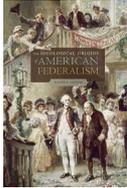


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THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM



by Alison L. LaCroix. Cambridge, MA: Harvard University Press, 2010. 312pp. Cloth \$35.00. ISBN: 9780674048867.

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Alison L. LaCroix is Assistant Professor of Law at the University of Chicago Law School, where she specializes in legal history, federalism, constitutional law and questions of jurisdiction. She has written a fine, scholarly volume on the intellectual origins of American federalism. LaCroix holds the JD degree (Yale, 1999) and a Ph.D. in history (Harvard, 2007). According to the author, to fully understand the origins of American federalism, we must look beyond the Constitutional Convention of 1787 and range over the colonial, revolutionary, and founding periods including developments in the early republic. LaCroix questions both the idea that American federalism originated, all at once, at the Constitutional Convention of 1787 and the idea that republican ideology (with its strong emphasis on legislative power) was the single dominant framework of eighteenth-century American political thought. Versions and elements of federalist or confederative ideas were also long present and in a process of development.

In the account on offer, federalism is 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” (p.6). The “central claim of the book,” is that “the emergence of American federalism in the second half of the eighteenth century should be understood as primarily an ideological development” (p.6). Generally, the federal idea arose in a struggle to defend colonial rights against the British doctrine of the unitary and all encompassing sovereignty of Parliament. Americans eventually felt it necessary to “draw a line” between the legitimate powers of central authority and those of their local legislatures.

The word “ideological” in the title emphasizes that the federal idea of 1787 was not writ in Plato’s heaven, or always in contention, but instead arose as “an artifact of intellectual endeavor at a particular historical moment” (p.6). The use of the word is also intended to invoke a contrast between those who approach the history of the federal Constitution via the ideas which entered into it and those who have emphasized the institutional continuity between the American federal government and prior structures of the British empire. Here LaCroix sides with the emphasis on ideas in the historiography of Bernard Bailyn and Gordon S. Wood. Contributing strands or elements of the federal idea are to be collected and surveyed. The early twentieth century “economic interpretation” of American history is rejected (p.4; p.223, n6). Wood’s (1969/1998) *The Creation of the American Republic, 1776-1787*, is a fine companion volume for a deeper reading of the present book. The contrasts highlight [*620] LaCroix’s emphasis on the roles of the judiciary in American

federalism.

We are led through various colonial period pamphlets and writings, in the style of Bailyn and Wood; and, regarding overall sources, back at least as far as the mid-seventeenth and early eighteenth century – including British and continental sources such as Samuel von Pufendorf's work on the law of nations. Though some degree of institutional continuity can hardly be doubted, given that colonial Americans lived under a dual-level system of colonial and imperial governments, 1787 represents here the culmination of a "transformation of thought" (p.4) – and LaCroix thus emphasizes discontinuities and the emergence of something new. I take it the account is consistent in spirit with seeing, in the words of Washington and Madison, a "miracle" of consummation at Philadelphia in 1787, though our author wants to "demystify" the constitutional founding, "while still recognizing the extraordinary confluence of theory, circumstance, and innovation at a particular legal and political moment..." (p.220). The miracle at Philadelphia is naturalized, so far as creativity can be, but not perhaps entirely denied. The word "ideological" may mislead some readers, who might better think in terms of the intellectual origins of American federalism, following Bailyn's usage. The word also invites readers to think in terms of political divisions along the lines of intellectual differences – in some tension, perhaps, with our (now weakened) tradition of "big tent" political parties.

Considerable institutional continuity, as the colonies revised themselves into independent, confederated and lastly a union of states, was indeed perfectly consistent with deep transformations of experiences in the population at large in those times, and it may be argued in support of the author's approach that we need an emphasis on discontinuity with the prior British institutions in order to understand, say, how the Constitution of 1789 could have continued in coexistence with Jefferson's "Revolution of 1800." The constitutional order we got was not exactly the more con-federal one that Jeffersonian Republicans wanted. But it was not exactly the more centralized or national order which James Madison or Alexander Hamilton wanted either. The reader is reminded, for instance, that Madison's proposal for a Congressional veto over state legislation – which originated in the Virginia plan – was defeated. (See Chapter 5, "The Authority of a Central Government" and especially, p.145ff.) As LaCroix points out, "the old meaning of 'federal' was quite close to that of 'con-federal' or 'confederation'" (p.217) – as in a league of states. The new union, however, was more than a league of states. The new federal union formulated in 1787 was not an "incorporating" union or fusion of the states either, like the British union of 1707. It was instead a "hybrid" of the two, dividing power between the general government and the states; and it was less than a full national consolidation. With the idea of a Congressional veto over state laws abandoned, we shift to the author's emphasis, in the final chapters, on the origins of judicial roles in American federalism.

