirteen individual states.¹⁸⁴

Every state acquiesced and accepted the Articles of Confederation except Maryland, but the latter’s resistance was legally dispositive.¹⁸⁵ Congress proposed the Articles of Confederation in June 1776 and submitted a final draft for approval in November 1777.¹⁸⁶ Yet the requirement of unanimous consent meant that the Articles were not legally operative until 1781.¹⁸⁷ Throughout that period, the improvisational Continental Congress continued asserting independence from Britain, waging war, negotiating treaties, and printing currency.¹⁸⁸ Without a collective charter or constitution, however, the United States’ formal legal basis was obscure or nonexistent.

Virginia claimed that every state possessed the same territory that it held as a colony.¹⁸⁹ Invoking a notably formal view of statehood, one Virginian exclaimed, “How came Maryland by its land, but by its charter? By its charter, Virginia owns to the South Sea. Gentlemen shall not pare away the Colony of Virginia. Rhode Island has more generosity than to wish the Massachusetts pared away. Delaware does not wish to pare away Pennsylv-

179. Harris, *supra* note 164, at 495 & n.3.

180. *Id.*; see also HULSEBOSCH, *supra* note 23, at 99–100.

181. Harris, *supra* note 164, at 496–97.

182. *Id.* at 495 & n.3.

183. William F. Swindler, *Our First Constitution: The Articles of Confederation*, 67 A.B.A. J. 166, 169 (1981).

184. *Id.*

185. JENSEN, *supra* note 169, at 150–51.

186. ARTICLES OF CONFEDERATION of 1781, Historical Background (as recounted by the Government Printing Office).

187. J.C.C. (1907), *supra* note 168, at 1; Randall G. Holcombe, *Constitutions as Constraints: A Case Study of Three American Constitutions*, 2 CONST. POL. ECON. 303, 312–13 (1991); Swindler, *supra* note 183, at 166, 169.

188. WOOD, *supra* note 32, at 355; Ben Baack, *Forging a Nation State: The Continental Congress and the Financing of the War of American Independence*, 54 ECON. HIST. REV. 639, 640–42 (2001).

189. See Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 36–37 (1936).

nia.”¹⁹⁰ If states would not respect British territorial law as an immovable anchor, Virginians implied that states themselves would be nothing at all. This was a notably Anglocentric thesis coming from a group of anti-British revolutionaries. Yet Virginia analogized to private property, claiming that “[a] man’s right does not cease to be a right, because it is large; the question of right must be determined by the principles of the common law.”¹⁹¹ State territory must derive from colonial charters, unchanged by war or independence, much less by vague threats of interstate compulsion. Without fierce protection for states’ territorial boundaries, Virginians argued that the entire project of statehood would be utterly doomed. As a category, states would not be much better than colonies, and Virginia in particular would be substantially worse.

Maryland espoused a different legal vision of statehood, implying that the motto “*novus ordo seclorum*”—new order of the ages—also prescribed a new territorial order based on functionality and mutual respect.¹⁹² Maryland believed that its very existence would be threatened by a brotherhood with such oversized siblings.¹⁹³ In particular, Maryland feared that Virginia’s expansive territory would allow lucrative public land sales and low tax rates, thus siphoning Maryland’s best families to Virginia and abandoning Maryland’s political economy to deflation or collapse.¹⁹⁴

Maryland renounced the kind of antique British charters that had regulated colonies in accordance with homeland imperial interests. Any confederation of revolutionary states must yield workable and equitable results for each component. Maryland thus characterized territorial statehood as something more than the dead-hand creature of “common law” and imperial mandates. State territory was supposed to create a new and living framework for the United States itself. Insofar as Virginia’s territorial claims threatened ruinous subservience as a practical matter, Maryland defended its sovereign statehood and rejected the confederation.¹⁹⁵

But what was the legal basis for Maryland’s sovereign statehood in the first place? Somewhat ironically, it was the Articles themselves. The Continental Congress alone had required that the Articles should “be proposed to the legislatures of all the United States” and approved by unanimous consent.¹⁹⁶ Interstate law was the only legal mechanism that allowed individual

190. 2 JOHN ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 502 (Boston, Charles C. Little & James Brown 1850). The speaker did not address the proper legal basis for Delaware’s territorial claims against Pennsylvania, which might have been somewhat harder to support using British imperial law.

191. *Id.*

192. J.C.C. (1909), *supra* note 177, at 619–22; *see* Swindler, *supra* note 183, at 169.

193. *See* JENSEN, *supra* note 169, at 150–51.

194. Jensen, *supra* note 189, at 36.

195. JENSEN, *supra* note 169, at 150–51.

196. ARTICLES OF CONFEDERATION of 1781, Conclusion; J.C.C. (1907), *supra* note 168, at

states like Maryland to wield veto power over the rest.¹⁹⁷ Maryland was not protecting its land claims under a charter or otherwise. Instead, it was using interstate law to scale back Virginia's allegedly "old" dominion, while creating collective territory for the United States. Without any sense of paradox, Maryland officials used legal authority provided by the Articles to prevent those same Articles from becoming law.

Present discussion does not require a detailed explanation of the Maryland–Virginia dispute and its resolution. The important point is that, throughout that multiyear conflict, the territorial scope and legal basis of American statehood were completely integrated with debates over ratifying the interstate Articles, even as pressures to ratify the Articles influenced the scope and basis of territorial statehood. For participants at the time, this was much more than a debate about where to draw specific boundaries. It was a decision about two states' political and economic future, as well as an institutional choice about whether a majority of states could prescribe territorial mandates through the Continental Congress.

The legal existence and scope of states and statehood did not predate the Articles of Confederation. Those principles were contested, created, and compromised alongside the interstate regime itself. To secure Maryland's assent, Virginia agreed to cede land from its colonial charter, and New York proclaimed a western border for the first time in its history.¹⁹⁸ Even as specific disputes were resolved between Maryland and Virginia, however, the Articles did not address broader vulnerabilities about state borders in other circumstances. For example, even though the Articles implied that the United States could not possess its own legal territory, the interstate government unlawfully agreed to accept land cessions from Virginia and other "South Sea" states as a precondition for Maryland's ratifying vote.¹⁹⁹ The Articles also failed to protect states against future interstate efforts to curtail or reallocate lands. As late as 1781, many legal issues surrounding statehood and territory remained unresolved.

The Constitution represented a large step forward, establishing for the first time that western lands could legally become the United States' Northwest Territory instead of merely a state-based entity like Greater Virginia or Western Connecticut.²⁰⁰ At the same time, the Constitution also included new guarantees for state-based territory: "[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by

197. See ARTICLES OF CONFEDERATION of 1781, Conclusion.

198. Sara Stidstone Gronim, *Geography and Persuasion: Maps in British Colonial New York*, 58 WM. & MARY Q. 373, 397–98 (2001); Swindler, *supra* note 183, at 169.

199. See Craig Green, *Creating American Land: A Territorial History from the Albany Plan to the U.S. Constitution 247–380* (Sept. 2018) (Ph.D. dissertation, Princeton University) (on file with author); see generally ARTICLES OF CONFEDERATION of 1781, art. II ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.").

200. U.S. CONST. art. IV, § 3.

the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”²⁰¹

Virginia abandoned its largest claims to western and northern territories, yet the Constitution also promised that the federal government and particular states could not convert an existing state’s land into new states without the older state’s consent. That confirmed the valid borders of larger states, and it also guaranteed newly created states that they would have the same territorial integrity as other members of the union. The abstract categories of state territory and statehood were suddenly more important, but that augmented status was the result of interstate government rather than its primordial precursor.

The Constitution guaranteed state representation in federal political institutions, and its territorial clauses confirmed states as vital parts of the new order. Although the Constitution is commonly viewed as reducing states’ sovereignty and significance, the actual history is complex. The federal Constitution confirmed and reduced states’ legal authority, and none of those results was a thunderbolt from blue skies. On the contrary, statehood emerged gradually from networks of support and interdependence that existed from the start. Territorial conflicts among states revealed statehood and national government as interdependent co-creations. Even as territorial statehood was deeply enmeshed with interstate government, interstate government was produced by individual states that were perennially under construction.

III. THE CONSTITUTIONAL POLITICS OF STATEHOOD

This Article’s main goal is to demonstrate that states and the United States were simultaneously created and mutually constitutive. That thesis is enough to displace prevalent errors, raise new questions, and highlight episodes that have been overlooked. Part II revealed the instability of statehood during the revolutionary era, and it also sets a new benchmark for discussing statehood in later periods. Because Americans struggled from the beginning to resolve legal questions about states and statehood,²⁰² modern observers should feel new skepticism toward casual assertions about statehood’s intrinsic character, nature, or essence in other historical eras. For legal historians, eighteenth-century materials caution against the overbroad, undersourced normative claims that pervade public opinion in the twenty-first century.

This Part uses evidence from the Constitution’s creation and ratification to pursue ancillary objectives. The first task is to show that legal controversies about statehood were not conclusively resolved in the years between the

201. *Id.*

202. See SAMUEL BANNISTER HARDING, *THE CONTEST OVER THE RATIFICATION OF THE FEDERAL CONSTITUTION IN THE STATE OF MASSACHUSETTS* 3 & n.1 (New York, Longmans, Green, & Co. 1896) (quoting claims from Massachusetts residents in 1778 that, after the war, “‘all distinction of Separate States’ should be abolished, and the union of America be secured ‘by reducing the whole into one great Republic’”).

