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JOSH CHAFETZ

Multiplicity in Federalism and the Separation of Powers

The Ideological Origins of American Federalism

BY ALISON L. LACROIX

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AUTHOR. Assistant Professor of Law, Cornell Law School. Thanks to Greg Alexander, Will Baude, Josh Bolian, Laurence Claus, Erin Delaney, Mike Dorf, Nate Oman, Aziz Rana, Catherine Roach, Steve Shiffirin, Karen Tani, Justin Zaremby, and Mariah Zeisberg, as well as to the participants in the Cornell Law School Summer Workshop Series, for helpful and thought-provoking comments on earlier drafts. Any remaining errors or infelicities are, of course, my own.



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Federalism in the American Constitution is too often treated as a virgin birth—as “the unique contribution of the Framers to political science and political theory,”¹ in Justice Kennedy’s words. But federalism did not spring forth fully formed from the Constitutional Convention. Alison LaCroix has done constitutional scholarship a great service, then, by providing us with an *ideological* history of federalism—that is, a history that demonstrates that federalism has “a before and an after, like all intellectual artifacts.”² In tracing the before, LaCroix’s erudite new book helps us make sense of what came after.

But as LaCroix traces the *intellectual* artifact—the “federal idea,” as she terms it³—her *institutional* focus inexplicably narrows. By focusing on the judiciary alone, she misses not only some key aspects of federalism in the constitutional order and in early republican politics, but also some of the ways in which her understanding of American constitutional development ramifies outside of the sphere of federalism. In this Review, I suggest how these deficiencies can be rectified and how LaCroix’s provocative discussion of governmental multiplicity can be expanded to the separation-of-powers context.

LaCroix defines the federal idea as the “belief that multiple independent levels of government could legitimately exist within a single polity, and that such an arrangement was not a defect to be lamented but a virtue to be celebrated.”⁴ Her most compelling work—comprising the bulk of her book—is spent tracing the development of this idea from the controversy over the 1765 Stamp Act to the recognition that the Articles of Confederation were inadequate to govern the new nation. Part I of this Review briefly recounts LaCroix’s prehistory of federalism in the Constitution.

This Review parts ways with LaCroix, however, when she arrives at the Constitution itself. LaCroix reads the Constitutional Convention’s rejection of Madison’s proposal to give Congress a veto over state laws, combined with the

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1. United States v. Lopez, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (emphasis added).
 2. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 220 (2010). LaCroix’s title is, of course, a nod to BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967), with which LaCroix shares a number of methodological commitments. For a more detailed placement of LaCroix’s approach in the historiographical literature, see Daniel W. Hamilton, *Hiding in Plain Sight: A Review of The Ideological Origins of American Federalism by Alison L. LaCroix*, U. CHI. L. SCH. FAC. BLOG (May 19, 2010, 8:51 PM), <http://uchicagolaw.typepad.com/faculty/2010/05/hiding-in-plain-sight-a-review-of-the-ideological-origins-of-american-federalism-by-alison-l-lacroix.html>.
 3. LACROIX, *supra* note 2, at 6.
 4. *Id.*

Convention's adoption of the Supremacy Clause, as a decision for judicial supremacy as the institutional means of operationalizing federalism. She then argues that the debates over the scope of federal jurisdiction in the Judiciary Acts of 1789 and 1801 further demonstrate this judicial turn. Part II of this Review takes issue with these claims, suggesting that the focus on the judiciary is an artifact of LaCroix's choice of evidence rather than an accurate reflection of the constitutional debates between 1787 and 1801. In highlighting some aspects of the debate that LaCroix overlooks, this Part argues that the political branches were meant to play at least as significant a role as the judiciary in the operation of the federal system.

Part III suggests that LaCroix's court-centric view is especially unfortunate because the idea of multiplicity has quite a bit to offer to our understanding of the separation of powers. This Part begins to develop a theory of multiplicity in the separation-of-powers context, focusing on the ways in which constitutional politics affects not only the resolution of substantive issues but also the institutional site at which those issues are resolved.

I. FROM THE STAMP ACT TO THE CONSTITUTION

LaCroix's most significant contribution to federalism scholarship lies in her tracing of the origins of the "federal idea" in constitutional prehistory. She shows that, beginning with the reaction to the Stamp Act of 1765, the colonists sought to reconceptualize the nature of the transatlantic constitution of the British Empire.⁵ Since the Glorious Revolution of 1688-89, imperial constitutional theory had been built upon two pillars: (1) the idea that *imperium in imperio* is a constitutional solecism⁶—that is, that there could only be one sovereign in a given geographical area—and (2) parliamentary sovereignty, or the idea that the word of the Monarch-in-Parliament was law and nothing could check it.⁷ Combined, these two principles meant that Parliament in London had absolute authority over the American colonists and their elected assemblies across all matters of politics.

But this metropolitan constitutional theory stood in some tension with the lived constitution of the colonists in the 1760s. In their day-to-day lives, they operated "within the regulatory ambit of both a colonial parliament and the

5. On the concept that there was a transatlantic imperial constitution, see generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2004).

6. LACROIX, *supra* note 2, at 14.

7. *Id.* at 13-15.

metropolitan Parliament.”⁸ The simultaneous existence of theoretical unity and lived multiplicity was necessarily unstable, and it was the Stamp Act—which the colonists perceived as interfering in their internal affairs in an unprecedented way⁹—that caused a collision.

LaCroix demonstrates that, beginning with the Stamp Act controversy, the colonists started to engage with the metropolitans on the level of theory. That is, they began developing theories to provide a normative justification for multiplicity in governmental authority.¹⁰ Of course, there was no single colonial conception of multiplicity, but LaCroix identifies two core elements of the nascent federal idea: “first, structuring a government to include multiple levels of authority; and second, dividing that authority along subject-specific lines.”¹¹

One of the great virtues of LaCroix’s ideological approach is that it resists forcing a simple linear narrative onto the development of the federal idea. Instead, her subtle and textured account charts the various strands of argument surrounding the development of the federal idea on both sides of the Atlantic through the constitutional debates of the tumultuous 1760s and early 1770s.¹² Especially enlightening is her description of the 1773 debate between Governor Thomas Hutchinson and the Massachusetts General Court over the nature of sovereignty.¹³

The common thread running through these disparate engagements—what made them part of a single overarching debate—was their “experiment[ation] with subject-matter divisions as one means of rationalizing and formalizing multiplicity.”¹⁴ Central to all of them was an attempt to carve out room for self-government, a way for the colonists, while remaining within the British Empire, to govern themselves, free of metropolitan oversight. In short, the constitutional crisis precipitated by the Stamp Act forced the colonists to begin articulating what had previously been unspoken assumptions about how they were to be governed—or, in LaCroix’s elegant phrasing, it began to turn “the practice of living with divided authority . . . into an ideology of multiplicity.”¹⁵

8. *Id.* at 33.

9. *See id.* at 40–41.

10. *See id.* at 32–34.

11. *Id.* at 35.

12. *See id.* at 37–126.

13. *See id.* at 68–104.

14. *Id.* at 60.

15. *Id.* at 64.

Metropolitan theories of sovereignty held fast, however; London would brook no competing sources of authority. And so the Revolution came, and suddenly it was up to the (former) colonists themselves to figure out how to divide power in practice. The Articles of Confederation established “the leanest possible union”¹⁶ and were created as part of “a strategy for resistance and defense.”¹⁷ Little wonder, then, that while they instantiated the “governmental multiplicity for which American whigs had argued since the Stamp Act debates,”¹⁸ they were distinctly undertheorized. Worse, they proved unequal to the task of establishing a lasting union.

II. THE CONSTITUTION AND THE JUDICIAL TURN

A. *The Supremacy Clause*

It fell to the Founders of 1787 to theorize and systematize the federal idea as it had been developing organically since 1765.¹⁹ In LaCroix’s telling, the Constitution’s drafters, concerned as they were to maintain a greater level of centralized authority than had existed under the Articles of Confederation, had two choices, both modeled after powers wielded over the colonies by the Privy Council in the name of the Crown.

In one camp stood James Madison, who wanted to give the Federal Congress the authority to veto state laws, just as the Privy Council had the authority to allow or disapprove a colonial legislative act.²⁰ Madison insisted that the problem with the Privy Council had not been the fact of legislative review but rather the fact that colonial and metropolitan interests were not aligned, so that the reviewing power was exercised in the service of substantive values that were distasteful or oppressive to the colonists.²¹ The solution, for Madison, was to keep legislative review but to design institutions that ensured that the central government respected the interests of the states.²² The Virginia Plan thus “embraced the federal negative”²³ in its sixth article, which provided

16. *Id.* at 127.

17. *Id.* at 128.

18. *Id.*

19. *See id.* at 132-33.

20. *See id.* at 135-58.

21. *Id.* at 153; *see also* BILDER, *supra* note 5, at 191-92 (describing Madison’s arguments in favor of the congressional negative).

22. LACROIX, *supra* note 2, at 152-53.

23. *Id.* at 147.

the “National Legislature” with the authority to “negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”²⁴ Madison himself supported an even stronger federal negative—he seconded Charles Pinckney’s motion to expand the negative from unconstitutional laws to *any* laws that Congress “shd. judge to be improper.”²⁵

But this smelled too much of empire to the other delegates. Elbridge Gerry declared that “[t]he Natl. Legislature with such a power may enslave the States,”²⁶ and Gunning Bedford of Delaware noted “the smallness of his own State which may be injured at pleasure without redress” under Virginia’s proposal.²⁷ Pierce Butler of South Carolina worried that the negative would “cut[] off all hope of equal justice to the distant States.”²⁸ Gouverneur Morris not only declared the negative “terrible,”²⁹ but he also insisted that it was unnecessary: “A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.”³⁰ In the end, not only was Pinckney’s motion to extend the negative voted down,³¹ but the original proposal itself was also rejected on July 17, 1787.³²

Immediately thereafter, the Convention adopted, on Luther Martin’s motion, a version of what would become the Supremacy Clause, which had first been proposed in William Paterson’s New Jersey Plan.³³ On August 23, the

24. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND’S RECORDS].

25. *Id.* at 164.

26. *Id.* at 165.

27. *Id.* at 167.

28. *Id.* at 168.

29. 2 *id.* at 27.

30. *Id.* at 28.

31. 1 *id.* at 168.

32. 2 *id.* at 28.

33. See 1 *id.* at 245 (New Jersey Plan); 2 *id.* at 28-29 (Convention adopting the New Jersey Plan’s supremacy clause).

Interestingly, this version of the Clause provided that federal law and treaties made pursuant to the Constitution would be supreme, “any thing in the respective laws of the individual States to the contrary notwithstanding.” 2 *id.* at 29. That is to say, originally, it did not allow federal legislation to preempt state *constitutions*. The subsequent alteration in wording made federal law supreme “any thing in the Constitutions or laws of the several States, to the contrary notwithstanding.” 2 *id.* at 389. This alteration was approved unanimously, *id.*, and Luther Martin was present at the Convention that day. See *id.* at 387 (Martin speaking on a different issue); 3 *id.* at 589 (Martin’s attendance record). Nevertheless, during the ratification debates, Martin would insist that, so altered, the Clause

Convention agreed to an alteration of the wording³⁴ that gave the Supremacy Clause more or less its final form.³⁵ Without a doubt, this constituted an adoption (or at least a recognition³⁶) of judicial review as a means of enforcing federal authority, much as the Privy Council's Committee of Appeals had exercised a reviewing power over colonial legislation.³⁷

But in LaCroix's telling, this is more than simply the adoption of judicial review as a means of enforcing federal authority over the states; for LaCroix, the rejection of Madison's proposal and adoption of the Supremacy Clause constituted a turning "toward a vision of federal authority that relied not on legislatures but on judges and courts to mediate among disparate sources of law."³⁸ That is, the Constitution's drafters opted for "judicial supremacy"³⁹ as the institutional means to operationalize governmental multiplicity.⁴⁰

is now worse than useless, for being so altered as to render the treaties and laws made under the federal government superior to our [state] constitution, if the system is adopted it will amount to a total and unconditional surrender to that government, by the citizens of this state, of every right and privilege secured to them by our constitution.