There is an admirable attention to contextual constraint in the interpretation of the ideas and debates of those times. [*621] We are not to focus exclusively on accounts of debates in 1787 or on the Federalist Papers, valuable and admirable as those sources are, but widen our horizons to include other sources that helped the founders arrive at their federal idea. Nor are we to understand federalism in terms of what we think it is or should be now. The objective here is to understand the intellectual and political origins of American federalism – presumably so that we may better understand and evaluate it; but not to "expose" the ideas as either "true or false" (p.5). The aim is to "show the ways in which constitutive elements of various conceptions arose in the competitive context of political argument" (p.5). The attentive reader of footnotes will find mention of the work of

Quentin Skinner. Subsequently, readers of the book may turn to examining how federal ideas enter into our contemporary political debates. But that is not the objective of this book. Still, this contextualism might have been considerably strengthened by adroitly contrasting our present understanding of key terms such as “confederation” and “federalism” with the various elements or contributing ideas as they arose. Compare the author’s understanding of the federal idea, quoted above with the following: “Federalism: the distribution of power in an organization (as a government) between central authority and constituent units – compare centralism” (Webster’s Collegiate Dictionary); “Federalism: mode of political organization that unites separate states or other polities within an overarching political system, in such a way as to allow each its own fundamental political integrity” (Encyclopedia Britannica). These alternative, contemporary definitions help recall the point that, in our present understanding, federalism is consistent with somewhat greater or somewhat less centralization of power.

The book consists of an Introduction “A Well-Constructed Union,” six numbered chapters on “The Federal Idea,” “Dividing Lawmaking Power,” “Debates over Sovereignty,” “Forging a Federated Union,” “The Authority of Central Government,” and “Jurisdiction as the Battlefield,” and an Epilogue, “Federalism Demystified.” There are 64 pages of notes to the main text, a Selected Bibliography, Acknowledgements and an index. The chief claims of the book are explained concisely in the Introduction and afterward supported.

No one doubts that Parliament in London had in fact legislated for the American colonies, but the issue of the correctness or propriety of the revolutionary slogan “No taxation without representation,” is not simply a matter of the positive precedents for the onerous taxes imposed to pay for the British forces which fought in the French and Indian wars. LaCroix argues persuasively that the constitutional order of the British empire was under debate in the colonial era.

Part of the difficulty was that both monarchist Britain and the Britain of parliamentary ascendancy, after the Civil Wars of the 1640’s and the Glorious Revolution of 1688, had largely held to a doctrine of unitary sovereignty. The idea was that either the King, or, if not the King, then “the King in Parliament” must have an exclusive and singular authority. (Someone must have the final say.) The idea had partly developed as [*622] the English resisted papal authority and partly as they sought an effective and efficient government and laws. LaCroix rehearses some old debates among historians in the opening section of the first chapter – concerning which side was right in terms of the then existing constitutional theory – while stressing that the American colonists held to or sought constitutional innovations or reforms.

Their proposals were not without precedent. The colonies had long taxed and legislated for themselves. But how could legislative power be divided? They came to resist taxation from London designed to pay for the French and Indian Wars and the expanded British North American possessions which arose from them. If “No taxation without representation” was valid or binding, then either Parliament in London would have to invite American representatives (this was generally regarded as impractical on both sides of the Atlantic), or it would have to give up the power to tax the colonies. Similar anomalies had existed within the British empire – including the relative independence of Scotland (though sharing the same monarch with England), before the Act of Union of 1707.