Articles and the Constitution. Relevant actors did not experience statehood as a longstanding foundation of American law. How could they? Nor did discussion reveal universally accepted understandings about statehood in practice. At the Convention, much as before, the constitutive legal status of states remained one of America's "contested truths," as prominent Americans fought on many sides of the issue.²⁰³

Second, post-Convention political fights over ratification circulated overly simple descriptions of statehood that resemble current public discourse. Eighteenth-century politicians on both sides of ratification supported static and state-centric descriptions of preconstitutional states for their own political purposes. Arguments about preconstitutional statehood were highly exaggerated in popular pamphlets, yet many observers accept them as historical truth. This Article seeks to undo the damage, drawing inspiration from Mary Sarah Bilder's award-winning book, *Madison's Hand*, which recaptured the political valence of familiar constitutional debates.²⁰⁴ State-centric histories of preconstitutional statehood were good political theater during ratification, but they do not match historical evidence from Part II.

For many politicians, states seemed increasingly stable and important during the war's aftermath. Some Americans viewed states as indispensable pillars that were newly oppositional to a strong interstate union. However, those arguments were not universally accepted. Most important, such disputes emerged from constitutional struggles in the 1780s rather than existing timelessly as primordial axioms. In a legal sense, despite strident advocacy, statehood remained significantly fluid and up for grabs.

A. *Serpents' Teeth, Split Atoms, and Statehood in Orbit*

Statehood's legal complexities traveled to the Convention along with the delegates themselves. In 1785, George Washington characterized the United States as an unresolved dilemma: "We are either a United people, or we are

203. See RODGERS, *supra* note 42, at 16 ("The words we use . . . have been made, remade, repudiated, fought over. Should someone try to sell you a piece of political goods as an authentic encapsulation of the American political faith, the wise course is to run for cover. We have been too conflict-ridden a church to have [that kind of] a creed.")

204. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 3 (2015) ("Madison's Notes recorded one man's view of the writing of a constitution in which the politics and process of drafting the document deferred comprehension of the Constitution as a unified text."); see also KLARMAN, *supra* note 4, at 600 ("The compromises undertaken in Philadelphia . . . illustrate the extent to which the Constitution was a product of clashing interests rather than dispassionate political philosophizing."); cf. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 16 (2018) (explaining that "the Constitution should not be rescued from this [messy partisan] context; instead, it should be better understood within it"); *id.* at 17 (observing nevertheless that "arguments and the mental images they form are consequential, even if uttered by the least sincere, least scrupulous actors").

not. . . . If we are not, let us no longer act a farce by pretending to it.”²⁰⁵ Notably, Washington characterized the Articles of Confederation as pretending unity rather than state-based division. But he also knew that states could “act independently of each other” with unworkable frequency.²⁰⁶ In part because the Articles lasted only a few years, practical legal relationships among confederated and state powers were never entirely clear. Like Washington, many Americans were initially ambivalent or optimistic about statehood under the Articles, but practical frustrations eventually prompted constitutional reform.

Even at the Convention itself, the mixture of practical and theoretical arguments was not easy to disaggregate. Bilder characterized debates over statehood as follows: “To what degree did the small states care about state sovereignty? [Madison’s notes from the Convention] indicate more concern about large state political dominance than an ideology of state sovereignty.”²⁰⁷ Bilder claimed that many constitutional arguments at the Convention were contingent and improvisational. This Article more specifically claims that there was not any coherent “ideology of state sovereignty” that delegates could have credibly invoked. Everyone ultimately agreed that states were essential to the constitutional order, as they had been from the start. But there was not any similar level of agreement about the details, scope, or status of legal statehood under the new regime.

Consider a few illustrative speeches. James Wilson flatly rejected any possibility of “each State being sovereign.”²⁰⁸ He did not think state sovereignty was an appropriate description of the revolutionary past, much less was it a worthy goal for the constitutional future. Wilson claimed that, just as individuals necessarily sacrifice autonomy to accept social order, so does “a Sovereign State, when it becomes a member of a federal [i.e., confederated] Govern. If N.J. will not part with her Sovereignty it is in vain to talk of Govt.” under the existing Articles or the new Constitution.²⁰⁹ Wilson claimed that an entirely “new partition of the states is desirable, but evidently and totally impracticable.”²¹⁰ The territorial scope and boundaries of American states were politically convenient and therefore necessary, but for Wilson, they were nothing more glamorous than that. He did not accept state sovereignty as a historical fact or a normative objective.

205. Letter from George Washington to James Madison (Nov. 30, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 419 (W.W. Abbot ed., 1994); BILDER, *supra* note 204, at 37; VAN CLEVE, *supra* note 33, at 100.

206. Letter from George Washington to James Madison, *supra* note 205, at 420.

207. BILDER, *supra* note 204, at 5; *see also id.* at 3 (“James Madison’s record of the Constitutional Convention . . . is the single most important source for the Convention.”).

208. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 180 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE CONVENTION].

209. *Id.*

210. Remarks by James Wilson in Debates at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (June 9, 1787), in 5 STATE CONVENTIONS (1845), *supra* note 10, at 177.

Alexander Hamilton claimed that it would be completely useless to amend the Articles while leaving “the States in possession of their sovereignty.”²¹¹ He explained as a normative matter that states “are not necessary for any of the great purposes of commerce, revenue, or agriculture.”²¹² Only “[s]ubordinate authorities . . . would be necessary. There must be district tribunals: corporations for local purposes. But cui bono, [who gains from] the vast & expensive apparatus now appertaining to the States[?]”²¹³ Hamilton was willing to preserve states as inferior administrative corporations for practical purposes, but “[a]s states, he thought they ought to be abolished.”²¹⁴ Although the Constitution ultimately kept the term “states,” questions about their “sovereignty,” practical “purposes,” and constitutional scope lay quietly unresolved.

James Madison endorsed a similar proposal that “indefinite power should be given to the Gen[era]l Legislature, and the States reduced to corporations dependent.”²¹⁵ That approach would allow flexible political struggles to determine the powers and limits of provincial governments, and “no fatal consequence would result.”²¹⁶ Madison later suggested that states should be “mere counties of one entire republic.”²¹⁷ The short-term result would protect small states from abuse by large states, while facilitating the long-term possibility of “[g]radual partitions” among states and “junctions of the small (States)” with one another.²¹⁸ States would be governmentally and territorially subservient, analogous to colonies in British North America. A third speech from Madison declared that “States are not sovereign in the full extent of the term.”²¹⁹ Even under the Articles, he emphasized that “States . . . have not such full power, but are deprived of such . . . by the Confedn.”²²⁰ Madison thought that far “too much stress was laid on the rank of the States as political societies,” and he claimed that their limited sovereignty “in relation to the paramount law of the Confederacy [was] analogous to that

211. BILDER, *supra* note 204, at 93.

212. RECORDS OF THE CONVENTION, *supra* note 208, at 287.

213. *Id.*

214. Remarks by Alexander Hamilton at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (June 19, 1787), in 5 STATE CONVENTIONS (1845), *supra* note 10, at 212.

215. BILDER, *supra* note 204, at 99.

216. *Id.*; see also Letter from George Washington to James Madison (Apr. 16, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 144–45 (W.W. Abbot ed., 1997) (“[A]n individual independence of the States is utterly irreconcilable with their aggregate sovereignty: [yet] a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable.”).

217. RECORDS OF THE CONVENTION, *supra* note 208, at 449.

218. *Id.*

219. 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 610 (Charles R. King ed., New York, G.P. Putnam’s Sons 1894) [hereinafter KING] (June 29, 1987); see BILDER, *supra* note 204, at 100.

220. KING, *supra* note 219, at 610.

of bye laws” with respect to ordinary corporations.²²¹ Madison was unwilling to accept states as foundationally sovereign elements of American government, and he also claimed that the Articles had established states as legally subordinate entities from the beginning.

Most dramatic of all, Gouverneur Morris argued that “State attachments, and State importance have been the bane of this Country. We cannot annihilate [the States]; but we may perhaps take out the teeth of the serpents.”²²² Morris claimed that states were “originally nothing more than colonial corporations.”²²³ However, the war’s existential pressure required that “a Governnt. was to be formed,” and during this frantic period, “[t]he small States . . . taking advantage of the moment, extorted from the large ones an equality of votes” at the Continental Congress.²²⁴ Internal voting rules of Congress could not change states’ fundamentally subordinate position, however, and Morris thundered: “What if all the Charters & Constitutions of the States were thrown into the fire, and all their demagogues into the ocean. What would it be to the happiness of America.”²²⁵ Few delegates agreed with Morris about states and statehood, but that disagreement is itself the point. Framers of the Constitution—like the Articles’ framers and earlier Americans—did not inherit legal statehood as an established convention. In 1787, applicable details were not universally understood, much less were they uniformly accepted.

Contrary to Morris’s fantasy and other delegates’ nightmare, the Constitution did not eliminate states, burn their constitutions, drown their proponents, or “take out the[ir] teeth.”²²⁶ Most delegates could not imagine

221. RECORDS OF THE CONVENTION, *supra* note 208, at 463–64.

222. RECORDS OF THE CONVENTION, *supra* note 208, at 530 (July 5, 1787) (alteration in original omitted); see BILDER, *supra* note 204, at 106–07.