Id. at 287.

34. 2 *id.* at 389.

35. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

36. Recall that, even before the Supremacy Clause was adopted by the Convention, Gouverneur Morris thought that the judiciary could "set aside" state laws. See *supra* text accompanying note 30.

37. See LACROIX, *supra* note 2, at 142; see also Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council. I*, 28 POL. SCI. Q. 279 (1913) (describing the Privy Council's proto-judicial review power); Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council. II*, 28 POL. SCI. Q. 433 (1913) (same).

38. LACROIX, *supra* note 2, at 164; see also *id.* at 168 ("Taken together, the Supremacy Clause and Article III communicated that American federalism would emanate from a national judicial power . . ."); *id.* at 169 (stating that the "principal institution responsible for this mediation ['among multiple bases of authority'] was to be the judiciary").

39. *Id.* at 158.

40. This interpretation is not unique to LaCroix. See, e.g., Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1047 (1997) ("From this point on, it was evident that the task of maintaining both the superiority of national law and the boundaries of federalism would fall to state and federal judiciaries, the residual claimants of this great responsibility once the rival alternatives of the negative and coercion were discredited.").

B. Federalism in Political Equipose

For an account that had heretofore emphasized multiplicity, this discussion of institutional arrangements is shockingly monistic. First, LaCroix's exclusive focus on the Supremacy Clause as the means of operationalizing federalism suggests that she sees federalism almost wholly in terms of protecting the federal government from the states. But in one of the canonical statements from this time of the purposes of federalism—a statement that LaCroix never cites—Hamilton wrote: “Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate.”⁴¹

Manifestly, Hamilton⁴² is calling on three interrelated ideas. First, federalism, to be effective, must operate so as to keep centrifugal and centripetal forces in rough equipose.⁴³ If either the federal government or the state governments are too strong, then “[t]he people, by throwing themselves into either scale” would still not be able to make a difference. Thus, the federal structure must ensure a vigorous national authority, both to counteract the centrifugal force of numerous state authorities and to combat potential tyranny by state authorities. But likewise, the federal structure must ensure vigorous

41. THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

42. It should be noted that Hamilton was not alone in voicing this sentiment. Madison, for instance, wrote:

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due

THE FEDERALIST NO. 46, *supra* note 41, at 295 (James Madison). And James Wilson thought that:

A private citizen of a State is indifferent whether power be exercised by the Genl. or State Legislatures, provided it be exercised most for his happiness. His representative has an interest in its being exercised by the body to which he belongs. He will therefore view the National Legisl: with the eye of a jealous rival.

1 FARRAND'S RECORDS, *supra* note 24, at 344.

43. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1449 (1987) (“What America needed, then, was some . . . model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body.”).

state authorities, which alone can “afford complete security against invasions of the public liberty by the national authority.”⁴⁴ Second, the balance of powers between the federal government and the states must remain to some degree indeterminate. If there is no indeterminacy, then there is no possibility for conflict; and if there is no possibility for conflict, then there is no opportunity for the people to choose their champion. And third, in striking this indeterminate balance, Hamilton is not speaking the language of judicial supremacy—or, indeed, the language of the judiciary at all. He is speaking to *political* controversies. That is, he was speaking of what Herbert Wechsler would famously call the “political safeguards of federalism.”⁴⁵

The Senate, of course, was meant to be a “representation . . . of the States,”⁴⁶ as evinced not only by the equality of representation, without regard to population,⁴⁷ but also by the fact that senators were, until 1913, appointed by the state legislatures.⁴⁸ Indeed, senators were seen as agents of the state legislatures to such an extent that those legislatures were thought for much of the nineteenth century to have a right to instruct their senators on how to vote.⁴⁹ But, as Wechsler noted, the states’ role in the federal government was not limited to the Senate. The states controlled both districting and voter qualifications for House elections.⁵⁰ And not only did the Constitution leave the manner of selecting presidential electors up to the states,⁵¹ but if a candidate could not muster the required absolute majority of electors,⁵² the

44. THE FEDERALIST NO. 28, *supra* note 41, at 181 (Alexander Hamilton). Hamilton elsewhere elaborated:

[T]he State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

THE FEDERALIST NO. 26, *supra* note 41, at 172 (Alexander Hamilton).

45. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).
46. THE FEDERALIST NO. 58, *supra* note 41, at 357 (James Madison).
47. U.S. CONST. art. I, § 3, cl. 1.
48. *Id.*
49. See Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 213-14 (2008) (discussing the practice of instruction).
50. See Wechsler, *supra* note 45, at 548-52.
51. See U.S. CONST. art. II, § 1, cl. 2.
52. See *id.* cl. 3 (requiring a majority of electors for victory in the electoral college).

election was thrown to the House—where “the Votes shall be taken by States, the Representation from each State having one Vote.”⁵³ One need not think that these political safeguards are sufficient to protect federalism⁵⁴ in order to think that they play a major role in our constitutional scheme for “mediat[ing] among disparate sources of law”⁵⁵ and that they represent something other than a purely “judicial solution” to the thorny problems of multiplicity.⁵⁶ And yet these structural safeguards of state power are wholly absent from LaCroix’s analysis.

Instead, LaCroix ignores Hamilton’s meditation on the need to balance state and federal powers and focuses her attention entirely on the need to “controul the centrifugal tendency of the States,” in Madison’s words.⁵⁷ Even for Madison, this was only half the story—writing as Publius, he noted that federalism and the separation of powers combined to offer the people a “double security” for their liberties because “[t]he different governments will control each other, at the same time that each will be controlled by itself.”⁵⁸ But even as to the Constitution’s means of controlling the states’ centrifugal tendencies, LaCroix errs when she puts all her eggs in the judicial basket. There is no doubt that the supremacy of federal law in (both federal and state) courts was one mechanism of keeping the states in check, but there are others. First, recall Gouverneur Morris’s claim that a state law inimical to federal authority “may be repealed by a Nationl. law”⁵⁹—that is, a recognition that federal *legislation* could preempt state law. We thus see that the principles of the Supremacy Clause speak to Congress, as well as to the courts.⁶⁰

53. *Id.* (emphasis added).

54. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (“[T]he view that the structure of the Federal Government sufficed to protect the States . . . [is] predicated . . . on assumptions that simply do not accord with current reality.”); John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 103 (2004) (“[O]ur analysis undermines the argument that the political process will prove an effective substitute for judicial review.”); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1313 (1997) (“Although there is a great deal of historical support for the idea that the national government itself would protect state interests, there is no evidence that the Framers understood the political process to be the *exclusive* safeguard of federalism.”).

55. LACROIX, *supra* note 2, at 164.

56. *Id.* at 135.

57. 1 FARRAND’S RECORDS, *supra* note 24, at 165, *quoted in* LACROIX, *supra* note 2, at 150.

58. THE FEDERALIST NO. 51, *supra* note 41, at 323 (James Madison).

59. See *supra* text accompanying note 30.

60. See Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1040 (2010) (“Preemption of state law by federal law is justified by the Supremacy Clause.”).

But we need not limit our gaze to the Supremacy Clause. Consider, for example, the first and last provisions of Article IV. On the front side, the Full Faith and Credit Clause⁶¹ empowers Congress to mediate disputes among the states; as Stephen Sachs has shown, “[T]he only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have. The real significance of the Clause was the power it granted to Congress to specify that effect later.”⁶² And on the back side, the federal government is required to “guarantee to every State in this Union a Republican Form of Government” and to “protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁶³ The guarantee of a republican form of government has long been understood as a directive to the political branches, not the courts.⁶⁴ And, of course, any directive to protect states against invasion or domestic violence must largely be addressed to the Commander-in-Chief of the nation’s military.

Indeed, this brings us to the most crucial means of controlling the states’ centrifugal tendencies: the federal military.⁶⁵ Article I gives Congress the power to declare war.⁶⁶ In the service of this power, it is also empowered to raise an

61. U.S. CONST. art. IV, § 1.

62. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) (footnote omitted).

63. U.S. CONST. art. IV, § 4.

64. See *Luther v. Borden*, 48 U.S. 1 (1849) (holding the Republican Guaranty Clause nonjusticiable); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM*, 1829-1861, at 75 (2005) (“[T]he provision need not be read as self-executing. It gives no one a right to republican government; it imposes an obligation on the United States. Article I gives Congress authority to pass legislation necessary and proper to carry out the Government’s powers and duties; the most obvious way for the United States to guarantee states republican government is by congressional legislation.”). Even in the absence of legislation, each house of Congress can enforce the Guaranty Clause by refusing to seat representatives of nonrepublican states. See JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 168, 183, 188 (2007).

65. As Akhil Amar has persuasively noted, the 1787 Constitution deals significantly more with issues of national security and geostrategy than is commonly realized. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 44-51 (2005). And while much of the concern centered around foreign invasions, the Founders were also deeply worried about “envy and jealousy” arising among the states. *THE FEDERALIST NO. 5*, *supra* note 41, at 51 (John Jay); see also *THE FEDERALIST NO. 8*, *supra* note 41, at 66 (Alexander Hamilton) (worrying about “[w]ar between the States”).

66. U.S. CONST. art. I, § 8, cl. 11.

army⁶⁷ and a navy,⁶⁸ and to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁶⁹ Although the appointment of militia officers and the training of the militias are reserved to the states, Congress may dictate the procedures for “organizing, arming, and disciplining” the militias, and “for governing such Part of them as may be employed in the Service of the United States.”⁷⁰ The President, of course, is the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁷¹

In other words, Congress and the President not only create and command federal forces, they also can call up and command the state militias. And the purposes for which they can do so include the suppressing of insurrections.⁷² There is no doubt that the Founding generation had (well-founded) fears of standing armies—fears reflected in the Second and Third Amendments as well as in the Article I provision reserving to the states the power to appoint officers and train their militias. A despotic President seeking to use the federal army to oppress the people would find himself opposed by the combined force of the state militias, who would no doubt follow their locally appointed officers rather than their distant Commander-in-Chief. Madison noted that “[i]t may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the late

67. *Id.* cl. 12.

68. *Id.* cl. 13.

69. *Id.* cl. 15.

70. *Id.* cl. 16.

71. *Id.* art. II, § 2, cl. 1.

72. The extent of military power granted to the federal government in the Constitution was, of course, influenced by the fear recently generated by Shays’s Rebellion. See FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776-1790*, at 145-54 (1965) (describing Shays’s Rebellion and the public reaction thereto); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 111 (2009) (“As Washington declared in response to Shays’s Rebellion . . . ‘influence is no government.’ Force may have been uncertain in its results and distasteful for good republicans to use, but for most Federalists the possession of military power was essential to the existence of the government.” (footnote omitted)).

Moreover, one of the first significant exercises of the new power came in response to the Whiskey Rebellion of 1794, which Gordon Wood has called “the most serious domestic crisis the Washington administration had to face.” WOOD, *supra*, at 134. See generally *id.* at 134-38 (describing the Rebellion and its suppression).

The maintenance of national unity was thus central to early thinking about the federal military power.

successful resistance of this country against the British arms will be most inclined to deny the possibility of it.”⁷³ If the state militias fought together, then they could defeat the regular federal army, just as the colonial militias, together, defeated the regular British army. But—and this is key—a single state or a small handful of states would be unlikely to defeat the combination of the regular federal army and the militias of the other states, all under unified presidential command. As Hamilton suggested, the competition between the state and federal political branches was supposed to ensure the greatest liberty for the people.