James I (1566-1625) was King of Scotland (1567-1625) as James IV, and became King of England in 1603; and he thereafter termed himself "King of Great Britain." But the union of Scotland and England into the United Kingdom, and unification of the parliaments, did not take place until 1707. Before the Act of Union a Scottish Parliament had operated independently. The precedents of British constitutional history were themselves not entirely clear. The point is developed by LaCroix by the end of the first chapter – in her discussion of the Scottish example. It is worth noting here that the Parliamentary claim, in the Declaratory Act of 1766, of power to tax and to "bind the colonies. . . in all cases whatsoever," was, in the words of Samuel Eliot Morison, "an almost word-for-word copy of the Irish Declaratory Act of 1719 which held Ireland in bondage" (Morison, 1972, p.254).

The second chapter, concerned with the division of legislative power, argues against the notion of "federal ideas as hovering above but ultimately only marginal to the 1760s debates," and "seeks to demonstrate that the concepts that would be denominated as 'federal' after the 1780's in fact originated in the opposition constitutional theories of ... 'American whigs'" (p.36). Some role of Parliament in legislating for the colonies, or the empire in general, was widely accepted by the colonists even as they resisted the imposition of the Stamp Act and related measures from London. Theorist and protesters attempted to distinguish what could be properly legislated from London in terms of the general vs. the domestic, external vs. internal (to the colonies), or along the lines of the regulation of trade vs. the aim of raising revenue. They were generally convinced that they had a right (either as a matter of natural rights or as a matter of the rights of Englishmen), to legislate for themselves at home in America concerning laws which most directly affected them. Thus the explicit doctrine arose, in various formulations, that it was possible to divide legislative [*623] powers among multiple legislative bodies, conceived either as parallel and equal or as existing in a hierarchy of legislatures. The idea of the unlimited power of Parliament was often met with contrasting ideas of English liberty, ideas, such as those of the Magna Charta, which English parliamentarians and political theorists had used, over centuries, in their fight against unlimited royal power. A right to representation in legislative bodies was part of this heritage, and for the Americans there were no plausible alternatives to their own legislatures. Since the same American theorist and pamphleteers predominately confessed loyalty to the King and/or the mother country, a two-tiered conception of divided legislative power frequently resulted. But a full-blown federalism requires, in addition, some detailed account of the relations between the levels.

While authorities in London and the royal governors in America could hardly deny the existence of the colonial legislatures, they tended to view them as strictly subsidiary to the power of Parliament. They were frequently dissolved. The distinction we hold between political constitutions and corporate charters was not nearly so clear at the time, and the power of Parliament to grant, modify or revoke colonial charters was not widely doubted in London. To risk an analogy, one might say that the British thought of the colonial charters in somewhat the way we think of the incorporation of cities or firms. The American states have the power to incorporate cities and grant corporate status to firms; and presumably also the right to intervene or regulate – especially if the subsidiary bodies fail in their tasks or exceed their authority – by the light of old or new state laws. But a similar view of the colonial charters and legislatures, as subsidiary, did not sit well with doctrines of rights which had developed in the English-speaking world over centuries in opposition to arbitrary power, and which came to renewed expression in the colonies in the 1760s and 1770s.

In contrast with the philosophical emphasis on unified sovereignty among the British, there was, at the same time on the continent, much consideration devoted to divided sovereignty and confederation. Here LaCroix mentions and briefly discusses theorists such as Hugo Grotius, Pufendorf and Emmerich de Vattel. These thinkers built upon ancient discussions from Cicero and Plutarch and proposed theories of alliance, of leagues of states and confederation with divisions of powers across distinct territories – and unification for limited purposes and objectives. An important model and object of discussion here was the limited unity of the (German) Holy Roman Empire, its increasing fragmentation, and theoretical discussions of needed amendments or augmentations of centralized organs and functions. The American founders were aware of this background and would ultimately make use of these discussions, though they often used them as illustrations of kinds of division of powers that were better avoided – e.g., the power of sub-polities to form foreign alliance. In the first chapter, LaCroix discusses both the New England confederation of 1634 and the Albany Plan of Union from 1754 – in which Benjamin Franklin played a central role. The contrast with the European thinkers is illuminating. [*624] LaCroix emphasizes that these various sources and ideas, developed by Americans in the 1760s eventually entered into the thinking of the founders and formed the intellectual background – as they planned the “e pluribus unum” of 1787.