223. RECORDS OF THE CONVENTION, *supra* note 208, at 552 (July 7, 1787).

224. *Id.*

225. *Id.* at 553; see Letter from Henry Knox to George Washington (Aug. 14, 1787), in 5 THE PAPERS OF GEORGE WASHINGTON, *supra* note 216, at 293 (“Although I frankly confess that the existence of the State governments is an insuperable evil in a national point of view, yet I do not well see how in this stage of the business they could be annihilated . . .”); ALEXANDER HAMILTON, *Impressions as to the New Constitution* (1787), in 2 THE WORKS OF ALEXANDER HAMILTON 419, 421 (John C. Hamilton ed., New York, John F. Trow 1850) (expressing hope that a presidential administration led by George Washington might “enable the government to acquire more consistency than the proposed constitution seems to promise for so great a country. It may then triumph altogether over the State governments, and reduce them to an entire subordination, dividing the larger States into smaller districts”). Even after ratification, some politicians continued to fear the abolition of states just as much as other politicians cheered that possibility. See Richard Henry Lee & William Grayson, Letter to the Speaker of the House of Representatives of Virginia, in 2 THE LETTERS OF RICHARD HENRY LEE 507, 507–08 (James Curtis Ballagh ed., 1914) (“It is impossible for us not to see the necessary tendency to consolidated Empire in the natural operation of the Constitution if no further Amended than now proposed. . . . [S]uch amendments therefore as may secure against the annihilation of the State Governments we devoutly wish to see adopted . . .”).

226. RECORDS OF THE CONVENTION, *supra* note 208, at 526, 530 (July 5, 1787).

endorsing such positions, yet some of the brightest and most influential delegates argued about statehood's history and future. Speakers who repeatedly questioned states' constitutional status escaped ridicule only because the legal status of statehood remained a disputed issue, as it was from the start. Fluidity, dynamism, and interdependence characterized statehood throughout the revolutionary period. Even the process of drafting the Constitution was another episode of simultaneous debates over interstate government and the development of statehood itself.

The Constitution's effort to reimagine interstate government as a federal republic produced many changes concerning statehood, which variously increased and decreased states' legal power. For the first time, states lacked equal voting status; certain rules and tax burdens were tied to population; relevant numbers were gathered by a federally administered census instead of states themselves; every manifestation of federal law was explicitly "supreme"; and state judges themselves were obliged to respect it.²²⁷

On the other hand, congressional representatives were chosen by voters authorized by state law, senators by state legislatures, and presidential electors however state legislatures wished.²²⁸ Representatives and senators also had to "[i]nhabit[]" their electoral jurisdictions.²²⁹ These were all structural commitments to states' continued influence and significance.

Various constitutional provisions explicitly constructed revised concepts of statehood and interstate government. Sometimes they weakened one side and strengthened the other, yet the immediate goal was to create a system that would be politically saleable and operationally workable. The constitutional union never required states to "come together" as a group of prefixed entities.²³⁰ Nor did interstate delegates invent federalism as a summertime "miracle."²³¹ Different layers of government legally constructed and reinforced one another, while also adapting to dynamic circumstances and new mechanisms of constitutional law.²³² These years were certainly different from the Revolution and wartime, but there were also similarities.

Some modern observers badly mischaracterize the Constitutional Convention. For example, Justice Kennedy used a metaphor about nuclear fis-

227. See U.S. CONST. art. I, § 2, cl. 1, 3; *id.* § 3, cl. 1; *id.* art. II, § 1, cl. 2; *id.* art. VI, cl. 2. Madison reportedly understood this inequality as a transformation of states' status: "If each State retained its Sovereignty an Equality of Suffrage would be proper, but not so now." BILDER, *supra* note 204, at 75.

228. U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1; *id.* art. II, § 1, cl. 2.

229. U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3.

230. *But see* Wood, *supra* note 4, at 724.

231. *But see* CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at ix-xi (1966).

232. James Madison's speech at the Virginia Convention noted several aspects of the Constitution's "unprecedented" interreliance between state and interstate governance, politics, representation, and authority. JAMES MADISON, *Speeches in the Virginia Convention: Necessity for the Constitution* (June 5, 1788), in 5 *THE WRITINGS OF JAMES MADISON* 123, 123-37 (Gaillard Hunt ed., 1904).

sion that is widely quoted: “Federalism was our Nation’s own discovery. *The Framers split the atom of sovereignty.*”²³³ Describing “the genius of their idea,” Kennedy raved that the “Constitution created a legal system unprecedented in form and design.”²³⁴ Historical materials from Part II reject Kennedy’s assumption that the “discovery” of federalism or statehood in 1787 was “unprecedented in form and design.”²³⁵ States, statehood, and interstate government were under construction and debate from the beginning. They remained in process at the Convention and beyond.

By comparison, John Dickinson was a Delaware representative at the Convention with his own flawed metaphor about constitutional statehood.²³⁶ Dickinson’s comparison of pre- and postconstitutional government emphasized conceptual similarities more than practical differences.²³⁷ After Madison boldly declared that “[w]e are about to form a national Govt. and therefore must abandon Ideas founded alone in the plan of confedn.,” Dickinson replied with conservative astronomy from his own era: “We cannot abolish the States and consolidate them into one Govt Let our Govt. . . . be the Sun and the States the Planets repelled yet attracted, and the whole moving regularly and harmoniously in their respective Orbits.”²³⁸ For Dickinson, preserving graceful and established trajectories was indispensable to any continuation of the United States.

Modern readers cannot sensibly choose between Kennedy’s fission and Dickinson’s planets. The two metaphors for statehood cannot both be correct because Kennedy’s dramatic novelty undermines Dickinson’s celestial continuity. Both descriptions are incomplete because states were simultaneously new and old under the Constitution, as they also had been under the Articles. More important, the metaphors are flawed because during this period statehood was nothing like natural science. On the contrary, naturalistic metaphors risk obscuring the stumbles, disputes, and thoroughly human processes that pervaded the development of eighteenth-century states. Whether inadvertently or otherwise, analogizing eighteenth-century statehood to natural science is a terrible mistake that elevates rhetorical flourish above historical truth. There is no evidence that any conception of statehood was expressed or widely held at the Constitutional Convention, aside from specific provisions that were written into the text.

233. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (emphasis added).

234. *Id.*

235. *Id.*

236. RECORDS OF THE CONVENTION, *supra* note 208, at 17.

237. *Id.* at 158–59.

238. *Id.*

B. *To Melt Down States or Make a Nation*

After the Convention, debates over statehood moved from elite corridors of power into newspapers and the streets. The Convention's nuanced and elaborate discussions remained hidden, even as the final product was circulated for approval. During this period, Americans heard loud and polarized disputes of yes versus no—"take this or nothing"—in what has been called "one of the greatest and most probing public debates in American history."²³⁹ However, modern observers must not mistake political arguments for accurate legal analysis. Participants in the state convention process "were not trying to distort history," but historical distortion is certainly something they produced.²⁴⁰ Various actors were "struggling to win a very tough fight on behalf of what they understood as the nation's welfare in a world where the rules of the political game were different from those of today."²⁴¹ It is not hard for modern Americans to understand how facts might bend under that kind of political pressure.

Exaggerated histories of American statehood were especially prevalent. Constitutional proponents claimed that the Articles imposed hardwired state-centrism as an unfixable flaw, while constitutional opponents characterized state-centrism as an ancient and priceless treasure. No one spoke about statehood as a recent and variable category of American law. For Federalists and Anti-Federalists alike, artificially sharpened pictures of pre-constitutional states crystallized arguments about ratifying the Constitution, regardless of whether those political pictures were historically supportable.

Ten months of ratification debate yielded vast amounts of printed material, and many more discussions were not recorded or preserved.²⁴² Generalizations are possible only because political leaders were interconnected by newspapers and friendships, which meant that some arguments followed patterns or templates. This Article considers a few prominent speakers who discussed the history of states and statehood during this period. As with most historical analysis, it is hard to know whether particular speakers were sincere, much less how their audience might have felt. A narrower goal in this context is to identify elements of eighteenth-century discussion that resemble modern misperceptions about early statehood.

In September 1787, "Centinel" wrote one of the first public critiques, urging Pennsylvanians to reject the Constitution because "the United States are to be melted down into one empire."²⁴³ Centinel claimed that "a very extensive country cannot be governed on democratical principles [except as] a

239. MAIER, *supra* note 4, at ix; THE WRITINGS OF JAMES MADISON, *supra* note 232, at 232.

240. MAIER, *supra* note 4, at xiv.

241. *Id.*

242. *Id.* at xii.

243. Letters from Centinel to the Freemen of Pennsylvania (Oct. 1787–Apr. 1788), in 2 THE COMPLETE ANTI-FEDERALIST: OBJECTIONS OF NON-SIGNERS OF THE CONSTITUTION AND MAJOR SERIES OF ESSAYS AT THE OUTSET 136, 141 (Herbert J. Storing ed., 1981).

confederation of a number of small republics, possessing all the powers of internal government, but united in the management of their foreign and general concerns.”²⁴⁴ Centinel’s thesis was that, although the Articles of Confederation formed a workable “confederation of . . . small republics,” the Constitution did not.²⁴⁵

Both of Centinel’s statements about the Articles were dubious. First, as a geographic matter, the Articles’ definition of Virginia and other “South Sea” states could not qualify as “small republics,” and their state boundaries were contested just a few years before.²⁴⁶ Maryland ratified the Articles only after the United States agreed to take land that it was not authorized to govern or possess.²⁴⁷ The Articles’ territorial framework for statehood thus failed before it began—hardly a persuasive model for governing a “very extensive country . . . on democratical principles.”²⁴⁸

Centinel was not worried about the actual size of particular states, but about statehood as a category. Some states looked large on a map, but they were smaller than a “melted down . . . empire.”²⁴⁹ Centinel assumed that somehow states would be small enough for “democratical principles.” That is what Centinel presumed states were and should remain forever. By contrast, if the Constitution at all diminished states’ supposedly historical status, America would be “melted,” sliding backward toward the grip of an undemocratic “empire.” This was political theory and political theater, detached from the fluid history of preconstitutional statehood.