And of course this did not remain in the realm of the speculative. The nation’s greatest conflict over the proper balance between federal and state authority was tried, not in a court of law, but on the field of battle. And although it came to its conclusion in a small Virginia town called Appomattox Court House,⁷⁴ the judges had no say in the matter.⁷⁵

Nor has this brief discussion even begun to touch upon all of the checks on state authority that the Constitution gave to the political branches. To prevent the states from conspiring together against the union, the Constitution forbids

73. THE FEDERALIST NO. 46, *supra* note 41, at 299 (James Madison).

74. General Lee formally surrendered to General Grant in the living room of Wilmer McLean’s house in the village of Appomattox Court House. See HARRY HANSEN, *THE CIVIL WAR: A HISTORY* 633-34 (Signet Classic 2002) (1961). It is perhaps indicative of the legal profession’s obsession with courts that so many legal scholars have mistakenly placed the surrender in an actual courthouse. See, e.g., Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 929 n.117 (2003) (referring to “General Lee’s surrender at the Appomattox Courthouse”); Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 190 (2000) (citing “the decisive ruling on this point at the Appomattox courthouse in the case of *Grant v. Lee*”); Nikiforos Mathews, *Beyond Interrogations: An Analysis of the Protection Under the Military Commissions Act of 2006 of Technical Classified Sources, Methods and Activities Employed in the Global War on Terror*, 192 MIL. L. REV. 81, 82 n.3 (2007) (referring to “General Robert E. Lee’s surrender at the Appomattox courthouse on 9 April 1865”); John O. McGinnis, *Remarks on the Installation of Mark Movsesian as Max Schmertz Distinguished Professor of Law*, 35 HOFSTRA L. REV. 31, 33 (2006) (referring to “the most famous case of *Lee v. Grant*—decided finally at the Appomattox Courthouse without possibility of further appeal”); Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605, 1614 (2004) (referring to Lee’s surrender “at the Appomattox Courthouse”).

75. Four years later, the Supreme Court did get around to declaring secession unconstitutional. See *Texas v. White*, 74 U.S. 700, 724-26 (1869). By then, it need hardly be said, the matter was settled. Cf. Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 LAW & HIST. REV. 71 (2010) (arguing that the Civil War operated, in a manner akin to medieval trial by battle, to settle the legal question of the constitutionality of secession).

interstate compacts—unless Congress consents.⁷⁶ Congress’s power “[t]o establish Post Offices and post Roads”⁷⁷ gave it both a foothold and a significant source of patronage in every state.⁷⁸ Examples could multiply still further.

To put it succinctly, then: it is simply mistaken to suggest that the rejection of Madison’s proposed congressional negative over state laws and the adoption of the Supremacy Clause constituted a “decision to use courts rather than legislatures as the principal mechanism to balance multiplicity with union.”⁷⁹ Rather, the Constitution uses institutional multiplicity in the service of federal multiplicity; each branch—including but certainly not limited to the judiciary—is given roles to play in keeping federal and state powers in balance.

C. *The Judiciary Acts—and Beyond*

1. *The Judiciary Acts*

Turning from the Constitution’s birth to its childhood, LaCroix argues that “[t]he final decade of the eighteenth century and the early decades of the nineteenth century witnessed a transformation from sovereignty to jurisdiction as the central organizing principle—and battlefield—of American federalism.”⁸⁰ Or, put more starkly: “The period between 1787 and 1802 witnessed a transformation in American constitutional discourse from the language of legislative power and sovereignty to that of judicial power and jurisdiction.”⁸¹ LaCroix’s position is not simply the now-familiar claim that American society became more legalized in the early years of the new

76. U.S. CONST. art. I, § 10, cl. 3.

77. *Id.* art. I, § 8, cl. 7.

78. See John Lauritz Larson, “Bind the Republic Together”: *The National Union and the Struggle for a System of Internal Improvements*, 74 J. AM. HIST. 363, 369 (1987) (noting the use of the postal power for patronage purposes in the early Republic); see also WOOD, *supra* note 72, at 107-09, 478-85 (noting the ways in which post offices, post roads, and other internal improvements constituted a core element of the Federalist project of promoting national unity).

79. LACROIX, *supra* note 2, at 221; see also *id.* at 169 (“The defeat of the negative and the adoption of the Supremacy Clause heralded the arrival of an explicitly judiciary-based approach to the problem of multiple authorities.”); *id.* at 173 (“[T]he combined efforts of the delegates at Philadelphia produced a judicial mode of organizing federalism . . .”).

80. *Id.* at 178.

81. *Id.* at 180.

Republic.⁸² Rather, she makes the bolder claim that jurisdiction—that is, the “delineat[on of] the boundaries among the judicial bodies that . . . guide the exercise of [governmental] authority”⁸³—was the fundamental ideological unit structuring federalism discourse during this time.

In support of this claim, LaCroix offers detailed and sophisticated readings of the Judiciary Acts of 1789 and 1801.⁸⁴ As LaCroix rightly notes, the so-called Madisonian Compromise, which left the structure (and, indeed, existence) of the lower federal courts undetermined in the Constitution,⁸⁵ made it necessary for Congress to take up the issue, and in the months between ratification of the Constitution and the meeting of the First Congress, there was heated debate on the topic.⁸⁶ Ultimately, the 1789 Judiciary Act created thirteen district courts and three circuit courts, the latter of which were staffed by a combination of district judges and Supreme Court Justices.⁸⁷ The Act did not grant general federal question jurisdiction to the inferior courts, and much of the original jurisdiction that it did grant was concurrent with the state courts.⁸⁸ LaCroix’s discussion of the debate over concurrence is illuminating.⁸⁹

Also especially useful is LaCroix’s discussion of the 1801 Judiciary Act—which is generally noted only for its repeal a year later.⁹⁰ Instead of the usual reading of the 1801 Act as a last-ditch power grab by an outgoing Federalist Congress and President,⁹¹ LaCroix treats it on its own terms, as indicative of

82. See, e.g., CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 21-34 (1993); WOOD, *supra* note 72, at 407, 425.

83. LACROIX, *supra* note 2, at 179.

84. See *id.* at 184-213.

85. *Id.* at 180-81.

86. *Id.* at 182-83.

87. *Id.* at 184.

88. *Id.* at 185.

89. See *id.* at 188-201.

90. See *id.* at 176 (“As Kathryn Turner Preyer observed, ‘[A]wareness of the Act seems to have been kept alive chiefly because it must be summoned to serve as the cause of its own repeal in March 1802.’”) (alteration in original).

91. See, e.g., Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 602 (1993) (“Seeking to secure their power in the overwhelmingly Federalist judicial branch, the lame duck Federalist Congress enacted the Judiciary Act of 1801 and several pieces of related legislation. These acts were intensely partisan, creating posts designed to be filled hurriedly by the outgoing Federalist administration.” (internal footnote omitted)); Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1072 (2007) (“The simplest explanation of the Judiciary Act of 1801—enacted by a lame-duck Congress and hastily signed and executed by a lame-duck president—is that it sought to secure a defeated party’s domination of one branch of government through the

the Federalist theory of federal jurisdiction. The 1801 Act both significantly increased the number of federal judges—most notably by expanding the number of districts⁹² and circuits⁹³ and creating circuit judgeships⁹⁴—and gave the circuit courts general federal question jurisdiction.⁹⁵ LaCroix demonstrates that this expansion of the original jurisdiction of the circuit courts was an important component in the Federalists' conception of the scope of federal power.⁹⁶ LaCroix is certainly to be commended for putting the 1801 Act back on the map.

But once again, LaCroix's field of vision is too narrow. "By 1801," she writes, "jurisdiction had replaced sovereignty as the lodestar of American constitutional debate."⁹⁷ But this preoccupation with jurisdiction is little more than an artifact of LaCroix's choice of evidence. Of course if you only examine the 1789 and 1801 Judiciary Acts, then the federalism discourse will appear to be centered on questions of jurisdiction. But the debates over federal *jurisdiction*, while undeniably important, were hardly the only debates over federalism in the first decades of the new Republic.

2. *The Bank*

Consider the Bank. Hamilton, in his capacity as Secretary of the Treasury, formally proposed to Congress the creation of a "National Bank" in mid-

mechanism of life tenure."); Linda Przybyszewski, *Three Tribes*, 11 GREEN BAG 2D 537, 539-40 (2008) (book review) ("Marbury's commission was one of many made under the Judiciary Act of 1801 [sic] by Adams who wanted to fill up the judicial benches and administration with his Federalist Party's cronies.").

92. Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96-97.

93. *Id.* § 6, 2 Stat. at 90.

94. *Id.* § 7, 2 Stat. at 90-91. It was the repeal of this provision a year later, Repeal Act, ch. 8, § 1, 2 Stat. 132, 132 (1802), that came before the Court in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Plaintiff's counsel argued that the elimination of an Article III judgeship was unconstitutional. *See id.* at 303-04 (argument of Charles Lee). Justice Paterson's opinion for the Court completely ignored this argument, *see id.* at 308-09, thereby implicitly upholding the constitutionality of the 1802 Act. *Stuart v. Laird* is usually read *in pari materia* with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as part of the battle between the Federalist-dominated courts and the newly Republican-dominated political branches. *See, e.g.,* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 97-124 (5th ed. 2006) (discussing *Marbury* and *Stuart* together).

95. Judiciary Act of 1801 § 11, 2 Stat. at 92.

96. *See* LACROIX, *supra* note 2, at 208-10.

97. *Id.* at 203.

December of 1790.⁹⁸ The constitutional debate began almost immediately, with an especially contentious debate in the House in early February of 1791. Madison, noting that the Constitution gave the federal government “a grant of particular powers only, leaving the general mass in other hands,”⁹⁹ went on to insist that any reading of the Constitution that would give Congress the power to incorporate a bank would “destroy[]” this “essential characteristic of the government.”¹⁰⁰ Madison’s fellow Virginian William Giles elaborated:

The general government, he said, was not a consolidating government, but a federal government, possessed of such powers as the states or the people had expressly delegated; but to support these incidental powers ceded to Congress was to make it not a federal, not even a republican consolidated government, but a despotic one.¹⁰¹

James Jackson of Georgia insisted that the bill would “essentially interfere with the rights of the separate States.”¹⁰² And Madison, speaking again at the close of the debate, insisted that the arguments advanced in favor of the bill’s constitutionality “go to the subversion of every power whatever in the several States.”¹⁰³

In support of the bill, Fisher Ames and Elbridge Gerry, both of Massachusetts, offered lengthy arguments for an expansive power in Congress.¹⁰⁴ And it was these arguments that carried the day. Having already passed the Senate on January 20, the bank bill passed the House on February 8, 1791¹⁰⁵ and was sent to the President. Relying on his power to “require the Opinion, in writing, of the principal Officer in each of the executive

98. See Alexander Hamilton, Report of the Secretary of the Treasury (Dec. 14, 1790), in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: 4 MARCH 1789–3 MARCH 1791, at 174, 174 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter DHFFC]. For an account situating the Bank within Hamilton’s broader economic and political philosophy, see WOOD, *supra* note 72, at 95-110. See also *id.* at 103 (“[T]here is no doubt that Hamilton and his [economic] program laid the basis for the supremacy of the national government over the states.”).

99. *Congress: House of Representatives, Wednesday, Feb. 2: The Bank Bill Under Consideration*, GAZETTE OF THE U.S., Feb. 23, 1791, at 1, reprinted in 14 DHFFC, *supra* note 98, at 369.

100. 14 DHFFC, *supra* note 98, at 371.

101. *Philadelphia, Feb. 5, House of Representatives of the United States: Wednesday, February 2, 1791*, GEN. ADVERTISER (Phila.), Feb. 5, 1791, at 3, reprinted in 14 DHFFC, *supra* note 98, at 377.

102. 14 DHFFC, *supra* note 98, at 406.

103. *Id.* at 475.