The highlight of the account of “Debates on Sovereignty” in the third chapter is the intellectual contest between the royal Governor of Massachusetts, Thomas Hutchinson, and the Massachusetts General Court (the colonial assembly) which took place between January 6 and March 6, 1773. Could sovereignty be divided? Hutchinson generally defended the then current British orthodoxy of the indivisibility of sovereignty and the unlimited purview of Parliament in London. But given the colonial charter of Massachusetts and its legislative powers, how could sovereignty not be divided? “I know of no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies,” argued Hutchinson in his address to the General Court (quoted, p.78). The only alternative was the dreaded, institutionalized divisiveness of an imperium in imperio. If the “supreme authority” Hutchinson claimed for Parliament, “includes unlimited authority,” answered the Massachusetts legislators, “the subjects are emphatically slaves” (quoted p.83). In effect, if the power of Parliament could modify the ancient English constitution at will, then it was lost; and the power of the colonial legislatures was at one with the rights of Englishmen. The colonial charter and legislative powers had been granted by the King, they argued, and to suppose that Parliament had supreme authority over them would invoke the same dreaded imperium in imperio (p.91). The General Council referred the question of where to draw a line between the powers of Parliament and their own to the general interest of the colonies and to Congress (p.91).

The most innovative element of the present book is precisely its developed view of the role of the federal judiciary in continuing to draw the line between the powers of the states and the powers of the federal government. This is the thesis of the final chapter, “Jurisdiction as the Battlefield”: in the early republic, the debates concerning sovereignty gave way “to a search for the proper jurisdictional arrangement to mediate between multiple levels of government...” (cf. pp.178-179). Without the rejected Congressional veto over state laws, the federal courts would draw the line between the powers of the states and that of the federal government. While few are unaware of the power of judicial review exercised by the Supreme Court in the early republic, the emphasis here is on the role potentially played in mediation between state and federal law.

Though we may doubt, say, of a federal power to require all automobile drivers to purchase liability insurance, few have doubted of the states' power to make such a requirement. We may dispute cases, but we make an intuitive distinction – which sometimes requires refinement. LaCroix's emphasis on the federal judiciary's role in the origins of American federalism takes us from the constitutional convention, the failure of Madison's proposal for a Congressional veto over state legislation, to the Supremacy Clause, and eventually to some evaluation of the Judiciary Acts of 1789 and 1801. She argues that there is a [*625] direct connection between the failure of Madison's proposal and the constitutional stipulation that Congress shall have the power to define the jurisdiction and make up of the federal judiciary. As Wood has argued, the advocates of the Constitution eventually came to see that ultimate sovereignty remains ever in the hands of "We the people." They may, as they will, distribute it between the states and the federal government. Yet this does not answer the practical question of mediation between state and federal law. Lacking the Congressional veto over state laws, only the federal courts could deal definitively with conflicts arising. In consequence, to strengthen the federal judiciary as in 1789 and to expand its resources and regulate its jurisdiction as in the Act of 1801 was to strengthen the power of the federal government to continue drawing the line, as needed, between federal and state powers.

The Judiciary Act of 1801, passed by the Federalist Congress at the end of the Adams administration was repealed in 1802 by the incoming Congress at the request of President Jefferson. This was not simply a political question of the "midnight appointments" and the defeated Federalists seeking refuge in the judiciary. According to LaCroix, it was much more a matter of the new administration resisting the potentiality for further consolidation (or centralization of power) in the federal government. There is a very nice quotation attributed to Alexander Hamilton, expressing his dismay at the prospect of repeal: "...if the bill for repeal passed, and the independence of the judiciary was destroyed, the constitution was but a shadow, and we should e'er long, be divided into separate confederacies, turning our arms against each" (quoted, from a newspaper account, p.211). Though the independence of the judiciary was never destroyed, Hamilton's apprehension at the prospect of weakening its power appears prescient. The student of American history will recall the debates over nullification – both before and after the repeal in 1802 – and wonder if greater resources to the federal courts and a widening or regulation of jurisdiction would not have avoided the evils to come.