Second, Centinel argued that legal statehood under the Articles was an effective balance of “internal government” against “foreign and general concerns.” Centinel never analyzed whether the Confederation Congress in fact adequately served “general concerns,” and the lack of interstate revenue suggested otherwise.²⁵⁰ Constitutional proponents claimed that “critically dreadful” circumstances meant that, “however reprehensible and exceptionable the proposed plan of government may be, there is no alternative, between the adoption of it and absolute ruin.”²⁵¹ Centinel replied that the

244. *Id.*

245. *See id.*

246. *See id.* During this era, Virginia included nearly 110,000 square miles, relative to 43,000 square miles today. By contrast, Rhode Island has encompassed 1,500 square miles since long before the Revolution, and Maryland has been 12,000 square miles. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (Aug. 9, 2018), <http://www.census.gov/geographies/reference-files/2010/geo/state-area.html> [<https://perma.cc/G58F-8T3D>].

247. *See supra* notes 189–201 and accompanying text.

248. Letters from Centinel to the Freemen of Pennsylvania, *supra* note 243, at 141.

249. *Id.*

250. *See* MAX M. EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867*, at 1–12 (2014).

251. Letters from Centinel to the Freemen of Pennsylvania, *supra* note 243, at 143; *see also* ARTICLES OF CONFEDERATION of 1781.

preconstitutional framework for statehood was “a safe and a proper one.”²⁵² Yet Centinel again swapped out practical objections in exchange for theoretical debates, staying focused on the abstract “form of government” instead of evaluations of operational results. Centinel’s thesis assumed that legal statehood was chronologically primary, firmly established, and valuable beyond any compromise. None of that was true as a matter of legal history.

In January 1788, several other constitutional opponents explained that they would not accept any constitutional plan that “tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation.”²⁵³ Such authors were “opposed to any system, however modified, which had in object the consolidation of the United States into one government.”²⁵⁴ Again, however, the Constitution’s opponents could not identify which legal “rights of sovereignty” states were supposed to have.²⁵⁵ Nor did they mention the dynamic interdependence that created states and interstate governments in the first place. On the contrary, Anti-Federalists’ ahistorically invented theory about “sovereign states” was useful in producing a simplified yes-or-no political choice.

An early public test for the Constitution was the Pennsylvania convention.²⁵⁶ Opponents claimed that the preamble’s “We the People”—instead of “We the States”—proved beyond doubt that “the old foundation of the union is destroyed, the principle of confederation excluded, and a new and unwieldy system of consolidated empire is set up, upon the ruins of the present compact between the states.”²⁵⁷ The new constitutional system was “incontrovertibly designed to abolish the independence and sovereignty of the states individually.”²⁵⁸ One supporter said that “[t]he Sovereignty of [Pennsylvania] is ceded to U.S. . . . I am a Citizen of every State,” and an opponent replied “I never heard [anything] so ridiculous.”²⁵⁹ Constitutional oppo-

252. Letters from Centinel to the Freemen of Pennsylvania, *supra* note 243, at 143.

253. Letter from Robert Yates and John Lansing, Jr. to New York Governor George Clinton (Dec. 21, 1787), in 1 STATE CONVENTIONS (1836), *supra* note 9, at 480.

254. *Id.*

255. *See id.*

256. Delaware became the “first state” by unanimously ratifying the Constitution a few days before Pennsylvania’s convention finished. Somewhat ironically, Delaware’s older history of subordinate colonial status means that Delaware—as an identifiable legal entity—also was “first, a state.”

257. HIST. SOC’Y OF PA., PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 256 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Pa., Inquirer Printing and Publishing Co. 1888) (quoting Anti-Federalist Robert Whitehill’s statement during the state ratifying convention). Other Anti-Federalists were also angered by “We the People” instead of “We the States.” *See* Remarks by Patrick Henry at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (June 4, 1788), in 3 STATE CONVENTIONS (1836), *supra* note 9, at 22–33; SAMUEL ADAMS, Letter to Richard Henry Lee (Dec. 3, 1787), in 4 THE WRITINGS OF SAMUEL ADAMS 323 (Harry Alonzo Cushing ed., Octagon Books 1968) (1906).

258. HIST. SOC’Y OF PA., *supra* note 257, at 256–57.

259. *Id.* at 771–72.

nents' vision of statehood was easy to summarize: "Sovereignty is in the States and not in the People—in its Exercise. . . . I wish not to destroy this [current legal] system: Its Outlines are well laid."²⁶⁰

The truth was complicated. The Articles were never an ordinary international "compact" among preexisting entities. On the contrary, states were manufactured alongside the interstate government.²⁶¹ There was not any moment on the timeline when "state sovereignty" was singularly established, and even the meaning of that term would have been highly debatable. Any argument that statehood's "outlines are well laid" had to ignore a large fraction of United States history. Even though abstract theories of statehood became increasingly popular over time, underlying historical facts remained awkwardly messy.

After Pennsylvania voted to ratify, twenty-one delegates wrote a dissent.²⁶² They wanted to amend the Constitution so "[t]hat the sovereignty, freedom and independency of the several states shall be retained, and every power, jurisdiction and right, which is not by this constitution expressly delegated to the United States in Congress assembled."²⁶³ Otherwise, the Constitution would "annihilate the state governments, and produce one consolidated government that will eventually and speedily issue in the supremacy of despotism."²⁶⁴ Once again, opponents presumed that legal statehood's status was historically fixed, which is why they characterized threats to statehood as categorically new. The political need to resist made Anti-Federalists mischaracterize states as natural, ancient, and unalterable. Opponents steered constitutional debates away from political discussion of substantive regulations or taxes, thus minimizing the Articles' practical failures. Instead, opponents argued about structural abstractions, including state sovereignty and dignity, with strong exaggeration for maximum political effect.

On the pro-ratification side, James Wilson was uniquely important at the Pennsylvania convention.²⁶⁵ Following a standard script, Wilson posed binary questions of statehood-or-not, and he analyzed the category of statehood separate from its policy implications. Invoking high political theory,

260. *Id.*

261. Throughout American history, some advocates have relied on a "compact theory" of the Constitution to justify various forms of states' rights. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 321 (Melville M. Bigelow ed., Little, Brown, & Co. 5th ed. 1905) (1833) (noting that the compact theory of the Constitution has been used to argue that federal law "has an obligatory force upon each state no longer, than suits its pleasure, or its consent continues" and that "each state has a right to judge for itself in relation to the nature, extent, and obligations"). It is easy to see how some nationalists used an inaccurate "compact theory" about the Articles to highlight their favorable view of the Constitution.

262. Nathaniel Breeding et al., *The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents* (1787), <https://www.loc.gov/item/90898134/> [<https://perma.cc/MP6W-WBVD>].

263. *Id.*

264. *Id.*

265. See Morton M. Rosenberg, *In Search of James Wilson*, 55 PA. HIST. 107 (1988).

Wilson called the Constitution's ordering of states a "confederate republic" that was fundamentally different from everything else in human history.²⁶⁶ Wilson interpreted confederate republics as "a convention, by which several states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies that constitute a *new one*, capable of increasing by means of further association."²⁶⁷

Wilson never explained why the Constitution's statehood qualified as a "confederate republic" but statehood under the Articles did not. Overlooking practical differences, Wilson casually distinguished the new constitutional system from "Swiss cantons," the "United Netherlands," the "Germanic body," and Ancient Greece without any serious discussion of recent American history.²⁶⁸ Instead, Wilson argued as a theoretical matter that preconstitutional statehood—whatever that meant in practice—was so powerful that it had produced the wrong category of governmental system.²⁶⁹ States under the Articles could not be molded into a serviceable confederate republic. The category of statehood itself needed rebirth.

Analogous to the Constitution's opponents, Wilson characterized ratification as something greater than mere policy disputes that could be fixed through ordinary politics or amendments to the Articles. Because the Constitution was a major structural reform, its proponents focused on correspondingly structural problems. For both sides, state sovereignty became a useful political tool, and a useful form of language, despite or because of the concept's practical instability.

Bypassing details of legal history, Wilson analogized constitutional statehood to social contract theory. "When a single government is instituted, the individuals . . . surrender to it a part of their natural independence, which they before enjoyed as men."²⁷⁰ Similarly, "[w]hen a confederate republic is instituted, the communities . . . surrender to it a part of their political independence."²⁷¹ Much like imaginary prepolitical individuals who joined the first government, America's Constitution required that "states should resign to the national government that part, and that part only, of their political liberty, which . . . will produce more good to the whole than if it had remained in the several states."²⁷² To describe the problem that way supported Wilson's political results as though constitutional restrictions were inevitable and also ideal.

266. See Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Nov. 26, 1787), in *STATE CONVENTIONS* (1836), *supra* note 9, at 421.

267. *Id.* (citation omitted).

268. *Id.*

269. See *id.* at 430–31.

270. *Id.* at 429.

271. *Id.*

272. *Id.*

Wilson did not explain how or when states historically acquired, during their brief postrevolutionary existence, “political liberty” analogous to individuals’ prepolitical “natural independence.” Nor did Wilson consider whether states had already “surrender[ed]” their “political independence” under the Articles.²⁷³ Ignoring recent events, Wilson chose to prioritize dramatic change over incremental reform, supporting that decision with stark images of the ongoing crisis. Here as elsewhere, Wilson’s analogy to anarchic individualism promoted theoretical visions of statehood that were mostly separated from historical facts.