104. See *id.* at 392-97 (Ames); *id.* at 452-62 (Gerry).

105. The bill’s timeline is laid out at 4 *id.* at 171-73.

Departments, upon any Subject relating to the Duties of their respective Offices,”¹⁰⁶ Washington sought advice from his Cabinet luminaries. On February 12, Attorney General Edmund Randolph wrote an opinion arguing that the bill was unconstitutional.¹⁰⁷ Placing emphasis, as Madison did, on the limited nature of federal power, in contrast to the plenary nature of state power,¹⁰⁸ Randolph insisted that the power to create corporations was neither expressly granted in the Constitution nor inferable from any expressly granted power. The breadth of construction contended for by the bill’s proponents, he argued, would “stretch the arm of Congress into the whole circle of state legislation.”¹⁰⁹ Three days later, Secretary of State Jefferson weighed in, concurring with Randolph.¹¹⁰ Again noting the enumerated nature of federal power, Jefferson wrote that “[t]o take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”¹¹¹ He concluded that the incorporation of banks is a “right remaining exclusively with the states”¹¹² and urged Washington to use his veto “to protect against the invasions [by] the [federal] legislature . . . of the states and state legislatures.”¹¹³

As he had the first word in the debate, Hamilton also got the last word, delivering his lengthy rebuttal to Randolph and Jefferson on February 23.¹¹⁴ Hamilton began with the premise that the federal Constitution divided “the powers of sovereignty . . . between the National and State Governments.”¹¹⁵ In support of his claim that the federal government is sovereign “as to its objects,”¹¹⁶ he cited the Supremacy Clause, noting that “[t]he power which can

106. U.S. CONST. art. II, § 2, cl. 1.

107. Edmund Randolph, *The Constitutionality of the Bank Bill* (Feb. 12, 1791), in *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 3 (H. Jefferson Powell ed., 1999).

108. *See id.* at 4.

109. *Id.* at 7.

110. THOMAS JEFFERSON, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), in 19 *THE PAPERS OF THOMAS JEFFERSON* 275 (Julian P. Boyd ed., 1974) [hereinafter *JEFFERSON PAPERS*].

111. *Id.* at 276.

112. *Id.* at 280.

113. *Id.* at 279-80.

114. ALEXANDER HAMILTON, *Final Version of an Opinion on the Constitutionality of an Act To Establish a Bank* (Feb. 23, 1791), in 8 *THE PAPERS OF ALEXANDER HAMILTON* 97 (Harold C. Syrett ed., 1965).

115. *Id.* at 98.

116. *Id.* at 98-99.

create the *Supreme law* of the land, in any case, is doubtless sovereign *as to such case*.¹¹⁷ And sovereign powers, he argued, must be interpreted broadly in pursuance of the public good.¹¹⁸ Thus, in response to Jefferson's claim that a broad construction of federal power would have no stopping point, Hamilton retorted that:

[T]he doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the National government is sovereign in all respects, but that it is sovereign to a certain extent: that is, to the extent of the objects of its specified powers.

It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.¹¹⁹

Hamilton was clearly persuasive: Washington signed the bill two days later.¹²⁰

This was a debate centrally organized around themes of sovereignty and legislative powers, not jurisdiction. Indeed, as we have seen, Hamilton pressed the Supremacy Clause into service in an argument about the scope of *congressional* power. And when this same issue—the constitutionality of a federal bank¹²¹—reached the Supreme Court twenty-eight years later,¹²² the debate was once again framed around sovereignty and legislative power, not

117. *Id.* at 99.

118. *Id.* at 105.

119. *Id.* at 107.

120. See 4 DHFFC, *supra* note 98, at 173.

121. The First Bank of the United States's charter expired in 1811, and Congress refused to renew it. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 209–26 (1957). Intervening experience, including the economic turmoil caused by the War of 1812, was not pleasant, and Congress in 1815 passed a bill chartering a new bank. After vetoing the bill once, President Madison signed it in 1816, creating the Second Bank of the United States. See *id.* at 227–46. The First and Second Banks were organized along nearly identical principles. See *id.* at 243–44. Therefore, although *McCulloch v. Maryland* dealt with the Second Bank, the constitutional issues it addresses are identical to those raised in the political branches during the debate over the First Bank. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

122. *McCulloch*, 17 U.S. 316.

jurisdiction. Walter Jones, arguing for Maryland, insisted that the Constitution is “a compact between the States, and all the powers which are not expressly relinquished by it, are reserved to the States,”¹²³ and Jones’s co-counsel, Luther Martin (the Attorney General of Maryland) elaborated this point at some length.¹²⁴ Chief Justice Marshall, noting that “[i]t would be difficult to sustain this proposition,”¹²⁵ offered a distinctly Hamiltonian view of sovereignty. He cited the Supremacy Clause in support of the proposition that “the government of the Union, though limited in its powers, is supreme within its sphere of action.”¹²⁶ Noting that this sphere encompasses “[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation,”¹²⁷ Marshall argued that the federal government “must also be entrusted with ample means for their execution.”¹²⁸ Thus, echoing Hamilton, Marshall famously intoned, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹²⁹ The Bank, he concluded, passed that test.¹³⁰

Sovereignty, it should be clear, played a central role in this debate. As Akhil Amar has noted, if the Constitution—like the Articles of Confederation¹³¹—was simply a league among sovereign states,¹³² then “arguably Article I should be strictly construed, in accordance with the traditional rule that treaties generally be interpreted narrowly.”¹³³ But if the Constitution instead created a national sovereign, then Hamilton could rely on another rule—the “sound maxim of construction” that sovereign powers “ought to be construed liberally, in

123. *Id.* at 363.

124. *See id.* at 372–77.

125. *Id.* at 403.

126. *Id.* at 405.

127. *Id.* at 407.

128. *Id.* at 408.

129. *Id.* at 421.

130. *Id.* at 424.

131. *See* 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.”).

132. *See* Chafetz, *supra* note 49, at 204 n.182 (discussing the structure of the Continental Congress under the Articles of Confederation).

133. Amar, *supra* note 43, at 1453.

advancement of the public good.”¹³⁴ That is, the debate about the location of sovereignty was absolutely central to the debate over the scope of congressional power.

This centrality is reflected in Marshall’s opinion, which uses the word “jurisdiction” exactly once—and he is there discussing legislative jurisdiction, not judicial.¹³⁵ By contrast, he uses the word “sovereign,” “sovereignty,” or “sovereignties” a total of thirty-four times,¹³⁶ including in the very first sentence of the opinion. The debates in the Supreme Court over the constitutionality of the Bank—like the debates in Congress and the Executive Branch—were debates over the scope of congressional power, organized by the rhetoric and logic of sovereignty. And, of course, this was all in the context of one of the most gripping federalism disputes in the early Republic.

Nor did the *McCulloch* opinion end this dispute. The author of the “Amphictyon” essays in the *Richmond Enquirer*¹³⁷ insisted that any claim that the states were not sovereign parties to a compact was “untenable in itself, and fatal in its consequences.”¹³⁸ In the same newspaper, Virginia Judge Spencer Roane approvingly cited an 1811 resolution by the Pennsylvania General Assembly that called the Constitution “to all intents and purposes a *treaty* between sovereign states.”¹³⁹ Marshall fired back in the press:

But our constitution is not a league. It is a government; and has all the constituent parts of a government. . . .

The confederation was, essentially, a league; and congress was a corps of ambassadors, to be recalled at the will of their masters. . . . They had a right to propose certain things to their sovereigns, and to require a compliance with their resolution; but they could, by their own power, execute nothing. A government, on the contrary, carries its resolutions into execution by its own means, and ours is a government.

134. HAMILTON, *supra* note 114, at 105.

135. *McCulloch*, 17 U.S. at 429.

136. *See id.* at 400, 402 (twice), 404 (seven times), 409 (four times), 410 (six times), 411 (twice), 418 (three times), 427 (twice), 429 (five times), 430, 433.

137. The author was probably Judge William Brockenbrough. Gerald Gunther, *Introduction to JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND* 1, 1 (Gerald Gunther ed., 1969) [hereinafter *DEFENSE*]. On the uncertainty surrounding this identification, see generally Eric Tscheschlok, *Mistaken Identity: Spencer Roane and the “Amphictyon” Letters of 1819*, 106 VA. MAG. HIST. & BIOGRAPHY 201 (1998).

138. Amphictyon, Letter to the Editor, *Essay I*, RICHMOND ENQUIRER, Mar. 30, 1819, at 3, reprinted in *DEFENSE*, *supra* note 137, at 52, 55.

139. Hampden [Spencer Roane], Letter to the Editor, *Essay IV*, RICHMOND ENQUIRER, June 22, 1819, at 3, reprinted in *DEFENSE*, *supra* note 137, at 138, 150.

Who ever heard of sovereigns in league with each other, whose agents assembled in congress, were authorized to levy or collect taxes on their people, to shut up and open ports at will, or to make any laws and carry them into execution?¹⁴⁰

The debate over sovereignty thus continued to shape the debate over the Bank's constitutionality, for only if sovereignty existed on a national level—both Marshall and his interlocutors seemed to claim—could an expansive reading of federal power be justified. But whereas Bank opponents—from Madison and Jefferson to Martin and Roane—believed that the Constitution's allocation of sovereignty was no different than the Articles of Confederation's, Bank supporters—from Hamilton to Marshall—believed that, post-1788, sovereignty resided on a national level. And when President Jackson vetoed the renewal of the Bank's charter in 1832, it was this debate to which he made reference, insisting that the legislation chartering the Bank went beyond the bounds of Congress's enumerated powers, Marshall's opinion to the contrary notwithstanding.¹⁴¹

Of course, questions about federal jurisdiction did not disappear. LaCroix, in other work, discusses a trio of early-nineteenth-century cases dealing with the Bank of the United States that *do* concern themselves with jurisdictional questions¹⁴²: *Bank of the United States v. Deveaux*,¹⁴³ which dealt with the scope of federal question jurisdiction in dicta; and *Osborn v. Bank of the United States*¹⁴⁴ and *Bank of the United States v. Planters' Bank*,¹⁴⁵ which held that a provision in the Bank's charter giving it the power to sue in federal court also conferred jurisdiction on the lower federal courts to hear the suit. These cases are an important part of the federalism story, and LaCroix, again, deserves significant credit for bringing them to the fore. But a history of federalism in the early Republic that does not discuss—and whose theoretical framework

140. A Friend of the Constitution [John Marshall], Letter to the Editor, *Essay VII*, ALEXANDRIA GAZETTE & DAILY ADVERTISER, July 9, 1819, at 2, reprinted in DEFENSE, *supra* note 137, at 196, 199.

141. See Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson ed., New York, Bureau of Nat'l Literature, 1897).

142. Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction* 24-42 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 297, 2010), available at <http://ssrn.com/abstract=1558612>.

143. 9 U.S. (5 Cranch) 61 (1809).

144. 22 U.S. (9 Wheat.) 738 (1824).

145. 22 U.S. (9 Wheat.) 904 (1824).

cannot account for—the controversy over the constitutionality of the Bank itself is not a complete account by any means.

3. *The Kentucky and Virginia Resolutions*

And it is not just the Bank that is missing. Consider the Kentucky and Virginia Resolutions of 1798–99. The Sedition Act¹⁴⁶ had deviously left Republican critics of the Alien and Sedition Acts in something of a bind. Any attempt to criticize those laws in the normal venues—the press or public meetings, for example—would be liable to be interpreted as a seditious libel on Congress or the President.¹⁴⁷ That is to say, the Sedition Act was likely to make criticism of the Sedition Act a criminal offense. But there was one place where political speech was always free from outside interference: in the legislature.¹⁴⁸ Although the Constitution’s Speech or Debate Clause¹⁴⁹ applied only to the federal legislature, the long history of this legislative privilege in Anglo-American law made it highly unlikely that the federal government would attempt to prosecute state legislators for speaking, introducing legislation, or voting.¹⁵⁰

Thus in late 1798, the Republican-controlled legislatures of Kentucky and Virginia took up and passed resolutions that had been secretly authored by Jefferson and Madison, respectively.¹⁵¹ Madison’s Virginia Resolution began by announcing that the Constitution was a “compact to which the states are parties.”¹⁵² For that reason, the states had a special “duty to watch over and oppose every infraction of those principles which constitute the only basis of

146. Sedition Act, ch. 74, 1 Stat. 596 (1798).

147. *Id.* § 2. Note that the Sedition Act did *not* make it criminal to defame the *Vice* President—Thomas Jefferson.

148. See CHAFETZ, *supra* note 64, at 68–110 (tracing the legislative privilege of freedom of speech and debate through British and American history).

149. U.S. CONST. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place.”).

150. *Cf.* *Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951) (finding a common law privilege of state legislators akin to the privilege for members of Congress reflected in the Speech or Debate Clause).