LaCroix has it that "after 1801, Jeffersonian Americans pulled back from the federal idea..." (p.213). This in spite of Jefferson's famous claim, in his first inaugural address, that "we are all republicans, we are all federalists" (cf. p.214). One might better say that the Jeffersonians were skeptical of strengthening the federal union by augmenting the judiciary. This Jeffersonian position is provided for in the Constitution, and has federalist (though not Federalist) credentials: The "judicial power of the United States," according to the Constitution, is vested in "one Supreme Court, and such inferior courts as the Congress may from time to time establish" (cf. p.181). The Constitution provided for Congress strengthening the jurisdiction of the inferior federal courts and for possibly weakening or altering it – as might be needed. Though the Jeffersonian Republicans were localists, suspicious of centralized authority, and descendent from the Anti-federalists, they were also, no doubt democrats, and they tended to emphasize the power of the popularly elected legislatures over that of the judiciary. The new Constitution of 1789 allowed that Congress could strengthen [*626] the configuration, resources and jurisdiction of the

federal judiciary, but this is not mandated. Partly because of the doubts of the Jeffersonian Republicans, our judges wear black robes to this day – instead of anything suggesting the purple of royal favor.

LaCroix certainly makes her point about crucial roles of the judiciary in American federalism and its origins. Yet, wider possible suggestions may be doubted. A president like Andrew Jackson was perfectly willing to ignore orders from the federal courts – orders favoring native American Indians over the plans of the state of Georgia (1829). On the other hand, it was the Supreme Court which held, in the Dred Scott decision (1857), that a slave was property anywhere in the Union, in spite of Congressional decisions and federal law in the Missouri Compromise (1820), – and in spite of Scott's residence in a state with laws to the contrary. According to Chief Justice Taney, African Americans had “no rights which any white man was bound to respect.” A stronger or reconfigured federal court system could still not have enforced its own rulings in 1829, given real opposition from the President; and nor would we expect a stronger judicial system to have been less decisive on the issue of slavery – an issue that deeply divided the nation before the Civil War. Again, more recently, in *Roe vs. Wade*, the law was substantially consolidated or nationalized, but only at the expense of so much subsequent divisiveness and polarization as to create our most enduring contemporary “wedge issue.” Do we continue to believe that the laws governing abortion must be substantially the same in Manhattan and in every rural hamlet of the nation?

While the powers of the federal judiciary were and remain crucial to American federalism, they cannot be expected to make up for every lack of political skill and wisdom among the politicians. The errors to be prevented regarding slavery were made in 1787 – and afterward long confirmed by Congress, by the executive enforcement of the federal fugitive slave laws, and by the federal courts. Generally, the role of the federal judiciary in mediation between the states and the federal government has grown in more recent times, and is much needed; yet the wisdom of particular acts of judicial consolidation are not thereby assured. LaCroix briefly suggests greater attention to division between state and federal powers depending on subject matter – as in the Act of 1801.

The dust-jacket art of this handsomely produced volume is both attractive and apt. Jean-Leon Jerome Ferris' watercolor “Constitutional Convention,” shows a celebratory crowd just inside Independence Hall, with elder statesman Benjamin Franklin standing at the focus of attention. The elderly patriot has the supporting arm of an officer of the Continental Army, splendid in his Whiggish, blue-and-tan uniform. George Washington stands to one side tipping his hat – and he is hidden as the dust-jacket folds. What did we get? “A republic, if you can keep it,” was the famous answer Benjamin Franklin gave to the crowd outside – once the Convention had finished its business.

Was this the Franklin who had long championed mediation at London and a reformed and improved British empire, or was this the Franklin who chaired Pennsylvania's Committee of Public Safety on his arrival home in 1775, and who was the first President of Pennsylvania under the new, radically democratic state constitution? Or, again, was this Franklin, the man of science, and the skilled diplomat, who charmed the French enlightenment, signed the Declaration of Independence and sent home French money and arms to defeat the British? Or, was this the man, ever skeptical of the perfection of human reason, who moved for prayers and bringing in the clergy each morning, as the

Convention arrived – deeply divided – at its heated climax just before the Great Compromise? Though ever the man of action, Franklin was all these things. He seems very much in place on the book's cover and at the center of attention.

This point stands in some tension with a more Hamiltonian-nationalist understanding of American federalism, but it is also a fitting reminder of the genuine tensions of our not fully consolidated, but still living federal republic. Constant emphasis on national consolidation, even for the best of causes, may ultimately feed into and support the kinds of oppressive centralism and imperial mind-set which the founders were determined to avoid.

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