Federalists knew the Constitution would not abolish states, but Wilson agreed with Anti-Federalists that ratification would reconfigure legal statehood. In particular, Wilson defended the Constitution using popular sovereignty, and he attacked the Articles as correspondingly defective.

[W]e are told [constitutional change] is a violation of the present Confederation—a *Confederation of sovereign states*. I shall not enter into an investigation of the present Confederation, but shall just remark that its principle is not the principle of free governments. The people of the United States are not, as such, represented in the present Congress²⁷⁴

Echoing the speeches of Anti-Federalist rivals, Wilson agreed that the status quo was all about “We the States,” not “We the People.” Unlike politicians who thought state-centrism was indispensably useful, Wilson thought state-centrism was one of the Articles’ most damaging problems.

This Article cannot adequately analyze popular sovereignty, which has its own mythology and scholarly literature.²⁷⁵ In the revolutionary era, “[t]he very idea of sovereignty became problematic, and its rhetorical depository, ‘the people,’ an inherently elusive location.”²⁷⁶ Even as the Constitution reformulated “the People” and their “more perfect union,” substantial evidence suggests that Americans also may have experienced states’ rights and sovereignty as theoretically “problematic” in comparison to governmental practice and legal instruments.²⁷⁷ Wilson’s link between popular sovereignty and statehood confirms that both concepts were strategically designed to highlight the political need for structural change. Under the Constitution, in contrast to the Articles, “[t]he truth is . . . that not the states only, but the people

273. *Id.*

274. Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1787), in *STATE CONVENTIONS* (1836), *supra* note 9, at 458.

275. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13–15 (1988).

276. ELLIS, *supra* note 30, at 226.

277. See *supra* Section III.A.

also, shall be here represented[.] And if this is a crime, I confess the general government is chargeable with it”²⁷⁸

For this Article’s narrow purposes, Wilson’s key tactic was describing constitutional statehood as something new: “By adopting this system, we become a *nation*; at present, we are not one. . . . This system . . . [will] make us a nation, and put it in the power of the Union to act as such. . . . We shall regain the confidence of our citizens, and command the respect of others.”²⁷⁹ In fact, gaining confidence and international respect had been important goals ever since the Revolution, and the Articles were an embarrassingly recent effort to do so. Why should the new Constitution be different? Wilson’s optimistic rhetoric emphasized the constitutional system’s theoretical novelty as the means to success. That required him to greatly exaggerate preconstitutional statehood’s legal status and solidity, thus distorting America’s “before” picture in order to yield a more flattering “after.”

Wilson and his adversaries agreed on just one thing about the Constitution: it would transform the legal system of states and statehood like never before, while also creating an entirely new kind of nation. Both sides marshalled dramatic and vivid rhetoric, pairing one side’s nightmares of tyranny and despotism with the other side’s fears of anarchy and collapse. In the aggregate, those tactical choices caused ratification debates to oversimplify images of preconstitutional states and statehood. The urgency of defending and attacking the status quo always seemed clearer when advocates characterized existing conditions as persistent and stable—two things that preconstitutional statehood most certainly was not.

C. *Statehood at Last*

Ratification had two important results for constitutional statehood. First, states-rights advocates were substantially defeated. For Anti-Federalists, ratification meant annihilating statehood, while Federalists claimed that ratification meant diminishing statehood. Under either interpretation, state conventions voted “yes,” and the nation’s heated debates quickly cooled. “[T]he score was tallied, and the crowds went home After Congress declared the Constitution ratified and called the first federal elections, the country rallied behind the new Constitution.”²⁸⁰ The purported diminution of statehood did not produce immediate or widespread political resistance against the new constitutional order.²⁸¹

278. Remarks by James Wilson at the Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 11, 1787), in *STATE CONVENTIONS* (1836), *supra* note 9, at 444.

279. *Id.* at 526–27.

280. MAIER, *supra* note 4, at 432.

281. More than 200 amendments were proposed in various state conventions, but the ten that were ultimately ratified said remarkably little about states and statehood. Kenneth R. Bowling, “A Tub to the Whale”: *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 227–28 (1988) (“The majorities and minorities of eight of the

When the federal government started to operate, many constitutional proponents were public officials. The first senators were all Federalists except two, so was 80 percent of the House, and the Federalist President George Washington appointed every federal judge and officer.²⁸² Political struggles and violence continued, but there would no longer be transformative legal claims that America suddenly “became a nation” or Delaware became “the first state.” Formal efforts to redefine statehood and the United States were settling down, even as practical statehood and nationhood rapidly grew stronger.

What did postratification practices and results mean for “statehood”? The Constitution offered several provisions that directly affected states—making them greater and weaker relative to the Articles—but it also left many aspects of statehood unresolved. The latter silence is not a basis for criticism, nor does it imply dysfunction. Every document says something while the rest is unsaid. The point is that the Constitution’s unanswered questions were implicitly left for other legal mechanisms to answer—including political debates, statutes, executive practice, judicial interpretation, and constitutional amendment.

Given those options, a brief sidenote seems appropriate about the Tenth and Eleventh Amendments. Those documents were separately ratified in 1791 and 1795, and each of them has a distinctive context and scholarly literature that cannot be explored here.²⁸³ This Article’s research does suggest, however, that the Tenth Amendment’s reservation “to the States respectively, or to the people” might have echoed earlier disputes about the location of preconstitutional and extraconstitutional sovereignty.²⁸⁴ The Tenth Amendment confirmed that the federal government possessed enumerated powers, and for that purpose, it was not necessary to specify whether power outside the federal government was vested in “We the States”—as Patrick Henry and Samuel Adams might have claimed—or in “We the People”—pursuant to Wilson’s popular sovereignty.

The question of whether the Articles’ residual sovereignty vested in “States” or “the People” was hotly contested in 1787 and 1788. Perhaps the Tenth Amendment stepped aside by merely providing that “powers not delegated to the United States by the Constitution,” nor prohibited to it by the states, *shall belong to whoever possessed them beforehand*. Given the dynamic and fractured history of preconstitutional statehood, that interpretation would make the Tenth Amendment a very weak source of states’ rights. Perhaps the Tenth Amendment changed nothing at all about states’ constitu-

twelve state ratifying conventions that met prior to the First Federal Congress put forth 210 amendments.”).

282. MAIER, *supra* note 4, at 433–35.

283. See, e.g., THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES (Mark R. Killenbeck ed., 2002); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987).

284. U.S. CONST. amend. X.

tional status, beyond the modest amount that was already textually specified in 1787.

A slightly larger point about the Tenth and Eleventh Amendments concerns efforts to manufacture a longstanding, inert, and largely implicit history of constitutional statehood. Observers sometimes characterize the Tenth and Eleventh Amendments as incorporating supposedly obvious assumptions about statehood from Independence, the Articles, the Convention, ratification debates, or some other unspecified moment.²⁸⁵ The historical sources in Part II undermine that kind of “silent majority” approach to statehood.

On the contrary, statehood was legally contested and volatile throughout the preconstitutional period, with multiple revisions in quick succession. There simply was no traditional or uniform understanding with respect to many legal aspects of statehood—including territorial borders—until after the Constitution was ratified. To support arguments based on the Tenth and Eleventh Amendments, states-rights advocates must show that the years between 1788 and 1795 produced the kind of widespread understanding about statehood that was lacking from 1776 to 1788. This Article offers a skeptical framework for evaluating that kind of argument, but the factual details offered here cannot answer such questions directly.

The second effect of ratifying the Constitution was an ironic victory for future generations of states-rights advocates. The Constitution’s extraordinary durability transformed ratification into a monumental event, thereby amplifying attention to debates from that period.²⁸⁶ The Federalist Papers have eclipsed almost all other eighteenth-century materials about the Constitution in the public imagination, and also in the legal community.²⁸⁷ Such pamphlets were not written to guide 250 years of government, but as quite specific political advocacy to attract a majority at state conventions like New York. One unrecognized consequence of postratification history has been to memorialize the Federalist Papers’ claims about statehood as timeless constitutional truths, while forgetting their uniquely distortive political context.

This is ironic because victorious eighteenth-century Federalists, for their part, were exaggerating preconstitutional statehood in the hope that Americans would reduce it—and that is what happened. The Constitution offered a

285. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008).

286. See BILDER, *supra* note 204, at 3, 15–16.

287. See H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 27 (2002) (describing the Federalist Papers as “the most important ratification-era discussion of the Constitution’s meaning”); Clinton Rossiter, *Introduction* to *THE FEDERALIST PAPERS*, at vii (Clinton Rossiter ed., 1961) (“*The Federalist* is the most important work in political science that has ever been written, or is likely ever to be written, in the United States. It is, indeed, the one product of the American mind that is rightly counted among the classics of political theory.”).

new framework that the Federalists believed would make statehood less powerful and more flexible, with incrementally larger input from democratic opinion across the country. By contrast, states-first histories have used ratification debates to support silent reservations of states' rights, based on principles of state sovereignty that were supposedly too familiar for eighteenth-century actors to specify in the Constitution itself. Contradicting the Constitution's original proponents, some states-rights theories espouse a vision of statehood that is marked by rigidity, limits, and antidemocratic formalism—characteristics that were mostly absent in the eighteenth century itself. The prevalence of inaccurate histories about statehood might be the strangest legacy that constitutional ratification ever produced.