151. For a detailed history of the Resolutions, see generally Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WM. & MARY Q. (3d ser.) 145 (1948).

152. James Madison, *Virginia Resolutions of 1798*, reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528, 528 (Jonathan Elliot ed., 1907) [hereinafter ELLIOT’S DEBATES].

[the] union.”¹⁵³ The Resolution then went on to “declare” the Alien and Sedition Acts unconstitutional, to “solemnly appeal to the like dispositions in the other states,” and to note its confidence “that the necessary and proper measures will be taken *by each* [state] for coöperating with this state, in maintaining unimpaired the authorities, rights, and liberties, reserved to the states respectively, or to the people.”¹⁵⁴ Similarly, Jefferson’s Kentucky Resolution insisted that, as the Constitution was a “compact among parties having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*”¹⁵⁵ The Resolution went on to announce the judgment of Kentucky that the Acts were “void, and of no force.”¹⁵⁶ But the mode of redress was modest: the Resolution merely called on Congress to repeal the Acts.¹⁵⁷

The Federalist-dominated legislatures of the Northern states responded angrily. Delaware declared simply that the Resolutions constituted an “unjustifiable interference with the general government,” one that was “of dangerous tendency.”¹⁵⁸ Massachusetts offered a more detailed rebuttal, insisting that the Constitution represented a national popular sovereign, not a compact between sovereign states,¹⁵⁹ and that a lack of respect for federal supremacy could lead to anarchy—or worse.¹⁶⁰ And a number of the Northern legislatures insisted that rendering judgment on the constitutionality of federal statutes was exclusively the province of the federal judiciary.¹⁶¹

153. *Id.*

154. *Id.* at 529.

155. Thomas Jefferson, *Kentucky Resolution of 1798*, reprinted in 4 ELLIOT’S DEBATES, *supra* note 152, at 540, 540.

156. *Id.*

157. *Id.* at 542; *see also* Koch & Ammon, *supra* note 151, at 158 (noting that the “steps proposed” in the Kentucky Resolution “were extremely temperate”); Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 CONST. COMMENT. 315, 321-23 (1994) (noting that the Kentucky Resolution of 1798 did not advocate nullification).

158. *Answer of the State of Delaware*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 532, 532.

159. *Answer of the Commonwealth of Massachusetts*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 533, 534 (insisting that the legislature “cannot admit the right of the state legislatures to denounce the administration of that government to which the people themselves, by a solemn compact, have exclusively committed their national concerns”).

160. *Id.*

161. *See id.* at 534; *Answer of the State of New Hampshire*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 538, 539; *Answer of the State of New York*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 537, 537-38; *Answer of the State of Rhode Island and Providence Plantations*, in 4 ELLIOT’S DEBATES, *supra*

Both Jefferson and Madison responded to the Northern legislatures. In November 1799, the Kentucky legislature passed a second Resolution, with more heated rhetoric than the first. Insisting that the principle that “the general government is the exclusive judge of the extent of the powers delegated to it, stop[s] not short of *despotism*,”¹⁶² this Resolution went on to insist that “a nullification, by those sovereignties [i.e., the states], of all unauthorized acts done under color of that instrument, is the rightful remedy.”¹⁶³ As Wayne Moore has noted, however, it is unclear “whether the Kentucky legislators were claiming in 1799 that they had authority to nullify the Alien and Sedition Acts unilaterally or whether the legislators presupposed only that the states collectively had such authority.”¹⁶⁴ Indeed, the 1799 Resolution closes on a more measured note:

[A]lthough this commonwealth, as a party to the federal compact, will bow to the laws of the Union, yet it does, at the same time, declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter soever offered, to violate that compact: And finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future violations of the federal compact, this commonwealth does now enter against them its solemn PROTEST.¹⁶⁵

Madison penned a longer rejoinder to the Northern states, which the Virginia House of Delegates issued as a Report in early 1800.¹⁶⁶ This Report explained in detail why, on the view that the Constitution was a compact between sovereign states, those states had the authority to declare an act of Congress unconstitutional:

[W]here resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges, in the

note 152, at 533, 533; *Answer of the State of Vermont*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 539, 539.

162. Thomas Jefferson, *Kentucky Resolution of 1799*, reprinted in 4 ELLIOT’S DEBATES, *supra* note 152, at 544, 545.

163. *Id.*

164. Moore, *supra* note 157, at 331.

165. Jefferson, *supra* note 162, at 545.

166. James Madison, *Report on the Virginia Resolutions*, in 4 ELLIOT’S DEBATES, *supra* note 152, at 546.

last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. . . . The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal, above their authority, to decide, in the last resort, whether the compact made by them be violated; and consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.¹⁶⁷

As for the claim that this was a wholly judicial matter, Madison had three responses. First, “there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the judicial department.”¹⁶⁸ Surely, the mere fact of a political question should not insulate the federal government from any constitutional inquiry. Second, “the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution.”¹⁶⁹ And third, and most importantly, he insisted that the Resolutions “are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection.”¹⁷⁰ This opinion-expressing function was particularly appropriate for the state legislatures. As Madison noted, during the ratification debates, Anti-Federalists who worried about the power of the federal government had their attention directed “to the intermediate existence of the state governments between the people and that government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public.”¹⁷¹

Madison’s argument thus blends a theory of the Constitution as a compact among sovereign states, with an invocation of legislatures as a specially privileged site of robust political speech, with an argument (echoing Publius¹⁷²) about the role of the federal and state governments in checking one another. Importantly, again, this was a discourse centrally organized around ideas of sovereignty and legislative power. Although some of the Northern states responded with jurisdictional arguments, asserting that only federal courts

167. *Id.* at 548.

168. *Id.* at 549.

169. *Id.*

170. *Id.* at 578.

171. *Id.* at 579.

172. See *supra* notes 41-44 and accompanying text.

could judge the constitutionality of federal laws, those arguments did not prevent the ultimate success of the Resolutions' authors—success, that is, in the *political* arena.

Talk of “nullification” in the context of the Resolutions is, in fact, somewhat misleading. Unlike, say, a president’s refusal to enforce a law that he believes to be unconstitutional, it is unclear what actual effect state “nullification” of a federal criminal statute would have. As Amar notes, “[d]espite some grand and ambiguous claims in the resolutions themselves, these enactments had no *legal* force.”¹⁷³ But they did indeed serve their intended purpose as a public rallying point. They were “an integral part of the Republican national campaign” in 1800,¹⁷⁴ a campaign that the Republicans won decisively.¹⁷⁵ The new, Republican-dominated Congress allowed the Alien and Sedition Acts to lapse, and President Jefferson pardoned those who had been convicted under the Sedition Act and reimbursed the fines that they had paid.¹⁷⁶

Ultimately, the debate over the Kentucky and Virginia Resolutions was a debate over the ability and authority of the states to serve as loci of protest against unconstitutional and oppressive federal laws. The political branches of the states, serving as a competing power source to the federal political branches, organized opposition using the rhetoric of sovereignty. And despite the attempts of some other states to turn the discussion toward jurisdiction, it was the political discussion that ultimately proved effective, resulting in the Republican Revolution of 1800.¹⁷⁷

* * *

In short, LaCroix’s detailed and convincing study of the development of an ideology of governmental multiplicity in the years between 1765 and 1787 leads

173. Amar, *supra* note 43, at 1502.

174. Koch & Ammon, *supra* note 151, at 170; *see also id.* at 176 (noting that the Resolutions “served as efficient rallying devices for Republicans from Vermont to Georgia”).

175. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 934 (1985) (“[T]he Resolutions were triumphantly vindicated, at least in Republican eyes, by the results of the election of 1800, in which the Republicans seized control of both Congress and the Presidency from the Federalists.”).

176. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 273 (1997).

177. *See* Powell, *supra* note 175, at 934 (“The victors viewed the ‘revolution of 1800’ as the people’s endorsement of the approach to constitutional interpretation embodied in the ‘doctrines of ’98.’” (footnote omitted)).

her to an unfortunate institutional monism in the years 1787 to 1801. I certainly do not mean to suggest that jurisdictional controversies were not important—LaCroix’s discussions of the Supremacy Clause and the 1789 and 1801 Judiciary Acts make it amply clear that they were. But in focusing so intently on those controversies, LaCroix has written a book about federalism that neglects to discuss, *inter alia*, the composition of the Senate, the controversy over the federal bank, and the Kentucky and Virginia Resolutions. These examples should suffice to show that the story of federalism in the Constitution and the early Republic is simply not reducible to the story of federal jurisdiction.

III. BRINGING MULTIPLICITY INTO THE SEPARATION OF POWERS

This institutional monism is especially unfortunate precisely because LaCroix’s analysis of multiplicity in the federalism context is so powerful. Indeed, the concept of multiplicity provides a useful set of tools for analysis in other institutional contexts, especially the study of the separation of powers. This Part will begin to sketch what a truly multiplicity-based theory of the separation of powers would look like—a theory that, like LaCroix’s compelling view of the federal idea in the years 1765 to 1787, focuses on “divid[ing constitutional] authority among multiple jurisdictions.”¹⁷⁸ This “belief in multiplicity, in overlap and concurrence”¹⁷⁹—and also in the necessarily accompanying tension and conflict—is “not a defect to be lamented but a virtue to be celebrated.”¹⁸⁰ The discussion that follows is meant to be both descriptive and normative. That is, it is meant to show both that multiplicity *is* a crucial element of our constitutional separation of powers and that it *ought* to be so.

Before entering into that discussion, however, I should essay a brief definition of multiplicity in the separation-of-powers context—a definition that will necessarily be fleshed out and elaborated upon in the discussion that follows. By multiplicity, I mean not simply the now-familiar observation that all three branches of the federal government engage in constitutional decisionmaking. Multiplicity entails this, but it goes further. My argument here is that there is (sometimes) affirmative value in promoting the means for interbranch tension and conflict¹⁸¹ without any sort of superior body that can

178. LACROIX, *supra* note 2, at 108.

179. *Id.* at 6.

180. *Id.*

181. And perhaps intrabranched conflict, as well. Gerard Magliocca has recently pointed out that each house of Congress has a number of pressure points that it can use to try to get the other house to change the way it does business. See Gerard N. Magliocca, *Reforming the Filibuster*,

articulate a global, principled, final, and binding decision on the matter.¹⁸² That is, I mean to assert that the Constitution in many cases leaves not simply the resolution of substantive issues, but also the resolution of the meta-question as to the proper site of resolution for those issues, to constitutional politics.¹⁸³

This Part will first discuss three examples of such conflicts; it will then draw some conclusions from them.

A. Three Cases of Separation-of-Powers Multiplicity

1. Jefferson's Summary View

The first example is one that LaCroix herself discusses in some detail.¹⁸⁴ In 1774, Thomas Jefferson drew up a set of resolutions intended to instruct the Virginia delegates to the Continental Congress in preparing an address to George III. The resolutions were soon published—Jefferson claimed without his knowledge—as *A Summary View of the Rights of British America*.¹⁸⁵ The *Summary View* sought to lay before the King Parliament's "many unwarrantable incroachments and usurpations" against the colonies.¹⁸⁶

105 NW. U. L. REV. (forthcoming 2011) (manuscript at Part III), available at <http://ssrn.com/abstract=1564747>.

182. My argument is thus one that Sandy Levinson, in his helpful taxonomy, would characterize as institutionally protestant. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 44 (1988) ("A 'protestant' Constitution is a deinstitutionalized, or at least, given the ubiquity of our life within institutional contexts, nonhierarchical, Constitution.").

183. In this regard, my claim is similar to Eric Posner and Adrian Vermeule's argument that the Constitution sometimes fosters the conditions for separation-of-powers "showdowns." See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1004 (2008) (noting that showdowns require more than an interbranch disagreement about policy; they require "a disagreement about authority"). Posner and Vermeule argue that the principal virtue of such showdowns is that they set precedents that "clarif[y] constitutional authority, reducing decision costs for the government and public in the future." *Id.* at 1010. They are undoubtedly correct that such conflicts produce precedents that are useful in guiding our thinking in future conflicts, but I aim to emphasize here that it is precisely the *unsettling* nature of such conflicts—which Posner and Vermeule view entirely as a cost—that can actually be a source of some of their most significant benefits.

184. See LACROIX, *supra* note 2, at 113-20.

185. See *id.* at 113-14 (discussing the history of the pamphlet); see also THOMAS JEFFERSON, DRAFT OF INSTRUCTIONS TO THE VIRGINIA DELEGATES IN THE CONTINENTAL CONGRESS (July 1774), in 1 JEFFERSON PAPERS, *supra* note 110, at 121, 135 n. (same).

186. JEFFERSON, *supra* note 185, at 121.

Although the entirety of Jefferson's argument warrants careful attention—and LaCroix's close and interesting reading highlights its place in the development of the federal idea¹⁸⁷—what is most noteworthy for present purposes is the remedy that Jefferson seeks:

By the constitution of Great Britain as well as of the several American states, his majesty possesses the power of refusing to pass into a law any bill which has already passed the other two branches of legislature. His majesty however and his ancestors, conscious of the impropriety of opposing their single opinion to the united wisdom of two houses of parliament, while their proceedings were unbiassed [sic] by interested principles, for several ages past have modestly declined the exercise of this power in that part of his empire called Great Britain It is now . . . the great office of his majesty to resume the exercise of his negative power, and to prevent the passage of laws by any one legislature of the empire which might bear injuriously on the rights and interests of another.¹⁸⁸

This is a remarkable passage—and not simply because it referred casually to “the several American *states*” in 1774. Jefferson here insists that the King ought to withhold royal assent to bills passed by Parliament that would infringe on the colonies' rights of self-governance. True, the constitutional principle of parliamentary supremacy normally requires that the Crown assent to any act passed by both houses of Parliament, but, Jefferson argues, that principle is inapplicable where parliamentary legislation is aimed at those unrepresented in Parliament.

This was truly a radical proposal. The royal veto had not been exercised (and, indeed, to this day has not been exercised) since Queen Anne vetoed the Scottish Militia Bill in 1708¹⁸⁹—or, to put it more starkly, no Hanoverian

187. See LACROIX, *supra* note 2, at 113–20.

188. JEFFERSON, *supra* note 185, at 129.

189. 18 H.L. JOUR. 506 (Mar. 11, 1708); see also F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 423 (H.A.L. Fisher ed., 1908) (mentioning Anne's refusal of royal assent to the Scottish Militia Bill). As William Everett noted, Anne's veto was tied up in the continuing fallout from the Glorious Revolution and the Act of Union:

[T]he sudden outbreak of Jacobite insurrection, supported from France and directed to Scotland, would naturally create a dread of establishing a militia in that part of the island, still chafing under the unpopular Act of Union, and with many of its Lords Lieutenants, who would be commanders of the militia, notoriously disaffected.

William Everett, *The Last Royal Veto*, 5 PROC. MASS. HIST. SOC'Y (2d ser.) 156, 159 (1889).

monarch had *ever* exercised the royal veto. The reason is not difficult to discern: the royal veto sat increasingly uncomfortably with the principle of parliamentary sovereignty, which was the chief element of the Revolution Settlement,¹⁹⁰ and with the growth of responsible cabinet government in the first half of the eighteenth century.¹⁹¹ Under a customary constitution like the British,¹⁹² desuetude is an essential constitutional principle: powers that are no longer exercised—especially powers that are no longer exercised because they have ceased to fit with the overall constitutional structure—at some point cease to exist. This can be seen quite clearly with the veto. At some point after Anne’s reign, “the crown . . . lost all discretion in the matter of accepting or rejecting bills that have passed the two houses.”¹⁹³ It is, of course, impossible to date precisely when the royal veto withered away—although Bagehot’s insistence in 1867 that “The Queen [no longer has any] such veto. She must sign her own death-warrant if the two Houses unanimously send it up to her”¹⁹⁴ suggests that it was long gone by then. But it is at least quite clear that any exercise of the veto in the 1770s would have created a substantial uproar and been met with strenuous parliamentary resistance.

Jefferson, then, was urging the Crown to stake out a highly contestable position on its own authority—to pick a fight with Parliament in an institutional context in which it was clear that there was no third party to arbitrate between them. Jefferson, that is, was urging institutional multiplicity in the service of the federal idea. Just as Hamilton and Madison would later suggest that federal multiplicity could guarantee individual rights,¹⁹⁵ here the young Jefferson was insisting that institutional multiplicity could serve as a guarantor of collective political rights. Jefferson, in short, was attempting to promote institutional conflict—conflict that could only be resolved on the field of constitutional politics, not by reference to some supervening authority—as a means of achieving better government.

190. See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1117-19 (2009) (describing the Revolution Settlement).

191. See MARY TAYLOR BLAUVELT, *THE DEVELOPMENT OF CABINET GOVERNMENT IN ENGLAND* 103-05, 139 (1902) (noting the gradual rise of cabinet government under Anne and the first two Hanoverian Monarchs).

192. See CHAFETZ, *supra* note 64, at 1 (“The British Constitution cannot be distinguished from institutional interpretations of it: the actual, current structure of institutions is constitutive of the Constitution itself.”).

193. A.F. POLLARD, *THE EVOLUTION OF PARLIAMENT* 275 (2d ed. 1964).

194. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 53 (Miles Taylor ed., Oxford World’s Classics 2001) (1867).

195. See *supra* notes 41-44, 73 and accompanying text.

In doing so, Jefferson was calling on a long line of conflicts between Crown and Parliament. Disputes over parliamentary privilege had always played out in the arena of constitutional politics,¹⁹⁶ and both Parliament's insistence on its privileges and its refusal to invoke the aid of outside parties in defense of its privileges were central to the growth of its power in the Tudor and Stuart periods.¹⁹⁷ Indeed, as I have argued elsewhere, the English Civil War can be seen as a dispute over the respective scopes of royal prerogative and parliamentary privilege, played out in political, constitutional, and military battles¹⁹⁸—and decidedly not in the courtroom.¹⁹⁹ Moreover, there can be no doubt that the American Founding generation both knew and approved of the parliamentary actions precipitating these constitutional conflicts.²⁰⁰

2. *Senate Confirmation of Judges*

This sort of interbranch conflict is not limited to the interstices of an unwritten constitution like the British. The American Constitution, too, contemplates—indeed, promotes—such conflicts without any “ultimate arbiter” standing above the conflicting parties.²⁰¹ Nor is the value of institutional multiplicity limited to interventions in support of federal multiplicity. Institutional multiplicity is both present and valuable in “pure” separation-of-powers conflicts, as well. Consider, for example, the Senate

196. See CHAFETZ, *supra* note 64, at 27-48 (discussing the history of the relationship between *lex parliamenti* and *lex terrae* and noting that the former has always had some autonomy from the latter).

197. See *id.* at 69-74 (discussing Parliament's clashes with the Crown over the privilege of freedom of speech); *id.* at 116-22 (discussing Parliament's insistence on using its own authority to vindicate its freedom against civil arrest); *id.* at 145-51 (discussing Parliament's insistence on judging the elections and qualifications of its own members); Chafetz, *supra* note 190, at 1095-1119 (discussing Parliament's use of its contempt powers against Crown officials); Chafetz, *supra* note 49, at 186-95 (discussing Parliament's insistence on being the only institution that could excuse its members from service).

198. See Chafetz, *supra* note 190, at 1100-16, 1147.

199. The trial of Charles I after the end of the War was merely the façade of judicial procedure, masking what was, ultimately, a revolutionary act. See Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 385-88 (2010).

200. See *id.* at 367-69, 385; see also JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 189-207* (1994) (discussing the extent to which colonial legislatures modeled their behavior toward royal governors on parliamentary opposition to the Stuart Crown).

201. On the history of the courts' use of the phrase “ultimate arbiter” to refer to their own constitutional role, see Chafetz, *supra* note 190, at 1153-54.

confirmation process for judicial nominees.²⁰² In recent years, a vigorous debate has arisen between those who think that the Senate's primary inquiry should focus on a nominee's qualifications (for example, education, employment history, integrity, writing skill, and so on) and those who think that an inquiry into a nominee's ideology (including perhaps both general judicial philosophy and thoughts on the proper resolution of certain concrete issues) is appropriate, as well.

Stephen Carter, a proponent of the "qualifications only" position, has insisted that "trying to get [a nominee] to tell the nation how he would vote on controversial cases if confirmed might pose a greater long-run danger to the Republic than confirming him and letting him do what we assumed he would."²⁰³ Likewise, Senator Leahy has recently scoffed:

Not so long ago, Republican[] Senators contended that a nominee's judicial philosophy was irrelevant. All that should matter, they claimed, was that the nominee was qualified, had gone to elite schools, and had good character. . . . Now they apparently want to examine something else, which they will call her "judicial philosophy" or "independence" What they really want is assurance that she will rule the way they want so that they will get the end results they want in cases before the Supreme Court.²⁰⁴

Leahy went on to insist that "I do not always agree with Justice O'Connor, nor with Justice Souter. I have my disagreements with some of Justice Kennedy's decisions. But I have never regretted my vote in favor of their confirmation, because I respect their independence."²⁰⁵ The implication is clear: respect for judicial independence—here treated as a paramount value—requires that senators do not consider (or at least do not ask) how judicial nominees would

202. For ease of presentation, I limit my discussion here to judicial nominees. The same analysis could be applied, however, to the Senate confirmation process for other nominees—both those in the executive branch and those in "quasi-judicial and quasi-legislative" independent agencies. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935). Although different senators may find different levels of scrutiny appropriate depending on the office to which the nominee is nominated, the exercise of line-drawing remains fundamentally one of constitutional politics.

203. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS*, at x (1994).

204. 156 CONG. REC. S4611 (daily ed. June 7, 2010) (statement of Sen. Leahy).

205. *Id.*

approach specific legal controversies.²⁰⁶ And this view is not limited to the halls of Congress and academia—newspaper editorials, too, frequently express the belief that senators should not inquire into the judicial philosophy of nominees.²⁰⁷

On the other side of the debate are those who, like Senator Schumer, insist that “[i]deology matters, judicial philosophy matters, and questions about them are not only appropriate, but obligatory.”²⁰⁸ Schumer’s view, too, has a substantial amount of support in the legal academy. In Charles Black’s words,

a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee’s views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court²⁰⁹

And Elena Kagan has insisted that Senate confirmation “ought to focus on substantive issues”—that is, it ought to focus on “what the nominee believes the Court should do and how she would affect its conduct.”²¹⁰ Kagan therefore recommends probing inquiry into both abstract questions of judicial philosophy and concrete questions of specific constitutional issues.²¹¹ In this regard, she views the Bork hearings as a model to be emulated, rather than a

206. This principle is, however, frequently tempered by the caveat that the nominee’s approach must be within the “mainstream” of legal thought. *See, e.g.*, 156 CONG. REC. S4592 (daily ed. June 7, 2010) (statement of Sen. Specter) (noting that he had voted to confirm every Supreme Court nominee during his tenure in the Senate except for Robert Bork, whose “testimony placed him well outside the judicial mainstream”).

207. *See, e.g.*, Editorial, *Please, No Spectacle: Kagan May Be Fourth Straight Qualified-Yet-Demonized Nominee*, SAN DIEGO UNION-TRIB., May 11, 2010, at B5 (“[P]residents deserve[] deference to their high court nominees so long as they [are] scandal-free and well-qualified.”).

208. Senator Charles Schumer, *Questioning Judicial Nominees: A Duty Not a Privilege*, Speech to the Center for American Progress and the American Constitution Society (July 14, 2005), available at http://schumer.senate.gov/new_website/record.cfm?id=260657; *see also* Charles E. Schumer, Op-Ed., *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (“It would be best for the Senate, the president’s nominees and the country if we return to a more open and rational debate about ideology when we consider nominees.”).

209. Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 657 (1970).

210. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 935 (1995).