IV. THE UNWRITTEN FUTURE OF STATEHOOD'S HISTORY

Although this Article's goals are mostly descriptive and interpretive, this Part considers normative implications. Flawed histories of states and statehood have appeared almost endlessly throughout American law and politics.²⁸⁸ Every one of those episodes is an occasion where some set of actors believed that legal history mattered, and where correcting legal history might also matter to some degree.

Without trying to single out the most important or recent episodes,²⁸⁹ this Part describes the potential impact of revisionist legal history using three types of examples. The first is doctrine. John Manning has criticized a group of Supreme Court cases that he calls "freestanding federalism."²⁹⁰ This Article supports substantive challenges to those decisions that do not require Manning's commitment to constitutional textualism.²⁹¹ Whenever judges or scholars have cited casual, oversimplified eighteenth-century history to support their doctrinal arguments, evidence from Part II suggests the possibility of reconsideration and revision.

Second is politics. Relocating the origins of states-rights doctrines in the nineteenth and twentieth centuries would affirm their historical nexus to American slavery and racial subordination, while deflating their undeserved status as "Founders-Chic Federalism." Revolutionaries began the legal project of American statehood, and the Constitution transformed it. Yet much like the American nation, statehood was mostly composed during the nineteenth and twentieth centuries, periods that are not emphasized enough with respect to constitutional federalism.

Third is judicial role. Most modern advocates discuss states' rights based on functional arguments, with eighteenth-century history as an unexamined

288. See *supra* notes 3, 9–12 (collecting sources).

289. E.g., *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 434 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

290. Manning, *supra* note 13, at 2004.

291. I am grateful to Gillian Metzger for focusing my attention on this group of cases and arguments.

premise or afterthought. In debates over governmental function, however, the existence of dynamic changes over time suggest that most decisions about legal statehood should be made by political institutions instead of constitutional adjudicators. The Constitution is quite clear that States are here to stay as a formal matter. But statehood's meaning in practice should be mostly flexible and dynamic, as was more emphatically true in the eighteenth century.

Scholars have debated federalism for centuries, and excellent work continues in the realm of constitutional theory and policy.²⁹² This Article joins that conversation from a distinct historical perspective, rebutting prevalent assumptions that—during the eighteenth century—everyone somehow knew what constitutional statehood was supposed to mean. The forgotten history of statehood does not reveal ancient, stable, or determinate legal status. Evidence from Part II suggests exactly the opposite. It is very clear that flawed histories of statehood have been used for many doctrinal, political, and institutional purposes in the past. This Article optimistically and tentatively hopes that readers will find comparable uses for more accurate histories of statehood in the future.

This Part sketches a few possibilities that illustrate different levels of commitment to historical evidence. For judges and intellectuals who view eighteenth-century experience as intrinsically important or decisive, new historical evidence might alter modern judgments about operative doctrinal questions, including freestanding federalism but not limited thereto. For people who focus on political genealogy and consequences, maybe exposing the nineteenth- and twentieth-century origins of constitutional statehood will make modern states-rights advocacy seem more or less normatively appealing. And for observers who care about the analytical category of “constitutional law,” the evident dynamism of statehood as a “contested truth” might shift states-rights issues toward the realm of democratic politics, instead of mythologies about timeless principles.²⁹³

A. *Freestanding Federalism*

An important group of “New Federalism” precedents emerged in the 1990s because new conservative justices were appointed to the Supreme

292. E.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Judith Resnik, Essay, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

293. Of course, it is also possible that reactions to new historical information will not justify much optimism. For example, different kinds of evidence that are not discussed here might overwhelm this Article's narrow legal focus, boosting statehood by describing it as a phenomenon of extralegal politics, culture, or social history. Furthermore, perhaps myths of statehood are too big to fail, having become so deeply embedded and politically useful in modern times that historical truths are ancillary or irrelevant to modern practice. See *infra* Conclusion.

Court.²⁹⁴ Such federalism cases were “new” because they restricted federal authority and boosted states’ power in ways unseen since the 1930s. But they also echoed decades of legal thought, holding that constitutional federalism: (a) demands respect for states’ rights as a hardwired eighteenth-century feature of American law, and (b) confers functional benefits such as accountability, experimentalism, localism, and liberty that improve American democracy.²⁹⁵ Those same principles will most likely yield similar results in the foreseeable future, given the Supreme Court’s latest conservative members and decisions.²⁹⁶ Accordingly, even though New Federalism cases are no longer “new,” they provide an indirect avatar for future generations of aggressive states-rights jurisprudence.

John Manning decried one group of New Federalism cases as “freestanding federalism” because they were “not tied to any particular clause of the Constitution.”²⁹⁷ In particular, doctrines about anticommandeering and state sovereign immunity rely on arguments about constitutional purpose and structure that are separate from the Tenth and Eleventh Amendments’ text.²⁹⁸ Because Manning rejected the Court’s nontextual methodology, he categorically argued that, applying proper constitutional analysis, “there is no freestanding federalism” at all.²⁹⁹

A response by Gillian Metzger disputed Manning’s textualism, and that methodological dispute kept her from fully endorsing his substantive results.³⁰⁰ Unlike Manning, Metzger was dedicated to using interpretive factors other than constitutional text—especially constitutional purpose and structure—unless in particular contexts the Framers and ratifiers “intended” to

294. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Kathleen M. Sullivan, *Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995). The crucial moment was in 1991, when Clarence Thomas succeeded Thurgood Marshall, because that appointment is what initiated twenty-five years of “swing vote” status for Sandra Day O’Connor and Anthony Kennedy. See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1008 (1992) (“Over the next four decades you will cast many historic votes on issues that will profoundly affect the quality of life for our citizens for generations to come.”); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1320–21, 1321 n.66 (2011).

295. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 957 n.8, 961 n.37 (1994); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 642 (1993); see *New York v. United States*, 505 U.S. 144, 157 (1992).

296. Ian Samuel, *Textualism for Realists*, 117 MICH. L. REV. 1085, 1085–86 (2019).

297. Manning, *supra* note 13, at 2004–05; see also Green, *supra* note 13, at 662 (discussing various doctrines regarding constitutional structure that Manning might criticize as similarly “freestanding”).

298. See Manning, *supra* note 13, at 2030–39. Manning also criticized “clear statement rules” based on federalism, see *id.* 2025–29, but those will not be discussed here. See *infra* note 333 (discussing similar doctrines under the heading “constitutional common law”).

299. Manning, *supra* note 13, at 2004.

300. Metzger, *supra* note 13, at 99–103.

require pure textualism.³⁰¹ With respect to states' rights, Metzger did not find any such intent, and she suggested that Manning's strict textualism could be "destabilizing to existing doctrines and long-established practices of constitutional interpretation."³⁰² The evidence in Part II offers new historical grounds for skepticism about states' rights without having to confront methodological disputes about constitutional textualism.

Freestanding federalism and other New Federalism decisions have prominently featured states-first historical theories.³⁰³ Any assumption that states preceded the federal government and compromised small parts of their intrinsic sovereignty under the Constitution distorts the constitutional balance in favor of "unenumerated states' rights."³⁰⁴ The typical states-first argument assumes that states possessed—at some indefinite historical moment—unlimited and unspecified legal prerogatives comparable to international forms of governmental sovereignty. Under that assumption, states arguably retained such primordial authority to the greatest degree possible unless there is specific eighteenth-century evidence of waiver.³⁰⁵

For example, proponents describe anticommandeering and state sovereign immunity as privileges that were stable, established, widely understood, and traditional elements of eighteenth-century statehood, which hardly anyone thought it was necessary to describe in explicit language.³⁰⁶ Almost all of the Supreme Court's evidence in upholding these doctrines came from the Convention and ratification debates, without recognizing statehood's instability before and underneath those politically motivated speeches. The Court concluded that states would never relinquish their dignity without a fight, and because there was not particular evidence about anticommandeering and sovereign immunity, those highly contestable prerogatives for eighteenth-century states became established constitutional precedent in the twentieth century.

Even if Manning is wrong about constitutional textualism, evidence from Part II suggests that his critique of freestanding federalism is substantially correct. Legal negotiations and documents from 1776 to 1788 illustrate that constitutional text, purpose, and structure *were all equally unresponsive* of aggressive assumptions about preconstitutional statehood.³⁰⁷ Anticommandeering and state sovereign immunity were not only absent from the

301. *Id.* at 100.

302. *Id.* at 99.

303. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 713–15 (1999); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002); *Printz v. United States*, 521 U.S. 898, 918–19 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–03 (1995) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 9 (1964)); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

304. Manning, *supra* note 13, at 2005.

305. *See Alden*, 527 U.S. at 718.

306. *Id.* at 713–19.

307. *See supra* Part II.

original constitutional text, they were also inconsistent with original historical context. Preconstitutional states never embodied the kind of sovereign, autonomous, stand-alone entities that are assumed in conventional narratives and precedents. On the contrary, legal words and actions from that era repeatedly demonstrated that states were interdependent and unstable—always struggling over legal status, sometimes winning or losing, but never silently resting on well-established constitutional privileges.

Revising flawed histories also provides new support for Metzger's view that "no compromise" emerged from American history or politics to resolve most details about constitutional statehood.³⁰⁸ Without disputing Manning's interpretive methodology, evidence from Part II supports Metzger's desire "to recover or reconstruct a historically situated understanding of the [Constitution]."³⁰⁹ The most important eighteenth-century traditions about preconstitutional statehood were indeterminacy, interdependence, and instabil-instability—not specific constitutional judgments about anticommandeering or state sovereign immunity.³¹⁰

This Article's research might resolve similar disputes about New Federalism that are currently fought on methodological grounds rather than substantive ones.³¹¹ Constitutional judgments about statehood may not require any dramatic choice between original history and modern function. Eighteenth-century legal history suggests that "unenumerated states' rights" have deserved, in many contexts, the skepticism that Manning and Metzger applied to freestanding federalism. Unlike "unenumerated rights" for individuals or "unenumerated powers" for the federal government,³¹² a skeptical framework for preconstitutional statehood—and also for states' constitutional dignities and privileges—might produce consensus about substantive results even for legal observers who disagree about interpretive methodology.

B. *Racial Politics and States-Rights Federalism*

Alongside modern revivals of New Federalism by conservative judges, the twentieth century also witnessed new ideas about states' rights. State-centric federalism had a somewhat negative image in the late twentieth century, especially concerning national issues of racial injustice and oppression.

308. Metzger, *supra* note 13, at 101.

309. *Id.* at 100 (quoting Manning, *supra* note 13, at 2038).

310. See *supra* Part II.

311. See Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297 (2019); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191 (2003).

312. See *Washington v. Glucksberg*, 521 U.S. 702, 756–65 (1997) (Souter, J., concurring); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014).

For several decades, the term “states’ rights” had been widely used to resist school desegregation and oppose antilynching laws.³¹³ Across a longer time span, arguments for state-centric federalism were used to defend Jim Crow racism after Reconstruction.³¹⁴ The idea was that local populations, including African-Americans, silently endorsed “traditional race relations” even if outsiders and the national public found them repellant. For states-rights advocates in that era, localized “folkways” demanded respect as authentic and organic expressions of social values.³¹⁵

Looking further back in time, the Civil War was waged over states’ rights to secede and support slavery.³¹⁶ And John Calhoun earlier explained that “the peculiar domestick institution of the Southern States, and the consequent direction, which that and her soil and climate have given to [their] industry, has placed them in regard to taxation and appropriations in opposite relation to the majority of the Union.”³¹⁷ The first moments to cement connections between states-rights federalism and regional slavery concerned nineteenth-century technological, agricultural, and imperial developments, as much of the United States economy became a “cotton kingdom.”³¹⁸ Any history of constitutional advocacy would show a long tradition in the United States of supporting states’ rights and restricting federal power, and a large fraction of that history is linked to the politics of racial injustice.³¹⁹

To pick one example, Ronald Reagan had survived almost seven decades of American history when he spoke at the Neshoba County Fair in 1980.³²⁰ The fairground was a half-hour drive from Mt. Zion Methodist, an African-

313. See JOHN MORTON BLUM, *YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961–1974*, at 191–98 (1991); Fallon, *supra* note 295, at 959; Avis Thomas-Lester, *A Senate Apology for History on Lynching*, WASH. POST (Jun. 14, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301720.html> [https://perma.cc/E8XJ-UYJZ].

314. See KIMBERLEY JOHNSON, *REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE BROWN* 9–10 (2010).

315. See STEPHEN A. BERREY, *THE JIM CROW ROUTINE: EVERYDAY PERFORMANCES OF RACE, CIVIL RIGHTS, AND SEGREGATION IN MISSISSIPPI* 143 (2015); WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 18–25 (1906).

316. See Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 290 (2008).

317. JEFFREY S. SELINGER, *EMBRACING DISSENT: POLITICAL VIOLENCE AND PARTY DEVELOPMENT IN THE UNITED STATES* 98 (2016).

318. WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 7–8 (2013).

319. Of course there were also exceptions, including various kinds of resistance to slavery in northern states. See EDLIE L. WONG, *NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL* 1–18 (2009).

320. See CAROL V.R. GEORGE, *ONE MISSISSIPPI, TWO MISSISSIPPI: METHODISTS, MURDER, AND THE STRUGGLE FOR RACIAL JUSTICE IN NESHOPA COUNTY* 153 (2015) (describing Reagan’s speech to 30,000 fairgoers as the first stop after his nomination by the Republican National Convention).

American church that was burned in 1964.³²¹ It was a half hour from the swamp where civil rights activists investigating the arson were killed and left in a charred station wagon—the FBI called this episode “Mississippi Burning.”³²² Only slightly farther away was a federal courthouse where the killers were convicted for violating federal law.³²³

In that very specific context, Reagan chose to end his fairground speech with a remarkable defense of state sovereignty against federal intervention:

I believe in states’ rights: I believe in people doing as much as they can for themselves at the community level and at the private level. And I believe that we’ve distorted the balance . . . by giving powers that were never intended in the Constitution to that federal establishment. And if I do get the job I’m looking for, I’m going to devote myself to trying to reorder those priorities and to restore to the states and local communities those functions which properly belong there.³²⁴

Reagan’s reference to states’ rights became national headline news.³²⁵ One can only imagine what such words meant for his audience of Mississippi Republicans, or for the many African-American residents of Neshoba County who did not attend the speech. In 1980, links between states’ rights, civil rights, and racial justice were obvious and direct.³²⁶

Despite the long and dismal history of states-rights rhetoric, at least two contexts are sometimes viewed as politically neutral occasions for advocating state-centrist federalism. One is a purely functional view of “New Federalism,” which began under Richard Nixon, flourished under Reagan, and remains important today. The “newness” of New Federalism is self-consciously

321. SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* 37–39 (1988).

322. JERRY MITCHELL, *RACE AGAINST TIME: A REPORTER REOPENS THE UNSOLVED MURDER CASES OF THE CIVIL RIGHTS ERA* 396 n.27 (2020).

323. *Mississippi Verdict: It May Give a New Face to Justice in the South*, N.Y. TIMES, Oct. 22, 1967, at 2E.

324. Ronald Reagan, Speech at Neshoba County Fair (Aug. 3, 1980), in MEG JACOBS & JULIAN E. ZELIZER, *CONSERVATIVES IN POWER: THE REAGAN YEARS, 1981–1989, A BRIEF HISTORY WITH DOCUMENTS* 85, 88 (2011).

325. E.g., Douglas E. Kneeland, *Reagan Campaigns at Mississippi Fair: Nominee Tells Crowd of 10,000 He Is Backing States’ Rights—Attacks Inflation Policy*, N.Y. TIMES, Aug. 4, 1980, at A11.

326. Even a once-conservative author wrote: “It’s callous, at least, to use the phrase ‘states’ rights’ in any context in Philadelphia [Mississippi]. . . . And it’s obviously true that race played a role in the G.O.P.’s ascent.” David Brooks, *History and Calumny*, N.Y. TIMES, Nov. 9, 2007, at A27 (Nov. 9, 2007) (emphasis added); see generally George Packer, *The Fall of Conservatism*, NEW YORKER, May 26, 2008, at 47, 52 (describing Brooks’s career “mov[ing] through every important conservative publication—*National Review*, the *Wall Street Journal* editorial page, the *Washington Times*, the *Weekly Standard* . . .” as a “young movement journalist . . .”). For present purposes, the simple point is that state-centric federalism—with “states’ rights” as its dominant catchword—was understood in a highly racial context during the 1980s and 1990s, which has made it important for “New Federalism” to assert meaningful political distance from those parts of its past.

located within the vague “now” of legal modernity, sharply and intentionally separated from premodern episodes of racist ugliness.³²⁷ One result of verbally separating “New Federalism” from “Old Federalism” is to insulate current states-rights arguments from earlier versions that were connected to white supremacy and racial subordination.

“New Federalism” is not supposed to be your grandfather’s federalism, nor even that of your older siblings. Alongside Reaganite political theory, the precipitous growth of law and economics has promoted a rhetorical modernization of states’ rights that has discarded the ideology’s inglorious past. Modern scholarship and judicial opinions routinely discuss or espouse abstract institutional arguments for constitutional federalism and states’ rights, without mentioning the older racial politics that made federalism’s “newness” seem so attractive and important.³²⁸ The New Federalist methodology of emphasizing institutional theory and governmental function will be considered *infra* in Section IV.C.

The other safe space for aggressive states’ rights is the Framing Era, with its reliance on eighteenth-century history. Many Americans have unwavering affection for the men who drafted and ratified the Constitution.³²⁹ No one is confused about whether they were racist, and of course many of them claimed to own slaves.³³⁰ Nonetheless, such individuals’ contributions to American law have somehow immunized their ideas from political critiques that are applied more quickly and forcefully to nineteenth-century politicians like Andrew Jackson or John Calhoun.³³¹ As mentioned *supra*, the longstanding practice of American slavery was economically, socially, and politically monumental during the 1800s as compared to the 1780s. In some legal circles, there also is a sense that to criticize the Framers—unlike most historical figures—implies opposition to the Constitution or perhaps the United States itself.³³²

327. See TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (1998).

328. E.g., Alden v. Maine, 527 U.S. 706 (1999); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 88–94 (1982).

329. See KLARMAN, *supra* note 4, at 4–5.

330. *Id.* at 263–64.

331. For recent evidence about the political stakes of even possibly insulating the Framers from modern criticism, see the heated exchange about SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING (2018) in Nicholas Guyatt, *How Proslavery Was the Constitution?*, N.Y. REV. BOOKS (Jun. 6, 2019), <https://www.nybooks.com/articles/2019/06/06/how-proslavery-was-the-constitution/> [<https://perma.cc/VE5V-8G8Q>], and Sean Wilentz, James Oakes & Nicholas Guyatt, ‘No Property in Man’: An Exchange, N.Y. REV. BOOKS (June 27, 2019), <https://www.nybooks.com/articles/2019/06/27/no-property-in-man-wilentz-guyatt-exchange/> [<https://perma.cc/8NTM-HZT5>].