211. *Id.* at 935-36.

cautionary tale to be avoided.²¹² (Or, at least, she regarded them as such until it was her turn to face the Senate Judiciary Committee.²¹³)

My point here is not to take a side in this debate. Rather, my point is that this debate plays out—and will continue to play out—in the context of constitutional politics. The debate over how probing the Senate should be in questioning nominees does not call for a global final principled resolution; rather, it calls for specific local resolutions in the context of particular local controversies. A hard-and-fast rule about questioning nominees is neither desirable nor feasible. Crucial to this argument is the seemingly obvious point that, although “[c]onfirmation politics . . . differs from normal politics in significant ways, . . . it is still politics.”²¹⁴ And as with all political issues, the extent to which one actor has to take into account the demands of other political actors depends on the relative strength of the actors. Of course, the Constitution sets the ground rules that constrain and condition political strength—so long as the Constitution stands, no President can be so strong as to appoint Article III judges without the consent of the Senate, nor can the Senate appoint Article III judges without the President.²¹⁵ But the question of how deferential the Senate will be to a particular nominee is largely shaped by the same factors that determine how deferential it will be toward a President’s desired legislative program.²¹⁶

And this is as it should be. A President’s strength in the nominations context is shaped by factors like whether his party also controls the Senate

212. *Id.* at 940-41.

213. See Charlie Savage & Sheryl Gay Stolberg, *Kagan Follows Precedent by Offering Few Opinions*, N.Y. TIMES, June 30, 2010, at A1 (“Ms. Kagan’s responses, during a long and sometimes tense day of parrying with members of the Senate Judiciary Committee, were similar to those of Supreme Court nominees past. But unlike her predecessors, Ms. Kagan wrote a 1995 article calling for judicial nominees to be more forthcoming. On Tuesday, minutes into her testimony, she backpedaled . . .”); see also Dion Farganis & Justin Wedeking, *Kagan’s Candor: Updated Findings from the Recent Supreme Court Confirmation Hearings* (July 6, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1635240> (finding that Kagan responded in a forthcoming manner to roughly the same percentage of questions as other recent Supreme Court nominees).

214. GEORGE WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 21 (1995).

215. See U.S. CONST. art. II, § 2, cl. 2 (The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other [principal] Officers of the United States, whose Appointments are not herein otherwise provided for . . .”).

216. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1208 (1988) (“The Senate’s actual role in the confirmation process depended upon the shifting balance of political power between Congress and the President.”).

(and, if so, by how large a margin), how popular the President is with the electorate, and how popular he is with the members of his own party in the Senate.²¹⁷ These factors help to ensure democratic accountability. A President who has lost the confidence of the public or of members of his own party in Congress cannot count on deference to his choices. On the other hand, a President who enjoys broad public and congressional support can plausibly claim a democratic mandate for deference to his appointments.

And, of course, the process is not static. Political strength can be increased or diminished in the appointments process itself. A weak President can bolster his political standing with a widely respected and easily confirmable pick.²¹⁸ A weak opposition in the Senate (and among allied interest groups) can use the period before Senate hearings, as well as the hearings and floor debates themselves, to try to convince the public that the nominee should be rejected,²¹⁹ thereby—if successful—making the political setting less favorable for the President. Such a clash has the potential to be a “cathartic conflict”—that is, a conflict that “will require [the nation’s] citizens to consider some of the first principles of the republic’s governing order.”²²⁰

3. *Contempt of Congress by Executive Branch Officials*

Consider next the situation in which an administration official, asserting executive privilege, refuses to comply with a subpoena duly issued by a congressional committee. Congress clearly has the authority to issue subpoenas in the furtherance of its legislative duties.²²¹ Likewise, some amount of internal executive branch secrecy is justified by separation-of-powers concerns.²²²

217. See WATSON & STOOKEY, *supra* note 214, at 41; see also LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 108 (2005) (noting that higher presidential approval ratings tend to translate into easier confirmation for the President’s nominees).

218. See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1155 (1988) (suggesting, perhaps somewhat hyperbolically, that “one of the most politically advantageous decisions that a weakened President can take is to appoint to the Supreme Court a universally respected jurist”).

219. See Kagan, *supra* note 210, at 940 (noting that the Bork hearings “captivated and involved” the citizenry in substantive constitutional discourse).

220. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 637 (1993); see also *id.* at 658–59 (elaborating on this cathartic conflict).

221. See Chafetz, *supra* note 190, at 1143–46.

222. See Akhil Reed Amar, *Nixon’s Shadow*, 83 MINN. L. REV. 1405, 1410 (1999) (“As a matter of separation of powers, each branch must have some internal space—a separate house, if you

What is to be done when these constitutional principles collide? One answer—and it is the answer given in recent years by, unsurprisingly, the courts—is that the judges should decide.²²³ But this is a recent development²²⁴—and an unwarranted one. As I have argued elsewhere, judges are often ill equipped to understand the needs and procedures of the other branches; they are inclined to view the needs of the judiciary as more pressing than those of the other branches; and they are generally incapable of moving quickly enough to satisfy Congress’s need for timely information.²²⁵ More distressing, however, is the anti-republican character of such judicial interventions. By asserting a privileged status for the judiciary as the keeper of the Constitution, they implicitly denigrate the political branches’ capacity for principled judgment and constitutional deliberation.²²⁶

Another, older way of dealing with such conflicts is to let them play out in the field of constitutional politics. Both the executive branch and Congress have a number of weapons at their disposal, ranging in intensity from minor annoyances to major confrontations.²²⁷ The outcome of such struggles might—perhaps—be less certain than the outcome of struggles submitted to the judiciary, but, as one judge has noted, “[t]here are worse things than unpredictability”²²⁸ Political resolution of such conflicts might well depend on the relative strength of the branches, the party affiliations of the houses and of the President, and the relative strength of their preferences on the issue. The issue would be settled locally—that is, with reference to the particular circumstances surrounding the controversy and its broader political context—rather than globally, with a grand statement about the proper institutional arrangement at all times and under all circumstances. In this regard, it would mirror Hamilton’s insistence that some degree of

will—to ponder its delicate business free from the intermeddling of other branches. Senators must be free to talk candidly and confidentially amongst themselves and with staff in cloakrooms; judges must enjoy comparable freedom in superconfidential judicial conferences, and in conversations with law clerks; jurors in the jury room ordinarily deliberate together with absolute secrecy to promote candor; and the same basic principle holds true for the Presidency and the Oval Office.”).

223. See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff’d*, 498 F.2d 725 (D.C. Cir. 1974).

224. See Chafetz, *supra* note 190, at 1146-47 (noting that the resolution of such cases by the judiciary was a late-twentieth-century innovation).

225. See *id.* at 1149-50.

226. See *id.* at 1150-51, 1155.

227. See *id.* at 1152-53.

228. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 28 (1997).

indeterminacy in the federal balance conduces to good government.²²⁹ The contending institutions would be forced, as part of their project of winning the political battle, to make public, principled, constitutional arguments. There is a great deal of republican virtue in such an arrangement.²³⁰

B. Toward a Theory of Separation-of-Powers Multiplicity

I have discussed above three seemingly divergent cases: Thomas Jefferson urging George III to resume use of the royal veto, the process of Senate confirmation for judicial nominees, and contempt of Congress by executive branch officials. What links the three together is that each involves the creation of (or the attempt to create) space for conflict between branches of government without an overarching adjudicator to resolve the conflict. That is to say, each deals with multiplicity in the separation of powers.

Separation-of-powers multiplicity, to be sure, has important differences with federalism multiplicity. Most obviously, there is no separation-of-powers Supremacy Clause. Of course, the Supremacy Clause itself privileges “Laws” and “Treaties”—so long as they are constitutional—over other types of government action.²³¹ But many actions by the branches occur in the absence of governing statutes or treaties—that is, they occur in Justice Jackson’s twilight zone, in which “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”²³² The executive decision whether or not to veto, the Senate’s decision whether or not to confirm a nominee, and the adjudication of a claim of executive privilege in response to a congressional subpoena all fall within this category. That is to say, while separation of powers, like federalism,²³³ divides power along subject-specific lines, it also—again, like federalism²³⁴—ensures

229. See *supra* notes 41-45 and accompanying text.

230. See Chafetz, *supra* note 190, at 1150-51; Chafetz, *supra* note 49, at 182-83, 224-36.

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

232. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

233. See LACROIX, *supra* note 2, at 35.

234. See *supra* Section II.B. Part of where LaCroix and I differ is that she sees our constitutional structure as one in which a single institutional actor—the judiciary—is responsible for maintaining clear lines between which subject matters are reserved to the federal government and which are reserved to the states. As I endeavored to demonstrate in Section II.B, our constitutional structure in fact uses separation-of-powers multiplicity in the service of federalism multiplicity. And, as I have endeavored to demonstrate in Section III.A, multiplicity is in fact characteristic of our constitutional separation of powers as a whole.

that those lines are fuzzy, overlapping, and insufficient to determine in advance which institutional actor will have decisionmaking authority in many particular cases.²³⁵

This conception of multiplicity has at least three virtues. First, it allows separation-of-powers conflicts to mirror constituency conflicts in a healthy, polyarchic society.²³⁶ The Constitution structures political institutions so as to ensure that each has a different constituency. The House is, of course, closest to the people in both numerical and temporal terms. Not only do House members have the smallest constituencies,²³⁷ but they also face the voters at the most regular intervals. House members thus represent the (relatively) immediate concerns of a (relatively) small number of people. A small but geographically concentrated group can generally be assured of at least the attention, if not the wholehearted fealty, of its representative. The larger constituencies of senators²³⁸ mean that they are less likely to be responsive to the concerns of relatively small interest groups. Moreover, their longer terms mean that senators can be less responsive to immediate concerns, and the Senate's staggered terms mean that, even as a third of the body approaches reelection, their colleagues are still two or four years from facing the voters. The President represents a national constituency (as refracted by the odd prism of the electoral college), and the lifetime tenure and salary security of federal

Part of my critique of LaCroix is thus that she does not follow the logic of multiplicity far enough.

235. Of course, there are also many cases in which the Constitution *does* specify the relevant institutional site of decisionmaking authority. No one doubts, for example, that only the House can impeach and only the Senate can try impeachments. See U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6. Nor do I dispute the principle of judgment finality for cases of which courts properly have cognizance. See generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (arguing for a principle of judgment finality). My argument here is simply that there is a wide range of separation-of-powers controversies—like those discussed in Section III.A—for which the Constitution does not clearly allocate decisionmaking authority but rather provides the political framework within which the branches can fight it out among themselves. Further, my argument is that, for the reasons to be discussed in this Section, this is a good thing and that we should resist the urge (which most often takes the form of bringing the courts in) to look for some hierarchically superior decisionmaker to impose a global, principled, and final solution that would preempt such interbranch fights.
236. On the concept of polyarchy, see generally ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 63-89 (1956).
237. Or, in the case of Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming, the same size constituency as those states' senators.
238. Again, with the caveat mentioned in note 237, *supra*.

judges are designed to ensure that they have no particular constituency to please²³⁹—provided that they maintain good behavior.

The point of this one-paragraph civics review is simple. In Bruce Ackerman's words, the Constitution "proliferat[es] the modes of representation governing normal politics"²⁴⁰ because "no legal form can transubstantiate any political institution of normal politics into We the People of the United States."²⁴¹ Representing a diverse polity requires diverse modes of representation. But diversity is not static. Allowing for the boundaries between branches to be renegotiated as a matter of constitutional politics helps to ensure that the dynamism of the represented interests is matched by dynamism in the forms of representation.²⁴² So, for example, when a President

239. *But cf.* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (arguing that the Supreme Court is quite responsive to public opinion).

240. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1028 (1984).

241. *Id.* at 1026.

242. It is precisely this dynamism that allows us to integrate the rise of political parties into the Constitution's separation-of-powers scheme. The virtue of the separation of powers is not that the branches are always, necessarily in conflict. *Contra* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2312, 2316-21 (2006) (suggesting that the Madisonian conception of the separation of powers relies on constant conflict between the branches and that this conception was "eclipsed almost from the outset" by the rise of political parties). Rather, its virtue is that it creates *opportunities* within the governing structure for the representation of different interests, thus allowing for the *possibility* of conflict. Precisely because of the structure of the branches created by our system of separated powers, the existence of a unified government (that is, the House, Senate, and Presidency (and perhaps the courts, as well) all controlled by the same political party) tells us something about the American people: it tells us that we have a temporally extended, significant preference for one party over the other. In such a situation, it makes good democratic sense that there would exist fewer checks on the implementation of that party's governing agenda. This is not a case of the rise of parties defeating the "Madisonian model of inherently competitive branches checking and balancing one another." *Id.* at 2329. Rather, this is a case of political parties and the separation of powers working hand-in-hand to ensure the best overall fit between the interests of the represented and the structure of representation.

It is, for example, this failure to treat the issue of unified versus divided government as a *dependent* variable that leads Levinson and Pildes to assert that Westminster-style minority opposition rights are desirable, because "the structural position of the minority party under unified American government is more closely analogous to that of minority parties shut out of parliamentary governments than observers have recognized." *Id.* at 2368-69. But—the 2010 election notwithstanding—unified government is very much the norm at Westminster. If, on election day, Labour receives a plurality of the votes in a majority of the constituencies, then it controls the entirety of the government. Unified party government in America is much harder to achieve: it requires not only a majority of seats in the House (the

has become very unpopular, the houses of Congress might well feel more free to contest claims of executive privilege²⁴³ or to show less deference to his nominees.²⁴⁴ More rigid dividing lines—rules, for example, about the appropriate level of deference to nominees or to assertions of privilege—would not be able to take into account a widespread sense that a certain constitutional actor was performing poorly—or admirably—in its duties. By keeping the boundaries uncertain, then, separation-of-powers multiplicity allows for a certain level of interbranch conflict, which, in turn, makes the system as a whole more representative:

[T]he separation of powers operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that *he* speaks with the authentic accents of the People themselves, representatives in other institutions will typically find it in their interest

requirements of which are similar to those of putting together a Westminster majority) but also a majority in the Senate (where only a third of the seats are up for election every two years) and the presidency (which comes up only every four years). Moreover, Americans with a preference for divided government can always split their ballot; this is impossible in the United Kingdom, where a vote for your M.P. is also a vote for your P.M. The greater difficulty of unified government in the United States also means that its presence at some times tells us more about the relevant *independent* variable: the preferences of the American people.

If government is divided, then our separation-of-powers structure provides institutional homes for the two parties. If government is unified, then it is because one party is more appealing than the other, generally across several election cycles and across different crosscutting constituencies. In that case, it is democratically desirable to have fewer checks on that party's ability to enact its own agenda. (I should note that Westminster-style opposition rights may well be desirable—but, if they are, it is not because unified American government is structurally similar to Westminster.)

243. Consider, for example, the battle over subpoenas to Harriet Miers and Joshua Bolten in 2007-08. See Chafetz, *supra* note 190, at 1086-93.
244. Again, the example of Harriet Miers is illustrative. See generally JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 263-84 (2007) (describing the conflict over Harriet Miers's eventually withdrawn Supreme Court nomination in 2005). Note that the Miers nomination is something of a counterexample for Levinson & Pildes, *supra* note 242. Republicans controlled the Senate by a comfortable margin at the time. President Bush was, however, wildly unpopular. See *President Bush—Overall Job Rating*, POLLINGREPORT.COM, <http://www.pollingreport.com/BushJob.htm> (last visited Sept. 5, 2010) (showing that during October 2005—the month in which Miers was both nominated and withdrawn from consideration—President Bush's job approval rating was between 35% and 42% in every national poll).

to deny that their rivals have indeed represented the People in a fully satisfactory way.²⁴⁵

This conflict can help ensure that the constitutional system as a whole is more representative than any one of its parts.

Just as separation-of-powers multiplicity helps to promote representativeness, so too it helps to prevent tyranny. The point here mirrors that made by Hamilton and Madison in the federalism context.²⁴⁶ By leaving the balance of powers somewhat indeterminate and open to negotiation, multiplicity promotes the ability of the people to choose their champion and thereby encourages the branches to compete for their affections.²⁴⁷ Thus, “[a]mbition . . . [is] made to counteract ambition” in the service of freedom.²⁴⁸ Again, it must be noted that the performance of this tyranny-prevention function requires some room for friction and jealousy among the branches.²⁴⁹ And for that friction and jealousy to be effective, the extent of each branch’s powers must be at least somewhat indeterminate—otherwise, it is hard to see what legitimate role popular support for one branch over another would play.

These first two virtues of separation-of-powers multiplicity both assume somewhat static conceptions of the public interest and the interests of the branches. The third virtue, however, recognizes that these interests are not static and, in fact, are partially worked out in the process of interbranch conflict. Multiplicity helps promote deliberation as to these interests. As Mariah Zeisberg has noted, the fact that “the possibility for interbranch conflict

245. Ackerman, *supra* note 240, at 1028.

246. *See supra* notes 41-45, 73 and accompanying text.

247. *See* Posner & Vermeule, *supra* note 183, at 1006 (noting that, in a constitutional showdown, “through the mysterious process by which public opinion forms, the public will throw its weight behind one branch or the other, and the branch that receives public support will prevail”).

248. THE FEDERALIST NO. 51, *supra* note 41, at 322 (James Madison).

249. This friction may appear unseemly to some, but, as Machiavelli noted of another constitution designed to institutionalize a certain amount of friction,

those who condemn the quarrels between the nobles and the plebs [during the Roman Republic], seem to be cavilling at the very things that were the primary cause of Rome’s retaining her freedom, [yet] they pay more attention to the noise and clamour resulting from such commotions than to what resulted from them, i.e. to the good effects which they produced.

NICCOLÒ MACHIAVELLI, THE DISCOURSES bk. I, ch. 4, at 113 (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1998) (1531); *see also* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 34 (1999) (“Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology.”).

is endemic to American politics”²⁵⁰ means that “each branch is required to grapple with the perspectives of the other branches.”²⁵¹ This grappling—through both word and deed²⁵²—creates and furthers a public discourse about constitutional meaning and values. In this respect, recall the extent to which the interbranch conflict of the Bork hearings served as a “national seminar on constitutional law,”²⁵³ one that focused on constitutional “essentials”²⁵⁴ and that “captivated and involved [the] citizenry.”²⁵⁵

As Zeisberg notes, this promotion of interbranch conflict, which creates “continuous public assertions of disagreement with public policies,”²⁵⁶ helps “to reveal the truth about the common good.”²⁵⁷ Moreover, it serves to strengthen self-government by showing that the representative political branches can be trusted to engage in good-faith deliberation about the common weal.²⁵⁸ Again, it must be emphasized that these goods result from the fact of conflict itself. Any principled, final resolution to the underlying conflict would destroy the deliberative virtue.²⁵⁹

Of course, arrayed against these virtues of separation-of-powers multiplicity is the criticism that multiplicity undermines stability and predictability and that these are significant legal values. Sometimes it really is vitally important that an issue be settled, and the specifics of the settlement are less important. This may be the case for reasons of efficiency (for example, we are less willing to engage in an otherwise mutually beneficial transaction if we

250. Mariah Zeisberg, *Constitutional Fidelity and Interbranch Conflict*, GOOD SOC’Y, Issue 3, 2004, at 24, 26.

251. *Id.*

252. *See id.* (“By deliberation, I mean more than talk. I also mean to refer to the signals that the branches give each other through their actions . . .”).

253. Kagan, *supra* note 210, at 940 (internal quotation marks omitted) (quoting CARTER, *supra* note 203, at 6).

254. *Id.*

255. *Id.*

256. Zeisberg, *supra* note 250, at 28.

257. *Id.*

258. *See* Chafetz, *supra* note 190, at 1150–51.

259. *Cf.* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 49–53 (2010), <http://yalelawjournal.org/images/pdfs/900.pdf> (noting the deliberative virtues of methodological dissensus in statutory interpretation); Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010) (arguing that it is precisely the vagueness and opacity of legal standards that sometimes deserve celebration because it is these qualities that promote moral deliberation among the subjects of the law).

do not know the rules by which our transaction will be judged²⁶⁰) or for reasons of fairness (for example, we consider it fundamentally unfair to hold people accountable for violating legal rules of which they lacked reasonable notice²⁶¹). But these considerations, which may be quite strong in criminal law or contract law,²⁶² are much weaker when it comes to the separation of powers. In this context, as Michael Stokes Paulsen has perceptively asked, “Does not our Constitution deliberately prefer division, tension, uncertainty, and dynamic equilibrium over ‘authoritative’ resolution?”²⁶³ A person who was deprived of liberty or property when it was not possible for him to discover in advance the legal rules governing his conduct would receive a very sympathetic hearing from most people; a President whose judicial nominee was subject to more strenuous questioning than the previous President’s nominees had been would not. It is true, of course, that multiplicity increases governmental inefficiency—if there were a clear set of rules governing confirmation of judicial nominees, the confirmation process would be much faster and easier—but we tend to regard transactional efficiency as less important in the workings of the federal government than we do in private law.²⁶⁴

Because concern for stability, predictability, and notice are at their weakest in the separation-of-powers context, arguments for a hierarchical structure capable of providing a final answer are also at their weakest. Conversely, the virtues of representation, tyranny-prevention, and deliberation-promotion sound strongly in the separation-of-powers context, and they are all promoted by a multiplicity-based approach.

260. See Werner Z. Hirsch, *Reducing Law’s Uncertainty and Complexity*, 21 UCLAL. REV. 1233, 1234 (1974) (“In terms of efficient allocation of resources, uncertainty about laws tends to increase the cost to transactors and the efficiency with which society conducts its business.”).

261. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . .”).

262. *But see* Shffrin, *supra* note 259, at 1222–29 (defending imprecise standards in certain contract doctrines).

263. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 716 (2004) (reviewing DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2003)); *see also id.* (referring to the idea that an “authoritative method is needed to resolve disputes about the meaning of the Constitution” as “surely one of the great unexamined legal premises of our time” (quoting FARBER, *supra*, at 183)).

264. See Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1878 n.20 (2004) (declaring that the inefficiencies created by the separation of powers are a constitutional feature, not a bug).

CONCLUSION

By highlighting multiplicity in the federalism context, Alison LaCroix's new book does constitutional scholarship a great service. Her tracing of the federal idea in the 1760s and 1770s, as well as her tracing of jurisdictional ideas in the early Republic, is thorough and insightful. But it is unclear why her focus suddenly narrows from the federal idea—the idea that multiplicity in levels of government was a virtue rather than a vice—to federal jurisdiction. Certainly, as this Review has endeavored to show, her claim that federalism discourse after 1787 reduced entirely (or even primarily) to jurisdictional debates cannot stand.

And this narrowing is unfortunate precisely because LaCroix's discussion of multiplicity is so powerful and engaging. In this Review, I have attempted to bring back in the dimension of multiplicity that dropped out of LaCroix's discussion: separation-of-powers multiplicity. Just as multiple competing levels of government were seen as a virtue, so too were multiple competing institutions within each level of government. Indeed, it was the interlocking of these two multiplicities that Madison referred to as “a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”²⁶⁵

This ever-present multiplicity means that our constitutional order is always a work in progress—not because the meaning of the Constitution changes, but rather because one of the meanings of the Constitution is change. Multiplicity—and therefore overlap, tension, negotiation, and uncertainty—are built into our constitutional order. And this “arrangement [is] not a defect to be lamented but a virtue to be celebrated,”²⁶⁶ because it promotes representativeness and deliberation and prevents tyranny.

And it is a virtue to be celebrated loudly—because, as the example of executive branch contempt of Congress makes clear, judicial supremacy has become the conventional wisdom in constitutional discourse. But to focus on judicial supremacy in the separation-of-powers context is to sacrifice many of the virtues that LaCroix has identified so well in the federalism context.

265. THE FEDERALIST NO. 51, *supra* note 41, at 323 (James Madison).

266. LACROIX, *supra* note 2, at 6.