332. But see Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (expressing the author’s very different perceptions concerning patriotism and constitutional law).

All of these political dynamics illustrate potentially serious consequences of letting states-rights federalism time travel from the nineteenth and twentieth centuries back to 1787 and 1788. Regardless of whether readers generally endorse the kind of political legitimation known as “Founders Chic,” it is crucial to debunk modern efforts to promote states’ rights with undeserved references to “Founders-Chic Federalism.”

This Article does not claim that legal ideas and doctrines surrounding states-rights federalism are improper just because they emerged in the nineteenth and twentieth centuries. Much less does it claim that all states-rights decisions should be overruled. The simpler goal is to relocate doctrines of state-centric federalism in their proper context, so that they can be appreciated or disdained for what they are, instead of being celebrated as Framing-Era developments that certainly they were not.

C. *States’ Rights and Democratic Self-Governance*

This Article has drawn a sharp separation between states-rights arguments and Founding-Era history in order to challenge the alchemy that has transformed abstract ideological principles into new constitutional doctrine. Too many Americans think that aggressive state-centrism was a solidly fixed component of the constitutional system from the start, and modern courts deploy that historical mistake as a reason to enforce states’ rights against other political actors.³³³ Many features of constitutional statehood are relatively unchangeable, such as the Electoral College, the requirement of two senators, and legal protection for state territory.³³⁴ Implicit assumptions about states’ dignity and sovereignty do not belong on that list, and this Section suggests that implicit states-rights principles do not deserve judicial enforcement.

To be clear, this Article’s last pages are not a good place to debate whether to overrule individual precedents as a matter of *stare decisis*.³³⁵ Instead, the urgent issue is whether the current Supreme Court should extend states-rights precedents and create new ones. For example, *Franchise Tax Board v. Hyatt* increased “freestanding federalism” by overruling established precedential limits on state sovereign immunity.³³⁶ Vastly more trouble-

333. This Article sets aside issues surrounding “constitutional common law,” which has a potentially complicated status—including the name—as a hybrid derivative from the “Constitution,” “statutes,” “common law,” some combination of the three, or something altogether different. For a powerful exposition and analysis of constitutional common law, see Henry P. Monaghan, Foreword, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). See also Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Metzger, *supra* note 13, at 105–07.

334. U.S. CONST. art. I; *id.* art. II; *id.* art. IV.

335. See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789 (2018). *But cf.* *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (“In my view, the Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III . . .”).

336. 139 S. Ct. 1485 (2019).

some, *Shelby County v. Holder* announced a novel states-rights principle that facilitated racist voting barriers in high-risk areas.³³⁷ The Supreme Court's conservative majority seems committed to expanding states-rights federalism in various substantive areas, without requiring specific support from legal precedents or eighteenth-century history. Especially given the dynamic nature of statehood throughout America's legal experience, many expansions of states-rights jurisprudence do not seem adequately justified.

First, functional arguments that are used to support states-rights jurisprudence can be exaggerated and incomplete. Advocates of state-centric federalism claim that judges should defend the constitutional authority of states to enhance modern political values such as accountability, experimentalism, localism, and liberty.³³⁸ However, courts have never assumed or possessed freewheeling authority to make political actors accountable, experimental, local, or libertarian. That is why courts would never create constitutional rules to compel campaign disclosures, public record-keeping, bureaucratic transparency, or other good-government policies.³³⁹ Regardless of whether those doctrines would be useful or harmful, they simply are not mandatory features of constitutional law.

By contrast, the constitutional category of statehood is a seemingly special trigger that makes judges stand up against democracy to save democracy, striking down authoritative actions by political officials and institutions in pursuit of abstract ideas about governmental structure. Some states-rights enthusiasts have suggested that Americans require legally powerful state governments across the board, regardless of whether, in particular contexts, the national democracy would prefer something different.

The standard list of states-rights values—accountability, experimentation, localism, and liberty—is only sometimes linked to constitutional statehood in practice, depending on whom, where, and when one has in mind. For example, it seems hard to celebrate political accountability in states that have historically or currently imposed barriers against racial minorities' right to vote.³⁴⁰ Likewise, suggestions that states are experimental laboratories sound different as applied to states that pursued eugenic sterilization in the twentieth century.³⁴¹ Enthusiasm for local authority has been a mixed bless-

337. 570 U.S. 529 (2013).

338. *E.g.*, Powell, *supra* note 295, at 641–42.

339. *Cf.* *Houchins v. KQED, Inc.* 438 U.S. 1, 14 (1978) (“There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, . . . hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems ‘desirable’ or ‘expedient.’”).

340. Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/E7RM-8L4W>].

341. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); ADAM COHEN, *IMBECILES: THE*

ing for racial minorities, feminists, and people of diverse sexual identities, while the word “liberty” has been similarly controversial for states’ rights that historically enforced slavery and racial segregation for a very long time.³⁴²

The point is not to imply that states are characteristically retrograde or pernicious. States have produced widely various mixtures of benefits, costs, sins, and virtues in different historical contexts—just like other kinds of political entities. But the fact of radically changing circumstances makes it hard to understand *on functional grounds* why courts should invalidate federal statutes or other political acts in order to defend statehood as a legal abstraction. County and municipal governments do good and bad things, and so do international or private entities. However, only states receive constitutional protection as presumptive instruments of responsible, localist, and beneficial government. Although states’ rights are frequently defended on functional grounds, evidence is notably scant about whether and when states have actually, always, or sometimes achieved the proposed ideals at stake. The point of legal theory and abstraction is to treat statehood’s virtues as an axiom or presumption, more than as a provable or contestable fact.

Second, even if expansive states’ rights were indeed essential to preserving American government, that alone would not be enough to convert political necessity into constitutional doctrine. From the 1780s to the present, a vast bulk of American history shows that the operative value and status of state governments have dramatically changed over time. There is no easy basis to compare modern state governments with those of the 1780s, or the 1850s, or the 1920s.³⁴³ In general terms, factors that have driven pertinent changes have included technology, demography, imperialism, economics, and political theory. All of these represent unpredictable variables whose management should be presumptively assigned to democratic governance instead of constitutional adjudication.³⁴⁴ Like many aspects of American life, the functional significance of states is something that depends on dynamic political realities, not timeless constitutional principles. The legal status of states should rise or fall with rhythms of social experience and political insti-

SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 1–14 (2016); THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 109–28 (2016).

342. *E.g.*, FRANK LAMBERT, THE BATTLE OF OLE MISS: CIVIL RIGHTS V. STATES’ RIGHTS 100–25 (2010); Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 LAW & HIST. REV. 491, 498–500 (2013); Lynda Worley Skelton, *The States Rights Movement in Georgia, 1825–1850*, 50 GA. HIST. Q. 391, 401 (1966); *see also* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1, 16–29 (2016).

343. *See* SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 1–6 (2019).

344. *See* DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 25–38 (2014); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 22–32 (2012); LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 20–54 (2016).

tutions, not the relative insulation of judicial precedent and constitutional decisionmaking.

In most contexts, there is no clear reason for courts to intervene and protect states from ordinary political forces. Democracies routinely make mistakes, even about important things, without prompting courts to interfere on constitutional grounds. Especially given this Article's historical evidence, there is no categorical justification for protecting states' rights by analogy to individual liberties or equality.³⁴⁵ There also is no reason to think that democratic political actors systematically fail to appreciate the importance of state governments any more than the importance of municipal or county governments, nongovernmental wealth, or capitalist labor systems. This Article's evidence does not support a special constitutional mandate for judges to shelter states' rights based on policy perceptions of institutional competence, much less does judicial intervention seem consistent with constitutional presumptions in favor of democratic politics and self-governance.

CONCLUSION

As a scholar of several revolutions, Ernest Renan said that “[f]orgetting, I would even . . . say historical error, is a crucial factor in the creation of a nation, which is why progress in historical studies often constitutes a danger for [the principle of] nationality.”³⁴⁶ A similar comment could be made about American statehood, and in both circumstances, the first half about “forgetting” is certainly correct. Historical amnesia and errors are everywhere, forming indispensable parts of almost everything. This Article has suggested that legal histories of the American Revolution are incomplete or incorrect. Yet some observers might characterize even that small act of truth-telling as some kind of “threat” to American law, “nationality,” or identity.

By contrast, W.E.B. Du Bois in “The Propaganda of History” asserted that telling historical truths does not necessarily endanger nationality, statehood, or anything else.³⁴⁷ Describing the past can *change the character* of a nation or state—just as new historical facts can transform readers, citizens, and authors if they pay attention. Such changes are often useful, in many different contexts, and Du Bois argued that they can be necessary.

This Article's effort to understand the origins of American statehood clarifies the historical and current basis for states' constitutional authority. On one hand, states were a disputed inheritance from the Revolutionary War, and certain features of statehood remain indispensable to the modern constitutional order. On the other hand, some lawyers and judges have misread the eighteenth century, enforcing theories from later generations about

345. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

346. Ernest Renan, *What Is a Nation?* (1882), reprinted in *BECOMING NATIONAL: A READER* 42, 45 (Geoff Eley & Ronald Grigor Suny eds., 1996).

347. See *supra* note 1 and accompanying text.

what states are and what statehood means. This Article seeks to challenge those theories, at least by placing them in an appropriately poststratification time period. Parallel to Du Bois's account of national governments, American states have done "frightful wrongs" as well as "great and beautiful things."³⁴⁸ The best way to increase states' constitutional benefits within the framework of American government is to entrust most of states' legal characteristics to the imperfect hands of American democracy.

348. DU BOIS, *supra* note 1.

